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& School of Law

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MESSAGE FROM CHAIRMAN'S DESK

We, at CPJ College, continuously strive to enhance our programs to stay at the forefront of higher educational trends. Our accreditations ensure that high academic standards are maintained. We inculcate amongst students a spirit to strive and achieve the desired goals and one of the way is providing a legal journal for law fraternity.

At CPJ School of Law we have provided a platform wherein they can flourish their caliber and potential to the maximum. This encouragement is provided to them by highly skilled and experienced faculty who play the role of a mentor on guide them to their way to success.

I congratulate to whole Editorial Board for this issue of CPJ Law Journal and my sincere thanks to Advisory Board also for supporting and giving the valuable suggestions and insights.

This Vol. XI of CPJ Law Journal is a clear reflection of our years of sincere working for the law students, law Academician respected members of the legal fraternity.

Sh. Subhash Chand Jain

Chairman

CPJ College of Higher Studies
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MESSAGE FROM GENERAL SECRETARY'S DESK

In today's competitive and globalized world, having a professional and specialized education becomes an imperative for future success. We, at the CPJ College of Higher Studies and School of Law, are committed to providing academic excellence in the fields of Management, Commerce, IT and Law. The research skill has been the most important part of legal field along with other intern disciplinary subjects. Keeping this in mind, we sought to create a platform which appreciates and accepts each and every idea and thoughts which are there in the form of treasure.

The initiative of the Chanderprabhu Jain College of Higher Studies & School of Law in regularly publishing CPJ Law Journal containing insightful research papers is an appreciable attempt by the Editorial Team in spreading legal awareness and knowledge. Quality legal research and standard publications constitute one of the important mandates of CPJ Law journal.

I am confident that readers will find the present issue of the Law Journal interesting and thought provoking. My highest regards to the Editorial Board to have meticulously worked and created this impeccable issue. We are also indebted to all our authors who contributions in the form of article, legal studies etc. have made CPJ Law Journal listed with UGC CARE.

We hope that this July-2021 XI Volume of our prestigious journal will make a strongmark in the legal research journal fraternity.

Dr. Abhishek Jain

General Secretary

CPJ College of Higher Studies
& School of Law

MESSAGE FROM EDITOR-IN-CHIEF

My Message for CPJ Law Journal-2020 was penned during the first phase of the Covid-19 Pandemic in April-2020. More than a year down, we are still undergoing a tough and even worse unprecedented time ever witnessed by the mankind. The gruesome impact of Covid-19 has brought drastic changes in the ways and working of the Education Industry and the Academia. The shift to e-learning methodology and opening up of new avenues is indeed a commendable step towards the same.

While welcoming you to the July, 2021 edition of **CPJ Law Journal**, it is, indeed, our honour to share that CPJ Law Journal is now a **UGC Care** Listed Journal. It is a Peer reviewed Journal that aims to create a new and enhanced forum for exchange of ideas relating to all aspects of Legal Studies and assures to keep you updated with recent developments and reforms in the legal world in the form of Articles, Research Papers, Case Studies etc. I believe that learning is a never-ending process and one continues to discover oneself in this journey. In this process of learning, research studies have always been challenging with positive outcomes witnessed as a result of meticulous and persistent efforts. Researches in the field of Law have benefitted both the Industry and the Academia and it has always been our continuous endeavor to publish such scholarly Research Papers in this Annual National Journal of **CPJ School of Law**.

CPJ Law Journal is an open access Journal that aims at providing high-quality teaching and research material to Academicians, Research Scholars, Students & Law Professionals. This issue Includes papers from the Contemporary areas of Research in Mediation, Forensic, Corporate Governance, Labour Law, Consumer Law, Online Gaming Law, Data Protection, Cyber Crime, Human Rights, Female Foeticide, Genetic Privacy & Marital Rape.

We appreciate the tremendous response towards our **"Call for Papers"** and regret that due to the decision of the editorial board, some papers could not be included in the present issue of this Journal but we welcome contributions in the form of unpublished original Articles, Case Studies or Legal Research Reviews for publication. We are obliged to our widespread readership for their continued support and encouragement in our endeavor to strengthen every issue of **CPJ Law Journal.** The credit to this achievement also goes to all Authors, Law Academicians, Editorial Board & Advisory Committee who have contributed to make CPJ Law Journal a quality journal. We highly solicit to have your continuous support and feedback for further growth of the Journal with quality learning for all the readers.

With this note, welcome once again to **CPJ Law Journal- July' 2021** edition!!

Mr. Yugank Chaturvedi
Director General
CPJ College of Higher Studies
& School of Law

MESSAGE FROM EDITOR

It is our pleasure to present the CPJ Law Journal (ISSN: 0976-3562). The experience has been splendid and full of challenges. Our team faced all challenges with never-ending energy and attitude. It depicts boundless enthusiasm, emotions, imagination and of course talent of the young minds. We applaud this creative endeavor with fine contribution from academicians and Research Scholars for the success of the journal.

CPJ Law Journalis a blind two fold peer reviewed Annual Journal. Accordingly, it brings to the readers only select articles of high standard and relevance. In a country governed by the rule of law, it is important that awareness about the research is created among those who are supposed to be concerned with these researches. Academicians can play a very important role in the development of the higher research, and there is need to encourage young minds to participate in development of research based on the needs of the changing society and technical advances. This Journal provides an excellent platform to all the academicians and Research Scholars to contribute to the development of sound Research for the country.

We would like to express our gratitude to the Editorial Advisory Board and the Panel of Referees for their constant guidance and support. Appreciation is due to our valued contributors for their scholarly contributions to the Journal. We would also like to thank our Editorial members, whose valuable suggestions and continuous support to make this edition a success. We are also thankful to those who facilitated quality printing of this Journal.

We wish to encourage more contributions from academicians as well as Research Scholars to ensure a continued success of the journal.

We hope that this issue of CPJ Law Journal will prove to be of interest to all the readers. We have tried to put together all the articles coherently. Suggestions from our valued readers for adding further value to our Journal are however, solicited.

Thank you.

Prof. (Dr.) Amit Kr. Jain

Dy. Director

CPJ School of Law

MESSAGE FROM CO-EDITOR

It is the supreme art of the teacher to awaken joy in creative expression and knowledge- Albert Einstein

Dear Readers,

We are presenting to you July, 2021 Issue of CPJ Law Journal. Our aim behind introducing this journal is to create a new forum for exchange of ideas on all aspects of legal studies and we assure to keep you updated with recent developments in the legal world. Future scope of journal is open to your suggestions. You are invited to contribute for the Journal,and your submissions should include original research articles, criticism and commentaries on legal aspects.

The CPJ Law Journal is a UGC Care Listed journal which is published annually. The journal publishes scholarly articles and commentaries on various aspects of law contributed by jurists, practitioners, law professors and students. The primary aim of this journal is to provide close insights into the various contemporary and current issues of law to the readers. Contributing to this journal provides an opportunity to authors to take an in-depth study in specific areas of the law and enhances their skills in Legal Research Writings and Analysis.

Talking about this Journal, it is great to be part of such a great initiative which provides all possible services to legal fraternity. Since it is not just confined to being a paper collection activity, rather it aims at providing services for all round development of law students, professionals and all others in this field. Also, being from law background we feel that it is our prime duty to contribute for development of the society and we have taken many initiatives in this regard also by organizing various events of social relevance as well. Many exciting years for the journal have passed. Some notable developments might have been recognized by most of our readers but others probably have passed unnoticed to the majority. Therefore, this CPJ Law Journal is not only a retrospective on the previous years but also a good opportunity to summarize recent developments.

I hope you find this issue of Journal informative and interesting. The success of this enterprise depends upon your response. We would appreciate your feedback. You are also requested to submit your articles for the next issue of CPJ Law Journal.

Dr. Shalini Tyagi
Dean
CPJ School of Law

MESSAGE FROM SH. R.S. GOSWAMI

Dear Readers,

CPJ Law Journal is in its 12th year of continuous publication with a diverse, professional, highly engaged and expert global readership. This Law Journal is a box filled with original research-based papers, articles etc., which is an attempt to cover almost all the subjects relating to legal field.

Getting published is something all Law professionals Strive to achieve, and it feels great to me that Chanderprabhu Jain College of Higher Studies & School of Law is providing that platform by bringing out the 12th volume of the CPJ Law Journal with eagerness and enthusiasm.

The CPJ Law Journal Team deserves very high appreciation for this endeavor. I cherish my association with this journal since its inception and wish it all success and endurance. Such a journal for the practitioners, Law professors and Law students is the need of hour.

Adv. R.S. Goswami
Ex-Chairman
Bar Council of Delhi

MESSAGE FROM SH. MURARI TIWARI

I feel extremely exhilarated to be a part of CPJ Law Journal which aims to create all aspects of Legal Studies and also gives a highly readable and valuable addition to the recent developments and reforms in the legal world. It also helps to provide a different outlook to various legal issues that are prevalent in the contemporary society and also to extract exact solutions for the same. As Nelson Mandela said and I quote, "Education is the most powerful weapon which you can use to change the world."

The journal is a great way to invite one's thoughts for a fruitful experience in Legal Research and Drafting and especially for Academicians, Lawyers and the Law students as it has become a demanding area for the highly complex legal system. The relation between the Bar Council of India and Law Colleges/University of Delhi is exceptional and the Bar Council of India also promotes Legal Research such as conducting Seminars, Workshops, etc.

In my entire career as an Advocate, I have always affirmed with the idea that Journals and Research Work have quintessential means for advocating Societal Issues and thereby changing the entire horizon of the Indian Legal system and for the betterment of Legal Fraternity.

I honor CPJ School of Law for giving me an opportunity to be a part of the Law Journal Advisory Board.

Adv. Murari Tiwari
Chairman, Enrolment Committee
Bar Council of Delhi

CONTENTS

Female Foeticide – A Social Menace

*Dr. Avimanyu Behera**

Female foeticide is a practice that involves the detection of the sex of the unborn baby in the womb of the mother and the decision to abort it if the sex of the child is detected as a girl. One of the greatest threats to our contemporary civilization is the menace of skewed sex ratio. The increasing imbalance between men and women is leading to many crimes such as illegal trafficking of women, sexual assaults, polygamy and dehumanization of society. These acts have been increasing making this world unsafe for women. Female foeticide is one of the most nefarious crimes on this earth; perhaps what is detestable is that the people who commit crime belong to the educated class. To this menace our ancestral and biased view about male child, lack of education, ever increasing population and dowry have been good propellants.

Female Foeticide is the most disgraceful act on the part of human being who are considered to be the superior creatures of God responsible to create conducive conditions for the existence and survival of their follows. The first predicament is that it amounts to homicide, destruction of a life and liquidation of human race. The foetus contains life and its elimination is an airful crime.

The tradition of continuance of human race has always been conceptually founded on a son being born. At the time of wedding, blessings are showered on the bride to become a mother of sons.

The traditional patriarchal family embedded a bias in the Indian Psyche in favour of male child. It became an obsession. The same was based on religious, social, cultural and economic factors in as much as a feeling was harboured that an 'Aputrika' does not has his way to heaven, a man without a son has some kind of curse and a daughter destablishes the family economy because of the dowry system which was insegregably linked with marriage. The question that penetrates into one's mind is whether it is a collective psychological ambivalence or an in curable dominating attitude or an indomitable dichotomy.

The term 'foeticide' has a different connotative expense. Understood in a rudimentary and elementary manner it eloquently speaks against women. The destruction of the female foetus, traditionally a sex bias, slowly got galvanized and was pyramided by many a notion, as a result of which the sex ratio decreased. India had a tradition by

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putting opium on the mother's nipple and feeding the baby by suffocating her in a rug, by placing the afterbirth over the infant's face. The ill-trading of daughters also saw their end. As early as in 1901 the sex ratio in India was found quite adverse to the female sex being 972 per 1000 males. The 1991 census showed further declination to 927 females to 1000 males. Such downward graph made the parliament to spring into action by enacting Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 which came into effect on 1st January, 1996. Despite the enactment nothing much happened and there was a further sharp decline.

Thus was the resultant factor of new scientific techniques including amniocentesis, ultra-sonography, chorion villi biopsy etc. That apart a modern technology has come into the field which has given a choice to the couple at the preconception stage to have a child of the deserted sex. A survey by India Today, 15.06.1986, revealed that among the Kallar Community in Tamil Nadu, mother who gave birth to baby girl may be forced to kill the infant by feeding it milk from poisonous oldeander berries. Some believe that some kind of crude methods of female infanticide in parts of western Gujarat, Rajasthan, Uttar Pradesh, Bihar, Punjab and Madhya Pradesh are also prevalent.

The root cause of Female Foeticide is the dowry system in our society. A number of girls are killed inside the womb due to fear of dowry inspite of having dowry prohibition laws[1]. The poor family worried about giving dowry during the marriage of their girl child, which they can't afford. The social, ritual and religious fiber of India is predominantly patriarchal contributing extensively to the secondary status of women.

The performance for a male child is so strong in patriarchal society that many women choose to abort rather than give birth to a girl child, branding then with a social stigma.

Lack of education and awareness has also prompted female foeticide.

Religious faith that only a male child can perform the last rites, forces Indian parents towards heedless efforts of begetting one.

The demand of dowry looms large over the female foetus, compelling hapless pregnant women to succumb to the family pressure.

A male child has been treated as a substantial factor in rendering a sense of both social and economic security.

Modern Technology has proved its convenience and cost effectiveness in killing unwanted baby girls while still in the womb.

The killing of the female foetus not only limited within family or personal matter and it has come within crimes and also become a social evil. Foeticide is very old practice in India and mistrend in declination of child sex ratio is the clear indication of female foeticide for long period. According to an activist, five million girls were eliminated between 1986 and 2001 because of foetal sex determination done by unethical medical professionals. The rate of extermination continues to increase after census

1. The Dowry Prohibition Act, 1961

2001.[2]

The increasing imbalance men and women are leading to many crimes such as illegal trafficking of women, sexual assaults, polygamy and dehumanization of society. It is becoming difficult to find girls marriage. According to news girls from Assam and West Bengal are kidnapped and sold into Haryana for marriage, where the child sex ratio is least in the country. This in turns also lead to girls' trafficking. Many cases of trafficking of young girls & women have been reported despite of having legating against this.[3] These women are either forced into prostitution, domestic work or child labour.

SEX DETECTION PROHIBITION LAWS IN INDIA

India has taken some legislative initiatives to curb this social problem. The Preamble of the Pre-conception and Pre-natal Diagnostic Techniques (Regulations and Preventions of Misuse) Act, 1994 provides for the prohibition of sex selection before or after conception, and for regulation of pre-natal diagnostic techniques for the purpose of detecting genetic abnormalities or metabolic disorders of chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. Inspite of enforcement of legal mechanism, continuation in the declination of sex ratio is the clear indication that there is a vast gap in implementation of those laws. Unfortunately, facts reveal that perpetrators of the crime also belong to the educated middle class and often they do not perceive the gravity of the crime. The purpose was to limit the use of pre-natal diagnostic techniques to genuine medical purposes and to prevent its misuse. It was amended and replaced in 2002 by the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act. The Act has two aspects viz., regulatory and preventive. It seeks to regulate the use of Pre-natal diagnostic techniques for legal or medical purposes and prevent misuse for illegal purposes. The act provides for the setting up of various bodies along-with their composition powers and functions.

Three major techniques are prevail relating to sex detection before birth like, Amniocentesis, chronic villus Sampling and most popular method, ultrasonography. In India Amniocentesis was tested in 1974, carried out by All India Institute of Medical Science (AIIMS), for detecting abnormality in foetus and later this test was changed into sex detection followed by abortion of female foetus. Ultimately the tests were stopped by the Indian Council of Medical Research (ICMR) in 1979 due to heavy misuse by medical practitioners and clinics. In a meeting in New Delhi, it was decided that amniocentesis should be allowed only for educational research. The ban on the government hospitals and clinics at the centre and in the states, making use of Pre-natal sex determination for the purpose of abortion – a penal offence-led to the commercialization of the technology, private clinics providing sex determination tests through amniocentesis multiplied rapidly and widely. These tests are made available

2. Midden Gynocide, Sabu George, Times of India, 8th March, 2007.
3. The Immoral Traffic (Prevention) Act, 1956.

in areas that do not even have potable water. Despite the law being there, due to lack of proper implementation, very few cases are registered. Under the two main laws - Medical Termination of Pregnancy (MTP) Act 1971 and the Pre-natal Diagnostic Techniques (PNDT) act, 1994, the Indian government has conceded that abortion may be carried out if there is (a) Daughter to the life of the mother in child birth, (b) if the child is at risk of being born handicapped or (c) if the woman has conceived the child as a result of rape. The problem is that the implementation of these Acts has been scarce and they could not be strictly implemented. As a matter of fact, people in general and medical practitioners avoided the provision of the Act and the practice of female Foeticide went on.

JUDICIAL RESPONSES

After the enactment of the Act in 1994, in the year 2006 there was first conviction, where a doctor and a lab technician were sentence to two year of imprisonment under the Act. Public Interest Litigation was also file in Supreme Court of India by concerned health activists, centre for inquiry into Health and allied themes CEHAT vs. Union of India[4].

In Suchita vs. Chandigarh Administration[5] case of a bench of three judges in the Supreme Court held that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Art.21 of the Constitution of India. Again a married couple challenged the constitutional validity of preconception and Prenatal Diagnostic Techniques (Prohibition of sex selection) Act of 1994 as it violates Art. 14 of the Constitution of India and Art. 21 of the Constitution of India. But the Bombay High Court[6] rejected the petition that the sex selection Act of 1994 is factually enacted to further the right under Article 21 which gives to every child right to full development and the legislation is confined only to prohibit selection of sex of the child before or after conception. This enactment does not bring about total prohibition of any such tests and no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1) chromosomal abnormalities (2) genetic metabolic diseases (3) heamoglobinopathies (4) sex linked genetic diseases (5) congenital anomalies and (6) any other abnormalities or diseases or may be specified by the Central Supervisory Board. Thus the enactment permits such tests if they are necessary to avoid abnormal child coming into existence. The right to life or personal liberty can not be expanded to mean that the right of personal liberty to determine the sex of a child which may come into existence. It prohibits user and indiscriminate user of such tests to determine the sex at pre-conception stage or post conception stage. The legislature defined 'conceptus' as follows :

4. AIR 2007
5. (2009) 9 SCC1
6. Vinod Soni vs. Union of India, Cnl. Writ Petition No. 945 of 2005 & Cnl. Application No. 3647 of 2005 the jurisdiction of the Bombay High Court, 13.06.2005.

> "Conceptus means any product of conception at any stage of development from fertilization until birth including extra embryonic membranes as well as embryo or foetus".

The term 'foetus' as given the following definition :

> "foetus means a developing human organism after fertilization till the end of eight weeks (fifty six days)".

Recently the Supreme Court of India asked internet companies to take appropriate steps to withdraw advertisements and information which violated the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003. The Bench comprising Justices Dipak Mishra and R. Banumathi directed to respondents like Google India Pvt. Ltd., Yahoo India and Microsoft Corporation (I) Pvt. Ltd. Shall appoint an in-house expert body which shall take steps of any words that is shown on internet and which shall take steps of any words that is shown on internet and which has the potential to go court to section 22 of the Act[7]. Later while hearing a PIL, filed by activist Sabu George who sought its direction to block search engines to block advertisements and texts on sex determination as per Sec 22 of PCPNDT Act. The Supreme Court said that it could not direct online search engine to block all texts pertaining to pre-natal sex determination tests as it would deprive researchers, academicians and students valuable information on the issue[8].

There should be registration of all the nursing homes and rigorous action should be taken against the defaulters. Government must deploy natural wide campaign to spread cognizance among the people. There should aware the people about the importance of girls and should not consider them as stigma to their families. More reservation should be given to the girls in education. Government should provide financial support to those families who are not able to educate their children. Proper measures should be taken to implement anti dowry law and culprits should be punished. Government should provide financial support for the marriage of girls belonging to poor families. Emphasis should be given to women empowerment. Women education will help in eradicating this problem. As the women will become independent, they can take decision according to their will. There is need to remove the myth of son performance from society only then this problem can be tackled.

CONCLUSION

Female foeticide is one extreme manifestation of violence against women. In our country a girl is worshiped as a Devi on one hand and denied her existence on the other as if she has no right to live. Time has perhaps come for us to treat children as gifts of nature regardless of their gender. We can not imagine a society in future

7. SC to search engines: Block pre-natal sex test content, The Times of India (Ranchi edition), dated 2nd February, 2017.
8. Apex Court rules out blanket ban on online content on sex determination, the Times of India (Ranchi edition) dated April 12, 2017.

where there will be only males and no females. The society will be full of crimes and evils. Foeticide after carrying out legally banned Pre-natal sex determination tests to meet the desire of the family to have a male child. Misuse of law, wrong implementation of law has added to the woe of female foeticide. Female foeticide is a reflection of what happens when technologies are misused.

The protection of child is important as well as interest mother and family should also be protected. The problem that is visualized should not be perceived as a minor one. If not taken care of at the appropriate time it can have malignant effect. Every thinking man who has concerned for the future must feel the feeling of child.

"I am the child"

All the world waits for my coming. All the earth watches with interest to set what I shall become

Civilization hangs in the balance for what I am, the world of tomorrow will be

I am the child.

You told in your hand my destiny. Yet determine, largely, whether I shall succeed Or fail,

Give me, I pray you, these things that make for happiness.

Train me, I beg you, that I may be a blessing to the world[9].

Ergo not for nothing it has been said that where a child is born the fragrance of human race is felt. Let the child cry on the surface of the mother earth.

9. M.C. Mehata V. State of Tamil Nadu, AIR 1997 SC 699.

Impact of Mediation in Current Legal System: Indian Reflections

Dr. Kavitha Balakrishnan & Mr. Sreerag Mohan***

"Peace is not the absence of Conflict but the presence of creative alternatives for responding to conflict, alternatives to passive or aggressive responses, alternatives to violence."

—Dorothy Thomson

"Peace Cannot be Kept by Force, it can only be achieved by understanding".

—Albert Einstein

ABSTRACT

Mediation System plays a vital role in providing expeditious and inexpensive justice to the people in our country. Justice should not be delayed because it is equal to its denial this is the main philosophy of the justice delivery system.Establishment of fast track courts' and 'Increasing number of judges' are solutions to this denial, but it is time consuming, high cost-oriented and attached with complex procedures. So, this is not an exact solution to this dilemma. This problem can be effectively rectified throughimplementing proper alternative speedy justice delivery system like Mediation at various levels, with less complex procedures.

INTRODUCTION

Dispute resolution is one of the paramount function of a Welfare state. The dispute can be resolved through several ways. The effective dispute resolution process makes or enables the persons to maintain harmony, cooperation and peace in the society. An operative dispute resolving machine needed to fulfil this task."The term 'Dispute' refers to a difference of opinion resulting in differences regarding the interests, rights and liabilities of the concerned parties."[1] The traditional dispute resolution system focussed on identification of right and wrong between the litigants and prescribes the penalties rather than protecting their inter personal relationship. Here comes the importance of Alternative Dispute Resolution System to provide complete justice to the persons engaged in conflicts and legal disputes.[2]

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1. Madabhushi Sridhar, Alternate Dispute Resolution: Mediation and Negotiation 79(2010).
2. Id

Any dispute is like a cancer, if it is not treated properly and timely it grows at the fast rate and with time, it becomes very difficult to resolve it.[3] "The society, State and the Parties to the dispute are all equally under an obligation to resolve the dispute, as in the civilised society, the rule of law should prevail, and complete justice should be meted out."[4]

The problems connected with the state sponsored dispute resolution system are many and varied. Delay in disposal of cases, complexity of procedures, high cost of ligation are alienating the people from the system. India is not the only country which is suffered by arrears of cases. Even the developed countries like U.S.A, Germany, Canada, Australia, Holland and U.K also suffer from this problem.[5]

"The central objective of ADR mechanism is avoidance of vexation, expense and delay and promotion of "delivery of equal justice" for all. ADR System seeks to provide Cheap, speedy and inexpensive justice. The desirability and necessity of boosting ADR on large scale is hardly in dispute."[6]

The ADR mechanismconsist of Negotiation,Conciliation, Mediation,Arbitration,and hybrid procedures such asMediation and Last offer arbitration (MEDALOA), Mini trial,Med-Arab and neutral evaluationetc.[7]

Among the other modes of ADR, Mediation is treated as a most popularised form and fastest growing method to resolve the disputes in amicable manner.Mediation is a voluntary and non-binding out of court negotiation process in which a neutral third person control the interaction between the participants and to reach amicable and innovative solutions.[8] It empowers the participants to come forward and solve their own problems. Mediator performs facilitative functions during the process.

HISTORY OF MEDIATION

Since more than 3000 years Mediation has been used as a method ofdispute resolution in variety of different cultures. Organised form of mediation traced back into B.C 3000 in Egypt, Bable and Assyr.[9]. In china there is an established history of resolving disputes through the intervention of respected third party by way of mediation. Mediation is also used as a main mode of dispute resolution in Malaysia, Indonesiaand Philippines. Mediation in Malaysia is conducted by the local village headman who is known as 'KetuaKampong'.In Indonesia there is a tradition to to use consensual procedures in the decision making process as well as in dispute resolution.[10] In

3. Kishor Kunal, Importance of ADR in Current Indian Scenario, SSRN, 2 (Dec. 6, 2011), https://ssrn.com / abstract =1969164
4 Sridhar, Supra, note 1, at.79
5 P.C Rao & William Sheffield, Alternate Dispute Resolution: What it is and How it Works 24(1997)
6 Id
7 Id at 25
8 Anuroop Omkar & Kritika Krishnamurthy, The Art of Negotiation and Mediation 188 (2015).
9 Id at 189
10 Id at 190

Philippines there is a committee of mediators in Villages as a form of institutionalising mediation. In Europe, the existence of mediation process dates back to centuries.[11] The Justice system of Rome and Greece gave a primordial place to amicable resolution of dispute.The development of mediation in USA has streamed from several distinct directions.In the 1960's Community mediation mushroomed in USA in response to integration issues and racial tensions.To address these issues various neighbourhood Justice centres were established. With time, community mediation extended family disputes, neighbours disputes, and other interpersonal disputes.[12] Private mediation gained place in the 1980's when insurance companies become conscious of the economic advantages of resolving insurance claims expeditiously and informally.[13]In India Mediation through Panchayat System has been using since 500 B.C. Village Panchayat, meaning five men, used to be recognisedand accepted as a Conciliatory or decision making body.

EVOLUTION OF MEDIATION IN INDIA

Mediation was a method of dispute resolution prevalent in India even centuries before the British period. Panchayat system was the first recognised form of dispute resolving method existed in India. Village head in the community resolved the numerous community dispute through this method. The mediation mechanism was prevalent among the business class people during the pre-British period.[14]

During British period several legislations were enacted to give a statutory recognition to various dispute resolution methods.Bengal Resolution Act-1772 and Bengal Regulation Act -1781 contains provisions of Arbitration. In addition to that Indian Arbitration Act was passed in 1899. It was the first special law enacted in India for ADR mechanism. In 1908 code of civil procedure was enacted. This legislation has not made any extensive modifications in the Arbitration laws. Being a most popularised form of dispute resolution methods, Mediation had not get wide statutory acceptance. A new Arbitration Act was passed in 1940 by repealing earlier statute.[15] But this statute has several defects. Then it was modified into new statutory form Arbitration and Conciliation Act-1996.

The code of Civil procedure amendment in 1999 inserted new provision Sec.89 in CPC to deal with settlement of Civil disputes through five modes of ADR such as Arbitration, Conciliation, Mediation, Judicial Settlement and LokAdalat.

Salem Bar Association Cases

Honourable Supreme court of India Upheld the constitutional validity of the amendments made in CPC in the years 1999 and 2002 through Salem bar association

11 Id at 191

12 Id at 192

13 Id at 193

14 Kunal Supra note 3,at 3

15 Rao & Sheffield, Supra note 5, at19.

case-1[16] and appoint a new commission under the chairmanship of justice Jagannath Rao (then Chairman of Law Commission of India) to suggest and frame rule for proper execution of mediation proceedings. The Commission formulated model rules. In Salem Bar Association case -2[17], Hon'ble Supreme Court of India sanctioned the model rules and instructedall High Courts to make rules in consonance with the model rules.

Afcons Case[18]

In Afcons case Supreme Court of India made a clear distinction between the cases which are suitable forreferring ADR and not suitable for referring ADR.

Mediation Conciliation Project Committee (MCPC)

The Mediation and conciliation project committee was constituted by then Chief Justice R.C Lahoti on April 2005. The members of MCPC consist of other Judges of Supreme Court and High courts, Member secretary of NALSA and Senior Lawyers.MCPC has taken initiative to formulate policies on the matters which deals with mediation. They have decided 40 hours training essential for an accredited mediator. In addition to that 10 actual cases must be handled by the mediator. The committee has conducted training programme for mediators, referral judges, for trainers with the assistance of department of legal affairs.[19]

NEED FOR MEDIATION AS A DISPUTE RESOLUTION METHOD

Mediation is one of the modes of dispute resolution. The constitution of India Contemplates a welfare state." Needs" Figure in it as "rights". Rights are seen as regulating the relationship of citizens amongst themselves too. Article 14 and 21 have a supportive role for enforcement of the right to legal aid under Article 39A.All methods of dispute resolution, litigative and non-litigative, alike have to be seen as part of the legal aid. Viewed thus, mediation can be perceived as an implementation of the values underlying our constitution. Such value can be vindicated by social action. It is not necessary and indeed, not desirable that a society should depend only on the judiciary for such protection. The traditional approach to protecting rights has been essentially legislative. Impartial application of objective legal standards was itsaim.[20] The linking of modern right to to legal aid with the traditional right of access to the courts has denied the strong basis of an affirmative social action. Citizen

16 Salem Advocate Bar Association, Tamilnadu V. Union of India, AIR 2003 SC 189

17 Salem Advocate Bar Association, Tamilnadu V. Union of India, AIR 2005 SC 3353

18 Afcons Infrastructure Limited V. Cherian Varkey Construction Company Private Limited 8 SCC 24(2010).

19 Mediation Conciliation Project Committee, Concept of Mediation, Mediation Training Manual of India, 7 (2005), https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf

20 D.K Sampath, Mediation- Concept and Technique in support of resolution of disputes 1-2 (1991).

activism should supplement lawyer activism if judicial activism is to function effectively as a protection of the rights guaranteed by the constitution of India. Mediation is an area where citizens activism can play a significant role.[21]

ROLE OF MEDIATION IN JUSTICE DELIVERY SYSTEM IN INDIA

The significant feature of the justice Delivery system is how speedily and inexpensively the dispute between the parties are settled. The pendency of the litigation not only the burden for the judicial system but also effects the entire society. In any kind of disputes whether it is civil, criminal, family or commercial takes 15 or 20 years for its final disposal. Average life time of human being is 50 years. Suppose a person is filing a case in his old age he cannot enjoy the fruits at his life time. So, a complete revamping is required in our Justice Delivery System.

Right to Speedy Trial and Speedy Justice

The Hon'bleApexCourt on numerous times observing the importance of speedy delivery of justice. The speedy trial and speedy justice is the essence of both civil and criminal justice system. In the famous HussainaraKhatton case (1979)[22] the apex court observed that "Speedy trial implies expeditious and inexpensive trial which is an integral part of the fundamental right enshrined under Article 21 of the Indian constitution".[23]

The Justice Delivery System

Justice has basically two kinds

1. Criminal Justice
2. Civil Justice

Criminal justice system comprises

a) Investigation agencies
b) Prosecution
c) Defendant
d) Victims
e) Criminal Courts

Civil Justice system comprises

a) Plaintiffs
b) Respondents
c) Government machineries
d) Civil Courts

21 Id at 2
22 Hussainara Khatoon V. Home Secretary, State of Bihar, AIR 1360 SC 1979
23 Sridhar, Supra note 1, at.218

The justice means grant of expeditious and inexpensive relief to the person who came to the court for addressing the legal problem. The Preamble of the constitution of India speaks about the justice in its form such as -socio-economic and political. The main Ingredient of the natural justice principle is "The justice should not only be done but it seems to have been done".[24] It means those who obtain justice should feel the justice is completely done. The justice should be received on reasonable period of time otherwise it will become injustice. Two important quoting are explained here i.e "Justice delayed is justice denied" which means untimed justice is the same and equal to denial of justice. Other quoting is "Delivery of Justice in hurried mode is equal to burying the justice" which means the hasty justice badly effect the quality of justice. So, most important thing in delivery of justice is maintain the proper time and quality of the justice.[25]

The Mediation system does not determine the right and wrong between the parties but this system help to identify the common area, which protecting the interest of parties. If this system utilises effectively for redressing the minor criminal offences and other civil disputes, then the number of litigation and time of litigation will be reduced. Being a social animal relationship is very important. Today people are fighting with each other for money, status, property and they approaches court for seeking relief. Ultimately, they got relief after 10 or 15 years or at the end of their life time. So strained relationship is the by-product of this dilemma. The mediation system is completely different from judicial adjudication. In Mediation, the final decision from the dispute taken by the parties themselves. So, mediation mechanism involves both moral justice and legal justice. But in court adjudication legal justice is more important than moral justice. So we can say that in all aspect mediation is a justice oriented system.

Constitutional Obligation

"The preamble of the constitution of India ensures the state to secure socio-economic political justice to all its citizens. Through various landmark judgment the Apex court declared that Speedy trial and speedy justice is an integral part of Article 21 of the Indian Constitution." Article 38(1) direct the state to reduce the inequalities among the people in different areas. Article 39(A) gives specific direction to the state for the promotion of justice. "It is further directing the state that justice is not denied to any citizen by the reason of economic and other disabilities. The Honourable Supreme court of India interpreted the above provisions in L. Babu Ram Case[26] and held that Social justice Include Legal Justice also. For the realisation of justice, expeditious, inexpensive and operative instrument must be provided to all sections of people

24 Vivek Narayan Sharma, Land Acquisition case: Not only must justice be done, it must also be seen to be done, Bar and Bench(Oct.17,2019 10:01 AM) https://www.barandbench.com/columns/land-acquisition-case-not-only-must-justice-be-done-it-must-also-be-seen-to-be-done.

25 K Ramakrishnan (Addl District Judge, Mavelikkara), Scope of Alternate Dispute Resolution in India, Kerala Judicial Academy, 1(2005) http://www.kja.nic.in/article/scopeofadr.pdf.

26 L.Babu Ram V. Raghunathji Maharaj and Ors, AIR 1976SC 1734

irrespective of their socio-economic and financial position."[27] Not only mediation, all ADR Systems are considered as this operative and effective instrument to provide expeditious and Inexpensive justice to all kinds of people including poor and rich.

Changing Scenario of Mediation

Mediation is a voluntary dispute resolution mechanism where the neutral third person assisting the parties to reach an amicable settlement between them by using negotiation and proper communication. The modern form of the mediation evolved in later part of the 20th century and roots of the mediation system traced back into ancient legal system. NyayaPanchayat were existed in India during ancient times. This system is still prevalent in many parts of the Rural India.[28]

The elements of Mediation were first introduced in India through the statute Arbitration and Conciliation Act-1996.[29] But such elements were transformed into its brother form Conciliation. The Concept of Meditation were relinquished due lack of specific rules and enforceability during that time. But in 1999, code of civil procedure amended and new section 89 was inserted. This amendment strengthened the entire ADR system. As per this section, Court can refer the dispute to different forms of ADR methods such as Arbitration, Conciliation, Mediation, Judicial Settlement, and LokAdalat for settlement. The amendment of the code of civil procedure in the years 1999 and 2002 were challenged in the Salem Bar Association -1 case[30] in the year 2003.The Court upheld the validity of the above amendment and constitute a committee for avoiding the practical difficulty while implementing those provisions. The committee was headed by former supreme court judge and then Law commission chairman Justice M. Jagannath Rao. The Court considered various committee reports for amendment feasibility in Salem Bar Association Case -2 in the year 2005.[31] The committee considered two aspects, the first is a model case management formula and the second one is framing of rules while taking recourse to ADR referred to in Sec.89.

The committee report has three parts[32]

1. Report 1 – contains various grievance, related to the implementation of the amendment and recommendations of the committee
2. Report 2 – deals with Draft Rules and model rules of ADR and Mediation in Connected to Sec.89 of CPC
3. Report 3 – contains case management formula and its' model rules.

27 Sridhar, Supra note 1, at. 218

28 Arjun Pal, The impact of mediation in India, Mediation.com India (Dec. 2018), https://www.mediate.com/ articles/impact-of-mediation-in-india.cfm

29 Id

30 Salem Advocate Bar Association, Tamilnadu V. Union of India, AIR 2003 SC 189

31 Salem Advocate Bar Association, Tamilnadu V. Union of India, AIR 2005 SC 3353

32 Salem Advocate Bar Association, Tamilnadu V. Union of India, Juris The-Laws - Encyclopedia of Indian Laws, (2005), http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=005002417000

The court held that model rules may be adopted by the concerned high court, with or without modification, while implementing the provisions of Sec.89(2)(d).The Court further held that if any difficulties are faced at the implementation time it can be placed before the committee. It would consider the same and make necessary suggestions in this regard.

In Afcons infrastructure case[33] the court has listed out the matters which are fit for mediation and not. These cases which are suitable for ADR are

1. Cases like representative suit
2. Election petitions
3. Suits for grant of Probate or letters of administration
4. Cases involving serious allegations of Fraud or forgery, Coercion etc
5. Suit for declaration of title against government
6. Claims against minors

The case which are suited for ADR are

1. Cases related to Trade, commerce or contract
2. Cases involving strained relationship
3. Tortial claim
4. Consumer disputes

The 129th law commission report recommended that making it obligatory to the court to refer the dispute to ADR including mediation.[34] This aspect also considered in Afcons case. The Court held that on harmonious construction it is mandatory to refer cases to ADR whether or not it is actually referred to.

Sec. 16 of the Court Fee Act -1870 amended in consonance with the amendment of Code of Civil procedure-1908 in 1999 with respect to the court fee. It states that where the court is referred the cases for any other mode of settlement under section 89 of CPC, and the matter is settled the person shall receive back full amount of court fee that he has already paid for the plaint.

"The honourable Supreme court of India made another landmark decision in 2013, B.S Krishnamurthy V. B.S Nagaraj[35], the court directed the family courts to refer the matrimonial disputes to Mediation process especially in the matters concerning maintenance, Divorce, Child custody etc."

Despite being successful in various Countries ,the mediation process in India is still in birth stage .The main reasons behind these are Lack of awareness about its benefits, Lack of Initiative from the part of the government for its development, Referral

33 Afcons Infrastructure Limited V. Cherian Varkey Construction Company Private Limited ,8 SCC 24(2010).

34 Pal Supra note 28

35 S.L.P. Civil) No(s).2896 OF 2010

judges and lawyers are not properly responding to this process, Poor infrastructure facility at the mediation centre, Lack of legislative frame work etc. The Malimath committee recommended that implement different kinds of Justice delivery mechanism and it will have a long-term effect to reduce the litigation of common man. The 129th law commission also made several proposals for speedy disposal of cases in urban areas.The main proposals are follows.[36]

1. Establishing Nagar Nyayalaya in the same manner of GramaNyayalaya, for dealing with the cases in Urban areas
2. To Constitute a Neighbourhood justice centres in each small locality. The people in that locality can approach this institution for dispute resolution.
3. Establishing Conciliation Court System, (already Constituted in Himachal Pradesh).

Constitution of MCPC (Mediation Conciliation Project Committee)

"For the effective implementation of Mediation and Conciliation system ,the honourable then Chief Justice of India of India justice R.C Lahoti constituted Mediation Conciliation Project Committee on April 2005.Justice Santhosh Hedge was the first chairman of MCPC.This body consist of other judges of High courts and Supreme court, Senior Lawyers and Member secretary of National Legal Service Authority."[37]

Qualifications of Mediators[38]

"MCPC recommends the following persons are eligible for training as a Mediator.

1. Retired Judges of the Supreme Court of India **or**
2. Retired judges of High Courts **or**
3. Retired Judges of the District and Sessions Courts **or** retired judges of the City Civil Courts or equivalent Rank
4. Judicial officers or Legal Practitioners with at least 10 years standing at the bar at the level of Supreme Court/High Courts/District Courts/Equivalent status
5. The Experts /other specialist Professionals with at least 15 years' experience; or Retired Senior Bureaucrats/ Senior Executives (Retired)."[39]

Mediators must be provided with 40 hours training in Mediation. In addition to that Refresher training programme also providing for mediators under the supervision of State Legal Service authority.

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36 Pal, Supra note 28

37 MCPC, Supra note 7, at 19

38 Scheme for trainingunder Mediation Conciliation Project Committee, Sonitpur District Judiciary http://sonitpurjudiciary.gov.in/DLSA/Acts%20&%20Rule/Mediation_and_Concillation_Project_Committe0001.pdf

39 Id

New Committee to Draft Mediation Law

The honourable Supreme court of India recently Constitute a committee to draft a legislation to give a legal sanctity to the dispute settlement through mediation. This committee was headed by mediator Niranjan Butt. The other members of the committee were appointed by Mediation Conciliation Project Committee (MCPC). The committee will recommend code of Conduct for mediators. The committee conducted a meeting on January 12,2020 at Hyderabad for inviting suggestions from the legal experts and mediators from all over India. The experts enumerate the different areas such as[40]

- Confidentiality
- Voluntarily nature of the mediation process
- Enforceability of settlement
- Neutrality
- Avoiding Conflicts of Interest

The other members in the committee are [41]

1. Jusice K. Kanan
2. A.S Chandok (Former Additional Solicitor General)
3. P.S Narasimha (Former Additional Solicitor General)
4. SriramPanchu (Senior Advocate)
5. J.P Singh (Senior Advocate)
6. Susheela.S (Senior Mediator)
7. Sadhna Ramachandran (Senior Mediator)
8. Laila Ollapally (Senior Mediator)
9. Anil Xavier (Senior Mediator)

In addition to these members two international professional consultant/experts on mediation such as HiroAragaki and Joel Lee also part of this committee.

This Committee proposed the concept of **Pre-Litigation mediation** and it creates a boom ADR arena. Recently Chief Justice of India Justice S.A Bobde remarked that "all commercial matters could be made first go through **Pre-litigation mediation**.[42] If it cannot be resolved then they can approach the concerned court." Another important proposal of this committee is the **Pre-ligation agreement** between the parties should have given the status of a decree. The provisions relating to mediation are included in some domestic legislation such as Section 442 of the companies Act, 2013, Section

40 Ajmer Singh, Supreme Court forms Committee to draft mediation law, will send to government, The Economic Times(Jan 19,2020,11.40 PM), https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/ articleshow/73394043.cms

41 Id

42 Id

12A of the Commercial Courts Act,2018 and Chapter V of the Consumer protection Act, 2019.But these provisions are rarely used in dispute resolution. While considering the International aspects, India has already signed the U.N Convention on International settlement agreement resulting from Mediation.

MEDIATION AND CRIMINAL JUSTICE SYSTEM

The Criminal justice is series of process begins with criminal investigation and ending with rehabilitation of the offenders and the victims. Criminal justice system is a set of legal and social institutions constituted for enforcing criminal law in motion. Such institutions are Police, prosecution, Court, Defence lawyers and Prison. The important significance of the criminal justice system are[43]

- Prevention of Crime
- Punishment of Criminals
- Rehabilitation of Criminals
- Compensation to the Victims
- Maintain law and order in the society

In any justice-oriented system will be complete and effective only through expeditious and inexpensive delivery of justice. Each of the institutions in Criminal justice system have their own role in providing timely and speedy justice. However, in spite of well-established criminal justice system in our society, huge backlog and pendency of the cases disturb the prompt delivery of justice.. Majority of the crimes arises in our society from the discrepancies between the individuals and community. The Court adjudication system existed in our society is concentrating only on present dispute resolution and not on crime prevention in future. But the Mediation system will not only be resolving the conflict but also prevent the crimes likely to be arised in future.

Concept of Restorative Justice

Today most of the countries in the world are following retributive perspectives of criminal justice system, which punishes the offender heavily based on the offence committed by him. But the concept of restorative justice is different from the above perspectives. Restorative Justice mainly concentrate on resolution of disputes and creating harmonious relationship between the parties.[44] This mechanism enables opportunities for the offender to repair the harm caused and ultimately restore the relationship with the victim. At the same time the label of "offender" on him is changed and he restored in to the society as a common man.

43 Rahul Kumar Singh, Objectives of Criminal Justice System, Legal Service India, http://www.legalservice india.com/articles/op.htm

44 Vikram Sopan Yadav, ADR as a means of restorative justice in Criminal Justice System: An Analytical Appraisal, International Journal of Law, 59 (Mar. 2017), http://www.lawjournals.org/download/104/3-2-20-529.pdf

The term 'Restorative Justice' is invented by Albert Eglash and he further classify the criminal justice system into its three forms. They are[45]

- Retributive Justice
- Distributive Justice
- Restorative Justice

Retributive Justice

Retributive justice is mainly focussed on punishment. In this system various offences are classified and punishment of each offences are also prescribed on the basis of the gravity of the offences.

Distributive Justice

Distributive Justice system connected with rehabilitation of offenders.

Restorative Justice

The primary emphasis is on the principle of restitution

The first two justice systems focus on the criminal act, and they negating the victim participation in the justice process and necessitate mere passive participation of the offender. The third one emphasised on removing the harmful effects by proper communication and restoring the relationship. All the parties are actively involve in the restorative process.

Western Restorative Justice[46]

45 Id at 59

46 Jack B Hamlin & Akira Hokamura, The Cultural Context of Restorative Justice: Journeys Through Our Cultutal Forests To a Well Spring of Healing, Research Gate, (June 2012), https://www.researchgate.net/ figure/ Western restorative-justice-model_fig1_257663557

Re-integrative Shaming Theory

This theory was developed by John Braithwaite, famous expert in Restorative justice.[47] According to this theory, "Inflicting shame upon the offender about the crime which he has committed, for a longer period" is useful tool for changing the mindset of the offender and controlling his criminal behaviour. The Re-Integrative shaming, may take place during mediation process in criminal disputes. The conversation about the consequences of the crime usually cause shaming to the offender and he remorsefully made apology to the victim and the victim may forgives him. The Stigmatisation on an offender in an uncontrolled manner may lead to recidivism. So shaming is a different approach to reintegrate the offender to the society as a law-abiding citizen. In Re-integrative shaming, labelling the Criminal act but not the offender-as if to say he has done a bad thing-rather than he is a bad person. Expressing disapproval in all forms including community disapproval, which intended to invoking remorse in the offender being shamed.

Dis-integrative shaming is completely opposite to Re-integrative shaming theory. In this theory the person is castigated and branded as a criminal for his wrongdoing, who is beyond forgiveness and unable to restore in to the community. He was denied with the employment and other legitimate opportunities. Consequently, he is compelled to commit further offences.

"The main significance of the Re-Integrative shaming are:-

- The Re-integrative shaming avoids stigmatising the offender as evil
- It Making him aware of the negative impacts of his actions on others
- This process encouraged the Victim to forgive the person but not his act
- The offender is restored in to the community as law abiding citizen[48]
- Thus, avoiding the negative consequences associated with the secondary deviance"

Important characteristics of Restorative Justice[49]

- ✓ This system is not for punishing the offenders.
- ✓ Revenge or Punishment does not restore the losses of victims.
- ✓ Reconciliation about the harm caused and its ramification.
- ✓ Repairing the harm caused through compensation or other methods demanded by the victims.
- ✓ Opportunities for the parties to actively participating in its resolution.
- ✓ Reintegrate Offenders and Victims in to the community.

47 Christian Wickert, Reintegrative Shaming (Braithwaite), SozTheo, (Oct.2019) https://soztheo.de/theories-of-crime/sanctioning/reintegrative-shaming-braithwaite/?lang=en

48 Id

49 Yadav Supra note 44, at 59

- ✓ Restorative Justice system considers crime as violation of one person's right by another instead of violation against the state.

Mediation is one of the important tool of Restorative Justice system. It Promotes discussion and resolution between the parties in disputes rather than punishment. Victim offender Mediation is prevalent in western countries like USA and they have adopted this ADR model into their criminal justice system few years back.

Victim-Offender Mediation

"Victim-Offender mediation is a process by which Victim and offender in a criminal offence brought together and make a face to face interaction under the supervision and guidance of the trained mediator." Such mediation may usually take place after the court involvement or any time during the justice delivery process. This method also called restorative justice dialogue or Victim -offender conferencing or Victim-offender dialogue. In USA violent crimes such as homicide have been successfully mediated through this system.[50]

During the process, the victim and the offender talk to each other about the reason for committing such crime, consequences of the crime, and how to repair the harm caused due to that crime etc. Finally, they reach a mutually acceptable solution to repair the harm caused as a result of such crime.

Evolution of Victim-Offender Mediation

"The first Victim Offender mediation programme/ Victim offender Reconciliation programme was reported in Kitchener, Ontario, Canada in 1976. The Victim-Offender mediation programme in USA was reported in Indiana in 1978."[51] During the years 1990 and 2000 number of such programmes were increased from 150 to 1200.

Advantages of Victim-Offender Mediation

- ❖ Offenders and Victims have an active role in consensual process.
- ❖ Enable victims to have a voice in the criminal justice process[52]
- ❖ Offenders have an opportunity to learn impact of his actions on others.
- ❖ The resolution is through Apology, compensation and forgiveness.
- ❖ The trained mediator control and supervise the whole process.
- ❖ It contains the aspect of reparation – Reparation means an act on the part of the offender to do something beneficial and positive towards the victim.

50 Id, at 60

51 Victim Offender Mediation, Centre for Justice and Reconciliation, http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/victim-offender-mediation/

52 Northern Territory Law Reform Committee, Mediation and Criminal Justice System-Final Report, Northern Territory Government-Department of the Attorney-General and Justice 9(Feb.1996) https://justice.nt.gov. au/ __ data/assets/pdf_file/0004/483430/NTLRC-Report-17A-Mediation-and-the-Criminal-Justice-System-1996.PDF

it may involve[53]

- Compensation,
- apologising,
- work for community cause opted by the victim,
- Promise to do something

❖ More focussed on Victim satisfaction

Applicability of ADR methods (Victim-Offender Mediation) in Criminal Justice System of different countries

1. **Blood money system in Saudi Arabia**

   When person has been killed or caused to death by the accused person, then compensation is paid by the accused to the heirs of the victim for apology. The amount of compensation is fixed based on the percentage of responsibility in the offence. This is called Diyya .Diyya is a private right of the victims and it could not be waived by the sovereign. Blood money is to be paid not only for homicide but also it extends to other offences such as unnatural death, death caused due to fire, Motor OR Industrial accident etc.[54]

2. **United States of America**

   Victim Offender mediation has been prevalent in USA since 1978.The One-third of the mediation programmes were taking place in USA prior to the formal finding of the guilt. The remaining part take place after the court interference. Even the serious assault and murder have been successfully mediated in United states of America through this mechanism.[55]

3. **Australia**

   In Australia Victim -Offender mediation is widely used in 'Youth crimes'. This mechanism applicable in different ways in the states of Australia.

   a. **Victoria**

      The Victim Offender mediation programme is limited to property offences in Victoria. The violent crimes, sexual offences and domestic violence offences are excluded from the purview of this mechanism. Both offender and victim agreed to take part in Victim Offender mediation programme.[56]

   b. **Queensland**

      In Queensland Victim-Offender mediation is available in two stages

53 Id at 5

54 Qiyas And Diyya or Blood Money, Philippine Consulate General-Jeddah Saudi Arabia, https://jeddahpcg.Dfa .gov.ph/qisas-and-diyya-or-blood-money#

55 Yadav, Supra note 44, at 60

56 Northern Territory Law Reform Committee, Supra note 46, at 9

- Option available for the offender before charged (Pre sentence mediation)
- Option in the sentencing process

  The Victim-offender mediation is a part of the sentencing process. The main purpose of this programme is to giving the opportunity for the offender to admit the responsibility and be accountable for his actions.[57]

4. Ethiopia

In Ethiopia Vitim -Offender mediation programme is widely practised and deep rooted in the society especially in rural areas. It is prevalent among various ethnic groups in the country. The recent survey showed that majority of the people (79%) were satisfied with this criminal dispute resolution system rather than normal court adjudication. Even the united Nations also reinforced this informal mechanism for resolving disputes whether it is more beneficial for the victims.[58]

5. India

The Victim-Offender mediation programme has not gained much popularity in India. The ADR mechanism is very rarely used in Indian Criminal Justice System compared to other countries. Indian system is still stick on the normal court adjudication in criminal matters. So, this mechanism became unfamiliar to criminal justice system in India. But its elegant form is using in Indian criminal justice system in the form of compounding and Plea bargaining.

Restorative Justice in Indian Criminal Justice System

In India the concept of restorative justice is in diminished form. To implement the concept of Rule of law and Natural Justice certain essential steps need to be taken by the state. In Civil matters alternative options are available in the form of ADR. So, backlog of cases can effectively managed through the procedures prescribed under ADR. However, such Concrete structured mechanism is not available in criminal justice system. There is an urgent need to develop an alternative method to resolving criminal disputes in a organised manner. A very few alternatives available for speedy disposal of cases in Indian criminal justice system are Compounding of offences of less serious nature and Plea Bargaining.

"Section 19(5)A of the Legal service Authorities Act-1987 strictly prohibit reference of non-compoundable offences to LokAdalat. But impliedly it can permit the reference of compoundable offences to LokAdalat for settlement."[59]

Compounding of Criminal Offences

Section 320 of the code of criminal procedure-1973 deals with compounding of criminal offences. This section contained two parts. The first part contained the list of offences

57 Id, at 10

58 Yadav, Supra note 44, at 60

59 Id

which can be compounded without the court permission. The second part contained the list of offences which are relatively serious than first group, can be compounded only with the court's permission. Examples of compoundable offences are Criminal Intimidation, Criminal trespass, Wrongful restraint, adultery etc.

Plea Bargaining

By the Criminal law(Amendment) Act -2005 has been inserted a new chapter 21A in Code of Criminal Procedure-1973 which deals with the concept of Plea Bargaining. Section 265A to 265L of CrPC contains different aspects of Plea Bargaining.

"Plea Bargaining is an agreement between the prosecution and defence on a condition that accused changes his plea from not guilty to guilty in return for a proposal made informally by the judge or prosecution to the accused that his sentence will be minimised.[60] Plea bargaining is applicable only in the offences which prescribes the punishment extend for a period of 7 Years. If the offence affects the socio-economic conditions of the country or has been committed against a woman, or a child below the age of 14 years, the accused cannot apply for plea bargaining."

Plea bargaining has some difference with other modes of settlement. Plea bargaining proposed to reduce the quantum of punishment not to evade the punishment. His status of 'offender' is not changed after the plea-bargaining process. But In compounding process, the matter is completely and finally settled through mutual negotiation/ mediation process and the accused restored in to the society as a common man.

importanttypes of plea bargaining are[61]

- Charge bargaining means the prosecutor agrees to avoid some of the charges framed against the accused in return of plea of guilty.
- Sentence bargaining indicates under an agreement prosecutor suggest specific sentence or to refrain from making any sentence recommendation in return of plea of guilty.

Criminal case Management System

In order to ensure speedy delivery of justice, the honourable supreme court of India proposed a model case flow management system in which, the judge would be required to maintain a time-framework and monitor the case from its beginning stage to disposal stage. Justice Jagannath Rao committee already point out that the case management system in other countries yielded a good result so we should adopt such system to ensure dispensation of justice.[62]

The committee proposed that cases should be divided into 5 categories such as Track 1, Track 2 and Track3, Track 4 and Track 5.[63]

60 Id

61 Jon'a F. Meyer, Plea Bargaining, Encyclopaedia Britannica(Feb.26,2020), https://www.britannica.com/topic/plea-bargaining

62 Sridhar, Supra note 1, at 223

63 Id

Track 1 cases includes Crimes punishable with death, Rape, sexual offences and dowry death. The time limit to complete track 1 cases with in the period of 9 months.

Track 2 cases includes where accused have been denied bail and kept in jail custody. The time limit to decide the track 2 cases with in the period of one year

Track 3 cases comprises Food adulteration, economic offences, cheating, Illicit liquor tragedy, etc such offences have to be decided within 12 months.

Track 4 cases related to Terrorist activities under POTA, drugs and corruption. The time frame fixed for disposal such cases is 15 months.

Track 5 cases encompasses all other criminal cases and must be disposed off within 15 months.

The honourable Supreme court made a direction to all its subordinate courts including trial courts and high court to classify all criminal appeals pending before them into different tracks on the same lines.[64]

In cases of writ petitions before high courts, habeas corpus has class-1 priority. Other writ petitions are classified into different categories such as

- Fast Track
- Normal Track
- Slow Track

The Writ Petitions under Fast Track Categories, the deadline for disposal is 6 months. In a Normal Track category, petition must be disposed within one year. The slow track petitions the dead line is 2 years, subjected to the pendency of the other cases in the concerned court.[65]

In civil cases, the court should consider the possibility of the settlement at the initial stage. If there is a chance of settlement immediately refer the matter to concerned ADR method.

Recently Delhi High court made guidelines to be followed by Criminal courts and Mediation Centres in India while dealing with the criminal cases

The Delhi high court was considering the various petitions under section 482 of CrPC concerning the offences of serious nature sought to be quashed on the ground of settlement of disputes between the parties. The court entertained 5 criminal offences through the present petitions. Four of them related to credit card frauds and the last one related to obscene calls and offences under I.T Act. It is surprised to the fact that the lower courts and the mediation authority should not take proper care while dealing with such serious offences and they have simply made settlement and came to high court for quashing the F.I.R. The main question dealt with the court was "Whether the process of mediation could be permitted or entertained to be availed for bringing about such settlement as may possibly not to be taken by the court in

64 Id

65 Id

ordinary circumstances, but on just or sufficient reason, having regard to the nature and seriousness of crime involved?"[66]

The above five offences were serious in nature, the credit card frauds have created serious and adverse impact on the society. Conduct of the accused, seriousness of the crime and impact on the society are the 3 main reasons to discard the settlement.The lower courts and mediation authorities made grave error in registering the settlement. The court dismissed the five petitions and formulate these guidelines to be followed by the Criminal courts and mediation authorities while dealing with the criminal offenses.[67]

Guidelines[68]

1) While referring any of the Criminal cases to mediation, the criminal court first ensures, before deciding the chance of settlement, through a preliminary scrutiny that making an end to such criminal actions are permissible in law, through compounding or non- inhibition from the part of high court to quash such proceedings and at the same time keep in mind the principles governed by the Section 482 of Code of criminal procedure.
2) Before commencing the mediation process in a criminal matter, the mediator himself conduct a preliminary scrutiny about the facts and circumstances of the criminal cases and identify the possibility of assisting the parties in such resolution and that would be acceptable to the court. While doing so, the mediator must consider the rules of compounding and jurisdictional elements and principles specified under section 482 of CrPC. For implementing these directions, an institutional framework has to be formed in all mediation centres so that the system can maintain uniformity and consistency in the mechanism. Such preliminary scrutiny mut be compulsorily conducted if the mediation process would be continue. Any such criminal cases as mentioned above proceeded to the table of mediation, the above directions should consider first beyond the cases referred.
3) System of vetting (careful investigation or deep examination) needs to be institutionalised before the settlement.

The court further emphasised on timely conclusion of the old cases in time bound manner. But considering the serious Fraud cases for means of recovery through the process of mediation is not a justified remedy to the challenge of huge backlog of the cases in criminal justice system. There must be an additional set up like Fast

66 Devika, Delhi High Court lays down guidelines to be followed by the Criminal Courts and Mediation Centres while dealing with Criminal Cases; to be applied mutatis mutandis to other ADR Methods, SCC Online(Apr.24, 2019), https://www.scconline.com/blog/post/2019/04/24/del-hc-court-lays-down-guidelines-to-be-followed-by- criminal-courts- and-mediation-centres-while-dealing-with-criminal-cases-to-be-applied-mutatis-mutandis-to-other-adr-methods/.

67 Id

68 Id

Track courts to deals with the pendency of the non-compoundable cases. Justice R.K Gauba remarked that "the criminal court is not a closed room where the accused person can any time make an entry and exit at his own notions or impulses. Protracted or prolonged trials have become the rule and expedition or promptness is an exception".[69]

The Delhi High Court sent the matter back to the concerned Chief Judicial magistrate and gave proper direction to conduct the trial on day to day basis and dispose the matter with in 6 months.[70]

Strengthening the Mediation system is necessary in our criminal justice system. It is one of the best tool for resolving compoundable and petty offences in criminal jurisdiction. In addition to that some matrimonial disputes of criminal nature can also be settled through this mechanism.

Supreme Court to evolve a mechanism for expeditious disposal of cheque bounce case

Recently the honourable Supreme court of India made a concern about the pendency of cases related to dishonour of cheque. Justice S.A Bobde and justice L.N Rao remarked about it while considering a cheque bounce case which has been pending in different courts for 15 years. Recent study shows that more than 35 lakhs cases were pending in different courts in India. For expeditious disposal of cases related to dishonour of cheque, the apex court made directions to the various duty holders such as Banks, Police and Legal Service Authorities to take measures and formulate some scheme related to this. Two senior lawyers of supreme courtMr.SiddharthLuthra and K.Parmeshwar was appointed as amicus curie in the above mater. The dishonour of cheque was criminalised in1988 with the objective to ensure efficacy in banking operations and credibility in transacting business on cheque.[71]

The Court seeks a proposal to develop a **pre litigation settlement** in dishonour of cheque cases and NALSA must develop a scheme for pre litigation settlement of the disputes involving cheque bounce. In addition to that supreme court proposed the government to set up specialised courts to deal with matters relating to 138 of the N.I Act-1881.[72]

CONCLUSION

The mediation system is gaining importance day by day as a main alternate dispute resolution method.It is extremely relevant to justice delivery in India since it not only brings an end to the litigation but it also maintaining the harmonious relationship

69 Id

70 Id

71 PTI, Supreme Court to evolve mechanism for expeditious disposal of Cheque Bounce Cases, Deccan Herald(Mar.07,2020 22.20 PM) https://www.deccanherald.com/national/supreme-court-to-evolve-mechanism-for-expeditious-disposal-of-cheque-bounce-cases-811625.html

72 Id

between the parties. 'Reducingoverburden of court' is another advantage of the Mediation System. The common people are provided with speedy and inexpensive justice through this mechanism. So we can say that mediation is a tool for ensuring prompt delivery of justice in Civil and Criminal Justice System in our Country.

Covid 19 and Environment Conservation: Exploring the Interlinkages

*Dr. Monika Bhardwaj**

ABSTRACT

One of the silver things that has been reported from across the world, amidst the covid 19 pandemic, is that people are breathing cleaner air and witness to clear and more blue skies because of restrictions on human movement due to lockdown. Is not it sounds odd that the only thing helping us reduce carbon emissions globally, at the time we need the most, is the corona virus? Its not wrong if we say that this crisis is nature's blessing in disguise. The current crisis is not the real warning but its simply a alarm bell of what is coming. Covid 19 threatening lives and upending the economy of the world. Planet earth has certain boundaries, four out of nine planetary boundaries including climate change, loss and extinction of certain species, bio geochemical flows and land system change have already been exceeded which have destructive consequences for humankind. Covid 19 is a result of climate change, depletion of ozone layer, deforestation, loss of biodiversity, human activities which totally devastating the world. This requires an acute and reviewable or action to protect the natural resources for present and future generation. This paper is an attempt to explore the consequences of covid 19 on environment. Many of environmental challenges caused by corona virus crisis will gradually resolve and the crisis comes to an end, but it is also true that the benefits of air pollution reductions will also erased. So covid 19 is a hooter, its an alarm bell against environmental degradation. The threat of covid 19 is temporary but threat of degrading environment will remain for years if human being is constantly interfering the nature.

INTRODUCTION

World Health Organization (WHO) on December 31, 2019, reportedly received an information about an epidemic with unidentified etiology, from Wuhan, China. Later on, this epidemic was officially named as COVID- 19 i.e China originated virus in December 2019 and same was acknowledged as an infectious disease resulting in public health emergency as it quickly spread within china and to further 24 countries

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situated geographically between 42.937084 degree N and 75.6107 degree E.[1] Clinical studies relating to Covid 19 reported that most patients suffer from difficulty in pneumonia. Symptoms reported during treatment were similar to other coronavirus illness such as SARS and MERS e.g coughing, fever, difficulty in breathing and in case of worst infection, failure of kidney, pneumonia and even death.[2] Current studies have shown that coronovirus is zoonotic virus. Zoonotic virus is virus that has jumped from animals to human beings. Zoonotic diseases are responsible for an estimated 2.5 billion cases of illness. In 2016, the United Nations Environment Programme (UNEP) observed that out of 75% of infectious diseasesin humans are zoonotic which are closely iinterlinked with thehealth of ecosystems[3]. Zoonotic diseases are of two types viz :

- Where the disease is of animal origin and transmission from animal to human is rare but once this threshold has been crossed, the disease is maintained by human to human transmission, which maintains the infection cycle., e.g HIV, Ebola and SARS.
- Where the disease is of animal origin but the transmission to human occurs mostly by direct contact. Animal populations continue to be the principle reservoir of such pathogens. Some examples are Lyssavirus, Lyme disease, Nipavirus and Hantavirus.[4]

Now the question arises here is what factors are increasing zoonosis emergence? And the answer is following factors are increasing zoonosis:

(i) Deforestation and other land changes

(ii) Illegal and poorly regulated wildlife trade

(iii) Climate change

(iv) Intensified agricultural and livestock production

(v) Antimicrobial resistance.

Climate change conditions degradation of environment are classified as top predictors of this corona virus illness[5] as animal, wind, temperature, humidity are critical in transmission of infectious diseases reported that pneumonia's morality rate is highly correlated weather changes. Biologists have known for years that more than half of

1 R.M. Anderson, H. Heesterbeek, D. Klinkenberg, T.D. Hollingsworth, "How will country-based mitigation measures influence the course of the COVID-19 epidemic?" *Lancet* 395, 931–934 (2002)

2 Y. Wang, Y. Chen, Q. Qin, "Unique epidemiological and clinical features of the emerging 2019 novel coronavirus pneumonia (COVID-19) implicate special control measures" J. Med. *Virol*. 92, 568–576 (2020)

3 Utkarsh Dixit and Illasgree Singh, "A Tough road ahead : Balancingthe environmentand the economyamid the COVID-19 crisis" in *Bar and Bench*, June 11, (2020).

4 Frederic Keck and Christos Lynteris, "Zoonosis :Prospectus and Challenges for medical anthropology" (2018), also see 4869-Article%20Text-15122-1-10-20200901.pdf

5 B.D Dalziel, S. Kissler, J.R Gog, C. Viboud, O.N. Bjørnstad, C.J.E. Metcalf, "Urbanization and humidity shape the intensity of influenza epidemics in U.S. citie". *Science* 362, 75–79 (2018)

diseases that infects human beings come from animals. By disrupting the natural world, web cycle and ecosystem, human increase their own risk of epidemics. The disruption of forests by logging, illegal mining, road building through remote places, rapid urbanization and population growth is bringing people into closer contact with animal species they may never have been near before.

Studies have shown that the transmission route of COVID-19 bat-human, based on the similarity of its genetic sequence to that of other known corona virus. In February 2020, two researchers (Shen Yongyi and Xiao Lihua) from South China Agricultural University in Guangzhou identified the pangolin as a potential source of SARS-CoV-2 virus. This was based on the genetic comparison of corona virus taken from pangolins and from humans infected during the recent outbreak. Some Scientists have theorized that pangolins traded on the illegal wildlife market were an intermediate host that allowed the virus to infect humans[6]. Because of this, suddenly the world's most traded wild mammal becomes the symbol of the biggest threat to human health on the planet Earth.

IMPACT OF COVID-19 ON ENVIRONMENT

The deadly Corona virus pandemic not only grows across the globe, threatening lives and upending the world economy, but it also had a profound impact on environment. If we pay a close eyes to all that is happening around us owing to the spread of this corona virus, we will notice that all the negative effects of corona virus are restricted to the mankind only. As far as over co owners of earth are concerned, the flora and fauna as well as the nature itself, they are enjoying the positives out of this deadly virus because of restriction on human movement due to lockdown. Many cities around the world adopted isolation, quarantine and campaigns stimulating people to not circulate without necessity, with the advancement of pandemic which is provoked by coronavirus[7]. The decrease in the movement in big cities directed effects on the environment in positive as well as negative way.

(A) Positive Impact of COVID-19 on Environment:

(1) With most vehicles off the roads, flights grounded and all but essential businesses shut, People in some of the biggest cities appears to be breathing in air relatively safer levels of pollutants, data from SAFAR (System of Air quality weather Forecasting and Research) and the CPCB (Centre for Pollution Control Board) show.

(2) Delhi's noxious smog makes the news every winter but it has satisfactory air quality rating in recent days according to SAFAR.

6 Are pangolins the intermediate host of the 2019 novel coronavirus (SARS-CoV-2)? available at https://journals.plos.org/plospathogens/article?id=10.1371/journal.ppat.1008421(visited on September 28, 2020)

7 The positive and negative impacts of coronavirus pandemic in the environment, available at https://meuresiduo.com/en/blog-en/the-positive-and-negative-impacts-of-coronavirus-pandemic-in-the-environment/(visited on October 1, 2020)

(3) Global air traffic dropped by 60%. Taken together, there emissions reductions have led to a temporary dip in carbon dioxide emission from their pre crisis level, encouraging some to hope that our global society may indeed be able to cut down greenhouse gas emissions substantially over the long term to reduce impending climate change.

(4) The coronavirus is driving us towards the emission reduction targeted by International climate agreement such as Paris Agreement. So, the outbreak has forced us to reduce emissions that we cannot meet normally.

(5) Everyone witnessed the bluer sky, cleaner air, clearer moon, clearer stars, birds songs and we saw clear images of river and mountains.

(6) In a historic development, India's daily power consumption has suffered a 26% fall in less than 10 days since 18 March,2020 as a result of which, there is drastic and clear reductions in pollution levels. All this is because of decreasing fossil fuel, consumption in transportation, industries and energy sector.

(7) Because of lockdown due to COVID-19, we can see its positive effect on Indian's rivers. India's Pollution monitoring body said the water had become fit for bathing and drinking. A recent analysis by Delhi Pollution Control Board found that the quality of river Yamuna has also improved because of decrease in runoffs from industries and les trash. Similar is the case with river Ganga and other rivers.[8]

(B) Negative Impact of COVID-19 on Environment

(1) COVID 19 has kneeled the world economy. It is expecting a major recession. Fragile societies and economies will take time to recover from the negative impact of this virus.

(2) There is rise in volumes of unrecyclable wastes and medical waste such as infected masks, shoes, medicines used or expired, ppt kits and other products local waste problems have emerged as many municipalities have suspended their recycling activities over fear of virus propagation in recycling centers.

(3) Social distancing in the true sense, creating rifts between the people because the wheels of social divide have already been put in motion.[9]

(4) Because of emergence of import restrictions in export markets and sharp decrease in the availability of cargo transportation services, the coronavirus crisis has led to increased volumes of un-shippable agriculture and fishery commodities. Thus organic waste levels have mounted substantially.

8 Lockdown reveals fresh air, cleaner, cleaner rivers in India, available at https://abcnews.go.com/International/wireStory/lockdown-reveals-fresh-air-cleaner-rivers-india-70279781(visited on October 4, 2020)

9 Natania Mahipal, "The Positive and Negative impact of COVID-19" *Inventive*, August 12, (2020).

(5) Natural ecosystems and protected areas are at risk during because in many countries including India, the workers, guards, wildlife wardens at national parks, land and marine conservation zones are required to stay at home in lockdown, leaving the ecosystems and protected areas and national parks unmonitored. There absence has resulted in a rise of illegal deforestation, fishing and wildlife hunting.[10]

(6) Due to COVID-19, the stoppage of ecotourism activity has also left natural ecosystems at risk of illegal harvesting and encroachment.

(7) Because of lockdown restrictions, humans are self isolating in their homes, animals that usually stay away from urban area now have space to roam. For example, in northern India, a herd of deer was caught on camera walking th streets of Haridwar. And a wild bear have been spotted in the centre of Barcelona, Spain.

(8) Coronavirus is a zoonotic disease which means it jumped from animals to humans. Now it seems to be jumping back. However, a news emerged that a tiger at the Bronx zoo, USA, tested positive for coronavirus. It is thought that the tiger, named nadia, along with six other big cats, were infected by asymptomatic zookeeper.[11]

(9) The major projects that were scheduled to gather environmental data have all been cancelled or postponed and the crisis has also cast a shadow on routine monitoring of climate change.

So COVID-19 would have both positive and negative indirect impacts on the environment.

Coronavirus as a Hooter Against Environment Destruction

Mother Earth is sending us message with COVID-19 pandemic and the unending crisis of climate change. Human beings were placing lot of pressure on the Earth by overexploiting the nature and natural resources and failing to take care of nature and its resources meant not taking of ourselves. The outbreak of COVID-19 was a clear warning shot, given that more deadly diseases existed in wildlife and present generation was playing with fire by not preserving and taking care of the same. According to experts, in order to prevent such outbreaks in future, both global warming as well as destruction of nature and its resources have to be stopped. No doubt ,our priority is to protect human beings from this deadly virus and prevent its spread, but our long term response must be to find out ideas to deal with habitat and loss of biodiversity. Our continued intervention with nature and wildlife has brought us close to wild animals and plants which are the main hosts of deadly virus that can jump to humans. Australian bushfire, floods in Venice, broken heat records and locust attack in Kenya are the examples of result of human interference with nature.

10 Robert Hambey, "Environmental impacts of coronavirus crisis, challenges ahead" in UNCTAD (United Nation Conference on Trade and Development)

11 Source: The HINDU, April 6, 2020

Through all these incidents, earth is sending us a message to restrict ourselves and stop the destruction of environment. It is all because of human invasion in environment and there will be more in future unless human change its behavior towards nature.[12]

According to Scientists, a market in China where live wild animals are butchered is the source of COVID-19. The animals have been transported from one place to another and stuffed together into cages. As these animals are stressed , have weak immune systems and excreted whatever virus, germs they have in them. People in large are directly in contact with these animals and their body fluids in such kind of markets like wet markets and get infected. These wet markets should be banned permanently and this needs to be done globally.

This pandemic has led to unprecedented enforced and voluntary restrictions on work and travel resulting in reduction of greenhouse gases and air pollutants.[13] Nitrogen oxide and carbon monoxide have also shown reduction during the lockdown. Even the quality of air in the transportation and industrial areas have improved nearly 60%.[14] Lockdown would not save the world from global warming, but COVID-19 pandemic is an opportunity to recover the green economy. Nature has benefited from last several months due to dramatically reduction in greenhouse gases. The air is clean and fresh, birds are visiting gardens, wild animals are moving towards cities, fishes have repapered in urban waterways and emissions of greenhouse gases will likely drop by 8% this year.[15] Obviously this durability of nature is temporary and it will last only till the enforcement of lockdown. So the reduction of greenhouse gases must be intentional not circumstantial, supportive not temporary. More importantly, it must be for the welfare of human beings as well as environment and for their suffering and destruction. COVID-19 pandemic give us an opportunity to ensure rescue packages, designed by governments to rescue the week and poor global economy, do not merely redeem the high carbon economy of yesterday but help us in raising a healthier economy and centered on human as well nature wellbeing and of course low on carbon and high in durability.

Nature Conservationist Negotiate the New Normal

In COVID-19 pandemic, nature conservationist are coming with term new normal with suspended food supply for animals, delayed research work and training and limited funding research grants and various other conservation projects. Many conservationists continue to monitor the wildlife, communication with scientists, researchers, people, organizing online training programs for conservation of species.

12 Damian Carrington, "Coronavirus : Nature is sending us a message," in *The Guardian weekly*, International Edition, March 25, (2020). (this article was amended on March 27, 2020).

13 P.M. Forster, H.I.Forsrer, M.J.Evans, et al, "Current and future global climate impacts resulting from COVID-19" *Nat.Clim.Chang*, 10, 913-919(2020).

14 Susanta Mahato, "Effect of Lockdown amid COVID-19 pandemic on air qualityof the megacity Delhi, India" in *the science of technology*, vol 730, August 15,(2020).

15 Christiana Figueres, "COVID-19 has given us the chance to build a low carbon future" in *The Guardian weekly, International Edition* June 1, (2020).

When India imposed lockdown in March 2020, the world's only pygmy hog conservation breeding program, Pygmy Hog Conservation Program (PHCP), turned to home garden owners in Assam for food produce in order to feed the animals[16], as there smallest pigs are found nowhere else except in Assam.

Rajeev Raghavan (aquatic conservationist) of Kerala University of Fisheries and Ocean agreed with the growing need of funds in the field of research. According to him, the outbreak of pandemic has hampered the research and fieldwork. Because of lockdown, the laboratory and filed research was completely shut, Raghavan spread awareness among the local people regarding existence of fish species into hidden ecosystems and established an initiative in Kerala which they are going to expand in other parts. In Manipur and Nagaland, the forest department, conservationists and local people are constantly monitoring the falcons, a small bird migrated from Russia and China to Manipur and Nagaland in the month of October. Varad B Giri ,an independent researcher, showed his concern regarding shortage of funds for research and conservation of amphibians and reptiles in COVID-19. According to him, there is a link between pandemic and loss of biodiversity. COVID-19 forced us to think our past unstoppable actions that have given rise to present situation. It high time to think for the conservation of biodiversity. If not now, then when.[17]

As per information, collected from a paper[18], lots of research laboratories have shut down and research work is halted due to outbreak of this pandemic. Similarly because of restrictions on transportation, field research has been impacted. This gap cannot be bridge later but at the same time it may not be serious if precautions and observations are restarted. For this it must be keep in mind that researchers and fieldworkers keep in touch with local participants and make an arrangement for alternatives activities, where possible. Delayed research means missed opportunities to recognize the conservation policies, conservation priorities, conservation and monitoring the endangered species as well as ecosystem and provide the methods for conservation of resources for present and future generation. The lasting effects of COVID-19 on these will depend on how researchers, conservationists, scientists, local communities and conservation institutions respond to the concerns regarding environment conservation during pandemic.

Indian Laws on Environment Protection and COVID-19

Across the world, the crisis of COVID-19 has strongly affected different countries at different levels, but the common thing globally experienced is that there are gaps in existing public policies and capacity of adaptation. Policies, Plans for developments

16 Sahana Ghosh, "Conservation biologists navigates the new normal" *Mongabay series,* April 29, (2020).

17 id

18 Corlett RT, Primack RB, Devictor V, Maas B, Goswami VR, Bates AE, Koh LP, Regan TJ, Loyola R, Pakeman RJ, Cumming GS, Pidgeon A, Johns D, Roth R. Impacts of the coronavirus pandemic on biodiversity conservation. Biol Conserv. 2020 Jun;246:108571. doi: 10.1016/j.biocon.2020.108571. Epub 2020 Apr 8. PMID: 32292203; PMCID: PMC7139249.

and copying actions are important to tackle with the threats like COVID-19. India which has been largely affected by COVID-19 experienced the same and point out to a number of concerns in the same field. India is signatory to lot of International environmental instruments and also has number of legislation at national as well as state level. However, these legislations and regulations have been criticized for anthropocentric approach rather than ecocentric approach. There are lots of examples that disclosed the ill functioning of environment protection laws in India in current situation of COVID-19.[19] Out of top twenty polluting cities in the world, fifteen are in India. Stoppage of work in the industries and suspension of transportation activities because of restrictions imposed on movement due to COVID-19 caused instant improvement in the quality of air and water. Studies have shown that water stress is another big issue that restricts the locals from maintaining cleanliness and proper sanitization during this pandemic. Therefore, it is clear that to maintain natural ecosystems and health of community in dense populated areas is not possible without well planned policies and legislations. Besides this, anthropogenic threats to the nature and its resources, which includes poaching, illegal hunting, deforestation, illegal mining, dam and road constructions, lack of polices to protect endangered species and other development projects are considered as more dangerous and make the country more vulnerable to future pandemic. [20] There is lack of inspection, search, monitoring in the protected areas. There is conflict between humans and wildlife due to unsustainable tourism practices, denial to involve local communities in conservation activities and withdrawal of rights of local people to have access to forests and its produce.[21]

India had witnessed loss of lives, long term health issues and deterioration in environment due to industrial disasters like leakage of gas in polymer plant in Andhra Pradesh, explosion in thermal power plant in Tamil Nadu and fire in Assam forests caused by natural gas extraction.[22] There lies the need of strict environment conservation policies and standards for activities like mining, power projects, development projects and industrial projects. India is going through a nation wide dissatisfaction regarding the suspension of environmental regulations in the recently proposed draft of environment impact assessment (EIA) 2020 notification. Food security and nutritional status of the country are posing threat through higher chances of failure of crops, lack of quality seeds, farmer's distress and exhaust the fragility of natural resources.[23]

19 Indian environmental laws and covid 19, a case study in regulation, available at https://www.greeneconomycoalition.org/news-analysis/indias-environmental-laws-and-covid-19#(visiton *October 6, 2020).*

20 Covid must not be used as an excuse to ignore environment protection, available at https://indianexpress.com/article/opinion/columns/covid-19-pandemic-environment-protection-pollution-amit-sibal-6393959/(visit on October 7,2020).

21 P. Tripathi, "Tribes and forest: a critical appraisal of the tribal forest right in India" *Res J SocSci Manag* 6 (06), 8 (2016).

22 B.K. Gupta, R.Singh, K.Satyanarayan and G.Seshamani, "Trade in bears and their parts in India: threats to conservation of bears" *in proceedings of the fourth International Symposium on the trade in bear parts*, pp. 50-60(2007).

23 A. Kothari, "Agro-biodiversity: The future of India's agriculture" Article for *MACER* (1999).

In that sense, laws and regulations relating to agriculture need to be drive, cultivation of local crops with genetic diversity, sustainable ecosystem need to be maintained in order to deal with problems like COVID-19. The crisis of COVID-19 has opened the eyes of India to rethink and reformulate the plans, policies at national, state and local level.

CONCLUSION

Many of the environmental challenges caused by COVID-19 pandemic will gradually resolve on their own once the crisis comes to an end and previous levels of economic activity resume. But at the same time, it is also true that the advantages of air pollution reductions will also be erased. The study finds that high temperature, minimum temperature, poor air quality, overexploitation of natural resources, deforestation, over population and anthropogenic threats are correlated with COVID-19 pandemic. Therefore policies regarding air quality and green environment policies should be promoted as it would help in the reduction of spread of infectious diseases like COVID-19. Formulation of environmental laws and regulations and effective plan of actions need to introduce both long as well as short term vision for betterment of human and nature. There is a need to communicate with the people using separate portal to share environmental issues, pollution levels, causes for climate change, reasons behind loss of biodiversity, the action taken and health precautions. Remember that this crisis is going to come back and too in worse form if we ignore the current situation and fail to reformulate strict laws and policies regarding conservation of environment. After COVID-19, we must understand that development should be there but not at the cost of environment. A growing economy needs to respect the carrying capacity of nature. However, what we have learned during the covid-19 crisis about environmental benefits and risks of acute drop in economic activity globally? Obviously it would help us to understand in a better way the methods and techniques of environmental sustainability, societal consumption patterns and how we can reduce environmental degradation in future for crisis free world. The present scenario of nature requires us to adopt more realistic approach to reduce the endless consumption of natural resources by the government and locals. It will not be easy but not tough too. The sustainability of the environment depend upon our present actions.

Right to Information in India in Cases of Matrimonial Disputes

Dr. Pradeep Kulshrestha & Mr. Kush Kalra***

ABSTRACT

The problems in the field of maintenance need to be tackled with a combination of humanitarian as well firm Legal measures, so that the person who seek a helping hand from the institution of maintenance which basically aims to establish and provide a social and financial security, should not feel victimised in order to secure the justice to fulfill the needs on day to day basis. It is the legal right of spouse to claim maintenance. Apex Court in the case of Ramji v. Muna Devi,[1] has laid down that Right to claim maintenance under Section 125 Code of Criminal Procedure is a distinct Statutory right, which the legislatures has recognized irrespective of the nationality, religion or creed of the parties.

The RTI Act, 2005 provides that the spouses have right to information between them, the husband are duty to provide all that information to his wife, and the appellant wife has right to information. Though certain documents like annual returns of assets, investments, IT returns etc were earlier declared as private/personal or third party information, as far as spouses are concerned they are not private or personal or third party information between them, in the context of marital disputes especially for maintenance purposes.

Also the PIO's cannot reject the request for such information, if filed by spouses, on the ground of Section 8(1)(j) saying it is personal information, because the protection of privacy is overridden by the huge public interest in maintaining wives, as provided in the proviso to exception 8(1)(j). The larger public interest in maintenance of wives and children, prevention of domestic violence, etc., for the purposes of the disclosure of such information is to be observed.

The proviso to Section 8(1)(j) read with Section 8(2) of the Right to Information Act entitled the destitute wives to information which they sought because of overwhelming public interest in securing their right to life. Thus, every spouse has a right to information about income, assets, investments, etc from the other spouse regarding the claim of maintenance from the other spouse employed by Government.

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1 1959 Cri LJ 386

INTRODUCTION

The basic purpose of the Right to Information Act, 2005 is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governments accountable to the governed. In fact, the RTI Act is meant to serve two fold puposes, viz.,

(i) effectuating the right to know already enshrined in Article 19(1) (a) of the Indian Constitution; and

(ii) greater access to information in order to ensure maximum disclosure and minimum exemptions.

The Right to Information Act provides for setting out the practical regime of right to information for citizens to secure access to information under the control of public authority.[2]

The fact that the Right to Information is part of the fundamental rights of citizens under Article 19(1) of the Constitution of India has been recognised by various Courts, since the landmark decisions in the Raj Narain's case[3], S.P.Gupta's case[4] and others. The objective of RTI Act, 2005 is to enable citizens to hold all the instrumentalities of the Government accountable.

The concept of information under the RTI Act, 2005 has been given a wide scope. It says that information means "any material in any form", which would mean any material concerning the affairs of the Government, e.g. decision, action, plan or schedule. Further, it has been defined in detail including the various modes and forms of information which can be accessed under the Right to Information Act. In other words, section 2(f) of the Act provides an inclusive definintion of the 'information' to be sought under the RTI Act but it may be extended beyond the purpose, objective and spirit of the Act.

The main purpose and objective behind the beneficial legislation is to make information available to citizens in respect of organizations, which take benefits by utilizing substantial public funds. This ensures that the citizens can ask for and get information and to know how public funds are being used and there is openness, transparency and accountability. Even though, those private organizations or institutions which are enjoying benefit of substantial funding directly or indirectly from the Governments fall within the definition of public authorities under RTI Act.[5]

Growth and Development of RTI in India

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having elected by them, seek to

2 Lalit Dadwal, "Right to Information" M.D.U. Law Journal, Vol. X, Part I, 2005, p. 264.

3 AIR 1975 SC 865

4 AIR 1982 SC 149

5 Krishan Pal Malik, "Right to Information" Allahabd Law Agency, Faridabad, 2013, p. 60

formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations. It is by no means absolute. In transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated.[6]

The Delhi High Court in the case of Secretary General, Supreme Court of India v. Subhash Chandra Agarwal[7] observed that the right to information, being integral part of the right to freedom of speech, is subject to restrictions that can be imposed upon that right under Article 19(2). The revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information and, therefore, with a view to harmonize these conflicting interests while preserving the paramountacy of the democratic ideal, Section 8 has been enacted for providing certain exemptions from disclosure of information. Section 8 of the Right to Information Act, 2005, has provided certain categories of exemptions, where the Government has no liability or responsibility or obligation to give information to any citizen. Ordinarily all information should be given to the citizens but there are certain information's which have been protected from disclosure. It means this is an attempt to harmonize the public interest with the individual's right to information. Though the Act envisages imparting a progressive and participatory right to the citizens in a meaningful manner, still the wider national interest have to be harmonized in it. The words 'Notwithstanding anything contained in this Act' symbolized that this section is an exception to the general principles contained in the Act that it is an obligation of the PIO to provide information to the citizens unless ordered to the contrary by the Central or State Information Commission.

In a case of Anuj Dhar v. Ministry of External Affairs[8] an application was filed with the PIO, Ministry of External Affairs, on 2nd August 2006 for seeking certified copies of the complete correspondence by the Ministry of External Affairs had with the Governments of the USSR and the Russian Federation over the disappearance of Netaji Subhash Chandra Bose. The application was denied by the Ministry of External Affiars on the ground that the disclosure of said information might affect the relation with a Foreign State. The Commission held and directed to the respondent to have the correspondence examined by the experts and in case the experts came to the conclusion that the relations between the Government of India and USSR would be affected through the disclosure of the information in question and the issue be settled only after a reference has been made to the Government of Russia.

In Mukesh Kumar v. Addl. Registrar, Supreme Court of India and Others[9] a citizen made a request for securing a copy of recommendations or consultations of any one year during the past ten years submitted to the President of India under Article

6 MANU/SC/1138/1997

7 AIR 2010 Del 159.

8 CIC/OK/A/2006/00671 dated 23rd March, 2007

9 CIC/AT/A/2006/00113 dated 10th July, 2006.

124(2) of the Constitution on appointment of judges of various ranks in the Supreme Court and High Courts. The CIC held that the entire process of consultation between the President of India and the Supreme Court must be exempted from disclosure. Disclosure of the list of candidates prepared by the highest Court for the purposes of consultation with the President of India attracts the exemption of section 8(1)(e) as well as the provisions of section 11(1) of the RTI Act.

The Madras High Court in The Superintendent, Office of the Public Prosecutor, High Court, Chennai v. The Registrar, Tamil Nadu Information Commission, Chennai[10] held that no barrister, attorney, pleader or vakil shall at any time be permitted, unless with the express consent of his client to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment. Section 8(1)(e) of the RTI Act exempts from disclosure information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.[11]

The Commission in Venkatesh Nayak v. Department of Personnel and Training[12] held that the provisions of this Act would apply only when a note was submitted by the Ministry that had formulated it to the Cabinet Secretariat for placing this before the Cabinet. All concomitant information preceding that, which did not constitute a part of that Cabinet note will then be open to disclosure u/s 4(1)(c), but in a manner as would not violate the provisions of section 8(1)(i). Thus, a clear demarcation was indicated between the actual formation of the Cabinet note and the preceding proceedings, the former was exempted u/s 8(1)(i) of the RTI Act and the latter was not exempted.

No doubt, Parliament has passed the Right to Information Act with the objective to bring transparency, openness and accountability in the working of the public authorities, but general public is still facing the number of problems in accessing the information. These are from both sides i.e. administrative and public. The problems are as follows:

1. Untrained or no proper training to the Public Information Officers (PIOs).
2. Poorly maintained official record.
3. Culture of secrecy prevalent in the Government offices.
4. Rude attitude of the officers.
5. Poor quality of information provided.
6. No stick rules for suo moto dissemination of information.

10 MANU/TN/0016/2010 (Writ Petition No. 20574 of 2009 decided on 5th January, 2010).

11 K. G. Bafana v. MHA, CIC/AT/A/2007/00073. Also See Milap Choraria, New Delhi v. President Secretariat, Appeal No. CIC/WB/A/2006/01003 dated 16 th December, 2006.

12 Complaint No. CIC/WB/C/2010/000120 dated 3rd August, 2010.

7. Corruption already peeped in the roots of the Government departments.
8. Less deterrent penalties to the concerned officials who failed to provide the information requested.
9. No provision under the Act which provides penalties to Appellate Authorities.
10. Lack of awareness among the public about their rights.
11. Lack of awareness/knowledge about the process of information
12. Illiteracy

Access to information can empower the masses of the country to demand their rights. It is a boon for a counrty like India which is seeing a cancerous growth of corruption, lack of public accountability and bureaucratic indifference and numerous other ills. The main aim is to bring people close to governance by informed citizenry, transparency in administration as well as public accountability and minimizing corruption. Under this Act every citizen has a right to receive and impart information, as part of his right to information. The State is not only under an obligation to respect this right of the citizens, but equally under an obligation to ensure conditions under which this right can be meaningfully and effectively enjoyed by one and all.

Use of RTI in Maintenance Issues and Matrimonial Disputes'

Under Right to Information Act 2005[13] any citizen of India may get any information from central and statutory public authorities[14]. The public authorities must respond to request for information in 30 days[15]. An independent Information Commission is setup at the national level[16] and Information Commissions at state levels[17].

13 Act No.22 of 2005.

14 Section-6 Request for obtaining information - A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed, to the Central Public Information Officer or State Public Information Officer, as the case may be, of the concerned public authority.

15 Section-7 Disposal of request- The Central Public Information Officer or State Public Information Officer, as the case may be, on receipt of a request under section 6 shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in sections 8 and 9: Provided that where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request.

16 Section-12 Constitution of Central Information Commission The Central Government shall, by notification in the Official Gazette, constitute a body to be known as the Central Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act

17 S-15 Constitution of State Information Commission- Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the State Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.

The institution of maintenance, which is prevalent in Indian since the dawn of ages aiming to provide the support network to the support to destitute females comes as a measure of social justice to women. The Hon'ble Judiciary has developed the law related to 'Institution of maintenance' to the extent as a measure of social justice and fall within constitutional sweep of Article 15(3) reinforced by Article 39. The provisions are intended to provide relief to the destitute".[18] For the development of the Law and the social change, it is required that Judiciary plays an active role by evolving the new principles.

When a destitute female approaches the Court in India, it can never be certainly answered that (a) If she is entitled to maintenance under the particular law or not? If the answer to this question is yes, then the next question arises (b) To what extent the other party is liable to maintain her? The next important question arises in the series is (c) From when and which date she will be entitled to get the relief? And last but not the least, if she has come across the entire hurdles and somehow she is able to get the award of maintenance in her favour, the next important question arises that (d) What are the consequences if the person liable fails to oblige with the orders of Court?

The problems in the field of maintenance need to be tackled with a combination of humanitarian as well firm Legal measures, so that the person who seek a helping hand from the institution of maintenance which basically aims to establish and provide a social and financial security, should not feel victimised in order to secure the justice to fulfill the needs on day to day basis.

It is the legal right of spouse to claim maintenance. Elucidating the scope of provisions incorporated under Sections 125-128 of Part IX of The Code of Criminal Procedure, 1973, Apex Court in the case of Ramji v. Muna Devi,[19] has laid down that Right to claim maintenance under Section 125 Code of Criminal Procedure is a distinct Statutory right, which the legislatures has recognized irrespective of the nationality, religion or creed of the parties. The only condition precedent is the existence of the conjugal relationship in the case of the wife, which will have to be ascertained with reference of the Personal Laws of the parties.

Section 4(1)(b) of RTI Act, imposed a mandate to disclose among other things the salary of the public servants. To that extent i.e., income as salary of public servant is not personal or private information. Spouse or any other person can ask for it. In above referred cases, some documents like IT Returns, pay-slip which explain deductions and loans were declared as personal or third party information. The privacy of public servant and right of spouse to information was explained by the Delhi High Court recently in Kusum Sharma v. Mahinder Kumar Sharma[20]. The Delhi High court has directed:

18 Monica Chawla, Gender Justice: Women and Law in India, 99 (2006).

19 1959 Cri LJ 386

20 (FAO 369/1996 decided on 14th January 2015), (Available on http://www.the-laws.com/Encyclopedia/Browse/ShowCase.aspx?CaseId=104102482300)

> "The affidavit of assets, income and expenditure of both the parties are necessary to determine the rights of the parties under Sections 24 to 27 of the Hindu Marriage Act and, therefore, should be filed by both the parties at the very threshold in order to curb the delay and expedite the trial in terms of Section 21-B of the Hindu Marriage Act. 19.7 The Court may also call upon the parties of to file such an affidavit in pending cases of maintenance if the parties have not already disclosed their true income.

The Court shall ensure that the filing of the affidavits by the parties is not reduced to a mere ritual or formality. The Court shall scrutinize the affidavit threadbare and may decline to take the same on record unless it contains complete particulars mentioned Annexure A and is accompanied by the documents mentioned therein.

If a party has made concealment or false statement in his/her affidavit, the opposite party shall disclose the particulars of the same in his/her response on affidavit along with the material to show concealment or false statement. The aggrieved party may also seek permission of the Court to serve interrogatories and seek production of relevant documents from the opposite party under Order XI of the Code of Civil Procedure.

Whenever a party discloses sufficient material to show concealment or false statement in the affidavit of the opposite party, the Court may consider examining the deponent of the affidavit under Section 165 of the Evidence Act to elicit the truth. In appropriate cases, the Court may direct a party to file an additional affidavit relating to his assets, income and expenditure at the time of marriage and/or one year before separation and/or at the time of separation.

If the statements made in affidavit of assets, income and expenditure are found to be incorrect, the Court shall consider its effect while fixing the maintenance. However, action under Section 340 Cr.P.C. is ordinarily not warranted in matrimonial litigation till the decision of the main petition.

The aforesaid procedure be followed in all cases relating to maintenance including cases under Hindu Marriage Act, 1955, Protection of Women from Domestic Violence Act, 2005, Hindu Adoption and Maintenance Act, 1956, Special Marriage Act, 1954 Indian Divorce Act, 1869 as well as Section 125 Cr.P.C.

Court was of the view that filing of affidavit of assets, income, expenditure and liabilities by both the parties in the prescribed format at the very threshold of matrimonial litigation as in developed countries would enable the Courts to pass maintenance order within 60 days in terms of Section 24 of Hindu Marriage Act, 1955 and therefore should be incorporated in all the matrimonial statutes."

Details of affidavits of assets, income and expenditure from the date of the marriage

In Puneet Kaur v. Inderjit Singh Sawhney[21], dealing with a matrimonial appeal directed both the spouses to file their respective affidavits of assets, income and expenditure from the date of the marriage up to this date containing the following particulars:—

21 MANU/DE/7166/2011 : (2011 (183) DLT 403

"7.1 Personal Information

(i) Educational qualifications.

(ii) Professional qualifications.

(iii) Present occupation.

(iv) Particulars of past occupation,

(v) Members of the family.

(a) Dependent.

(b) Independent.

7.2 Income

(i) Salary, if in service.

(ii) Income from business/profession, if self employed.

(iii) Particulars of all earnings since marriage.

(iv) Income from other sources:—

(a) Rent.

(b) Interest on bank deposits and FDRs.

(c) Other interest i.e. on loan, deposits, NSC, IVP, KVP, Post Office schemes, PPF etc.

(d) Dividends.

(e) Income from machinery, plant or furniture let on hire.

(f) Gifts and Donations.

(g) Profit on sale of movable/immovable assets.

(h) Any other income not covered above.

7.3 Assets

(i) Immovable properties:—

(a) Building in the name of self and its Fair Market Value (FMV):—Residential, Commercial, Mortgage, Given on rent, Others.

(b) Plot/land.

(c) Leasehold property.

(d) Intangible property e.g. patents, trademark, design, goodwill.

(e) Properties in the name of family members/HUF and their FMV.

(ii) Movable properties:—

(a) Furniture and fixtures.

(b) Plant and Machinery.

(c) Livestock.

(d) Vehicles i.e. car, scooter along with their brand and registration number.

(iii) Investments:—

(a) Bank Accounts - Current or Savings.

(b) Demat Accounts.

(c) Cash.

(d) FDRs, NSC, IVP, KVP, Post Office schemes, PPF etc.

(e) Stocks, shares, debentures, bonds, units and mutual funds.

(f) LIC policy.

(g) Deposits with Government and Non-Government entities.

(h) Loan given to friends, relatives and others.

(i) Telephone, mobile phone and their numbers.

(j) TV, Fridge, Air Conditioner, etc.

(k) Other household appliances.

(l) Computer, Laptop.

(m) Other electronic gadgets including I-pad etc.

(n) Gold, silver and diamond Jewellery.

(o) Silver Utensils.

(p) Capital in partnership firm, sole proprietorship firm

(q) Shares in the Company in which Director.

(r) Undivided share in HUF property.

(s) Booking of any plot, flat, membership in Co-op. Group Housing Society.

(t) Other investments not covered by above items.

(iv) Any other assets not covered above.

7.4 Liabilities

(i) OD, CC, Term Loan from bank and other institutions.

(ii) Personal/business loan

(a) Secured.

(b) Unsecured.

(iii) Home loan.

(iv) Income Tax, Wealth Tax and Property Tax.

7.5 Expenditure

(i) Rent and maintenance including electricity, water and gas.

(ii) Lease rental, if any asset taken on hire.

(iii) Installment of any house loan, car loan, personal loan, business loan, etc.

(iv) Interest to bank or others.

(v) Education of children including tuition fee.

(vi) Conveyance including fuel, repair and maintenance of vehicle. Also give the average distance travelled every day.

(vii) Premium of LIC, Medi-claim, house and vehicle policy.

(viii) Premium of ULIP, Mutual Fund.

(ix) Contribution to PPF, EPF, approved superannuation fund.

(x) Mobile/landline phone bills.

(xi) Club subscription and usage, subscription to news papers, periodicals, magazines, etc.

(xii) Internet charges/cable charges.

(xiii) Household expenses including kitchen, clothing, etc.

(xiv) Salary of servants, gardener, watchmen, etc.

(xv) Medical/hospitalization expenses.

(xvi) Legal/litigation expenses.

(xvii) Expenditure on dependent family members.

(xviii) Expenditure on entertainment.

(xix) Expenditure on travel including outstation/foreign travel, business as well as personal

(xx) Expenditure on construction/renovation and furnishing of residence/office.

(xxi) Any other expenditure not covered above.

7.6 General Information regarding Standard of Living and Lifestyle

(i) Status of family members.

(ii) Credit/debit cards.

(iii) Expenditure on marriage including marriage of family members.

(iv) Expenditure on family functions including birthday of the children.

(v) Expenditure on festivals.

(vi) Expenditure on extra-curricular activities.

(vii) Destination of honeymoon.

(viii) Frequency of travel including outstation/foreign travel, business as well as personal.

(ix) Mode of travel in city/outside city.

(x) Mode of outstation/foreign travel including type of class.

(xi) Category of hotels used for stay, official as well as personal, including type of rooms.

(xii) Category of hospitals opted for medical treatment including type of rooms.

(xiii) Name of school(s) where the child or children are studying.

(xiv) Brand of vehicle, mobile and wrist watch.

(xv) Value of jewellery worn.

(xvi) Details of residential accommodation.

(xvii) Value of gifts received.

(xviii) Value of gifts given at family functions.

(xix) Value of donations given.

(xx) Particulars of credit card/debit card, its limit and usage.

(xxi) Average monthly withdrawal from bank.

(xxii) Type of restaurant visited for dining out.

(xxiii) Membership of clubs, societies and other associations.

(xxiv) Brand of alcohol, if consumed.

(xxv) Particulars of all pending as well as decided cases including civil, criminal, labour, income tax, excise, property tax, MACT, etc. with parties name."

Parties were also directed to file, along with affidavit, copies of the documents relating to their assets, income and expenditure from the date of the marriage up to this date and more particularly the following:—

"(i) Relevant documents with respect to income including Salary certificate, Form 16A, Income Tax Returns, certificate from the employer regarding cost to the company, balance sheet, etc.

(ii) Audited accounts, if deponent is running business and otherwise, non-audited accounts i.e. balance sheets, profit and loss account and capital account.

(iii) Statement of all bank accounts.

(iv) Statement of Demat accounts.

(v) Passport.

(vi) Credit cards.

(vii) Club membership cards.

(viii) Frequent Flyer cards.

(ix) PAN card.

(x) Applications seeking job, in case of unemployed person."

Through this judgment the Delhi High Court has laid down a comprehensive right to information of spouses between themselves, especially when they are in dispute. This right is available to spouses whether they are in public service or not. This

responsibility is higher on the public servants. Section 2(f) defines information to include any information related right as per the law in force.

The Central information commission held in the case of Prashansa Sharma vs. Delhi Transco Ltd.[22]

"a. the spouses have right to information between them.

b. The husband are duty to provide all that information to his wife, and the appellant wife has right to information.

c. Though certain documents like annual returns of assets, investments, IT returns etc were earlier declared as private/personal or third party information, as far as spouses are concerned they are not private or personal or third party information between them, in the context of marital disputes especially for maintenance purposes.

d. The PIO's cannot reject the request for such information, if filed by spouses, on the ground of Section 8(1)(j) saying it is personal information, because the protection of privacy is overridden by the huge public interest in maintaining wives, as provided in the proviso to exception 8(1)(j). The larger public interest in maintenance of wives and children, prevention of domestic violence, etc., for the purposes of the disclosure of such information is to be observed.

CONCLUSION

It can be noted from the above decided cases by Supreme Court/High Courts and CIC that the right to maintenance is a basic human right. This human right cannot be implemented if there is no disclosure of vital information.

Every spouse has a right to information about income, assets, investments, etc from the other spouse regarding the claim of maintenance from the other spouse employed by Government. Under Section 8(1)(j) generally, the information about a spouse happened to be public servant sought by an victimized spouse shall be disclosed in larger public interest. The proviso to Section 8(1)(j) read with Section 8(2) of the Right to Information Act entitled the destitute wives to information which they sought because of overwhelming public interest in securing their right to life.

22 (03.02.2015 - CIC) : MANU/CI/0014/2015

Human Resource Issues and Corporate Governance: A Social and Humanitarian Approach

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ABSTRACT

This paper presents the relationship between corporate governance from dimension of human resource management (commonly referred to as HRM). It examines as to how the ownership and governance of the organization influences HRM strategies and practices. Simultaneously, this paper will try to find out how human resource management is facing troubles to maintain corporate governance in COVID-19 pandemic situation. The task of corporate governance now includes the act of balancing the needs, goal and interests of different stakeholders. This being the situation, the human resource management has a good role to play in taking care of human resources for keeping trusts of shareholders. Human resource management plays a balancing act whereby the interest of the stakeholders, the benefit of the company and the interest of the employees are to be balanced. In this grim situation of COVID-19[1] pandemic, the task of human resource management becomes harder. How can Human Resource maintain the balance in this tough time? Can Legal Fraternity play a role in this crisis? The authors have tried to find out these issues in this paper.

INTRODUCTION

Corporate Governance deals with the transparency and accountability of the enterprise. Corporate governance balances a lot of connections between management and stakeholders: the executives, board, investors and various stakeholders. The embodiment

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1 COVID-19 is a disease caused by a new strain of coronavirus. 'CO' stands for corona, 'VI' for virus, and 'D' for disease. Formerly, this disease was referred to as '2019 novel coronavirus' or '2019nCoV'. – available at<https://www.who.int/docs/default-source/coronaviruse/key-messages-and-actions-for-covid-19-prevention-and-control-in-schools-march-2020.pdf?sfvrsn=baf81d52_4>(last visited on August 19, 2020).

of corporate governance from an investor's point of view is the means by which director or managers control the outside impacts of their decisions and undertakings for the advantages of the investors. Corporate governance can be conceptualized as a lot of procedures, customs, strategies, laws and foundations influencing the manner in which a company is coordinated, managed or controlled, and its motivation is to impact legitimately or in a roundabout way the conduct of the association towards its partners. It is worried about the obligations and duties of an organization's top managerial staff to effectively lead the organization, and their relationship with its investors and other stakeholders. The result of a decent corporate governance practice requires a responsible directorate who guarantees that the speculators' advantages are not imperiled. The responsibility and straightforwardness segment of corporate governance would assist organizations with picking up investors' and financial specialists' trust. These stakeholders need affirmation that the organization will be run both sincerely and keenly. This is the basic functioning and obligation of corporate governance. Corporate governance improves partners' certainty and this would help the manageability of business over the long haul. In this way, corporate governance identifies with the inward methods by which companies are worked and controlled. While governments assume a focal job in molding the lawful, institutional and administrative atmosphere inside which individual corporate governance frameworks are created, the fundamental obligation lies with the private part. A decent corporate governance system assists with guaranteeing that organizations utilize their capital proficiently. Great corporate governance assists with guaranteeing that companies consider the interests of a wide range of stakeholders, just as of the networks inside which they work, and that their board of directors and managers are responsible to the organization and the investors. This, thus, assists with guaranteeing that organizations work to serve society in general. It assists with keeping up the certainty of speculators – both domestic and foreigner – and to draw in more consistent and long term capital.

CORPORATE GOVERNANCE AND HUMAN RESOURCE: RELATIONSHIP

Corporate governance is basically focused about issues of management and control inside the corporate. It assumes a focal job in the capacity of corporate to perform viably over the long term. As part of their obligations of corporate governance, the managers and directors disclose respective property rights to the stakeholders. This influences their motivating forces and subsequently their ability to help out each other in profitable exercises. The focal reason for HRM is improving execution of corporate governance. Even HRM itself is influenced by the usage of rules and obligations maintaining corporate governance. In this way, the requests of the stakeholders could affect on working procedures of HRM. The execution of corporate governance depends on the benefits of the stakeholders. This being the focal point, HRM has to keep this thing in their mind while executing corporate governance. HRM is one of the wings of corporate governance. This is why HRM practices are lot particular on the matter related to internal functioning and development. By such internal functioning and convergence, HRM tries for pulling in, creating, and

keeping up a company's HR. There are two sorts of HRM - 'Hard' and 'Soft' HRM. Hard HRM concentrated on the assets the board parts of HRM like cost control and workforce adaptability. Soft HRM concentrated on human parts of HRM. The soft HRM includes motivation, inspiration, commitment, communication and learning. It also includes leadership as what makes a strong HRM is keeping authority over the functioning of different employees in the organization.

IMPACT OF COVID-19 : HUMAN RESOURCE ISSUES

The effect of Covid-19 on economies, medical infrastructure and markets is an unfurling story that is unpredictable in its ever-evolving characteristic. It is not only making the world 'confused' but also 'panicky'! This unpredictability costs the economy immensely! One of the greatest obvious effects of the infection has been on the associations and the idea of work environments. As the 'crown' infection spread undetectably over the globe, a great many countries has proclaimed lockdowns. Corporate houses, large and small business entities, and other manufacturing units have mixed to conform to lockdown limitations while endeavoring to prop tasks up. As representatives began signing in distantly, HR capacities ventured up to change physical workplaces into virtual working environments practically overnight. Work-from-home (WFH) turned into the quick answer for business congruity. Deftness, inventiveness, adaptability - these are the traits exhibited by HR in the lockdown situation. Rules to guarantee that workers could oversee WFH flawlessly and safely have been immediately characterized and scattered. By and large, representatives must be upheld with computerized framework - PCs, information cards - to guarantee that business coherence could be kept up. The harm to the world economy is set to observe repercussions like no other. Not having encountered anything like this in their whole lifetime, most of India's young workforce is good to go to observe vulnerabilities. One could hazard losing their positions as organizations rebuild representative workforce and many shut down tasks, and with the said cutbacks, India could observer a domino impact! In these difficult occasions, corporate ought to vouch to care for the requirements of the workers in trouble. A HR expert ought to bring the compassionate go into the functions of the companies. The choices taken by Human Resources sway the occupation of the representatives, and the whole workforce more or less. This incorporates their capacity to acquire cash to pay for basics like food and lodging among different costs. These are at a hazard for a couple of months.

Albeit, significant partnerships and national stock trades are diving in esteem, with significant companies losing up to one-thirds of their worth as of now, the previous presentation patterns, able administration and asset base can regularly go about as an assurance that the organization will endure. In any case, episodes, for example, COVID-19 might be unavoidable taking a gander at the present status of social insurance, absence of readiness and its harmful nature in itself, their monetary partners need not! With the correct direction and headings, the administration behind each organization can be taught about the dangers so as to fence against the equivalent! Through a powerful wellbeing security protection, the organizations can mitigate

the devastating outcome, for their workforce just as to make sure about their own standing. Regardless, the administration need not leave their workforce hanging. One of the worries that the HR branch of each organization is relied upon to satisfy, something that has of late been recognized as a grave concern, is the issue of psychological wellness, the reason for which has quite often been turned away. Totally dismissed, with the cutbacks, the not really stubborn representatives, who are as of now pained by the unfriendly impacts of lockdown, may fall back on outrageous measures. Even reports are coming of life loss due to suicides. To support the organization and its representatives during such difficulties, the HRM needs to discover models adjusting measures.

According to a joints report[2] recently published by the International Labour Organization (ILO) and the Asian Development Bank (ADB), approximately around 41 lakh youth in the country have lost their employments due to the ongoing COVID-19 pandemic. This is the scenario in less than three months of lockdown. The number may escalate to 61 lakh in six month scenario. As per ILO-ADB report, titled as "Tackling the COVID-19 youth employment crisis in Asia and the Pacific", construction and agriculture sector workers have accounted for the maximum job losses. It is also estimated that this loss of employment among youth may continue throughout 2020. The situation may arise where youth unemployment rates may doubled up in some Asian countries by the end of this year and in India it may increase up to 30%. As per the report, the impact is felt on apprenticeship and internship as two thirds of apprenticeship and internship is thoroughly damaged. But the ray of hope lies in the data that six out of the ten companies have paid their interns. It is reflected in this report that one of the critical factors for such job loss is lack of digital literacy.

JUDICIAL RESPONSE : LEGAL DISCOURSE

The Supreme Court of India passed a judgment as of late in the matter of Ficus Pax Private Limited v. Association of India[3], dated June 12, 2020. The Apex Court has advanced its view on the legitimateness of the notice dated March 29, 2020 distributed and circulated by Ministry of Home Affairs' (MHA). By this notice, the Government guided businesses to make installment of wages of their laborers, at their work place, on the due date. Such distribution of wages has to done with no derivation, for the period their foundations are closed during the lockdown. The Apex Court held that foundation, ventures, businesses, who are eager to go into arrangement and settlement with the laborers/workers in regards to installment of wages for 50 days or for some other period as pertinent in a specific State during which their modern foundation was shut down because of lockdown, may start a procedure of dialogue and negotiation

2 Tackling the COVID-19 youth employment crisis in Asia and the Pacific: International Labour Organization, Bangkok (Thailand), and Asian Development Bank,Manila (Philippines), 2020, available at< https://www.adb.org/sites/default/files/publication/626046/covid-19-youth-employment-crisis-asia-pacific.pdf>(last visited on August 19, 2020).

3 Available at<https://main.sci.gov.in/supremecourt/2020/10983/10983_2020_36_1502_22526_Judgement_12-Jun-2020.pdf> (last visited on August 19, 2020).

with employees organization and go into a settlement with them. The authorities who are endowed with the commitment under various resolutions, for example, the Industrial Disputes Act, 1947—would be required to encourage dealings, assuagement and settlement. Hence from the view purpose of the court, it very well may be reason that lone choice left in these circumstance is negotiation. Out of court settlement or settlement under the Court monitoring are the options available for corporate bodies as far as legal framework is concerned. Good gesture amounts to great relevance before the court of law as it helps to ensure law of equity. Thus, good gesture is required from corporate world to maintain their obligations under fair and transparent corporate governance. On the other hand, HRM has to initiate this dialogue. Soft HRM is the key in this pandemic situation. Such positive approach would help the corporate organizations to keep intact the faith of stakeholders even in this grim COVID-19 pandemic situation.

CONCLUSION

The recent judgment of Apex Court has shown the best approach to HRM on how to deal with the ongoing issues in corporate governance amidst the COVID-19 pandemic situation. The judgment has openly asked the corporate bodies and employees to begin discourse for settlement as opposed to locking horns. This process is not alien for Human Resource Management. As a part of Soft HRM, it is an obligation to start conversation. It is their duty to look after the psychological aspects of the employees. Thus, HRM has a task to carry out to keep intact the corporate governance and the solution is already provided by the Apex Court . Along these lines, the social and humanitarian approach is the only solution to address human resource issues in corporate governance amidst the ongoing COVID-19 pandemic situation.

Special Economic Zones and Labour Laws in India

*Dr. Sumithra. R**

ABSTRACT

The migration of people from rural areas to the urban areas in search of better pastures has given rise to a varied form of exploitation of the man power. The people in order to make both ends meet in urban areas go the extra mile even to the extent of pushing themselves to the brink of exploitation. They are compelled to do so as the same is inevitable. The helplessness of these people is taken undue advantage of by the people who have set up their business enterprises in the Special Economic Zones. The statute enabling the setting up of Special Economic Zones has not exempted the application of labour laws there, yet, they are almost entirely absent. The study undertakes the different kinds of exploitation that the people working there are subjected to. Thousands of workers, try to earn their living in an atmosphere of unsecure employment and uncertainty. This is one of the problems that the urbanisation has led to and ultimately has resulted in urban impoverishment.

INTRODUCTION

At the outset, the main aim of all our labour legislations is to safeguard the interests of our labour force. These labour legislations have unqualified application to the entire workforce. But this is not true in reality, as there are few islands that are created by the enabling legislation where these labour laws are either flagrantly violated or partially adopted but majorly omitted. These islands are Special Economic Zones (SEZ) which are supposed to be the saviours of our economy as they allege to create more employment opportunities, bring in investments both from outside the country as well as local investors thus boosting the economy, to bring in more foreign exchange and better technology. India copied the idea of SEZ from its neighbour China, where SEZs have contributed 22% of China's GDP, 45% of total national foreign direct investment, and 60% of exports. In China, SEZs have created over 30 million jobs, has increased the income of participating farmers by 30% and boosted industrialization, agricultural modernization, and urbanization. In India Special Economic Zones, Act was passed in 2005 by the Central government which resulted in setting up of SEZ in different parts of the country. As the subject of labour comes

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under the Concurrent list, the respective state governments are also authorised to pass their legislations based on the central legislations, modifying the same to suit their needs. The objective of this paper is to highlight the resultant conflict between globalisation and labour exploitation in the enterprises situated in SEZs.

After the setting up of these SEZs in India, the successive governments have been highlighting only one face of these SEZs ignoring the fact that the labour laws are flagrantly violated in these SEZs. But the Ministry of Commerce and Industry in its letter to the Press Information Bureau dated 07th August 2015, has very clearly stated that "the Central Government shall have no authority to relax any law relating to the welfare of the labour in the SEZs. All Labour laws are applicable in Special Economic Zones. The rights of the workers/labour are therefore protected under the SEZs Act. Ongoing review and reform, as necessary, of Government policy and procedure is inherent to Public Policy. The Government, on the basis of inputs/ suggestions received from stakeholders on the policy and operational framework of the SEZ Scheme, periodically reviews the policy and operational framework of SEZs and takes necessary measures so as to facilitate speedy and effective implementation of SEZ policy".

NEED FOR THE STUDY

The Researcher finds the need to study this topic because of the flagrant violation of the labour laws in the SEZS, one of the results of the urbanisation. SEZs will be set up only in the urban areas congesting the already scrawny resources. SEZs have become the islands of non application of labour laws. The Researcher only hopes that these anomalies will be avoided in the labour code which is in the offing.

OBJECTIVE OF THE STUDY

Objective of the study is to find out various ways in which the basic rights of the workmen are violated and how the labour laws are being buried in the SEZs. Workmen still go to work in these SEZs owing to large scale displacement of the people from the rural areas to urban areas in search of better pastures.

METHODOLOGY ADOPTED

The methodology adopted is doctrinal based on both primary sources like judgements, Acts, decisions of the court, law commission reports and Secondary sources like journals, articles.

What are SEZs

SEZ is a designated geographical area where widespread/extensive infrastructural facilities, fiscal support and logistics support is extended by the state to enterprises to set up their business in these zones to promote the manufacture of goods for exports and to create more employment opportunities for the localities. SEZs can also be described as a geographical region that has economic laws that are more

liberal than a country's typical economic laws. SEZs in India were established to instil confidence in the investors (both foreign and domestic), to generate greater economic activity and employment. The objectives of the SEZs also extend to promotion of export of goods and services, development of infrastructure. SEZ Act, 2005 is an enabling legislation for the creation of SEZs.

Need for SEZs

SEZs are supposed to act as a medium by not only attracting the companies and enterprises from different countries which are looking out for cheaper, economic and efficient location to establish their offshore business, but it also encourages the local business enterprises to improve their export with the aid of new foreign partners at competitive price through a proper channel. The states in turn will have to offer relaxed tax and tariff policies which are different from the rest of the economic areas in the country, like duty free import of raw materials and tax exemption on the exports by the industries set up in the SEZs.

Though the SEZ Act, 2005 over rides some laws like providing financial benefits to enterprises located in SEZ, the Act mandates that in relation to labour and other standard/statutory labour laws will continue to be applicable in the SEZ. But the implementation of labour laws in these zones is not to be done by the Labour commissioner but by the Development Commissioner of SEZ, who has been conferred with substantial power over all aspects of governance of the SEZ. Economic reforms initiated by successive governments and the proliferation of SEZs in various parts of the country were thought to generate millions and millions of job avenues. The ensuing employment generation was supposed to compensate for the huge revenue losses suffered by the state, the sweeping displacement of the farmers and regional economic disparities. But the implementation of the SEZ Act, 2005 has pointed towards the serious apprehensions on the working conditions of the workers at the SEZs.

The Researcher is appalled about the kind of employment that exists in these SEZs that lures the investors with the promise of cheap labour and forced work environment. It is to anybody's guess that the SEZs promise of low-cost labour and a peaceful working environment will entice the investors to forego the interests of the workmen working in the SEZs. Even a thorough reading of SEZ Act does not establish if the labour laws governing the entire country are the same as those applicable to workers working in these SEZs. But on a closer inspection, it becomes obvious that workers working in the SEZs are subjected to a customized regime which omits the applicability of majority of the labour laws. One of the tools adopted by the employers to circumvent the application of labour laws is to hire the workmen on contract basis as casual labourers than the regular workmen. "Any attempt to dilute the constitutional imperatives in order to promote the so called trends of Globalization may result in precarious consequences. At this critical juncture the judge's duty is to uphold the Constitutional focus on Social justice without being in any way misled by the glitz and glare of globalisation".

Objectives of the SEZs

The first and the foremost objective as contemplated by the SEZ Act, 2005 is to create multi fold employment opportunities to both skilled and unskilled workers. The setting up of SEZs leads to a both direct and indirect employment opportunities. Once a SEZ is set up, the areas and localities in and around it will automatically witness development in the form of townships and the establishments of commercial ventures. Over a period of time, the vicinity becomes a hub of economic activities like malls, commercial complexes and amusement parks. All these could be considered as large scale indirect employment opportunities and sources of income. People who are unskilled will be absorbed in these establishments as we have been witnessing mass exodus of people from rural areas to urban areas in search of better opportunities.

The second objective is to attract the foreign investors by extending liberal trade policies, tax exemptions on returns on exports, exemption of custom duty on imports, exemption of income tax for a specified period of time. All these in turn will boost the exports and our local tradesmen may also be benefitted indirectly in terms of supplying goods to them. But unfortunately, the goods manufactured in these SEZs are primarily meant for export and never enter our local markets. We sacrifice the interests of our workforce to satisfy the needs of foreigners and foreign establishments, it is like 'Rob Peter to pay Paul'.

Reason Behind Exempting the SEZs from the Application of Labour Laws

With the SEZ's endeavour to push for labour intensive export oriented consumer goods, the enterprise is located at the border between the formal and the informal sector, drawing the labour force from the agricultural sector. The moment a person is employed, he becomes entitled for all statutory benefits available for a workman in a formal sector, which in turn automatically escalates the production cost and can also dampen the national and international investment. Given the Indian labour law as well as the structure of the enabling law associated with SEZs, the available solution in such a situation has been to overcome the practice of law in a manner minimizing the coverage of labour law without actually challenging the law.

The SEZ Act 2005 received the assent of the President on 23/6/2005. Though the Act is unspoken about the labour laws that are to govern the rights of the workers in SEZs, a cursory reading of the Act reveals that the labour regime with respect to their rights has not been altered. But, upon close inspection of the administrative documents submitted by states, it is clear that the regulatory regime applicable to the labour force in the SEZs has been considerably modified to suit and to protect the interest of the investors.

Short Comings of SEZ Act, 2005

Though SEZ Act, 2005, is a special legislation enacted for the establishment and administration of the SEZ s still it suffers from some of the following lacunae.

Shift of Power from the Labour Commissioner to the Development Commissioner

The Act has ousted the labour commissioner of his powers, authority and jurisdiction over the SEZs. Section 12 (3) of SEZ Act, 2005 has conferred the administrative control and power in SEZs on the Development Commissioner, who is also invested with the powers of the head of the Unit Approval Committee. This committee looks into the grant of licences and registration of the unit, resolution of commercial disputes and also disputes between the developer and the unit. The Government in an attempt to ensure smooth and uninterrupted functioning of the SEZs without any hindrances as regard labour issues has transferred the administrative powers of the Labour Commissioners to the Development Commissioner. This is done to support the Foreign Direct Investment, because it is the primary responsibility of the Development Commissioner to see to it that the enterprises in SEZ function without any hindrances, disturbances and interruptions and to make sure that the SEZs turn out ample earnings. Hence, there any form of labour rights redressal mechanism is only in paper and is conspicuous by its absence.

Deprival of the Labour Courts of their Jurisdiction on SEZs

The SEZ act, 2005 has curtailed the Labour Courts of their jurisdiction to entertain disputes emanating from SEZs and has instead created a Special Court under 23(1). The state government may with the concurrence of the High Court or the Chief Justice is empowered to designate one or more courts to try suits of civil nature arising in SEZS and also notified offences committed in the SEZs. The Act has completely barred any other court other than the designated court to try any suit.

Working Conditions and Minimum Wages

The motto behind setting up any SEZ is un-disputably profit making. SEZ Act does not speak about the implementation of the Minimum Wages Act, 1948 in SEZ, it gives an opportunity to the employers to exploit and pay the wages which are far more less than prescribed by the Minimum Wages Act, 1948. It is documented that the minimum wages are generally not paid in any SEZ and the working conditions are also inhuman. More often, the workers are made to work extra without any extra financial benefit. There are instances where the employer categorises the workmen as apprentices beyond the permissible limit and escapes from the payment of proper wages. There are instances reported where a worker has been an apprentice for 6-7 years. There will be an inordinate delay in absorbing them as a regular employee only to dodge the payment of minimum wages to them. The absence of facilities such as, recreational facilities, canteen, crèche or dining space to provide decent working conditions to workers is common in most of the units in SEZ.

Occupational hazards, stiff targets, overwork and unhealthy working environment take a toll on the health of worker. In fact, the SEZ units are mandated to furnish the consolidated annual reports in the prescribed form to the Development Commissioner which includes the periodical / statutory returns required by the Workman's Compensation Act,

Payment of Minimum Wages Act, 1948. These returns can be construed as a self certification regarding the payment of minimum wages in the SEZ which is also a conclusive proof as to the payment of minimum wages. It accords blanket immunity to the employer against the violation of Minimum Wages Act. It is an irony that even after the government extends all kinds of support to the SEZs, there is no government report on the current status of wages or the social security of the workers working in units of SEZ. Studies have shown that Minimum Wages Act, 1948 has been implemented only on the paper as far as SEZs are concerned. Social security and Labour welfare measures like Provident Fund, ESI and bonus are limited only to the regular workers.

PROHIBITION OF TRADE UNIONS

Article 19 (1) (c) of Indian Constitution guarantees the fundamental right to form association and unions. The right to form association implies the right to form trade unions. Trade Unions Act, 1926 and the Industrial Disputes Act, 1948 (ID Act) legalise the right of the workers to form an association or a union and bargain collectively notwithstanding the restrictions on certain employments including those in the government sector. Section 22 (2) of the Trade Unions Act, 1926 stipulates that not more than one third of the office bearers or five of them, whichever is less can be persons who are not employed in that particular enterprise and they could be outsiders. So, in principle, 50 percent of the office bearers of a trade union could be people not working in a particular industry. But, to make matters worse, the state governments are making major changes to the labour laws only for the SEZs, wherein it is proposed that the outsiders will not be allowed into the trade unions in SEZs resulting in a monopolistic - employer sponsored trade union and as can be gauged by anybody they will act as the mediator of the employers to repress the legitimate struggle by the workers. So if the non workers do not have an access / entry into the SEZ, the dream of forming an association or a union is a far cry and is a hallucination. On top of it, the state governments are making major amendments to the labour laws for the SEZs, where it is proposed that outsiders will not be allowed in trade unions in SEZs with the consequence that employer sponsored trade unions shall have the monopoly and will act as the agents of the employers to suppress any genuine labour struggle. Many of the times, workers are sacked for having demanded the implementation of ID Act and the Trade Unions Act, 1926.

BAN ON STRIKES

A major reduction in labour laws in SEZs is that, SEZ Rules, 2006 direct the governments to declare all activities in the SEZ as "Public Utility Services". Since the subject matter of labour is under the concurrent list, both the Central government and the state government have the power to make laws with respect to it. Through amendment majority of the states have notified and placed the industries in First Schedule of the ID Act. Section 2(n) (vi) of the I D Act, authorises the government to declare in the public interest, an industry as a "Public Utility Service", implying that the workers

cannot go on strike in the ordinary course. This is one of the controlling mechanism adopted to thwart the labour rights available to the workers though under the ID Act workers have the restricted right to strike. The workers are not allowed to strike the work unless they give a six weeks advance notice and also not during the conciliation proceedings. A strike by public utility workers shall be construed illegal if it is called for in contravention of Section 22 of the ID Act.

UNCERTAINTY OF EMPLOYMENT/ JOB INSECURITY

As we have already noted, there are no trade unions in the SEZs which is blessing in disguise for the employers. The employees in the SEZ are at the mercy of the employer to retain their job. The employers hire and fire the employees at their whims and fancies jeopardising the job stability of the employees. Fact finding reports have exposed that even if there are any unions, the leaders are hand in gloves with the employers and as we have already mentioned in the trade unions at these SEZs, the employers enjoy the monopolistic rights and the leaders will act as the agents of the employers. There are instances reported wherein the conditions that are stipulated under Section 25F of the ID Act were also not met because the prevailing ID Act in practice in SEZ has no applicability in this regard. The workers may not be reinstated and back wages may not be paid even then, these workmen are barred from going to the labour court as per the dictum of SEZ, Act.

It has been observed that most of casual or contractual workers are not even given any formal appointment letters, contract papers or proper identity cards as proof of employment. Since workers do not possess records or proofs of employment, they can be hired and terminated without any reason. These contractual employees are not directly hired by the units in SEZs but through a Labour Contractor. Most of the times the same contractor supplies the labour force especially the unskilled and the menial staff to the entire SEZ. So even if the workmen change their job, invariably they will be under the same contractor not resulting in much of change in terms of conditions of employment or the wages. Wages due to the workers are paid to the contractor and the contractor in turn pays the same to the workers but not before deducting his commission. There is another gruelling truth that is the practice of employing the workers only on contractual basis and the job lasts for only 8–10 months then the contract gets terminated. These workers are again re-inducted in 2–3 months again on a contractual basis. This is done to ensure that they are not the workers for one full year which entitles them to all labour benefits. This is done to disturb their continuity of employment.

MISERABLE STATE OF WOMEN WORKERS

The concept of empowerment of women through employment is the SEZs is a mere misnomer. Majority of the hired workforce is women workers who are contractual labourers and they lack bargaining power resulting in their exploitation. Though the authorities claim that there is no gender discrimination in wages paid to the men and women workers, but in practice, discrimination does exist. The wages paid to

women is proportionately less compared to men folk. The labour department does not have much power to control these menace in SEZs as these are protective zones. The companies prefer to employ young women who are unmarried as they will be immune from family responsibilities which mean long working shifts, no maternity benefits etc.

The stress is on minimising the production cost by employing the available cheap labour so that prices remain competitive in the global market. It is the labour that suffers the brunt of tight competition in the international market. To meet the production targets, women are compelled to work harder and longer until they burn out or quit. Another study conducted by Mr Swaminathan in 2005 reveals "*the crucial situation of women workers in SEZs, as they suffered from frequent headaches due to tension and intense concentration at work place, acute back pain, joint pain, swelling in the legs, severe abdominal pain, various types of allergies, skin ailments and piles*" (the result of sitting in the same position for hours). Non-implementation of social security measures in SEZs is evident. All these will ultimately result in job insecurity, high work pressure and stress and not surprisingly, premature burnout. A fact finding report on the workers and environment impact of Falta SEZ in West Bengal, located at around 55 kilometres from the heart of Calcutta city stated that there are no mechanisms for addressing these women workers grievances, and a life of low wages, permanent job insecurity and hazardous working conditions is what these workers face. Now that the governments have allowed the women to work in night shifts, women are even more vulnerable to varied hazards.

Cases of sexual harassment have also been reported by a large number of women labourers. An intensive study conducted by the Society for Participatory Research in Asia (2000) on SEZ units has observed that the problems of sexual harassment are rampant but not reported due to prevailing social stigma. The supervisors in the units are generally male and they use highly objectionable language with female workers. It has also been reported that if a female worker is not able to meet the set production target, the supervisors even abuse them physically. Supervisors and contractors have been delegated with power to terminate any casual/contract worker, and this in turn creates fear and insecurity among female workers and can also lead to their sexual exploitation. Most of the times, if a female worker gets pregnant, her employment is terminated.

CONCLUSION

SEZs do offer a glimpse of world-class industrial infrastructure. However, beneath the entire slick looking infrastructure, one cannot hide the truth of working conditions and the dismal status of workers. *It is evident that SEZ Act has contributed in non-implementation of labour laws and has encouraged it to a large extent. Various provisions of SEZ Act have ensured that the voice of the workers will go unheard. Political economy has created new citizenship, as it is visible in SEZ units*. It has been observed that, the workers are not voicing their ire/ agony primarily due to the availability of the surplus labour at even more lower wages which has been further fuelled by the

absence of trade unions in SEZs. Workers are more often than not are compelled to pose a rosy picture of their work place when the factory inspectors or enquiry commissions come calling them. Units located in SEZs are declared to be public utilities which has restricted the right of work men to go on strike and has reduced the scope for collective bargaining by the workers. All these have resulted in exploitative work culture in SEZs, mainly with regard to the unorganised labour market. Consequently all this will impact the real development of the country negatively. Welfare measures should be undertaken rampantly in the SEZs so that the working conditions could be improved.

The SEZs have only strengthened the hands of the corporate elites which are already an enriched class. SEZs portray a lacklustre form of administrative affairs. The Researcher is mystified as to whether the trade liberalization and the proliferation of SEZs which sought to generate heightened economic activity and employment opportunities, is worth the miserable plight of the workers. Globalisation which is an engine for growth ought to benefit all people and should prove to be a boon and not a bane. It is not globalisation per se but the unfair and damaging effect from the way it is developing that is the humanitarian problem. The islands of labour law anarchy in the form of no labour law implementation, created by the SEZ Act should be stopped. The Researcher only hopes that the labour code which is on the anvil will address this anomaly.

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Industrial Relations Code, 2020 – An Overview

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ABSTRACT

The Industrial Relations Code, 2020 deals with industrial disputes, regulation of trade unions and standing orders in industrial establishments. The code designated to safeguard the rights of employers and employees by providing easy labour reforms and to facilitate ease of doing business. The object of the Code is to realize industrial peace and harmony as the ultimate pursuit in resolving industrial disputes and to advance the progress of industry by bringing about the existence of harmony and cordial relationship between the employers and workers. Through the IR Code, 2020, the central government has introduced changes in the provisions dealing with the workers' right to strike, the requirement of standing orders, the procedure in hiring and firing by employers, etc. The Code revises various definitions so as to give the wider coverage and give benefit to each sector of working class.

INTRODUCTION

India is a complex jurisdiction in context of labour laws which, being a concurrent list item, are weaved into more than 38 archaic central and several state specific labour legislations. The complexity could be understood by the statement of the former vice-chairperson of NitiAayog and a distinguished economist, Shri.Aravind Panagariya, given in 2014:

> "The labour situation is incredibly complicated: when you go from six workers to seven in a firm, the Trade Unions Act kicks in. When you go from nine to ten, the Factories Act kicks in. And when you go from 19 to 20, something else kicks in, as happens again when you go from 49 to 50 and 99 to 100. The biggest killer is the Industrial Disputes Act, which says that if you are a manufacturing firm with 100 workers or more, you cannot dismiss any of them under any circumstances unless you get prior approval from the government. This is rarely given, and it applies even if you go bankrupt, in which case you still have to pay your workers. This has important consequences, because investors are not going to enter into an industry if they can't exit. So,

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> India has a very pernicious set of labour laws and that really, to me, is the reason why Indian firms have remained so small on average."[1]

Unlike the USA or China, we are neither a capitalist nor a communist state, rather, our constitution calls us a socialist state, which ought to strike a balance between the interest of employers and workers. While all stakeholders have recognised the need of labour reforms in spirit, the letter of such reforms and any tilt in the said balance is bound to give rise to social and political discord. Despite many such discords, during the recently conducted controversial Monsoon session, acting upon its promise to rationalize labour laws, the NDA government has passed 3 labour codes, *viz*. the Occupational Safety, Health and Working Conditions Code, 2020, the Industrial Relations Code, 2020 ("**IR Code**"), and the Code on Social Security, 2020. The Code on Wages, 2019 had already been passed in August 2019.[2]

The consolidation of the labour laws into 4 codes was first recommended by the National Commission on Labour in 2002 and it has taken India almost 18 years for acting upon the recommendations. With this pandemic having an adverse impact on the economy, the need of the hour is to revive the economy by facilitating ease of doing business and attracting foreign investment. These reforms appear to have been passed to further the same, with the aim of catalysing the creation of ample employment opportunities in the country.[3]

On September 23, 2020, the Parliament of India passed 3 (three) long awaited labour codes, namely (a) the Industrial Relations Code Bill, 2020; the Code on Social Security Bill, 2020; and the Occupational Safety, Health and Working Conditions Code Bill, 2020. The labour codes subsequently received the Presidential assent on September 29, 2020, marking a major milestone in ushering reforms in the labour sector.

The Industrial Relations Code Bill, 2020 (here in referred as "**IR Code**") was first introduced in November 2019 and was thereafter referred to the Standing Committee on Labour 2019-2020 (Standing Committee) for its evaluation and comments.

LEGISLATIONS REPEALED

The IR Code will repeal the following legislations ("**Erstwhile Legislations**") from the dates to be notified by the Central Government:

1. The Industrial Disputes Act, 1947 ("**ID Act**");
2. The Industrial Employment (Standing Orders) Act, 1946 ("**SO Act**"); and
3. The Trade Unions Act, 1926 ("**TU Act**").

The IR Code deals with industrial disputes, regulation of trade unions and standing orders in industrial establishments. The IR Code subsumes the Industrial Disputes

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2 Ibid pg.2.

3 www.jsalaw.com/articles-publications/implications-of-the-industrial-relations-code-2020/ jsagar.visited on 11-3-2021 at 12.10am.

Act, 1947 ("**ID Act**"), the Standing Orders Act, 1946 ("**Standing Orders Act**") and the Trade Unions Act, 1926 ("**Trade Unions Act**"). The effective date of the IR Code and the rules to be framed thereunder are yet to be notified. The IR Code contains 104 Sections divided into 14 Chapters and it repeals three central legislations. The IR Code aims at creating a formal and conducive industrial relations system by doing away with the ambiguities and uncertainties and ultimately aiding economic progress, employment generation and labour welfare.

OBJECTIVES

- The code designated to safeguard the rights of employers and employees by providing easy labour reforms and to facilitate ease of doing business.
- The object of the Code is to realize industrial peace and harmony as the ultimate pursuit in resolving industrial disputes and to advance the progress of industry by bringing about the existence of harmony and cordial relationship between the employers and workers.[4]

NOTABLE FEATURES OF THE INDUSTRIAL RELATIONS CODE, 2020

Through the IR Code, 2020, the central government has introduced changes in the provisions dealing with the workers' right to strike, the requirement of standing orders, the procedure in hiring and firing by employers, etc. The Code revises the term 'industry' and defines 'worker' to include any person working in any industry to do any manual, skilled or unskilled, technical, operational, clerical or supervisory work, with wages not exceeding [1] 18,000. It also introduces the term 'fixed term employment', which allows employers to hire workers for a fixed period based on written agreements. Under this provision, the workers are entitled to the same statutory benefits available to permanent workers doing similar work proportionate to their service period. They would also be qualified for gratuity in case their services are rendered for a period of one year, and their termination after the expiry of the contract would not be considered as retrenchment under the Code.

The scope of the IR Code has been expanded to cover all employees from supervisory and managerial to the administrative department that were previously not included under the Industrial Disputes Act. The Code has increased the threshold for the requirement of applying standing orders in industrial establishments from one hundred employees to three hundred employees or more. Similarly, the threshold for seeking prior governmental approval by industrial enterprises for lay-offs, retrenchment, and closure has also been increased. Provisions for the exemptions of any new industrial establishment or a class of such establishment by the appropriate government for a specific period in public interest are also provided under the Code.[5]

4 http://www.lawrbit.com/article/The Industrial Relations Code,2020/ visited on 11-3-2021 at 12.37am.

5 https://www.mondaq.com/india/employee-benefits-compensation/995216/part-i-labour-code-2020.,visited on 11-3-2021 at 12.21am.

A POSITIVE ROLE FOR THE TRADE UNIONS

The IR Code provides recognition to trade unions and councils that are registered by the industrial establishments for the purpose of negotiations. In case there are more than one registered trade unions, the union with the membership of 51% or more workers would be considered as the sole negotiating union for that particular establishment. Thus, the Code has reduced the earlier threshold of 75%. For a trade union to get recognition, it must have the support of at least 10% of the workers or 100 workers that are employed by the industrial establishment. When there is no single union that fulfils the 51% membership criterion, the employer is empowered to constitute a negotiating council consisting of representatives from registered trade unions with the support of a minimum of 20% workers. To avoid political interests taking over the trade unions, the IR Code also requires that in trade unions from unorganized sectors at least half of the office bearers must be actually be employed at the industrial establishment.[6]

STANDING ORDERS

The new IR Code redefines the Industrial Employment (Standing Orders) Act, 1946, which has been one of the most important legislations for employees and is applicable to industrial establishments that employ 100 or more workers. Apart from defining the tenure of workers, this Act laid down the basic Rules and Regulations of employment such as misconduct, permissible punishments, right to be defended by a trade unionist or co-worker, the right to and rate of subsistence allowance.

IR Code provides that the provisions with respect to standing orders shall apply to establishments having had three hundred or more employees on any day of the preceding twelve months.

An employer shall be required to prepare the draft standing orders, basis the model standing order of the Central Government, within 6 months from the date of commencement of the code in consultation with the recognised negotiating unions or members of the negotiation council with respect to the same. The same shall be certified by the certifying officer.[7]

NOTICE OF CHANGE

Employers must not change the conditions of service in certain matters without giving notice of the proposed changes to the workers being affected, or within 21 days of giving such notice. These matters include wages, contribution, allowances, working hours, and leave.[8]

6 https://www.scconline.com/blog/post/2020/10/25/decoding the Industrial Relations Code, 2020.,visited on 11-3-2021 at 12.50am.

7 https://www.mondaq.com/india/employee-rights-labour-relations/891230/industrial-relations-code—bouquets-and-brickbats., visited on 8-3-2021 at 10.00pm

8 According to Sec.40,IR Code,2020, No employer, who proposes to effect any change in the conditions of service applicable to any worker in respect of any matter specified in the Third Schedule, shall effect such change, (i) without giving to the workers li kely to be affected

DEFINITION OF INDUSTRY

The exclusion of certain activities from the definition of "industry"[9] in the Code is crucial. Only those activities/undertakings which are included will now come under the provisions of the Industrial Disputes Act, 1947 and almost all other labour legislation, including the three new labour Codes.

The definition of "industry" has time and again come under the scrutiny of the Supreme Court as reflected by the judgements in the case *of Safdarjung Hospital*,[10] *Madras Gymkhana Club*[11] etc. leading finally to the judgement of a seven judge bench in the case of Bangalore Water-Supply & *Sewerage Board V. R. Rajappa& Others*.[12] This judgement included hospitals and philanthropic, charitable and religious institutions within the definition of "industry" so long as they passed the other criteria laid down.

In the case of *Tirumala Tirupati Devasthanam V. Commissioner of Labour*,[13] it was held that if the crucial, substantial and substantive aspects of institutional life, the nature

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by such change a notice in such manner as may be prescribed of the nature of the change proposed to be effected; or (ii) within twenty-one days of giving such notice: Provided that no notice shall be required for effecting any such change— (a) where the change is effected in pursuance of any settlement or award; (b) where the workers likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Services Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply; (c) in case of emergent situation which requires change of shift or shift working, otherwise than in accordance with standing orders, in consultation with Grievance Redressal Committee; (d) if such change is effected in accordance with the orders of the appropriate Government or in pursuance of any settlement or award.

9 According to Sec.(p), IR Code, 2020, "industry" means any systematic activity carried on by co-operation between an employer and worker (whether such worker is employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not,— (i) any capital has been invested for the purpose of carrying on such activity; or (ii) such activity is carried on with a motive to make any gain or profit, but does not include — (i) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or (ii) any activity of the appropriate Government relatable to the sovereign functions of the appropriate Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or (iii) any domestic service; or (iv) any other activity as may be notified by the Central Government.

10 1971 SCR (1) 177.

11 AIR 1968 SC 554.

12 1978 SCR (3) 207.

13 1979 ILLJ 448 AP.

of the relations between the participants is non-industrial, the institution cannot be held as an industry. Now, the IR Code proposes to bring about clarity and exempt institutions owned or managed by organizations wholly or substantially engaged in any charitable, social or philanthropic service from the purview of the term industry. This would have the impact of excluding educational institutions, which employ thousands of workers, from the purview of IR Code.

The new Code simply excludes all institutions owned or managed by organisations substantially engaged in any "charitable, social or philanthropic service", or any activity which is merely "spiritual or religious in nature", as well as any sovereign functions of the Government (State or Central).

Not only is a large section earlier covered by industrial law now removed from its ambit, but the vagueness of the term "social activity" will lead to all sorts of institutions claiming exemption from labour laws.[14]

As far as "sovereign function" goes, the Indian Constitution is unique in so far it specifically allows the state to make laws to carry on any trade, business, industry or service under Article 19 (6) (ii).[15] As such, when the State is specifically allowed to carry on an industry, it would not be fair to deprive the employees of that industry the protection of labour laws.

DEFINITION OF WORKER AND EMPLOYEE

The nomenclature of 'workman' which was at the core of applicability of ID Act has been changed to 'worker' in the IR Code. Its scope has also been expanded so that rights provided under the IR Code are made available to larger group. The definition of 'worker'[16] now includes persons in supervisory capacity getting salary up to Rs. 18,000/- per month or an amount as may be notified by the central government from time to time. The ID Act, excludes a person in supervisory capacity, getting salary more than Rs. 10,000/- per month from the definition of a workman. The term 'worker' also excludes apprentice engaged under the Apprentice Act, 1961 from its ambit, which was not the case under the ID Act.[17]

14 https://www.mondaq.com/india/employee-rights-labour-relations/891230/industrial-relations-code—bouquets-and-brickbats., visited on 8-3-2021 at 10.00pm

15 Article 19(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, 2 [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,— (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise].

16 See sec. (zr),IR Code,2020.

17 https://www.livelaw.in/columns/the-industrial-relations-code-2020-implications-for-workers-rights-164921

Section 2(l) of the Code defines the term 'employee' in a wider manner than the term 'worker'. Apart from persons performing work of a manual, unskilled, skilled, technical, operational and clerical work in an industrial establishment, those doing supervisory, administrative or managerial work are also included within the scope of the term 'employee'.

When one of the very purposes behind the enactment of the new Labour Codes is the simplification of the law, the usage of both the terms in the code without any explanation for that only leads to confusion. There is no clarity about the rights conferred by the Code on persons who fall within the scope of the definition of the term employee but are outside the scope of the definition of the term worker. The following example will illustrate the confusion brought about by the usage of the two terms: the definition of industrial dispute under section 2(q) refers only to the term 'worker' and not 'employee' implying that only workers will have the right to access the mechanisms for resolution of industrial disputes under the Code. However, section 91 of the Code enables an 'employee to make a complaint to the concerned authority or forum if his or her employer prejudicially alters his or her conditions during the pendency of an industrial dispute.[18]

EMPLOYER

The IR Code aligns the definition of the term 'employer'[19] with other labour laws. It has been expanded to include contractor and the legal representative of deceased employer as well. As per the revised definition, 'employer' now means and includes the head of the department, occupier of the factory, manager of the factory, managing director, contractor and legal representatives of a deceased employer. These provisions were missing in the definition of 'employer' under the ID Act.

The IR Code sanctions the engagement of workers as fixed term employees. It also enhances the threshold number of workers for the application of standing orders and for obtaining prior government permission in the case of layoff, retrenchment and closure. Such measures afford greater flexibility for employers.

18 Ibid.

19 According to Sec. (m),IR Code,2020, "employer" means a person who employs, whether directly or through any person, or on his behalf or on behalf of any person, one or more employee or worker in his establishment and where the establishment is carried on by any department of the Central Government or the State Government, the authority specified by the head of the department in this behalf or where no authority is so specified, the head of the department, and in relation to an establishment carried on by a local authority, the chief executive of that authority, and includes,— (i) in relation to an establishment which is a factory, the occupier of the factory as defined in clause (n) of section 2 of the Factories Act, 1948 and, where a person has been named as a manager of the factory under clause (f) of sub-section (1) of section 7 of the said Act, the person so named; (ii) in relation to any other establishment, the person who, or the authority which has ultimate control over the affairs of the establishment and where the said affairs are entrusted to a manager or managing director, such manager or managing director; (iii) contractor; and (iv) legal representative of a deceased employer.

INDUSTRIAL DISPUTES

Originally, the definition of 'industrial dispute'[20] under the ID Act did not expressly include disputes arising out of discharge, dismissal, retrenchment or termination of workers within its meaning and the same was includes by way of addition of Section 2A. Under the IR Code, for better clarity, disputes arising out of discharge, dismissal, retrenchment or termination of workers have been added in the definition of 'industrial dispute' itself.

RIGHT TO STRIKE

While extending the restrictions on going on strikes from public utility services to all the industrial establishments, the IR Code introduces new definition of 'strike'[21] and imposes conditions on workers' right to go on a legal strike. It forbids the exercise of the right to strike without the workers providing prior notice and puts a similar restriction on the employers in all industrial establishments from announcing lock-outs. The Code requires a person to serve a notice within 60 days before conducting strike or lock-out to the other party and does not allow strikes or lock-outs within 14 days of such notice or before the expiry of the date specified in the notice. Moreover, it states that no strike could take place either during conciliation proceedings or arbitration proceedings or 60 days after the conclusion of such proceedings.[22] It has been argued that by implementing these restrictions, the IR Code makes the participation of workers in legal strikes very difficult and has become a major concern for workers as these provisions are inconsistent with the principles of freedom of association.[23]

HIRE AND FIRE OR MISFIRE?

The IR Code introduces special provisions regarding Lay-off, Retrenchment and Closure. The required threshold for obtaining prior approval from the government in cases of lay-offs, retrenchment, or closure in an industrial establishment has been increased from one hundred workers to three hundred workers under the provisions of the IR

20 According to Sec. (q),IR Code, 2020, "industrial dispute" means any dispute or difference between employers and employers or between employers and workers or between workers and workers which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person and includes any dispute or difference between an individual worker and an employer connected with, or arising out of discharge, dismissal, retrenchment or termination of such worker.

21 According to Sec. (zk), IR Code,2020, "strike" means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment and includes the concerted casual leave on a given day by fifty per cent. or more workers employed in an industry.

22 https://www.thehindu.com/news/national/The Hindu Explains | What does the new Industrial Relations Code say, and how does it affect the right to strike? - The Hindu,visited on 11-3-2021 at 12.30am.

23 http://thewire.in/labour/labour-code-explainer-unions-strike-workers-opposition-parties/ visited on 8-3-2021 at 12.15pm.

Code. It also allows discretion to the government of increasing this limit through proper notification. Furthermore, the Code does not provide for a corresponding increase in the amount of compensation payable to the workers in case of retrenchment or closure. However, this measure of enhancing the threshold number exposes the worker employed in small scale organizations to the risk of loss of livelihood by the arbitrary actions of employers.[24]

The general provisions for continuous service, lay-offs, retrenchment and notice before the closure of business remain more or less the same in the new Code as in the Industrial Disputes Act, 1947. However, where the new Code is a game-changer is in providing employers with more flexibility in hiring and firing by way of appointing fixed-term workers. At the same time, the new Code seeks to balance the scales by extending all the statutory benefits including gratuity to such fixed-term employees as are employed for over a year.

RESKILLING FUND

It is another much-needed initiative, the new Code also provides for setting up a worker's reskilling fund for retrenched workers with contribution from both, the employers as well as the appropriate Government.[25]

The fund shall consist of the following amounts:

a. Contribution of the employer, equivalent to 15 days wages as last drawn by the worker immediately before being retrenched.
b. Contributions from other sources as maybe prescribed.

The fund must be utilized for paying 15 days wages last drawn by the worker, to his account, within 45 days of the worker being retrenched.

PUSH FOR ALTERNATE DISPUTE REDRESSAL MECHANISMS

In my opinion, where the new IR Code truly shines is in its significant push to avail multiple avenues outside of the traditional labour courts for grievance and dispute redressal. A laudable initiative in the new IR Code is the provision for the constitution of a Grievance Redressal Committee in all establishments employing 20 or more workers as an in-house redressal mechanism for fast-track redressal (within 30 days) of the grievances of individual workers. The appeal there from goes to the Conciliation Officer. The appeal from the Conciliation Officer in turn goes to the Industrial Tribunal.

Further, in keeping with the times, the new IR Code has done well to introduce Alternate Dispute Resolution in the Industrial Dispute Redressal mechanism by providing for the provision for voluntary reference and redressal of disputes by way of arbitration. The new IR Code further provides recognition to settlements (both within and outside conciliation proceedings) and arbitration awards by making them binding on the parties involved.

24 http://www.theleaflet.in/new-labour-codes-no-protection-against-hire-and-fire-regime/visited 0n 8-3-2021 at 11.10 am.

25 Supra note 6

Besides the usual Industrial Tribunal, the new IR Code also provides for the establishment of one or more National Industrial Tribunals which shall adjudicate such disputes (by consensus), that are deemed to be of national importance or concern establishments in more than one States, as are referred to it. A very important aspect of the new IR Code is that it shall also affect all pending disputes which will be transferred to the appropriate forum under the new IR Code and adjudicated either de novo or from the present stage as deemed fit.

An interesting aspect of the IR Code is that the appropriate State Government or the Central Government gets a choice to exercise veto on enforcement of any award on "public grounds affecting the national economy or social justice" subject to the subsequent approval of such executive action by the State Legislature or Parliament as the case may be.

The new IR Code also allows workers to recover money from their employers by initiating proceedings in the prescribed manner with the appropriate Government.[26]

MECHANISM FOR INDUSTRIAL DISPUTE RESOLUTION

DISPUTE RESOLUTION MECHANISM
BIPARTITE FORUMS **(WORKS COMMITTEE & GRIEVANCE REDRESSAL COMMITTEE)** Industrial establishments employing 100 or more than 100 workers may be required to constitute a works committee consisting of employers and workers for securing and preserving good relations between employer and employees. (Section 3) Industrial establishments employing 20 or more workers shall have Grievance Redressal Committee for resolution of disputes arising out of individual grievances. (Section 4)
ARBITRATION Industrial disputes may be referred to arbitration on mutual consent (Section 42)
RESOLUTION OF INDUSTRIAL DISPUTES Appointment of Conciliation Officer by the Appropriate Government. (Section 43)
INDUSTRIALTRIBUNALS Constitution of Industrial Tribunal by the Appropriate Government for adjudication of Industrial disputes (Section 44)
NATIONAL INDUSTRIAL TRIBUNALS Adjudication of Industrial disputes which ; i) involves question of national importance or ii) could impact industrial establishments situated in more than one State. (Section 46)

26 Supra note 6

The IR Code has made certain changes in the provisions for dispute resolution mechanism and the procedure to be followed in cases of industrial disputes. While addressing concerns over individual disputes, the Code requires industrial establishments employing twenty workers or more to constitute Grievance Redressal Committees with equal representatives from both workers and employers. Under the Industrial Disputes Act, only six members were allowed to be a part of such a committee, however, the recent legislation increases this number to ten. The Code also requires the committees to have an adequate representation for women. These individual disputes related to dismissal, retrenchment, or termination of services have to be adjudicated by the Industrial Tribunal 45 days after the application for conciliation has been made by the worker involved. A Conciliation Officer is required to produce a report on the disputed matter within 45 days from the commencement of the proceedings, when no decision can be reached in the proceedings within 90 days from the time of receiving the report from the conciliation officer, the case can be brought into the Industrial Tribunal. Additionally, the Code mandates the establishment of National Industrial Tribunals to decide on disputes that are deemed to be of national importance. The provisions of the IR Code also introduce Alternate Dispute Resolution by the way of voluntary reference of disputes to arbitration and recognizes settlements taking place both within or outside the conciliation proceedings.

CONCLUSION

In the country like India, where social justice is becoming a distant dream, a total dilution of rights of workers is nothing more than an authoritarian rule which is completely opposed to the democratic principles that the Constitution espouses. Labour reforms were indeed needed in India. The Industrial Relations Code has introduced many new provisions with the aim to reform and rationalize the labour laws, however at the same time, the legislation raised many concerns over provisions dealing with issues such as carrying out legal strikes, the implications of increasing the threshold for standing orders, and the rules on hiring and firing and as such it has encountered resistance from various stakeholders. Moreover the IR Code has also been criticized for introducing various provisions that are favorable to employers but reduce the protection provided to workers in an industrial environment.

My Speech, My Right: Analysis of the Right to Freedom of Speech and Expression

Dr. Ravinder Kumar & Mr. Yashdeep Lakra***

I. INTRODUCTION

History is brimming with legions of inspiring positive social changes steered by people's movements, for they function as the 'wheels in the running of a democratic nation.' The very essence of a democracy is the right to dissent, disagree to facilitate its growth holistically.

The first significant development toward this intrinsic freedom, signifying the paramountcy of free dialogue, observed the highest court of the land in the same year of adopting our Constitution. M. Patanjali Sastri, J., in *Romesh Thappar v. The State of Madras*[1] rightly emphasized upon its significance,

> "Freedom of Speech and the Press lay at the foundation of all democratic organisations, for without free political discussion, no public education, so essential for the proper functioning of the process of popular government, is possible."

These words give an excellent account of the judiciary's candor, and honest perspective as every legislative development remains subdued in the absence of a judicial endorsement.

Our history confers upon us the right to dissent and disagrees, which forms an indispensable part of our constitutional values. A society wherein the free flow of opinions, the medium of dialogue is curbed, turns into a redundant community. The right to freedom of speech and expression plays a vital role in shaping public opinion, and this role is hidden to none; this moulding of opinion serves as a channel for the populace to perceive the incidents around them. In the times that we witness, this 'unprecedented role' of the free flow of thoughts and opinions in verbal, written,

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1 AIR 1950 SC 124.

and electronic forms has risen to a stance where it becomes ostensible in one way or another.

The right to free speech empowers the masses as it is a function of multi-cultural democracies, a tool for advancing democratic principles. Juggling between various avenues, a common person, as a result of the futility of state institutions, views the freedom of speech as a beacon of hope for the attainment of self-fulfillment, as a tool for strengthening his capability to participate in decision-making, and as an inherent non-derogable fundamental right vested in him. The very foundation of democracies is based on the people's will, marking the fundamental divergence from a few rules. This democratic apparatus entitles its citizens to call on the authorities peacefully and mobilize the masses to act as natural channels in upholding this democratic edifice. The dialogue takes place in various milieus and is tremendously driven by sundries of social, political, moral, environmental, and religious elements, to name a few. Right to speech need to be reckoned as an emblem of individual and collective freedom, indispensable to the exercise of personal liberty, forming the bottom line of democracy.

II. THE BACKDROP

In every democracy, the right to freedom of speech and expression forms the bulwark of the democratic structure. We often hear the famous adage, "*Rome was not built in a day*," and laying down the foundational stone for the most extensive Constitution in the world was a chivalrous act effectuated by the members of our constituent assembly who were heedful of all the future challenges. This intrinsic freedom of speech and expression was the end product of their incessant efforts and tenacity. In simple words, it denotes that every citizen is having the liberty to express what one feels like, famously known as the "first condition of liberty."

Our nation fought for its independence from colonial rule through the anti-colonial struggle, dialogue, and discourse forming the core of the freedom struggle. The Constitution gives equal rights to all, and no one is above it. And this freedom is also enshrined under the Constitution only to enable people to register their discontent. Gandhiji's success and various movements inspired these provisions with his most essential tools, non-violence, and truth. He inspired millions to register their dissent against prima facie unjust, palpably unfair, and discriminatory laws. The right to freedom of speech grants power to register dissent but constructively criticize the authorities. This exchange of ideas and popular sentiments enables the authorities to understand society's needs, notice their problems, and secure the inclusion of the sidelined ones into the mainstream.

Hence, our historical spirit includes this right to dissent and disagree as to its quintessential feature. There are often dialogues taking place regarding this freedom and the innate grandeur of this right. Hence, it becomes all the more imperative on the part of the government and the courts of law to ameliorate the situations where subversives endanger the exercise of this unchained freedom.

III. INDIAN CONSTITUTION AND THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

The right to freedom of speech and expression is intrinsic to the very existence of every democracy, and the Indian Constitution enshrines this freedom under Article 19(1)(a).[2]

Since independence, the hon'ble apex court broadly construed this freedom, which was variously branded as a "basic human right" and "a natural right" and alike. In a democracy, the channels of free discussion of issues should always be open.

In *Maneka Gandhi v. Union of India,*[3] Bhagwati, J., comprehensively articulated his observation on the significance of the freedom of speech and expression in a coherent manner:

> "Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic setup. If democracy means the government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."

The role of the Hon'ble Supreme Court in shining a guiding light on the various aspects involved must not go unnoticed, and in furtherance to this, the court in the year 1992 considered the broad connotation vested in this freedom and observed,

> "Freedom of speech and expression must be broadly construed to include the freedom to circulated one's views by word of mouth, or in writing, or through audiovisual media. This includes the right to propagate one's views through the print or other media. Freedom to air one's view is the lifeline of any democratic institution, and any attempt to stifle, or suffocate, or gag this right would sound a death knell to democracy and would hold usher in autocracy or dictatorship."[4]

In a way, this judgment set the ball rolling for the modern-world evolution of the right of free speech and expression. Such an unequivocal interpretation paved the way for enormous possibilities in the evolution of this principle.

Further, the Bombay High Court, through a full-bench judgment, further emphasized the importance of tolerance and the freedom that needs to be given to one and all to express their views,

> "Tolerance of diversity of viewpoints and the acceptance of the freedom to express those, whose thinking may not accord with the mainstream, are cardinal

2 INDIA CONSTITUTION. Article 19, cl. (1)(a).

3 (1978) 1 SCC 248.

4 (1992) 3 SCC 637.

> values that lie at the very foundation of a democratic form of government. A society wedded to the rule of law cannot trample upon the rights of those who assert views that may be regarded as unpopular or contrary to the majority's views. The law does not have to accept the stories would tarnish the image of the High Court."[5]

In a catena of judgments[6], the Hon'ble Supreme Court articulated its views, and the summation speaks of the cardinal principle of *people's right to know* at the bottom line of freedom of speech and expression. The apex court held, "*Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.*"

Last year, the Delhi High Court, while dealing with the passing of an *ex parte* injunction regarding a book against a high-profile accused (Asaram Bapu) and co-accused,[7] dated 22 September, 2020, acknowledged that the right of individuals to reputation is essential. Still, it also noted that this objection takes a backseat when the facts give rise to a fair discussion not being *ex facie* defamatory.[8] The courts don't smell any malice, and hence no checks can be imposed on such flow of opinions.

The hon'ble Supreme Court took a similar view in *State of Uttar Pradesh v. Raj Narain*[9] and later in *P.V. Narasimha Rao v. State (Cbi/Spe)*[10] wherein the apex court once again reiterated the significance of the right to know in a democracy. The court interpreted art. 19(1)(a) and left no room for doubt that it shouldn't be narrowly read. Instead, a broader connotation shall be accorded that encompasses that there shall be a right to know and receive information in matters that concern the public.

The right to know about governmental affairs is also intrinsic to a healthy democracy. The hon'ble Supreme Court in *Dinesh Trivedi, M.P. and Others v. Union of India*[11] looked into the significance of the right to freedom of information and observed,

> "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare. Democracy expects openness, and openness is concomitant of a free society, and the sunlight is the best disinfectant."

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5 Shri Anand Patwardhan v. The Central Board of Film Certification, 2003 (5) BomCR 58; 2004(1) MhLj 856.

6 Indian Express Newspaper v. Union of India (1985) 1 SCC 641; Reliance Petro- Chemicals Ltd. v. Indian Newspapers (Bombay) Pvt. Ltd. AIR 1989 SC 190.

7 Harper Collins Publishers PVT Ltd. v. Sanchita Gupta @ Shilpi and ors., CM APPL. 21973/ 2020.

8 *Ibid.*

9 AIR 1975 SC 865.

10 AIR 1998 SC 2120.

11 (1997) 4 SCC 306: (1997) 1 SCJ 697.

In *People's Union for Civil Liberties v. Union of India*[12], following observation was made,

> "The freedom of expression as contemplated by Article 19(1)(a), which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. Even a manifestation of an emotion, feeling, etc., without words would amount to expression. Communication of emotion and display of talent through music, painting, etc., is also a sort of expression. It is noted that Ballot is the instrument by which the voter expresses his choice between candidates."

This freedom shall also include the Freedom of the Press, as in modern democracies, the extent of the Press exercising freedom in disseminating information to citizens that determine the democratic credentials. Press is famously known as the "fourth pillar" of democracy, functioning as an independent institution that serves as an additional check on the other three pillars- executive, legislature, and the judiciary.[13] Douglas, J., of the U.S. Supreme Court, opined, "*acceptance by Government of a dissident press is a measure of the maturity of the nation.*"[14]

Such freedom is granted to Press as it commands the prestige of advancing public interest through its publication of facts and opinions, the absence of which affects the responsible judgment-making ability of a democratic electorate. Righty so, it has been termed as a "*species of which freedom of expression is a genus.*"[15]

Several Judicial pronouncements in the preceding paragraphs manifestly outline the significance of the right to free speech and expression. India, as a nation, has had a long history of struggle from colonial rule, and after independence, since the nascent stages of independent India, the Hon'ble Supreme Court and various High Courts have duly appreciated the role of this freedom in realizing one's own identity, and a nation's identity. A healthy democracy calls for participation from every sector of society to rectify the inherent flaws and lay the foundation for a brighter future. Ours being the largest parliamentary democracy in the world, it becomes more and more imperative on the part of the judiciary and the government to uphold the sanctity of the constitution, to realize the true essence of a democratic structure.

A large number of foreign judgments also talk about the significance of this right. In the year 1927, in *Whitney v. California,*[16] Louis Brandeis, J., gave a classical account of this right in the backdrop of the U.S. Constitution,

12 PUCL v. Union of India, (2003) 4 SCC 399: AIR 2003 SC 2363.

13 New York Times v. Sullivan, 376 U.S. 254; New York Times Company v. United States, 403 U.S. 713 (1971) (known as the Pentagon Papers case).

14 Terminiello v. Chicago, 337 U.S. 1.

15 Sakal Papers v. Union of India, AIR 1962 SC 305: (1962) 3 SCR 842.

16 247 U.S. 214.

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties… They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile…. that public discussion is a political duty; and that this should be a fundamental principle of the American government."

The U.S. Supreme Court, while discussing about the First Amendment to the U.S. Constitution that guarantees freedom of speech, observed,

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee."

IV. FACILITATING HOLISTIC GROWTH

Dialogue is at the bottom line of every democracy. The people act as watchdogs and make their elected representatives answerable for their acts, serving as a feedback mechanism to the government and eventually contributing to refining governmental policies. This also enables us to become the author of our own lives and script our own stories. It rescues us from the shackles of dullness and provides us with an 'oasis of serenity by lifting the imagination levels. This mechanism's driving force is the freedom of speech and expression, as Constitution being supreme, nobody is above it, and this very Constitution vests in the populace a non-derogable right to question the ones in power amicably and constructively. To acquiesce with everything the ruling elite speaks leads to the travesty of this freedom.

The Universal Declaration of Human Rights also enshrines under Article 19 the right to freedom of speech and states, "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*"[17]

The International Covenant on Civil and Political Rights (ICCPR) provides, "*Everyone shall have the right to hold opinions without interference.*[18]*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*"[19]

17 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec.10, 1948), Art 19.

18 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1996), Art. 19 cl. (1).

19 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1996), Art. 19 cl. (2).

In the case of *M. Hasan & Anr. v. Government of Andhra Pradesh*[20], the Andhra Pradesh High Court delved into the importance of freedom of speech and expression within a democracy and held,

> "In a democracy, it is not necessary that everyone should sing the same song. Everyone has a fundamental right to form his own opinion on any issue of general concern. A democracy is a government by the people via open discussion. The democratic form of Government itself demands its citizen's active and intelligent participation in the community's affairs. The public discussion with people participation is a basic feature of democracy and a rational process of democracy that distinguishes it from all other forms of Government. Democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has a positive value."

These words give an excellent account of the candor and honest perspective of the judiciary in championing this freedom's growth as it is imperative for the judiciary to fortify the legislative developments so that they can have a widespread positive effect.

In contemporary times, the internet has become a vital tool in disseminating information across the world. There have been many allegations of stifling the freedom of expression through internet shutdowns. In December 2019, all districts of Assam faced a suspension of mobile internet for almost a week. The Gauhati High Court struck down this shutdown as it noted,

> "… mobile internet services now play a major role in the daily walks of life, so much so, shut-down of the mobile internet service virtually amounts to bringing life to a grinding halt."[21]

In the absence of any justification for the continuation of the shutdown, the state was directed to restore the services with immediate effect.

Further, in January 2020, the Supreme Court in *Anuradha Bhasin v. Union of India and Ors.*[22]declared that *"the right to freedom of speech and expression under Article 19(1)(a) and the right to carry on any trade or business under 19(1)(g), using the medium of internet is constitutionally protected."*

Reasonable Restrictions

However, at the same time, the courts shall not inadvertently, unbeknown to the facts, connive with the perpetrators, which would bring shame to the established

20 AIR 1998 AP 35.

21 Madan B. Lokur, *Justice Lokur: Our Fundamental Rights to Free Speech and Protest Are Being Eroded and Mauled,* THE WIRE (Oct. 12,2020), https://thewire.in/rights/fundamental-rights-free-speech-protest.

22 Writ Petition (Civil) No. 1031 of 2019.

principles of justice. Adherence to the limitations laid down in exercise of the right to free speech and expression is an essential duty on the part of every individual, and in case of any dereliction to this duty, the state, acting with the constitutional authority conferred upon it, is duly empowered to impose 'reasonable restrictions,[23] when the enjoyment of his right by a person imperils the interests of the community at large.

In *Chintamani Rao v. State of M.P.*,[24] it was implied that primarily, "such exercise of the right shall not be excessive and arbitrary, and it must, without any exception, strike a proper balance between the right guaranteed in Article 19(1) and the social control in Article 19 (6)."

In his book 'On Liberty, famed English Philosopher JS Mill suggested that *"the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."*

Imposing restrictions or not can't stem from a mechanical understanding of rights. Instead, they arise when they're needed in cases where one's right to freedom of speech infringes limits on an individual's right.

Article 19(2) provides for the imposition of restrictions in the interests of public order, etc. However, the legislature is granted a greater leeway through this expression 'in the interests of' to curtail freedom of speech and expression, for a law penalizing activity "having a *tendency* to cause, and not *actually* causing public disorder, maybe valid as being 'in the interests of public order."

However, it should be ensured that the restriction imposed "*must have a reasonable and rational relation with the public order, security of the state, etc. If the nexus between the restriction and public order etc. is farfetched, then the restriction cannot be sustained as being in the 'interests of public order, etc."*[25] This introduces the concept of proportionality in the area of Fundamental Rights.

The hon'ble Supreme Court has provided a comprehensible understanding of the effect of the clause 'in the interests of' in the case of *O.K. Ghosh v. E.X. Joseph*[26] as follows,

> "This clause again cannot be interpreted to mean that even if the connection between the restriction and the public order is remote and indirect, the restriction can be said to be in the interests of public order. A restriction can be said to be in the interests of public order if the connection between the restriction and the public order is proximate and direct. The indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression 'in the interests of public order.'"

23 INDIA CONSTITUTION. Article 19, cl. (2).

24 AIR 1951 SC 118.

25 V.K. Javali v. State of Mysore, AIR 1966 SC 1387: (1962) 1 LLJ 134.

26 AIR 1962 SC 814: 1962 Supp (2) SCR 571.

The hon'ble apex court's landmark judgment in the case of *Shreya Singhal v. Union of India*[27] is laudable as it expanded the scope of the freedom of expression by narrowly interpreting the grounds for reasonable restrictions that are attributed to this right and noted, "*[m]ere discussion or even advocacy of a particular cause, howsoever unpopular, is 'at the heart' of the right to free speech and expression.*"

The recent wave of protests stemming from the Citizenship Amendment Act, 2019 has reignited the debate over the extent of this freedom and the checks that the state is authorized to impose. On the one hand, people marched holding the national flag, with copies of the Constitution on the other hand. They assembled in front of the national flag and representations of Bhagat Singh, Gandhi, and Ambedkar. Huge masses sang the national anthem of people. The preamble to the constitution was read out that promises liberty, equality, justice, and fraternity and transformed the Constitution into a public, accessible, and democratic document. Our Constitution confers on every citizen of this free country's liberties. As no liberty can be left unrestricted, nobody is permitted to avail absolute powers, and the freedom of speech and expression is based on the same principle. Hence, equilibrium needs to be established.

How will better arguments prevail? The solution is to show acceptance to all varieties of opinions, no matter how offensive they may be to a particular person or ideology, which will open the doors for subjecting these ideas to criticism and ensure a better flow of arguments.

V. CONCLUDING REMARKS

In a democratic society, even the state cannot curb the different voices any longer. People have well analysed the right to speech and understood the need for this freedom. There is no doubt that although being the most attacking weapon to save one's dignity, the freedom to express could be used in many constructive forms. Still, if the public goes for 'an eye for an eye by using the freedom of speech and expression, it defeats the purpose. So, owing to recent times, the public has to understand the better mode to use the right to express themselves freely, and at the same time, the administration needs to know that it can no longer ignore the voice of the masses. Otherwise, the public can be equally dangerous if its patience is tested for an extended period. Power holders have to understand that the public is far intelligent these days, hence rather than acting as rulers, they have to fulfill their duty as public servants. This peaceful way will always lead to success.

We're now in the seventies of our republic, and the inalienable right to freedom of speech and expression, which is the 'mother of all rights,' is undergoing a gradual erosion. Therefore, preserving the long-cherished freedom of speech and expression is the most important battle to fight for all countrymen, a freedom struggle for the present and future India.

27 (2013) 12 SCC 73.

From this standpoint, it would not be wrong to say that democratic maturity may be perceived via the extent up to which the state facilitates or curbs this freedom. But, on the other hand, a state levying unjust restraints on disseminating thoughts, opinions, and varying points of view in a grotesque mockery of fundamental values evinces itself of being an authoritarian state.

The freedom to express is sacred to every soul, and every bonafide speech, as far as it doesn't become a threat to society, should not be restricted. As citizens, we need to provide constructive criticism and sincere feedback to the government, respecting our diverse nation's democratic ethos and social fabric. Similarly, it is the duty of the political establishment to ensure that the populace feels engaged in the working of the nation, that they have their say in matters of national importance. Through this arrangement, our unity in diversity can be preserved, and the ideal of fraternity, a keyword to the preamble to the constitution, keeps flourishing.

Whereas it needs to be realised that the aim is not to reach the moon for us anymore, as it has already been achieved, it is the grassroots that needs to be worked upon to fight such battles that affect the very existence of mankind. Hence the aim is to rise and to rise from dust to stardust.

An Analytical Study Towards Indian Approaches for the Best Teaching-Learning Process

Mr. D.K. Saxena & Prof. Dr. Vaibhav Goel Bhartiya***

ABSTRACT

Long term studies at various renowned universities have proved one common perception that Best teaching learning process is the amalgamation of unique and right percentage of Physical quotient, Intelligence quotient, Emotional quotient and Spiritual quotient. India being the third largest system of higher education after China and United Stated of America has a major responsibility to enlighten the hidden treasures for betterment of connection between student and facilitator to ensure self sustainability while enjoying quality life. This paper will include goal or objectives of Higher education, what are the four characteristics or measurable units through which one can define meaning in life and how he/she can inculcate self content to empower best teaching learning in Higher education.

INTRODUCTION

At one time, India was one of the major learning centers for entire world. Knowledge seekers used to travel from far places to gain knowledge at *Nalanda* or *Takshila*. But slowly and steadily, humans keep getting more and more mechanical. Success has been measured by virtue of materialistic gains, while at the same time moral and spiritual values are being undermined. As a wise man has very boldly said "Men are born ignorant, not stupid. They are made stupid by education."[1] One has to evaluate today's education system through questioning- is it the right man-making process? In all the aspects of life human beings keep ignoring fundamental principle of civilization i.e. morality and freedom. At the same time disregard for everything old is the fashion of the day. Factually, it has been forgotten that human race is divine one and are here for an earthy experience to enhance the divinity. It is high time, when one can start seeking social and global evils remedy through right education. One has to understand the basic scientific approach which is to define Goal or Objective.

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1 Bertrand Russell, https://www.brainyquote.com/quotes/bertrand_russell_101537 access at 22.00Hrs 04.04.2020 Subharti University Meerut.

When a painter starts a painting he or she is always familiar with what he or she is going to paint, when a sculptor starts work, they know what they will create, than why present teaching learning process lacks pre defined values. Can one create a painter play "Hammerklavier†" by Ludwig Van **Beethoven**? Answer will be no…! Or it will be very difficult so either it will be not be possible at all or it will be unpardonable. The question is why? And to answer in simpler words a painter's cognitive skill set is different from pianist cognitive skill set, though it is not impossible to have skills for both the talents but definitely it will be a rare combination.

DIFFERENT CATEGORIES OF FACILITATORS

Indian, teaching learning processes has passed through a crisis, as tremendous emphasis on scientific and mechanical approach has made all complacent. It is common to blame today's youth are not ready to dedicate time and energy to achieve the goal, most of the time set by their parents or well-wishers or in simpler familiar common term, they lack "*purusartha*-पुरुषार्थ[2]" or "*stritva*-स्त्रीत्व[3]". In old times Indian society has used different terms for facilitators, now it is essential to understand the reasoning behind it. Those terms are as follows:-

(i) आचार्य / अध्यापक-*Acharya/adhyapak* (Teacher) – A person who familiarizes the child with alphabets, words and communicative abilities, based on skill set enjoyed or understood by child. Thus making parents and primary facilitators as the first teacher. Thus Goal for a teacher to make child familiar with commonly understood and known language and respective grammar.

Or if a personality is combination of Physical quotient, Intelligence quotient, Emotional quotient and Spiritual quotient then a teacher helps and develops Physical quotient or in simpler words teacher quenches questions related with five senses.

(ii) प्राध्यापक-*Pradhapak* (Professor) – A person who bestows all with advance knowledge in a particular field or subject. Since teacher has already gave an understanding of communicative skills thus making raw clay to mould in a beautiful shape. Professor is the person who provide all the material to make mould to shape the future of all. Thus everyone give very high regard to

† Hammerklavier literally means "hammer-keyboard", and is still today the German name for the fortepiano, the predecessor of the modern piano.) It comes from the title page of the work, "Große Sonate für das **Hammerklavier**", which means "Grand sonata for the fortepiano".

2 puruSArtha Sanskrit-English Dictionary, Koeln University, Germany; https://en.wikipedia.org/wiki/Puru%E1%B9%A3%C4%81rtha#cite_note-se1-1

3 Strītva (स्त्रीत्व) refers to "womanhood", as defined in the Śivapurā Ga 1.17. Accordingly, "Brahmin women must take instruction from a preceptor and perform the Japa with Nama at the end. They shall repeat the five-syllabled mantra five hundred thousand times for their longevity. That is the rule. Again they must repeat it five hundred thousand times to wipe off womanhood (*stritva*). Becoming a man first, the liberation will be acquired gradually". https://www.wisdomlib.org/definition/stritva accessed at 19.40, 04.04.2020 at Subharti University.

Professor. Whether one wants to be a Doctor of medicine or Astrophysicist, for sure it will be a professor who will bless all with advance knowledge of the field to make them well versed and expert.

Professor helps all in growing Intelligence quotient. Through aptness of a Professor, learner learns to grow bond with surrounding or infinite cosmos through a chosen path.

(iii) प्राचार्य-*Pracharya* (Principal) – A person who shapes vision of academic success for all knowledge seekers, while creating a hospitable and conducive environment and add leadership or innovative skill set to all students. Principal is the person who schemes the man-making education in the light of overall philosophy of humanity. He sows the seed to identify other than two major faculties (Body & Mind) the most important and revered faculty "SOUL".

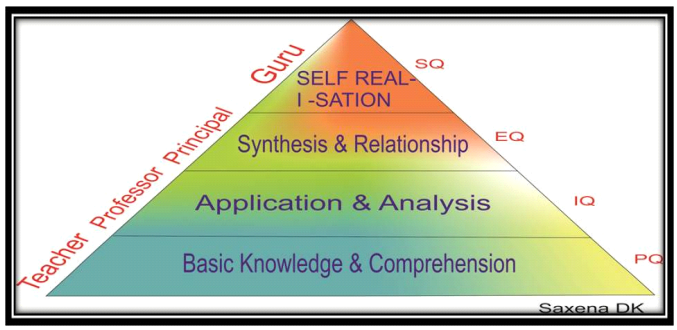
Principal is the one who makes all understand their inner faculties and how to utilize them for success or caters to Emotional quotient, shows different paths to reach final goal, while at the same time finds out the aptitude or the road through which one can gain maximum velocity with which will reach the desired destination or goal faster.

(iv) गुरु-*Guru* – Person can be described as the syllables '***gu***' which means 'darkness' and '***ru***' as 'destroyer', thus meaning "one who destroys/dispels darkness[4]". The eventual intend of learning is to mould all and to identify with the divinity and further to conclude that all are here for humanly experiences, which is very nature of eternal outlook. But it needs awakening because manifestation of the perfection is already in every human. In Computer language it is like opening codes to a blocked program.

It is the Guru who makes all understand the sole purpose of human existence, he/she is a friend, philosopher and a guide, who inculcates the values and define paths to the life goals. He always remains as a motivating foundation and helps in the spiritual advancement of a student. A *guru* is also one's spiritual guide, who helps one to discover the same potentialities that the *guru* has already realized.[5] In common terms the word '*GURU*' means 'teacher'.

4 Advaya Taraka Upanishad (English Translation)", https://en.wiktionary.org/wiki/gurus#cite_note-1 accessed at 19.45 04.04.2020 at Subharti University Meerut.

5 https://www.britannica.com/topic/guru-Hinduism accessed at 14.21; 11.04.2019 at Subharti University Meerut.

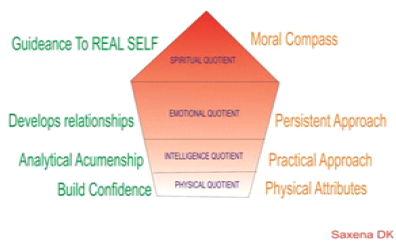


Prime responsibility of a facilitator is to attain perfect healthy prosperous life through realisation of infinite power which resides in everything and everywhere. It is just a matter of awakening right faculties at right time with right facilitator.

Four quadrants responsible for teaching learning optimisation

A peronality is nothing but combination of four faculties, and they are

- Physical Quotient
- Intelligence Quotient
- Emotional Quotient
- Spiritual Quotient



Physical quotient[6] Physical Quotient (PQ) in common analytical meaning denotes everyone's physical capabilities. As primarily this the faculty which enables everyone to fulfill the prime animal needs. That means effective and efficient use of your physical abilities through hands, eyes, legs and their coordination. It is a skill through which one demonstrate the ability for survival, whether by being an individual i.e. sportsman, warriors, fighters, performers, athletes, dancer etc. As per consultant Robert Oates, **physical quotient** is a "function of your self-awareness at the most basic level. It defines and proves that he/she is in complete synergy to ensure the **physical** wellbeing. Physical Quotient helps one to ensure the existence of mind, body and spirit" are attuned for optimum utilization, however, at the same time it's not only self-awareness, but definitely more than that and it's about actively managing own physiology. Physical quotient, (PQ) and the role it plays to optimize full potential

6 https://www.investorsinpeople.com/knowledge/physical-quotient-are-your-skills-lacking/ accessed at 19.00 Hrs 04.04.2020 at Subharti University, Meerut. Further study-Dr. Howard Gardner, professor of education at Harvard University, came up with seven types of intelligence. One of which is Bodily-Kinesthetic Intelligence. This is our ability to exert fine motor control, to move our body as one and to be aware of where we are in space. For some, physical quotient is a more complex extension of this concept. For consultant Robert Oates, physical quotient is a "function of your self-awareness at the most basic level. It's a function of how well you are attuned to your physical wellbeing. how you treat your mind, body and spirit."

of individuals. As common saying goes "Physical body is the chariot on which inner-self travels", thus if a chariot is weak travelling through broken roads or far distances would be practically very difficult or as मुण्डोकपनिषद verse 4 have quoted

"नायमात्मा बलहीनेन लभ्यो न च प्रमादात् तपसो वाप्यलिङ्गात्।
एतैरुपायैर्यतते यस्तु विद्वांस्तस्यैष आत्मा विशते ब्रह्मधाम"

"nāyamātmā balahīnena labhyo na ca pramādāt tapaso vāpyaliṅgāt,
etairupāyairyatate yastu vidvāṁstasyaiṣa ātmā viśate brahmadhāma" [7]

Which means 'the inner strength cannot be achieved by the one who is lacking of potency, or with miscalculation in the looking for the same, and even without the true markof desire, but while possessing a sum of wisdom attempts to attain it enters into his self or into *brahman/bhramgyan*, his abiding place'. Or in simpler worlds "THE SELF CANNOT BE REALIZED BY THE PHYSICALLY WEAK[8]".

Fit psyche/intellectual vigor in a healthy body makes sure that the individual is on righteous path. It is about being healthy and confident about individual's appearance. The more confident an individual is, it directly proportionate through his/her persona. It results as a function, which elaborates self tuning with personal well being. Developing PQ can be easily understood by concept of triathlon, when competitor practices harder than competition becomes easier but to complete athlete has to complete all three parts of swimming, running and cycling. So only a runner or a swimmer or a cyclist cannot win a triathlon. Accordingly, while developing a PQ one has to combine main factors in right proportion and they are **Wise nutrition, consistent exercise, Leisure time, good sleep and proper stress management**, making it **unique combination** for each and every individual. As Every second of the valuable life, one comes across waves of thoughts influenced by hormones, emotions, physical and emotional stimulations, atmospheric conditions and other variables that all influence what all feel and how all visualize the world or a scenario and accordingly, personal response mechanism. Therefore, having confidence in the physical appearance and abilities to perform as per universal consciousness is crucial.

When enter into a negative environment, it restricts the ability to enjoy as human beings, which in return affects decision making faculties like decision-making, the subjects attitude to interpersonal relationships and the concentration involved. Therefore all need to actively manage this combination to shape the positive environment or surrounding. When human body exercises, it releases endorphins, which are structurally similar to morphine[9] and activate the same pain-killing receptors in the brain, as well as promoting a general feeling of excitement and happiness. A happy mind

7 https://upanishads.org.in/upanishads/4/3/2/4 accessed at 23.00 Hrs 04.04.2020 at Subharti Universty Meerut India.

8 Dhawan, M.L., Philosophy of Education, by Isha Publication ed 2005, p.157

9 https://www.investorsinpeople.com/knowledge/physical-quotient-are-your-skills-lacking/ accessed at 23.00Hrs 04.04.2020 at Subharti University Meerut. and also https://edition.cnn.com/2016/01/13/health/endorphins-exercise-cause-happiness/index.html accessed at 14.00Hrs 05.04.2020 at Subharti University Meerut.

helps in many ways and one of the main feeling is accepting of the way the body feels, rather than resisting negative feelings. This helps in saving packets of power boosters to fight in negative environment. The 'body scan' technique[10] is a good way to become more familiar to the bodily sensations and accept them without getting biased.

It is important to quote differently able persons might have better PQ than the healthy person, as PQ does not symbolizes the ability to walk, or touch, or see but it is to realize the physiology and overcoming the shortcomings with help of other faculties of the body.

Intelligence Quotient (IQ) Since long there were attempts to classify people as per their intelligence[11] categories through observing their response in daily life day to day scenarios. The English statistician "Francis Galton[12]" made the first attempt at creating a standardized test for rating a person's intelligence. There are several kinds of IQ tests include a wide variety of subjective analysis. **IQ** scores are used effectively for better educational placement, assessment of intellectual disability, and evaluating job applicants. However, even when students improve their scores on standardized tests, it does not ensure that they have improved their cognitive abilities, such as memory, attention and speed.

gender

IQ score	Classification	% males	% females
≥130	Very superior	0	0
120-129	Superior	4.6	2.5
110-119	Normal-brilliant	18.7	10
90-109	Normal	56.2	60
80-89	Normal-awkward	14.06	20
70-79	Borderline	4.6	5
≤78	Mental retardation	1.5	2.5

IQ = Intelligence quotient range ; % = percentage

IQ is related with cognitive control abilities, or in simpler words it is the epicenter of self awareness such as interference suppression. The IQ is commonly divided into two factors: fluid and crystallized intelligence. Fluid intelligence refers to think logically and it is not related to the acquired knowledge. On the other hand, crystallized intelligence depends on experience and knowledge and it could be defined as the ability to use these factors. Generally, Vocabulary and Verbal tests are used as a measure of this aspect of intelligence (Cattell and Raymond, 1963[13]; Sternberg, 1999[14], 2005[15]). An IQ test does not measure intelligence the way a ruler measures

10 https://www.mindful.org/the-body-scan-practice/ accessed at 14.05 Hrs 05.04.2020 at Subharti University Meerut.

11 https://en.wikipedia.org/wiki/Human_intelligence accessed at 14.05 Hrs 05.04.2020 at Subharti University Meerut.

12 https://en.wikipedia.org/wiki/Francis_Galton accessed at 14.05 Hrs 05.04.2020 at Subharti University Meerut.

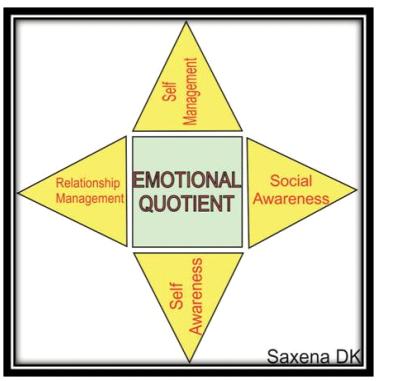
13 https://www.frontiersin.org/articles/10.3389/fpsyg.2015.01853/full#B10, accessed at 14.05 Hrs 05.04.2020 at Subharti University Meerut.

14 https://www.frontiersin.org/articles/10.3389/fpsyg.2015.01853/full#B66 accessed at 14.25 Hrs 05.04.2020 at Subharti University Meerut.

15 https://www.frontiersin.org/articles/10.3389/fpsyg.2015.01853/full#B67 accessed at 14.25 Hrs 05.04.2020 at Subharti University Meerut.

height (absolutely), but rather the way a speedometer measures speed (relatively)[16]. Modern IQ tests produce scores for different areas (e.g., language fluency, three-dimensional thinking, etc.)[17], with the summary score calculated from subtest scores. The average score, according to the bell curve, is 100[18].

As one may understand that IQ is nothing but mental age expressed in ratio of physical age and multiplied by 100. For a stable IQ Mental age of the person must increase at right proportion at least till the age is 18 years. Based on given facts one can easily derive importance of IQ and importance of facilitator to develop it through right social case studies. It needs not be from a particular subject. IQ helps the learner to understand the basic concept and respective duration to learn it.



A facilitator through right kind of test and situations make learner understand how combination of physiology of body can be utilized to achieve specific goal in minimum time, making time a quantifiable factor. By way of illustration the chemist in the laboratory concentrates all the will of mind to analyze the element or find out their secrets. Through concentration, learner learns to detach themselves from other irrelevant factors of that time. As Swami Vivekananad rightly made it understandable through his quote that "Education is not the amount of information that is put into learners brain to make riots without right processing but it means right processed information through which character's individuality is formed…"[19], his strength of mind is increased and intellect is sharpened because of which the learner becomes self sustainable in all areas of life.

There is no doubt that the learning involved is step by step and rule bound. Human beings may consider instinct as fixed programs as animals are trained to follow their masters' order. But teaching personnel are not animals per se, neither are students. Here in the community all have to evolve from machine's routine through innovative skills. Undoubtedly all efforts of breaking pre-defined boundaries will not produce positive result, but that is where third quadrant of Emotional quotient comes into play.

Emotional Quotient(EQ) Emotional quotient[20] or EQ is the ability to understand, use, and manage own emotions in positive ways to remain calm and in blissful state to

16 https://www.sciencedaily.com/terms/intelligence_quotient.htm accessed at 15.12 Hrs 05.04.2020 at Subharti University Meerut.

17 Fadul, Jose A., A Workbook for a Course in General Psychology Lulu Press Inc Manila, 2007, p.111

18 Russell, Ken Russell and other, Ultimate IQ Tests, Kogan Page Publishers, Aug-2015, p 1-2.

19 https://www.esamskriti.com/e/Spirituality/Education/Education-In-The-Vision-Of-Swami-Vivekananda-1.aspx accessed at 15.45 05.04.2020 at Subharti University Meerut.

20 https://www.helpguide.org/articles/mental-health/emotional-intelligence-eq.htm accessed at 15.45 Hrs 05.04.2020 at Subharti University Meerut.

relieve stress, communicate effectively, empathize with others, overcome challenges and defuse conflict. EQ helps individual to develop relationships, succeed at school and work, and achieve his/her career and personal goals. It aligns individual feelings and turn intention into action, while making informed decisions about matters close to individual heart, so one might link EQ to the technique of "Materialisation[21]". Higher EQ alone does not guarantee success without right proportion of PQ and IQ. As human beings have learnt by virtue of the experiences and factually all learning is done through trial and error method. More time most of the human beings dedicate to perform a skill successfully will inversely effect time taken in next attempt. Associative learning is also tacit learning – one learns the skill, but one cannot articulate any rule through which he/she has learned it. Thus it can be articulated that most emotions are developed by trial and error and they are quite habit bound.

Like other aspects of associative intelligence, emotions are not immediately verbal. Human brain often avoids talking about them and is often inaccurate without specific rationale in the sense of obeying rules or predictions. Most often the response is in incomplete data and in unpredictable data. The only disadvantage with EQ is that it is slowly learned, inaccurate and tends to be habit bound. All the human beings have their own ways to learn a skill.

EQ can be further sub-divided again in four major characteristics as self management, self awareness, social awareness and relationship management. This has been the observations that people who are academically brilliant and yet in personal life they are socially introverted, inept and unsuccessful at work or in their personal relationships. The intelligence quotient (IQ) alone isn't ensuring success in life. But yes, IQ helps anyone to get admission in a good college, but it will be the EQ that will help in managing the stress and emotions when facing final exams. EQ effects day to day performance through combination of physical health, mental health, relationships and social intelligence.

EQ can be improved anytime and does not have age limit. Teachers' attention as a facilitator is only to help children to convert gained knowledge in practical applications through which they should be able to remove or cross the life path among different hurdles in its way through applying unique combination of PQ, IQ and EQ. The plants growth cannot accelerated or decelerated, but efforts matters like keep on watering them, keep them in sunlight and provide manure to ensure availability of right atmosphere to grow.

Modern global teaching learning optimization need to invoke the spirit of inquiry, where learners suppose to find "SELF REAL-I-SATION" under bias free guidance. From Indian ancient scriptures it is derived that the term **Self Realisation** is for revered souls. No religion ever used the term coming across face to face with almighty. This is the part where all learners need to acquire Spiritual quotient.

21 https://en.wikipedia.org/wiki/Materialization_(paranormal) accessed at 15.45 Hrs 05.04.2020 at Subharti University Meerut.

SPIRITUAL QUOTIENT(SQ) is a measure that looks at a person's spiritual compass[22] or growth; If it is not more important than intelligence quotient (IQ) and emotional quotient (EQ) than it is as important as IQ & EQ . While IQ caters to cognitive or analytical intelligence, EQ looks at emotional power of a person and spiritual quotient (SQ) looks at spiritual compass of a person. SQ could also be called the intelligence of meaning as It is what makes one essentially human, having ability to plan, ability to sense own emotions, ability to control self impulses, ability to make choices and give the life a meaning.

IQ is associated with processing in brain through hard wired neural tracts and EQ formulates from associative processing through neural network but SQ comes with 40Hz (Angelic frequency) neural oscillations at front lobe of the brain. However **SQ is developed primarily through introspection**.

The significance of spirituality and 'spiritual quotient' has been ignored in contemporary structure of primary, secondary or higher education system and especially in English educational system. Even educational branches mainly depending on science and practical's such as medicine, nursing, psychiatry, and psychotherapy do not emphasize on spirituality aspect. Whereas; these sciences based streams were always an integral part of ancient civilization. The importance of Emotional Intelligence or EQ has been established; spirituality needs have not been systematically researched, examined and studied. The Three aspects of spirituality are mainly responsibility, humility and happiness.

- Responsibility. This particular aspect helps and makes society to understand the sole purpose in life or with the virtue of knowledge and experience and happiness what is the life's long term and short term goals. Thinking about these clarifies the vision of near and distant futuristic visions and answers most of the questions regarding life. After all, everyone's life is time bound and all should make their contributions to the next generation.
- **Humility.** When one thinks about it, as an individual in the entire universe the stature is not more than a speck. Even on earth, all are just one, among more than 7 billion humans on Earth; unlimited specie known or unknown. Now imagine the volume of living beings that lived ever on this planet earth. So what makes all to think that their existence is more important than any other?
- **Happiness.** In today's world, the world has become dynamic in its true sense and it has offered the essential comfort and convenience. But the real question is, does own-self happy in true sense? Cause every one individually might be measuring their happiness momentarily. Can it truly be said that all are a lot happier now[23]. We all want to be happy. But how, exactly, do all go about it? That is real question.

22 http://drvidyahattangadi.com/importance-of-spirituality-quotient/accessed at 15.45 Hrs 05.04.2020 at Subharti University Meerut.

23 https://www.psychreg.org/pursuit-happiness/ accessed at 15.45 Hrs 05.04.2020 at Subharti University Meerut.

The combination of Responsibility, Humility and Happiness connects the dot to dram the complete picture, and this picture shows the better side of human existence. It makes living beings civilized, humble to co-existence and clears the personal vision with the larger good of humanity. However at the same time it may reduce ones selfish intentions.

Holistic Development of learner to optimize Teaching learning Process

As picture clearly depicts the one of the probable equations for holistic development of learner through which teaching fraternity can maximize teaching learning process. They may say to success which is in need of almost 50% of Spiritual Quotient, 20% of Emotional quotient and 15% of Intelligence Quotient and Physical quotient each. This might be the combination which will make learner 100%. But at the same time all have to understand that it will vary from person to person but one thing is sure that it has to be these four quadrates to make the learner learn about real self and in turn their strengths and weaknesses.

IQ is rule based. EQ helps to perform the designated tasks within social boundary; whereas SQ helps one to stretch and change pre-defined boundaries, asks questions and formulate newer logical time based directives and becomes core of intelligence and creativity. Bringing about new order in the brain is one of the prime directives of any facilitator; this can be achieved through activities involving the creative brain-hemisphere in a playful and non dutiful fashion while SQ remains the compass. SQ is 'conscience'. To the surprise, one can find it that Conscience, compass, the inner truth of the soul; all have same roots.

But to achieve this goal, the ego from both the ends i.e. teacher and taught has to be eliminated, as it leads to false identification; while through meditation will fortify purity and passion for truth. The objective is to make learner aware of his self as identical with all other remaining other selves of the universe. The essential unity of the entire universe can only be achieved through right amalgamation of four quadrants available in everyone. However, today's education does not touches the point towards soul searching to find out truth. And teacher as facilitator should inspire the learner to find their own path by which they want to live their life with a high moral compass.

It can be co-related with the thought process with "*Gurukul*" culture (living with revered guru), where all learners are treated equally and do daily chorus as a team while learning to find true meaning of being alive. At the same time, they learn humility to respect others and defend self if need arises. Here, it must be emphasized that every learner should be multi-linguistic to understand hidden core values and

philosophy on which those values are built. To understand quote fables in *Upnishads can be quoted*, which are coded messages hidden in the form of story. Even asking the right question is education, a curious mind may ask why tortoise has the longest life span. The answer would be because of deepest breathing, as his breathing is so slow that it takes almost three to five minutes for one inhale and exhale. Now, one will have to relate it with human life.

The requirement is to mix aesthetics or fine arts in playful manner and make learner understand as four quadrants a persona is combination of four stages and they are the inner child, inner youth, inner adult and finally a guru. It is up to the person what comes out and at what time. As in computer a combination of tasks is completed in round robin fashion. A fixed time is allocated for each and every task at hand and one by one it keeps on doing till it reaches its final value. Same principle applies to all equally on teachers and learners. Having higher EQ or moral compass ensures that one will demonstrate righteousness in the deeds. Most may find that all are overemphasizing the role of spiritual development while neglecting material side, but that is not true. Because as a child how does it matter whether one is rich or poor because at that age what matters is food, company to ensure safety and joy, which might come through just a stick fallen from tree.

At the same time, all should take from other processes to optimize learning whatever good they have to offer but just like a person individuality must be saved. The entire educational program should be planned so every youth may earn enough to provide for them and save something against a rainy day.

CONCLUSION

Studying in one of the best University does not guarantee the success. All Universities have all kind of Alumni, but as Facilitators every one must strive to make their student understand, their best possible future, which they will love and become self content. Which makes teacher or the facilitator a "GURU" and A Guru is nothing but "a guide, a motivator, a counselor, who helps in building the clay pot with assistance of Teacher, Professor, and Principle while as a GURU teachers need to light the fire through which this clay pot will go through and takes a firm shape. Teacher as a facilitator needs to mold the students, while sharing experiential & literal knowledge, as an exemplar in life, an inspirational source and who helps in the spiritual evolution of a student". Moreover, *guru* is the spiritual mentor for the enlightenment of the spirit, who helps all to ascertain the true divinity in inner conscious with ultimate knowledge that the guru has already accomplished and blessed with.

History & Development of Consumer Laws in India: A Perspective

*Mr. Mohd Rafiq Dar**

ABSTRACT

Consumer protection is linked to the idea of "consumer rights" that consumers have various rights as consumers, and to the formation of consumer organizations which help consumers make better choices in the market place. Every individual is a consumer, regardless of occupation, age, gender, community, cast, creed, religion or race. The concept of consumer protection has its deep roots in the rich soils of Indian civilization. Indian Jurisprudence absorbs within its ambit ample of legislations for the protection of consumers in physical commercial transactions. This paper traces the historical evolution and development of consumer laws in India.

Keywords: Consumer Protection, Evolution, Consumer Rights, Development, Justice

INTRODUCTION

Man has been consuming various things right from the dawn of the human life on the earth.Consumer is the nucleus round whom all business activities revolve as the planets do around the Sun.[1] He used many things for the survival of his life, which were available in abundantly in the nature.With the passage of time people learnt to form social groups and knowledge dawned upon their evolving consciousness to create and develop a social environment to make life more secure,[2] the concept of ownership and possession developed and were accorded legal recognition and protection as well. Similarly, need for the protection of consumer interests also developed. The phenomenon of consumerism is as old as the mankind itself.[3] The consumer protection laws have originated and developed as a natural response to the recognition of the

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1 D. Himachalam, Consumer Protection in India, The Associated Publishers, Delhi, 2006, p.1.

2 Dr. J.N. Barowalia, Commentary on the Consumer Protection Act, 3rd edn., Delhi: Universal Law Publishing Co Pvt. Ltd, 2008, p. 2.

3 Dr. S. Mustafa Alam Naqui, Consumer Protection Act, 1986 and Professional Obligations, 1st edn., Faridabad: Allahabad Law Agency Publishers, 2005, p. 8

rights of every consumer to beprotected against exploitation and abuse by manufacturer or supplier of goods or service providers.[4]

Consumer rights and welfare are an integral part of the life of an individual and we all have made use of them at some or the other point in our daily routine.Consumer protection laws are designed to ensure fair competition and the free flow of truthful information in the marketplace. The laws are designed to prevent those businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and to provide additional protection for the weak and those unable to take care of themselves.

CONSUMER PROTECTION LAWS DURING ANCIENT PERIOD

Consumer protection is an old concept in Indian scenario. Consumer was a victim at the hands of the trader and he has been exploited since ancient periods. The seeds of the idea of protecting the consumer can be traced back to the ancient period or Vedic era that consists of various literary sources which deals with consumer protection. Consumer Protection has its deep roots in the rich soil of Indian civilization, which dates back to 3200 B.C. from the Vedic age'' (ancient period) to the modern period. In the past, human values were cherished and ethical practices were considered of great importance. In ancient India the Dharma Shastra[5] was followed by the society. The principles derived from Vedas, laid out social rules and norms serving as guidelines for governing human relations.[6] Among the Dharma Shastra, the most authoritative texts are the Manu Smriti (800 B.C. to 600 B.C.) the Yajnavalkya Smriti (300 B.C. to 100 B.C.) the Narada Smriti(100A.D. to 200A.D.) theBrahaspati Smriti (200A.D. to 400A.D.) theKatyayana Smriti(300 A.D. to 600 A.D)[7].

Among these, Manu Smriti[8] was them ost influential. It was believed that Ved as were the words of God, and law was said to have divine origin which was transmitted to society through sages[9]. Thus, Ved as were the primary sources of law in India.[10] Many writers and commentators of the ancient period documented the living conditions of the people through their innovative and divine writings, including Smriti (tradition)[11] and sruti (revelation)[12] and also prescribed codes to guide the kings and rulers about the method of ruling the State and its subjects. Consumer protection was also a

4 S.K.Verma and M.Afzal Wani, A Treaties on Consumer Protection Laws, New Delhi: The Indian Law Institute, 2004, p. 3

5 Codes of morals. They also deal with the rules of conduct, law and customs.

6 Shradakar supakar, Law of Procedure and Justice In India, 38(1986).

7 Gurjeet Singh "The problem of Consumer Protection in India: A Historical Perspective" Consumer Protection Reporter 704 at 705, n.6 (1994 III).

8 Manu, the ancient law giver, is the author.

9 Supra note 6 at 39.

10 Supra note 6 at 41.

11 It is also called Vedas.

12 The words of God.

major concern in their writings. However, the rulers felt that the welfare of their subjects was the primary area of concern. They showed keen interest in regulating not only the social conditions but also the economic life of the people, establishing many trade restrictions to protect the interests of buyers.[13] As per the Arthasastra of Kautilya, It was the duty of Superintendents to put the Government product in the market under favourable conditions and to supervise their sales at reasonably rates. Businessmen who cheated or interfered generally with the normal functioning of the market prices were open to heavy punishment.[14] Similarly, Narada and Brahaspati have also laid down numerous laws and regulations to safeguard the interest of buyers and sellers.

In Ancient India, Vedas were considered the words emanating from the mouth of God himself and were considered the supreme and sacred injunctions governing supposedly the entire society during the ancient period. It has been to learn the law from the letter of 'Vedas' and 'Upanishads', the law could be easily ascertained by following indications available there in abundance, either in the form of positive Vidhis or negative Nishedhas injunctions. To quote only a few: (i) Tell the truth, (ii) Never tell the untruth, (iii) Never hurt anyone and (iv) Perform the acts which are not forbidden.[15]

The punishment "for adulterating unadulterated commodities and for breaking gems or for improperly boring (them)" was the least harsh. Severe punishment was prescribed for fraud in selling seed corn: "he who sells (for seed-corn that which is) not seed-corn, he who takes up seed (already sown) and he who destroys a boundary (mark) shall be punished by mutilation".[16] During the ancient period, the king had the power to confiscate the entire property of a trader in two instances when the king had a monopoly over the exported goods; and when the export of the goods was forbidden. There was also a mechanism to control prices and punish wrongdoers. The King fixed the rates for the purchase and sale of all marketable goods.[17] Kautilya's Arthasastra, describes various theories of statecraft and deals with the rights and duties of subjects in ancient society.[18] Though, its primary concern is not the consumer protection, yet it occupies a prominent place in Arthasastra. It describes the role of the State in regulating trade and its duty to prevent crimes against consumers. Between 400 and 300 B.C., there was a director of trade whose primary responsibility was to monitor the market situations. Additionally, the director of trade was made responsible for

13 Supra note 7 at 705-706.

14 R.P. Kangle, TheKautiliya Arthasastra – Part III – A Study 116 (2000).

15 M. Rama Jois Legal and Constitutional History of India. Reprint- 2014. Universal Law Publication, New Delhi.

16 Suresh Misra & Sapna Chadah, eds. Consumer Protection in India—Issues and Concerns, p 12. Published by Indian Institute of Public Administration, New Delhi and printed atNew United Process, A-26, Naraina Industrial Area II, New Delhi-110028.

17 RajendraNath Sharma, Ancient India According to Manu 142 Nag Publishers, Delhi, (1980).

18 R.P. Kangle, The Kautiliya Arthasastra– Part II(2nd ed. 1972)

fair trade practices. The director of trade was required to be "conversant with the differences in the prices of commodities of high value and of low value and the popularity or unpopularity of goods of various kinds whether produced on land or in water [and] whether they arrived along land-routes or water-routes, [and] also [should know about] suitable times for resorting to dispersal or concentration, purchase or sale."[19] During Chandragupta's period, in which Kautilya lived, good trade practices were prevalent. For example, "Goods could not be sold at the place of their origin, field or factory. They were to be carried to the appointed markets where the dealer had to declare particulars as to the quantity, quality and the prices of his goods which were examined and registered in the books."[20] Every trader was required to take a license to sell. A trader from outside had to obtain permission. The superintendent of commerce fixed the whole-sale prices of goods as they entered the Customs House. The State bore a heavy responsibility for protecting the public against unfair prices and fraudulent transactions. There were severe punishments for smuggling and adulteration of goods. For example, public health was guarded by punishing adulteration of food products of all kinds, including grains, oils, alkali, salts, scents and medicines.[21]

All these measures show how effective ancient society was inregulating them any wrongs of the market place. These measures also show how developed the system was in identifying the market strategies of traders.

CONSUMER PROTECTION LAWS DURING MEDIEVAL PERIOD

Medieval period of Indian history is an interesting and indispensable link between the ancient and modern. It was a period partly of transition and partly of transformation.The Mughal era, from the 16th century to the 18th century, is often referred to as the early modern period, but is sometimes also included in the 'late medieval' period. Several historians view the death of Emperor Aurangzeb as the end of medieval Indian history and the start of modern Indian history.[22]

One of the most significant events of this period is the advent of Islam in this country.The legal principles of Islamic laws were engrafted in the Indian judicial system with the advent of Islam in India.Consumer protection and business ethics are amongst the more important aspects ofhuman being's dealings with each other. In Islam, the rights and obligations of an individual towards others are stressed heavily. Where violations occur, the prerogative to forgive orotherwise is vested in the affected individual. Allah's forgiveness or otherwise in such casesis dependent

19 Id. at 127.

20 Radha Kumud Mookerji, Chandragupta Maurya and his Times 204 Motilal Banarasidas - Delhi (4th ed.1966)

21 Id. at 140.

22 Radhey Shyam Chaurasia, History of Medieval India: From 1000 A.D. to 1707 A.D., 2002, Atlantic Publishers & Distributors. New Delhi. See also: Satish Chandra, Medieval India: From Sultanat to the Mughals, 2004 (2 vols), See also: Upinder Singh, A History of Ancient and Early Medieval India: From the Stone Age to the 12th century, 2008.

on the will of the individual sinned against; if he does not forgive, Allah willpunish the defaulter. Therefore, it is imperative for the individuals to deal with fairness in trade and commerce as well. There are numerous Qur'a¡nicinjunctions as well asHadith[the sayings of the Holy Prophet Muhammad (May peace be upon Him) emphasising the importance of righteous dealing in such matters. For instance:

> *O ye who believe! Eat not up your property among yourselves in vanities: but let there be amongst you traffic and trade by mutual good-will: nor kill (or destroy) yourselves: for verily God hath been to you most Merciful.*[23]

Islam promotes a market free from interferences such as price fixing and hoarding. Government intervention, however, is tolerated to ensure public interest under specific circumstances. Islam prohibits the fixation of a price by a handful of buyers or sellers who have become dominant in the market. Hazrat Muhammad (peace be upon him) condemned monopoly practice since it caused injury both to the producers and the inhabitants of Medina. Islam prohibits all types of fraud and deception, whether it is in buying and selling or in any other matter between people. The Prophet (peace be upon him) said that both parties to a transaction have a right to cancel it as they have not separated. If they tell truth and make everything clear, they will be blessed and their transaction, but if they lie and conceal anything, the blessings will be blotted out.[24]

In medieval India, consumer protection continued to be of prime concern for the rulers. During Muslim rule, a large number of units of weights were used in India. During the Sultanate period, the prices used were determined by local conditions. Consumer protection was of paramount importance in the medieval period in India ranging from 1000 AD to 1750 AD.[25] Sher Shah's currency reforms also promoted the growth of commerce and handicrafts. For the trade and commerce purpose, Sher Shah made an attempt to fix standard weights and measures across his empire. According to Barani, Alaudin set up three markets at Delhi, the first for food grains, the second for cloths of all kinds, and for expensive items such as sugar, oil, ghee, dry fruits etc., and the third for horses, slaves and cattle. Detailed regulations were framed for the control and administration for all these markets.[26] For controlling the food prices, Alaudin tried to control not only supply of food grains from the villages, and its transportation to the city by the grain merchants but its proper distribution to the citizens.[27] A special department was set up under the charge of 'Shahna-i-mandi'. It was his duty to prepare the lists of prices of various commodities to register merchants and to keep an eye on their movements to look after the royal

23 The Holy Qur'an 4:29.

24 (Al-Bukhari).

25 Maulana Hakim Syed Abdul Hai, India- During Muslim Rule 127 (Mohinuddin Ahmad tans. 1977).

26 Satish Chandra, Medieval India: From Sultanate to the Mughals. III edn 2004.Reprint 2006.HarAnand Publications, New Delhi.

27 Id. at 86.

granary, to supervise the markets and to check the weights and measures.[28] Alauddin'sminister of commerce was also the superintendent of weights and measures and the controller of commercial transactions. He was assisted by the superintendent for each commodity.[29] To keep an eye over the traders and keep them on the right path, there were secret and public informers and the inspectors. Merchants were heavily punished if even the slightest irregularity was detected. Public whipping, kicking them out of the markets,[30] and if there is breach of the rates and weights, the punishment was very severe. Flesh from buttocks of sellers was cut out for such breaches,[31] were some of usual punishments.Several generations of rulers following the Khalji did not contribute much to the consumer protection cause until Sher Shah Suri who ruled during the brief period between 1540 and 1545 AD. Sher Shah Suri was a visionary in matters related to commerce. He envisioned that an economy is always dependent on how well its consumers are treated. He emphasized on standardized measures and set forth decimal and centenary systems with respect to measures. He also published quality guidelines especially for produce, grocery, confectionaries and pharmaceuticals. The financial system he introduced along with the currency 'Rupiyah' forms the foundation of the monetary system of modern India. Although his reign was brief, he is thought to be one of the most important medieval rulers who have influenced consumer protection policies of modern India.[32]

During the reign of Akbar (1556-1605), the third Mughal Emperor of India, several significant achievements were made in matters related to consumer protection. The right of the consumer to be informed perhaps found its earliest roots during the period. All traders were required to publish details regarding the quality and quantity of their merchandise including weights, measures, adulteration if any, age, grade, and usability.[33] This law was strictly enforced through prefects and secret service personnel employed by the emperor. Violations and deceitful behavior were dealt with the harshest of punishments including amputation of limbs. Consumers also enjoyed the right to return merchandise which did not meet the standard requirements related to quality and quantity. Akbar's contribution is notable in that his rule improved accountability and transparency in commodity transactions which were perhaps non-existent in the medieval days in India. During Mughal rule the things of daily use like corn, vegetables, fruits, milk, ghee etc, were cheap. The people of cities, towns

28 Chaurasia, Supra note 22, at 42.

29 Dr. Gurjeet Singh, supra note 24, Pp. 48-49.

30 A.B. Pandey, "Early Medieval India," Allahabad: Central Book Depot, 1979, p.138,

31 Dr. Durga Surekha, Consumers Awareness about Rights and Grievances Redressal, 1st edn, Delhi: Abhijeet Publications, 2010, p. 8.

32 History of India (1526-1857). https://vou.ac.in/slm/BAH%20101_History%20of%20India_BA%20History.pdf. Retrieved on 21.01.2020.

33 J. L. Mehta Advanced Study in the History of Medieval India, Vol II Mughal Empire (1526-1707) Sterling Publishers Pvt Ltd. New Delhi.

and villages led a comfortable life. In short, the economic condition of the people was good and people were happy and prosperous.[34]

British Period

During the British regime (1765 to 1947) also known as the 'Colonial Era', government's economic policies in India were concerned more with protecting and promoting the British interests, than with advancing the welfare of the native population.[35] The administration's primary preoccupation was with maintaining law and order, tax collection and defense. Accordingly, much of the legislation enacted during the British period[36] was primarily aimed at serving the colonial rulers, instead of the natives. The legal system did in fact protect a class of population which had sufficient means like producers, though under theBritish regime some of the legislations enacted directly or indirectly protectedthe interests of consumers.[37]

A few legislations were enacted which providedvery specific but limited protection to the consumers.[38] However, to protectthe interests of the consumers a few consumer organizations came into being,but their activities were very limited and confined to specific goods, servicesand geographical area.It is not suggested that the law made by invidious distinction on the basis of class, all the laws were of general applicability.[39]

In the modern period, the British system replaced the age old traditional legal system of India. However, one of the outstanding achievements of British rule in India was "the formation of a unified nationwide modern legal system."[40] There were, however some pieces of legislation which protected the overall public interest though not necessarily the consumer interest. Prominent among these were, the Indian Penal Code, 1860,[41] the Dangerous Drugs Act, 1930, Sale of Goods Act,

34 N. Jayapalan, "Social and Cultural History of India Since1556". Atlantic Publishers & Distributors, New Delhi. p. 8.

35 Dr. P. Sri Devi, "Consumer Protection Act and Role of Consumer Fora," 2011 (2) SCJ, Pp. 23-24.

36 From 1600 to 1947. The Regulating Act of 1773 was passed by the British Parliament and one of its objectives was to bring the management of the East India Company under the control of the British Parliament and British Crown.

37 Sapna Chadah, Supra note 16 at 14.

38 Ibid.

39 D.N. Saraf, Law of Consumer Protection in India, 2nd edn., Bombay: N.M.Tripathi Private Limited, 1995, p.14

40 Marc.Galanter, Law and Society in Modem India 15 (1997).

41 Section 265,272 and 275 of the Indian Penal Code, 1860. S. 265. Fraudulent use of false weight or measure.—Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

S.272. Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description

1930[42]. Section 16 of Sale of Goods Act-1930. Says "Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose (2) Where the goods are bought by description from a seller who deals in goods of that description (whe ther he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:

> and the Drugs and Cosmetics Act, 1940. From 1930 to 1986 for fifty years, the Sale of Goods Act of 1930 [SGA] was the exclusive source of consumer protection in India. The main protection for the buyer against the seller for defective goods is found in Section (16) of the Act. It provides exceptions to the principle

for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

S.275. Sale of adulterated drugs.—Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

42 Section 16 of Sale of Goods Act-1930. Says "Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose: Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. (3) An implied warranty or condition as to quality or fitness for a particular purpose many be annexed by the usage of trade. 4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

of Caveat emptor ("let the buyer beware") and the interests of the buyer are sufficiently safeguarded. The skill and judgment of the seller, reliance of consumer on sellers' skill, and the test of "merchantable quality" provide effective remedies to buyers. Consumer protection was also provided within India's criminal justice system. The Indian Penal Code of 1860 has a number of provisions to deal with the crimes against consumers. It deals with offences which are related to the using of false weights and measures, the sale of adulterated food and drinks, the, and the sale of adulterated medicinal drugs.

It was only after independence that the IndianConstitution laid responsibility on government for turning India into anegalitarian, secular and socialistic society. The fundamental law of the countryis related directly or indirectly with the philosophy and mechanism for theprotection of the interest, health and happiness of its citizens.[43] Consumer protection legislation enacted after India's independence from Britain include: the Essential Commodities Act of 1955, the Prevention of Food Adulteration Act of 1954 and the Standard of Weights and Measures Act of 1976. The Constitution of India in Article 46[44] provides that state shall work towards protecting the economic interest of the weaker section of its population and also protect them from social injustice and all forms of exploitation which means all kinds of harassments and frauds in the market place. As per the article 47 of the Indian Constitution people should be entitled to unadulterated stuff injurious to public health and safety.

Under the sections 264 to 267[45] of the Indian Penal Code relate to fraudulent use of false instrument for weighing, crooked use of false weight and measuring devices, any person in possession of false weights or measuring devices respectively. The Indian Penal Code also provide sections 269 to 271[46]on spreading of infections and in sections 272 to 276[47] on adulteration of food or drinking water, adulteration of

43 Sapna Chadah, supra note 16 at 14.

44 Indira Sawhney v. U.O.I. 1992 Supp.(3) SCC 217. (Mandal Commission case, the court has observed that the expression, "weaker sections of the people" is wider than the expression "backward class of citizens" or SEBCs or SCs and STs. It connotes all sections of the society who are rendered weak due to various causes including poverty and natural and physical handicaps.

45 The punishment prescribed for offences of Fraudulent use of false instrument for weighing, Fraudulent use of false weight or measure and Being in possession of false weight or measure under these sections is the same, i.e. imprisonment of either descrip-tion for a term which may extend to one year, or with fine, or with both.

46 The punishment prescribed for negligent and malignant act likely to spread infection of disease dangerous to life under sections 269 and 270 is imprisonment of either description for a term which may extend to six months, or with fine, or with both and imprisonment of either description for a term which may extend to two years, or with fine, or with both respectively. The punishment for an offence of an offence of disobedience to quarantine rule under section 271 is imprisonment of either description for a term which may extend to six months, or with fine, or with both.

47 The punishment prescribed for the offences of adulteration of food or drink intended for sale and sale thereof and adulteration of drugs and sale thereof and sale of drug as a different drug or preparation is same i.e. with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

any drugs, sale of adulterated drugs and sale of drugs as a different drug or any preparation for it, are punishable with imprisonment or with both. The Indian Standards Institutions (Certification Marks) Act, 1952[48] provides for the standardization and marking of goods which is a prerequisite to the establishment of a healthy trade and to compare favourably with the established makes of foreign products. The Act has been amended in 1961 and 1976 to make more effective in order to achieve its objectives. The Prevention of Food Adulteration Act, 1954,[49] keeping in view the menace of adulteration to the society and to make the machinery provided under it more effective to curb the increasing tendencies in adulteration, was amended in 1964. The amendment provides that for the proper enforcement of the provision of the Act that the central government also should have power to appoint food inspectors. One of the most important steps taken by Central Government to protect the interests of consuming public is the enactment of the monopolies and restrictive Trade Practices Act of 1969. The object of this Act is to provide that the operation of economic system does not result in the concentration of economic power to common detriment. It also provides for controlling the monopolies and prohibition of monopolistic and restrictive trade practices.

These acts are beneficial because they do not need the consumer to prove the guilt of another. These offenses are not dependent on any intention or knowledge to make the person liable. Criminal law has acquired much significance in the life of a consumer, as consumers are less inclined to go to civil court for small claims. A view is in the society saying that there has been an attempt to look at consumer protection as "a public interest issue rather than as a private issue" to be left to individuals for settlement in court. In addition to the remedies under contract and criminal law, consumers have rights under tort law also. Based on its numerous legal complexities, however, tort law is not the ideal remedy for injured consumers in India. For example, the traditional doctrine of negligence imposes heavy responsibility on the plaintiff to prove each of its required elements. These traditional legal requirements naturally encourage injured consumers to pursue legal remedies under different laws. Not surprisingly, it is estimated that for about half a century from 1914 to 1965, only 613 tort cases came before the appellate courts. The orthodox legal requirements under the law of torts and contracts forced the policy makers to craft specific legislation to protect consumers and safeguard their rights. As a result, the Consumer Protection Act of 1986 was enacted with the objective of providing "cheap, simple and quick" justice to Indian consumers. The Act of 1986 was amended from time to time to keep pace with the challenges of ever changing society. The Act was amended by the amendment acts of 1991, 1993 and 2002. Among all the 2002 amendment act is the

48 Section 13 of the Act prescribes punishment for improper use of Standard marks i.e. imposing of fine which may extend to ten thousand rupees and forfeiture of property in respect of which the contravention has taken place.

49 Prevention of Food Adulteration Act imposes the penalty under section 16 for various offences in the form of imprisonment starting from six months term up to the imprisonment for life. And imposing of fine starting from one thousand rupees up to five thousand rupees. And in some cases cancelation of license.

most important to be mentioned.In spite of the earlier two amendments, there existed some gaps. Further in pursuit of better protection to the consumers the Central Consumer Protection Council, the Ministry of Consumer Affairs and the National Commission provided insight into the required amendments. Thus the amendments were proposed for the third time to the Parliament and by Act 62 of 2002 these amendments came into effect from 15.3.2003. These amendments have greater significance because they almost restructured some of the provisions of the Act. The number of amendments made in 2002 is more than the sections provided in the principal Act. These amendments can be broadly classified into two categories. The first category of amendments is intended to streamline the procedural aspects of the Act whereas the second category of amendments is intended to widen the scope of the Act.

The Consumer protection Act 2019

The Consumer Protection Act, 2019 ("**CPA 2019**") finally repeals the Consumer Protection Act, 1986 ("**CPA 1986**"). CPA 2019 has been enacted to provide a more robust grievance redressal mechanism for protecting and enforcing consumer rights. Keeping in mind the fast changing new-age economy, e-commerce platforms have now been specifically included in CPA 2019.

Salient Features of CPA 2019:

Expanding the definition of "*consumer*"

The definition of "consumer"[50] under CPA 2019 includes persons who engage in *offline or online transactions through electronic means or by tele-shopping or direct selling or multi-level marketing*.[1] The definition provides consumers with a remedy in case of multi-level marketing to make liable the seller at each level of multi-level marketing and not restricted to only the manufacturer of the product. the person availing the service for free[51] will not be considered as a consumer.E-commerce[52] has been included in the definition clause to provide relief to the online consumers. The central government has been empowered to take measures and make rules to prevent unfair trade practices in e-commerce.[53]

50 Section 2(7) of CPA 2019.

51 Whether or not the service being provided is free is a question of fact and will have to be evaluated on case to case basis.

52 Section 2(16) of CPA 2019; "e-commerce" means buying or selling of goods or services includingdigital products over digital or electronic network;

53 Sections 94 & 101(2)(zg) of CPA 2019

New grounds to file complaints

The CPA 2019 provides seven[54] grounds in place of six as provided under the CPA 1986, to file complaints and also substantially modified one of the existing grounds to file complaints as provided under Section 2(c)(i) of CPA 1986. The two key changes are:

(i) *Introduction of Unfair Contracts & expansion of Unfair Trade Practices*

"*unfair contract*" has also been added which further broadens the ground to file complaints and allows consumers to challenge contracts which are unfair, unilateral and unreasonable.[55] Unfair contract has been defined to include contracts between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:—

i. *requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or*
ii. *imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or*
iii. *refusing to accept early repayment of debts on payment of applicable penalty; or entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or*
iv. *permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or*
v. *imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage.*

The above provisions would directly impact the financial institutions such as banks, as the apex court has already stated that the Banks also get covered under the Act.[8] This would specifically take into account contracts entered with banks, e-commerce platforms where parties are not left with any option but to agree to the standard terms to avail the services. With such a broad subjective definition, it remains to be seen how courts would interpret in case of online contracts.

Expanding definition of "unfair trade practice"[56]

The CPA 2019 has added three (3) types of additional unfair trade practices to the list which are as follows:

54 The new ground for making complaint under section 2(6)(vii) is: a claim for product liability action lies against the productmanufacturer, product seller or product service provider, as the case may be;

55 Section 2(6)(i) of CPA 2019. No. 35 of 2019.

56 Section 2(47) of CPA 2019. No. 35 of 2019.

i. *failure or non-issuance of a bill or a cash memo;*

ii. *refusal to take back or withdraw defective goods or withdrawal or discontinuance of deficient services or refusal to refund the consideration amount paid within the period as stipulated in the bill or cash memo or receipt or in the absence of such stipulation, refusal to withdraw or refund goods or services within thirty (30) days; and*

iii. *disclosure of consumer's personal information to any other person unless such disclosure is made in accordance with the provisions of any law for the time being in force or in public interest.*

The provision fails to give any clarity whether information can be shared if consent is taken from the consumers. The reliance will have to be placed on prevalent data protection law.

Product Liability

One of the most significant additions to the CPA 2019 is the insertion of "*Product Liability*" as a separate chapter and a new ground for filing a complaint.[57]. Product liability means the responsibility of a product manufacturer or product seller, of any product or service, related to the product to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating to the product.[58]

Who can be made liable:

The CPA 2019 has defined a product manufacturer,[59] productseller[60] and product service provider[61] to provide clarity on who can be made liable for an action under Chapter VI of CPA 2019.The CPA 2019 while defining a 'product'[62] has specifically excluded human tissues, blood, blood products and organs. CPA 2019 also lists down certain exceptions to "*product liability*" action, in circumstances where the products have been misused, or if the product being purchased by the employer for use at the workplace did not adhere to installation warnings or instructions, or if the nature of the product is such that the user should have known the associated dangers, etc.

Central Consumer Protection Authority

Section 10 of CPA 2019 seeks to establish a central authority, the Central Consumer Protection Authority ("**CCPA**") to promote, protect, and enforce the rights of consumers qua misleading advertisements and unfair trade practices as a class.[63] CCPA has also

57 Chapter VI. Sections 82-87 CPA 2019, No. 35 of 2019. Section 2(35) of CPA 2019 allows a person to make a claim of product liability against such manufacturer, seller or service provider for such defective products.

58 Section 2(34), CPA 2019, No. 35 of 2019.

59 Section 2(36) of CPA 2019. No. 35 of 2019.

60 Section 2(37) of CPA 2019. No. 35 of 2019.

61 Section 2(38) of CPA 2019. No. 35 of 2019.

62 Section 2(33) of CPA 2019. No. 35 of 2019.

63 Section 18 of CPA 2019. No. 35 of 2019.

been empowered to take actions against false or misleading advertisements. CCPA can impose a penalty of up to INR1 million, and up to INR 5 million for every subsequent violations.It is important to note that such penalty can be imposed on endorsers too, thereby bringing actors/actresses in the scope of penalty. However, the endorser would be exempted from any liability if s/he establishes that they undertook due diligence to verify the veracity of the claims before endorsing the same. Therefore, endorsers/actors/celebrities will also have to conduct a thorough due diligence/ research before signing up for any advertisements.

CONCLUSION

The rulers and the kings in the ancient and medieval India were duty conscious of the welfare of the people. The consumer issues were not complex. With the passage of time the situation changed and trade within and outside grew manifold during medieval period in India and the rulers were well aware of the consumer interests and there were laws to protect the consumers and punish the defaulters. During British rule there were many provisions regarding consumer protection available under some Acts like the Indian penal code, 1860 the Sale of Goods Act, 1930 and the Drugs and Cosmetics Act, 1940 but these provisions were not sufficient to provide the protection to the consumers. The Indian legal system experienced a revolution with the enactment of the Consumer Protection Act of 1986, which was specifically designed to protect consumer interests. The CPA was amended time and again and finally replaced by the CPA 2019 which is considered to be a gamechanger for the consumer rights and interests. It is intended to provide justice with regard to both offline and online consumer transactions and has come with a concept of product liability making liable not only the manufacturer but also the seller at every level of the transaction. The CPA 2019 has received wide recognition in India as poor man's legislation, ensuring easy access to justice.

Extradition and Human Rights Ideology: Interrelationship and Effect

*Mr. Mudassir Nazir**

ABSTRACT

Extradition is the subject of great academic importance. The concept of distributive justice require that not only the victim should be rehabilitated but the accused must be punished according to the procedure established by law. However the human rights ideology had also effected the process of extradition. The growing human rights protection movement particularly after Second World War has also effected the process of extradition of fugitive from surrendering state to requesting state. The human rights of accused has to be assured not only in municipal legal system but at international level as well. The growing area of human rights in relation to extradition are of death penalty, anti-torture, Cruelty and fair trial of fugitive. The paper is an attempt to add the already existing stock of knowledge. The paper is an attempt to highlight the effect of human rights ideology on the process of extradition particularly in relation to death penalty, cruelty, and fair trial. At the end of paper the author(s) has suggested various suggestions as well.

INTRODUCTION

Human rights are basic rights of every person in the world. These rights are basic inalienable rights of an individual which he/she enjoys irrespective of social, political, cultural status. These rights are also known as basic rights or birth rights or natural rights of an individual. The discourse of human rights have achieved the status of "universality" and this universality is the cornerstone of international human rights law. The legal recognition for human rights discourse can be traced back from the Magna Carta 1215, Habeas Corpus Act 1679 and Bill of Rights 1689. However, it was the occurrence of a 2nd world war which made the human rights as an international entity. The Universal declaration of human rights[1] 1948 was the first legal document which made human rights as universal phenomena. The UDHR formed the basis of

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1 Adopted on 10 December 1948. (Herein after referred as UDHR)

various other documents like of European convention on human rights adopted in 1950, American Convention on Human Rights, 1969, African Charter on Human Rights, 1981.

The impact of UDHR was very much reflected in the hearts of framers of Indian constitution. Part third and fourth of Indian constitution which provides fundamental rights and directive principles incorporated a number of rights from these documents. Article one of UDHR abolishes discrimination and provides that are human beings are born free and equal in dignity and rights. The Vienna world conference on human rights 1993 noted that it's the duty of states to promote and protect the human rights of all individual irrespective of their social political and cultural system. The UDHR guarantees right to asylum[2] under article 14(1). The UDHR prohibits arbitrary arrest, detention, or exile of individuals by nations. The UDHR allows individuals to seek asylum from persecution and draws a distinction between political and non-political crime. Human rights are negative rights which every state is supposed not to violate it.

The universally accepted definition of human rights is not available however in India it has been defined as "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courtsin India[3]. So in India, all those rights which are available not only in Indian constitution but in other international documents are considered as human rights. The supreme court of India in the privacy judgment[4] observed and held right to privacy as human right. The court opined that although privacy is not recognised expressly under Indian constitution but can flow from article 21 and other international documents. Indian extradition act of 1962 is based on the erstwhile United Kingdom extradition act of 1932 which was seen two major changes one in 1989 and another in 2003, to accommodate the growing human rights jurisprudence. However, it's to be noted that that the Indian extradition act of 1962 has not been revised except when some amendments were made in 1993.

The idea of human right develops out of minority rights, initially before the two world wars the minority rights protections dominated the human rights, its only after the two world wars and with the advent of the universal declaration of human rights, the idea of human rights overshadowed the idea minority rights. With the development of human rights ideology the various Constitutions, documents were laid down. The reflection of it is quite evident on minds of minds of framers of Indian constitution. Part 3rd and 4th of Indian constitution one of the example of it. The extradition act of India also recognises the idea of human rights like the bail provision in the act, the acceptability of doctrine of speciality, double criminality and other human rights ideology.

2 Everyone has the right to seek and to enjoy in other countries asylum from persecution.

3 The protection of Human Rights Act, 1993, s.2(d)

4 *K S Puttaswamy and Anr.*v. *Union of India* (2017) 10 SCC 1.

The purpose of this chapter is to study the impact of human rights ideology particularly in relation to the torture, cruel and inhuman degrading treatment, death penalty and Fair trail of the accused.

IMPACT OF HUMAN RIGHTS IDEOLOGY ON EXTRADITION LAWS

Human rights ideology impact the international law as a whole particularly after the two world wars mostly after the Second World War. It had also brought light on extradition. The number of declarations like that of UDHR, covenants like that of the international covenant on civil and political rights, other covenant's, model laws have cropped up to protect the human rights at international level. It had also impact on extradition laws of the countries. The Article 3 of the model treaty on extradition[5] 1990 excludes extradition if there are grounds to believe that the request has been made to prosecute or punish a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or if the person would be subjected to torture or cruel, inhuman or degrading punishment, or if the person has not achieved or would not receive minimum guarantees in criminal proceedings as contained in the Article 14 of the International Covenant on Civil and Political Rights. Various treaties entered by India with other countries also incorporate such provisions as well.

Article 14 incorporates the principle of Fair trial. The fair trial is a minimum standard guaranteed to every accused of the crime. The model treaty expressly provides that extradition can be refused if the accused will be subject to cruelty and inhuman treatment. Article 14 of ICCPR which incorporates the fair trial principles is also a ground for non-delivery of the fugitive. The recent developments in the international human rights regime are the abolition movement of death penalty this principle is also now almost well established in the law of extradition. The state can refuse to grant extradition on the ground of death penalty. Abu Salem was extradited from Portugal to India on this condition that death penalty will not be awarded to him. The same was respected. Similarly, India extradited Kohli in July 2011 to the UK with the assurance that no death penalty will be carried out against him.

The Model Law of Extradition 2004 provides the following exceptions to extradition bearing in mind the human right protection to fugitive criminals. They are, Offences of Political Nature,[6] Discrimination clause,[7] Torture, Cruel, Inhuman or Degrading Treatment or Punishment,[8] Fair trial standards-Judgement in absentia-Extraordinary or ad hoc court or tribunal,[9] Ne bis in idem,[10] The statute of limitation,[11] Military

5 United Nation Model law on extradition 1990 14th Dec 1990, GA/45/11

6 Model Treaty 2004, s.4.

7 *Supra* s.5.

8 *Supra* s.6.

9 *Supra* s. 7

10 *Supra* s.8

11 *Supra* s.9

offences,[12] Nationality,[13] Death penalty[14]. All these exceptions are the outcome of human rights protection movement. With the expansion and constant struggle of human rights jurisprudence the sovereign function of extradition becomes the exception to a number of principles. The main principles which had evolved over the period of time will be discussed in detail in the following paragraphs.

TORTURE, CRUEL, DEGRADING PUNISHMENT AND EXTRADITION

After the successful request of extradition, the fugitive is subject to punishment. The logical end of crime is punishment. The punishment must not be the arbiter, unreasonable and cruel. The international law provides that the state can refuse to extradite the fugitive on the ground if he will be subject to cruel and inhuman degrading treatment. Torture as a form of punishment has been abandoned by a number of countries and it has almost achieved a status of jus-cogens. The states can refuse the extradition if they feel or have a reasonable apprehension that the fugitive will be subject to torture, cruel, and degrading or inhuman treatment.

A. Definition of Torture

Torture has been defined differently by various conventions, agreements, laws. The united nation convention against torture and inhuman degrading treatment defined it as. "Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"[15]. The Indian Supreme Court In the case of *D.K. Basu* v. *State of West Bengal*[16] Supreme Court observed that Torture has not been defined in the Indian Constitution or in any other penal laws of India .torture is a way for imposing the will of one over the other, the will of stronger over the weak one. Torture represents the darkest side of human civilization. No human civilization will accept the torture as a form of punishment. The Court in the case quoted the definition of torture by Adriana P. Bartow as Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also such intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a

12 *Supra*, s10.

13 *Supra*, s11.

14 *Supra*, s 12.

15 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (popularly referred to as CAT), Article 1.

16 AIR 1997 SC 610

desire to kill and destroy including yourself. Torture is a *Hostis Humani Genies which* means enemy of all mankind.

The prohibition of torture and other cruel, inhuman or degrading treatment is enshrined in a number of international and regional conventions. It's recognised in almost more than dozen of internationally acknowledged documents. Some of them are as under.

- Article 5 of Universal Declaration of Human Rights, 1948
- Article 27 of American Declaration of the Rights and Duties of Man, 1948
- Article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 United Nations Convention Relating to the Status of Refugees, 1951
- Article 31 of United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 Draft Principles on Freedom from Arbitrary Arrest, Detention and Exile (1963).
- Various articles like that of article 4,7, and 10 of International Covenant on Civil and Political Rights, 1966
- Article 5 of American Convention on Human Rights, 1969
- Article 2-3 & 5-6 of Code of Conduct for Law Enforcement Officials (1979)
- Article 5 of African Charter on Human and Peoples' Rights, 1981
- Article 37 Convention on the Rights of the Child, 1989
- The European Convention for the Prevention of Torture and there Cruel, Inhuman or degrading treatment or punishment, 1989 also prohibits torture
- Article 19-20 Cairo Declaration on Human Rights in Islam, 1990 Charter of Paris for a New Europe, 1990
- Article 10, Convention on the Protection of the Rights of Migrant Workers and Members of their Families, 1990
- Various other documents like that of International Convention on the protection of the Rights of All Persons against Enforced Disappearance 1992 (CPAED). Inter-American Convention to Prevent and Punish Torture, 1985 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, 1987 also prohibits torture
- Article 8 of Arab Charter on Human Rights, 1994
- Apart from the above-mentioned provisions the other documents like that of the convention against torture and cruel, inhuman degrading treatment of 1984, an international convention on the elimination of all forms of racial discrimination of 1965, optional protocol adopted on 1976 to international covenant on civil and political rights, also prohibits the torture.

Article 3(f) of Model treaty bars extradition on the ground that If the person whose extradition is requested has been or would be subjected in the requesting state to

torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the article 14 of International Covenant on Civil and Political Rights The model law on extradition 2004 under Section 6 recognises torture, cruel in human treatment as an exception to extradition[17]. Torture has achieved the status of jus-cogens. Prohibition on torture has been recognised under various international documents.

Article 7 of ICCPR[18] provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

Article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment American Convention on Human Rights (Pact of San José, Costa Rica, 1969)

Article 3 of The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (popularly referred to as CAT)[19] provides that No State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Torture may also constitute a "crime against humanity" or "war crime" under the international criminal law, such as is specified in the Rome Statute of the International Criminal Court.[20] Thus, infliction of torture can be investigated and prosecuted by the International Criminal Court, subject to its jurisdictional limits.

Article 3 of the European convention of human rights is a major instrument which has played an active role in prohibiting the torture and other cruel punishment. Article 3 has often been invoked in cases of expulsion or extradition to a state where the expelled or extradited person may be exposed to certain risks. In the case of *Soering* v. *United Kingdom*[21], the ECHR brought a landmark decision engaging for the first time a State's responsibility if it extradites a person who will be subjected to a real risk of ill-treatment.in this case the ECHR observed that it is necessary to strike a balance between the two in which the crime is suppressed and human rights are

17 Extradition shall not be granted, if, in the view of the [competent authority of country adopting the law], the person sought [has been or] would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment.

18 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966. Entry into force 23 March 1976

19 Enteredinto force in 1987. India has not ratified this yet, Text available at http://www2.ohchr.org/english/law/cat.html.

20 International Criminal Court, Arts. 7 and 8.

21 *Soering* v. *united kingdom (No.14038/88 of the ECHR)*

respected. Further, the Court in various cases[22] found a violation of Article 3 when extradition is not compatible with a person's human rights as determined by the ECHR. In almost all these cases the request of extradition was denied on the ground of violation of article 3[23] of European convention on human rights. .human rights are now almost non-negotiable.

The United Nations has also shown much respect towards human rights. The US Court of Appeals in the case of *Filartiga* v. *Pena-Irala.*[24] The court observed that In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle, if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

Asylum to a grave offender or serious criminal in a country poses a threat to national security. In such situations, it becomes difficult for the states to decide whether a person is to be extradited or not on the ground of torture. One such issue was raised in the case of *Chahal& others* v. *U.K.* [25]in this case, the Indian nationals who were accused of conspiracy in Rajiv Gandhi assignations case were in the UK. The Indian authorities have sought his extradition which was accepted by the UK authorities. The accused applied for asylum which was rejected. The accused contended that if he will be deported to India he will be subject to cruel and inhuman treatment in India. His application was rejected by the authorities and he applies in the European court of human rights. The main argument on which the authorities relied was that if asylum will be given to him he may pose serious threats to national security. This argument was not accepted by ECHR and observed that prohibition against torture is absolute, from where no derogation is permissible even if the individual poses threat to national security. The observation was mainly focused on individual liberty and side-lined the national security.

The judgment was relaxed in the case of *Ramzy*v. *The Netherlands*[26] where the court observed that threat posed by individual vis-à-vis the possibility of torture must be assessed liberally. Individual liberty and national security must be assessed properly before reaching any conclusion in such case. In the case of *Soering* v. *United Kingdom*, it was observed by the European court of human rights that death penalty itself does not constitute torture, however inordinate long delay, modes of the death penalty may constitute death penalty.

22 *Trabelsi*v. *Belgium* (No.140/10 of the ECHR); *Klein* v. *Russia* (No.24268/08 of the ECHR) I*smailov*v *Uzbekistan* (No.20110/13 of the ECHR);- *Aswat*v. *the United* Kingdom (No.62176/14 of the ECHR),

23 No one shall be subjected to torture or to inhuman or degrading treatment or punishment

24 630 F2d 876 (2nd Cir 1980) at 880.

25 (1996) 23 EHRR 413.

26 25424/05,(2010) ECHR 1132

Protection from torture and cruel punishment has achieved now the status of jus-cogens. Derogation from this principle may result from cancellation or refusal of the extradition order. In India, the presence of torture is the harsh reality. The Indian criminal jurisprudence respects the human rights of accused by incorporated the concept of a fair trial as a fundamental right of accused but the torture is still available.

The Law Commission of India in its 273 report[27] "*United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*" published on October 2017 indicates that despite number of international documents and domestic laws, judicial pronouncements, the presence of torture in our country are often done by state agencies like of armed forces. In 2010 the protection from torture bill was passed by Lok Sabah and forwarded to Raj Sabah, which in turn sent it to select committee .the committee to suggest some recommendations but the bill lapsed before it could be passed in the upper house. The UN convention which was adopted by the general assembly on Dec 10, 1984, and came into force on 26 June 1987. India is among the only 9 countries worldwide which are yet to ratify the UN convention on torture. India became the signatory of the convention on Oct 14, 1997, but it ratifies the convention, ratified by over 160 nations including over neighbour Pakistan and Afghanistan. The law commission of India in its 273rd report 2017 recommended the ratification of UN convention and suggests new bill on prevention of torture in 2017. In the recent weeks, the UK Rejects 2 extradition request. Judges at Westminster magistrate court in London rejects the extradition request on the ground of violation of human rights and violation of Section 87 and article 3 relating to prohibition of torture or inhuman and degrading treatment. Besides Vijay mallaya, there is five Indian extradition request pending in UK courts involving fugitive Rajesh Kapoor, Tiger Haneef, Atul Singh, Raj Kumar Patel and ShakSadiq.[28] The Vijay Maliya in his defence submission mentions and sites the worst conditions of Indian prison including the bad toilet conditions in jail. As per the established standards and law, the UK judge is supposed to look into it before going or delivering the order. The judge is yet to pronounce the verdict and is expected to be delivered within a month or two.

B. Indian Response to the Anti-Torture Law

Various attempts had been made in the past to bring a law which prevents torture, however, these bills cannot achieve the status of the act for multiple reasons. However finally and recently the Law Commission of India in its 273rd report submitted in 2017 recommends ratification of UN Convention against torture which India had signed on October 14, 1997. The law commission also suggests new bill on torture. The bill is attached to this dissertation at the end. The silent features of the bill are as under;-

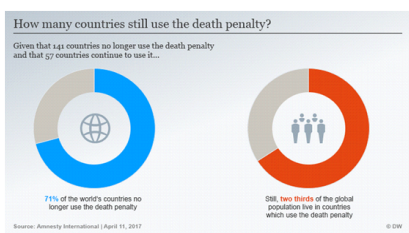
27 Law Commission of India, 273rd Report on Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation (October 2017).

28 https://economictimes.indiatimes.com/news/politics-and-nation/uk-rejects-2-indian-extradition-requests/articleshow/61516434.cms(accessed on 16 Feb 2018)

- The bill provides the broad definition of torture including physical, mental and psychological injury.
- It provides compensation to the victims of torture and other degrading treatment.
- While deciding the contempt of compensation the courts have to bear in mind the socio-economic condition of the victim, the injuries suffered by the victim, medical treatment of the victim.
- The bill provides the punishment to the officials including life imprisonment for the officials of state involved in torture.
- The bill recommends a certain change in criminal procedure code and Evidence act. Accommodating the provisions of compensation and burden of proof on state authorities.

DEATH PENALTY AND ITS EFFECT ON EXTRADITION

Death penalty as a mode of punishment is still recognised in various parts of the world. Death penalty which contains grave human rights violation if awarded on the factious or irrelevant ground. Judges are not free from errors. Human errors are infallible after all the judges are humans. The error is always a possibility in the judgement. There are two groups worldwide regarding death penalty one strongly recommends its abolition and one recommends its retention with minimum use. The international community adopts the Second Optional Protocol to the International Covenant on Civil and Political Rights[29], aiming at the abolition of the death penalty. Various countries have amended their domestic laws and had abolished the death penalty as a form of punishment while as some states used in very rear cases. According to the amnesty international report the death sentence is currently abolished in 104 of 198 countries while most of the death penalty executions are taking place in China[30], at the beginning of 2017, information was made public for the first time that indicated the number of executions in Vietnam was much higher than previously estimated. The past three years, that data suggests, saw more than 400 people put to death. The following picture will show the data.



It's not only International convents but some regional covenants which had adopted a path towards abolishing the death penalty. At the regional level, both the American

29 Adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989

30 http://www.dw.com/en/amnesty-international-fewer-executions-worldwide-but-more-death-sentences/a-38375363(accessed on 18-Feb-2018)

Convention as well as the European Convention on Human Rights led further support to the global initiative to abolish the death penalty. Article 4(4) of American convention on human rights[31] forbids capital punishment for political offences or related common crimes. The convention also prohibits the execution of a person who is under 18 years of age or above 70 years of age or the women who are pregnant. The convention also mandates that the countries who had not yet abolished death penalty will use it only for most serious crimes.

Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[32] recognises capital punishment as an exception to the right to life. The European Court of Human Rights found that the death row phenomenon in the United States constituted cruel, inhuman or degrading treatment in *Soering* v *United Kingdom and Germany*[33]. In *Judge* v. *Canada*,[34] the Human Rights Committee found that Canada had violated article 6(1)[35] of the International Covenant on Civil and Political Rights (ICCPR) by deporting Roger Judge to the United States to face a death sentence in 1998.

The Movement of abolishing of the death penalty has affected the extradition as well. Extradition request can be turned down on the ground of execution of death sentence. Mainly it can be turned down by three ways.

1. The legal representation by the requesting state, giving the valid assurance to the delivering state that death penalty will not be carried out. In this situation, the requesting states have to give full assurance that death penalty will not be given to fugitive or if awarded he will not be executed. The requesting state is supposed to respect the assurance. In India, this principle is much accepted and respected as well. Abu Salem who was extradited from Portugal on the assurance that he will not be subject to death penalty. Abu Salem was held guilty by the TADA court on June 16, 2017, and on September 2017 the court sentenced him 25 years of imprisonment but not death penalty in accordance with the assurance.
2. Bi-lateral treaties, arrangements or agreements between the starts expressly incorporate the provision against the death penalty. Death penalty an exception to the extradition can be incorporated in treaties whether bi-lateral treaties or multilateral treaties. The European convention on human rights and American convention on human rights provides that extradition can be refused on the ground of torture, death penalty. The various treaties, agreements entered by India with other states also specifically incorporate provisions in this behalf.

31 Signed on 22 November 1969 and effective from 18 July 1978.

32 Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force on Sept. 3, 1953.

33 *Soering* v.*Uk* 7 July 1989 Series A Vol 161 11 EHRR 439.

34 Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

35 Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life

3. Refusal by the state to extradite. The delivering state if not satisfied with the assurance of requesting state the delivering state can fully refuse to extradite the fugitive on the ground of death penalty. The decision of the delivering state will be immune from judicial interference on the ground of sovereignty. However, it's to be kept in, mind that if there is any law or treaty the states must follow the law. The UK court rejects the two extradition requests on the ground of violation of human rights[36] including the execution of death penalty. Judges at Westminster Magistrates' Court in London ruled in favour of UK-based alleged bookie Sanjeev Kumar Chawla on October 16.2017. The court also discharged a fraud case against a British Indian couple, Jatinder and Asha Rani Angurala, on 12 October 2017 on the same ground.

IMPACT OF MOVEMENT FOR THE ABOLITION OF DEATH PENALTY ON EXTRADITION

As has been mentioned above that the movement of abolishing of the death penalty has invited the international community, towards full abolishing of the death penalty. The world jurisprudence is moving towards abolishing the death penalty. The response to this call was the positive majority of the countries have either abolished the death penalty from their statute books or used this mode of punishment very rarely. Death penalty as an exception is provided and recognised by model treaty on extradition 2004. The model treaty under article 12 provides that "Extradition may be refused if the offence for which it is requested has been committed outside the territory of the requesting State and the law of [country adopting the law] does not allow prosecution for the same offence when committed outside its territory. As a result, the retention of death penalty becomes a ground for refusal of the fugitive. Many Retentionist countries have to justify the delivering state that death penalty will not be carried out on the fugitive. Many countries have adopted the death penalty as a ground of refusal for extradition.

The European Union, Mexico, and many other abolitionist nations have made the abolition of the death penalty one of the key items on their foreign policy agenda.in the United Kingdom under extradition act 2003 the extradition request can be rejected on the ground of death penalty[37]. The Indian practice is also somewhat similar to the UK. The Indian practice and law also recognise the refusal of extradition on the ground of death penalty unless assured that it will not be carried out.

In the recent past, Uganda made a request to the United Kingdom through the diplomatic channel for the extradition of two persons involved in a murder case. They faced the death penalty in Uganda if convicted. The request was not granted on the grounds that the United Kingdom had abolished the death penalty. The two fugitives are still believed to be at large in the United Kingdom. In a recent case

36 https://timesofindia.indiatimes.com/nri/other-news/uk-rejects-two-indianextraditionrequests/articleshow/61516020.cms(accessed on 18-Feb-2018)

37 http://www.unafei.or.jp/english/pdf/PDF_rms/no57/57-16.pd last (visited on 27 Feb 2018).

where an Iranian fugitive was sought by both Japan and Iran from the Netherlands, the latter's government granted extradition to Japan because the offender faced a death penalty in his mother country while Japan gave an assurance that the prosecutor would not seek a death penalty and therefore it would not be imposed.

The retention of the death penalty or carrying out a death penalty on fugitive will be held a violation of international laws. The law of death penalty and its effect on extradition is not fully settled yet, however, the presently the position is that the states can refuse to extradite a fugitive on the ground of death penalty and if the requesting state gives assurance that death penalty will not be carried out than penalty will not be imposed. the model treaty contain death penalty and torture a ground for refusal but the model treaty has no legal binding force it's only a model Law for states to follow. There is a number of countries who had incorporated provisions on their extradition agreements or treaties that death penalty will not be carried out in such situations death penalty will not be carried out. It's a need of the hour to settle down the law on this point and countries must incorporate the death penalty clause in their domestic laws as well as treaties with other countries.

As we know that the law of extradition is mainly based on treaties between the countries, the provision against the death penalty has been expressly recognised under the various treaty. India has entered under various treaties with several countries and has expressly mentioned a provision that extradition can be refused on the ground of death penalty.in year 2013, India has entered a treaty with Azerbaijan and had expressly recognised under article 12 of treaty that extradition can be refused on the ground of death penalty[38]. Article 4(3) (a) of the treaty between India and Australia provides that extradition can be refused on the ground of death penalty. Article 8 of the extradition treaty between India and USA also recognises this principle that death penalty can be refused to requesting state on the ground of death penalty. Similarly, such provisions are also available under various other treaties as well.

INDIAN POSITION ON DEATH PENALTY AND EXTRADITION

Although India has retained the death penalty as a form of punishment in its municipal law, however, India has shown much respect to the treaties or commitments made at international level**.** in its municipal legal the death penalty is still recognized its statute books however the supreme court and various high court had evolved a number of doctrines like that of the doctrine of rarest and rare cases[39] and other doctrines. In its application, the death penalty is awarded only in rarest of rare cases however the court did not define it in the strict sense as to what amounts or constitute rarest of rare case. The research conducted by National Law University Delhi in

38 Article 12 Capital Punishment If under the law of the Requesting Party, the person sought is liable to the death penalty for the offence for which his extradition is requested, but the law of the Requested Party does not provide for the death penalty for the same offence, extradition may be refused, unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be carried out.

39 *Bachan sing* v. *Union of India* AIR 1980 SC 898

2016-2017 shows that death penalty was awarded in few cases since from 2010 onwards. The Indian Supreme Court has adopted the approach of life imprisonment as rule and death penalty an exception. The position of the death penalty in respect to extradition adopted by India is that India respects the international commitment or the commitment made to the surrendering state in the various agreements or the treaties. The model law treaties adopted by UN also recognises now the death penalty as an exception to extradition. India had adopted the same pattern as well.

With regard to the imposition of capital punishment to the extradited fugitive, the Indian position is that it has retained exemption clause. The Indian extradition act 1962 under section 34C provides that[40] Notwithstanding anything contained in any other law for the time being in force, where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign state on the request on the request of Central Government and the laws of that foreign state do not provide for a death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence." This exemption is made keeping in view the human rights commitment at various international stages.

The long delay of death row prisoner's constitute torture. The prolonged long delay of a death penalty convicted person may itself constitute torture as it affects the psychology of the prisoner. Initially, the Indian Supreme Court had adopted the view that prolonged delay in death penalty may constitute a reason for converting death penalty in life imprisonment. However, the view was narrowed down by the Supreme Court in the case of *Devender pal Singh* v. *state of NCT Delhi*[41] observed that prolonged delay itself is not ground for converting it into life imprisonment, the court went on and observed that 10 years of delay will not be a ground for commuting death penalty into life imprisonment. Indian extradition act 1962 did not recognise it as a ground for commutation of the death penalty and Indian law is yet to recognise that prolonged delay amount to torture. The European court of human rights in the case of Soering vs. the United Kingdom had observed that prolonged delay in death penalty may constitute torture.

The unique question faced by Indian authorities in the case of *Republic of Italy* v. *Union of India*[42] where the Italian Marine officers were accused of the murder of two Indian fishermen. They were tried and finally was granted bail by Indian Supreme Court. After bail, they left India and refused to return back to India for trial. The Indian authorities approached the Italian authorities, the Indian request was turned down by the Italian government on the ground of fear of imposition of death penalty. Indian authorities made a diplomatic assurance that death penalty will not be imposed on them. The legality of diplomatic assurance was in question because in this case no extradition request was made. In extradition cases, the executive or diplomatic

40 Provision of life imprisonment for the death penalty

41 (2013) 6 SCC 195

42 2013 (1) SCALE 462

assurance has a legal value while as in other cases it may not contain legal binding. Death penalty as a ground for Refusal is not a ground available Extradition Act.

FAIR TRIAL AS A HUMAN RIGHT AND ITS EFFECT ON EXTRADITION

The fair trial is the heart of criminal jurisprudence. The fair trial is one of the fundamental rights of an accused. The state which claims to be governed by the rule of law, where constitutionalism is the idea must provide the fair trial to their accused. Fair trial as a matter of right is provided under various international documents like that of UDHR, Magna Carta and other celebrated documents. Magna Carta under clause 39 and 40 incorporated the rule of a fair trial. The international community recognises the rule of the fair trail not only in the country of accused but also in the other country. Article 10 of the universal declaration of human rights 1948 provides "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Article 14(1) of the international covenant on civil and political rights 1966, which India ratified on 10 April 1979[heirin after called asICCPR][43] provides. "All the persons shall be equal before the courts and tribunals.in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing, by a competent, independent and impartial tribunal established by the law."

Article 6 of the European convention of human rights provides. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Apart from these documents fair trial as a matter of rights is recognised under various regional charters and municipal laws. A fair trial is not a restricted concept it has a number of essential elements. Broadly speaking, the fair trial has around 10 essential elements, which are as under:

The essential ingredients of a fair trial are as under[44];-

- Presumption of innocence
- Independent, impartial and competent judge
- Expeditious trail
- The hearing should be in open court
- Knowledge of accusation and Adequate opportunity to defend himself
- Trail in presence of accused.
- Evidence to be taken in presence of accused
- Cross-examination of prosecution witnesses.

43 International Covenant on Civil and Political Rights,1966

44 Mudassir Nazir &ors Legal aid vis-à-vis fair trial; - a way to access to justice, "*good governance and human rights*" 90-109 Amity law school Noida (Bharti Publications New Delhi).

- Prohibition of double jeopardy
- Legal aid.

As has been mentioned earlier, cases of extradition are different as compare to ordinary cases. The delivering state can reject the request for extradition on the various ground like that of serious human rights violation including non-observance of a fair trial. The delivering state can reject the extradition request on the ground of non-observance of a fair trial. The data which I claimed through RTI from external affairs ministry was not provided to me where I requested to provide me with the data how many extradition requests were rejected to India by foreign countries on the ground of fear on non-observance of a fair trial.

According to Media Reports[45] the famous business tycoon Vijay Mallya who presently faces an extradition request from the UK to India can be rejected by UK courts on the ground of non-observance of a fair trial. The UK courts must be satisfied before proceeding further that Vijay Mallya will get the fair trial in India. The biggest hurdle in fair trial irrespective of jurisdiction is of media trail. Media trail has posed a new threat to the fair trial. The print as well as electronic media by running sensational news impact on the minds of people which in turn affects the first principle of the fair trial that's the presumption of innocence. The accused is presumed to be innocent unless proven guilty. The presumption of innocence is recognised under various convents and charters. The growing media trail is also a ground for courts to infer lack of fair trial. The UK Westminster court recently in the case of Vijay Mallya observed that whenever there is media trail it affects the fair trial. According to Media reports.[46] If an English Court comes to the conclusion that because there has been a trial by media in India, there is a real possibility that the court will deny Mallya's extradition on the grounds that he will not get a fair trial". Media trial prejudices the mind of people, and individual reaches the conclusion in hurry. Media trial built the pressure on the state, including the judiciary to act quickly, which may turn into justice hurried is justice buried.

Presumption of innocence which has been elevated to the status of human rights is also a necessary step for a fair trial. The presumption of innocence means accused is presumed to be innocent unless proven guilty. The burden of proof is on the one who alleges, in extradition cases, it's mainly the state who has to prove in the court of law. However, according to recent developments in criminal jurisprudence, this presumption of innocence can be relaxed in socio-economic offences like that of extradition. Presumption of innocence is recognised under various international documents like that of the international covenant on civil and political rights[47] 1966,

45 https://www.huffingtonpost.in/sarosh-zaiwalla/bringing-vijay-mallya-back-to-india-to-face-trial-is-going-to-be_a_22087171/(accessed on 19 March 2018)

46 *Id.*

47 Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 6(2) of the European convention on human rights[48], According to article 8(2) of American convention on human rights[49]. Indian jurisprudence accepts this principle in its, however, this presumption can be relaxed in certain cases like that of socio-economic offences. The new bill of economic fugitive bill 2018, also relaxes this rule as well.

The other elements of the fair trial is that trail must be conducted in presence of accused which also imply that the evidence must be taken in presence of accused. However, in common parlance, this principle can be observed and respected only if the accused is within the country and he need be present in the court. Usually, this principle is not observed because of two reasons one is that in extradition the accused is outside the bound of the country. If he is present usually on his behalf lawyer is present. The former is the big hurdle in it. So strict implementation of this rule will actually vitiate the process of justice. In case there is a grave violation of rights of accused the court can interfere by way of judicial review. In the case of *Bhavesh Jayanti Lakhami*v. *State of Maharashtra*[50] observed that if the person's fundamental rights were violated the court can interfere with it by way of judicial review.

A fair trial is not a ground for non-refusal of extradition under Indian extradition act. The fair trial as a ground for non-refusal is available under the various model law on extradition. India must enact the changes in our basic Indian extradition act, to incorporate the fair trial rule. As under the extradition act, certain limited grounds or restrictions were recognised like that of political offences[51], time-barred prosecution[52], the rule of speciality[53], and double jeopardy.

CONCLUSION

Thus it becomes evident, becomes clear that human rights ideology has influenced the international community to protect, promote and respect the human rights. The idea has received the seminal importance particular after world wars and the creation of United Nations. The idea of human rights got its reflection in almost under all the Constitutions of the world and extradition remains no-more isolated from its reflection. With the growth of human rights jurisprudence, the concept and practice of extradition went into drastic change wherein initial period or society's extradition remains the sovereign power of the state. Currently, although extradition is also a sovereign power of the state in addition to it the states can refuse to grant the extradition of the offender or accused on the ground of violation of human rights as well. The

48 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

49 Every person accused of the criminal offence has a right to be presumed innocent so long as his guilt has been proved according to law

50 (2009) 9 SCC 551

51 Indian Extradition Act 1962, s.31(1)(a)

52 Indian Extradition Act, 1962, s.31(1)(b)

53 Indian Extradition Act, 1962, s.31(1)(c)

various aspects of human rights and their impact on extradition were discussed in the above pages. However, the human rights ideology must confine to its limits, under the garb of human rights ideology the extradition process cannot remain in halt. The supreme court of India in the case of *Abu Saleem Qayoom Ansari* v. *state*[54] observed that there is a need for fair balance, between human rights norms or ideology and between the need to tackle the transnational crime. The extradition law is the mixture and amalgamation of both the laws one is a municipal law or domestic law and the other is international law. The human rights barriers or ideology cannot be allowed to stretch so far that the extradition will become a dead letter.

A balance is to be maintained between the Emphasis human Rights vis-à-vis the process of extradition. The process of human rights ideology cannot be stretched in its scope to such an extent so as to paralyse the whole object of extradition. However, the mid-way is to be adopted without compromising the basic human rights like that of a fair trial. The "Minimum Human Rights" need to be protected, promoted and respected as well.

54 (2011) 11 SCC 214 para 80/81

Inculpatory Nature of Hair Strands as Transfer Evidence: A Medico-Legal Inquiry

Mr. Aadit Ved*

ABSTRACT

The literature review focuses on the value of evidence obtained from the transfer of evidence specifically the hair strands found at the crime scene. The transfer evidence is inadvertently left behind at the crime scene as per the Locard's exchange principle and helps in personal identification. The hair strands have only circumstantial value and are not substantive in nature leading to many wrong results and convictions by courts when hair analysis was the sole test for identification. In present times, the hair analysis is not being looked at with absolute certainty rather with scrutiny. It is only being used by crime scene investigators to get a direction of investigation. There are various limitations and deficiencies in the microscopic analysis of hair leading to co-incident results. After the improvement in science and technology and advent of DNA evidence problems have occurred in reliance of hair evidence as they give contrary results uncertainty to the evidence and creating a gap for reasonable doubt to arise. The paper also focuses on the past present and future of hair evidence in the forensic science domain with its applications in not only criminal but also civil law jurisprudence. After the new advancements when other physical evidence have more probative value, this paper aims to answer the pertinent, question that whether hair analysis as inculpatory evidence has withstood the test of time after dynamic changes in the field of forensic science.

Keywords: Hair, DNA, Identification, Transfer Evidence.

(1) INTRODUCTION

Forensic laboratory investigations are used for establishing identity of person substance or common and uncommon constituents. As a part of the all, the physical evidences associated with the commission of any offence biological matter such as hair helps is used in many complicated issues such as disputed maternity and paternity in kidnapping, inheritance and adultery or instances of child swapping and to identify the perpetrators of violent crimes such as rape or murder. Depending upon the facts of the case hair strands usually provide a link that can be scientifically exploited

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advantageously[1]. Hair strands along with root ball can also be tested for DNA and clear identification can be made. In recent times, there have been many cases that have been over turned due to wrongful convictions on hair analysis and it has become evident that though transfer of hair may provide link evidence but blind reliance on any or all hair strands may lead to confusion errors and wrongdoings. Hence, the analysis of hair has lost the value it held in earlier times due to technological advancements and is not being preferred to secure convictions or as an important evidence by court of law. The paper shall comprise of the anatomical structure of hair, its analysis methods and the timeline of hair as a piece of evidence.

(2) ANATOMY OF HAIR

A large part of the human body is covered with hair an approximate of 5million hair follicles are available on the human body and almost 100,000 of them are on the scalp of the human head. Earlier hair was divided in three sub groups namely Asian, African and European but in recent time, the division has expanded to eight sub-groups[2].

2.1) Physiological Structure of Hair

A strand is divided into two parts the living and non-living part. The hair shaft above the epidermis is the non-living part and the follicle found below the epidermis is the living part of the hair. The shaft has three distinct parts namely cuticle, cortex and medulla. The cuticles and cortex work together to give follicular anchorage to the hair and protect it from the irritants that may affect the skin. The medulla on the other hand is the innermost part of hair shaft and acts as a pith and marrow to the hair strand. As for the living part of the strand that is the follicle it is further divided into upper region and lower region, upper region containing of the infundibulum and isthmus and the lower region comprises of the suprabulbar region of the follicle and ending with hair bulb[3].

2.2) Molecular Structure of Hair

Hair is made of cross-linked polymer proteins. The resistance level of these proteins is relatively high. The chemical nature of hair comprises of 45% of carbon, 28% of oxygen, and 15% of nitrogen, 7% hydrogen and 5% Sulphur[4]. The shaft of the hair has major component of keratin protein, which is having hard and fibrous properties.

1 Modi A textbook of Medical Jurisprudence & toxicology, 381, Lexis Nexis 26th edition, 2019

2 De La Mettrie R, Saint-Leger D, Loussouarn G. Shape variability and classification of Human hair: a worldwide approach. Human Biology; 79:265–281 2007

3 BilgenErdoðan, Anatomy and physiology of Hair, Hair and Scalp disorder, 2017; Chapter 2

4 Beauty tomorrow; https://medium.com/@beautytmr/the-chemical-properties-of-hair-955985908d05#:~:text=The%20overall%20chemical%20composition%20of,is%20essentially%20composed%20of%20keratin.&text=The%20keratin%20of%20these%20filaments,structure%20maintained%20by%20hydrogen%20bonds [accessed 20/10/2020]

The filaments of hair protein create a helix structure supported by hydrogen bonds to create cohesion and connection. The keratin of hair is divided into two type's acidic and basic-neutral keratin, which along with the cuticle and epithelial cell lend the hair its composition.

2.3) Growth Cycle of Hair

Hair strands have a three-stage growth primarily the Angen phase or active growth phase that is the inception phase in which the follicle is enlarged and hair takes its original shape this phase lasts from two to six years. The next phase is Catgen phase also known as transition phase in which the proximal portion of the hair is keratinized and this lasts up to two weeks. The Telogen phase relates to the end of growth cycle in this stage the hair shaft is transformed into a bulb and subsequently shed returning to the Angen stage. The Telogen phase is the final resting phase and usually lasts up to 2-4 months.

3) FORENSIC EXAMINATION OF HAIR STRANDS

The labs employ microscopic and macroscopic tests to distinguish hair from fibers and their specific origins that is whether the particular has animal or human origin. Primarily lab technicians determine the color, length and other broad characteristics that could be determined by the naked eye, which is the scope of macroscopic examination. In microscopic examination, a lot of information comes to light such as the shape size of cuticular scales the exact size and diameter of the medulla and in relation to the shaft size. It also gives a clear distribution of pigments in the medulla[5]. The method usually used to distinguish species is the electrophoretic patterning hair polypeptides as they differ species wise. In case of human hair when the racial origin of a hair strand is to be determined morphological characters such as diameter, length, cross-sectional shape and pigments are checked to find the correct racial origin.

After the source of the hair strand is detected if it is found to be human hair the next step done by labs is to find the body origin of the hair strand whether the strand was from the beard, pubic area or the chest. The hair from human scalp usually have tapered tip with the length from 1-100 cm and shaft diameters 20-130 microns. Beard hair has a sharp tip with a broad diameter, length between 5-30 cm.While dealing with pubic hair it is observed that tip is round or frayed, and length is relatively smaller ranging from 1-5 cm. The body origin of the hair helps to understand the nature of offence and further acts to determine the accused more clearly. The most important aspect while dealing with hair strands is the careful collection of the questioned hair for comparative analysis. The next step employed is of individualization and comparison of questioned hair found the scene. When the characteristics of hair strand is compared, it is to be proved that one or more characteristics of such strand of hair matching with the general population is rare.

5 LC Nikkols, The scientific investigation of crime, Butterworth's and Co Ltd 1956

The hair with root ball is usually preferred to get individualizing characteristics. Packaging and labelling is done at the scene to avoid confusion and proper notes are prepared to avail proper chain of custody and decrease cross contamination

To analyze the microscopic characteristics of hair it can be placed on amounting medium having a similar refractive index to that of hair, which is approximately 1.55 some mounting mediums used, are polystyrene-dibutylphthalate and stylolite. The hair present at the crime scene is called questioned hair and the hair samples collected from the suspects is known as control hair both of which are side by side compared under a microscope for matching characteristics[6]. In recent time's scientists have concluded that hair analysis are more reliable to eliminate people as suspects that to conclusively establish identity as hair is sometimes not attached with the root ball and without DNA a positive identification becomes extremely rare.

Table 1: Comparison of Human and Animal Hair

Characteristic	Human Hair	Animal Hair
Cuticular Scales	Small and Flattened	Projecting large and has various patterns
Shaft	Diameter between 50-150 microns	Diameter less than 25 or more than 3000microns
Pigments	Evenly distributed	Usually present near medulla

4) APPLICATION OF HAIR ANALYSIS: THE PAST AND PRESENT

Hair analysis has a multitude of applications in not only criminal but also civil and employment and sports law. Hair as evidence has come a long way from being the absolute standard of guilt to mere a connecting piece of evidence.

This portion of the paper deals with the past application of hair analysis with its present application case by case in different kinds of litigation.

4.1) History of Hair Analysis

When forensic science was in its nascent stage the study of hair analysis gained importence. The, first historically recorded case of hair analysis was as early as 1874 used in the murder of Duchess De Praslin in which her husband was the suspect. The logic behind hair as evidence was provided by French criminologist Edmond Locard when he laid down the principle that every contact leaves a trace or popularly known as Locard's Exchange Principle[7]. Alfred Swaine and Thomas Stevenson conducted further work and published the work titled "The principles and Practice of Medical Jurisprudence" which included a chapter on hair examination and sketches of hair under magnification.

6 GM Roe, R Cook and C North, An evolution of mountants for use in forensic hair examination. JFSS 31, 59-65 1991.

7 Locard's Exchange Principle, EVISCAN, https://www.eviscan.com/en/glossary/locards-exchange-principle/] (last visited Oct. 17, 2020).

The field of microscopic hair analysis rapidly expanded in early 19th century and led to development of many scientists developing relevant literature, the first comprehensive study of hair titled "The Hair of Man and Animals" was published by Victor Balthazar and Marcella Lambert as early as 1910. Professor John Glaister developed the foremost handbook for hair analysis information titled as "Hair of Mammalia-The Medico Legal Aspect in the year 1931. Further in the year 1977 John Hicks published "Microscopy of Hair: A practical guide and manual" that laid the groundwork for the use of hair as evidence by the forensic examiner.

The case of Knoll v. State[8] when the courts of USA relied on hair as evidence, the facts of the case were that a body was found in swamp near to the accused person's house and a wheelbarrow containing blood and hair was found in the possession of the accused. An expert witness was examined who observed that the hair found was same and came from the suspect, which led to the conviction of the accused. The conviction was set aside in appeal as hair as evidence was not digestible to courts. After a few years, courts realized the nature of hair evidence and in Williamson v. Reynolds[9] solidified the reliability of hair having evidentiary value. After the Williamson case, hair comparison became the prosecution tool to establish the link between a person and as specific environment as humans inadvertently shed 100 strands of hair a day. In earlier stages of hair examination, the only available tools for examination were the physical features of hair or examining magnified cross section of hair to identify common features in the strands.

Hair became the incriminating evidence necessary for conviction to such extent that hand books were published for all analysts to secure uniform standards of hair examination all throughout the country. It became evidence of great value 20th century and early 21st until the development of DNA profiling after which problems in hair analysis were realized.

4.2) Present Application of Hair Analysis

A) Sexual Assault Cases

In recent times, there have been instances of sexual assaults due to date rape drugs these crimes are known as drug facilitated sexual assault. The type of drugs used in such cases rapidly turn into metabolites and hence cannot be found in blood or urine but the same can be tested in the hair of the victim even after 1 month of aggression. The scientists have undertaken a segmental analysis of the hair strands and have been successful to determine the exact date of ingestion of the date rape drug[10].

8 Knoll vs State 55 Wis. 249 (1882)

9 Williamson vs Reynolds 904 F. Supp. 1529 (1995)

10 Kuwayama K, Nariai M, Miyaguchi H, Iwata YT, Kanamori T, Tsujikawa K, Yamamuro T, Segawa H, Abe H, Iwase H Forensic SciInt 288:23–28 (2018)

B) Drug History

In cases when the historical usage of drugs is to be determined, hair is cut in short fragments and near the skin for cross- sectional analysis. The method of testing effectively give a calendar as to the drug abuse by a person in their life[11]. These tests become useful in court to prove offences under Narcotic Drugs and Psychotropic Substances to prove consumption or intoxication.

C) Dope Testing

In the arena of sports law hair analysis plays a vital role in detecting performance enhancing drugs colloquially known as doping. Segment analysis of hair strands helps in detecting anabolic steroids, which are commonly used as performance enhancing drugs. The tests clearly show presence of components such as stanozolol, testosterone which are found in steroids[12].

D) Drug Screening

Nowadays drugs screens have become an imperative in securing jobs and drug screening is sometimes held after employment. To avoid being detected urine or blood samples are usually replaced by employees with another and hence hair can be used to conclusively check for drugs. Segmental analysis of hair in such cases shows the timeline of drug use as well as helps in establishing if someone is a single, multiple or chronic user of psychotropic substances. Such drug screening also becomes useful in cases of driving under the influence, a GC-MS method[13] has been developed for such cases that detects opiates or cocaine traces in drivers.

E) Metal Toxicity

In cases where the cause of death has to be determined and physical signs show, poisoning by metal hair strands can be used for determining the nature of such poisonous metal. In the similar manner as drugs metal, also get deposited on the hair of a human. The analysts uses atomic absorption spectroscopy to detect elements of metal such as mercury, zinc copper etc. The concentration of such heavy metals can also be detected by using microwave energy or by other absorption spectroscopy methods developed by scientists. Hair is chosen over blood or urine in such cases as it provides for larger detection period in comparison to the former. Testing on hair

11 Allibe N, Kintz P, Faure A, Paysant F, Michard-Lenoir A-P, Stanke-Labesque F, Scolan V, Eysseric-Guerin H Interest of single hair analysis to document drug exposure Curr Pharm Des 23:5502–5510 (2017)

12 Kikura R, Nakahara Y, Mieczkowski T, Tagliaro F Hair analysis for drug abuse (MDMA) and its related compounds into rat hair and application to hair analysis for MDMA abuse. Forensic SciInt 84:165–17 (1997)

13 Montagna M, Stramesi C, Vignali C, Groppi A, Polettini A Simultaneous hair testing for opiates, cocaine, and metabolites by GC–MS: a survey of applicants for driving licenses with a history of drug use. Forensic SciInt 107:157–167 (2000)

samples for toxicity can be done even after months of incident or crime and hence is considered as a better tool for detection.

5) KEY CASES INVOLVING HAIR ANALYSIS

United States of America

A) Central Park Joggers Case[14]

The case involved a young female jogger who was found comatose at the central park New York in the late hours of the day. The case was brutal one the woman had lost 75% of her blood and was raped. The New York police already had a group of teenagers in the station for other attacks in the park the police concluded that these teenagers were also the perpetrators of the rape and interrogated them accordingly. The only physical evidence that connected the teenagers to the crime were microscopic analysis of the hair strands from the defendant's t-shirt and the victim's pubic hair. No semen was collected nor any other physical evidence was presented at the trial but the jury found the defendants guilty and sentenced them to 13 years imprisonment.

Another criminal named Matias Reyes confessed who was in jail confessed to the joggers rape and follow up DNA confirmed that he was responsible for the crime not the original defendants. Other DNA tests also showed that the hair samples did not even belong to the victim. Subsequently the Supreme Court of New York dismissed the defendants' conviction.

B) Bas vs State of Florida[15]

The cases revolved on the dismissal of employment for drug use. Bas was a correction officer whose license was revoked as his hair analysis would not be correct test to determine cocaine usage and only urine analysis should be considered to dismiss him from employment.

The court held that evidence hair analysis was erroneously excluded and that "analysis of human hair to determine cocaine use is generally accepted in the scientific community." The plaintiff even appealed to the higher court and this court also affirmed the decision of the lower court went on to remark that "hair analysis precisely the tool which is used when there is a claim of error in a urinalysis for cocaine."

C) In the Matter of the Adoption of Baby Boy L.[16]

The adoptive parents of Baby Boy L. sought to use the results of a hair test of the biological parents' hair to demonstrate cocaine use. The biological parents objected to the introduction of the testing results into evidence because hair analysis (for

14 The people of the state of New York vs Kharey Wise Indictment No. 4762/89

15 627 So.2d 1321; (Fla. Dist. Ct. of Appeals 1993)

16 596 N.Y.S. 2d 997 (1993).

purposes of detecting the extent of drug use) had not been shown to be accepted by the general scientific community as reliable.

The expert witness testified that the hair analysis process was generally accepted by the scientific Community, and was not only accurate, but becomes even more probative and reliable when used in conjunction with other related testing procedures, such as gas chromatography mass-spectrometry. Finally, the court concluded that the hair analysis was generally accepted in the scientific community, and was, therefore, admissible. Finally, the court observed that the criticism of the hair test centered on the need for individual testing controls, not the scientific validity of the process itself.

INDIA

D) Magahar Singh vs State of Punjab[17]

Maghar Singh was convicted for the murder of Gurbax Singh the backdrop was that the accused had an illicit affair with the wife of the deceased i.e. Smt. Surjit Kaur. The accused planned the murder of the deceased with the wife of the deceased and killed him. He was subsequently charged with criminal conspiracy and murder convicted by both the trial and high court.

The primary contention before the Supreme Court was that hair found on the weapon the Kirpan was not sufficient to place the accused on the crime scene. The court after analyzing the scientific reports held that as the blades of hair on Kirpan recovered from the accused were the same from the deceased there could no other hypothesis other than the presence of the accused on the scene of offence. This was one of the foremost cases post-independence of India where hair strands were used as inculpatory evidence

E) Himangshu Paharia vs State of Calcutta[18]

The case was of robbery and murder the victim was alone at the time of the incident and the ex-husband of the housemaid who knew of the house and article on the house posed as fridge repairman and committed the robbery and murder of the victim.

The court though maintained the conviction of the accused but did not consider the hair as inculpatory evidence and stated that the hair found adhering to the blade of the Rampuria knife seized from the deceased's flat were found morphologically to be similar to the sample hair of the appellant. Though the lower court accepted the report of the Senior Scientific Officer, on scrutiny of his evidence, we consider it unsafe to act upon the report. It has been elicited in his cross-examination that he did not measure the diameters of the shafts of the hair or their length, did not take impression of the cuticles of the hair, and did not note the shapes, appearance and

17 AIR 1975 SC 1320

18 1986 Cri.LJ 621

the color of the hair or the directions of the pointing out of the hair. The science of comparison of hair has not yet reached perfection like the science of comparison of fingerprints.

F) State of Kerala vs Rajan alias Nasam[19]

The case was of murder of a 9-year-old girl but the trial court acquitted the accused, as the prosecution had not brought the hair evidence to connect the accused to the scene. In appeal the High Court convicted the accused and stated, "The science of hair identification is a fast advancing science and even if it is assumed that individualization is not possible the results of scientific examination of hair can be relied upon along with other circumstances connecting the accused with the crime".

G) Vijay Kumar alias Bhushan vs State of NCT Delhi[20]

This case was the latest of a long list cases on the issue of admissibility of hair analysis in India. This case extensively dealt with all the previous precedents and judgements of Supreme court as well as other High Courts across India and laid down the law as to Hair analysis after giving due consideration to the book of medical jurisprudence also.

The court came to the conclusion that medical jurisprudence can state microscopic examination of the hair whether the hair are of the same or of different colors or sizes and from the examination it may help in deciding where the hair come from. It also stated that the science of hair identification may be quite an advanced science and it may be possible to determine the source, it would not be safe to solely rely upon the similarity of hair to convict an accused person there must be some other connecting evidence to link the accused person with the crime, although the analysis of hair would be an important piece of evidence.

Hence, after careful scrutiny of the cases that involved hair as evidence it can be stated that though hair strands act as important evidence there are deficiencies in using it as the standard for conviction in crimes. Its use in drug analysis and paternity cases still holds good but in criminal cases there is a need for revision of standard operating protocol to net let hair be the sole criterion for conviction.

6) SHORTCOMINGS IN HAIR ANALYSIS – THE ROAD AHEAD

After the above cases it was found that Hair as the single evidence cannot be criteria for conviction. It was even after studies found that 10-13% of the hair were similar in their microscopic nature and could only be eliminated by mitochondrial DNA (MtDNA) testing[21]. In the year 2009 a report published by the National Academy of Science, USA, the report was solely dedicated to forensic usage and in the part of

19 2004 Cri.LJ 715

20 2007(1) JCC 16

21 Lee and Pagliaro Is Hair Reliable Forensic Evidence? J Foren Path 1, 1 2016

the report on hair analysis, it was concluded that microscopic hair analysis could not simply be used to uniquely identify a person[22]. Even in a report by the innocence project, it stated they helped exonerate 74 people convicted on microscopic hair analysis by conducting post-conviction DNA testing[23].

It is a clear fact that hair analysis is subjective and depends upon the interpretation of the examiner. Hence, a preconceived notion of the accused or preexisting knowledge of the case could sway the analysis away from its true results[24]. The practice of using the statement "consistent with" has also been looked at with much dismay. The expert is not merely a mouth piece of the prosecution and must concede to the fact that the hair can also be from the other people at the crime scene and do not blindly the strand of hair to the accused[25]. There have been also false positive in many drug cases when the deposition of drug trace on hair is not due to active consumption but due to being exposed to surroundings in which people may consume drugs and such false positives make it difficult to prove or disprove the fact of consumption

In a press release[26] released by the Department of Justice along with the Innocence project that conducted review of the conviction based on hair analysis it was found that 90% of the cases reviewed i.e. 258 of the 267 cases had erroneous statements in the reports or erroneous testimony. The cases reviewed were prior to 2000 before the advent of DNA testing as the standard mode instead of hair. It can therefore be clearly understood that hair analysis has not been able to compete with DNA analysis as the trace evidence to connect the accused to the scene of offence.

CONCLUSION

Hair analysis does not necessarily conclude identification or individualization but its importance cannot be obliterated by that mere fact. Hair strands are available at many locations over the body and hence they as trace evidence may not strong enough to conclusively establish guilt but can be used to place a person at the scene as Indian courts have agreed. DNA evidence obviously has had a better run in individualization but is also time consuming and tedious. Though in criminal cases, where the question of life and death hair evidence should not be given precedence over DNA but the same is not the case for drug abuse or date rape drugs. In matters of paternity hair is usually considered less invasive to privacy than DNA and is

22 Norton, Anderson, Divine Flawed forensics: Statistical failings of microscopic hair analysis Significance by RSS, UK Vol 12 Issue 2 26-29 2016

23 Id.at 22

24 Giannelli, Paul C., "Hair Comparison Evidence". Faculty Publications. 231. (2001)https://scholarlycommons.law.case.edu/faculty_publications/231

25 Id. at 24

26 Department of Justice, Govt. of USA (2015) FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review, available at https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review [accessed 23/10/2020]

therefore more acceptable. Microscopic hair examination helps establish the region of hair and understand the story behind any crime when facts are unknown to investigators. Thus alienating the entire process of forensic hair analysis cannot be solution to the problem but rather setting up standards as to till what extent hair can be considered, as evidence would be much better answer. Hair may not have stood the test for individualization and conclusive identification but has not lost the sanctity of evidence till date.

The Criminal Law (Amendment) Act, 2018 – A Critical Analysis of Parliamentary Tokenism in Criminal Law Amendment Process

*Mr. Amardeep Singh Sandhu**

INTRODUCTION

Law is a set of principles, rules, prescribed and proscribed behaviour or, in other words, the law of a state describes the conduct that should be followed in that state. This indicates that a system of law should be coherent and consistent based on a set of principles which will bethe driving force behindthe state policy behind deciding the prescribed and proscribed behaviours. In simpler words, the law cannot be inconsistent, contradictory and mutually destructive and must be determined by some policy decisions which will determine certain goals.Eventually,attaining these goals and objectives should be the aim of the state while making the law.

One such high priority goal of any modern welfare state is protection and safety of women. Tackling crimes against women is an objective that is yet to be considered with the sincerity that it deserves. The laws regulating the crimes against women are a victim of tokenism[1]. Tokenism as a legal phenomenon means creation of law which is ill-suited and does not provide real solutions to deal with the issue in hand while leaving a pretence that issue has been dealt with[2]. Therefore, the impact of a law suffering from tokenism is negligible, if any, on the issue which, here, is crime against women[3]. One of the major factors giving birth to tokenism is lack of preparation by the lawmakers before drafting the law, which amongst other factors include ignorance of the real causes, not understanding the issue itself and staying obliviousness to the principles of criminal law.

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1 Tokenism: The practice of doing something only to prevent criticism and give the appearance that people are being treated fairly. "Tokenism." The Merriam-Webster.com Dictionary, Merriam-Webster Inc., https://www.merriam-webster.com/dictionary/tokenism. Last visited on 07.04.2021.

2 Rituparna Bhattacharyya, *Criminal Law (Amendment) Act, 2013: Will it ensure women's safety in public spaces?*, Vol. 1 No. 1, Space and Culture, India 13-27 (2013), http://www.spaceandculture.in/index.php/spaceandculture/article/view/11/2 last visited on 24.03.2021.

3 NCRB Report Decoded – The Hindu, http://www.thehindu.com/news/national/watch-ncrb-report-decoded/article29805942.ece last visited on 26.03.2021.

The lawmakers rarely pay heed to any researches and studies conducted to understand the nature and magnitude of the problem and where the solutions can be found. Criminal law has to be treated with utmost careas it impacts the society in the most direct and serious way and crimes against women are suffering from the dearth of adequate laws because of the same reason. The importance of law as a tool of maintaining the social order and a tool of social change cannot be overstated and criminal law is even more so important because it affects the safety, life and liberty of an individual and gives the power to curtail the personal liberty of a person to the State.

This paper will analyse the Criminal Law (Amendment) Act, 2018 for tokenism on the following parameters[4]:

1. Comprehensibility[5]
2. Consistency[6]
3. Policy
4. Implementation Deficit[7]

BACKGROUND OF THE CRIMINAL LAW (AMENDMENT) ACT, 2018

The Criminal Law (Amendment) Act, 2013 was followed by the Criminal Law (Amendment) Act, 2018[8] in a short span of 5 years. A striking feature of the Criminal Law (Amendment) Act, 2018 is that no 'impact study' was conducted before making changes in the law in such a short time period. The shortcomings of the existing law were not ascertained before making changes in the law. Unlike the Criminal Law (Amendment) Act, 2013, legislative background of the Criminal Law (Amendment) Act, 2018 is not marked by any pending bill[9] in contention, some research or study which suggested for any change in the law, no committee[10] which was formed regarding such reforms. The Criminal Law (Amendment) Act, 2018 is a knee jerk reaction of the Parliament to the Kathua rape incident and Unnao rape incident. Many people

4 Amardeep Singh Sandhu, *Revisiting The Criminal Law Amendment Process Through The Prism of Principles Guiding The Criminal Justice System*, Vivekananda Journal of Research, Vol. 9 Issue 1.

5 Simon Bronitt, Is Criminal Law Reform A Lost Cause?, New Directions for Law in Australia: Essays in Contemporary Law Reform 133-142 (Ron Levy ed. Et al., 2017).

6 *Ibid*.

7 *Ibid*.

8 No. 22 of 2018.

9 The Criminal Law (Amendment) Act, 2013 had a previously pending draft of the Criminal Law (Amendment) Bill, 2012 which was itself a result of active legislative exercise happening for previous 4 to 5 years.

10 For instance, Justice Verma Committee was formed before passing the Criminal Law (Amendment) Act, 2013.

openly stated their apprehensions and objections to the Act.[11] The President promulgated Criminal Law (Amendment) Ordinance, 2018[12] on 21st April, 2018 which was later enacted and enforced as the Criminal Law (Amendment) Act, 2018 on 11th August, 2018.

The Kathua[13] rape case is a horrific account of lawlessness and portrays how people including the law enforcement agencies show no respect to the laws. A minor girl of 8 years of age was kidnapped, brutally beaten, drugged, raped and killed even in an inhumane manner by 8 men out of which 5 were policemen.[14] The victim was raped by multiple men and was constantly administered with Clonazepam, a sedative drug.[15] The victim was, then, murdered by crushing her face with a heavy rock. The National media covered the incident when chargesheet was filed against the accused in April.

Around the same time, another rape case started appearing in national news from Unnao, Uttar Pradesh where a sitting Member of Legislative Assembly of Uttar Pradesh, among others was accused of rape of a minor girl[16]. On 4th June 2017, the victim had gone to the house of the accused for seeking a job where she was exploited. The Unnao rape case caught the attention of the national media after the victim attempted suicide outside the residence of Uttar Pradessh Chief Minister on 8th April, 2018 after her 55-year-old father was allegedly beaten up by the ruling party's MLA's brother.

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11 Parliament update: "Asaduddin Owaisi (AIMIM) says he opposes the Bill. Quoting a court ruling, he says death penalty wouldn't be a deterrent for rape cases. Even the Justice Verma committee didn't recommend death for rape. The Law Commission also favours death penalty only for terror.

Our ratio for judges is 10 per one million judges. This Bill is only a symbolism. Why can't the government set up a child-friendly courts? Why not improve the female police personnel in stations. It's only 7.2 per cent. The government is only being reactionary, he says.

If this Bill become law, we will be with Saudi Arabia, Iran and China. Maybe Sharia is on the way, Mr. Owaisi says.

What we require in the change in the mindset of men. Laws will not stop rape, change in mentality of men can stop rapes, says Mr. Owaisi."

Parliament updates | Criminal law amendment that proposes death penalty for child rape convicts passed in Lok Sabha, available at https://www.thehindu.com/news/national/parliament-updates-live-day-8/article24550741.ece last visited on 15.02.2021.

12 No. 2 of 2018.

13 Kathua is a district in the Indian state of Jammu and Kashmir.

14 Kathua case: Charges of rape and murder framed against 7 accused. Read more at: //economictimes.indiatimes.com/articleshow/64497229.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

15 Arun Sharma, *Kathua rape-murder case: Tests confirm victim held in prayer hall, was sedated*, The Indian Express, Apr. 17, 2018, https://indianexpress.com/article/india/kathua-rape-murder-case-tests-confirm-victim-held-in-prayer-hall-was-sedated-5123806/ last visited on 15.02.2021.

16 Unnao Rape Case: What Has Happened So Far - A Timeline. A 16-year-old girl has accused BJP MLA Kuldeep Singh Sengar of raping her in June last, https://www.ndtv.com/india-news/unnao-rape-case-what-has-happened-so-far-a-timeline-1836833 last visited on 15.012.2021.

The father of the victim died the next day, reportedly due to the injuries he had sustained.[17] This incident led to a nationwide uproar with civil bodies and citizens demanding justice for the minor.[18]

The Government was under pressure to take a strict stand against such incidents. Since both the cases involved a minor victim, the legislators found it feasible to amend the laws related to rape against minors and therefore, out of nowhere, the legislators decided to bring a new amendment in the recently amended rape laws to provide harsher punishments in cases of rape of minor girls. The entire theme of the amendment is revolving around increasing the punishment. The rushed reaction of the Parliament made room for a lot of legislative ambiguity which is being examined here.

ANALYSIS OF THE CRIMINAL LAW (AMENDMENT) ACT, 2018:

"We legislate first and think afterwards; complexity is heaped upon complexity, and confusion becomes worse confounded"[19]

1. Comprehensibility

Comprehensibility of a law reflects that it is capable of dealing holistically with the issues and all the relevant issues are addressed by the law.

1.1. Whether the amendment is a result of any study conducted by the Parliament?

The most glaring defect of this amendment and arguably the cause of every following shortcoming in the amendment is the absence of any study or research regarding the issue being tackled by the amendment. There was complete absence of any material or other data on the basis of which the amendment was drafted. In fact, the data and the research available at hand in foreign jurisdictions and in India goes against the foundational theme of the amendment, which seems to be blind increase in punishment. The deterrent effect is not gained by making the punishments harsher, rather certainty of punishment increases the deterrence of a criminal law.[20] The only issue was preventing the public anger from exploding while legal and socio-legal issues were not given centre stage.

17 All that has happened in Unnao rape case, a timeline. Father of the woman, who had accused a BJP MLA and his aides of rape, died in judicial custody on Monday. Available at https://www.hindustantimes.com/india-news/all-that-has-happened-in-unnao-rape-case-a-timeline/story-mawXOV70RXnt74VNdiJ02I.html last visited on 15.03.2021.

18 Unnao Gang rape case: BJP MLA Kuldeep Singh Senegar named in CBI charge sheet, Omar Rashid July 11, 2018. Available at https://www.thehindu.com/news/national/other-states/cbi-files-charge-sheet-against-bjp-mla-kuldeep-singh-sengar-in-unnao-rape-case/article24390137.ece last visited on 15.03.2021.

19 Soli J. Sorabjee & Arvind P. Datar, Nani Palkiwala: The Courtroom Genius 27 (4d LexisNexis Butterworth 2012).

20 Andrew Ashworth & Julian Roberts, Principled Sentencing: Readings On Theory And Policy, (Andrew von Hirsch ed., 3ded. Hart Publishing 2009).

This defect in the amendment was also noticed by the High Court of Delhi and a Bench of the Acting Chief Justice Ms. Gita Mittal and Justice Mr. C. Hari Shankar asked, "Did you carry out any study, any scientific assessment that death penalty is a deterrent to rape?"[21] The bench further and asked, "Have you thought of the consequences to the victim? How many offenders would allow their victims to survive now that rape and murder have the same punishment?"[22]

A simple study on principled punishment and sentencing can show that merely increasing punishments do more harm than good. Public sentiment, community emotions or popular demand are not reasons enough for increasing the punishment since it does not solve any problem.[23] This amendment lacked a study, of any standard or quality.

1.2. Constitutional Principles:

The constitutionalisation of criminal law has been witnessed in the Hon'ble Supreme Court of India.[24] The Parliament must take cognizance of this process whereby the Hon'ble Supreme Court is declaring the provisions of criminal law unconstitutional. Thus, the laws to be enacted henceforth must take in account the provisions of the constitution, especially, Articles 14, 15, 19, 21, 38, 39, 41 along with the other constitutional principles. The right of equality and right to work of women places a duty on the Parliament to provide a safer environment to women at work places and public places. Public transportation should be women friendly. Article 15 empowers the Parliament to tackle the burning issue of marital rape[25] by declaring it a crime.

2. CONSISTENCY

2.1. Unprincipled distinction between male and female victims:

The issue is that the amendment created a new category of offence for rape of minor girls under 12 years of age. Earlier, there were 2 legislations dealing with such rapes in India, i.e., the Indian Penal Code, 1860 (IPC) and the Prevention of Children from Sexual Offences Act, 2012 (POCSO). Prior to the amendment, both acts provided for same punishment. Also, POCSO is a gender neutral act where as IPC is gender specific where only females can be a victim. Yet, now, in IPC, the minimum punishment has been increased to imprisonment of 20 years with a provision of death penalty.

21 Was any study done before bringing out rape ordinance, The Hindu, April 14, 2018. Available at https://www.thehindu.com/news/cities/Delhi/was-any-study-done-before-bringing-out-rape-ordinance/article23651748.ece last visited on 13.04.2021.

22 *Ibid*

23 *Supra* note 20.

24 Navtej Singh Johar v. Union of India Writ Petition (Criminal) No. 76 of 2016, Joseph Shine v Union of India Writ Petition (Criminal) No. 194 of 2017.

25 It has been suggested that rather than punishing marital rape under 'Rape', it can be punished under 'Sexual Assault' for the reason of stigma and taboo related with the term rape in marital set-up.

Whereas in POCSO, the minimum punishment is 10 years with no provision of death penalty. This has created a difference in punishment that can be provided for sexual assault of male child of age less than 12 years and a female child of the same age group, which is way more than the punishment in the cases of sexual assault of a male child less than 12 years.

Criminal law proceeds on gender neutrality and there is no justification of harsher punishment for rape of a female child than male child. There is no coherence between the IPC and POCSO as far as this point is concerned.[26] Article 14[27] – Equality before law – provides a constitutional guarantee of equal treatment at the hands of the law without any discrimination on the basis of sex.[28] This distinction made in the IPC and POCSO is not made on any reasonable classification and thus fails the test of constitutionality. Moreover, besides being mutually inconsistent, this provision does not adhere to or reflect presence of any rational policy decision of the Parliament.

2.2. Dissolution of distinction between Rape Simpliciter and Aggravated form of rape:

Prior to the Criminal Law (Amendment) Act, 2018, there was a distinction between punishment of rape simpliciter and 14 aggravated forms of rape provided under section 376 (1) and 376 (2), respectively. The minimum punishment in the former case was imprisonment for 7 years and 10 years in the latter and in both the cases may extend to life imprisonment. Post the Criminal Law (Amendment) Act, 2018, this distinction has been dissolved and punishment for both rape simpliciter and the aggravated forms of rape has been made same. The presence of aggravating circumstances does not warrant a greater punishment. It is logically and legally sound to expect that presence of aggravating will lead to an aggravated sentence but this is not what the Criminal Law (Amendment) Act, 2018 provides.

The only distinction which is remaining is that under section 376 (1), punishment may extend to "imprisonment for life" and under section 376 (2), punishment may extend to "imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life". This distinction is a problem in itself since it has evolved two different types of 'life imprisonment'. This distinction in the statute book does not appeal to reason or principles of criminal law.

The only aggravated rape punishable under section 376 is a rape on a woman under 16 years of age which is punishable with a minimum punishment of imprisonment for 20 years. This provision ignores societal realities which shows that a lot of consensual

26 The Criminal Law (Amendment) Act, 2018 was followed by another amendment in Prevention of Children from Sexual Offences (Amendment) Act 2019 just to remove this anomaly.

27 Constitution of India.

28 Article 14. Equality before law.

sexual activity is happening in the age group of 16 to 18 years.[29] The provision for increased minimum punishment is not guided by any research or study and is a blatant abuse of state's power through criminal law. Writing about the 2018 amendment, Senior Supreme Court Advocate Indira Jaisingh wrote, "What then was the urgency for an ordinance? It seems to be scoring political points. Neither the death penalty nor harsh punishments will ensure conviction, rather they may even have the effect of driving reporting underground."[30] This ultimately affects the conviction of the accused and the case ends in an acquittal. Every acquittal transcends to victim shaming and public perceives it as a false case by the victim and the victim is made a subject of media trials.

3. POLICY

3.1. Victim Involvement

A very essential part that the law ignores is the emotional and psychological toll which these crimes and judicial process takes on a victim. There is no acknowledgement of the mental impact and therefore the victim rarely finds emotional closure even in those cases where the culprits are punished. Victim Impact Statements (VIS) is a solution to this problem. "It (Victim Impact Statement) has the potential to alter the course of things for victims of crime in India. Victim impact statements are written or oral statements by crime victims, about how the crime has impacted them. Often, the family members and friends of victims also make written and verbal statements. Victim impact statements could provide information about the damage caused to victims by the crime, which is information that would otherwise not be available to the courts"[31]. Even the Hon'ble Supreme Court of India has recently acknowledged the necessity of victim impact statement "so that an appropriate punishment is awarded to the convict"[32].

29 Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 Buff. L. Review 703 (2000). Oberman further suggests reforms in statutory rape which include, abolishing statutory rape, lowering the age of consent, eliminating strict liability, consent as an affirmative defence, innovative punishment schemes. The Dane County project in the United States designed an alternative disposition program for younger offenders up to the age of 21 years, where age difference between the offender and the victim is less than 5 years. To be eligible, the offenders must have no other sexual assaults on their record and must admit the sexual contact. Offenders who used any kind of threat or physical force are not appropriate for the program. Under this program, those convicted of statutory rape offences are given the option of attending a nine week class in sex education. If they complete the course, their conviction will not become a part of their criminal record.

30 Indira Jaisingh, *Stringent punishment to score political points*, The Deccan Herald, Sept. 21, 2018. Read more at: https://www.deccanherald.com/national/sunday-spotlight/stringent-punishments-score-political-points-667220.html last visited on 16.03.2021.

31 G S Bajpai, *Mainstreaming Victims of Crime*, The Hindu, January 01, 2019. Available at: https://www.thehindu.com/opinion/op-ed/mainstreaming-victims-of-crimes/article25874475.ece last visited on 17.01.2021.

32 Mallikarjun Kodagil (Dead) v. State of Karnataka Criminal Appeal Nos. 1281-82 of 2018 [Arising out of S.L.P. (Cri.) Nos. 7040-7041 of 2014].

The High Court of Delhi also put question marks on the methodology adopted and questioned if the opinion and suggestion of any victims were taken before coming out with the Ordinance.[33] The Court went ahead and remarked that the government was "not even looking at the root cause", educating, or sensitising people.[34]

3.2. No judicial discretion

Prior to 2013 amendment, the court had the discretion to impose a sentence below the prescribed minimum sentence for adequate and special reasons to be mentioned in the judgment.[35] Post 2013 amendment this discretion was taken away from the court. Thereafter, in 2018 amendment, the minimum sentence was increased to imprisonment for 20 years without any discretion to court to impose sentence lower than the prescribed minimum. The court has to sentence the offender for a minimum 20 years mandatorily. There can come situations where this will be highly counterproductive for example in case of statutory rapes where the act was consensual with a 18 years old boy or even worse when a 17 years old minor boy performs consensual intercourse with a minor girl. In these cases, the boy will be punished for a minimum of 20 years which means that he will be released from the jail at the age of 37 years and 38 years, respectively and with a label of a 'rapist' after having spent his most crucial years in prison. Such a person has high probability of not finding a decent life after he is released and will resort to criminal activities because of non-availability of any other option. Therefore, not giving discretion to a judge can make the sentencing process more rigid and stringent. Indira Jaisingh opposes the increase in minimum punishment and dissolution of judicial discretion in following words, "By far, the most unconstitutional part of the ordinance is likely to be the mandatory punishments ranging up to 20 years. The mandatory nature of the offence takes away the discretion of the judge. Every sentence must fit the crime"[36]

3.3. Introduction of Death Penalty

The Criminal Law (Amendment) Act, 2018 introduced new sections namely, Section 376 AB, 376 DA and 376 DB out of which section 376 AB and 376 DB are punishable with death penalty for offence on women under 12 years of age and gang rape of women under 12 years of age, respectively. This introduction of death penalty is against the internationally accepted modes of punishment[37], recommendations of the

33 *Supra* note 21.

34 *Ibid*.

35 Proviso to Section 376 (1) - Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

36 *Supra* note 30.

37 See for example: The Universal Declaration of Human Rights, adopted December 10, 1948, proclaimed that "[e]veryone has the right to life" and "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, Article 3 (1948).

Law Commission of India[3839], the Malimath Committee[40] and the JVC report[41], statistics showing ineffectiveness of death penalty[42] and does not take into account the judicial trend of not giving death penalty.

Some relevant observations made by the Law Commission of India in its 272nd report are – "Capital punishment fails to achieve any constitutionally valid penological goals. Reliance on death penalty diverts attention from other problems…such as poor investigation, crime prevention and rights of victims of crimes"[43] "One thing, however, can be said with certainty. To impose a death penalty for rape will be counterproductive; it will only drive the crime underground. Given that most child abuse occurs within the family by a known person, a victim will be reluctant to report the crime knowing it could result in death."[44]

The same approach was taken in the American Declaration of the Rights and Duties of Man, adopted May 4, 1948.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty (1989) (entered into force July 7, 1991); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty,(1985). The American Convention on Human Rights is also an abolitionist instrument because it prevents countries that have already abolished the death penalty from reintroducing it.

38 Law Commission of India, 262nd Report recommended the abolition of capital punishment "for all crimes other than terrorism related offences and waging war".

39 Law Commission of India, 172nd Report on Review of Rape Laws, (Mar., 2000).

40 Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System 193 (Mar.2003).

41 Justice J.S. Verma et al. Report of the Committee on Amendments to Criminal Law (2013).

42 Swagata Raha, *Death penalty ordinance is a reactive and disproportionate response to child rape*, The Print 22 April, 2018. According to 'Crime in India' 2016 data published by National Crime Records Bureau, 94.6 per cent of offenders under rape/penetrative sexual assault under the POCSO Act, were known to the victims.

Empirical studies by the Centre for the Child and the Law, NLSIU Bengaluru, have revealed that a high percentage of children turned hostile when the accused was the child's father or step-father, brother, or related to the child. Consequently, the conviction in these types of cases was also exceedingly low. Death penalty will undoubtedly place children at risk of life and complicate their participating in the criminal justice system.

Available at https://theprint.in/opinion/death-penalty-ordinance-is-a-reactive-and-disproportionate-response-to-child-rape/51585/ last visited on 16.05.2018.

43 Rahul Tripathi, *Beyond The News: The Debate over Death: How have India's Parliament, Law Commissions and the Supreme Court dealt with the question of capital punishment and the many issues it raises?*, The Indian Express, Mar. 14, 2018, https://indianexpress.com/article/explained/the-debate-over-death-penalty-law-commissions-supreme-court-on-capital-punishment-5096813/ last visited on 15.03.2021.

44 *Supra* note 30.

The judicial approach of the Hon'ble Supreme Court of India can be traced in its recent judgments where the court commuted 11 death penalties[45] to life imprisonment[46] in 2018, while rejecting the review petition filed by the 2012 Nirbhaya gang rape convicts.[47] This gives birth to a very peculiar situation where two apex institutions of the state, i.e., the Parliament and the Hon'ble Supreme Court of India are advocating and furthering two opposing schemes of punishment.[48] The consequence of this dichotomy in approaches towards death penalty was witnessed in the state of Madhya Pradesh. According to the 'The Death Penalty in India: Annual Statistics 2018' published by NLU Delhi's Project 39A, "M.P. government had consistently pushed for punishing child sexual assault with death penalty, flagging its incentive system for public prosecutors seeking the severest punishment for offenders"[49]. The BBC reported that a major argument against imposing death penalty for rape is that it actually deters the system from handing out convictions.[50]

45 Chhannulal v State of Chattisgarh (Criminal Appeal 1482/2018), M A Antony v State of Kerala (Review Petition [Crl] 245/2010), Rajendra PrahladraoWasnik v State of Maharashtra (Review Petition [Crl] 306/2013), Prahlad v State of Rajasthan (Criminal Appeal 1794/2017), Vijay Kumar v State of Jammu and Kashmir (Criminal Appeal 1391/2018), Swapan Kumar Jha v State of Jharkhand, Sukhlal v State of Madhya Pradesh (Criminal Appeal 1563/2018), Babasaheb Maruti Kamble v State of Maharashtra (Review Petition [Crl] 388/2015), Jitendra v State of Madhya Pradesh (Review Petition [Crl] 324/2015), ViranGyanlal Rajput v State of Maharashtra (2018): Criminal Appeal Nos 1558–1559 arising out of SLP (Criminal) No 5416–5417/2015.

The Supreme Court's Death Penalty Focus: Reflections on Sentencing Developments, Neetika Vishwanath, Ninni Susan Thomas, Project 39A, National Law University, Delhi. Available at: https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5c5074af88251ba97163ac14/1548776624624/SC+focus+on+the+Death+Penalty.pdf last visited on 30.03.2021.

46 The sentences in different cases ranged from simple life imprisonment to fixed terms of imprisonment and imprisonment till the end of natural life as per the Supreme Court judgment of 2015 in V Sriharan v Union of India ([2016] 7 SCC 1) which allows for placing a sentence beyond the pale of executive remission. This however does not have any effect on the powers of the President and the Governor under Article 72 and 161 of the Constitution respectively.

Available at: https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5c5074af88251ba97163ac14/1548776624624/SC+focus+on+the+Death+Penalty.pdf last visited on 23.01.2021.

47 Ritika Jain, *MP issued most death sentences in 2018 — a result of harsher child rape law*, The Print, 30 January 2019. Available at: https://theprint.in/governance/mp-issued-most-death-sentences-in-2018-a-result-of-harsher-child-rape-law/184934/ last visited on 10.04.2021.

48 *Ibid*, The state government reportedly devised and implemented a rewards system, under which public prosecutors are awarded 100-200 points for securing the maximum punishment for a given crime, 500 for life sentence, and 1,000 points for death penalty.

Prosecutors earning more than 2,000 points, the report adds, are given titles such as 'Best Prosecutor of the Month' and 'Pride of Prosecution', while those who get less than 500 points are issued strict warnings.

49 *Ibid*

50 Divya Arya, *India death penalty: Does it actually deter rape?*, BBC News, Delhi.

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4. Implementation deficit

The Criminal Law (Amendment) Act, 2018 provides for time bound investigation which mandates that the investigation in cases of rape should be completed within a period of 2 months. Importance of investigation cannot be overstated as it lays down the foundation of a criminal trial. If investigation is not done properly, it can have serious repercussions on the trial leading to acquittal of the accused and grave injustice. This means that a sexual predator can roam around scot free in case the police fails to conduct a solid investigation. But as a matter of practice, police investigations are time consuming because of multiple factors such as lack of manpower, infrastructure, time consumed by overburdened forensic laboratories. "If the statistics of NCRB are considered, in 2016 there were 55,071 cases for investigation out which in 16,124 cases investigation are still pending from the previous year and 38,947 new cases were reported for investigation. As of 2016, with a pendency percentage of 30.3%, there were 16,678 cases which are pending investigation at the end of the 2016."[51] With the enactment of the Criminal Law (Amendment) Act, 2018, a sub-section has been inserted in section 374, Code of Criminal Procedure, 1973 that mandates that an appeal against a sentence in rape cases must be disposed within 6 months.[52] Looking at present rate of pendency in the lower courts and at the appellate courts, the 2018 amendment has set some unrealistic goals for the already overloaded judiciary and the issue worsens with increasing judicial vacancies, low budgetary allocation, poor infrastructure.

CONCLUSION

It remains to be seen how the courts will cope up with such high expectations of the Parliament with the existing infrastructure or on the other hand, whether courts will be able to cope up or not with such targets with the means at its disposal. The policy is, patently, devoid of the understanding of the present situation of the courts in the country as well as the reasons for inordinate delay that happens in the investigations and at the stage of the trials. A study of the problem of rape adjudication as well as shortcomings of the judicial system was necessary before such an amendment could be introduced to tackle such a sensitive issue. As feared, the Criminal Law (Amendment) Act, 2018 is a glaring example of tokenism, an amendment which creates more problems than it solves.[53]

There are major legislative shortcomings in this act ranging from unprincipled sentencing scheme, lack of research work to violation of constitutional provisions. The approach

51 Abhishek Gupta, *Decoding 'Deterrence': A Critique of the Criminal Law (Amendment) Act, 2018*, Summer Issue ILI Law Review 136, (2018), Available at http://www.ili.ac.in/pdf/ag.pdf last visited on 20.03.2021.

52 The Criminal Law (Amendment) Act, 2018 (No. 22 of 2018)

53 Sourya Banerjee, *Criminal Law (Amendment) Ordinance, 2018: How The "Bandaid Legislation" Creates More Problems Than It Solves*, The Logical Indian. Available at: https://thelogicalindian.com/awareness/criminal-law-ordinance-2018/ last visited on 20.03.2021.

is not based on a legally tenable criminal law policy. The Government tried scoring some political points with the help of the 2018 amendment which is not what criminal law should be used for. Criminal law is a power resource in the hands of the state which should not be used by the state for appeasement of the public as that is a blatant abuse of the power given to the state by the people of the nation as well as an abuse of the criminal law.

The criminal law is often accused of being a colonial era statute which is unfit in the present scenario and not in line with modern ideas of society, constitution and individual liberty. The law is perpetuating the colonial mind set of the Indian police force which still deals with the same heritage laws and thus carries the same traditions and attitude as of the British Era police force, thereby impeding the transition of pre-independence police force to a new age police force which works in support of the public rather than over the public.

The adverse consequences of tokenism leave a Domino effect that causes following far reaching damages:

1. Incompetent Law: The law formed as a result of tokenism is ineffectual and fails to deal with the issues as required. The law is incompetent and more often than not, it adds to the problem rather than solving it. Eventually, it takes more effort to undo the harm done by such laws. Additional work has to be done, for instance, the Prevention of Children from Sexual Offences (Amendment) Act, 2019 was introduced to solve the difference in punishmentcreated by the Criminal Law (Amendment) Act, 2018 for the same offence of child rape under the Indian Penal Code, 1860 and Prevention of Children from Sexual Offences, 2012.
2. Stops any Future Progress: Legislative process is a tedious process and it is not an everyday event especially in criminal law. The recent amendments in criminal law is an outcome of huge public uproar and visible public discontent. This means that once a law is passed, whether good or bad, then it takes a good number of years to observe the result of the law and then introduce the required changes. Anti-Rape law as provided in the Criminal Law (Amendment) Act, 1983 (43 of 1983) was amended in 2013 for the first time since 1983 after a period of 30 years. Therefore, criminal law amendments should be treated with utmost carefulness and prevented from tokenism since it has an unmeasurable impact on the society.
3. Problem Persists:Criminal legislative work is a problem centric and problem solving activity. But in case the legislative work suffers from tokenism, the impact of the law on problem is non-existent and the problem subsists. The problem centric approach yields to public pleasing approach and law becomes a tool of public appeasement which is used to score some political points[54]. The issue gets ignored and law loses its aim. This is arguably the worst result of an act of tokenism in the field of law.

54 *Supra*note 30.

The paper has, hitherto, established how the Parliament indulged in the act of 'tokenism' while drafting the Criminal Law (Amendment) Act, 2018 and the possible outcomes of such an amendment. However, it is also acknowledged and recognised that there is a huge scope of further research to expose the acts of tokenism in criminal law on the criteria mentioned and/or on other suitable grounds. Such researches can help in identifying the criteria which can help the Legislature to make and amend the law in a better way.There is a dire need of a blueprint of law-making process which can act as a model or a detailed plan of action to aid the process particularly when the Ministry of Home Affairs had surfaced its intention to revamp the entire Indian Penal Code[55]. The Ministry of Home Affairs realised that the criminal law of the nation has not been amended in totality since its formation in British era. The Home Ministry further noted that the law in its present form is colonial in nature and serves to maintain a 'Master-Servant' relationship between the government and the public which should be changed. The police no longer protects just the interest of the government, rather the main duty of police is to 'serve and protect the people'[56]. Criminal law amendments need a direction and efforts should be made to provide that direction.

SUGGESTIONS

The following suggestions have been made specifically to provide a better tool to the legislature while drafting criminal law, both substantive and procedural. These suggestions should be inculcated in our laws at the earliest as the first measure or an initial action to give a direction to the later work. It should also be recognised that these measures have been delayed and ignored in India but are critical to the development ahead.

1. Policy driven approach: There should be recognition of women welfare as a target for the law and then all changes made to such criminal law provisions should be women-centric and not focused on criminals and death penalty. The criminal centric approach should be abandoned where criminal is at the centre of attention and law revolves around strict punishments. It should be acknowledged that crime is an indispensable part of an ambitious society and law should be inclusive of victims and their rehabilitation.
2. Victim Rehabilitation: There is not much attention on victim rehabilitation who often faces a social ostracism and is unable to live their lives normally. No part of the civil or criminal law ensures that every victim of such crimes is offered a rightful chance of social integration and employment opportunities. The law should be catering to the victims rather than treating them as a third party in their own cases.

55 Centre all set to revamp British era Indian Penal Code – The Hindu:

Available at: https://www.thehindu.com/news/national/centre-all-set-to-revamp-british-era-indian-penal-code/article29752397.ece last visited on 31-03-2021.

56 *Ibid*.

3. Better treatment of victims: Sensitisation of police staff and even the process itself. It is often said about the 'judicial process' of our country that the process itself is a bigger punishment than the sentence of the court. And female victims of sexual crimes are especially vulnerable under such alien circumstances and environment in our courts. Victim Impact Statement should also be made part of the judgment and used for the purposes of rehabilitation and sentencing.
4. Inclusion of the victims in the police and judicial process: The victim takes a back seat after filing of F.I.R. The police does not involve any input from the victims and in courts, the case becomes a matter between the prosecution and the defence and victim merely plays the role of a witness in her own case.
5. Conviction Rate: Find reasons for the low conviction rate which is falling down further. The reason for this downward trend has to be ascertained. It is not a plausible reason that such majority of cases are fake or filed for other untoward reasons. Although, it has to be kept in mind that achieving a high conviction rate is not to the aim of the law. The aim remains to attain justice and find the truth of the matter but such low rates of conviction are unintelligible as well as unjustified and requires an inquiry to find the cause of such low conviction rate.
6. Medical Examination: The process of medical examination has improved over the years but there is still room left for a lot of improvement. Especially the prescribed medical examination forms by the government is rudimentary, insensitive, intrusive while at the same time it fails to mention important things and becomes a hurdle in conviction.
7. Marital Rape: It has been accepted as an offence in many modern welfare states like Canada, United States, Ireland, South Africa with Poland being the firstcountry to do so in 1932. It is time torecognise thatthe evil of marital rape should be made a crime in India as well.
8. Innovative Punishments: New and innovative methods of punishment and novel sentencing policies can help the cause of reducing and containing the crimes against women and should be given a chance. Punishments such as community service has been adopted by countries like United States but it is not provided as a punishment in India.
9. Introduction of police reforms[57]: The Model Police Act of 2006 was drafted to with a goal to provide:
    i. Functional Autonomy to the police: This is a way to break the nexus between the police and politicians.[58]

57 The Model Police Act of 2006.

58 *Ibid*, A provision of filing complaints from police officers against their seniors for pressurising them to commit illegal or unconstitutional acts was also inculcated. A provision of fixed tenure of 2 years was also present to avoid transfers arbitrarily.

ii. Encouraging Professionalism: The Police Act Drafting Committee recommended abolition of the rank of constable and replacing it with a primary rank of Grade II civil police officer.[59]

iii. Accountability: The police Act proposed introducing criminal penalties for the most common defaults of the police such as non-registration of FIRs, unlawful arrest, detention, search or seizure.

iv. Jurisdiction: Underpinning the Model Police Act is the notion that police officers should be duty-bound to assist victims of sexual offences irrespective of the crime's jurisdiction.[60]

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Reforms in Agricultural Laws and its Impact

Himanshu Bansal & Nidhi Garg***

ABSTRACT

It is very much needed to be making of necessary agricultural reforms in the present market machinery for the proper welfare and growth of farmers. However, the present new reformed bills faced a lot of opposition. The present farmers' bills object to provide farmers the right to sell its produce outside the APMC restricted premises; the right to enter into contracts directly with the buyers to sell their produce at the maximum price. Till today major reforms for the agriculture has not yet been taken even as agricultural sector is one of the most populations engaged sector of India. This sector has faced a lot of social, economic and environmental difficulties which overall results in lacing the overall development of the country. So, it is necessary to take major and important steps for the upliftment of farmers.

There are institutions also which have been put into the place in order to enforce these laws. But, the recent experiences have revealed that despite of the existence of the laws and institutions built with the aim of protecting the farmers, not for the growth of farmers. This article also aims at providing the real image of these laws and the affect of these new acts of farmers and society.

Keywords: *Farmers, Welfare, Agriculture, Population.*

INTRODUCTION

Agriculture is one of the most important and eminent sector in India. Agriculture leads to provide the largest livelihood in India which is necessary for development of any Nation. Agricultural sector in India is performing well and in last two decades India is producing surplus food grains, including the highest record in 2019-20 of 292 million tones.[1] In India Agriculture is considered as to be the most popular sector from decades and it includes 17% of GDP and also overall includes 60% of India's population.[2] The sector of agriculture is functioning at its pace and even also

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1 Press Note on National Conference of Kharif Crops 2020, Ministry of Agriculture and Farmers Welfare, (16 April 2020) <https://pib.gov.in/PressReleseDetailm.aspx?PRID=1614994

2 PRS Legislative Research, 'State of Agriculture in India' (March 2017), <www.prsindia.org/policy/discussion-papers/state-agriculture-india>

exporting a large amount of food grains in different countries. Now a day's India is not only fulfilling the demand food grains of the county but also one of the largest producers of wheat and Rice in the world. However the income of farmers is not increasing with the same pace as the proportion of increase in production. From 2004 to 2012 the income of farmers grew at a rate of 3.94% per annum, and it takes a long time to increase in their incomes in the real sense.[3] In the year 2019 NITI Aayog has come up by setting a goad in their mind to take reformative steps to double the income of farmers by 2022.[4]

As being the significant occupation and covering more than 50% of the total population of India it is necessary to take major and reformative steps for the farmers. For the same Central government had passed two laws namely *Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020,* and *Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020* and an amendment to the *Essential Commodities Act, 1955*. These bills will create an conductive ecosystem private investment in agriculture and also promote efficient, transparent and barrier free inter state and intra- State trade and commerce of farmers produce.

HISTORY OF FARMERS POST INDEPENDENCE

At the time of Independence the agricultural productivity was very loess about 50 million tones. Subsistence farming was done at that time and is done by traditional tools and equipments. At that time more that 80% population is engaged in agriculture.

Royal Commission in 1928 in its report laid down different aspects as spreading new agricultural technologies for the irrigated arid and semi-arid areas. Efforts were then concentrated mainly to develop labour saving manual and animal drawn implements. Later, with the starting of B.Sc. Agricultural Engineering Programme at Allahabad Agricultural Institute during 1942, establishment of Agricultural Engineering Division at TART in 1947, Agricultural Engineering Department at IIT, Kharagpur in 1954, and colleges of Agricultural Engineering and Technology at Pantnagar, Ludhiana, Jabalpur, Udaipur, Coimbatore. 1960s gave an impetus to agricultural engineering research programmes.

Eminent political scientist KC Suri classifies the post-Independence era into three phases. First, the 1950-60s which was marked by reforms and consolidation of agriculture; second the period of the Green Revolution and growth of political populism during the 1970s-80s; and the third being the advent of liberalization and deterioration of farmers' condition after the 1990s.[5]

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3 KJS Satyasai, "Farmers' income: trend and strategies for doubling" [2016]

4 NITI Aayog, 'Doubling Farmer's Income: Rationale, Strategy: Prospects and Action Plan' (2017) NITI Policy Paper No 1/ 2017, <https://niti.gov.in/writereaddata/files/document_publication/DOUBLING%20FARMERS%20INCOME.pdf>

5 https://www.dailyo.in/politics/farmer-suicides-mandsaur-agrarian-crisis-india/story/1/17772.html

The report "70 years of farmer's journey" presents a comprehensive picture of Indian agriculture after independence to now in terms of farmer's situation and policies intervened during different phases. The report is presented here is the compilation of various reports and data showing the trend in last seven decades and also mentioned the challenges, issues and way forward to combat with the farmer's suicides and encourage the vision of doubling farmer income.

CONCEPT OF APMC

Till today, the markets and mandis of agricultural products are mainly controlled by the Agriculture Produce Marketing Committees (APMC). The work of this committee is to regulate trade between farmers, buyers and traders and the main work is to provide licenses to the traders to conduct free and fair trade. APMC's levied various market fees and other charges on farmers and in exchange provide framers with required infrastructure and a particular platform to sell its harvest.

There are very few licensed traders, which lead to concentration of market and also a kind of monopoly of traders which doesn't provide adequate price of their farm products to the farmers. APMC model was setup with the objective of efficient and effective trade practices but by time, this model is not able to achieve the required goal. Also, a farmer who is registered with a particular APMC can only sell their produce in the same mandi even if he/she is offered a high price in any other APMC mandi. Therefore, the APMC model was not very well executed, and it was high time for the government to alter the existing agricultural market structure, as a well-structured market is a key requirement for raising farm income.[6] The changes to the markets for the farmers have been brought in after enactment of these Bills.

NEW REFORMED FARM BILLS

1. The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020.

This bill will provide for the creation of an ecosystem where the traders and farmers enjoy the freedom of choice in relation to sale and purchase of farmer's produce which lead to increase in prices though competition among alternative trading channels. The present Bill demolishes the market boundary and allows intra and inter-state trade which could be done in any market across the country.[7] It will provide a promotion to efficient, transparent, and barrier free interstate and intra state trade and commerce of farmers produce outside the physical premises of market or deemed market.[8]

2. The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020.

The Bill laid down the concept of 'contract farming' where a prior contract can be

6 A. Narayanamoorthy, "Farm income in India: myths and realities" [2017] 72 Indian Journal of Agriculture Economics

7 The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020, s 3-4.

8 Abid

made between the farmers and buyers before the season of crop.[9] The bill also provides for the clause where the price of the product shall be decided between the farmer and buyer at the time of formation of contract. This bill will decline the fear of a common farmer as of not getting much amount of produce as is expected by him at the time of production. Farmers can engage for minimum one crop season and maximum to five years.

3. The Essential commodities (Amended) Act, 2020

This act provides a legal framework and power to the government to regulate certain commodities which are designated as 'essential commodities'. "Essential commodity" means a commodity specified in the "Schedule" of this Act.[10] At present, the "Schedule" contains 9 commodities — drugs; fertilizers, whether inorganic, organic or mixed; foodstuffs, including edible oils; hank yarn made wholly from cotton; petroleum and petroleum products; raw jute and jute textiles; seeds of food-crops and seeds of fruits and vegetables, seeds of cattle fodder, jute seed, cotton seed; face masks; and hand sanitizers. Till today, farmers were bound by a stock limit where they can't reserve the food grains above a particular limit. After these amendment farmers got relaxation as now government can impose stock limits when there is a 50% increase in the retail price of non- perishable agricultural items and 100% increase in the retail price of perishable farm items.[11] These Bills are introduced with the intent to open up the market and provide a more significant opportunity for the farmers to sell their produce.

BENEFITS OF SUCH REFORMS

1. Break monopolistic power of market.
2. APMC now applies only to mandis.
3. Stop Corruption.
4. Farmers now free and confident to produce different crops.
5. Legal framework of Contract farming.

IMPACT OF THE BILLS IN FARMER'S INCOME

Current income

Till today, the main focus of country is on the development of agricultural sector which ultimately lead to raise the farm output and improve in food security.[12] Government had taken a lot of steps and as the result of that it leads to increase in the production of the farmer but the main concern here is that even after the increase

9 The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020.

10 Section 2(A) of ECA.

11 Sec-3(1)(b) of Essential Commodities Amendment Ordinance, 2020

12 DPK Pillay, TKM Kumar, "Food Security in India: Evolution, efforts and problems" [2018

in production the income of farmers never increased and even government had not taken any particular strategy to increase in farmer income. As a result of this the average monthly income as per official data from NSSO is Rs.6,426.[13] Also this is considered to be the average income among the big and small farmers and there is a huge margin between the farmer's incomes. According to NITI Aayog, 80% of the rural population is dependent on agriculture.[14] As per the facts and figures it seems that the situation of farmers in country is not well and a upliftment in the income of farmers is required for overall development of nation.

Increase in production and not increase in farmer's Income

As stated above by the increase in technology and engagement of more that limit of man power in the same piece of land by the farmers lead to increase in production, but our strategies are not so much advanced so that we can increase in the income of farmers by increase in their production. Investment of farmers are increasing day by day as farmers now starts using fertilizers which costs around 8% of the total cost.[15]

So, it can be proved by the above classification that no doubt the production of farmers of the country is increasing day by day, but the real fruit is still to reach to the farmers.

Farmer's Income after introduction of new Bill

Till today the surplus is not directly proportional to profits and higher of the profits occurs only when revenue is more that the cost incurred. As stated above, in the last many years the cost of input is rising gradually but the increase in the income of farmers can't be traced in the same proportion. As by the introduction of these the income of farmers can be increased. The concept of '*Unified Market Platform*' (UMP) will ultimately be adopted by the country 'Unified Market Platform' as witnessed in the mandis of Karnataka. The use of UMP resulted in increase in the offering price for most of the agricultural commodities so produced.[16]

So, it is the high time to take revolutionary steps for the upliftment of farmers and after going through the bills it can be identified that these bills will ultimately lead to increase in standard and income of the farmers.

DIRECT IMPACT OF BILLS ON FARMERS

1. Relaxation in stock of farm products

13 <http://mospi.nic.in/sites/default/files/publication_reports/KI_70_33_19dec14.pdf>

14 NITI Aayog (n 4).

15 T. Ranganathan, 'Framers income in India: evidence from secondary data' (2015) Institute of Economic Growth Research Paper (9 April 2015

16 MK Nidheesh, 'Why Karnataka scores with its e-market model' (Mint, 18 October 2016) <www.livemint.com/Politics/GfNuS0u8bhjKeReQp0mPUN/Why-Karnataka-scores-with-its-eMarket-model.html>

As the universal rule of economics there is a friendly relation between demand and supply. After the amendment in Essential commodities Act farmers got relaxation as now government can impose stock limits when there is a 50% increase in the retail price of non- perishable agricultural items and 100% increase in the retail price of perishable farm items.[17] These Bills are introduced with the intent to open up the market and provide a more significant opportunity for the farmers to sell their produce at high price.

2. Advancement in Technology

The *Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020* aims to establish the online market system all over the country. This step leads to facilitate the trade in online manner. According to the NITI Aayog report on *Doubling Farmers' Income*, a 13% rise in crop price will result in a 9.1% increase in farmers' income.[18] Therefore, if the price offered to the farmers will rise, it will lead to a rise in an overall increase in farm income.

Also the important factor as in relation to advancement of technology the new reformed bills talk about contract farming and if any person does any contract which the farmer for the production of certain thing, then for the sake of quality standard of the thing, the person who is giving such contract will try to arrange the advanced technological equipments.

Presently, the government is operating the *e-National Agricultural Market* (eNAM), which will be strengthened by the passing of this Bill.

3. Dismissal of middle person

Another component for the increase in the income of farmers is the market reform to reduce the interference of middlemen. These Bills will lead to reduce the role of intermediaries at a large extent. Earlier, only licensed buyer and traders can purchase the produce from the farmers in the same mandi in which farmer registered him.

The license system also created a monopoly in the market among the traders in the APMCs, which influenced the price of the commodities. And this system also leads the intervention of middlemen and ultimately increases in the price of commodities and the real profit goes to middlemen. After the enactment of these acts farmer is free to sell its produce in the market even to any private individual where he thinks he will get more price. This will provide open market to farmers and ultimately increase in income of farmers.

4. Reduction in Harvest Cost

The farmers had to incur a lot of transportation cost. Indian farmers incur a loss of Rs. 92, 651 crores per year in post-harvest losses, primarily including storage and transportation.[19] APMCs mandi were not always located at a favorable location. On

17 Sec-3(1)(b) of Essential Commodities Amendment Ordinance, 2020

18 NITI Aayog (n 4).

19 Kiran Pandey, 'Poor post-harvest storage and transportation facility to cost farmers dearly' (Down to Earth, 28 August 2018.

average, each APMC mandi serves a geographical area of 496 sq. km. against the prescribed limit of 80 sq. km.[20] As due to introduction of new agricultural bills, contract farming can be done and as after production of produce on the terms of contract the person who is coming in contract with farmer, he will purchase the produce soon after the production and harvest such produce which leads to decrease in the cost of harvesting from the side of farmers and ultimately net income of farmer will increase.

DIRECT IMPACT OF BILLS ON COMMON PERSON

1. Availability of low cost products

There are so many products which we had to import due to non-production of those products in India. It seems to be a custom that farmers used to produce only wheat and rice, due to that there is surplus of wheat and rice in country. After enactment of these bills, contract farming came into operation and the farmers start producing such products which we are importing now a day. Due to production of those things in our own country we get the products at low price in comparison of the price of thing which we import.

2. Liberalization of markets

As after the enactment of this bills common person of the country get the produce with free market. He/she can buy the product with a lot of options as after these bills market get liberalized and there will be an open market for the purchase of things. Monopolistic trend in agricultural produce get decline after the introduction of these bills.

CONCLUSION

At the end, we can say that agriculture share in the Indian economy is declining of about 15% after the 1991 reforms. In the longer run, doubling farmer income and strengthening the repayment capacity of the farmers by improving and stabilizing their income is the only way to keep them out of distress. The new Bills aim to liberalize the market. We need to undertake agriculture market reforms to ensure that farmers get reasonable prices for their produce. The sustainable solution to indebtedness and agrarian distress is to raise income from agricultural activities through improving productivity in agriculture through improvement in irrigation, mechanization, availability of quality seeds, fertilizers, pesticides, crop diversification towards high-value crops and solving ethical dilemma related to GM crops.

The new Bills aim to liberalize the market. It is anticipated that the entry of private players will bring in the much-needed infrastructural investment to the agricultural sector. Much like the 1991 reforms, these reforms aim to rejuvenate the economy by uplifting the lethargic agrarian sector. It is anticipated that the entry of private players

20 PRS Legislative Research, 'Agriculture marketing and role of weekly Gramin Haats' (21 January 2019), <www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/SCR%20Summary%20%20Agriculture%20Marketing%20and%20Role%20of%20Weekly%20Gramin%20Haats_0.pdf>

will bring in the much-needed infrastructural investment to the agricultural sector. Much like the 1991 reforms, these reforms aim to rejuvenate the economy by uplifting the lethargic agrarian sector.

At last assistance from the government is required, and the Centre makes concerted and coordinated efforts with the States, the new Farm Bills will not only be a boom for the farmers but also for the economy of the country.

Witness Protection in Criminal Trial in India

*Naman Shukla**

ABSTRACT

The commission of a crime is a complex procedure that involves a sequence of interconnected activities and actions. One of the primary goals of the criminal justice system is to arrest and convict the perpetrator, which can only be accomplished through a thorough and methodical process that identifies the sequence of actions required to prove the offence. The gathering and analysis of evidence in a systematic manner is important to the investigative method, since the prosecution will almost often want to disprove its veracity in order to avoid criminal guilt during the trial. In every country's criminal justice system, the position of a witness is critical. They are an integral component of any civilised society's justice system. Each of their statements is critical since it has the power to alter the trajectory of the whole event. They activate the criminal justice system by providing information relating to the committing of an offence. Witnesses, who are thought to be the eyes and ears of the law, are being aggressive with increasing regularity. The aim of this study is to examine the functions, status, and importance of witnesses in criminal prosecutions in India, as well as the Witness Protection Scheme 2018, before explaining the need for an adequate legal framework to offer necessary protection to witnesses.

1. INTRODUCTION

Justice is a damsel-in-distress sculpted from the clay of witness testimony, mixed with a systematic and decorative excellence represented by lawyers and judges combining the paints of various types of evidence.[1] The criminal justice system is one of the most critical organs of representative government, since it protects both people's rights and the state's interests.[2] The criminal justice system's primary goals are to uphold the rule of law and to instil a sense of security within society's citizens. This is accomplished by rewarding the convicted and thereby restoring the public's confidence in the criminal justice system.

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1 Ravulapati Madhavi, "Witness Attack on Justice", Justitia, Osmania University Law Quarterly, Faculty of Law, Osmania University, Vol. I Part I, p. 83.

2 Renu Sharma, "Criminal Justice System in India: Some Reflections", Third Concept, April 2011, p. 41.

Any prosecution that fails as a result of outside intervention is a disaster for the criminal victim(s). More particularly, any dissatisfied trial defies and mocks the rule of law-based culture. The criminal justice system bears the scars of a tainted trial. The machine becomes unrecognisable as a result of repeated scars, and people lose faith in it.

In Zahira Habibullah Sheikh v. State of Gujarat[3] the Supreme Court observed that "Witnesses are the eyes and ears of justice. If they are incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed and it no longer constitutes fair trial. The incapacitation may be due to several factors like witness being not in a position for reasons beyond control, to speak the truth in the court due to negligence or ignorance or some corrupt collusion[4]."

In recent years, several high-profile trials have resulted in acquittals due to aggressive material witnesses. The eyewitness is becoming increasingly scarce. And when he is available, he shifts colours like a chameleon, to the point that the Supreme Court had to punish Zahira of Gujarat in 2006 for her kaleidoscopic differences of her versions in different courts. Many an open and shut case has been closed by the Red Herring of a "hostile" eyewitness (bribed, harassed, favoured, or won).[5] "Time has come ripe to act on account of various encounters encountered by the court on account of repeated turning of witnesses as hostile, either due to intimidation, bribery, lures, and monetary interests at the instance of those in charge, their henchmen and hirelings, political clout and patronage, and myriad other factors," according to the Supreme Court. "Time has come when intense and undiluted thoughts are to be bestowed for shielding witnesses such that ultimate reality is put before the court and justice triumphs and the trial is not reduced to ridicule," the Hon'ble Supreme Court said about the witness protection. If the end goal is to find the facts, the eyes and ears of justice must be secured so that the rights of justice are not jeopardised by turning judicial hearings into mock trials like those seen in film.

A witness's testimony, it is argued, is essential for a successful investigation and conviction in a criminal trial. As a result, victim intimidation can be solely prosecuted under a witness protection statute.

1.1. Meaning and Competency of Witness

Witness can be defined as, "A person who gives evidence in a cause, an indifferent person to each party, sworn to speak the truth, the whole truth and nothing but the truth."[6] He is the one who sees or knows something personally. "One who hears, learns, or vouchs for something, or one who gives evidence, under oath or confirmation

3 (2004) 4 SCC 158.

4 id., p.187.

5 B.R. Sharma, Scientific Criminal Investigation, Universal Law Publishing Company Private Limited, Delhi, 2006, p. (v).

6 B.L. Bansal and RajiveRaheja, Capital's Lcgal and Medical Dictionary, Vol. 2, Capital Law House, Delhi, 2006, p. 1853.

in person, or through oral whether written deposition, or by affidavit," according to Black's Law Dictionary.[7]

Furthermore, the Witness Protection Scheme of 2018 describes 'witness' as "every individual who holds facts or documents concerning any offence considered by the responsible authority as material to any Criminal proceedings and who has made a comment, or who has provided or agreed to provide or is expected to provide evidence in relation to such proceedings."

1.2. Classification of Witness

There are many types of witnesses. The below is a general classification such as Child Witness, Common Witness, Expert Witness, Interested Witness, Dumb Witnesses, Hostile Witness. The research paper focuses on Hostile Witness.From now, the research paper would focus more on Hostile witness.

2. THE PROBLEM OF HOSTILE WITNESSES

According to Kautilya, one of the most important tasks of the state was the administration of justice. However, since the making of justice was essentially dependent on the truth of the oral statements of the witnesses, it became difficult to do justice in a court if the witnesses offered false testimony, which resulted in a slew of negative effects. Given the paramount value of justice and the position and necessity of truthful proof in achieving it, legislators have placed a premium on witnesses telling the facts while delivering testimony.[8]

According to the Law Commission of India, the number of acquittals in criminal trials has risen to a high level, although this is not always due to a lack of proper proof presented to the courts by the police. When witnesses appear in court to provide evidence, they often do so in a way that undermines the effectiveness of their testimony by deposing to a narrative that differs from the one they gave to the police.[9]

The fact that trial witnesses refrain from comments given earlier before the police and become violent in court is the most overwhelming and important of the many ills that haunt India's criminal justice system today. External pressures cause witnesses to become hostile with repeated regularity in proceedings involving violent offences or high-profile celebrities, resulting in the criminal justice system's collapse.[10]

It is not uncommon for key witnesses to become hostile and irreversibly sabotage prosecution trials. Witnesses becoming hostile and overtly resiling from their earlier

7 Bryan A. Yarner (Ed.), Black's Law Dictionary, 7th Edition, West Group, St. Paw, Minnesota, 1999, p. 1596.

8 K.M. Agrawal, Kautilya on Crime and Punishment, Shree Almore Book Depot, Almora, 1990, p.59

9 The Law Commission of India, Fourteenth Report on 'Reform of Judicial Administration (1958)', p. 650.

10 Subhrarag Mukherjee and VatsalArya, "Independent Witnesses: A Legal Crisis in India", Cri.L.J. June 2004, Journal Section, p. 186.

testimony before the police in certain high-profile trials (such as Jessica Lall's) have shaken the public's conscience and shattered their confidence in the criminal justice system's functioning. Witnesses are bullied or bribed by the promise of money, and they withdraw their prior testimony to the police without any moral remorse.

All of the main witnesses in Jessica Lall's case were hostile, and none of them could identify the perpetrator, who was the son of a prominent Haryana minister. The High Court, however, took notice of the media reports after a long and tenacious campaign by the media, and pressured the Delhi Police to file an appeal against the judgement. Finally, the wrongdoers were brought to trial.

The primary witnesses in the Nitish Katara[11] case even were hostile. Nitish Katara was assassinated in a suspicious manner. He reportedly had feelings for a classmate whose brother was the main suspect. The two defendants were the sons and daughters of a former Member of Parliament known as the "strongman" of western Uttar Pradesh.[12] The deceased's girlfriend, who was a primary witness for the defence, refuted that she and Nitish were in love or planning to marry. She wasn't hostile, but she wasn't necessarily a welcoming witness either. She is one of many witnesses in Indian legal history who have reversed testimony, claimed to have misunderstood vital evidence, or changed their minds in court. Since the witnesses were hostile, the court had no choice but to acquit both of the defendants. The accuser in a rape case against Bollywood actor Shiney Ahuja has recanted her allegation. Thirty-eight of the fifty-nine witnesses in the case of undue assets against the Badal family had been hostile. There are only a few reports of high-profile witnesses removing their claims.

2.1.2 Hostile Witness: Concept and Meaning

There is no legal definition of the word "hostile witness" in Indian law. The Indian Evidence Act of 1872, on the other hand, deals with hostile witnesses without specifying the word. It gives you, "The court can, at its discretion, allow the individual who calls the witness to ask him any questions that the opposing party may ask during cross-examination. In most cases, the opposing side is the one who does the cross-examination of a witness." There is an exception to this general rule: if a witness is found hostile by the judge, the party calling him will cross-examine him.

When a witness attempts to undermine a party's argument by withholding the facts or making a declaration that tends to endorse one side's case but then departs significantly from it during testimony on that party's behalf, the caller may ask the court to declare the witness hostile. However, in order for this to work, the witness had to do more than just disappoint the caller by failing to come up with evidence. There must be proof of a conscious decision not to say the facts. The court will check this by looking at prior comments, but more than inconsistent remarks are required for a witness to be considered hostile. The inconsistency must be on a

11 Ms. Neelam Katara v. Union of India, Cri. W. No. 247 of 2002, available at http://judis.nic.in, last visited on 24th January, 2013.

12 The Week, 12th March, 2006, p. 49.

continuum that demonstrates that denial of the facts, rather than forgetfulness, is the sole reason for the difference.[13]

A hostile defendant is a witness in a courtroom who testifies for the opposition side or who gives unfavourable evidence to the calling party through close questioning, as per American law. By using deception, such a witness could jeopardise the case of the party calling him to testify. Such witness conducts damage the litigating parties' rights while also interfering with the court's journey to the seas of truth and justice. Under common law, the precaution consisted of contradicting those witnesses with their prior declarations in order to impeach their credibility.

2.1.3 Effect of Declaring Witness as Hostile

When a witness becomes hostile to the party calling him and is declared hostile, the party calling him seeks refuge under the Indian Evidence Act, 1872, and, with the express consent of the judge, may ask leading questions similar to those posed by the opponent's lawyer through cross-examination.[14] This is often referred to as cross-examination of one's own witness. The object of such an exercise is to refute the witness with respect to previous claims made in writing or reduced to writing and related to the issues at hand, as allowed by the Indian Evidence Act.[15]

Through doing so, the party calling the witness tries to undermine the integrity of the witness' testimony and, in doing so, tries to persuade the court that the witness' depositions that are unfavourable to the party calling him should not be trusted and should be dismissed, since they are incapable of any recognition. The related provisions of the Indian Evidence Act, 1872, are also used to impeach the credit of the hostile witness, thus lowering his or her overall integrity.[16]

2.1.4 Reasons for Witnesses Turning Hostile

According to a 2012 report by the National Crime Record Bureau, India's conviction rate has fallen at an unprecedented rate. One of the key reasons for this, according to the argument, is that witnesses became hostile, resulting in the accused's acquittal. Witnesses can become hostile for a variety of motives, including coercion, subornation, revenge, or a desire for rewards. This may be the usual sources of victim evidence inconsistency. The witness may become frustrated by frequent and numerous court appearances, leading to a careless attitude toward the facts.

Witnesses lose their moral conviction before the terrible scenario of factual circumstances in the case of faction feuds, competition between potential and powerful people, where there might be fear of life and safety. The length of time it takes for a trial to begin has a similar effect on witnesses' willingness to appear in court.[17]

13 Price v. Manning (1889) 42 Ch. D 372, quoted in Jenny Mc Eivan, Evidence and the Adversarial Process – The Modern Law, 2nd Edition, Hart Publishing, Oxford, 1998, p.105.

14 Section 154, the Indian Evidence Act, 1872

15 Section 145, the Indian Evidence Act, 1872

16 Section 155, the Indian Evidence Act, 1872.

17 Ravulapati Madhavi, "Witness Attack on Justice", Justitia- Osmania University Law Quaterly, Osmania University, Vol. I, Part I, Oct- Dec, 2007, p.86.

2.1.5 Consequences of Witnesses Turning Hostile

Whenever a witness becomes hostile, the prosecution as a whole usually falls apart. It has irreversible consequences for the criminal justice system. As previously said, it has been very popular for key witnesses to become hostile during a trial for various reasons.

In India, it is normal for the rich and powerful to walk free after committing crimes with impunity. The high amount of acquittals in criminal courts would severely erode the public's confidence in the judiciary. This is a disturbing development because it encourages people to take law into their own hands.[18]

Owing to a lack of evidence and hostile witnesses, the Indian criminal justice system is currently experiencing a poor conviction rate.[19] According to the National Crime Records Bureau's 2012 Report, the conviction rate, which is described as the percentage of crimes prosecuted to total cases tried, was 38.5 percent in 2012, down from 41.1 percent in 2011.[20] According to the survey, the conviction rate in 1972 was 62.7 percent, but that has since dropped to 38.5 percent in 2012. The conviction rate in Japan is more than 99 percent.[21] The conviction rate in state courts in the United States is still high. It is worth noting that witnesses are afforded fair legal rights in both nations.

The rate of conviction obtained in felony offences, which entails the ratio of cases that resulted in the accused's conviction against the number of cases in which courts were held within a given year, is used to determine the consistency of a criminal justice system.[22] Despite its high crime rate and low conviction rate, India has yet to develop even a rudimentary system to protect witnesses in critical cases.[23]

3. WITNESS PROTECTION SCHEME, 2018

On December 6th, 2018, the Supreme Court gave its approval to the Draft Witness Protection Scheme, which was drafted with input from 18 states/union territories, numerous open records, and recommendations from police officers, judges, and civil society, and then finalised by the National Legal Services Authority (NALSA). "The freedom to testify in courts in a free and reasonable manner without any intimidation or threat whatsoever is under severe assault today," said the bench of Justice A.K. Sikri and Justice S. Abdul Nazeer, which established the rights of the witness to testify within the ambit of Article 21 of the Constitution.

18 Sairam Sanath Kumar, "The Menace of Hostile Witnesses in Criminal Trials in India: A Closer Look", Cri.L.J., July 2006, Journal Section, p. 170

19 Brishketu Sharan Pandey, p. 17.

20 Crime in India, 2012, available at http://ncrb.gov.in, last visited on 4th July, 2013.

21 Available at http://en.wikipedia.org/wiki/conviction_rate, last visited on 5th July, 2013

22 P.C. Sarkar, p.1337.

23 Deodhari v. R, A1937 P34.

It is a direct breach of Article 21 of the Constitution if anyone is unable to appear in court due to intimidation or other pressures." Furthermore, the bench deemed the arrangement to be a "rule" under Article 141/142 of the Constitution, requiring the centre and states to implement it before qualified legislation on the subject is enacted.

It is a rule of law that no witness' rights should be jeopardised by threats, harassment, or corruption, so he should be free to testify for or against the case in which he had been a witness. In the words of Jeremy Bentham, "Witnesses are the Courts' eyes and ears," so it is incumbent on the State to offer reasonable care to the claimant in order to guarantee that the wheel of justice runs smoothly.

The need to shield witnesses was highlighted by the Hon'ble Supreme Court of India in Zahira Habibulla H. Sheikh and Others v. State of Gujarat[24], where the Hon'ble Supreme Court noted that "if the witnesses are intimidated or coerced to give false testimony, that will also not result in a fair trial." Furthermore, in State of Gujarat v. Anirudh Singh[25], the Supreme Court of India held that "it is the salutary responsibility of a witness who has experience of the commission of the crime to assist the State in providing evidence."

3.1. Drawbacks

Even if the scheme provides jurors with a great deal of relief in terms of their protection over the course of the trial and, in rare circumstances, even after the trial is over, it has certain shortcomings, such as:

I. The state is responsible for maintaining a stable criminal justice system, and certain states which lack the ability to successfully administer this scheme. The solution is for the centre to help, but nowhere in the scheme does the centre have the authority to contribute even a single penny to the Witness Protection Fund.

II. The Witness Protection Order has been limited to a three-month period of operation.

III. The task of determining the specifics of the Threat Analysis Report and preparing it has been assigned to the district's chief of police, because in high-profile situations with officials or prominent individuals, the police officer might be pressured to give the information to other people.

IV. In high-profile incidents involving officials or powerful figures, the police officer can be pressured to give evidence about the witness to certain individuals.

V. The plans to change witnesses' identities and move them might not be appropriate for Indian circumstances.

VI. The scheme did not discuss the intimidation of plaintiffs as a result of multiple case adjournments, monetary damage, or other forms of suffering as a result of their regular appearances in court.

24 (2004) 4 SCC 158.

25 (1997) 6 SCC 514.

VII. It should not take into account the socioeconomic realities of witnesses. The majority of crimes in India occur amongst individuals that are acquainted or linked to one another, and as a result, the witnesses have some kind of connection with both the suspect and the perpetrator. As a result, it puts a lot of emphasis on the witness, usually of a social or caste sort.

4. CONCLUSION

Witness protection legislation is needed for a functioning criminal justice system. A bill like this will aim to prevent jurors from being violent as a result of outside involvement in criminal trials. The statute would discourage wealthy and prominent defendants from manipulating, pressuring, threatening, or abusing witnesses. Witnesses would feel more safe and comfortable testifying against those defendants. It would aid in the prevention of unjustified acquittals of convicted people due to a lack of witnesses. As a result, the conviction rate will rise, and the criminal justice system's reputation will be enhanced.

It is common knowledge that the most powerful form of testimony for confirming or disproving an accused's guilt is a witness. He aids the court in reaching a just and equitable verdict. However, he has to go through a lot of hardships when doing his task of deposing before the judge. He comes to court at his own expense in terms of time, effort, and ease, but the court officials and lawyers do not always treat him with dignity and courtesy. For his ease and warmth, there is no proper plan. He doesn't even have access to a decent seat or drinking water. Owing to repeated adjournments, he is unable to appear before the court on a regular basis.

In addition to these challenges, he must contend with the displeasure of the accused against whom he must depose. If the accused is a notorious thief or extremist, or if he is wealthy and powerful, his life and property, as well as the lives and property of his family members, could be jeopardised. There is no adequate legal protection for a witness against such difficulties, inconveniences, harassment, or threats. It is said that in India, witnesses are handled inhumanely.

Many witnesses are unable to come forward and comply with law enforcement authorities because of these factors. It is clear that the lack of a witness protection statute discourages witnesses while promoting convicted parties who can effectively bully witnesses. This necessitates the passage of a witness protection statute, allowing whistleblowers to testify without fear of being threatened or intimidated.

The Witness Protection Scheme of 2018 is a welcome move in the right direction in terms of witness/victim safety, but it does have some flaws. To begin with, the security provided therein is only for a period of three months at a time. Second, the recommendations/ advice made in TAR(s) by concerned police officers, who are frequently vulnerable to corruption, superior/ political influences, and other factors, seem to be the foundation of orders that could be passed under the Scheme. Moreover, although the Scheme provides for secrecy and the protection of documents, it does not provide any penalties for such violations.

The Scheme therefore makes no allowance for the witnesses' profession, job, or education in the interim. The Witness Protection Bill, on the other hand, included clear clauses about the fines that could be levied for violating the terms of the aforementioned Bill; instructions for the protectee's safety and security from the beginning of the investigation until the stage after trial on terms that the Court deems warranted based on the individual's danger perception; and so on.

In fairness, the said Bill had explicit clauses relating to the protectee's right to engage in a different profession without jeopardising the case's reputation or the juvenile protectee's schooling, which were absent from the Scheme. A bill to secure the identity of witnesses has been proposed in Parliament. Unfortunately, none of the above Bills were able to become law.

India has undoubtedly come a long way in terms of maintaining the protection and welfare of witnesses, who are an important part of the criminal justice system. However, the absence of a procedural structure with strict punitive consequences which leave the whole mechanism, which was adopted by the judicial process, in limbo. "The edifice of administration of justice is focused on witnesses coming forward and deposing without fear or favour, without coercion or allurement in Courts of Law," as the Indian Courts have often said. As a result, stating the existence of an adequate and stringent Witness Protection Scheme is insufficient.

5. SUGGESTIONS

The following proposals could be useful in addressing the issue of witness abuse and harassment and developing a formal basis for witness protection law:

1. The legislature should pass a strict victim protection bill to ensure the privacy and well-being of witnesses in court cases involving serious crimes. Aside from cases containing criminal offences, the benefit of such legislation should be applicable to cases in which the perpetrator has financial, military, or political influence. It is recommended that the government create a witness protection scheme as quickly as possible under such legislation to ensure the safety and health of jurors in court cases involving serious crimes.
2. It is also proposed that the upkeep of such a witness protection scheme be assigned to an impartial and autonomous Commission, whose head will be a former Supreme Court Judge. Other members may include former Supreme Court and High Court justices, senior lawyers, and police commissioners, among others.
3. The seriousness of the offence to which the witness's statement relates, the nature and significance of the witness's statement, the nature of the alleged threat to the witness's security, other methods of protecting a witness available, the suitability of the witness for inclusion in the programme, and the cost is some of the criteria for providing witness protection.

4. To discourage abuse of the protection programme, it is recommended that the service be monitored on a daily basis. To ensure the program's integrity and accountability, it should be audited on a daily basis.
5. The Central Government should establish for a set amount of money per year for the Witness Protection Program. Alternatively, the government can "enact statute legislation for the service to be financed by revenue from property obtained or recovered for having been purchased by drug dealing or organised criminal activity."
6. It is also recommended that witnesses who testify in court at the cost of their time and work be compensated appropriately. Allowances should be granted in an easy-to-understand manner.

A Critical Analysis of Availability of Witnesses in Acid Attack Cases and Sensitization of Public

*Sudhir Kumar Dwivedi**

ABSTRACT

Acid attack, especially on women, has seen an alarming growth in India. Acid attack or "vitriolage" is often referred to as a "crime of passion" fuelled by jealousy and revenge. Acid throwing is the easiest way to hurt a woman and often used as a form of revenge on refusal of sexual advances, proposal of marriage and demands of dowry. Perpetrators of acid attacks intend to disfigure and cause extreme physical and mental suffering to victims. The proposed paper presents an indictment upon one such unfortunate and ghastly incident of acid attack on a girl of tender age in public arena witnessed by public who showed no sensitivity. The issue is not limited to a de-sensitized citizenry but is convoluted by the fact that the perpetrators of the crime walk scot free in society due to the non-activism of the witnesses. Besides, the woman affected can barely be able to carry on living, with the similar nonchalance.

Generally in acid attack cases, acid is splashed on the face of victims who suffer brutal injuries on her face, chest and hands. As a result of acid being splashed on her face, she is unable to recognize the wrong doer and even if she makes a statement to that effect, it is not accorded much weight age because of many prevailing circumstances. Through this paper, the author aims to analyze those situations where a victim is the sole witness and criminality of the accused has to be decided on the basis of statements of the victim. The question of the weight to be attached to the evidence of a sole witness that was herself injured in the course of the occurrence is to be discussed. Where a witness to the occurrence has herself been injured in the incident, the testimony of such a witness is not cent percent reliable because of critical situation of victim especially in acid attack cases.

The author also wishes to analyze the reasons which hinder public to become witness in such a crime which not only affects the victim but also society at large because such ill minds continue to rove about in society with no intervention. The author also explores and examines measures which may be adopted not only by the

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government, police but also by public at large so that they are sensitized on such issues. This may lead to creation of an environment which discourages such an ill-fated behaviorisms' in society, henceforth.

Despite some high-profile rape and sexual assault prosecutions, new reports of gang rapes, domestic violence, acid attacks, and murders of women in 2016 necessitated persistent and thorough government effort to ascertain women's need for basic security besides providing them the support of prompt police investigation of such crimes. Women and girls with disabilities in particular are found most under–represented and are unable to counter these crimes against them with legal action.

State duty is not only to act with due diligence to protect women from evil of acid attack but also to prosecute and put behind the bar to the perpetrators of acid attack and this is not just a duty it's an obligation of the state to make fear free society. The duty to adequately prosecute and punish may include creating specialized investigatory or prosecutorial units, implementing witness and victim protection programs designed, in part, to safeguard the availability of essential testimonial evidence, and ensuring that law enforcement procedures and personnel adapt to the specific issues and problems related to gender-based violence. Before 2013, there was no law in effect specifically addressing acid violence.

Both the Law Commission of India and the National Commission for Women (NCW) had supported enacting amendments to the Indian Penal Code (IPC) and Indian Evidence Code to address acid violence.[1] However, in a public interest litigation court filing in April 2010 before the Supreme Court of India, the government stated that the "existing legislations are sufficient to deal with the offense of acid attack."[2] The government reversed its position, at least with respect to the adoption of criminal provisions. In today's modern times, it is strangely ironical to find that factually, implementation of laws designed to combat acid violence is yet to become an effective reality. In fact, even the blueprints of existing laws are not exhaustive enough to cover the concerns of acid attack victims.

Acid attack survivors undergo immense daily trauma – they are blinded, scarred beyond recognition, robbed of their identity, often unable to step out of the house, seek employment or lead a normal life ever again. But, it was only in 2013, after the Jyoti Singh gang rape and murder case,[3] that India officially acknowledged its seriousness by introducing separate sections in the India Penal Code – 326A and 326B – to deal with acid attackers, making the offence non-bailable and specifying a minimum of ten years to life imprisonment.

1 National Commission for Women, Prevention of Offences (By Acids) Act 2008–Draft Bill, at 15–16 "Both the Law Commission of India and the National Commission for Women recommend adding a section 326 A to the Indian Penal Code and a section 114 B to the Indian Evidence Code." (April, 2008) *available at:* http://lawcommissionofindia.nic.in/reports/report226.pdf (Visited on January 19, 2018).

2 Laxmi vs. Union of India – (2014) 4 SCC 427 on "the Inclusion of acid attacks as special offenses in the Indian penal code and a law for compensation for Victims of crime"

3 Mukesh v. State of NCT, (2013) 2 SCC 587

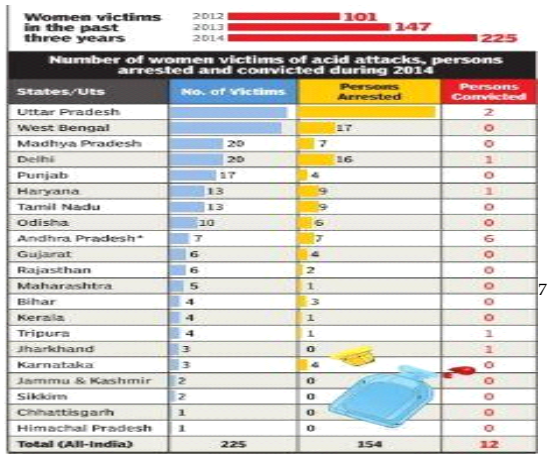
Before 2013 amendment of Indian Penal Code, acid attack could only be prosecuted as violence against women. In one way or another, this has caused obstruction in data availability, storage and research that could aid the development of laws that specifically address the concerns of acid victims. It also made arrest and punishment arbitrary and lenient. The Indian Penal Code amendment *Vide* Criminal law (Amendment) Act 13 of 2013 included provisions for prosecution of perpetrators, treatment and rehabilitation of the victims, right to self-defense against acid attack and control of acid sales. The laws however, for sure 'too late', might also be 'too little' in their current state.

However as already mentioned these amendments are not sufficient, analysis of these amendments results that evidentiary issues particular to acid violence has not been addressed. Since these evil incidents generally happen very quickly, at night, or from a distance. As a result, there are often few witnesses. Even when there are witnesses, perpetrators often threaten them to prevent them from testifying at trial or recounting previous testimony. The weapon, including both the acid and the container, is rarely found or collected. To address these evidentiary problems often encountered by prosecutors, the NCW had suggested an amendment to the Indian Evidence Act, 1872 that allows the statement of victims to be sufficient to convict a perpetrator.[4] However government did not show much concern in finality of these cases and amendment suggested by NCW were ignored. Result is that though cases are registered, prosecution also starts but final judgment either doesn't come or if comes, it comes so late that objective of justice get fails. Analysis of recent data makes it clear that on average it takes between five and 10 years for a legal case to be concluded.[5] This is in itself pretty astonishing, and damning in terms of how the judiciary and investigation procedures work in dealing with acid attack cases in India. The rising number of acid attack cases, from 83 in 2011 to 349 in 2015, shows India's inability to grapple with this heinous crime.[6] Cases continue unabated in various parts of the country, showing the pan-Indian character of this form of assault.

4 National Commission for Women, Prevention of Offences (By Acids) Act 2008–Draft Bill, *supra* note i, at 15–16. *Available at:* http://lawcommissionofindia.nic.in/reports/report226.pdf(Visited on January 19, 2018).

5 Rukmani S. "District Court will take 10 years to clear cases" The Hindu, New Delhi, Sep.27,2015.

6 Shree Vankatram " India Needs to seriously address its acid attack problem" June 6, 2016, available at https://thewire.in/56752/acid-attacks/



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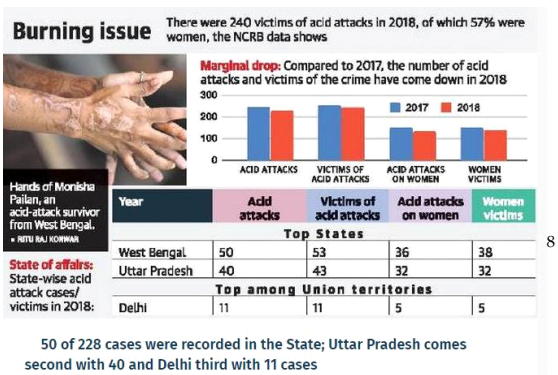

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Analysis of reports reveals the harsh reality that number of acid attacks victims increased by more than 50% in 2014. While there were 225 victims, there were 154 arrests and just 12 convictions in the year and this is scenario when drastic changes were made in criminal laws. If we analyze NCRB data of 2018 we finds that though number of acid attack cases has been decreased capital of India has reached on 3rd position it shows if the capital of county, where all government machinery is considered as pro active, is not able to control the cases what we accept from other states.

Tabulation available on 'Acid Survivors Foundation India' (ASFI) website reveals that total 1189 acid violence incidents taken place during 2010 to 2016. The first data available after the amendment of 2013 relate to the year 2014 when 225cases were reported from all over India. That indicates a steep rise compared to the previous

7 Government of India report (Ministry of home affairs, 2015). Number of women victims of acid attacks, persons arrested and convicted: 2014; Graphic courtesy: *The Times of India available at:* http://Epaperbeta.Timesofindia.Com/Gallery.Aspx?Id=07_08_2015_009_ 023_003&Type=P&Arturl=Statoistics- Harsh-Reality-07082015009023&Eid=31808(Visited on January 18, 2018).

8 West Bengal tops in 2018 acid attack cases: NCRB *Available at* https://www.thehindu.com/news/national/other- states/west-bengal-tops-in-2018-acid-attack-cases-ncrb/article30537254.ece (Visited on July 20, 2019).

year 106 in 2012 and 116 in 2013. This rise is continuing year wise from 249 in 2015 to 307 in 2016.[9]

In India, it takes many years for courts to hear and decide cases.[10] Such delays tend to hurt prosecutions' cases, as victims and witnesses lose interest and as physical evidence deteriorates or disappears. Indeed, only 41.8% of IPC cases reported results in convictions,[11] a figure much lower than the 90% or more conviction rate in criminal cases of countries such as the United Kingdom, the United States, France, Japan, and Singapore. If we analyze the data provided by the National Crime Records Bureau (NCRB), we finds that despite widespread concerns about acid attacks in society, the rate of conviction in such cases is abysmally low (20.4 per cent) across the country. According to the data provided by (NCRB), as many as 203 cases of acid attacks were reported from all over the country, but convictions were done in only 11 cases, showing a very low percentage of convictions. Around 12 cases were registered in Haryana out of which there was only one case in which the guilty got convicted. As many as 14 cases were reported related to incidents of acid attack in Madhya Pradesh and persons were convicted only in one case. Out of 15 cases that were reported in Punjab, none got convicted. Only in two cases persons were convicted in Uttar Pradesh out of a total of 42 cases registered in the state. No one was convicted for such crimes in a total of 39 acid attack cases that were reported in West Bengal.[12] The prosecution statistics published in the situational analysis of acid violence in eastern India report published by ASFI tell a similar story. Of the attacks registered from 2010-2014 (most prior to 2013 went into grievous assault bucket) only 60% resulted in filing of charge sheets - 81% of the perpetrators were able to obtain bail, 49% are absconding.[13]

The most important evidentiary issue encountered in acid violence cases; proving knowledge and intent to cause harm. '*Presumed innocence*' is well established principle of criminal justice system. The 226th report of Law Commission proposed an amendment to the Indian Evidence Act, 1872 that throwing acid on or administering acid to another person is "prima facie evidence" of the intent to cause grievous hurt to the

9 Tabulation available on acid violence incidents taken place during 2010 to 2016. *Available at:* http://www.asfi.in/webpage.php?title=Statistics+&p_type=1&parent=76&catid=78 (Visited on January 20, 2018).

10 Rukmani S. "District Court will take 10 years to clear cases" The Hindu, New Delhi, Sep.27,2015.

11 Government of India report: Committee on reforms of criminal justice system, (Ministry Of Home Affairs, 2003) Vol. I ("Mailmath Committee Report") 18–19 (2003), *Available at* http://indialawyers.files.wordpress.com/2009/12/criminal_justice_system.pdf

12 "Crime in India 2016" the annual publication of National Crime Records Bureau Available at http://ncrb.gov.in/ (Visited on 18-012018)

13 Tabulation available on acid violence incidents taken place during 2010 to 2016. *Available at* http://www.asfi.in/webpage.php?title=Statistics+&p_type=1&parent=76&catid=78 (Visited on January 20, 2018).

victim.[14] This will places the burden of proof on the defendant (which in general is on the prosecution as per section 102 of Indian evidence Act)[15] to demonstrate that he had no intention of causing any harm to the victim. And thus this provision will therefore remove a major obstacle to bringing perpetrators to justice. In cases in which victims die, perpetrators often argue that they did not intend to kill the victim, but only to cause harm and, thus, should not face the higher penalties associated with murder. This will empower the Courts interpret intent to mean a deliberate and premeditated act on the part of the accused with the aim of causing the victim's death. The suggested amendment to the Indian Evidence Act would allow perpetrators to be charged with murder for killing their victims with acid in appropriate circumstances. But government did not take this proposed amendment into consideration, the result is this that a number of acid attack cases are pending due to want of evidence and technicality of law proving guilt beyond reasonable doubt.

Non availability of eye witness is another issue of concern in acid attack cases. Peoples are hardly concerned about the acid violence victim. There narrow mind and pre determined mindset compel them to presume that if victim is female, she must have some affair with attacker. As is often the case with other crimes against women, acid attacks are treated with official apathy and societal indifference. The victims are usually women between the ages of 14 and 35 years,[16] and the attack often occurs as revenge for rejecting a marriage proposal or sexual advances, showing the peculiar mindset of male entitlement and power, and no right for a woman to refuse.[17] Women have had acid thrown at them for not bringing enough dowries, for bearing a female child and for not cooking a good enough meal. There is also lack of support to witnesses. Witnesses don't show any interest even if incident has taken place before their eye. There mind set is that why should they wear any trouble. Schemes as announced by government in accident cases that who will bring the accident victim in hospital will be rewarded[18] should also be announced in acid violence cases that some reward not only to those who brings the acid victims to the hospital but also to the person before whom incident has taken place and are ready to become witness. Such type of schemes will help timely disposal of the cases.

While legal and structural changes to the criminal justice system are important when it comes to fighting acid violence, such changes must occur in conjunction with

14 Law Commission of India Report, "The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a law for Compensation for Victims of Crime", at 43–44 (Report No. 226 July 2008) *available at* http://lawcommissionofindia.nic.in/reports/report226.pdf(Visited on January 19, 2018).

15 Arvind Kumar Dubey (ed.), "The Law of Evidence", by Batuk Lal 98-221(Central Law Agency, Allahabad 16th edn. 2003).

16 Shree Vankatram " India Needs to seriously address its acid attack problem" June 6, 2016, available at https://thewire.in/56752/acid-attacks/

17 *Another Face of Violence,* The Hindu, 15.08.2004

18 *Rs 2,000 reward for people helping accident victims in Delhi*, Soumya Pillai, Hindustan Times, Jan 07, 2017.

social and cultural changes. The Victim's Assistance Board[19] (As constituted in the matter of rape victim) should also be constituted which may provide a mechanism through which stakeholders can give the government input on how best to tackle this issue. The Board, through its monitoring duties, may ensure that government hospitals, police officers, and public prosecutors fulfill the State's due diligence obligations to assist acid violence victims. Given the difficulties acid violence victims have in interacting with the healthcare system and the criminal justice system, acid violence victims would benefit from having advocates from the Victim's Assistance Board lobbying on their behalf.

Let us discuss specific concerns faced by acid attack victims in their interactions with the criminal justice system. Acid victims are reluctant to report acid attacks to the police because they fear harassment and ridicule from police officers[20] and this leads a hindrance in tackling the crime and achieving the justice. Some police officers espouse blatantly sexist views. For instance, an advocate recounted that one police officer, when asked why he felt that certain women are attacked with acid, answered: "These women dress up like boys. What do they expect?"[21] It is well known that officer frame acid violence investigations in terms of a woman's sexual history and questions of morality. For example, an investigating officer blamed one victim for the acid attack against her, saying that she instigated the crime by engaging in a series of "affairs" with co-workers, which led to one of the co-workers throwing acid at her. The Delhi Deputy Commissioner of Police, who believes that acid violence is a form of gender- based violence, agrees on the need to more broadly "sensitize the police force and society at large" to the specific issues faced by acid attack victims.[22]

Not only this, some police officers are susceptible to corruption. Indeed, several acid attack victims reported that their attackers bribed the police with money in order to influence investigations. For example, Jacquiline Asha claims her attacker gave the police a bribe; thereafter she faced threats from the officers to withdraw the case. There are several documented cases in which acid attack victims have received inadequate police protection even when they have complained of harassment by their perpetrators prior to the attack. For instance, acid violence victim Shri Mahaveer Singh filed a police complaint stating that a man was harassing her and threatening

19 Available at http://ncw.nic.in/pdffiles/scheme_rape_victim.pdf. (Visited on February 20, 2018).

20 Campaign And Struggle Against Acid Attacks On Women (CSAAAW), Burnt Not Defeated 46 (2007) Report by CSAAAW, April 2007, CSAAAW Bangalore publication.

21 E-mail message from Sagar Preet Hooda, Deputy Commissioner of Police, Delhi Police, May 2010, in response to a query posted by the KRITI Team on the Resource Team and Members, Solution Exchange for Gender Community - an initiative of UN agencies in India, *available at*: http://www.nycbar.org/pdf/report/uploads/20072039-CombatingAcidViolenceinBangladesh IndiaandCambodia.pdf (Visited on February 21, 2018).

22 Gender base violence and human right *available at*: http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2014/04/Gender-based-Voilence-and-Human-Rights.pdf.(Visited on February 22, 2018).

to kill her, abduct her, and throw acid on her if she did not marry him.[23] Her father requested that police protect his daughter from harm and included the name and description of the man harassing Shri in his complaint.[24] The police failed to take any action to protect her, and two years later the harasser threw acid at Shri. A subsequent National Human Rights Commission investigation found the police to be negligent in failing to protect Shri and deemed their negligence the proximate cause of the acid burn injuries Shri suffered.[25] In Dr. Mahalakshmi's case, the police ridiculed her unmarried status when she filed complaints of harassment against the man who later attacked her with acid.[26] Prosecution and Punishment Perpetrators of acid attacks are not effectively prosecuted.

Another specific concerns faced by acid attack victims in their interactions with the criminal justice system is extensive caseloads and lack of training of public prosecutors. Public prosecutors do not have the time or resources to properly investigate and prosecute cases.[27] For instance, Gita was unconscious for several days after the attack against her and could not give a statement to the police. Since then she has attempted several times to meet with the public prosecutor, but he has refused to meet with her. One High Court Chief Justice urged more cooperation between victims and prosecutors and allowing victims an opportunity to play a more active role in prosecutions.[28]

The crucial role of judges is to ensure that acid attack perpetrators are adequately punished. Gender insensitivity and other structural problems within the Indian judiciary, present challenges for the punishment of acid attack perpetrators. It can be understood by an example, the judge hearing an acid attack case asked the survivor to cover her face when she appeared in court. In cases in which judges have imposed stiff punishments on acid attackers, it appears that, in assessing the harm to the victim, judges have given great weight to the fact that the victim has lost her chance to be married and to be a mother. Thus, if a judge believes that the perpetrator has prevented a woman from satisfying her traditional role as mother or wife, then the perpetrator is likely to receive a higher sentence. However it is notable that only higher punishment by judges is not desirable it is a social evil and if we really determined to uproot

23 National Human Rights Commission (NHRC), *Action Details, File Number 719/30/98-99*, 14 September 1998

24 *Ibid*

25 *Ibid*

26 Delhi Commission For Women, Annual Report 2015-16: *available at*: http://delhi.gov.in/DoIT/dcw/pdf/Annual_Report_2015_16.pdf .(Visited on February 20, 2018).

27 Interview with Sheela Ramanathan, Campaign and Struggle Against Acid Attacks on Women (CSAAAW) & Human Rights Law Network (HRLN) of Bangalore, in Mysore, India (Jan. 18, 2010) (on file with Avon Global Center), *available at*: http://www.nycbar.org/pdf/report/uploads/20072039-CombatingAcidViolenceinBangladeshIndiaandCambodia.pdf (Visited on February 22, 2018).

28 *State of Karnataka Vs. Joseph Rodrigues,* (2005(5) AIR Kar. R 724). (DB) *Decided by the Hon'ble Karnataka High Court on 22/8/2006*

this evil from the society then we have to come together, as it is truly said- "*बहनामप्यसाराणा समवायो हह दर्यः" (Bahoonaamapyasaaraanaam samavayoo hi durjayah) meaning that* "If a large number of people unite for a purpose they become invincible, though each one, by himself is weak."[29]

Another area where much sensitization is required is medical care of victim. The then Minister for Health and Family Welfare, Dinesh Trivedi, had proposed that acid attack victims receive free healthcare and insurance, and concrete steps have been taken to adopt this proposal.[30] Victims in India report unacceptable treatment in government hospitals. In one case, after acid survivor Shanti was admitted to a government hospital with massive burns, she received only an energy drink at the first hospital she visited.[31] Upon her transfer to a second government hospital, she received an improper treatment regimen of ointments for 18 days. Only after she was transferred to a private hospital was the dead skin appropriately removed. The unacceptable quality of treatment can be attributed in part to the lack of facilities for proper care. Most government hospitals in India, like those in the other countries, do not have plastic surgeons or medical facilities necessary to conduct necessary procedures for acid survivors.[32] For instance, in Bangalore, India, the Burn Center at the primary public hospital has 60 beds for a region with a population of over 12 million people. In addition; there is a shortage of plastic surgeons in the country. According to one medical expert, there are only around 2,500 plastic surgeons in a country of one billion people. Even if there were more trained professionals, hospitals do not have the facilities and equipment to support them. In addition to the lack of adequate facilities, government hospitals in India have routinely denied admission and treatment to acid attacks victims.[33]

However some good steps taken by the government is noteworthy. To give relief to the victims, the Central government has decided to set up a Central Victim Compensation Fund[34] (CVCF) with a corpus of Rs 200 crore which is meant for tackling crime or violence against women." A provision is also stipulated to provide special financial assistance up to Rs 5 lakh to the victims of acid attack to meet treatment expenses over and above the compensation paid by the respective states or UT Administration," Minister of State for Home Ministry Hansraj Gangaram said.

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29 Panchatantra (Vishnu Sharma) *available at*: http://stotram.lalitaalaalitah.com/2011/11/quotable-quotes-from- sanskrit-classics.html .(Visited on February 20, 2018).

30 Aarti Dhar ,"*Free Treatment Proposed for Acid Attack Victims*" The Hindu, Nov. 24, 2010, New Delhi.

31 Sonam Saigal, "*Acid attack victim question state relief scheme*", The Hindu, Sep. 23, 2016, New Delhi

32 Krishandas Rajgopal, "*Give free treatment to acid attack victims: SC to Private hospitals*", April 2, 2016, New Delhi.

33 *Ibid*

34 Central Victim Compensation Fund, Govt. of India, Ministry of home affairs, *available at:* https://mha.gov.in/sites/upload_files/mha/files/CVCFFuideliness_141015.pdf

The government has also issued strict directions that no hospital or clinic should refuse treatment citing lack of specialized facilities.[35] The directions make it clear that first-aid must be administered to the victim and after stabilization she could be shifted to a specialized facility for further treatment wherever required.[36] It is notable that action may be taken against hospitals or clinics for refusal to treat victims of acid attacks and other crimes in contravention of the provisions under Section 357 C of the Code of Criminal Procedure, 1973.[37]

From the above discussion it is clear that there's a dire need for a change in mindset, as we know"*सता हह सन्दहपदष वस्तष प्रमाणमन्तकरण प्रवृत्तय:[38]" (Sataam hi sandehapadeshu vastushu Pramaanam antahkarana pravruttayah*) (For people of character, when in a dilemma whether a particular conduct or deed is good or bad, their own inner voice or conscience is the final arbiter) if there is to be any hope of reducing and one day not having acid attacks in India. Apart from, all the judicial and legislative changes that can and should be made, what also needs to change is the deep rot in the Indian mindset, the sexist, chauvinist view of women that's engendered and endured through generations due to ignorance, illiteracy and outdated traditions and beliefs. The belief that you can own, control and have some kind of power over another person's life and body needs to be done away with. Acid attacks rob people of their bodies and souls, the medical costs rob them of their life's savings, and their appearance, in a lot of cases, robs them of social acceptance. It's a heart- rending situation that our country's people find themselves in, and it's one that needs to be dealt with at the earliest because no compensation can fill the wound of soul as we know "*सामान्याहि िकरण हह तर्ेहस्तहमरयो: कत:[39]" (Saamaanyaadhikaranam hi tejastimirayo kutah?*

Means- Where is comparison between light and darkness? There is no comparison at all.).

However, when we analyze the state of the country today, we find that even with these added laws, the enforcement is at a bare minimum, and that means hope for fewer of these attacks remains dim. Rehabilitation efforts towards victims might be rising, but if we don't address the problem at its core, which are the easy availability

35 T.V.Sivnandan, "*Govt. frames policy to pay relief to victim of rape, acid attack*",March 29, 2016, Karnatka, *available at*: http://www.thehindu.com/news/national/karnataka/govt-frames-policy-to-pay-relief-to-victims-of- rape-acid-attack/article7598327.ece (visited on Feb.24, 208)

36 Sonam Saigal, "*Acid attack victim question state relief scheme*", The Hindu, Sep. 23, 2016, New Delhi.

37 K.N. Chandrasekharan Pillai (ed.), "Lectures on Criminal Procedure", by R.V. Kelkar 98-221 (Eastern Book Company, Lucknow 8th edn., 2016).

38 Raghuvamsam (Mahakavi Kalidasa) *available at*: http://stotram.lalitaalaalitah.com/2011/11/quotable-quotes- from-sanskrit-classics.html (Visited on February 20, 2018).

39 Kumarasambhavam (Mahakavi Kalidasa) *available at*: http://stotram.lalitaalaalitah.com/2011/11/quotable-quotes- from-sanskrit-classics.html .(Visited on February 20, 2018).

of acid and our own prejudiced thinking; do we have any actual hope for a safer future?

From the above discussion it can be conclude that there is dire need to specifically address acid violence and effectively regulate the production, distribution, use, sale, and handling of acid; and also effectively enforce and implement laws designed to deter acid violence.

Uniform Civil Code: An Analysis Under Personal Laws

*Ms. Kiffi Aggarwal**

ABSTRACT

Indian society is a pluralistic society which includes a vast diversity of religions with wide range of their respective Personal Laws. But unequal treatment among individuals based on their gender in the pretext of Personal Laws is quite prevalent in India since ancient times. India being a male chauvinist society, men have always dominated the society in all spheres of life, thus making conditions of women worse. This research paper deals with those provisions of Hindu and Muslims Personal laws which in one way or other prompts gender inequalities. Thus, imparting the need of Uniform Civil Code because the overall development of the nation depends upon the abilities and potential of each and every person irrespective of sexual category. The basic aim of this paper is to look around to find the actual condition of the women in Indian society due to the Personal Laws.

This paper analyses the gender disparity and list out the problem related to gender disparity due to Personal Laws in the Indian domestic setting. This paper also analyses the scope of enactment of Uniform Civil Code in India.

INTRODUCTION

Indian society is a pluralistic society where people have faith in their respective religious beliefs or tenets which are propounded by different religions. But unequal treatment among individuals based on their gender in the pretext of Personal Laws is quite

prevalent in India since ancient times. Thus, the problem of the Uniform Civil Code has raised into India's political discourse recently mainly because many Muslim women, affected unfavorably by the personal laws, have begun knocking on the doors of the Supreme Court to uphold their fundamental rights of equality and liberty.

Now the question arises that what is Uniform Civil Code, it is a code with a common set governing every citizen irrespective of its religion. It proposes to replace the personal laws based on the scriptures and customs of each major religious community

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in the country. The Indian Constitution can direct the state under Article 44 to secure a Uniform Civil Code for the citizens applicable throughout the India.[1]

Personal Laws and Gender Inequality

Since men and women considered as two wheels of vehicles of a society, both wheels should work equally to move the vehicle of society yet they are placed at various disadvantageous positions due to gender differences. History has evidences that woman have been regarded as the properties of men.[2] And by following down by the text this statement will be justified.

- **Hindu Law**

The unequal treatment in favor of women counterpart is not a new phenomenon, it is quite prevalent in India since ancient times in the name of religion, traditions, etc. Prior to 1955, polygamy was very much prevalent in India and no property right was given to daughter in the property of her parents. But even after codification of Hindu law, some discriminatory provisions are still existent in Indian society. A woman is the goddess who brings a human into a life but she can't hold the position of a natural guardian of a child during the life of her husband.

The women's right to dwelling home is also very unjust and highly discriminatory. Female inheritors to a male Hindu intestate's property cannot ask for a partition of the intestate's residing house in which the intestate's family lives till the male heirs choose to split their respective shares. A female inheritor who is a daughter has the right of residence in the dwelling house only if she is single, has been deserted by or is separated from her husband, or is a widow.[3]

Under Hindu Succession Act, 1956, the preference is given to the male counterpart rather to female counterpart. The women are not given a birth right in the joint family property under *Mitakshara coparcenary*.

If a woman doesn't have children, then the property inherited from her husband or father-in-law would go to the husband's heirs. In the case of female intestate's self-attained property, a gift, or property obtained under a valid will first would go to her children and her husband. In the lack of children and husband, the property transfers upon her husband's heirs and then to her parents.

A widow has a right in property of her husband property but if husband wants to give his property to someone else or third party then wife has no right to oppose such statement in her husband's will. In case she married to someone else after the death of the husband then her right to be maintained by her in laws is also evaporated. Even her parents are not legally bound to maintain her as she is neither a minor nor unmarried.

1 INDIA CONST. art. 44.

2 Nevidita Giri, Laws Institution and Women Right in India 301 (Tapan Biswa, ed).

3 Chawla M. Gender justice: Women and law in India, Deep and Deep Publications, New Delhi, 2006, 33-67.

In matter of maintenance as well the women have to suffer the atrocities of being the women as neither the police nor such authority will come to the deserted wife's rescue.

Not only this, these Religious personal had also promoted the menace of child marriage, dowry system, etc. Thousands of women are maimed and burned because the husband, or the husbands, or the husband's family, is dissatisfied with the dowry brought by the wife. In India occasionally women are burned if their parents didn't pay sufficient dowry when the girl got married. 4000 women are burned every year.[4] Thus it is obvious that the codification of personal law of Hindus has not succeeded completely in eradicating the gender inequality.

• **Muslim Law**

In India, the situation of woman is very bleak but the situation of Muslim women is the most vulnerable to abuse mainly in the name of religion. Although the Holy Quran and Islam confess the equality of men and women, yet inequalities between them are very ample in many areas in practice such as marriages, divorce and maintenance, etc. In Islamic world marriage is considered to be a social contract with clear conditions in which polygamy is allowed but only a Muslim male is permitted conditionally to marry as many as four spouses at a time.

A woman may sacrifice with all her belongings for her husband, but a man may have more than two, three or four wives. This is totally an injustice towards the female counterpart; older wives feel pains and sufferings that their husband has neglected them because of his marriage of new wife. And sometimes they may be seen as slaves because they wait their master (husband) to visit them. „Studies have shown that polygamous marriages are more likely than are monogamous marriages to be torn by spousal conflict, tension, and jealousy.[5] Particularly, the stress associated with polygamous family life predisposes mothers and children to psychological problems.[6] Some have perceived this change in the family organization as an abusive or traumatic experience for the wife. Marital distress is linked with suppressed immune function, cardiovascular arousal, and increases in stress related hormones.[7] Thus, it can be said that polygamy is also a form of gender discrimination.

Since the judgment of the Shayara Bano, the concept of *Talaq-ul-Bidat* or commonly known as the triple *talaq* was very much prevalent in India which was highly discriminatory. A Muslim man only has to say the word talaq thrice in the company of two witnesses to divorce his wife. Till date, Muslim men have been using other

4 Sinha RK. Women across generation. Mohit Publications, New Delhi, 2010.

5 Salman Elbedour et al., The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature, 5 CLINICAL CHILD AND FAMILY PSYCHOLOGY REVIEW 255–271, (2002).

6 Id.

7 Salman Elbedour et al., The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature, 5 CLINICAL CHILD AND FAMILY PSYCHOLOGY REVIEW 255–271, (2002).

forms of communications such text messages and emails in order to divorce their wives.

In the affair of maintenance also the divorced Muslim wife is not needed to be maintained after the Iddat period. In the well-known case of Mohd Ahmed Khan v. Shah Bano Begum,[8] where the Supreme Court ruled in favor of granting Shah Bano alimony. The pressure from the Muslim community prompted the government to overturn the Supreme Court's decision and resulted in the passing of the Muslim Women Act, 1986, which says that wife can be only maintained till the *iddat* period.

Many Indians have heard of *Nikah Halala*, but unknown about its grim reality in the lives of thousands of hapless Muslim women. To prevent making a ridicule of the sacred bond of marriage and of the rights of women, when the man divorces his wife and marries her again and again, Islam forced the two-strike rule where a man is permitted to divorce and remarry the same woman again if the same woman weds again with another man, consummates the marriage and the man expires or out of own free will he divorces her. But, the ugliness of *Nikah Halala* burst upon the nation when a Muslim man in Jaipur lost his wife in a gamble with a friend and forced her to sleep with the latter on the pretext of *Nikah Halala*.

It is important to respect the rights of religious minorities in a secular country like India, it is also critical to ensure that such practices do not abuse basic human rights. Thus, such provisions in Muslim personal law must be reformed in conformity with the Fundamental Rights.

Scope of reformation in Personal Laws and Uniform Civil Code

The Article 25 of the constitution starts with the words "**Subject to public order, morality and health, and to the other provisions of this Part,** all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."[9] These words prescribe for limitations on right to freedom of religion, even before mentioning the rights available to the people. Thus, the Constitution empowers the legislatures to legislate these personal laws and also directs the state to enact Common Civil Code.

Some of the Muslim associates of the Constituent Assembly sought to protect the Muslim personal law from state rule. But K. M. Munshi[10] pleaded for divorcing "religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession". The Chairman of the Drafting Committee Dr. B. R. Ambedkar,[11] has also emphasized that in a secular state religion should not be allowed to govern all human activities and that personal laws should be divorced from religion.

8 Mohd Ahmed Khan v. Shah Bano Begum, AIR 1985 S.C. 945

9 INDIA CONST. art. 37

10 VII Constituent Assembly Debates, 547 (1948)

11 Id. at 550-552

The judiciary in India has been pronouncing its concern via a number of judgments showing the necessity to have regularity in personal matters of all the citizens. In the case State of Bombay vs. Narasu Appa,[12] Bombay High Court argued that the challenged legislation abolishing polygamy unconstitutionally infringed the religious freedom of a Hindu and discriminated against him on grounds of religion. The Madras High Court in case of Srinivasa Aiyar v. Saraswathi Ammal[13] relied on a passage in Reynolds v. U. S[14] that distinguished religious belief from practice and held that practice of religion was subject to state regulation. Also in the case of Mohd Ahamed Khan v. Shah Bano Begum,[15] the Supreme Court held that Section 125 Cr.P.C which imposes such obligation on all the husbands is secular in character and is applicable to all religions. Again in Sarala Mudgal v. Union of India,[16] a division bench of the Supreme Court strongly advocated the introduction of a Uniform Civil Code in India.

Again, the judiciary in the case of Sharya Bano has given a very liberal view by announcing triple talaq unconstitutional. Thus, the judiciary is promoting the idea of Uniform Civil Code among the common masses.

CONCLUSION

The present situation is open to misuse and is inhuman and unjust as it permits inhuman and undignified treatment to women. Marriage, succession and the similar matters of a secular character cannot be carried within the guarantee of religious freedom in articles 25-28. Such practices are injurious to public morals. The Courts, therefore, requested the Government of India to secure Uniform Civil Code for all citizens of India. No gender justice could be judged in its comprehensive sense, lest we have a Uniform Civil Code covering the best provisions taken from all the religions, with the sole aim of ensuring gender justice. The constitutional mandate of right to equality of status and opportunity cannot be implemented unless the women have been conferred equal rights on par with men in personal matters. However, adequate care should be taken to see that only the rights are made uniform otherwise it would violate the basic structure of the constitution.

12 State of Bombay vs. Narasu Appa, A.I.R. 1952 Bombay HC 85

13 Srinivasa Aiyar v. Saraswathi Ammal, A.I.R. 1952 Madras 193

14 Reynolds v. U.S, 98 U.S. 145 (1879)

15 Mohd Ahamed Khan v. Shah Bano Begum, AIR 1985 S.C. 945

16 Sarala Mudgal v. Union of India, AIR 1995 S.C. 1531

Vitriolage: Analysis of this Acute Hate-Crime Against Women in India in Light of the Dynamism and Changing Perspective of the Society

*Ms. Shovonita Acharjee**

ABSTRACT

The present research paper aims to throw light on the traumatic experience and difficulties of an acid attack survivor to get proper medical facilities or to obtain adequate compensation. The Criminal JusticesysteminIndia is based on the famous saying that 'hundred guilty men should be let free, but one innocent man should not be punished'. The major aim of a criminal justice system is indisputably the safety of individual life, liberty, and property. With a very few exceptions, such kind of violence is usually inflicted on women either from unrequited lovers or friends and family feuds. In such incidents it is usually observed that the malefactor cannot bear the rejection and seeks to destroy the body of the woman who has dared to stand against him. Thus, such vitriolattack is extremely violent crime by which the perpetrators seek to inflict severe physical and mental suffering on his victim, asaresult, the sufferer experiences worthlessness, afraid and modified and become social outcasts because of their appearance. They may become mortify and demean to walkout of their house or get married, have children, get a job, go to school, etc. In recent report, the rate of acid attacks in India has increased in alarming rate with 459 incidents that have been reported from 2011-June 2019 and 153 cases reported from January 2002 to October 2010. Laws in India concerning compensation to the victim of crime can be observed through various Legislation and Constitution of India. In such cases the compensation is usually determined by taking in to account the nature of the crime, the claim by the victim and the ability of accused to pay. However, in there centtimes there have been a marked shift in judicial and legislative approach. This paper aims to analyze this shift in the statutory provisions, role of judiciary and other governmental organizations dedicated to serve the causeing ranting compensation and rehabilitation to victims of acid attacks in India and also seeks to highlight the change in perspective and dynamism of the Supreme Court in its decision given in Lakshmi v. Union of India (2014), taking notice of the plight of acid attack victims as well as easy availability of acid in the

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market, further laying down guidelines on the regulations of acid. For the first time, the Court also raised the issues of compensations for such victims to be given by the State. The paper also analyses the 226th Law Commission Report set in 2008 and JS Verma Committee Report of 2013 and lay emphasis on implementing stringent laws to the perpetrators and suggest further measures to curb these incidents and assist these victims to restore back tosociety.

Keyword: *Acid-attack, Women Victimization, Assault, Criminal Justice, Constitution of India.*

INTRODUCTION

"Society is guilty if anyone suffers unjustly".

- Justice V.R. Krishna Iyer

The carriage of justice is often misconceived to halt at the signature on a judgment; however, the true destination lies at the lap of the victim. While it is the courts that preserve the sanctity ofjustice, it is the prerogative of the State to support the pillars of justice. During the eternal procedure of trial in India, the anguishes of victims are utterly unnoticed by empathy for the accused. Especially the position of girls, women, and children who happen to be a victim can be disastrous specifically in case of rape and acid attacks victims where delay in collection of samples can render the entire case baseless. The jurisprudential effect of Victimology has debated extensively on where to place the ball of responsibility - whether the responsibility of the State ends merely by registering a case or conducting investigation or initiating prosecution and sentencing an accused or whether apart from pursuing these steps, the State has a further responsibility to the victim. Likewise, there remains a confusion whether the court bears a legal duty to award compensation irrespective of conviction. Even in the event when the machinery of justice fails, it has been noticed by the bench that the eventual wrong has been done to the victim and his safety and welfare are of the same prominence as that of theaccused.[1]

Assisting victims of offense or crime is of boundless implication because victims have grieved irremediable harms because of a crime. The difficulties of sufferers of victims and the effect of crime are long-lasting. Therefore, the agencies of the criminal justice system should be receptive to the needs of the victims of crime and address their issues sincerely and empathetically. Various efforts are made to improve the criminal justice system in India by the judiciary but there is alot to be done in order to make a conducive environment for victims.

Acid Vitrolage: An Acute Crime Against Women

"*Law should not sit limply, while those who defy it go free and those who seek its protection lose hope*".

- Jennison v Baker, (1972) 1 All ER 997[2]

1 Acid Throwing, available at https://en.wikipedia.org/wiki/Acid_throwing visited on August 19, 2019).

Crime is not something which has been created by Almighty rather it is the creation of human being. There are numerous ways where people are committing crime in the society. Acid Vitrolage or Acid Attack as the name given, is one of the is the most he inous form of gender based crime against women irrespective of age, caste, and religion. Acid victimization has deliberated globally and even several countries are sensitizing the problems so as to virtuously streng then the victims. Sulphuricandnitric acid, thrownona human body causing skintissuetomelt, often exposing bones below the flesh and sometimes even dissolving the bones. This gender-based violence is usually committed with an aim to destroy the physical appearance of a women thereby causing an extreme lifelong mentaltrauma.

Meaning

Protection off undamental freedom and human dignity is one of the most prominent goals that the world community tries to achieve at the national, regional and international level. The Law Commission of India in its 226th report has expressed that the majority of acid attack victims are women, "particularly young women for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. The perpetrator cannot bear the fact that he has been rejected and seeks to destroy the body of the woman who has dared to stand up to him"[3]

Under the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, states parties are obligated to prevent and adequately respond to all forms of gender discrimination, including gender-based violence.[4]

United Nations International Children Emergency Fund defines acid violence as, "*in the acid attack a person throws acid (thekind foundincar) on the face or any part of body of other person. Anynumber of reasons can lead to acid attacks. Sulphuric acid is ubiquitously being the basic in expensive in gredient for making lead acid batteries in all motor vehicles all over the world. There does not appear to anyway of reducing its availability anyways*" (UNICEF, 2000).

According to **Section 326A of Indian Penal Code**, "*Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either*

2 Jennison v Baker, (1972) 1 All ER 997; Justice V.S. Malimath, Report of the Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs,(2003),https://mha.gov.in/sites/default/files/criminal_justice_system_2.pdf. [hereinafter "Malimath Committee Report"].

3 226th Report, Law Commission of India, Proposal for the Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime 7 (July 2009).

4 *See* Article 1, Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], Dec. 18, 1979, 1249U.N.T.S. 13, 19 I.L.M. 33 (1980); CEDAW Committee, *General Recommendation No. 19: Violence Against Women* (1992).

description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine[5]."

Section 326B of Indian Penal Code, "*Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fin*e."

The **National Commission of India** defined acid attack to be "any act of throwing acid or using acid in any form on the victim with the intention of or with knowledge that such person is likely to cause to the other person permanent or partial damage or deformity or disfiguration to any part of the body of such person".[6]

The **United Nations Entity for Gender Equality and the Empowerment of Women**, defines "Acid Attack" *as any act or omission, caused by corrosive substance/acid to be thrown or administered inany form on the victim with the intention that such person is likely to cause to the other person permanent or partial damage/injury or deformity or disfiguration to any part of the body of suchperson*.

Reasons for Acid Attacks: Indian Scenario in Past and Present

The World Health Organization (2013) regarded violence against women as a 'global health problem of epidemic proportions[7].' International norms have recognized gender-based violence and especially violence against women as crime as well as human rights violation under the various instruments of the United Nations. In India, according to National Crime Record Bureau, Acid attacks increased 222 in 2015 from 203 in 2014. But when compared to 2018 the number of incidents is reduced from 39 to 18. While there has been a marginal decline in the incidents of acid attacks in the country in 2018compared to the previous year, West Bengal accounted for the highest number of cases of such attacks, according to the National Crime Records Bureau (NRCB) report released earlier thisweek[8].

In 2018, 228 incidents of acid attacks were recorded across the country against 240 victims. Of these, West Bengal recorded 50 incidents involving 53 victims.

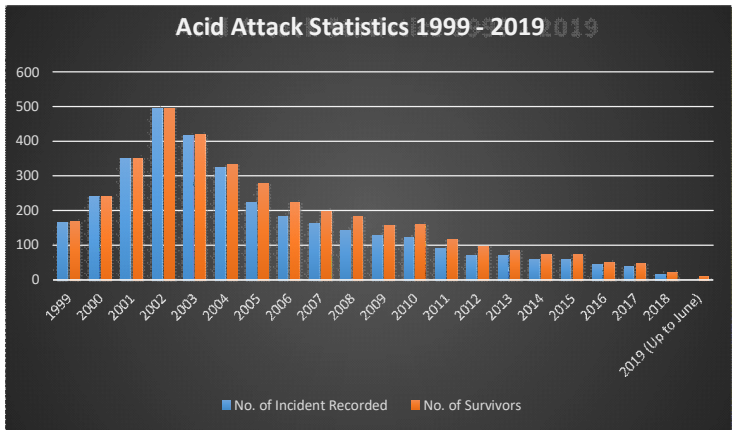
In 2017, 244 acid attacks were recorded across the country and Bengal came second on the list with 54 incidents of acid attacks, while Uttar Pradesh recorded 56 incidents. Women were the victims in 131 of the 228 attacks accounting for more than 57% of the cases.

5 K.D.Gaur, Textbook on Indian Penal Code 634(Universal Law Publishing, Noida, 5th edition, 2014)

6 Acid violence as on www.acidviolence.org/index.php/acid-violence

7 https://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en/

8 Singh Sahay Shiv, "West Bengal tops in 2018 acid attack cases: NCRB" published in The Hindu. Dt: 11thJanuary, 2020 at :https://www.thehindu.com/news/national/other-states/west-bengal-tops-in-2018-acid-attack-cases-ncrb/article30537254.ece



** Source: NCRB data

Even though, by its very nature, acid attacks fall in the category of most heinous forms of crimes committed against society, it took a while for the Indian law makers to acknowledge this brutal form of violence as a separate crime, as prior to 2013 there was no specific provision in law punishing acid attacks as an offence *per se*. The perpetrators were tried under section 326 of the Indian Penal Code which penalizes voluntarily causing grievous hurt. It was only on 3 February 2013 that the Criminal Law (Amendment) 2013 inserted Sections 326(A) and 326(B) in the Indian Penal Code, 1860 to deal with acid attacks. Eminent academician AfrozaAnwary feels that, men throw acid on women's faces as a mark of their masculinity and superiority, "to keep women in their place[9]. Additionally, a report written by a leading organisation in India working on acid violence, "the Campaign and Struggle against Acid Attackson Women (CSAAAW)", found that sexual harassment or assault in response to a woman or girl refusing such advances or demanding that the violence stop often precede suchattacks[10]

This logic would apply to India as well, as there is a strong patriarchal culture running through theveins of Indian society. The 226 threport of the Law Commission of India addsthatacid" attacks are used as a weapon to silence and control women by destroying what is constructed as the primary constituent of her identity[11]." Acid attacks are often referred to as a 'crime of passion[12],' fueled by jealousy and revenge. Awoman's virginity is usually the major point of concern in the marriage circle, and therefore, a woman's involvement in romantic relationships before marriage is

9 Afroza Anwary, Acid Violence and Medical Care in Bangladesh: Women's Activism as Carework, 17 Gender and Society 307 (2003)

10 Campaign and Struggle against Acid attacks on women (CSAAAW), Burnt not defeated 21-22(2007)

11 226th Report, Law Commission of India, Proposal for the Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime 7 (July 2009)

12 Acid Throwing: A Cause of Concern in India: http://medind.nic.in/iaa/t14/i3/iaat14i3p989.pdf

proscribed. The vindictive men, on their proposals being turned down by women or their families, resort to acid attacks to destroy the woman's appearance and relegate her to a fate worse than death. Not only single women, but also married women fall prey to such aheinousact by their husbands or any other members of the family. Awoman,wholeaves behind her paternal house to reside with her husband for a happy marital life, when she becomes a victim of such a crime, the perpetrator being her husband himself, there cannot be anything to compensate the loss suffered by such a woman.

Unfortunately, the numbers of acid attack cases are still on rise indicating that merely criminalizing acid attack is not enough, instead adeeper deliberation is needed on core issues surrounding the crime of acid attack such as the acid sales restrictions, prosecution and rehabilitation realities post 2013. Further to uproot this crime from its base there is a need to understand acid attack in the social context by examining the underlying causes, its consequences and further to overcome the multiple barriers to justice for its victims.

Consequences of Acid Attack on Victims

Today in the modern era, the appearance of person is playing vital role. An acid attack has enduring consequences on the life of the victim who faces perpetualt or ture, permanent damage and other problems for the rest of her life. Victims normally feel worthless, afraid, modified, and become social outcasts because of their appearance. They may become too traumatized and embarrassed to walkout of their house and carry out simple tasks let alone get married, have children, get a job, go to school, etc. Even if they are willing to pursuea normal life, there is no guarantee that society itself will treat them as normal human beings given their appearance and disabilities after anattack[13].

Psychological Consequences

Victims of attacks donot only undergo severe physical traumabutal sounder gotraumatic changes in the way they feel and think. Psychological trauma is caused by both the terror victims suffer during the attack, as they feel their skin burning away, and after the attack by the disfigurement or disabilities that they have to live with for the rest of their lives. The acid especially, *Hydrochloric, Sulphuric acids have a catastrophic effect on human flesh. These corrosive substances cause the skin tissue to melt. Permanent scars as can be seen, in short, disfigure a human being's body for life. Furthermore, if acid enters the eyes of the victim during an attack, as is common in acid attack cases, it damages these vital organs permanently. Many acid attack survivors have lost the use of one or both eyes*[14]. Victims suffers from psychological symptoms such as depression, insomnia, nightmares, fear about an other attack and/or fear about-facing the outside world, headaches, weakness and tiredness, difficulty in intent and recalling things, etc. They

13 Mamta Patel, " A desire to disfigure: Acid Attack in India",7 IJCAST, 2(2014)

14 Supra, 11

feel perpetually depressed, ashamed, worried, and lonely. In this regard, compensation to cover vital surgeries for victims who can no longer support themselves becomes imperative[15].

Social and economic consequences

Victims faced is crimination during their life time from society and they become isolated. They are embarrassed that people may stare or laugh at them and may hesitate to leave their homes fearing an adverse reaction from the outside world. Victims who are not married are not likely to get married and those victims who have got serious disabilities because of an attack, like blindness, will not find jobs and earn a living. Discrimination from other people, or disabilities such as blindness, makes it very difficult for victims to fend for themselves and they become dependent on others for food andmoney.

Physical Consequences

In our society, where people believe in beauty of physical appearance rather than inner beauty, when a person's body gets maimed with acid, that person is looked upon as, nothing but an "alien". The victim, if she was unmarried, she can never get married again owing to her marred physical appearance, andthe rest are often disowned by theirfamilies.

Acideatsthrough two layers of the skin, i.e., the fat and muscle underneath, and sometimes not only eats through to the bone but it may even dissolvethe bone. The deepness of injury depends on the strength of the acid and the duration of contact with the skin. Burning continues until the acid is thoroughlywashed offwith water. Thrown on a person's face, acid rapidly eats in to eyes, ears, nose and mouth. Eyelids and lips may burn off completely. The nose may melt, closing the nostrils, and ears shrivel up. Acid can quickly destroy the eyes, blinding the victim. Skin and bone on the skull, fore head, cheeks and chinmay dissolve. When the acid splashes or drips over the neck, chest, back, arms or legs, it burns every where it touches.

It usually takes 3 to 12 months for burn wounds to heal. Thicks cars, which are painful anditchy, grow over the healed burns. The scars grow and change over 1 to 2 years. As the scars thicken and contract, they can cause permanent disability by stiffening joints and restricting movement[16]. Long periods of physical therapy is the only process needed to minimize victims' lack of movement and dramatically can reduce the thickness and stiffness ofscars.

15 Supra, 11

16 Supra 11

Legal Provisions and Developments: International Endeavour

"*Don't stare at me, I am humantoo*!"[17]

Acid attacks are the brutal form of violence that undermines the basic rights guaranteed to an individual under several human rights instruments. The duty to prevent human rights violations includes an obligation to enact legislation designed to curb acid violence. States should enact laws that provide for appropriate criminal remedies and criminal procedures to ensure that perpetrators are brought to justice. Additionally, to combat acid violence, it is essential for governments to enactlaws to limit the easy availability of acid. Following are some of the significant provisions of international human rights instruments as well as international initiatives that were being initiated to address gross human rights abuses of acid attacks.

Universal Declaration of Human Rights

The wordings of Article 3 of the *Universal Declaration of Human Rights* (UDHR) provide for right to life, liberty and security of person. The term 'person' *includes every single individual*. However, this significant provision of the UDHR is greatly undermined by the incidents of acid attacks. In most of the cases, the victims are not killed but they are given a life of unexplainable miseries and complications. The chemical burns of acid can completely destroy the nose, throats and eyes of the victim that makeseating and breathing intolerable or completely impossible. It destroys eyesight or makes the victim blind.[18]

Article 5 of the UDHR prohibits to rture and cruel, in human or degrading treatments. However, the consequences of acid attack are no less than cruelty and torture. Social isolation, unbearably expensive cost of medical treatments, guilt and shame makes the victim feel like they are a burden for their own families. Inadequacy of rehabilitation schemes is another major problem as far as acid attack is concerned. Hence, considering the consequences and after attack changes that the victims face; acid attacks can be regarded as the most degrading and dehumanizing form of violence prevalent in the world[19].

Under the provision of Article 25(1) of the UDHR right to *health care has been made a fundamental human right. It further elaborates that everyone has a right to a standard of living adequate for health of himself and of his family, including medical care and necessary social services and the right to security in the event of unemployment, sickness, disability or other lack of livelihood incircumstances beyond its control*. However, despite this significant provision being inserted under UDHR, many victims who cannot bear the huge

17 Harinder Baweja, Don't stare at me, I am human too: acid attack survivor Laxmi, Hindustan Times (13/07/2013) available at http://www.hindustantimes.com/stopacidattacks/don-t-stare-at-me-i-am-human-tooacid-attack-survivor-laxmi/article1-1095721.aspx

18 Awasthiand Kataria, *Law Relating to Protection of Human Rights*, Orient Publishing Company, New Delhi, 2011, Print.

19 Awasthi and Kataria, *Law Relating to Protection of Human Rights*, Orient Publishing Company, New Delhi, 2011, Print

expenses of treatment receive extremely poor or in some cases no medical care at all. Without a concrete provision at the national level to determine the quantum of compensation to be paid, victims in most cases only get negligible amount of financial help[20].

Convention on Elimination of All Forms of Discrimination against Women

The United Nations *Convention on the Elimination of All Forms of Discriminations against Women* (CEDAW) described as the Magna Carta of women's human rights as it essentially constitutes the international Bill of rights for women. Discrimination against women also violates the principles of equality of rights and respect of human dignity[21].

Declaration on the Elimination of Violence against Women

The Declaration on the Elimination of Violence against Women was passed in 1993 by the United Nations General Assembly aims for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings. India is under an obligation to implement the provisions of this Declaration as it has ratified the Declaration on the Elimination of Violence against Women. Under Article 4 (f) of this declaration the member states are recommended to develop preventive approaches with the help of legal measures for violence against women. Under this provision the state parties are expected to focus on all such measures; be it legal, political, administrative or cultural innature.[22]

General Recommendation No. 19 (eleventh Session, 1992)[23] by the Committee on Elimination of Discrimination against Women

Para 11 of the General Recommendation No. 19 made by the Committee on the Elimination of Discrimination against Women views that the traditional attitudes of regarding women as subordinateto men results in the widespread practices involving violence or coercion[24]. In this recommendation, acid attack finds a mention as a type of violence against women. The Committee views that the prevailing prejudices and practices of regarding women as subordinate to men may justify gender-based violence as away of protecting or controlling women. However, the physical and mental effect

20 Awasthi and Kataria, *Law Relating to Protection of Human Rights*, Orient Publishing Company, New Delhi, 2011, Print

21 *Human Rights in International Law.* Council of Europe Publishing, Universal Law Publishing Co. 2011.Print

22 Brownlie, Ian and Goodwin-Gill, Guy S. *Basic Documents on Human Rights*, 2007.Print.

23 "General Recommendations made by the Committee on the Elimination of Discrimination against Women." http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm.UnitedNationsEntityforGenderEquality and the Empowerment of Women. Web. 21 May,2016.

24 Violence against women is a long existing problem that includes family violence and abuse, forced marriage, dowry deaths as well as acid attacks.

of such violence is severe on women. It deprives them the equal enjoyment, exercise and knowledge of human rightsand fundamental freedoms.

Acid Survivors Trust International (ASTI)

At the international level, Acid Survivors Trust International is the only organization in the world that works to end acid violence across the world. This organization works to increase awareness of acid violence and develop effective responses both at the national and international levels. The partner organizations of ASTI in Bangladesh, Pakistan and Cambodia have effectively played their advocacy role that led to legislative reforms and reduction in the number of such violence. In Bangladesh the government has introduced acid specific legislation in the year 2002, the Pakistani Government passed the *Criminal Law Amendment Act* 2011, the Cambodian government passed legislation in 2012[25].

Legal Provisions and Developments: National Endeavour

Initially, Indian criminal law did not recognize acid attacks as a separate offense. They were usually classified under Section. 320 of the Indian Penal Code ("IPC") as 'grievous hurt', with punishment for grievous hurtunder S.325 IPC. However, S.325 IPC is classified as abailable and compoundable offence, which means that the accused and the victim could mutually settle, thereby making acid attack in particular a private conflict and not a crime against the society, further the punishment meted out to the accused could only go as far as 7 years of imprisonment. Section 326 IPC which prescribes punishment for voluntarily causing grievous hurt by dangerous weapons or means, wasn't particular to acid attacks alone, rather in most cases where S.326 IPC was applied the accused would often get a sentence lesser than 10 years unless the acid attack caused the death of the victim. However, the said section was usually applied in cases where there was grievous hurt or such hurt has likely to caused death to a person, additionally, one need to understand that S.326 IPC did not cover attempt to throw acid, which left the accused plenty of loop holes to get away with a lightersentence.

In the *Delhi Domestic Working Women's Forum*case[26], the Supreme Court of India having regard to the Directive Principles contained under Article 38(I) of the Constitution of India[27] had pronounced upon the need by the government to setup a Criminal Injuries Compensation Board as the victims frequently incur substantial financial loss and are too traumatized to continue in employment. The Supreme Court had suggested that this board should give compensation whether or not a conviction takesplace.

25 "Acid Survivors Trust International." http://www.acidviolence.org/. Web. 21 March, 2016.

26 *Delhi Domestic Working Women's Forum Vs. Union of India, (1995) I SCC 14;*

27 Art.38.(1)- The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life

In, *Shesnath v. State of Chhattisgarh*[28] in which the accused person threw acid on two person causing death to one of them and severe injuries to the another on the face, chest, and neck of the other. The Additional Session Judge, however, sentenced the accused to only two years of rigorous imprisonment under S.324 IPC (voluntarily causing hurt by dangerous weapons or means) and four years of rigorous imprisonment under S.304 IPC (culpable homicide not amounting tomurder).

Again, in *Devanandv. The State*[29], the Delhi High Court convicted the accused under S.307IPC (attempt to murder) but sentenced the accused up to 7 years of rigorous imprisonment.

In the case of *State of Karnataka vs. Joseph Rodrigues,*[30] involving acid attack the accused threw acid on a girl named Hasina, for refusing his job offer, which deeply scarred her physical appearance, and lefther blind. This was a landmark case as it was the first time that a compensation which was quite a large sum was given to the victim to meet the medical expenses including that of plastic surgeries.

In *Syed Shafique Ahmed V State of Maharashtra*[31], personal enmity with his wife was the reason behind a dreadful acid attack by the husband on his wife as well as another person, which caused disfiguration of the face of both the wife as well as that of the other person and loss of vision of right eye of wife. The accused was awarded Rs.5000 as fine and only 3 years of imprisonment. This is yet another example where punishment is awarded without taking into account the deliberate and gruesome nature of the attack, but merely on the basis of technicalities of injuries.

But with the insert of The Criminal Law (Amendment) Act, 2013, there seems to be a ray of hope for the victims of such heinous crime, as the changes brought about by the said Act concerning specific punishment for offenders and mandatory provisions for providing compensation to the victims of acid attack. The said Act has inserted **Sec.326A**[32] and **326B**[33] under the Indian Penal Code, 1860 and also

28 Shesnath v. State of Chhattisgarh, Criminal Appeal No.341/2011, decided on 13.12.2011

29 Devanand v. The State, 1987 1 Crimes 314

30 *State of Karnataka vs. Joseph Rodrigues, 2006*

31 2002 CriLJ1403

32 Sec.326A, Indian Penal Code,1860- Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine; Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim; Provided further that any fine imposed under this section shall be paid to the victim

33 Sec.326B: Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent of partial damage or deformity of burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years, but which may extent to seven years and also be liable to fine.

Sec.357B[34] and **357C**[35] of the Code of Criminal Procedure, 1973, to ensure adequate relief to the victims of vitriolage. By virtue of this amendment, the word "Acid" *for the first time was defined and included any substances which has acidic or corrosive character or burning nature, capable of causing body injury leading to scars and disfigurement or temporary or permanent disability*[36]. Further the section also talks about the minimum punishment prescribed is 10 years' rigorous imprisonment and the maximum is life imprisonment.

However, the landmark case which brought about a change in the field of this gruesome violence was the case of Laxmi's.[37] The Hon'ble Supreme Court of India held that" *keeping in mind the constitutional provisions of Arts.21, 14, 15 and 32, issued guidelines as preventive measures and relief to the victims of the acid attack, and also passed an order urging the need for framing rules regulating retail sale of acids in the society., and also directed the state authorities to provide a uniform compensation of Rs. 3- lakh as expeditiously as possible. The accused were awarded rigorous imprisonment of 7 and 10 years respectively*."

In *Parivartan Kendra v UOI*[38], two Dalit girls of Bihar, who were attacked by four assailants whothrew acid on the face and bodies of the girls while they were sleeping on their rooftops. The Supreme Court issued a direction that the State Governments should seriously discuss and take up the matter with all the private hospitals in their respective State to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full treatment should be provided to such victims including medicines, food, bedding, and reconstructive surgeries. Further, it opined that the State Government should take as tringent action be taken against those erring persons supplying acid without proper authorization and the concerned authorities would be made responsible for failure to keep a check on the distribution of the acid.

In 2019, the Supreme Court in *Omanakuttan vs The State of Kerala*[39], opined that "*the act of causing grievous hurt by use of acid, by its very nature, is a gruesome and horrendous one, which, apart from causing severe bodily pain, leaves the scars and untold permanent miseries for the victim*."

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34 Sec.357B: The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code

35 Sec.357C: All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code, and shall immediately inform the police of such incident.

36 Sec.326A, Indian Penal Code,1860

37 Laxmi v. Union of India, (2014) 4 SCC 427

38 2015(13) SCALE 325

39 CRIMINAL APPEAL NO.873 OF 2019

Irrespective of judicial pronouncement the glacial pace of India's legal system suffers agreat deal due to a slow judicial process and inadequate compensation and often the attackers, though charged, takes between five and ten years foraconviction. With Laxmi's judgment, its ought to bring at part he amount of compensation granted to the victims by prescribing a minimum amount, as the Supreme Court has rightly observed that the *compensation granted earlier was grossly inadequate*

In, the landmark case of *Bodhisattwa Gautam*[40], the Supreme Court issued a set of guidelines to help victims who cannot afford legal, medical and psychological services, in accordance with the Principles of UN Declaration of Justice for Victims of Crime and Abuse of Power[41]. Keeping in mind the precedential judgment, yet in the case of *Chairman, Railway Board. v. Mrs. Chandrima Das and others*[42], the Hon'ble Supreme Court opined that victims of any crime and of human rights violations (regardless of their legal status) have a right to be compensated for the losses sustained due to the crime committed on her/him which included that while awarding the compensation what has to be taken into account is the pain, suffering and shock as well as loss of earnings and the expenses of surgeries as per the case. Thus, apart from providing compensation under Section 357A[43] of the Code of Criminal Procedure, the victim should be provided compensation by the accused in accordance with Section 357B.

40 *Bodhisattwa Gautam vs. Subhra Chakraborty, AIR 1996 SC 922;*

41 The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly, 1985), considered the 'magna carta' for victims

42 *Chairman, Railway Board. v. Mrs. Chandrima Das and others, AIR 2000 SC 988.*

43 357A, The Code of Criminal Procedure, 1973- (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. (2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section(1). (3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation. (4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation. (5) On receipt of such recommendations or on the application under sub section (4), the State or the immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deemsfit. District Legal Services Authority shall, after dueen quiry award adequate compensation by completing the enquiry within two months. (6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering ofthevictim,mayorderfor immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

Therefore, it is the utmost duty of judiciary to provide anadequate compensation which would been ough to recompose the irreparable injury on her body and soul, as it has been rightly observed by the Apex Courtthat "*to repair the wrong done and give judicial redress for legal injury is acompulsion of judicial conscience*".

According to this section, it is mandated that every state should establish Victim Compensation Fund in co-ordination with the central government. The purpose of this is to provide funds to the victim of the crime. The compensation is to be provided as to the scheme that has been adopted by the particular state. The compensation could be provide deither to the victimor his dependents who have suffered loss or injury because of crime and who also require rehabilitation. Apart from this, the Central Victim Compensation Fund (CVCF) has also been set up with the initial corpus of '2 billion. It has been introduced by the Ministry of Home affairs. The purpose of it is to support the prevailing victim compensation schemes to reduce the bigotry in quantum of compensationnotifiedbydifferentstates/union territories. Underit, victims will be provided compensation on the ground of various injuries, loss and death with respect to acid attack, rape, human trafficking, disabilities and burns[44]. A criteriahas also been laid down for the eligibility of the victims to claim compensation under CVCF. The victim can claim compensation if adeclaration with application form is filed that no compensation has been received from the government (central/ state); there is substantial loss of family income, the loss should be such as it becomes difficult to make both ends meet or the cost on the medical expenditure is exceeding the fiscal capacity of the family. The compensation would also be available to the victims or dependent sunder Section 357A(4) CrPC, eventhough the culprit is undetectable.

The scheme provides for maximum compensation of '0.3 million. Also, if the age of the victim is less than 14 years of age, the victim shall be eligible to get additional amount of '150,000.

Apart from this, the National Commission for Women, New Delhi, also in its Report 2008–2009, drafted the 'Scheme for Relief and Rehabilitation of Offences (by Acids) on Women and Children'. The main objective of this scheme is to enable the acid attack survivors with suitable medical treatment and communal, mental and fiscalsupport.

It observed that 'Acid attacks permanently disfigure and eventually destroy the victim, both physically and psychologically. The victims need short- and long- term medical facilities in the form of specialized plastic surgery'.[45]

This scheme also suggested to institute a federal system of 'Criminal Injuries Compensation Boards' at all the three levels of government that would predominantly handle cases relating to acid violence.

44 See https://pib.gov.in

45 See http://www.thehindu.com/news/national/ministry-national-commission-for-women-in-the-dark/article4446923.ece

Additionally, it has also been observed by the National Legal Services Authority (NALSA) that legal service institutions can play apivotal role in providing access to compensation under Victim Compensation Scheme. It came out with NALSA (Legal Services to Victims of Acid Attacks) Scheme, 2016[46].

Its main objectives are as follows:

1. To streng then legal aid and representation at the national, state, districtand taluka levels for victims of acid attacks inavailing the benefits of the various legal provisions and schemes for compensation which exists;
2. To enable the victims of acid attacks to get access to medical facilitiesand rehabilitative services;
3. To create and spread awareness about the entitlements of the victims of acid attacks through the District Legal Services Authorities, Taluka Legal Service Committees, panellawyers, paralegal volunteers and legal service clinics;
4. To enhance capacities at all levels of penal lawyers, para legal volunteers, volunteers in legal services, government officers tasked with the implementation of the various schemes, service providers, police personnel, non-governmental organizations by organizing training, orientation and sensitization programme; and
5. To understand research and documentation to study the various schemes, laws, etc., to find out the gaps, the needs and to make suggestions to the appropriate authority[47].

A plan of action has also been prepared to fasten and accelerate the process of receiving compensation to be given to the victims of acid attacks. It talks about legal aid to be provided to the victim of acid attack. In case of death of a victimon account of acid attack, legal aid to be provided to the heirs of the victim. State Legal Services Authorities to ensure speedy interim compensation without delay on account of compliance of legal formalities. One penal lawyer to bedesignated by District Legal Service Authority and Taluka Legal Services Committee as legal service officer. To enforce the provisions of the scheme, District Legal Services Authority to appoint appropriate number of para legal volunteers. Para legal volunteers to act as a bridge between acid attack victim and legal service institution. Legal services clinic to be established at hospitals for treatment to be meted out to the acid attack victims. Para legal volunteers to help and support victims and also to get them certificates from the hospital as well as to make ensure that they get all rehabilitative services. Opening of the legal services clinic to be communicated to all government departments, NGOs, etc. Action to be initiated against the hospital who denies to treat victim suffering acid attacks. In matters pertaining to functioning, infrastructure, clinics control, maintenance of records and registers, it is the National Legal Services Authority

46 Seehttps://nalsa.gov.in/acts-rules/preventive-strategic-legal-services-schemes/nalsa-legal-services- to-victims-of-acid-attacks-scheme-2016

47 *Id*.

(Legal Services Clinic) Regulation, 2011, to be applied to all clinics. Apart from this, State Legal Services Authority is required to work incoordination of state government, union territories and government departments. State Legal Services authority are requi- red to make database relating to hospitals, database to include all the schemes of the central, state, policies and regulations which are related to acid attacks. Then provisions have also been made to ensure implementation of assorted schemes. Various awareness programmes, training and orientation programmes organized in order to create awareness is also the mandate.

Suggestion & Conclusion

The position of women in India is very weak and feeble. Sinceages, she has been made to suffer multitudinous and countless amount of violence during her life time. Out of these incalculable number of violence, acid attack is considered to be the most horrendous and awful kind of violence where the woman is made to suffer for no blunder and blooper on her part. How far this is justified and tenable? What is their culpability? Are they not human beings? Isn't acid attack worse and shoddier than rape? Do they not have a right to live with self-respect and serenity? Should they continue to suffer as they have been? Should society continue to pester, agonize and torment them, the way they have been doing? Do they deserve such a pathetic and wretched treatment by the society? Are the provisions in IPC sufficient to curb such a kind of violence?[48] These and many more questions keep on cropping up and hauntingus. The sequestions immediately require an answer.

The Constitution of India through Article 15 (3) empowers the State to make special provisions for women and children. Clause (3) of this Article states that "*...Nothing in this article shall prevent a State from making any special provision for women and children.*"[49] Undoubtedly, legal succors have been incorporated, but they are not sufficient to deal with this heinous and monstrous crime where the life of the woman is devastated and wrecked within fraction of seconds and that too without any fault and slip up on their part. Though the changes brought about by the Criminal Law (Amendment) Act, 2013, provides relief to a certain extent, what has to be noted here is that, the provision for punishment provided under Secs. 326A and 326B, provides for a general punishment totally neglected the gender dimension of this offence in India. The immediate hurdle obstructing the judgment is the doctrine of "prospective application". The directions issued by the Court do not carry retrospective effect, which means that victims of acid attack prior to the verdict do not get benefitted. Therefore, the introduction of specific legislation and compensation schemes having retrospective effects with regard to acid attacks survivors becomes imperative.

48 Shivani Goswamiand Rakesh Kumar Handa, The Peril of Acid Attacks in India and Susceptibility of Women, published in Journal of Victimology and VictimJustice 3(1) 72–92,2020©2020 NationalLaw UniversityDelhi Reprintsandpermissions:in.sagepub.com/journals-permissions-indiaDOI:10.1177/2516606920927247 journals.sagepub.com/home/vvj

49 The Constitution of India, 1950, Article 15 (3).

Several laws and schemes like restriction of acid, harsher punishments for the perpetrators and free access to healthcare facilities to acid attack victims, have been laid down by our lawmakers, however the main focus must be restrictions and prevention. An acid attack has a lifelong consequence on the life of the victim. It permanently destroys the future of the victim. It permanently scares the victim's life. It isvery difficult for the victim of acid attack to get jobs, to get married, go to school etc. Society stare and look at them as if they were not human beings. Society condemns them for their appearances. Even if they want to pursue a normal life, then what is the surety that society will accept and treat them as normal human beings by looking at their appearances? Hence, it's high time, measures like strengthening NGO's, electronic, social and print media campaign must be adapted to change the orthodox mentality and justifying the violence against women. It is not easy to provide justice to the victims of vitriolage unless a strict measure istaken.

Thus, the court should have kept in mind both the current law penalizing acid attacks, and the needs of majority of the victims, and issue directions for implementing free medical-aid, or compensation for treatment in are nowned government medical facility providing cheap, but efficient services. Apart from the above it is further submitted and recommended that the distribution and sale of Acid should be banned except for commercial and scientific purposes. With respect to this, the police force also needs to be sensitized on this matter and fast-track courts should also be established for speedy trial of the cases. Additionally, a clear updated Bill of the NCW, or recommend a new Bill on acid attack and sales and implement the same unvaryingly across the nation, is the utmost need of the hour. So, the government has to make more new laws, legislation, amendments and take stringent measures to end this menace. The Government should also arrange more medical care and effective rehabilitation program to be given to victims of acid attack.

Genetic Privacy: Expanding Horizon of DNA Technology

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ABSTRACT

DNA based technology is most influential and unanimously accepted technology in the present world which has opened the new door for the criminal investigation, in the legal field and also in the medical world. There is always a need to regulate or control the new techniques for the common benefits of the society This article is trying to find out the various issues related to the DNA based information or the genetic It is explained why genetic information is different to other sensitive medical information, why researchers and biotechnology companies have divergent new rules to protect genetic privacy and favor anti-discrimination laws instead, and it is also discussed why genetic privacy is important and why it should be protected.

INTRODUCTION

The safety of the society from criminal activities is the State's main obligation and responsibility. On the other hand, these obligation and responsibility has to be implemented with respect of various fundamental moral values, existing legislations and recognized human rights principles. Today DNA data is an essential tool in many criminal investigations and prosecutions. Despite that, some concerns have expressed in regard to the use of DNA information, are related to the collection, retention and release or share of genetic information, its potential conflict with some basic legal aspects, human rights (respect of dignity of human and genetic privacy right, respect of human dignity) and ethical principles (consent, autonomy, integrity of the body, etc.).

DEVELOPMENT OF THE CONCEPT OF RIGHT TO PRIVACY

The English words "private" and "privacy" come from the Latin privatus, meaning "withdrawn from public life, deprived of office, peculiar to oneself" By the end of the 19th century, "privacy" had become related to legal and political rights, associated with modernity and advanced civilization, and attributed relatively or very high value.[1] The

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1 "Privacy - Rights of Privacy in National and International Law –Available at: https://science.jrank.org/pages/10849/Privacy-Rights-Privacy-in-National-International-Law.html last visited 4th July 4, 2020

preamble to the Universal Declaration of Human Rights commences with a difference to the inherent dignity of all members of the human family and provides more specifically that all human beings are born free and equal in dignity and rights.[2] to Privacy is the basic inalienable right of an individual[3] Right to privacy has been held to be constitutionally protected right[4].The basis of recognition of right to privacy can be traced back to the year 1890 when Warren Samuel and Louis Brandeis issued a paper titled "the right to privacy"[5] According to Jonathan Herring, the rights to privacy means that the right to have autonomy and control to decide what should be seen or let known by others, which gives people the control and possibility to live their lives as they wants[6]

CONCEPTUAL DIMENSION OF RIGHT TO GENETIC PRIVACY

Genetic technology give rise to a unique form of genetic privacy, defined as the inappropriate or involuntary disclosure of the information coded in an individual's genome[7]The DNA molecule itself is a source of medical information and, like a personal medical record, it can be stored and accessed without the need to return to the person from whom the DNA was collected for permission. But DNA-sequence information contains information beyond an individual's medical history and current health status. DNA also contains information about an individual's future health risks, and in this sense is analogous to a coded 'future diary'[8]. Having a DNA sample from an individual is like having medical information about the individual stored on a computer disk, except in this case the information is stored as blood or as other tissue samples. Like the computer disk, the DNA sequence can be 'read' by the application of technology. Norman-Bloodsaw v. Lawrence Berkeley Laboratory, employees of a research facility owned and operated by state and federal agencies alleged that non-consensual genetic testing by their employers violated their rights to privacy. Holding that the right to privacy protects against the collection of information by illicit means, as well as unauthorized disclosures to third parties, the court stated "One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up[9]

2 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Gaor, 3d Sess

3 Justice K.S. Puttaswamy (Retd.), and Anr. v. Union of India and Ors. AIR 2015 SC 3081

4 Kharak Singh v. State of UP AIR 1963 SC 1295.

5 Available at : http://www.cs.cornell.edu/~shmat/courses/cs5436/warren-brandeis.

6 Jonathan Herring, Medical and Ethics, 3rd (Edn.), Oxford University Press, New York, 2010, pp: 255

7 Merryn Ekberg, "Governing the Risks Emerging From the Non-Medical Uses of Genetic Testing", Australian Journal of Emerging Technologies and Society Vol. 3, No. 1, p1-16 (2005).

8 Annas, G. J. Privacy rules for DNA databanks. J. Am. Med. Assoc. 270, 2346–2350 (1993)

9 Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F. 3d 1260 (1998). At 1269.

VIOLATIONS OF GENETIC PRIVACY

A. Criminal Investigation

Every person has a unique DNA fingerprint, which is identical in nearly every cell of a person's body, making it one of the best methods for identifying and distinguishing among human beings.[10] As far as using DNA as an investigative tool, the issue of how to obtain a suspect's DNA still remains. Currently there are three ways to get a DNA sample from a known suspect: voluntary submission; DNA abandonment; or a court order. Getting a DNA sample by voluntary submission is the least problematic of the three. Although obtaining a DNA sample from a person's body is considered a search under the Fourth Amendment, an individual may consent to a search without implicating the Fourth Amendment. DNA abandonment occurs when a person discards a personal item containing DNA. Thus far, the criminal justice system has largely ignored the role that a person's biological makeup, when combined with sociologic factors, plays in the criminal tendencies and recidivism rates of offenders. Additionally, improved genetics information will likely, and should, affect the assumptions upon which our criminal justice system is based—assumptions related to both culpability and treatment. While there are stages during the criminal process where it would be inappropriate to rely on genetic information, as a predictor of future violence, an understanding of the underlying social and biological mechanisms involved in criminality will ultimately help to develop humane policies with a better preventative effect, especially in the areas of sentencing and rehabilitation. It is for these reasons that policy makers need to begin taking affirmative steps toward incorporating some of this biological knowledge into the justice system. Our fate may yet be in our genes.

B. Employers

Employers have a long history of interest in their employees 'health status, driven by both legitimate and illegitimate motivations. Surveys indicate that 77% percent of medium-to-large firms conduct medical examinations on either employees or new hires. Employers may screen employees for the purpose of monitoring job-related injuries, gauging physical and mental fitness characteristics related to job performance, or protecting other employees from communicable diseases. While genetic information can be put to beneficial se in safeguarding the health and safety of the workplace, it can also be used to stigmatize and discriminate against current and prospective employees.[11]

10 DNA was first used as evidence at a criminal trial in the United States in 1986. See Mark Hansen, The Great Detective, A.B.A. J., Apr. 2001, at 37, 40.

11 Louise Slaughter." The Genetic Nondiscrimination in Health Insurance and employment Act: H.R. 602", 18 *N.Y.L. Sch. J.Hum. Rts.* P12 (1999).

C. Health Care Sector

Genetic information is an essential clinical tool in an increasing number of medical specialties, including clinical genetics, oncology, obstetrics, neurology, pediatrics, and behavioral health. As clinicians obtain, aggregate, store, use, and disclose more genetic information, there is a greater possibility of breaches of privacy, confidentiality, and security. Some scenarios where such breaches may occur include the following: (1) genetic information is disclosed to or accessed by healthcare providers without the authority or legitimate need to see it; (2) the scope of the genetic information obtained and disclosed is beyond that needed for a legitimate healthcare purpose; and (3) genetic information is used for a purpose unrelated to the disclosure.[12] Each of these, and many other situations in clinical settings, raises important legal and ethical issues.

D. Insurance

Genetic information or genetic test results can be used to prevent the onset of diseases, or to assure early detection and treatment, or to make reproductive decisions. This information can also be used for nonmedical purposes, such as insurance and employment purposes. Insurers might wish to use a genetic test result for underwriting, just as other medical or family history data. Employers might wish to ensure that an individual does not have a genetic risk which might affect his ability to work or which might lead to problems of safety to the individual or to others. Applicants might wish to voluntarily disclose their genetic status in order to pay cheaper premiums; or applicants who are prone to disease might wish to seek out the companies with the best benefits. In regard to the above, two principles govern the use of genetic information and testing in insurance and employment; firstly, no one should be subjected to discrimination based on genetic characteristics; secondly, the disclosure of information to a third party or accessibility to personal genetic data should be allowed only with the individual's informed consent.[13] Regulating the use of genetic information in insurance is extremely difficult for several reasons. First, the social function of insurance varies greatly among the various types of insurance products. Second, the insurance industry is large, politically powerful, and, in the case of life insurance, has been doing business largely the same way for centuries. Genetic discrimination in insurance, especially health insurance, was one of the first public concerns raised by the Human Genome Project.[14]

12 Ellen Wright Clayton, Barbara J Evans, James W Hazel, and Mark A Rothstein,The law of genetic privacy :Application,Implication and limitation Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6813935/ Last visited 27th

13 Genetic information and testing in insurance and employment: technical, social and ethical issues, Available at: https://www.nature.com Last visited at 2nd July 2, 2020

14 Working group on ethical Legal and social implication of Human Genome Research, Genetic Information and Health insurance (1993)

E. Medical Research

Genetic data can be obtained from cells we routinely shed, is easily shared, and is in high demand for cutting-edge medical research.[15] Every year in the world over, tens of thousands of people participate as subjects in genetics research can derive health benefits and new knowledge from such involvement; they also put themselves at risk of third-party access to their sensitive and confidential medical information.[16]

GENETIC PRIVACY AND INTERNATIONAL LEGAL FRAMEWORK

The UNESCO Universal Declaration on the Human Genome and Human Rights (1997) states that 'no one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity'. According to article 14 of the declaration

(a) States should endeavour to protect the privacy of individuals and the confidentiality of human genetic data linked to an identifiable person, family or, where appropriate, group, in accordance with domestic law consistent with the international law of human rights.

(b) Human genetic data, human proteomic data and biological samples linked to an identifiable person should not be disclosed or made accessible to third parties, in particular, employers, insurance companies, educational institutions and the family, except for an important public interest reason in cases restrictively provided for by domestic law consistent with the international law of human rights or where the prior, free, informed and express consent of the person concerned has been obtained provided that such consent is in accordance with domestic law and the international law of human rights. The privacy of an individual participating in a study using human genetic data, human proteomic data or biological samples should be protected and the data should be treated as confidential.

(c) Human genetic data, human proteomic data and biological samples collected for the purposes of scientific research should not normally be linked to an identifiable person. Even when such data or biological samples are unlinked to an identifiable person, the necessary precautions should be taken to ensure the security of the data or biological samples.

(d) Human genetic data, human proteomic data and biological samples collected for medical and scientific research purposes can remain linked to an identifiable person, only if necessary to carry out the research and provided that the privacy of the individual and the confidentiality of the data or biological samples concerned are protected in accordance with domestic law.

15 Available at :https://www.eff.org/issues/genetic-information-privacy Last Visited 5th July 17, 2020

16 Sheila Mclean, Old Law, New Medicine, Medical and Human Rights, p. 9 (1999).

(e) Human genetic data and human proteomic data should not be kept in a form which allows the data subject to be identified for any longer than is necessary for achieving the purposes for which they were collected or subsequently processed.[17]

GENETIC PRIVACY AND INDIAN LEGAL SCENARIO

The specific law related to the DNA Technology does not exist till the date in India which can resolve the issue related to DNA technology or genetic information. The DNA Technology (Use and Application) Regulation Bill, 2019 is pending in the Loksabha[18] However, the use of DNA technology also raises major concerns relating to consent (i.e. the right to refuse to provide a bodily substance), privacy and data security. Hence, countries the world over have felt the need to strictly regulate the use of DNA. One hopes that the new law would fill a major gap, as the use of DNA technology in India has been left unregulated. Unfortunately, there are major lacunae in the way the new law addresses core issues such as privacy and fundamental rights.[19] In current pending bill the DNA information related to civil matters is stored in the data bank; it may violate the fundamental right to privacy as laid down by the Supreme Court. The Court has stated that the right to privacy may be infringed only through the enactment of a law, and that law must achieve a public purpose that's proportionate to the infringement of privacy. Since the storage of DNA profiles for civil matters (such as paternity suits and medical diagnoses) may not serve a public purpose, it may violate the right to privacy. Thus there is a need to add the genetic or DNA privacy related issue in the upcoming law as it is the need of hour.

CONCLUSION AND SUGGESTION

Current developments in DNA technol-ogy challenge the conventional normative framework for Criminal investigation and the entire legal field. There is a general consent on the need to protect genetic privacy, designing efficient and fair policies for the protection of genetic privacy. There are many situations where one person's right to genetic privacy conflicts with another's equal and opposite right to genetic information. The right to genetic privacy is not an absolute right for an example in the context of insurance, fund managers have a liability to other policyholders and thus, genetic privacy may be violated to ensure the capability of an insurance fund and to maintain actuarial fairness. The genetic privacy of immigrants may be violated to protect public health, and to avoid fraudulent claims of consanguinity and finally, in forensic investigations, the right of victims to justice and retribution and the collective right of society to safety and security trumps the privacy rights of suspects and

17 Available at :http://portal.unesco.org/en/ev.php-URL_ID=17720&URL_DO=DO_TOPIC&URL_SECTION=201.html Last visited 10th July 17, 2020

18 Available at : http://loksabhaph.nic.in/Legislation/billspending.aspx Last visited 4th July 17, 2020

19 Available at :https://www.livemint.com/opinion/online-views/the-country-s-new-dna-law-raises-privacy-concerns-1563905765685.html Last Visited 6th July 17, 2020

criminals .However the genetic privacy is not an absolute and inalienable right, protecting genetic privacy is an important goal for genetic policy. It is important for maintenance the inherent value of preserving the integrity, dignity and autonomy of individuals and because it provides one of the most effective mechanisms for protecting against genetic discrimination. There is no specific law in India which can deal with DNA technology and related issue like genetic privacy which is an urgent need of the society. Thus there is a need to provide effective and sufficient legal framework for genetic privacy related issue to face the upcoming challenges in a technologically equipped world.

A Study on Inter-State Migrant Workers in India

*Ms. Hansaja Pandya**

I. INTRODUCTION

In economics, there are 4 main factors of production, land, labour, capital and entrepreneur. All these factors together ensure that there optimum utilisation of resources resulting in maximum production by using the least amount of resources. Labour is the factor of production that executes the ideas by utilising the technology and other relevant resources. Industries around the countries, including India are located near the source of raw material and distribution networks which means that the labour available at a particular place may not be able to fulfil the total requirement and this is when the inter-state migrant workmen come into the picture. In terms of semi-skilled and unskilled workmen, it is usually seen that workmen move from their state of origin to another state within India, because of lack of economic opportunities in their state of origin or because of abundance of such opportunities in the state they are migrating to. It is pertinent to mention that even the Constitution had envisioned and protected the right of citizens under Article 19(1)(g)[1] to move freely throughout the country and to be able to do settle down in another state while doing any legal work for earning their livelihood. Such free movement of workmen aids in the development of a free and liberal economy. However, in a number of instances it has been seen that such inter-state migrant workmen are being exploited for maximisation of profits.

One such instance of extreme exploitation can be seen in the state of Odisha where the employment of inter-state migrant workmen is known as Dadan Labour. Such labourers are recruited on the promise that they will be taken to work in large construction projects outside the state and that their piece wage will be settled every month. However, this led to a series of abuses and exploitation since the labourers were not treated humanely, they were not paid timely wages, there were no fixed working hours and they had to work all days of the week under the worst working conditions. The provisions of law had become dead letter in such circumstances and were not sufficient save workmen from exploitation.

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1 The Constitution of India, art. 19(1)(g).

The 28th session of the labour minister's conference was held in 1976 and it recommended the setting up of a small compact committee to go into the question of protection and welfare of dadan labour. It was observed that effective measures are required to be put in place in both the state of origin as well as the state in which they are engaged for work. The committee in its report submitted in 1978 recommended for the enactment of a central legislation to regulate the employment of Inter-state migrant workers. It was observed in the report that the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 were not sufficient to safeguard the interests of the migrant workers. The recommendations of the committee and the deliberations with labour ministries of various state governments led to the enactment of the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act in the year 1979. This paper focuses upon the provisions of the inter-state migrant workmen act along with other such legislations and the judicial response to these provisions. It is pertinent to understand the effect of these provisions in the light of the COVID-19 pandemic which has adversely affected the lives of the inter-state migrant workers and their families.

II. UNDERSTANDING THE INTER-STATE MIGRANT WORKMEN ACT, 1979

Applicability of the Act

It applies to every establishment in which 5 or more inter-state migrant workers are employed or were employed on any day in the preceding 12 months. The Act also applies to contractors who employ 5 or more inter-state migrant workers during the last 12 months[2].

Who is considered as an Inter-state migrant workman(Section 2(1)(e):

- The worker should be recruited by or through a contractor in one state (Home state)
- The recruitment should be for employment in an establishment in another/ Host state
- The recruitment is under an agreement or any other arrangement and
- The recruitment may be made with or without the knowledge of the principal employer in relation to the industrial establishment of the Host state.

Registration of the Establishment

- Grant of registration or rejection of application (Section 4):

  The principal employers of all establishments to which the act is applicable have to make an application to the registering officers for registration of the establishment. This registration is compulsory. The registering officer issues a certificate of registration within 1 month of the receipt of the application, if

2 Interstate Migrant Workmen (regulation of Employment & Conditions of Services) Act 1979, (Act 30 of 1979).

the application is complete in all respects. If the application is not complete, then it has to be returned to the principal employer. In a situation where the registering officer neither grants the certificate within a month nor does he return the application as incomplete, the registering officer shall within 15 days from the receipt of an application cum reminder from the principal employer, register the establishment and issue the registration certificate.

- Revocation of registration

  Section 5 of the Act empowers the registering officer to revoke the registration certificate already issued if he is satisfied that the registration has been obtained by misrepresentation or suppression of material fact or it has become useless or ineffective for any other reasons. However, an opportunity of being heard is to be given to the principal employer and prior approval of the appropriate government is to be obtained.

- Suspension of registration (Section 5):

  The Act also empowers the registering officer to suspend the operations of the certificate pending such revocation and serve the order by registered post. The order must contain the reasons for taking such action.

- Other important aspects:

  The principal employer is prohibited from employing Inter-state migrant workmen, if the registration certificate is not obtained. However, this prohibition is not applicable in case the registration application is pending before the registration officer.

Licensing of Contractors

- Requirement of License(Section 8):

  The Inter-state migrants are recruited through contractors but the same has to be done in accordance with the license issued by the licensing officer appointed by the Central or state government. Similarly, the contractor is prohibited to employ as workmen persons from another state except under and in accordance with the license issued by the central or state government having jurisdiction in the area in which the establishment is situated.

- Terms and Conditions for the License:

  The license may contain the terms and conditions of the agreement, the remuneration payable, fixation of wages and other essential amenities to be provided to the workmen and shall be issued on payment of prescribed fees. For special reasons, the licensing authority may require the furnishing of security for performance of conditions. The security furnished will be reasonable on the basis of the number of workmen employed, wages payable to them and such other relevant factors.

- Application Procedure(Section 9):

  Every application for grant of license has to be made in the prescribed format and it must contain the particulars regarding the location of establishment, nature of process, work for which the worker is employed. The licensing authority can undertake investigation in relation to an application and the license is granted for a specific period which can be renewed from time to time.

- Revocation or Suspension of License(Section 10):

  The licensing authority is empowered to revoke the license and revoke the security received from the contractor if license has been obtained by misrepresentation or suppression of material facts or holder has failed to comply with any of the condition of the license or the holder has contravened the relevant provisions of the Act or Rules. Opportunity of being heard is to be granted to the holder and pending such revocation of forfeiture of security, the operation of license may be suspended. The license may be varied or amended by the licensing authority also.

Duties, Obligations and other arrangements to be made by the contractors (Section 12):

- The contractor has to furnish the particulars regarding the recruitment of Inter-state migrant workers within 15 days from the date of recruitment to the relevant authorities in the Home State as well as the Host State.
- Changes in the particulars have to be notified to the relevant authorities of both states.
- A passbook will be issued by the contractor to the inter-state migrant worker containing the worker's photograph, name and place of employment of the worker, period of employment, wage rates and return-fare payable to the worker, any deductions made from wages and other particulars in a language known to the worker. Pass book has to be updated by contractor and retained with the worker.
- The authorities of both the states have to be intimated in case of termination of employment with a declaration that wages and other dues including the return fare for return journey has been paid.

Aspects related to payment of wages & other allowances to the Inter-state migrant workmen:

- Wage security to the Inter-state migrant workmen(Section 13):

  The wage rates holidays, hours of work and other conditions of service of such workmen shall be the same as those applicable to other workmen in the same establishment, if they perform identical or similar kind of work.

The wages paid to these migrant workers cannot be less than the minimum wages as prescribed by the Minimum Wages Act, 1948 and wages shall be paid in cash.

- Displacement Allowance to the Inter-state migrant workmen(Section 14):

  The workmen are entitled to such an allowance because they have to migrate to some other place for employment and for which they have to leave their home state.

  The allowance has to be paid by the contractor at the time of recruitment and it shall be equal to 50% of the monthly wages payable to the worker or Rs. 75 whichever is higher. The amount paid shall not be refundable.

- Journey Allowance to the Inter-state migrant workmen (Section 15):

  The contractor has to pay a sum of not less than the fare from the Home state of the Inter-state migrant workman to the Host state, both for outward and return journey apart from payment of wages during period of his journey as if he is on duty.

- No discrimination and safe working conditions(Section 16):

  The contractor has to ensure regular payment of wages, equal pay for equal work irrespective of sex, suitable conditions of work and to provide and maintain suitable residential accommodation, medical facilities on free of charge, protective clothing.

  In case of serious bodily injury or fatal accident of workman, it has to be reported to the specified authorities of both states and the next of kin of workman.

- Timely payment of wages and disbursement of wages(Section 17):

  The contractor will be responsible for payment of wages to each migrant worker and such wages shall be paid before the expiry of prescribed wage period.

  A representative nominated by the principal employer will be present at the time of disbursement of wages so as to certify the amount being paid and to ensure that no deductions are being made from the wages payable to workmen.

  In case of failure on the part of the contractor to make timely payments or in case of short payment or to pay any allowance or benefit to the workman, the principal employer will be liable to pay the balance amount, allowances and to provide the benefits to the workmen and the same can be recovered from the contractor (section 18).

Repayment of Loans granted to the workman(Section 19):

- Every contractor and principal employer has to ensure that the loan granted to the inter-state migrant workman does not remain outstanding after the completion of the period of employment.

- If the loan is not recovered from the workman before completion of the period of employment, then it is deemed to have been extinguished on the completion of the period of employment.
- No suit or proceeding can be initiated for the recovery of such debt. This has been done to safeguard the interest of the migrant workers.

Appointment and Powers of Inspectors (Section 20):

- Inspectors will be appointed by the appropriate government within defined local limit.
- If the inspector has a reasonable ground to believe that in a particular establishment, an inter-state migrant workman is employed, then he may enter the premises of such establishment, with the help of local authorities, for the purpose of satisfying himself that the provisions of the Act are being complied with.
- The inspector is empowered to examine registers or records or notices. They can seize to takes copies of such register or records which in their opinion are relevant to constitute an offence under the Act.
- A particular state government can appoint inspectors to satisfy itself that the provisions of the Act are being complied with in relation workmen of that state employed in another state. However for such order the concurrence of the Host state government or the central government, as the case may be, is mandatory.

Date of employment and place of employment (Section 21):

- The Inter-state migrant workman shall be deemed to be employed and actually worked in the establishment or the first establishment in connection with the work which they are doing from the date of their recruitment for the purpose of the enactments specified in the schedule of the Act.
- The date of recruitment and not the date on which they are made available for employment by contractors shall be deemed to be the date of employment for certain labour enactments such as Employee Compensation Act, Industrial Disputes Act, Employee's Provident Fund Act.

Adjudication of Industrial Disputes relation to migrant workmen (Section 22):

- The appropriate government (central government) is empowered to refer such a dispute to the authorities, as per the Industrial Disputes Act, in the Host state or the Home state. Reference to Home state is possible if the workman has returned after completion of work and he makes an application in this regard.
- If the appropriate government is a state government, then it will be referred to the authorities within the state, in case of Host state. However, in case an

application is made by the worker within 6 months of his return to the state, the dispute can be referred to the authorities within the Home state. The concurrence of the Host state government is mandatory.

- The proceedings may also be transferred in case of an application by the workman in this regard. The authority to which it has been transferred can either start the proceedings afresh or from the stage it was so transferred.

Provisions related to Punishment:

- The person who obstructs an inspector in discharge of his duties or wilfully neglects to afford the inspector or the authorized person any reasonable facility for making any inspection or inquiry or investigation, shall be punishable for a maximum of 2 years of imprisonment or with fine of uptoRs. 2000 or with both as provided under section 24.
- Any person who contravenes any provision of the Act or the rules regulating the employment of Inter-state migrant workmen or contravenes any condition of license granted, shall be punishable with imprisonment of upto 1 year or within fine of uptoRs. 1000 or with both as provided under section 25.
- In case of a penalty is not provided for the contravention of the provisions of the Act and Rules, the person shall be punishable with imprisonment of upto 2 years or with fine of uptoRs. 2000 or with both as provided under section 26.
- In case of a company, all those officers who had the knowledge about the contravention of the provisions of the Act and Rules shall also be liable to punished as provided under section 27.
- The cognizance of an offence under the Act can only be taken by the court when a complaint is made by or with the previous sanction of an inspector or authorized person and the offence is triable by courts of or superior to that of Judicial Magistrate First Class or Metropolitan Magistrate as provided under section 28.
- The limitation period for prosecution is 3 months from the date on which the alleged commission of the offence came to the knowledge of the inspector or authorised person. However, the limitation period is 6 months where the offence consists of disobedience of the orders of inspector or authorised person as provided under section 29.

III. FLAWS IN THE INTER-STATEMIGRANT WORKERS ACT, 1979

A deep and a thorough analysis of the Act governing Inter-State Migrant workers reveals that it suffers from various shortcomings and lacunae.

A detailed version of the flaws spotted in the Act is enumerated below:

- The Act is limited in its scope and limitation as it does not apply to all migrant laborer. It only applies to those industrial establishments in which 5 or more migrant workers are employed. It leaves behind small establishments which employ less than 5 migrant workers out of its purview. Hence many small migrant workers are left out without nay protection.[3]
- The Act states that the responsibility of implementing the protective provisions lies on the "Appropriate Government". This means that the responsibility falls on both the state government of the host state of the migrant laborer as well as the home state of the migrant worker. It requires both the state level governments to work together in complete harmony which is an extremely rare feat never to be achieved by the Indian political system. Generally, one state government keeps an arms distance from another and does not interfere or even consider working together. This is a serious hurdle to effective implementation of the Act.[4]
- The Act has a peculiar definition for Inter-State Migrant Worker which means, a person who is recruited by or through a contractor in one state under an agreement or some other arrangement for employments in an establishment located in the territory of another state. It is immaterial whether the principal employer has or does not have knowledge of his migrant status. An important pre-condition under the act as seen is that the migrant worker must be employed by or through a contractor. It does not cover those migrant laborers who are employed directly or individually in daily wage work. Such an exclusionary provisionary leaves out major chunk of daily wage laborer who are self-employed and have no protection or guarantee for food and shelter on daily basis.[5]

These three points make it clear that the act fails to do full justice to the migrant laborer. In reality the Act has failed to achieve the aim for which it was made. The preamble of the act reads,

> "An Act to regulate the employment of inter-State migrant workmen and to provide for their conditions of service and for matters connected therewith."

This objective outlined in the preamble is only partially satisfied as a major junk of similarly placed migrant labourers are left out of the scope of protection of the Act. There is an imminent need to change the definition of Inter State Migrant Workers in Act in order to make the **Act less discriminatory** and more equal for all the migrant labourers.[6]

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3 ICSSR, 'National Workshop on Internal Migration and Human Development in India' [2011] 2SDTT.

4 Dr. K.K. Singh and Anita Pathak, Problems & Solutions of Inter State Migrant Workers of Bilaspur District 38 (Wadhwa, C.G. 2010).

5 Prof.Neena Thomas, 'A Study on Issues of Inter-State Migrant Labourers in India' (2014)7(91)INT' L. J. SCI. & ENG. RESEARCH <https://www.ijser.org/researchpaper/A-study-on-issues-of-inter-state-migrant-labourers-in-India.pdf> accessed 15 April 2020.

6 South Gujarat University, 'Working and living conditions of the Surat Textile Workers: A Study' (1985) SGU 440.

- The Act is encouraging contract labour by requiring the migrant workers to be employed by or through a contractor. It is counter-intuitive. The Act refrains from bringing the migrant worker under the direct control of principal employer. The Royal Commission on Labour, the National Commission on Labour and the Judiciary all have discouraged the practice of employment of workers through or by contractor.[7] In spite of that the Act has continued the evil practise.
- One major disadvantage of not having the direct control and supervision of the principal employer is that the migrant worker does not enjoy the formal employer-employeerelationship and the benefits and protections that come with it. This prevents stability and continuity in the employment of the worker.[8]
- There is no provision providing for permanent employment or job security for the migrant worker even after working under the same person for a considerably long period of time.
- Duties and obligation of the principal employer are not specified. This requires the migrant worker to turn to the contract every time in need for protections. Contract is not involved in the day to day work of the migrant labourer and hence is more often than not unable to help. The problem also arises because the obligations of the contractor are also not specified. The contractor in not under any obligation to help the migrant worker nor is he liable for any kind of breaches.
- The Act enables the home state of the migrant labourer to appoint an inspector[9] to ensure that the worker is protected in the host state. But such appointment can be made and will be effective only if the host state agrees and consents for an inspections. Generally, the state governments do not allow inspectors from other states to operate within their jurisdictions rendering the Act ineffective.[10]
- The Act permits the migrant work to raise dispute against his employer in either the host state or the home state and in case of terminations of his employment when he has to return to his home state, the Act allows the labourer to transfer the proceedings to his home state within 6 months But such transfer is not hassle free as it requires the approval of the host state. Host state is unlikely to agree for transferring the case making it difficult for the worker.

7 Vidyut Joshi, Migrant Labour and Related Issues (Oxford and IBH Publishing Co. Pvt. Ltd. 1963).

8 Archana Chaudhry, 'India's Next Problem: Convincing Frightened Workers to Return' (Bloomberg Quint, 16 April 2020) <https://www.bloombergquint.com/politics/india-s-next-problem-convincing-frightened-workers-to-return> accessed 16 April 2020.

9 Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service)Act, 1979, s20(3).

10 Prof.Neena Thomas, 'A Study on Issues of Inter-State Migrant Labourers in India' (2014)7(91)INT'L. J. SCI. & ENG. RESEARCH <https://www.ijser.org/researchpaper/A-study-on-issues-of-inter-state-migrant-labourers-in-India.pdf> accessed 15 April 2020.

- Section 27 provides for the biggest defence that the employer can take rendering the entire fabric of the Act torn and starched. It enables the employer to escape the responsibility of any act by defending that it was done without his knowledge.
- The Act is silent on permitting third parties to file complaints on behalf of migrant worker. This weakens the act because the migrant workers are unware, uneducated and have negligible bargaining power. They generally do not want to enter into disputes with their employers because they fear loss of job.

Having highlighted the insufficiencies the Act suffers from it is time that major amendments be brought in to lock the loopholes and ensure better protection for migrant labourer. Amending the act will also bring in the necessary transparency and accountability in the system in India.[11]

IV. JUDICIAL RESPONSE TO THE CONDITION OF INTER-STATE MIGRANT WORKERS

Judiciary is the third pillar of democracy and a tool to bring about social revolution.[12] The Indian judiciary has always stood for the weaker sections of the society and has always upheld the ideals of equality and right to life and freedom from exploitation.[13] It acts as a guardian and protects the fundamental rights of the citizens of India.[14]

There are various landmark Supreme Court decisions observing the state and conditions of migrant workers and protecting and safeguarding their lives and interests. One of such major case is that of Damodar Panda v. State of Orissa.[15] The Supreme Court gave the following direction,

> "…that every State / Union Territory in India shall be obliged to permit officers of the originating State of migrant labour for holding proper inquiries within the limits of the recipient State for enforcement of the Act and no recipient State shall place any embargo or hindrance in such process…"

After this decision there is hope that the difficulty faced in appointing inspectors under section 20(3) will be carried out without any hindrance and the inspector will be able to work effectively and honestly.

Another major case was that of Peoples Union for Democratic Rights v. Union of India. In this case, minimum wages were denied to all the workers engaged in the

11 Standing Committee on Labour Laws, The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Services) Amendment Bill 2011, (23rd Report, 2011-12).

12 Austin, G.The Indian Constitution: Cornerstone of a Nation; J.N.Pandey, Constitutional Law of India (421, 38th edn, 2002).

13 Baxi, Upendra, Courage, Craft and Contention: The Indian Supreme Court in mid- eighties (Tripathi, Bombay1985).

14 Standing Committee on Labour Laws, The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Services) Amendment Bill 2011, (23rd Report, 2011-12).

15 Damodar Panda v. state of Orissa AIR, 1990 SC 10901.

ASIAD Project, including to the Inter-State migrant workers. The Supreme Court reprimanded the magistrates and the judges that they must view labour law violations with utter strictness and punish the employers adequately so that the same violations are not repeated again. The laws must not only remain on paper. They must benefit the workers at large. The rights and benefits provided under the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 intend to ensure protection of basic human rights and social welfare for the workers. It aims to uphold their rights under Article 21 of the Constitution. The court held that, It was also held that non - payment of minimum wage to the workers engaged in construction work would amount to not only violation of minimum Wages Act, but also Article 23 of the Constitution, which intends to prevent forced labour and beggar.

Another landmark case is that of Neerja Chaudhary v. State of Madhya Pradesh[16], Sibi Thomas v. State of kerala[17] and RajanKudumbathil v. Union of India[18] the Court laid down the guiding principles:

- Ensure proper rehabilitation of migrant workers.
- Ensure proper study and assessment of the migrant labourer in the sates,
- A methodology must be evolved to ensure registration of migrant workers with the panchayats or the district level corporations. This will ensure proper issuance of identity cards to these migrant labourers. It should also become mandatory for the employers to report workers employed by them.
- A comprehensive program must be developed for providing certain basic amenities to the migrant labourers. For this purpose, a scheme can also be drawn by the respective state governments.

Another Significant case is that of Bandhu Mukti Morcha v. Union of India.[19] The case is an eye-opener. Here a survey was made of some of the stone quarries in Faridabad. It was found that a large number of migrant workers were employed in the quarries under inhuman and intolerable conditions. Such conditions resulted in the loss of lives of several workers. It was a clear violation of the labour laws. Apart from inhuman conditions of work, there was a strong presence of many thekedars who appropriated poor man's wages. The court gave a broad interpretation to the word 'contractor' and held that the thekedars entering into agreements and arrangements with the migrant workers are the contractors. Designating a contractor enabled the migrant workers to come within the ambit of the act.

16 Neerja Chaudhary v. State of Madhya Pradesh AIR 1984 SC 1099.

17 Sibi Thomas v. State of kerala Crl.MC.No.988/2012, High Court of Kerala at Ernakulam.

18 Rajan Kudumbathil v. Union of India WP(c). No. 15393 of 2009(s) Highcourt of Kerala at Ernakulam.

19 Bandhu Mukti Morcha v. Union of India (1997) 10 SCC 549.

Another landmark case was that of Salal Hydro Electric Project v. State of Jammu and Kashmir.[20] A large number of workmen including migrant workmen were working on a hydroelectricity project in extremely difficult conditions. The workmen were denied various benefits under the labour laws and even those guaranteed by the Constitution of India. Therefore, based on a letter and an article on this issue published by the Indian Express the Apex Court came to the rescue of the migrant workers and other labourers who were denied their fundamental right of freedom from exploitation. It was observed that the government had failed in setting up bureaucratic apparatus for implementing provisions of the Migrant Workers Act and rules made under it.

The Apex Court gave two major directives:

- Every State must, for the benefit of Migrant Workmen allow an inspector appointed by their home state to inspect the working conditions and ensure that there in no exploitation of the workmen.
- The Central Government must ensure that every payment of wages including normal and overtime wages must be made directly to the workmen without involving any middleman and without any unnecessary deduction.

These cases have proved to be the eye-opener exposing the world of marble building to the grim and harsh realities of the migrant labourers. The cases come as a breath of fresh air, as a beacon light, a guiding star for Government, the enforcement agency, the planners, administrator and the Social activities and provides a ray of hope for the deprived and distressed, the illiterate and the expression less.[21]

V. OTHER LABOUR LAWS GOVERNING MIGRANT LABOURERS

A vast majority of migrant labourers work in the unorganised sector and the laws in that area are sparse as most of the labour laws do not extend protection to the labourers in the unorganised sector.

However, apart from the Migrant Workers Act, 1979 there are various other labour laws governing migrant workers as mentioned in the Schedule of the 1979 Act:

- **The Employees Compensation Act, 1923.[22]**

  This act applies to all the workers who suffer from workplace injury in the course of their employment and are not covered by the Employees State Insurance Act. The act entitles the worker to claim compensation from his employer for the injury suffered during the course of employment. The Inter-State Migrant Workman Act put an obligation upon the contractorto report the concerned authority of both the state and next of the kin of the migrant

20 Salal Hydro Electric Project v. State of Jammu and Kashmir, 1983 (3) SCC 538.

21 Vidyut Joshi, Migrant Labour and Related Issues (Oxford and IBH Publishing Co. Pvt. Ltd.1963).

22 Employees Compensation Act, 1923.

workman in case of fatal accident or serious injury to any such workmen. There are various hurdles the migrant worker faces in availing compensation. Foremost among them is the language of the host state with which he is mostly unfamiliar. In order to make it easy for the migrant worker, section 21(1)(b)enables the migrant worker to file the claim petition in the state where he ordinality resides. Further when the petition is received by a commissioner other than the one who has jurisdiction over the area where the cause of action arose, he shall give a notice to the commissioner who has the jurisdiction.

- **The Payment of Wages Act, 1936.**[23]

  In order to carry out the provisions of the Payment of Wages Act, 1936, the Migrant Workers Act requires every contractor to specify the rate of wages, the mode of payment and the permissible deductions. The Migrant Workers Act also upholds the principals of equal pay for equal works, cash payment and regular payment of wages. The Act also requires that the Contractor must make the payment of wages in presence of an authorised representative and the principal employer and when he contractor fails to make the payment, liability shifts on the principal employer. This ensures that the migrant worker is always protected. The amount paid to the worker should in no case be less than the wages prescribed under Minimum Wages Act, 1948.

- **The Industrial Dispute Act, 1947.**[24]

  The Migrant Workers Act, 1979 contains provisions regarding settlement of industrial dispute on the lines of Industrial dispute Act. it enables the migrant worker to raise an industrial dispute against the appropriate government.[25] Application can be made to the government of home state only after he has left his employment and returned to his home state. The application must be made within 6 months of terminations and with the assent of the host state. The dispute must be with regard toemployment, non-employment, terms of employment or the conditions of labour.

- **The Employees State Insurance Act, 1948.**[26]

  The act provides benefits and protection like sickness and. Maternity leaves to those migrant workers not covered under Employees Compensation Act. the word employee under this act is vast enough to include any person employed for wages., and hence covers migrant workers as well as they are employed daily wage workers in most establishment. Migrant Workers Act brings the migrant workers under the purview of this act from the date of their recruitment.

23 The Payment of Wages Act, 1936.

24 The Industrial Dispute Act, 1947.

25 Interstate Migrant Workmen Act 1979, s 74.

26 The Employees State Insurance Act, 1948.

- **The Employees Provident Funds and Miscellaneous Provision Act, 1952.**

  This Act provides certain retirement benefits like Provident Funds, Pension Funds and deposit linked insurance fund. It has been steadily extended to the unorganised sector especially where the employer is identifiable. The Act is applicable to every factory engaged in any industry specified in the Schedule 1 of the Act and where 20 or more persons are employed. The term "employee" under this Act includes any person employed by or through a contractor, which means that it includes an inter-state migrant worker as well. The migrant workman can get the benefits of this Act from the date of its recruitment.

- **The Maternity Benefit Act, 1961.**

  With the objective of providing just and humane conditions of work and for maternity relief, the parliament had enacted the Maternity Benefit Act, 1961. The Act has been passed to regulate the employment of women in certain establishments for certain periods before and after child-birth and to provide for maternity and other benefits. A woman, under the Act, means one who has been employed whether directly or through any agency for wages in an establishment. Maternity Benefit can be claimed only if the female worker has worked in the establishment for more than 80 days in the 12 months preceding the date of her expected delivery. The coverage of this act can extend to unorganised sector as well. An inter-state migrant female worker will enjoy the benefits from the date of recruitment.

- **Trade Union Act, 1926**

  The Trade Union Act, 1926 is also applicable to Inter-state migrant workmen as they can form a trade union or become member of any trade union.

- **Unorganised Workers Social Security Act, 2008**

  This Act was enacted to provide socialsecurity and welfare to the unorganised sector workers such as beedi workers, construction workers, agricultural workers, etc. The beneficiaries of this Act are home-based workers, self-employed workers and wage workers. 'Migrant workers' have been included under the definition of 'wage workers' and therefore the Act is applicable to them as well.

These are the other laws that afford protection to migrant workmen.

VI. COVID-19 AND MIGRANT WORKERS

Due to the nation-wide lockdown imposed in order to prevent further spread of the infamous coronavirus, the migrant workers have suffered the most. Some of them are stuck in the host state without proper shelter and clothes and food, unable to return to their home state. Some have returned to the host state and are under the threat of losing their employments an d their source of livelihood.

These issues along with the pending wages of these workers was brought to the notice of the Apex court. Migrant workers depend on daily wages not only for buying

their meals, but also for sending money back home to their families.[27] Further since most of the migrant workers live in crowded shelters it is impossible for them to implement the norms of social distancing and prevent spread of COVID-19 among themselves.

Petitioners have therefore approached the court to enforce the fundamental rights of the migrant workers. The petition reads,

> "The government must...ensure that the wages are paid to migrant workers at the place that they are presently located during the lockdown, whether in their home state or in shelter homes or in the state where they had migrated to before the lockdown..."

There has also been another plea to allow workers that test negative for COVID-19 to return to their home states. They must not be unnecessarily confined in crowded shelter homes. The news article of the same is attached below:

> Migrant workers from Odisha, Madhya Pradesh Bihar, West Bengal, Jharkhand, Chhattisgarh and Uttar Pradesh are worst affected as most of them are daily wage workers working in construction sites, brick kilns, factoris and textile industries.[28] About 50% of 11,000 workers who were surveyed said they had stocks of ration that would only last for less than a day.[29]

However, some of the organisations like National Health Mission and Centre for Migration and Inclusive Development have been in close touch with the migrant workers and have tested them and provided sufficient medicare care to ensure that they do not contact COVID-19. But yet many of the migrant workers still do not have sufficient foods violating their right to life.

There is a strong hope that once again the Supreme Court will act as a guiding light and protect the rights of the migrant workers.

Most recently the government has issued guidelines to regulate the travel of migrant workers to their home state. The guideline has prohibited the migrant workers to travel outside the state or the union territory in which they are currently located. The local authorities are advised to map their skills in order to find relevant work for those migrant workers which suit their skills. The migrant workers are required

27 Shruti Mahajan, Migrant worker's Plight During Coronavirus Lockdown: Will not interfere in Government's Decision, (Bar & Bench, 7 April 2020)<https://www.barandbench.com/news/litigation/migrant-workers-plight-during-coronavirus-lockdown-will-not-interfere-in-government-decision-for-few-days-cji-sa-bobde> accessed 19 April 2020.

28 Ayesha Minhaz, COVID-19 Lockdown: Effects on Migrant Labourers (FirstPost, 20 April 2020)<https://www.firstpost.com/india/covid-19-lockdown-with-little-bargaining-power-migrant-workers-in-telangana-await-govt-relief-ngos-say-kcrs-targeted-disbursal-plan-flawed-8273781.html> accessed 19 April 2020.

29 Migrants Workers Received No Help From Government or Employers: Survey (Scroll, 15 April 2020) <https://scroll.in/latest/959271/covid-19-lockdown-90-migrant-workers-received-no-help-from-government-or-employers-shows-survey> accessed 19 April 2020.

to register for work.[30] Further all the migrant workers will be screened and only those who are found asymptomatic will be allowedto return to their work within the same state or union territory.[31]

The end of the pandemic must bring about a new lease of life for these workers.

VII. CONCLUSION

India has a large portion of population which consists of migrant labourers hailing from rural areas of India. They are the largest floating population of the country. They face various social and economics disturbances in their everyday life. These difficulties have been multiplied by the outbreak of the COVID-19 pandemic.

Today they are hurdled in crowded shelter homes where social distancing is not possible. They do not have sufficient financial resources to meet their daily needs. The Migrant Workers Act needs a complete overhaul to suit the current situations. The protection granted under the act need to be increased manifold. Certain imminent changes are necessary to ensure that contract labour in not encouraged and independently employed migrant workers also get sufficient protection.

Further, every individual has the right to life, right to food, right to adequate housing and freedom of exploitation. Thus the migrant workers must be afforded protections on the line of the principles underlined in the Constitution of India.

It will also be imperative for the government to come up with a welfare scheme post the end of the coronavirus pandemic as many migrant labourer have already lost and several thousands are on the verge of loosing their employment.

30 Sanket Upadhay, No Inter-State Movement Allowed For Stranded Migrant Workers, (New Delhi Television Limited, 19 April 2020) <https://www.ndtv.com/india-news/coronavirus-lockdown-no-inter-state-movement-allowed-for-stranded-labourers-workers-to-register-with-2214451> accessed 19 April 2020

31 Shemin Joy, Screening Before Moving Migrants TO Workplace, (Decan Herald, 19 April 2020) <https://www.deccanherald.com/national/skill-mapping-screening-before-moving-migrants-to-workplaces-mha-sop-827319.html>. accessed 19 April 2020.

Data Exclusivity and Data Protection – Article 39.3 of TRIPs Agreement and Its Impact on Access to Medicines

*Ms. Kanika Dhingra**

INTRODUCTION

The idea of protecting undisclosed test data, generated after years of research and development and having high commercial value is one of the most important concerns in the pharmaceutical sector today. The research based pharmaceutical companies which invest heavily in the research for creating the drugs have sought for a strict and inflexible regime for protecting their data against 'unfair commercial use'. It is for this reason that the WTO Agreement on TRIPs and its provisions have been construed and interpreted in a manner which could afford for this protection. For the same reason, the concept of 'data exclusivity', as interpreted from the TRIPs Agreement, has emerged as a major area of concern for the pharma companies. A few multi-national companies based in developed countries suggest that the need to protect this data is mandated by the TRIPs Agreement under its Article 39.3. Whereas, the generic companies and the developing states argue that the provision does not provide for a mandatory obligation for the Members to invoke this provision under their domestic legislations.It does not provide for market exclusivity rights, but for exclusive protection to the research based pharmaceutical companies in a manner such that not only the third parties, but also the approval authorities themselves cannot rely on the information generated and submitted by the companies for granting approval to the subsequent generic applicants.[1]

The basic issue of conflict in the idea of 'Data Exclusivity' lies in the fact that the originator companies (those companies who have spent time and money on the R&D for a particular drug and pre-clinical and clinical trials for testing the efficacy and viability of the same) demand protection for their test data which was generated after years of efforts and hard work. They seek protection of this data on the basic

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1 Manthan D. Janodia, Ajay Chauhan, Shuaib M Hakak, D Sreedhar, V.S.Ligade & N Udupa, Data Exculivity Provision in Inida: Impact on Public Health, 13 Journal of Intellectual Property 442, 442 (2008), Available at: http://nopr.niscair.res.in/bitstream/123456789/2030/1/JIPR%2013(5)%20442-446.pdf

argument that they deserve to enjoy the fruits of their labor in the form of returns after spending millions of dollars on the development of a drug. On the contrary, the not so developed countries argue for the need to secure access to medicines for all and to give more attention towards public health priorities as compared to the incentive theory of the pharmaceutical companies. This conflict between the rights of originator companies and the public interest has led to serious concerns with regard to the interpretation of the data exclusivity provision under the TRIPs Agreement[2], i.e., Article 39.3.Though every new invention is granted protection by means of grant of patent, the need arises to appraise the condition in developing and least developing states where the pharmaceutical sector mainly comprises of generic manufacturers with low or no capacity for R&D, and having the capability of merely developing drugs at a cheaper price by copying and proving its bioequivalence with the drug of an innovator company.[3]

DATA EXCLUSIVITY UNDER TRIPS AGREEMENT

The term Data Exclusivity has not been explicitly provided under the TRIPs Agreement. It is an interpretation drawn from Article 39.3 of the said agreement which reads as under:

> "*Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use.*"

Article 39(3) essentially imposes three obligations on governments:

1. To protect data on new chemical entities, the compilation of which involved significantstruggle, against unfair commercial use.
2. To protect such information against disclosure, except where required to protect the public
3. To protect such information against revelation, unless measures are taken to ensure that the data is protected against unfair commercial use.[4]

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2 WTO Agreement on Trade Related Aspects of Intellectual Property, 1994 (Implemented ON 1st January, 1995)

3 Jaya Bhatnagar & Vidisha Garg, India: Data Exclusivity, Mondaq: Connecting Knowledge & People, Available at: http://www.mondaq.com/india/x/79418/Information+Security+Risk+Management/Data+Exclusivity

4 Charles Clift, Data Protection and Data Exclusivity in Pharmaceuticals And Agrochemicals, I.P. Handbook of Best Practices, Available at: http://www.iphandbook.org/handbook/ch04/p09/

Thus, *Data Exclusivity* (DE) or *exclusive entitlement to accessdata required for approval* is the period of non-reliance and non-disclosure that is sought to be provided to new chemical entities used in medicinal compositions, and agrochemicals. It is a restricted period ofprotection during which the drug regulatory authorities do not permit the use of test data of the originator by the generic companies to register the generic version of the originators drug. Data exclusivity is sought to be established as an independent intellectual property right and should not be confused with the protection provided by other rights, especially patents.[5] Further, this Data protection is required both for patented as well as for non-patented drugs and agricultural chemicals. Therefore, even if a drug has not been patented in a particular country, a bioequivalent product cannot be put on the market during the period of data exclusivity where the data is inaccessible to all.[6] Although a product may enjoy patent security but the enormous data that gets produced during the developmental stages does not enjoy such safeguard.

The data which is protected under the ambit of data exclusivity provision includes Clinical trial data and other test data which are theexclusive data resulting from scientific research and development conducted by the innovator companies with investment of time and cost, to ensure the efficacy and safety of new chemical entities, formulations and their new uses. This process of developing a safe drug or chemical takes huge investment as well as about 50% of the time of the patent protection term. This data is not only essential for ensuring the safety and viability of the product, but also for attaining marketing approval from regulatory authorities. Data exclusivity, therefore, seeks to ensure the originator's rights to prevent third parties (including generics) from relying on the data generated and submitted to acquire market approval for a certain period of time. This time period varies from country to country. This is because the agreement does not provide for a fixed stipulation with regard to the duration of protection which is to be given for such data. Countries like USA and Europe have provided for data exclusivity provisions even before the arrival of TRIPS in 1994. However, the Agreement does not prevent third parties from creating their individual data with regard to the same drug. By making a mere reference to the originator's submitted data, the generics cannot be allowed to obtain an undue advantage, without performing any of the expensive and time-consuming tests to demonstrate the safety and efficacy of their product.However, in Britain, Smith Kline & French Laboratories Limited took legal action to stop the authorities from letting others to use their data even after the expiry of the ten-year period of enjoying the exclusivity. After getting a patent protection in 1972, SKF wanted to restrain the agency from allowing the registration ofgeneric versions of the drug in 1987 on the base of data submitted by them. However, the Court allowed the generics producers to rely for their application on the data originally presented by SKF in

5 Supranote 3 at 2.

6 F. M. Abbott & Graham Dukes, Global Pharmaceutical Policy:Ensuring Medicines for Tomorrow's World, 27 (2009)

order to acquire product patent for its own original version of the drug.[7]

As Article 39.9 indicates that test data protection is an incentive for the investments in data production, rather than for the creativeness and ingenuity involved in generating the data. Thus, the inclusion of test-data in TRIPs does not determine the nature of the protection conferred. In particular, it does not indicate that such data should be protected through the grant of exclusive rights. [8]It is pertinent to note that the pharmaceutical companies aim to establish double protection for their drugs and chemicals. Firstly, the originator companies seek market exclusivity by means of a patent protection for a specificduration which allows them to recoup the expendituresmade in generating the data for obtaining the marketing approval. Secondly, they seek for protection of their data such that the regulatory authorityneed not access the originator's data, without his accord, while considering applications from a subsequent entrants (generic) seeking approval of a similar product. This is because, in the absence of a data exclusivity provision, the generic manufacturers can easily make replica drugs of the originators drugs without making any considerable monetary or labor input for the same. This would ultimately lead to a disadvantage to the originators who have made valuable investment for their data. As a consequence of this drawback, the originator companies would resist and abstain from taking up any sort of investments and research in the pharmaceutical sector.

NEED FOR AND RATIONALE BEHIND DATA EXCLUSIVITY

The purpose of avoiding disclosure of the test data is to avoid unfair commercial use of this data which is generated after substantial investment of time, expertise, resources and money. It is basically the economic and incentive approach which calls for the need of data exclusivity. Any company begins with a pharmaceutical venture not only for serving a social purpose of making medicines accessible to all. The profit-making objective as well as the aim for incentives in return of investments made in R&D are also factors of prime importance. Exclusivity periods based on data developed in conjunction with study of their specific uses is a highly appropriate tool for providing the incentives to investigate previously "neglected diseases" areas.[9]Also, data exclusivity provides an additional opportunity for innovating companies to recover their investments in cases where the marketing approval is acquired in the later stages of the patent protection term. Also, such a protection for the innovator companies in developing companies and least developed countries can be of significant beneficial use. These companies may get an opportunity to market their invented drug in the developed countries where the drug was not earlier

7 *Ibid.*

8 C. M. Correa, Trade Related Aspects of Intellectual Property Rights, A Commentary on the TRIPS Agreement, 366-394 (2007).

9 International Federation of Pharmaceutical Manufacturers & Associations, "Data Exclusivity: Encouraging Development of New Medicines", July, 2011, Available at: http://www.ifpma.org/fileadmin/content/Publication/IFPMA_2011_Data_ Exclusivity__En_Web.pdf

discovered. As a result, the developing and least developed nations may get an opportunity to explore the global pharmaceutical market. Further, this exclusivity may also protect the innovating companies from generic competition.[10] As the protection afforded under Article 39.3 of TRIPs Agreement would lead to the inability of the generic companies to have access to the test data or other data relating to the invented drug generated by the innovating company, it would not be possible for them to enter the market with their generic version.

Although there is no uniformity that is respected by the Member nations while applying the TRIPs provision relating to data exclusivity, the duration for which the originator can enjoy the exclusivity after the marketing approval commonly ranges between 5 to 10 years. For instance, USA provides for a period of 5 years of exclusivity for data relating to New Chemical Entities and was the first state to pass data exclusivity law 1984. The Drug Price Competition and Patent Term Restoration Act, commonly known as the "Hatch-Waxman Act", essentially relaxed the level of protection offered to testing data in the US. Under the Hatch-Waxman Act, applications for approval of novel drugs receive 5 years of data exclusivity. Applications for the approval of new indications for an existing drug receive 3 years of data exclusivity. Japan and Canada provide for eight years of data exclusivity for human drugs with new active ingredients, whereas China, South Korea and Turkey have six years protection term. Australia, New Zealand, Mexico, Columbia and Argentina provide for five years of data exclusivity.[11] However, there is a group of nations which deny the TRIPs dictate, and India is one amid these countries.[12] The principle reasoning applied by these countries are:

- Referencing the originator's data is not 'unfair commercial use' according to TRIPs; or
- Referencing is not necessary to approve a generic drug as the authorities are generally aware about the existence of originator's branded drugs in the market.

DATA EXCLUSIVITY AND DATA PROTECTION

As mentioned above, data exclusivity means the protection of undisclosed test-data from disclosure and against unfair commercial use. The originator companies have sole monopoly over this data generated by them. However, Data Exclusivity is sometimes confused with 'data protection'. But it is pertinent to mention here that the two ideas have minute differences which lead to great differences in policies. A few observers have regarded Article 39.3 to mean mere protection of undisclosed data against disclosure and from unfair commercial use. It does not talk about strict exclusivity, but merely protecting the data from being disclosed to third parties and from unfair commercial use. It is suggested that the test-data cannot be created a

10 Supranote 4 at 3.

11 P. W. Grubb & P. R.Thomsen, Patents for Chemicals, Pharmaceuticals, and Biotechnology: Fundamentals of Global law, Practice and Strategy, 268 (5th ed., 2010).

12 Supranote 3 at 2.

new intellectual property so as to be enjoyed exclusively by the originating company. The provision is sometimes interpreted to allow the use of this data in certain circumstances where unfair commercial practices are not involved. It is generally the developing and least developed countries which rely on this policy and argue that TRIPs does not call for exclusivity to the originator's data, but a mere protection against unfair use. Such countries base their argument on the idea of ensuring access to medicine and health care for all. For countries which have insufficient or no capacity to invest in R&D and to innovate drugs, it will be a great crisis situation for them. Despite a cure being available in the market for severe diseases, there will be no access to medicine, especially for life-saving drugs which are granted data exclusivity protection. Hence, it is basically a difference in approach and interpretation of the TRIPs provision which has led to this conflict of ideas. Article 39.3 includes a few common terms such as **new chemical entities, considerable effort and unfair competition**. These expressions have been construed differently by different states. Owing to the flexibility in Article 39.3 empowering them to espouse an approach best suited to their needs and situations. On the other hand, most advancednations have embraced data exclusivity as the approach of protection complying with Article 39.3 responsibility.[13]

DATA EXCLUSIVITY AND INDIA

According to one view, Article 39.3 does not provide for any kind of fixed duration of data protection or data exclusivity. There is no precise provision in this regard and therefore India is under nocompulsorycommitment to offerfor such a provision in its domestic laws as it may be TRIPS-plus. Over the years Indian pharma industry has developed a strong ability as a manufacturer of good quality generic medications and any exclusivity provisions may unfavorably affect the interests of national industry. It would not only lead to restriction of entry of generics into the market, but would further lead tounrelentingincrease in prices of branded medicines in the country. There have also been issues with regard to the life-saving drugs like HIV/AIDS drugs which have become a main health concern for the nation. On the other hand, Data Protection may also result in giving a boost to R&D by Indian companies. Greater protection will provide greater security to the pharmaceutical companies which will eventually lead to greater inputs towards growth and progress.

In India, there is no singlelaw to protect the unauthorized use /disclosure of confidential material. The present legal means are the common law, principles of equity and the law of breach of confidence (also known as law of trade secrets) settled through case law. Certain provisions of the Official Secrets Act provide that unauthorized disclosure of official secrets is a punishable offence. The Drugs and Cosmetics Act, 1940 controlsproduction and market approval of drugs, while The Insecticides Act, 1968 deals with agricultural chemicals (insecticides, fungicides and weedicides). Both these

13 Ministry of Chemicals and Fertilizers, Government of India, Report on Steps to be Taken by Government of India in the Context of Data Protection Provisions of Article 39.3 of TRIPs Agreement, Available at: http://chemicals.nic.in/DPBooklet.pdf

Acts have the requirement to insist on the submission of treasured test data suggesting safety and efficacy for permitting marketing approval for new drugs and agricultural chemicals. Further, the provisions dealing with undisclosed information for pharmaceuticals products are prescribed in the Drugs and Cosmetics Rules, 1945 read with rules 122A, 122B, 122D, 122DA, 122DAA and 122E. Apart from this, Rule 53 provides that an inspector of Drug Regulator shall not without the permission in writing of his official superiors, unveil to any person any information obtained by him in the course of his official duties. It is also suggested that due to the period of exclusivity being ambiguous, marketing approvals are being approved on the basis of published data and data previously in public realm, as well as other data generated in the country.[14]

It is further pertinent to note that the Satwant Reddy Report On Data Protection Provisions Under Article 39.3 Of The TRIPS Agreement suggested for pharmaceuticals to include a transitional period in which early steps will be taken to implement the standards of minimum data protection i.e. to improve the system of data management in the Drug Regulatory Authorities to prevent unauthorized disclosure of data. This periodcan be followed by a post transition period which will offer a fixed term of data protection for a period of 5 years in which the Drug Regulatory Authority would not rely on the data submitted by the originator while granting second and subsequent marketing approval. The report also suggests certain safeguards in public interest to take care of adverse effects on public health or situations of health emergencies.[15] The committee has also suggested for several safeguards with regard to data exclusivity. One of the most noteworthy of these safeguards is to exempt the life saving drugs from the ambit of data exclusivity. The Indian Government also planned to introduce a Pesticides (Amendment) Bill so as to include data exclusivity provisions for a period of five years for agrochemicals.[16] The suggested model for data protection in the pharmaceutical industry stipulates certain safeguards as well as a very important exception with regard to life threatening diseases like HIV/ AIDS which may be spared from the provisions of set period of data protection as stated above, i.e., the Drug Regulator might place dependenceon the data tendered by the first applicant in India/foreign country and grant market approval to subsequent applicants for same product in India.[17]

14 Nishith Desai Associates, Indian Pharma and Life Science Industry – Legal and Tax Framework, 143 (2008)

15 Supranote 13 at 8.

16 Swaraj Paul Barooah, Data Exclusivity Back on Tables for India, Spicy IP(27/03/2015) Available at: http://spicyip.com/2015/03/data-exclusivity-back-on-the-table-for-india.html

17 Supranote 14 at 9.

AN ANALYSIS

• Arguments of Originator Companies

The primary argument raised by the innovating companies is that they require data exclusivity in order to safeguard their data generated after immense hard work and investment. They cannot allow other companies to rely on this data and deter their return prospects. Further, they also argue that they cannot introducenew drugs in the marketplace without any security and protection in the form of data exclusivity laws to protect their interests. Also, introduction of data exclusivity would result into more investments in drug development and in the long run it would benefit the consumers only. Another line of argument is that drugs supplyingfor the medical needs inIndia will only be developed if data exclusivity laws exist in India. This is because only when adequate protection is given to drug manufacturers, they willcome to India and spend their capitaland time on developing drugs for ailmentsendemic to India. This implies that granting a reasonable dataexclusivity period will make India an appealing destination for research and development work. Given these reasons, and international pressure as well asrequests from the pioneer pharmaceutical industries in the developed nations, establishing a data exclusivity regime could be seen as a positive initiative in the pharmaceutical sector.

• Public Interest Argument

The other view regarding data exclusivity regime, particularly with reference to India is that most medicineproducers in India work only on generic drugs.[18] Under these circumstances, if data exclusivity is approved, localcompanies would be prevented from obtaining marketing approvals on the basis of the data submitted by the first enterprise that had generated and submitted the data. As a consequence of this, there will be no entry of the generic medicines in the industry. Also, there seems to be no well-defined economic explanation as to why dataexclusivity should be approved to firms that already get a patent protectionterm of twenty years globally for their products. When their product is already endowed with a protection for a term of twenty years, there is no reasonable basis to claim for another protection. Further, in order to enter even small and marginally profitable markets, genericcompetitors would be required to duplicate expensive and time-consumingclinical trials in order to establish safety, quality, and efficacy. It would eventually lead to unnecessary expense on the same trials and tests which have already been conducted by the originating companies.

• The TRIPs Provision and Ambiguity

Article 39.3 of TRIPs contains two primary obligations: protection against disclosure andprotection against unfair commercial use. However, the term **'unfair commercial use' has not been well-defined under the TRIPS**. It has been left open to the discretion of individual Member states and has therefore been understoodcontrarily by various

18 Radha Iyer, Making the Case for Indian Generic Drug Manufacturing, Pharma Manufacturing (16/09/2019), Available at: https://www.pharmamanufacturing.com/articles/2019/making-the-case-for-indian-generic-manufacturing/

nations. There is also a difference in opinion as to whether that reliance placed by Regulatory Authorities on the data submitted by the first applicant for grantingmarketing approval to the subsequent applicants comes in the category of 'unfaircommercial use' under Article 39(3).

There has been strongdeliberation on **whether it actually implies data exclusivity or not**. The terms of the provision do not explicitly declare or call for a special and exclusive right to be granted to these originator companies. The issue that arises here is whether it merely requires the grant of the right to these companies or mere responsibility of the regulatory authorities to ensure protection of data. Owing to these ambiguities, another view held by some developing statespropose that **Article 39.3 does not require exclusive rights to be granted but obliges protection in the framework of unfair competition rules**. Under this understanding, a second or subsequent applicant should be disallowed from using the results of the tests conducted by the first applicant if the respective data had been acquired through dishonest commercial practices. However, a government authority would not be prohibited from relying on the data offered by the first applicant to judgelater applications.

Also, there is **no duration of exclusivity provided by the terms of the Agreement**. What shall be the term for which the generics cannot rely on their data and what shall be the term for which the Regulatory Authorities cannot place relianceon the data of the first applicant while granting approval to the subsequent applicantsfor the competing generic versions of the innovator's products has not been prescribed. This ambiguity has resulted in difference in national policies of the Member states, as mentioned above.

Article 39(3) grants **protection to the undisclosed test and other data** relating to pharmaceuticaland agricultural chemical products which utilize 'new chemical entities'. Firstly, the term**"New Chemical Entity**" has not been expressly defined in the TRIPS Agreement. It is unclear whether it is to be interpreted in terms of the novelty requirement that applies for patents, or it is deemed to be a mere new application where no prior application has been made for the approval of the same product. It is thus left open to the Members to decide this issue while amending their national laws to make them TRIPS compliant. Secondly, what constitutes this 'other data' has not been explained in the provisions of TRIPS. The dispute of what is protected and what is not protected will result into legal battles and chaos in the long run.

Further**, it protects** ***data the origination of which involves considerable effort***. The terms of the Article are vague to determine what is referred to by the word 'considerable effort'. It is unclear whether it speaks of investment of money, time and labor, or whether it refers to the effort undertaken for clinical trials or any other effort, whether technical or economic. It is also vague with regard to the magnitude as to what efforts shall be deemed to be considerable for the purpose of this Article. On the other hand, a pertinent issue to be noticed is that if this considerable effort talks about the economic basis, i.e., the investment perspective, then does it actually qualify for an intellectual property protection? If the answer is in the affirmative, would this protection of profit and incentive interest not imply deviation from the very fundamental

of protecting intellect of one's mind and his creation which are essential to intellectual property protection?

Another flaw in the wordings of this provision is concerned with the idea of **'countries requiring submission of data for market approval'**.This implies that not all countries are required to incorporate data exclusivity provisions as it only applies to countries which require submission of data to obtain marketing approval for drugs having new chemical entities. This implies that data exclusivity may not be necessary for countries which approve the marketing without the need of furnishing the data, for instance, countries approving marketing of drugs based upon prior approval in another country. Another pertinent issue to be noted is that not every application of for marketing approval of a drug would involve '**new chemical entities**'. Hence, this protection cannot be afforded to drugs which are otherwise developed and improved by generating data with considerable effort and after immense researches and trials only because of the requirement of it to contain new chemical entity.

It is also urged that **TRIPS does not explicitly prevent reliance on data**. It only sets a minimum standard to protect the data from unfair commercial use and disclosure. Generic companies may be allowed to place reliance on this data, if permitted by their country, whether with or without any kind of payment.Further, if it is construed in a manner which suggests that using the data for approving subsequent applications is 'reliance on the data', does it also imply that this is an unfair commercial use of the same? This would result into devastating effects in cases where certain drugs are essential for life threatening diseases and would be purely contrary to the provisions and principles relating to Compulsory Licensing in the same Agreement itself. Where WTO has expressed its special concern regarding public health issues under the Doha Declaration on TRIPS and Public Health[19], the agreement cannot be interpreted in an entirely opposing direction undermining public health.

The Doha Declaration recognized the gravity of health problems faced by victims suffering from diseases like HIV/AIDS, Tuberculosis, Malaria, etc. The prime outcomes that were brought in by the declaration include:

- Recognition of the fact that intellectual property protection is essential for creation of new drugs, but at the same time the TRIPS Agreement should not prevent members from taking measures to protect public health.
- The TRIPS Agreement shall be construed in light of protecting public health and promoting access to medicine for all.
- For achieving the said objective, Para 5(b) provides that the WTO Members shall have the right of granting Compulsory Licenses and also to decide the ground on which it is to be granted. Article 31(b) of the TRIPS provides for the provision dealing with Compulsory Licenses.
- It provided for the need to transfer technology and capacity building to the developing and least developed countries and also for export of medicines to

19 Doha Declaration on TRIPS and Public Health, 2001.

these countries which have insufficient or no manufacturing capacity in the pharmaceutical sector.

- Para 6 of the Declaration (which was later implemented by amending the TRIPS Agreement in 2005) led to the insertion of the provision providing for payment of "adequate remuneration" to the originator company where a Compulsory License is issues against its branded drug. The provision finds place in Article 31(f) of the TRIPS. But this provision shall not apply in case of least developing countries.

Not only this, the vision and principles upon which the TRIPS Agreement is based have been enshrined in the provisions of the Agreement itself. For instance, the Agreement itself suggests that the Member nations are free to determine the appropriate methods of implementing these provisions within their own legal systems and practice.[20] This implies that 'Data Exclusivity' is not a mandatory obligation to be invoked under the national regimes of the Member nations. The provisions of the agreement may be interpreted by Member nations as per the needs and requirements of its people.

It is further essential to consider the overall wordings of the Article and not merely the words which support the data exclusivity argument. **The wordings of Article 39.3 are followed by two important exceptions which suggest that:**

- Members shall protect such data against disclosure, except where necessary to protect public health; and
- Members shall protect such data unless steps are taken to ensure that the data are protected against unfair commercial use.

This implies that this **data protected under the Article can be disclosed in two circumstances:**

- Where it is necessary to protect public health; and
- Where the Member states have made provisions under their national regimes that they shall protect the data from unfair commercial use.

Thus, data may be made accessible to third parties under these circumstances in order to ensure access to medicines for all. A clear understanding of the provision implies that there is no such concept as "data exclusivity" sought to be established by the TRIPS Agreement. It merely seeks to protect this data generated after considerable effort. Thus, the Indian approach on this point seems justified and stands good and compliant with the TRIPS provisions.

Further, the Agreement on TRIPS suggests that "*Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technical development, provided that such measures are consistent with the provisions of this*

20 Article 1 of TRIPs Agreement.

21 Article 8.1 of TRIPs Agreement.

Agreement".[21] This Article is what basically elucidates upon the right of Member nations to construe Article 39.3 as a mere protection of the test and other data from disclosure from unfair commercial practices.

- **Impact on Public Health and Access to Medicines**

The idea of granting data exclusivity would greatly undermine the social interest of securing access for medicines to all. A number of countries, especially the developing and least developed countries, which majorly consist of generic drug companies and a weak support structure to indulge into R&D, may bear the burden of this provision. In cases of life-threatening diseases, though a treatment may be available in the drug industry, the same will be inaccessible due to the strict provisions of data exclusivity and the patent protection regime. Also, a significant point to be notices is that the TRIPS agreement nowhere imposes a restriction on ensuring public health. Rather, as discussed above, the general principles of the Agreement provide for the discretion of the States to implement the provisions while ensuring the public health requirement. It is for this reason, that the Indian Patent Act, 1970 provides for a provision dealing with use of a patented invention by the third parties so as to allow development and submission of information that is required to be submitted to authorities that regulate the manufacture, construction, use, sale, or import of any product.[22] This provision may mean to suggest that the generic companies may have access to the patented drug or its related information so that they may further develop data and submit it to the regulatory authorities for getting market approval. However, they are not allowed to enter the market during the patent protection term of the originator company. Though the provision paves way for having access to the data of the originator company, they can only serve the diseased population after the expiry of the patent term.

CONCLUSION

The main object of the pharmaceutical sector is to serve the basic health needs of mankind. For serving this end, the pharmaceutical companies strive hard to innovate and develop drugs. With this aim, it is not a suitable approach to claim exclusive rights on data relating to drug development, especially in case of life saving drugs. The economic interest of the pharmaceutical companies shall not be allowed to hinder the access to medicine However, the profit and incentive motive that drives their investments in R&D cannot be sidelined. Therefore, there is a strong need to reconcile these conflicting interests and to arrive at a solution which could ensure the satisfaction of the interests of the originators, without prejudice to the right to access medicines worldwide. The TRIPS Agreement does not prevent Members from taking measures to protect public health. Accordingly, the Agreement should be in compliance of WTO Members' right to ensure public health and also to promote access to medicines for all. The situation is grave in the developing and least developed countries which do not have sufficient resources and the infrastructure to satisfy their own health

22 Section 107A(a) of the Patent Act, 1970.

care needs. In such circumstances, the Agreement on TRIPS shall not be interpreted and construed from a profit or incentive based approach, but in accordance with the health needs of the larger world.

The idea of data exclusivity creates an indirect monopoly period of products and keeps product inaccessible, especially where the data exclusivity period extended beyond the patent period. Further, granting such exclusivity in Indiamay also provide an impetus for other multinational pharmaceuticals to start demanding data exclusivity for pharmaceutical products – which will in turn make medicines harder to access in terms of their availability as well as costs. It is required that the ambiguity relating to data exclusivity and the interpretation of TRIPS is harmonized by amending the TRIPS provision and elaborating the exception carved out in the Article itself which suggests that the data shall be protected from disclosure, except where necessary to protect the public health. The developed countries having the world's majority research based innovating companies shall not be permitted to misuse the visible ambiguity in Article 39.3.

Cyber Crimes Against Women and Children During Pandemic Times

*Ms. Nandini Tripathy**

INTRODUCTION

The lockdowns following the COVID-19 pandemic have surged up the variety of domestic violence instances amongst many nations global. The populations were directed to live indoors at their respective houses because it was proved to be an effective measure for combating against the coronavirus. While preventing the spread of the virus, they have also exposed the persisting gender equalities and perilous threats to women across the world other than the deadly repercussions of the pandemic.

In abusive families, ladies fear the aggressor inside and the virus outside. The confinement with abusive partners by and large outcomes in physical and emotional violence. It is tough for the victims to escape from the abusers and are looking for help because of the imposed regulations. Women are terrified to take help from the police and document instances due to their torturing in-laws and violent husbands at domestic. Some are dependent on them for his or her living due to lack of economic help. In low-earnings homes, the husbands tend to be extra abusive to their partners after losing jobs throughout the lockdown and vent their frustration on them. The loss of alcohol additionally provides to their resentment. The extended privateness of the home offers the abusers a feeling of immunity. The worry of being diagnosed with the aid of the abuser, worry approximately the feasible infection of coronavirus outdoor their houses and the uncertainty approximately the running local offerings are some of the barriers that terrify ladies. The financial instability observed by means of the chance of hunger tends to reflect and happen into verbal and physical abuse on many households. Many girls are not able to file a case or make a touch as they're trapped with their abusers and the infection of coronavirus prevails outside.

GLOBAL RESPONSE AND MEASURES

The United Nations recognizes home violence in opposition to ladies as a 'shadow pandemic' at the time of the COVID-19 pandemic. Antonio Guterres, the Secretary General of the United Nations, had informed the governments to place the safety of

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women important whilst responding to the pandemic. He also gave them recommendations concerning it. He counselled that there must be increased investment in civil society corporations and on-line services and the shelters should be declared as essential offerings for protection. He advised them to hold on with the prosecution of abusers and preserve the individuals in prisons who have been convicted of brutality in opposition to women. Various national and local governments, as well as non-governmental organizations, are already appearing at the given hints. Social and financial infrastructure and services have to be presented to girls and children to save you them from the violent environment in their family structures.

In exclusive elements of the arena, the mechanisms to defend women from being locked in with their perpetrators have developed at the same time as thinking about lockdown and social distancing. Spain, France, Germany, Italy, Norway, and Argentina have followed a campaign known as Mask-19. When a lady faces abuse at home, she will go to the nearest pharmacy and ask for a mask which is Mask-19. Pharmacy workforces take her call, quantity, and deal with. They alert the emergency offerings. The woman can go lower back domestic or look ahead to the appearance of police and guide people. The growing variety of cases all through the first week of lockdown led the French authorities to announce that it would pay for resort rooms for sufferers of home violence and open pop-up counselling centres. It will also fund anti-domestic abuse agencies with an additional 1,000,000 Euros to assist them respond to extended call for for services. Canada is keeping domestic violence shelters open for sufferers of home and gender-based totally violence. It is supplying $50 million to aid them. UK and Australia have also funded the supporting organizations. The Italian authorities has released an app that permits the victims of home violence to searching for help without creating a telephone name. It is a brilliant attempt taken by them towards the normal issue.

INDIA'S CONDITION

India is not always an exception to the global trend of elevated pandemic brought on domestic violence. The National Commission for Women in Delhi has obtained a huge number of distress calls at some stage in the lockdown. It has released an emergency WhatsApp quantity for the period of lockdown to record cases and aid the victims of home violence. Helplines and NGOs are operating to discover solutions for the victims by transferring them into safer places and by way of offering counselling over smartphone or online. An enterprise has a 24-hour hotline named 'Dhwani', a WhatsApp wide variety, and electronic mail ID and a talk characteristic on its internet site to help the survivors of domestic abuse.

A Public Interest Litigation has been filed within the Delhi High Court because of the heightened wide variety of home violence instances in the country throughout a nationwide lockdown. The petitioner has requested if the provisions of the Disaster Management Act may be used to extend protection to the harmed victims. It turned into knowledgeable that the Delhi Commission for Women had appointed best 17 protection officers in Delhi and their touch numbers are not publicly known. The

Delhi High Court has asked the National Commission for Women (NCW), the Delhi Commission for Women (DCW), the Delhi government and the Union Women and Child improvement ministry to submit written notes at the measures that are being taken to protect the sufferers of domestic violence at some point of the lockdown. It additionally wondered if the coronavirus pandemic has been declared a "catastrophe" within the definition furnished underneath the act. The officials have been advised to control critical materials in addition to investigate the topics of domestic abuse.The NGO named All India Council of Human Rights, Liberties and Social Justice filed a petition to are seeking for the intervention of the courtroom to make certain adoption and implementation of immediate and effective measures to assist the sufferers of home violence and baby abuse. The court has directed the Central Government, Delhi government, Delhi Commission of girls and different government to summon a meeting at high degree to recollect the problem of sufferers of home abuse in the course of this era.

GOVERNMENT FAILURE

Within a few hours of Prime Minister Narendra Modi pronouncing a national lockdown to fight the pandemic, it has become apparent that the authorities had failed to plan for its results on prone sections of society which include migrant workers and homeless. The sufferers of domestic violence don't visit their parental houses due to worry of infecting their elderly mother and father They can neither visit shelter houses as they may be crowded and vulnerable to more infection. The police force is already overburdened with ensuring that people follow the lockdown. Hospitals do now not have time or space to look at domestic violence instances. They are forced to remain in abusive and violent environments with little get admission to to redress. The ones who are able to escape the torture, locate themselves remoted without essential help and facilities.

Several NGOs had been running 24 hours of purposeful helplines since the lockdown began to assist the women inside the absence of a comprehensive plan from the Indian government. They are dealing with issue in offering assistance as they cannot pass beyond telephonic or internet counselling. There is a want for properly funded and vital assist services for survivors of the abuse. The requirement of psychological care and financial assets cannot be misjudged.The unfold of the radical Coronavirus (COVID-19) pandemic across the world is creating fear exponentially, but the health risks are not the best bane that comes from this catastrophic event. It has been noticed that this era of social distancing and incorrect information also gave an opportunity to the dark factors of the society.Cybercrime and coronavirus- There has been an inflow of faux apps, domains and web sites capitalizing on two data, first, the concern amongst most of the people and their search for records related to this pandemic and secondly, the corporations throughout the globe are turning to 'earn a living from home' thru the web medium. We will address both the scenarios one after the other.

EXPLOITING THE WORRY AMONG THE MAJORITY

Everybody who has been trapped inner their house amidst this lockdown is trying to live on top of any statistics associated with COVID 19 in an try to continue to be secure and far from inflamed people. The authors of malwares are taking gain of this example.One such app which was to be had in Google Play Store became "corona live 1.1", which claimed to be a live tracker of cases of Coronavirus. The human beings the usage of the app were of the view that they may be retaining a song of the pandemic, however the malicious app was absolutely invading their privacy: having access to the tool's pix, films, location and digital camera.The statistics accumulated may be used in more than one ways, they can be used to compromise your bank money owed or even blackmail the owner of the snap shots and videos.The Android Playstore, to scale down the rise of the fake apps, as eliminated many such apps from the Playstore and still have set regulations for these types of programs and feature placed all such apps inside the 'sensitive events' category.Now the apps are available on fake websites, one such being 'coronavirusapp. Web page', in which the hyperlink to download the app is indexed. These times adequately reveal the upward thrust in cyber-crime as a consequence of coronavirus.

EXPLOITING THE 'WORK FROM HOME' RULES

Every business enterprise, big or small, have been forced to work remotely due to the lockdown. This will cause boom in security hazard as the proprietary facts is being accessed from laptops and home PCs that can or may not have the identical stage of firewall and protection as an in-office setup.You may have noticed an growth inside the wide variety of emails in your Junk Folder, pretending to an advisory referring to the COVID-19. These emails will lure the user to open the attachments, which might be malicious in nature and the instant you open them the malware writer might be capable of access your system.Once, the malware has attacked one of the systems, there may be a capacity threat of the safety of the structures of your colleagues also being compromised. This can impact the whole grid of systems by means of which the business enterprise is staying related and there can be a large loss of exclusive records. Thereby, main to a spurt of cybercrime cases due to the coronavirus outbreak in India and international.At such instances, the businesses can rely on the ISO/IEC 27000 circle of relatives. The ISO/IEC 27000 is an international benchmark certificates which is given to the firms which comply with the Information Security Management System (ISMS). In addition to providing improvements in structure and cognizance of the companies, the ISMS let you protect you and your client's confidential records from cyber-attacks.

HOW TO KEEP YOURSELF SAFE

You can preserve yourself secure from such scams and frauds with a help of Vigilance and Diligence. Here are some hints which need to be saved in thoughts while having access to the abovementioned data:

- Check the App info on Playstore before downloading it, this consists of, info of the developer, their internet site (if any), evaluations and scores given by means of other users.
- Avoid downloading apps from 1/3-celebration stores and web sites and download the apps best to be had in App Store for Apple IOs customers and Google Playstore for Android users.
- Use dependable mobile and laptop antivirus, these can save you fake and malicious apps from being installed.

Advisories are also issued with the aid of the Delhi Police and WHO because of upward thrust of such frauds. Some of the DO's and DON'T's from the said advisories are as follows:

- Do now not open e mail attachments that you have not asked for. In case you so acquire an attachments, it is usually more secure to open the identical from WHO's professional internet site and now not the attachment within the mail.
- Always pay attention to the type of personal records you're requested to proportion. There is continually a purpose why your personal statistics is needed. In no occasions, there could be a need on your passwords.
- Do now not accept as true with any emails that include a feel of panic. Legitimate businesses will in no way want you to panic and they always take the approaches step by step.
- Do not believe that WHO or some other organization conducts lotteries or offer prizes, offers or certificate thru emails.

STEPS TO CHECK AUTHENTICITY OF WEBSITE

- HTTP = Bad, HTTPS = Good: The 'S' in https:// stands for 'at ease'. It suggests that the website makes use of encryption to switch records, shielding it from hackers.
- Check for clean markers including spelling errors, typos and broken links. It is fantastically improbable for a legitimate enterprise to have such errors on their website.
- Domain age: The imposters typically register a site call just for a few months earlier than converting the name of the area and registering a new one. You can us search engines such as Whois.Com to look up the statistics consisting of the date of registration of the Domain name.
- Look for dependable contact records: Try to do background take a look at. There is not any harm in double checking with the agency itself via exchange contact numbers.
- If you are an excellent Samaritan of the society and need to donate and help the needy then constantly donate simplest to the websites/apps whose authenticity is corroborated through the Government.

INSTANCES OF CYBERCRIME AT SOME POINT OF PANDEMIC

According to the Cyber Security Crime Wing of Maharashtra Police, fraudulent hyperlinks approximately COVID-19 are being circulated on the internet through the social media posts and WhatsApp. Through those fraudulent messages, worry and vulnerabilities of the people in the direction of the coronavirus are being exploited. According to the officers, such messages are being circulated:

1. Promising employment to the age group of human beings among 18-forty years, with a Class certificates and with a earnings of Rs. Three,500 per month during the lockdown,
2. Remedies and additional insurance for Coronavirus,
3. Free recharge of Netflix or different video streaming offerings,
4. Free net records, and
5. Sale of liquor offers.

However, those messages have malicious links. These links were created for the cause of collecting statistics, along with sensitive and personal ones which are stored inside the user's gadgets. The links assist in carrying out diverse phishing and malware assaults and subsequently, compromising the protection of the device and the information inside. People's on-line presence has extended since the lockdown which makes them more liable to such attacks.

FAKE WEBSITES

The Cyber Division of New Delhi recently warned the public about the malicious coronavirus related websites. They launched the URLs of the internet site and urged the humans to now not get right of entry to them. Following is the listing of web sites marked as malicious:

- coronavirusstatus[.]space
- coronavirus-map[.]com
- canalcero[.]digital
- coronavirus[.]sector
- coronavirus-realtime[.]com
- coronavirus[.]app
- coronavirusaware[.]xyz
- coronavirus[.]healthcare
- survive coronavirus[.]org
- vaccine-coronavirus[.]com
- coronavirus[.]cc
- Best Coronavirus Protect[.]tk
- coronavirus update[.]tkc

Keeping the dearth in supply of the mask and sanitizers for the duration of the lockdown, many scammers have made fake e-trade websites selling these items. These criminals are preying on the fear of the people for the COVID-19. However, the gadgets never get introduced and the internet site is close down after a while.

CYBER CRIME IN OPPOSITION TO WOMEN

Cybercrime in opposition to women has been increasing because of the lockdown. According to the National Commission for Women (NCW) stats of cybercrime lawsuits received in 2020:

- February- 21
- March- 37
- April- 54

Moreover, in line with the founding father of a public care NGO, Akanksha Foundation, 20-25 proceedings have been obtained by using them on a everyday foundation. The court cases are mainly about:

- Abuse and threats
- Indecent exposure and unsolicited obscene photographs
- Malicious emails claiming their account is hacked
- Ransom needs and blackmail
- Sextortion, this is, extorting money or sexual favours with the risk of exposing proof of their sexual activity.

PM CARES FUND FRAUD

The Prime Minister's Citizen Assistance and Relief in Emergency Situation (PM Care) Fund is receiving a whole lot of donations from the human beings. The Fund's UPI ID is pmcares@sbi. However, it has come underneath the awareness of the authorities that scammers have made similar UPI IDs which include pmcares@icici, pmcares@yesbank, pmcares@ybi, and so on, to defraud people. The Indian Computer Emergency Response Team (CERT-In) along with banks, ministries and police departments issued warnings to curb fraudulent activities.

EMI MORATORIUM FRAUD

Alerted with the aid of the scammers approaches to exploit the EMI Moratorium Scheme, the Indian banks have reached out to their customers and strongly recommended them not to share non-public information like OTP and ATM PIN with imposters, who started out contacting humans and promised for assist with suspending the EMI fee.

SCAMMER LISTED STATUE OF UNITY FOR SALE

The Indian government have filed a case towards the individual that listed the sector's biggest Statue for $four Billion on OLX, a customer to patron (C2C) platform. According to the commercial, the money which turned into going to be generated by means of the sale of the statute would be utilized by the government to satisfy its clinical expenses amidst the coronavirus pandemic.

APT GROUPS

Advanced Persistent Threat (APT) groups are known as corporations that assault on a overseas state's information associated with national safety or financial significance both through cyberespionage and cybersabotage. These companies preserve to conform and make the most in the course of the pandemic. They had been focused on the Critical National Infrastructure which incorporates Hospitals with ransomware, malware, and dispensed denial of service (DDoS) attacks. Not most effective the attacks are executed with the intention of creating income, however, also to extract and get admission to login credentials and touchy facts of intelligence cost. Naikon, a chinese language APT institution, has been focused on the international locations of Asia Pacific vicinity. According to the IT protection corporations, their method of attacking is to infiltrate a central authority frame and extract private facts to release a phishing attack on different government goals.

ZOOM-BOMBING

Zoom, a video conferencing app, allows experts and students to have online conferences and attend online training, respectively. However, currently, problems had been raised about the safety of the app. Zoombombing refers to an activity in which hackers can secure get admission to a specific assembly and bombard it with objectionable content material. There have been current times where objectionable cloth like a pornographic film changed into performed throughout an internet lecture room session or a meeting. Actions were taken by the organization to save you zoombombing times through disabling Personal Meeting IDs for scheduling or starting a meeting and a password can be required for all meetings. Moreover, display sharing privileges could be for the host only with the aid of default.

ATTACK AT THE WHO

The World Health Organization (WHO) has noticed a drastic boom inside the variety of cyberattacks directed towards its body of workers due to the fact the beginning of the COVID-19 pandemic. According to the reports of the WHO, 450 active e-mail addresses and passwords of WHO were leaked on-line in conjunction with different hundreds belonging to the ones running on the radical coronavirus reaction. However, the leaked records did now not put the WHO system at danger because the records turned into antique but the assault did affect the older extranet device that's utilized by the current and retired team of workers at the side of the partners. The number of cyberattacks towards the agency is five times more than the equal period in 2019.

CONCLUSION

It is sure that the security standards have deteriorated as many businesses have been not prepared to paintings remotely and a upward push has been witnesses in cybercrime because of coronavirus. With a little vigilance and due diligence, we will defend our data and privacy. It is usually higher to stay at the aspect of precaution but if, even after taking all of the precautions, we fall right into a lure then a brief motion can salvage the loss. It is recommended to resort a criticism with the precise authority. With the extension of lockdown, the sentence jail for the abused girls only gets longer. As we take all the essential steps to flatten the pandemic curve, we need to be equally aware of ensure that the curve of intimate terrorism does no longer upward push aggressively. The management and regulation enforcement businesses want to understand the depth of the hassle. It is vital for the policymakers to cater to the wishes of those abused ladies who are playing an critical position inside the conflict towards coronavirus as caregivers, health and sanitation workers, scientists, and suffering housewives. The protection of girls cannot be placed on preserve until we emerge out of the pandemic. Priority measures have to be initiated with the aid of the authorities without deviating from the general COVID-19 action plan to assist and shield the victims of domestic violence.

Child Labour Laws : Issues & Challenges

*Tanuja Puri**

ABSTRACT

Child labour is one of the most brutal forms of inhumanity that mankind exercises on young children. Exploiting and abusing the innocent class of the society is one of the biggest sins committed by a man. Children are the young pillars of the society. Their growth in life is important for the growth and development of the nation. Even with some laws and regulations in the country, India has more than 12 million children working as labourers in industries and families. Such young minds are deprived of their childhood. They don't have access to good education. They become susceptible to physical and mental torture. In the age of playing, they take the onus of their family's responsibilities and work tirelessly. Poverty, poor working conditions, lack of shelter, low family earnings are the reasons that compel the children of such families to work. Government of the country thus needs to come up with more strict laws that govern the working of children in hazardous conditions. Laws must be implemented that put a complete ban on working of young children. Adequate steps need to be taken to protect the young budding minds of the nation.

INTRODUCTION

Children are the greatest gift to humanity. They form an important part in the nation building process as they are the future of the country. Their development should be of utmost importance to the government and so they must be provided with good education along with nutritious food. Their intellect, physical, mental and social development is inevitable for the society to grow. But due to various unavoidable reasons in a poor family like lack of food, shelter, clothing, children are forced to work in industrial and family set up. At such a budding age, where their mind should learn and they should only focus on their personal development, they are made to work in horrifying conditions. As a result of which their mind fails to grow and they suffer from malnutrition and various other diseases. The impact of child labour on the society is condemnable. The human rights of the children are violated. They are made to work at the expense of their education. As a result of which the budding minds grow undeveloped. The government thus needs to take adequate

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steps in order to protect children from such heinous growing years. The current laws and regulations operating in the country are mentioned in the paper with their flaws highlighted. Recommendations have been given as to how to improve the condition of the children working day and night tirelessly in industries. Through this paper attempt has been made to throw light on what child labour is, what are its implications and how to improve the present situation of child labourers in India.

CHILD LABOUR IN INDIA

For the past years, child labour has been decreasing in India but still it happens to exist. International Labour Organisation (ILO) termed child labour as ruining of child's livelihood, ignoring their potential and dignity and harming their physical and mental development. It harms children physically, mentally, socially morally, as at the time of growing period it affects their health and also their ability to focus on their knowledge and studies.

The Child Labour (prohibition & regulation) Act, 1986 in India states that a child who hasn't completed 14 years of age is not to be allowed and permitted to work in the commercial places. The act defines commercial places such as shop, work shop, farm, hotel restaurant, eating house, theatre, or other place of public amusement or entertainment. This act came in India for decreasing the number of working child population. The Child Labour (Prohibition & Regulation) Act, 1986 states that the employment of children in dangerous and hazardous industries is not permitted. The working condition should be clean, tidy and well organised & maintained so that they can't harm anyone. There categories are classified in different groups as according to their danger levels. As currently, there are 57 hazardous processes and 13 occupations that are listed in the act.

As per the census 2001, the child labour defined and described more clearly as participation of child with or without compensation or wages, physical and mental participation, paid or part time, are consider as child and no excuses will consider. It is estimated that India has the largest numbers of child labour in world. As per census 2001 and 2011, here below is a data presenting the working population of children in India :-

Year	Percentage of working children (%)			Total number of working populations (in millions)		
	Rural	Urban	Total	Rural	Urban	Total
2001	5.9	2.1	5.0	11.4	1.3	12.7
2011	4.3	2.9	3.9	8.1	2.0	10.1

REASONS OF CHILD LABOUR

There are various reasons due to which child labour has grown in India. Possible reasons are mentioned below-

Economic Conditions

Economic reasons may lead to the disability of people as they both are interlinked. Poverty arises due to poor economic conditions which leads to the disability of people and to recover that disability they require money which they don't have, so they encourage and force under aged children to start working that in turn are more likely to experience development delays than other children who are from well and higher socio-economic backgrounds and impacting their physical and mental health.

Discrimination

Children with poverty and disabilities are among the most suffered children, as because of disabilities they face discriminatory problems within their families, schools, communities and other places. Due to this discriminatory problems, they feel guilt, shame and guilt associated with the birth of child. As a result of this, children with disabilities may have poor health and education outcomes; they may have low self-esteem and limited interaction with others; and they may be at higher risk for violence, abuse, neglect and exploitation.

Exploitation & Negligence

Children not only face the risk of infectious diseases and other health conditions but also they are also at the risk of facing child abuses, violence, exploitation and negligence. OECD (Organisation for Economic Co-operation and Development), an organisation of United States gives a study on the child labour that the infants in between the age of 5-14 are at twice the risk of homicide than other children. Also the risk is more in private houses where the small children are working and facing certain violent behaviours and many cases are being hidden due to force and pressure of society.

IMPACT OF CHILD LABOUR

The difficulty of tasks and harsh working conditions create a number of problems such as premature ageing, malnutrition, depression, drug dependency etc. From disadvantaged backgrounds, minority groups, or abducted from their families, these children have no protection. Their employers do whatever necessary to make them completely invisible and are thus able to exercise an absolute control over them. These children work in degrading conditions, undermining all the principles and fundamental rights based in human nature. Additionally, a child who works will not be able to have a normal education and will be doomed to become an illiterate adult, having no possibility to grow in his or her professional and social life. In certain cases, child labour also endangers a child's dignity and morals, especially when sexual exploitation is involved, such as prostitution and child pornography. Furthermore, a child who works will be more exposed to malnutrition. These children are often victims of physical, mental, and sexual violence.

CHILD LABOUR LAWS

Following are the various laws and regulations implemented by the government to protect the children from child labour.

Constitutional Protection

Article 24 prohibits the employment of children under the age of fourteen in any factory or mine or any institution of hazardous nature. Simultaneously, Article 47 creates a duty on the State to raise the level of nutrition and the standard of living and to improve public health. Article 39(e)provides that "*the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited totheir age or strength*" and Article 39(f) cast a fundamental duty on the government to ensure that "*children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment respectively.*"

Minimum Wages Act, 1948

The act insures that their should be fixation of minimum time, minimum piece rate of wages, guaranteed time rates of wages for different occupations and localities of class of work and adult and adult, adolescents, children and apprentice by the state government.

The Factories Act, 1948

The acts explains that a child who has not completed 14 years of age will not allowed and permitted to work in any factory. This is strictly prohibited under child labour laws. Only the adolescent child who has completed 14 years of age will be permitted to work in factory with a condition that the child shall be certified with the receipt of fitness which shall be issued by the surgeon which insures that the child is physically fit for such work. Also, the timing for them should be fixed as per the law :-

1. Child should not be working in between 7pm to 8am.
2. Not more than 4 to 5 hours of continuously will allowed for adolescence children, there should be a break or interval in between them for fest the refreshing.
3. The Plantation Labour Act, 1951
4. A child, as per the definition of this Act, means a person who has not completed his fifteenth year. It covers all tea, coffee, rubber, cinkona and cardmom plantation which measure 177 hectares or more, in which 30 or more persons are employed. **[14]** A child who has attained the age of twelve and possesses a certificate of fitness is permitted to work under this establishment.

The Mines Act, 1952

It states that the minor i.e below 18 years, will be prohibited to be present in any work place which is under or above the ground level that is provided under the section 40 of the act. This act insures safety for the minors so that they can be saved for dangerous and harmful work places.

The Beedi and Cigar Workers (Condition of Employment) Act, 1966

The act prohibits the working of children below the age of 14 years in any industrial premises and prohibits the working of children of age 14 to 18 years in beedi and cigar industries and prohibits bthe working in between 7pm ro 6am in the industry premises.

The Act, with its application throughout India, prohibits the employment of children below fourteen in any industrial premises and prohibits the employment of children in the age group of fourteen to eighteen years between 7 p.m. and 6 a.m. in the premises or elsewhere.

The Children Act, 1960

This act prohibits industries to exploits the working adolescence children and to provide care, protection, maintenance, welfare, training, education and rehabilitation for the children. It provides that exploitation of child employees shall be punishable with fine which may extend to one thousand rupees.

SUGGESTIONS & CONCLUSION

Child labour is a problem that is deep rooted in the society. The current laws governing the control of child labour are not enough. Other stringent measures can be applied in order to stop the exploitation of the young budding minds. There are different age requirements in different acts. Thus and exhaustive definition of the age of the child needs to be identified to stop child labour. Formal education of the children is very important. So a regular check at the district level must be observed by the government. Number of children in an area and number of students enrolled and studying should be matched. Government schools and private schools data needs to be verified. Reformative activities should be conducted for the children who are found working in hazardous institutions. Physical , mental and social health of the child needs to be maintained. It is the responsibility of the parents to do that. So counselling sessions of people of the underprivileged background needs to be conducted. Mid day meals, ration shops and other adequate measures should be taken in all the areas so that there is no shortage of food, shelter and clothing and so parents would not feel the need to send their children to work. Overall individual as well government efforts needs to be put in to eradicate the social evil: child labour from the society..

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Working Women in Unorganised Sectors in India: Challenges and Issues

Ms. Paramita Bhttacharyya*

ABSTRACT

Women constitute half of world's population, perform nearly two thirds of work hours, receive one tenth of the world's income and own less than one percent of world's property[1]*. Female workers form the biggest section of India's unorganized labour force. Majority of women work in unorganized sectors for low wages due to low level of skills, illiteracy, unawareness and thus face high level of abuse. The paper throws light on condition of women workers in the unorganized sector.*

INTRODUCTION

"Empowerment of women leads to development of a good family, good society and, ultimately, a good nation." Dr. APJ Abdul Kalam[2].

Indian society is strongly patriarchal. Patriarchy is the appearance and institutionalization of male dominance over society. It entails that men hold power in all the significant institutions of society and that women are dispossessed of access to such influence.[3] In Indian society, women have been socially, economically, physically, psychologically and sexually exploited from times immemorial. Role of the women in India mostly is household and limited to domestic issues. In this century the worldwide work place continues to exploit women worker. Female workers form the largest section of India's unorganized labor force. Majority of women worker face high level of exploitation in unorganized sectors due to low level of skills, illiteracy, ignorance and surplus labor. The social and economic status of female

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1 Dr. S.C. Tripathi & Vibha Arora, Law relating to women and children 1 (Central Law Publications, Allahabad, 1st edn., 2004)

2 https://www.shethepeople.tv/news/abdul-kalam-was-a-believer-of-womens-empowerment-5-memorable-quotes (last visited on 20th may, 2020)

3 Indu Prakash Singh, Indian Women : The captured beings 3 (Intellectual Publihsing House, Dellhi, 1st edn., 1990)

worker is greatly affected by the malpractices of unorganized sector where they work.

Though there are various provisions in the constitution of India and in other laws which guarantee equal rights for men and women, women have still been given next priority almost everywhere especially in unorganized sector. The women working in these unorganized sectors are often outside the reach of strong provisions of Labor Laws. In unorganized sectors, state of affairs is not in official record and working conditions are not protected by law. So the problems of female workers in unorganized sector are not properly known. They often have long hours of work, there is wage discrimination between men and women, lack of job security, no minimum wages, lack of minimum facilities at work place, ill-treatment, heavy physical work and sexual exploitation etc.

WORKING WOMEN IN THE ORGANISED AND UNORGANISED SECTOR

In India there is about 313 million workforces[4] of which only 27 million (8 percent) are in the organized sector, the remaining 92 percent are in the unorganized sector. When discrimination against women in the workforce is discussed, most of the time the focal point usually throws light on the organized sector. In organized sectors most of the statistics are available and most of the laws apply and are more or less enforced. The organized sector covers Education, Medicine, Law, Administration, Media, Defense and those working in Multi National Corporations. In the organized sector women constitute only 13.3 percent of total employees.[5]

The largest and most important sector of employed women is the unorganized sector which employs 91-94 percent of women workers.[6]The unorganized sector covers most of the rural labor and a substantial part of urban labor. It includes activities carried out by small and family enterprises, partly or wholly with family labor and in which wage-paid labor is largely, non-unionized due to such constraints as the causal and seasonal nature of employment and scattered location of enterprises.[7] Majority of women work within this highly exploited sector. Employment in this sector is distinguished by low pay, long hours of work, low productivity, low skills and lack of job security. Women workers even though large in number, lie at the buck stair of the socio-economic ladder.[8]

4 1993, National Sample Survey Organization Figures http://mospi.nic.in/sites/default/files/publication_reports/409_final.pdf (last visited on 30th may 2020)

5 Govt, of India, 1975 : "Towards Equality : Report on the status of women in India", New Delhi : Ministry of Education and Social Welfare, at 63 (https://shodhganga.inflibnet.ac.in/bitstream/10603/132551/12/12_chapter%204.pdf)

6 Joyce Lebra, Joy Paulson, Jana Everatt, Women and Work in India 21 (Stanford University Press, Standford California, 1st edn.1984)

7 B.N. Rajhans, The Organized and Unorganised Sectors- contributions and compensations,(Oxford & IBH Publishing, New Delhi, BBedn.1993)

8 Abraham, V, (2009), "Employment Growth in Rural India: Distress Driven?", Economic and Political Weekly, Vol. 44, No. 16.

UNORGANISED SECTORS

Unorganized sector comprises of major part of Indian Economy. Unorganized sectors are involved enterprises and employments which are unregistered under any legal provision. In Indian scenario 86 to 92 percent of human resource is employed in unorganized sector[9] National Commission on Labour (1966-69) has defined unorganized labor as those who have not been competent to organize themselves because of some restraints like casual nature of employment, ignorance and illiteracy, small and scattered size of establishments and position of power enjoyed by employers etc,. Unorganized sectors are having no fixed or permanent nature of employees. Its workers are casual, contractual, migrant, home based, own-account workers etc.

Unorganized labour stands for scattered and fragmented workforces working individually sometimes loosely associated, in various livelihoods. Unorganized labor is not incorporated in any recognized association and union with defined ideology, goals and areas of specialization. The unorganized sector of the economy in India is the largest sector in term of employment of the workforce. It consists of agriculture and such related activities as forestry, livestock and fishing as well as non-agriculture. The Bill Proposed by National Commission for Enterprises in the Unorganized Sector 2005, which was discussed at Indian Labour Conference, December 2005, presented by the government of India, broadly divided the works of unorganized sector into self-employment and wage workers.[10]

WOMEN IN UNORGANISED SECTOR

Unorganized sector was developed by the British economist Keith Hart in 1971, which appeared as a dynamic and alive sector, representing a growing percentage of economic action, particularly in the developing countries .[11] He described the unorganized sector as that part of urban labor force, which falls outside organized labor force. In the unorganized sector, work affairs are not in official record and labor conditions are not protected by law. So the problems of female workers in unorganized sector are not very clearly known to the common public. Due to population growth and urban migration, the active labor force in unorganized sector was growing at a much faster rate than availability of jobs in the organized sector. Women labour force is also actively engaged in the unorganized sectors. In Indian structure 86% of human resource is employed in unorganized sector. 91% of women workers in unorganized sector are rendering their services.[12]

9 https://www.otj247.com/blog/page/96/women-in-unorganised-sector/ (last visited on 22nd may 2020)

10 http://www.socialsecuritynow.org/Resource/NCEUS%20-%20ILC%202005.pdf (last visited on 30th may 2020)

11 http://www.ijsrp.org/research-paper-0613/ijsrp-p1825.pdf (last visited on 30th may 2020)

12 https://www.otj247.com/blog/page/96/women-in-unorganised-sector/ (last visited on 30th may 2020)

The International Labour Organization says that women represent:

- 50% of the population
- 30% of the labor force
- Perform 60% of all working hours
- Receive 10% of the world's income
- Own less than 1% of the world's property.[13]

As per a report[14] by International Labor Organization released on the International Women's Day on March 8, 2007, it is represented that though the status of a working woman does not surprise many, there is surprisingly a significant gender disparity in terms of wages, job security, etc. In various regions women are either under paid or are contributing members of the family who are unpaid.

SOCIO-ECONOMIC OUTLINE OF WOMEN WORKING IN UNORGANISED SECTOR AGE

Overall, majority of unorganized women workers are from the young age group of 18-35 years. About 35 percent are middle aged between 36 and 50 years. Only 4 percent are in the age group of 51-60 years. Just one percent is above the age of 60 years. Across the regions, not much variation is noticed worth indicating.[15]

MARITAL STATUS

Majority of the women workers are married, whereas only about 20 percent of them are unmarried. About 1.40 and 1.80 percent are widowed and divorced respectively. Just 0.60 percent women have been deserted by their husbands.[16]

RELIGION AND CASTE

Majority of the working women (87.90) are from Hindu religion. Muslims constitute about 8.31 percent, Christians 2.60 percent and Sikhs just 0.50 percent; Buddhist and others are about 0.90 percent. Almost similar pattern is observed across regions.[17]

About 38.88 per cent working women belong to OBCs, followed by 29.78 percent from General category, 21.72 percent from SCs and about 10 percent are from STs.[18]

13 https://www.ilo.org/global/about-the-ilo/history/centenary/WCMS_480301/lang—en/index.htm (last visited on 29th may 2020)

14 https://www.ilo.org/gender/Informationresources/WCMS_090534/lang—en/index.htm (last visited on 29th may 2020)

15 http://labourbureaunew.gov.in/UserContent/Match_Industry_Final_Report_250914.pdf (last visited on 29th may 2020)

16 http://labourbureaunew.gov.in/UserContent/Match_Industry_Final_Report_250914.pdf(last visited on 29th may 2020)

17 https://www.worldwidejournals.com/indian-journal-of-applied-research (IJAR)/special_issues_pdf/April_2016_1461059316__29.pdf(last visited on 29th may 2020)

18 http://labourbureaunew.gov.in/UserContent/Match_Industry_Final_Report_250914.pdf(last visited on 29th may 2020)

FAMILY TYPE

Majority of Women workers (85.90%) are from nuclear families and the rest (14.10) percent are from joint families. Across regions, proportion of nuclear families varies between 87.08 percent in North-East to 84.60 percent in the East.[19]

TYPES OF WOMEN WORKERS IN UNORGANISED SECTORS

WASTE MATERIALS PICKERS

Waste picker is a person who picks up reusable or recyclable materials thrown away by others to sell or for personal use. The worldwide population of urban dwellers has doubled between 1987 and 2015 with 90% of this growth occurring in developing countries. Worldwide there are millions of women waste picksers, mostly in developing countries.[20]

DOMESTIC WORKERS

In study report it says that during the year there were1.68 million female domestic workers, while the number of male workers was 0.62 million only. Although domestic work has brought higher incomes to many women and their families it is still far from honest work. It involves long working hours, low wages and barely any social security. Domestic workers are more susceptible than other sort of workers because they are not officially and legally classified as workers at all and are not covered by laws that apply to workers or labours.[21]

COOLIES

Women coolies are the persons who are involved with the job of loading and unloading of packages. Worldwide there are good numbers of women coolies.[22]

VENDORS

This is the most spread category, which includes women engaged in selling different types of commodities. Nearly 40% of total vendors are women and 30% of these women are the sole earning members in their families.[23]

19 https://icehm.org/upload/6334ED715042.pdf(last visited on 29th may 2020)

20 http://www.allresearchjournal.com/archives/2017/vol3issue4/PartL/3-4-182-302.pdf (last visited on 20th may 2020)

21 Mehrotra, et al, (2014), "Explaining Employment Trends in the Indian Economy: 1993-94 to 2011-12", Economic and Political Weekly, Vol. 49, No. 32.

22 http://www.allresearchjournal.com/archives/2017/vol3issue4/PartL/3-4-182-302.pdf(last visited on 20th may 2020)

23 http://www.allresearchjournal.com/archives/2017/vol3issue4/PartL/3-4-182-302.pdf(last visited on 20th may 2020)

BEAUTICIANS

A huge number of women are employed as beauticians. A large portion of the beauty salons and parlors fall under the unorganized sector. They are characterized as an informal employment.[24]

CONSTRUCTION LABORS

The construction industries provide direct employment to a large workforce in India. There are roughly 40 million migrant construction workers in India in 2008. There are a huge number of women workers in construction work in India. They work mainly as unskilled workers with a very small amount of wages.[25]

GARMENT WORKERS

The garment industry is a subsector of the textile business and also generates many jobs for migrant workers. India's readymade garment exports increased significantly as a share of total exports (12% or Rs 254780 million in 2001-02). The women work mostly as helpers of male tailors. [26]

PROBLEMS AND CHALLANGES OF WOMEN IN UNORGANISED SECTORS

A large number of women from rural areas migrate to cities and towns all over India. Most of these women and girls are illiterate and unskilled. They work in inhuman conditions in cities as their living standard is extremely poor. It is a recognized fact that there is still no society in the world in which women workers enjoy the same opportunities as men. The women in unorganized sectors are facing so many problems. These problems are discussed as under:[27]

EDUCATION

Illiteracy is the biggest problem because they do not get time to educate themselves. In childhood, they have to start working early which do not allow them to go school. Most of the female construction workers are illiterate. They do not know about the government rules and regulations as well as working conditions. They are very ignorant about market conditions as well as ups and downs in their wage rates. As they are scattered in nature they are totally helpless in pursuit of their common interest. Ignorance and illiteracy are the prime obstacles in the progress of working women.

24 http://www.allresearchjournal.com/archives/2017/vol3issue4/PartL/3-4-182-302.pdf(last visited on 20th may 2020)

25 http://www.allresearchjournal.com/archives/2017/vol3issue4/PartL/3-4-182-302.pdf(last visited on 20th may 2020)

26 http://www.allresearchjournal.com/archives/2017/vol3issue4/PartL/3-4-182-302.pdf(last visited on 20th may 2020)

27 Dev, S. Mahendra, "Inclusive Growth in India: Agriculture, Poverty, and Human Development", (Oxford University Press, New Delhi. 2007)

SKILL AND KNOWLEDGE

Majority of female do not have proper training and skills aligned to their task. This result is excessive stress and inefficient working.

GENDER BASED EXPLOITATION

Female worker are more vulnerable to exploitation by employer. Working women are always in danger of physical and economical exploitation by their male co-workers. Gender discrimination at the workplace is subtle and is reflected in the nature of work performed, valuation of the skills and the technology used by men and women. Generally lower wage rate jobs are assigned to women and higher wage rate jobs are assigned to men. Many women workers are exploited by the fellow male workers, owners as well as by the customers. The women are reluctant to complain with any of the formal bodies fearing loss of jobs and embarrassment caused in revealing the matter.[28]

INSECURITY IN JOB

Absence of strong legislation controlling the unorganized sector makes the job highly insecure in this sector.

ATTITUDE OF EMPLOYER

Temporary nature of employment in this sector does not allow the bond between the employee and employer to establish and become strong.

WORK PRESSURE

Female are overworked, they work twice as many hours as worked by their male counterpart. In agriculture sector the condition is the worst. When measured in terms of number of tasks performed and the total time spent, it is greater than men as per one study in Himalayas which found that on a one-hectare farm, a pair of bullocks' works 1064 hours, a man 1212 hours and a woman 3485 hours in a year.[29]

IRREGULAR PAYMENT

There is lack of controlled processes in unorganized sector which results in to untimely payment of wages to the workers. When it comes to payment to female, it is even worst. The most serious danger faced by the working class in the era of globalization is the increasing risk to job safety. The informal sector is fast expanding, while the organized sector is shrinking. Contract, casual, temporary, part-time, piece-rated jobs and home based work etc. are increasingly replacing permanent jobs. There was no

28 Sengupta, A. & P. Das, (2014), "Gender Wage Discrimination Across Social and Religious Groups in India: Estimates with Unit Level Data", Economic and Political Weekly, Vol. 49, No. 21.

29 http://www.ramauniversityjournal.com/commerce/pdf_march16/4.pdf (last visited on 22nd may 2020)

specific law to protect the interests of the workers working in unorganized sectors. The workers in the informal sector, a large number of who are women, have no job security. Work is often unskilled or low skilled and low paid. Availability of work is irregular; when work is available, they have to work for long hours.[30]

WAGE RATE DESCRIMINATION

Female do not get similar payment to the male for same work. The unorganized sectors practices wage discrimination between men and women. The wages of a female worker is always less than a male worker. Say if wages of a male worker is Rs 150 then wages of female workers will be Rs. 90-100.[31]

SEASON BASED EMPLOYMENT

Many of the unorganized sector industries are seasonal. These industries includes fruits processing, pickle making, agricultural sector, construction sector etc. They have to look for other alternative employment when there is no work during off season.

PHYSICAL PROBLEM

The working conditions are not healthy. Work place is not always scientifically designed. This results into workers facing fatigue resulting physical problems. Female workers are mostly on such tasks where they need to remain in one position such as agriculture.[32]

FAMILY PROBLEMS

Women are playing multiple roles in the society. Hence, they are also facing multiple problems. Every member in a family expects a lot from women. As expectation increases number of family problems increases. Domestic violence and divorce etc. are few such problems, which women regularly face. All these family problems put female workers into trouble. Discrimination against women has contributed to gender wage differentials, with Indian women on average earning 64% of what their male counterparts earn for the same occupation and level of qualification.[33]

The difficulties faced by the women workers in the unorganized sector are numerous. Their work is characterized by irregular employment, uncertain terms and condition, lack of service rules with regard to their specific responsibilities, rights and obligations and inaccessibility to social security benefits. Though they constitute a majority of the workforce in the unorganized sector, they are subjected to various forms of

30 https://www.otj247.com/blog/page/96/women-in-unorganised-sector/

31 Das, P, (2012), "Wage Inequality in India: Decomposition by Sector, Gender and Activity Status", Economic and Political Weekly, Vol. 47, No. 50.

32 http://www.ramauniversityjournal.com/commerce/pdf_march16/4.pdf (last visited on 22nd may 2020)

33 https://www.otj247.com/blog/page/96/women-in-unorganised-sector/(last visited on 22nd may 2020)

discrimination, inequitable pay and harassment.

Major challenges faced by the women working in the unorganized sector are as under;

- Insecure employment
- Irregular & low wages
- Long working hours
- Occupational hazards and health issues
- Lack of proper physical environment at place of work
- Loss of income arising out of accidents
- Lack of old age security
- Lack of bargaining power
- Non-applicability of social security measures
- Exploitation & discrimination of women

EMPLOYMENT OF WOMEN IN UNORGANIZED SECTOR

India's economy has undergone a substantial transformation since the country's independence in 1947. Agriculture now accounts for only one-third of the gross domestic product, down from 59% in 1950 and a wide range of modern industries and support services now exist. In spite of these changes, agriculture continues to dominate employment, employing two-thirds of all workers since the times immemorial, worth of the work done or services rendered by women have not been recognized. India is a multifaceted society where generalization could apply to the entire nation's various regional, religious, social and economic groups. Nevertheless, certain broad circumstances in which Indian women live affect the ways they participate in the economy. Indian society is extremely hierarchical with virtually everyone ranked relative to others according to their caste, class, wealth and power. This rank even exists in areas where it is not openly acknowledged, such as certain business settings. Women are expected to be chaste and especially modest in all actions that may constrain their ability to perform in their workplace on an equal basis with men. When a family suffers economically, people often think that a woman should go out and work, yet at the same time the women's participation in employment outside the home is viewed as "slightly inappropriate, subtly wrong, and definitely dangerous to their chastity and womanly virtue". When a family recovers from an economic crisis it attempts to improve its status, women may be kept at home as a demonstration of the family's morality and as a symbol of its financial security. Working women of all segments of Indian society faces various forms of discrimination including sexual harassment.[34]

34 https://www.worldwidejournals.com/indian-journal-of-applied-research (IJAR)/special_issues_pdf/April_2016_1461059316__29.pdf (last visited on 20th may 2020)

Economic participation of women can be mentioned in the field of production of goods and services accounted in the national income statistics. However, female work participation has always been low at 26% compared to 52% of men. The problem is that women have always been at work, only the definitions of work and work plan have never been defined to include their contribution to the economy and the society. Women work mainly for economic independence, for economic necessity, as some women are qualified enough to work, for a sense of achievement and to provide service to the society. Most Indian women by and large undertake "productive work" only under economic compulsion.[35] This is the reason for high female participation rates in economically under privileged communities. Usually upper class women are limited to homes. Work participation rate is found to be higher among rural women (27%) than the urban women (10%). The main workers are those who 'work' for the major part of the year. Female marginal workers constitute 6.26% of the population whereas males being only 0.98%. Most of the women are found to be employed in agricultural activities and in the unorganized sector. An estimate of the World Bank shows that 90% of the women working in the informal sector are not included in the official statistics and their work is undocumented and considered as disguised wage work, unskilled, low paying and do not provide benefits to the workers. Statistics show that vast majorities of Indians work in Agriculture where 55% of the population is female agricultural workers and 30% of the men are laborers and not cultivators.[36]

INTERNATIONAL STRATEGIES

India has endorsed various international conventions and documents on human rights to secure equal rights for the female sex. Among them ratification of the Convention on Elimination of All sorts of Discrimination against Women (CEDAW) in 1993 is mentionable. The Mexico Plan of Action (1975), the Nairobi Forward Looking Strategies (1985), the Beijing Declaration, Platform for Action (1995) and the document adopted by the UN general assembly Session on Gender Equality and Development & Peace for the 21st century, titled "Further actions and initiatives to implement the Beijing Declaration and therefore the Platform for Action" are endorsed by India for appropriate follow up.

NATIONAL STRATEGIES

GOVERNMENT ACTIONS

In India from the Fifth Five Year Plan (1974-78) onwards there has been a marked shift from welfare to development regarding issues concerning women. In current years, the empowerment of women folk has been recognized as a vital factor for determining the position of Women. In the year 1990, the National Commission for

35 Thomas, J. J., (2012), "India's Labour Market During the 2000s: Surveying the Changes", Economic and Political Weekly, Vol. 47, No. 51

36 https://www.worldwidejournals.com/indian-journal-of-applied-research (IJAR)/ special_issues_pdf/April_2016_1461059316__29.pdf (last visited on 20th may 2020)

Women was formed to safeguard the rights and legal entitlements of women. The 73rd and 74th Amendments to the Constitution of India have provided provisions for reservation of seats in Panchayats and Municipalities for ladies.

There still exists a broad gap between the goals pronounced within the Constitution of India, legislation, government policies, plans, programmes, and the associated mechanisms on the other. The gap has been analyzed extensively within the Report of the Committee on the Status of women in India and it's also been highlighted within the National Perspective Plan for women, 1988-2000 . The Shramshakti Report, 1988, stated that gender disparity manifests itself in various forms. Violence at the domestic and societal levels have been mentioned as kinds of gender disparity in the report. The report has also mentioned about the problems of discrimination against girl children, adolescent girls etc,. The underlying causes of gender inequality are associated with social and economic structure, which is predicated on informal and formal norms, and practices. Consequently, the access of girls, particularly those belonging to weaker sections including Scheduled Castes, Scheduled Tribes, Other backward Classes and minorities, majority of whom are within the rural areas and within the informal, unorganized sector , to education, health and productive resources, among others, is insufficient. Therefore, they continue to be largely marginalized, poor and socially excluded.

CONSTITUTIONAL PROVISIONS

The principle of gender equality is enshrined within the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favor of girls. Although social insurance isn't enshrined within the constitution of India as a fundamental right, the legislations incorporating the social insurance have got their strength from the Art. 41[37], Art.42[38], Art.47[39] of the DPSP, which seek to attain social, economic and political justice. Relevant constitutional provisions are discussed as under. Items 23[40] and 24[41] in the Concurrent List of the Seventh Schedule of the Indian Constitution also lay down about social insurance.

37 Art. 41 of the constitution require the State to secure the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement.

38 Art.42 requires the State to secure just and humane conditions of work and for maternity relief.

39 Art.47 requires the State to raise the level of nutrition and the standard of living of its people and improvement of public health.

40 Item 23 –Social Security and Insurance, employment and Unemployment

41 Item 24- Welfare of labour including conditions of work, provident funds, employer's liability, workmen's compensation, invalidity and old age pension and maternity benefits.

OTHER LEGISLATIVE PROVISIONS

Women form fundamental part of the Indian working class. The provisions of fundamental rights and fundamental duties within the Constitution of India are fundamental to the demand for defense of women work force. There are some legislations which are directly applicable for female workers, such as, The Maternity Benefit Act, The Equal Remuneration Act, 1976; The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 etc.

There are other laws like Factories Act, the Mines Act, The Dock Workers' Act, The Employees' State Insurance Act, Workmen's Compensation Act etc, which contain provisions for regulating the conditions of the workers in an institution. Though these laws aren't directly for the benefit of women workers of unorganized sectors, the principles contained in these laws are the same as those contained in the fundamental rights, directive principles of state policies and fundamental duties of the constitution of India. The laws provide health benefits and compensation to the workers in cases of ill-health, injuries etc. But within the unorganized sector where the bulk of female workers are concentrated, no occupational safety and health safeguards are exclusively provided. The Employees State Insurance Act 1948, The Minimum Wages Act 1948, The workers Provident Funds Miscellaneous Provisions Act 1952, The Payment of Gratuity Act 1972 etc are some of the other legislations which also contain similar provisions.

HE UNORGANISED WORKERS' SOCIAL SECURITY ACT, 2008

The Act provided for State Social Security Boards[42] and National Security Board[43] which would work at District and Panchayat through workers' facilitation centers all over the country. The Workers Facilitation[44] Centre was structured to act as the main instrument for implementation of the Act.[45]

The WFC was formed for the following functions:

- The registration of the workers and to provide them social security numbers with identity card should be primary duty of WFC.
- Resolution of labor disputes through conciliation and arbitration by setting up Committees in consultation with State Board.
- The Workers Facilitation Center should also have functions of increasing skill and productivity.

The welfare schemes[46] envisaged under the Act are:

42 Section 6 of the THE UNORGANISED WORKERS' SOCIAL SECURITY ACT, 2008

43 Section 5 of the THE UNORGANISED WORKERS' SOCIAL SECURITY ACT, 2008

44 Section 9 THE UNORGANISED WORKERS' SOCIAL SECURITY ACT, 2008

45 http://legislative.gov.in/sites/default/files/A2008-33.pdf last visited on 20th may2020)

46 SCHEDULE I of the THE UNORGANISED WORKERS' SOCIAL SECURITY ACT, 2008 [See sections 2(i) and (3) of THE UNORGANISED WORKERS' SOCIAL SECURITY ACT, 2008]

- Indira Gandhi National Old Age Pension
- National Family Benefit Scheme
- Janani Suraksha Yojana
- Handloom Weavers' Comprehensive Welfare Scheme
- Handloom Artisans' Comprehensive Welfare Scheme
- Pension to Master Craft persons
- National Scheme for Welfare of Fishermen and Training and Extension
- Janshree Bima Yojana
- Aam Admi Bima Yojana
- Rashtriya Swasthya Bima Yojana

According to this law, "unorganised sector workers as those who are home-based, self-employed or wage workers in an enterprise with less than 10 employees. This Act mandates the Central government to formulate a health and maternity benefit scheme for workers covered by it. In reality, this definition also excludes many women working in the unorganised sector, including agricultural labourers, seasonal workers, domestic help or construction workers"[47].

However, "a woman labourer can claim cash assistance under the Maternity Benefit Programme 2017 (MBP)[48]. The Ministry of Women and Child Development formulated MBP to comply with the provisions of Section 4(b) of National Food Security Act. It provides limited cash benefits to P&LW who are below the poverty line to make up for the wage loss".[49]

THE CODE ON SOCIAL SECURITY, 2019

The Government of India has undertaken a mammoth task of amalgamating varion labour laws of India into four specific codes. The Code On Social Security, 2019 was introduced in the Lok Sabha on 11th December, 2019, by the Mr. Santosh Kumar Gangwar, The Labour Minister. The Bill intends to amalgamate, rationalize and replace a number of central labour legislations like The Employees' Compensation Act, 1923, The Unorganised Workers' Social Security Act, 2008, The Payment of Gratuity Act, 1972, The Maternity Benefit Act, 1961 etc This code aims to introduce various welfare aspects for those working in the organized and unorganized sector. This Code has extended social security and benefits to workers of unorganized sector including gig workers (online), home based and domestic workers, platform workers, inter state migrants and fix term workers. Chapter IX of the Code provides for Social Security

47 Available at https://www.youthkiawaaz.com/2017/10/maternity-benefits-for-women-in-the-unorganised-sector/, Last visited on 29/5/2020

48 MBP was introduced in 2010 as the Indira Gandhi Matritva Sahyog Yojna (IGMSY)

49 Supra n. 47

for Unorganised Sector. It provides that Central Government shall notify schemes for workers of unorganized sector related to matters concerning[50]:

- life and disability cover;
- health and maternity benefits;
- old age protection;
- education;
- housing; and
- any other benefit as may be determined by the Central Government.

Section 109 of the Code also provides for the schemes related to the following matters which may be notified by the State Government for the unorganized workers:

- provident fund;
- employment injury benefit;
- housing;
- educational schemes for children;
- skill upgradation of workers;
- funeral assistance; and
- old age homes.

Though the Code has been subject to criticism from some sections of the society but if the provisions, which recognize the needs of the workers of the unorganized sector and promises to cater to their social welfare are implemented in a gender neutral pattern, they will serve to a large extent needs of the workers of unorganized sector including women.

CONCLUSION AND SUGGESSION

Conditions of working women in India have undergone change in recent years, however a lot still needs to be done. The female labour constitutes one third of the agricultural workers in India. Women workers face serious problems and constraints like lack of continuity, lack of proper work condition, insecurity, wage discrimination, absence of medical and accident care etc. AT this hour it is very important to seriously deal with issues concerning women working in the unorganized sector and challenges faced by them and to debate the type of policy reforms and institutional changes required for the liberation and empowerment of such labour force both in the urban and rural areas. Thus, in expectation of better working conditions and over all emancipation of women who form a significant part of Indian labour force by contributing in the unorganized sector, the following can be suggested:

(i) Creating an environment through economic and social policies for wholesome development of women.

50 Sec 109

(ii) Ensuring of de-jure and de-facto gratification of human rights to both men and ladies.

(iii) Strengthening the legal system aimed toward elimination of all sorts of discrimination against women

(iv) Transforming the attitude of the society and various community practices by active participation and involvement of both men and women in both organized and unorganized sectors.

(v) Elimination of all sorts of discrimination in unorganized and organized places of employment

(vi) Objective implementation of the Code of 2019 with the aim to serve the cause of all the neglected or ignored sector of labour force which includes women in unorganized sector.

Marital Rape: Women as the Silent Victims

Pahul Sond*

ABSTRACT

In the Indian Penal Code, rape is defined as any acts like penetration by penis, or any object or any part of body to any extent, into the vagina without the consent of a woman or making her to do so with another person against her will, but the concept of marital rape remains undefined in the Constitution of India. However, marital rape may be defined as apart from physical and sexual violation - a betrayal of the fundamental basics of a marital relationship. Only 5-6% of the rape cases were reported to the police in India in the year 2016 as reported by the National Family Health Survey (NFHS). The researcher, through this research paper aims at finding out how marital rape found its way in a sacred relation like marriage and thereby evaluating its impact on a woman's psychological health and physical trauma. It also focuses at evaluating the guidelines laid down by the Supreme Court of India on martial rape and as to why the concept of marital rape does not exist in the legislation. The paper aims at putting forth the gross levels of unlimited sexual access of a wife for the purpose of the recreation of a husband for they consider them as their property which drastically distorts her self-esteem. Thus, putting into perspective the further considerations, it is likely that the awareness among the masses must rise bringing into picture the various fallacies in the legal system and hence explaining the three kinds of marital rapes. The paper will try to bring out the various factors involved in the kinds of marital rape and why the voices of the women are subdued. The developing India's concern for women welfare is enormous and even should be, since leaving any section of the society bereaved would be of no use as far as the national ethics are concerned. Such heinous misogynist practices, having invited a great deal of criticism, must be strictly countered with the necessary law-committees since any further decrement would be a tantamount to a socio-legal apocalypse.

Keywords*: Apocalypse, Misogynist Practices, Psychological Health, Sexual Access.*

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RESEARCH DESIGN

1. AIMS AND OBJECTIVES

1.1. Aims

1.1.1. To find out how the concept of marital rape came into existence

1.1.2. To check awareness among people and why in the Indian society, there is no acceptance for the concept of marital rape

1.1.3. To bring out the loopholes and that there is no existing legislation in the Indian Constitution

1.2. Objectives

1.2.1. to analyze the impact of martial rape on a woman's psychological and physical health especially her reproductive organs

1.2.2. to analyze the guidelines laid down by the Supreme Court on 11 October 2017, under Section 375 of the Indian Penal Code

1.2.3. bring out the concern for the victimized in the Indian patriarchal society

2. SCOPE AND LIMITATION

The researcher has limited his research to the Indian Constitution and also the Indian Penal Code for certain definitions of crimes. However, there exists no legislation in the Indian Constitution or even the Indian Penal Code (IPC) and for the purpose of the same, the researcher has compared with the Indian Constitution with the legislations of other countries.

3. METHODOLOGY

The researcher has opted for doctrinal methodology of research although there exists no statue on marital rape but the parallel drawn with a few other legislations, fulfills the purpose of the same. the paper is a critical as well as a comparative analysis.

4. SOURCES

4.1. **Primary Sources:** The researcher has used U.S. Constitution and certain acts from the Indian legislation and the Indian Constitution. Along with this, certain reports have also been used with a few provisions of the Indian Penal Code. The legislations have been mentioned in the bibliography.

4.2. **Secondary Sources:** The researcher gas used certain book, articles, internet sources as secondary sources, which have been explicitly mentioned in the bibliography.

5. STATEMENT OF PROBLEM

The central idea of the research paper encompasses, why the concept of marital rape does not exist in India in the Constitution or in the Indian Penal Code(IPC) and also in the practical aspect. The paper also brings out the various issues that women face in a matrimonial relationship, with a main emphasis on marital rape. The researcher has also pointed out the three kinds of marital rape and also provided statistical numbers of the situation in India. Quoting a few cases, as have been reported, the trend in the crime (although not in the Constitution) has been highlighted. Certain guidelines given by the Supreme Court have also been put across through the paper.

Black's dictionary defines rape in criminal law as "The unlawful carnal knowledge of a woman by a man forcibly and against her will" and Section 375 of the Indian Penal Code(IPC), in the Constitution of India defines rape explicitly with seven clauses supported by an exception but in no Indian statute, is the term 'marital rape' defined per se and also it is not criminalized under the Indian Constitution because in the Indian society, the question of consent by the woman for sex does not matter to anyone except herself and hence the question of her consent does not come into existence. Earlier, when women were forcibly married at a younger age, the couple did not have the maturity to understand the seriousness of such a sacred institution such as marriage for it was imposed upon them by the so called worried elder members of the family and they, for the purpose of perversion, had sexual intercourse not aware of the consequences on their health and its impact on the society at large.

With gradual evolvement in time, men started considering women as their property like anything else that they possessed, they came up with c thought that they could do anything with her any which way in their relation of marriage because the woman were not supported by their parents for any signs of rebellion against marriage as it would break her matrimonial home and then she would have no home to live in, because her parents would not let her back to her original home. As the husband was thought of possessing the sole control over his wife, he used her for recreational purpose and any resentment to this acts of his, slowly led to what we now term as crimes against women. For a matrimonial house, these crimes include dowry deaths, honor killings, domestic violence, flogging, sexual crimes in the form of sexual abuses and harassment, marital rape and the list goes on. Marital rape still remains a hush-hush topic in the male dominated society because of woman being an asset of man and in some cases, women especially in the rural and underdeveloped areas of India do not know the existence of a concept like marital rape which aims at one of the dominant ways of exploitation of them in a patriarchal so-called sacred matrimonial relation in a society.

Even now, in the 21st century, she is considered as a property of the husband like any other and he can use her in whatever way he deems fit because of the 'ancestral' moral values and the traditions and the customs prevalent and nevertheless, the patriarchal mindset and mind-block of the Indian society. This leaves the still developing country from the past 7 decades, India, with other debatable and much to worry

about rising issues such as that of battered wives with the Battered Wives Syndrome(BWS) which emerged in the 1990s due to the so called 'soulmates' who turn violent during sex, psychological problems such as trauma and depression in women which has led to a tremendous increase in the number of suicide cases in various parts of the country and the effects of repeated and forced anal sex by her husband on her reproductive parts and many such other problems that our narrow-minded society is not capable of handling at this point of time.

On 18 January 2018, it was submitted before the Delhi High Court to the bench of Acting Chief Justice Gita Mittal and Justice C. Hari Shankar demanding marital rape to be declared as a criminal offence. "the petitions challenge Exception 2 Section 375 which says that sexual intercourse or sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age is not rape.[1] Later, last year, the Supreme Court of India, laid down guidelines that the marriage of a girl below 15 years of age is illegal and stated that "if a man has sexual intercourse with a girl under 15 years of age, it is termed as rape, irrespective of consent or no consent and if she is below 18 years of age, but more than 15 years of age, then no offence of rape is made".[2] This is a serious loophole for a girl aged between 15 to 18 years of age is not in the mental capacity and maturity of deciding between an informed decision and consent and she will not be protected this way in an abusive sexual relationship. She is left in a dilemma where she is confused between two things – whether she is meant to do this for her husband for she has become the 'property' of her husband or whether it is right for her to go against her husband because divorce is a big stigma in the patriarchal Indian society.

The concept is flourishing in arranged marriages because the life partner chosen by the parents of the bride is always right because they come to a consensus after a lot of struggle in their research among their relatives and friends. When she becomes the victim, she is under constant fear and anxiety that when will it happen next and what can she do to stop it and thoughts such as these give her constant stress. A recent article wrote that the most common reason given by a wife to resist such an act is of headache or that she is on her menstrual cycle. No means No. Why should a lady be forced to give such reasons to beg little freedom against forced sex which she is not thought to possess? The law is not being able to protect her in any way even though it violates her Article 14, 15 and 21 which deal with right to equality in the eyes of law, prohibition of discrimination and right to life and personal liberty respectively. This would be contradicting in nature and stance, to the provisions laid down in the Prevention of Children from Sexual Offences Act (POSCO), 2012 which states that a physical relationship of a man with a minor girl constitutes to rape and

1 Mandhani, Apoorva; Marital Rape Already Criminalized As Cruelty Under Section 498A IPC: Delhi Govt. To HC; as accessed on 19 January 2018; http://www.livelaw.in/marital-rape-already-criminalized-cruelty-section-498a-ipc- delhi-govt-hc/

2 Supreme Court: Sex between man and minor wife is rape; as accessed on 12 January 2018; http://www.livemint.com/Politics/PIVZ4ei8ePvvqR3HfalnRO/Supreme-Court-says-sexual-relations-between-man- and-minor-wife

also Protection of Women from Domestic Violence Act,2006 which provides for a civil remedy for the victims of such a heinous and unacceptable offence.

Worldwide, in the global scenario if we see, 76 countries in the world, including some of the superpowers and countries like in Turkey (2005), Rwanda (2009) and South Korea (2009) have mentioned special criminal offence for marital rape and only 34 countries, including India have not criminalized the shameful act of martial rape. In Oklahoma, one can file a case against their spouse if they have been forced into the act of marital rape under the influence of narcotics under subsection(B) of Section 1111 of their Constitution. Under Article § 11-37-2 in the legislation of Rhode Island, a person in marriage can be held guilty of 'first degree of sexual assault' when the victim is mentally incapacitated of the reasoning or disabled to make out the offence happening with him and is physically helpless. If such small countries which are far below India in terms of development, can criminalize marital rape and punish the criminal why not a democracy like India do so? If we see the other side of the coin, in South Carolina, the situation can be seen at the most extreme on the negative side and is heavily criticized because the crime is not at all dealt strictly and this poses a great loophole in its execution because the victim is given only a time period of 30 days to report their crime and also requires a very high level of sexual violence to be involved which cannot be determined and is subjective to the situation of the victim as it can criminalize the act only under 'Spousal sexual battery'.

Marital rape has emerged as one of the biggest loophole in India's judicial system and has become the basis of domestic violence and also a ground of divorce. Apart from this, it has also a thriving platform for child sexual abuse. The lust that cannot be fulfilled by a wife for sexual favors for a husband, in many cases, the husband tries to feed this lust of his, by sexually exploiting young girls, most of the times of which is his own daughter. In one such case in December 2017, an Indian father due to lack of sex with wife, had sex in front of his other children, with his eighteen months old daughter and she later succumbed to the brutalities of her father. It destabilizes the sacred institution of marriage and acts as a ground of humiliation for both the victim, her family and also for her children.

It is rightly said, "a man becomes an ape in marital rape." The unconsented sex with wife, leads to multiple abortions which in later stages of a woman's life, leads to sexual dysfunctions like resulting in the formation of cysts in the vagina which develops into vaginal cancer and endangers her life, thereby violating Article 21 of the Indian Constitution which talks about the right to life and personal liberty. This in turn questions the validity of the Constitution and challenges its authority. It increases the chances of sexually transmitted diseases like HIV and AIDS that are another rising issue in front of the world's largest democracy. Apart from such serious consequences, it leaves the victim in Post-Traumatic Stress Disorder (PTSD), fear, anxiety and conditions like insomnia, flashbacks and nightmares. Not only this, it leaves the victim with scars and bruises on the vaginal and the anal areas, fetal impairment, contraceptive failures, broken bones, torn muscles, miscarriages and suicidal inclinations which is better for a woman than living a life comparable to hell which

she is forced into every day. It amounts to more of honor killing in the rural parts and the backward villages especially the North India in states like Rajasthan, Punjab and Haryana where the tribal people who are locally termed as the 'Adivasis' still exist and are aloof from the laws prevailing in India. Therefore, in this context, it is heading towards an apocalypse against women. Yo Yo Honey Singh sang a song titled "Main Hoon Balatkari" which literally means 'I am a rapist'. The song was later banned because the public objected such indecency. But, when it comes to having forced sex with one's own wife, indecency is not involved!

Until now, there have been three types of marital rapes that have been reported namely:

1) battering rape force-only rape and
2) obsessive or sadistic rape.

The first one has no consent of the woman and it is only the sex she is forced to have against her will through means of violence opted by the husband which amounts to battering rape. Most of the rape cases fall under the category of battering rape. The second kind, force-only rape includes the physical and sexual assault by a husband on the wife to comply and coerce with his sexual demands. The third and the last type which is the obsessive or sadistic rape occurs when the husband's desire of sexual intercourse is not fulfilled and he vigorously and violently starts having sex with the wife.

In a UK based case, *R v R*[3], first time the instance of marital rape was reported and decided in favor of the wife, which convicted the husband of attempting to rape his wife against her will and consent although the defendant claimed that an express sexual intercourse consent is given by a woman at the time she agrees to marry and actually gets married. For arriving at this decision, the House of Lords contradicted, "Historia Placitorum Coronae" written by Sir Matthew Hale

and "Archbold's Pleading and Evidence in Criminal Cases" was referred to both of which state that a husband cannot be held guilty of raping his wife because a change in the law with the changing time was felt to be introduced. In yet another case named *S v H.M. Advocate*[4] was also laid precedent upon for convicting the husband in the case. This judgment later, was used by the European Court of Human Rights in the decision of *SW v. UK*[5], in New Zealand in which it was held that the marital rape clause which was exempted must be abolished and was done so in 1985 when the now existing Section 128 to the Crimes Act, 1961 was enacted.

The first case to be reported in India was in 1890 and it was infamously called as the Phulmoni case, *Empress v. Hari Mohan Maiti*[6] in which the 10-year old girl forced into marriage by her parents was raped repeatedly by her 30-year old husband named Hari

3 (1992) 94 Cr App R 216, [1991] 3 WLR 767, [1991] UKHL 12, [1992] Fam Law 108, (1991) 155 JP 989, [1992] 1 FLR 217, [1992] 1 AC 599, [1992] AC 599, (1991) 4 AII ER 481, (1991) 155 JPN 7452, [1992] Crime LR 207

4 1989 SLT 469

5 App No 20166/92, A/355-B, IHRL 2596 (ECHR 1995)

Mohan Maiti and she died after the forced sexual intercourse. This paved the way for a need in the legal reforms in our country. But, because Phulmoni was legally allowed to marry at that point in time, it was laid down by the Hon'ble High Court of Calcutta that forced sex on one's wife does not amount to rape because husband has unlimited sexual access to his wife and the husband was convicted and sentenced to only 12 months of hard labor not because he had raped his wife but because she had died. Now in India if we see, in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*[7] the Supreme Court held that rape per se is the most heinous crime and the utmost violation of the Article 21 which deals with right to life and personal liberty and is against its basic nature and an extreme case of human rights violation. Even then, the Supreme Court did not recognize the concept of marital rape.

India has ratified and is a signatory in the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which explains that sort of discrimination against women violates the principles of equality of rights and respect for human dignity and henceforth, marital rape must be criminalized.

In 2013, senior lawyer Ms. Indira Jaising said that "When the criminal laws were amended in 2013, I had sought to make it an offence if a separated husband forced himself on his wife (Section 376). Though that was a victory, but the law doesn't take care of women who are not separated."[8] Every single minute a person is spending in reading this research paper, approximately 20 women are becoming victims of marital rape in India alone. A survey was conducted jointly by the International Centre for Women (IRCW), United Nations Population Fund (UNPF) and National Family Health Survey (NFHS) of India in eight states in India, in 2014 namely in Punjab, Haryana, Uttar Pradesh, Rajasthan, Gujarat, Maharashtra, Madhya Pradesh and Odisha, on marital rape and it revealed horrific numbers covering 9,205 men and 3,158 women aged 18-years to 49-years and the results showed that just 2.3 per cent of rape was reported by women to the National Family Health Survey (NFHS). And yet 5.4% of married Indian women say they have experienced marital rape. 4.4% of them say they have experienced marital rape in just the last 12 months before this survey. The figure recorded by NFHS-3 for 2005-6 was 9.5%.[9] The graphs given by the NFHS show the statistics of sexual violence within marriage in India, marital status and violence in India in 2014:

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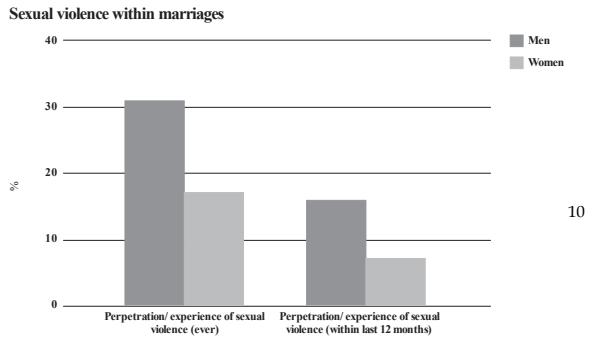
6 (1891) ILR 18 Cal 49

7 1996 AIR 922 1996 SCC (1) 490 JT 1995 (9) 509 1995 SCALE (7)228

8 Rape is a crime even within marriage, it is time to change the law to reflect this; Hindustan Times dated 21 May 2017; https://www.hindustantimes.com/editorials/rape-is-a-crime-even-within-a-marriage-it-is-time-to-change-the-law-to-reflect-this/story-gtDbL3zygKAhtiS6YY6QYM.html

9 Bhuyan, Anoo; Government Denies Marital Rape Occurs, National Survey Shows 5.4% of Married Women Are Victims; as accessed on 21 January 2018; https://thewire.in/212960/indian-law-denies-marital-rape-exists-5-4- married-indians-claim-victims/#disqus_thread



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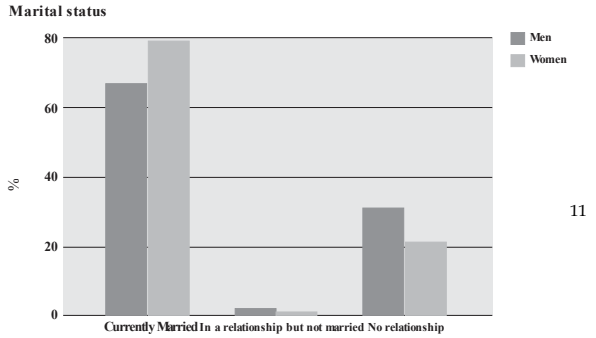

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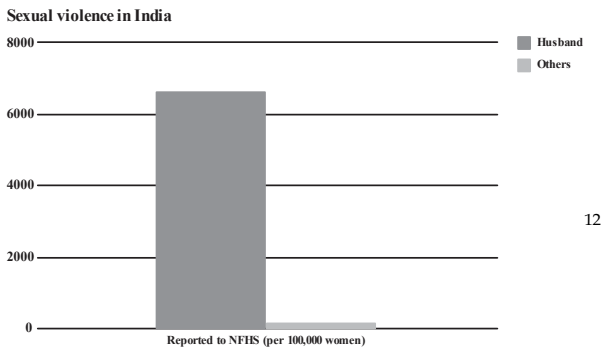

12

Out of the 664 cases of women who reported domenstic violence in 2015 at NGO Sneha's crisis counselling center in Dharavi, 159 women also reported, among other issues, marital rape. At counselling centres at KEM and Sion hospitals, out of the 218 cases of domestic violence received in 2015, 64 women said that they were a victim of marital rape.[13] If a person argues on the right to privacy confined to the four walls of his bedroom, his

10 Srivastava, Roli; Marital rape- the statistics show how real it is; dated June 30, 2016; http://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece

11 Id. 10

12 Supra 11

13 Id. 12

purpose must be defeated by clearly stating that overpowering a woman is an infringement on her privacy and also questions her will therefore the argument does not stand.

Another statistical report shows that up to 30% of the women asking for spousal support or maintenance in a divorce have reported at last one forced sexual assault by a partner and when there is domestic violence in a relationship, the risk of marital rape increases by 70%.[14] Latest example in the international scenario of we look into, Donald Trump's divorce with ex-wife Ivana Trump was based on the fact that she was being raped by Mr. Trump repeatedly in marriage and because she could not do anything about it and could not seek any remedy in law. A book has been written on the same titled as "*Lost Tycoon: The Many Lives of Donald J. Trump" which was written in 1993 written by Harry Hurt and is the biography of the now U.S. President, Donald Trump.*

Therefore, in a nutshell, the researcher would like to conclude that marital rape is an inexcusable offence committed by a husband to show his dominance over his physically weak wife. It must change from sexual penetration to sexual violation. Such a serious emerging issue in the contemporary world must be strictly taken action against otherwise, it would leave no loophole to hollow the foundations of the nation because a nation where women are not secure, is considered to be backward in every aspect be it political, social or economic. If it is not possible for the Indian judiciary to criminalize the offence of marital rape, the religious laws must come to light to prevent it from existing. Thus, for the nation to progress, it must ensure equal rights and protection for men and women and such crimes must be curbed at any cost which are still hindering the progress of our law and hence the nation itself.

14 Supra 9

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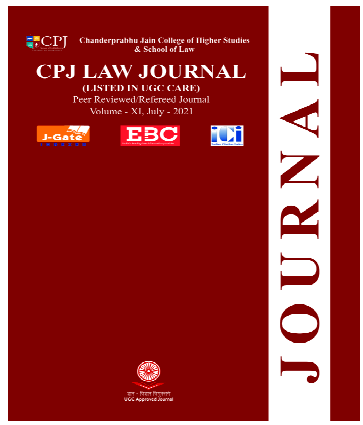

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