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# KASHMIR JOURNAL OF LEGAL STUDIES (KJLS)

# Editorial

In this dynamic landscape of Jurisprudence, we embark on a journey to explore the evolving legal frontiers that shape our societies. The articles in this volume delve into a diverse range of legal topics, offering insights that challenge conventional wisdom and pave the way for progressive change.

As the legal realm gripples with technological advancements, examining the intersection of law and emerging technologies is much needed.

In this respect, Kashmir Journal of Legal Studies has been contributing substantially in the field of legal education and research and serves as a repository for intellectual exploration and critical analysis. The Journal is being indexed by Indian Citation Index (ICI) as a sequel to its quality of content. It gives us immense pleasure to note that the ICI has authorized the college to use their Logo in this Journal which is duly acknowledged.

In a time when legal principles are continuously tested, our journal seeks to provide a platform for thoughtful discourse. This journal is not merely a compilation of articles; it is a testament to the intellectual curiosity and dedication of legal scholars. We extend our heartfelt gratitude to the authors who have contributed their expertise, the reviewers who have diligently evaluated the submissions and our editorial team that has worked tirelessly to bring this volume to fruition.

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# Comprehending Corporate Criminal Liability through the Evolution of Liability Paradigm

**Dr Deborisha Dutta***

**Abstract**

*The concept of attributing criminal liability to individuals has been always feasible but the challenge arose when collectivities had to be held criminally liable for their behaviour. The researcher believes that a comprehensive understanding of the criminal accountability of entities entails succinct scrutiny of the subject matter over time. The paper would focus on the concept of liability and its various theories and characteristics in order to establish the importance of corporate criminal liability. The paper would also try to analyze what can be the correct liability approach that would endorse social justice by holding the corporate bodies guilty. The researcher in this context would try to establish the importance of vicarious liability and the doctrine of identification along with other newly evolved doctrines. The concept of knowledge and intent forms an integral part of the paper. The question that remains constant is that which liability model should be relied on to establish a uniform approach while deciding cases on corporate crime.*

**Key words:** Exclusion of Time. corporate, criminal, intent, knowledge, liability.

**Introduction**

The role of corporations has slowly gained a status of prominence after the process of urbanization and industrialization. The importance of their activities both in areas of social and economic life cannot be denied and along with this important role they have also been involved in various wrongful activities. The activities of such entities that can be brought under the parameters of crime further lay down the notion of criminal liability which has been an issue for quite some time.[1] Such a liability did not allow the imposition of penal liability on corporate entities and therefore many juristic entities had no limitations when it came to establishing the authority of criminal law over them.[2] The criminal system has been seen to have extended to include corporations under its ambit which can be seen to have taken place under three

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1 Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", 4 *Buffalo crim. law rev.* 641, 644 (2001).

2 *Id.*

scenarios. Firstly, the liability initially was only with respect to offences of omission but gradually it started including active events. The idea of absolute liability offences was initially recognized which later on included offences of criminal intent. The last extension that was experienced was the development of the vicarious liability model to the models of direct liability, which is still being developed from time to time.[3] Such changes have now made the corporate entities responsible for almost every offence that they have committed which was not the case about a generation ago. It cannot be denied that from time to time this particular issue has been taken to be an obscure area of the criminal liability law. Two questions that have been highlighted here are if a company is unable to act on its own then how could it cause a particular incident prohibited by the law and if it is incapable to think on its own then how could it form the necessary state of mind regarding the happening of the incident prohibited by law?[4] Keeping in mind such pertinent questions over time there has been the development of two distinct rules in order to evaluate laying down of liability to companies.

The belief relating to the concept of *societas delinquene non-potest* has now been considered to some extent reduced by closely relating themselves to the area of public welfare. European countries approached the matter of criminal liability by believing that the officers in the managerial position should be held responsible but on the other hand, American law tries to hold the corporation liable through the idea of a separate legal entity.[5] In the last decade, the role played in the socio-economic area has drastically changed whereby rigorous privatization processes have taken place and which have empowered corporate entities to assume control in various fields involving economic undertakings. Therefore, such variations in the socio-economic scenario brought changes in the legal structure as well wherein criminal liabilities on corporation was not a distant reality. The applicability of criminal liability has slowly changed its path significantly and it differs from country to country.

The thought of corporate criminal liability challenged the very basic nature of criminal law as the latter is primarily designed to deal with individual human deviance. The criminal domain, therefore, only dealt exclusively with the behavioural patterns, thought processes, etc. of human beings per se. Here Mueller, an American jurist many years ago tried to explain by comparing this topic with the growth of weeds, by stating that "nobody bred it, nobody cultivated it, nobody planted it. It just grew."[6] Later on, the

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3 Eli Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle", 76 *J. Crim. L. & Criminology* 285, 288-89 (1985).

4 Amanda Pinto and Martin Evans, *Corporate Criminal Liability* 9 (Sweet & Maxwell, London, 3rd edn., 2013).

5 V.S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?" 109 *Harv. L. Rev.* 1477 (1996).

6 Gerhard O.W. Mueller, "Mens Rea & the Corporation - A Study of the Model Penal Code Position on Corporate Criminal Liability" 19 *U. Pitt. L. Rev.* 21, 28-35 (1957).

notion of a sensible contribution that might accrue from a method implementing legal responsibility on groups brought about its enlargement and improvement without making it contingent upon theoretical evaluation or complete empirical research. It cannot be denied that there have always been pragmatic concerns with respect to the ways juridical development has taken place related to the subject matter. To support the doctrine's tenets, several jurists emphasized how deeply ingrained the notion of holding legal bodies accountable is in society and how the interaction between law and culture ultimately led to the doctrine's development: It is not a legal fiction that citizens can hold businesses accountable for their actions; in every society, this is a regular practice. When the law incorporates these social conceptions of corporate responsibility, it strengthens and changes those notions of corporate responsibility that are already there in the culture rather than simply reflecting it. The law makes it clearer what exactly corporations are expected to be accountable for. For instance, keeping this in mind law can make any company dealing with hazardous chemicals responsible for possession of such substances on their premises but such liability cannot be imposed on any individual homeowners.

The relationship between law and culture has been established from time immemorial, therefore, the law, in comparison to any other institution in society, is continually influenced to reproduce the cultural truth that a company can be held accountable. The paper would try to analyze all the basic parameters of various models of liability and how one has evolved from the other by drawing some common lines of thought. Not only the common line of thought will be looked into but also those models which have a different line of thought process against the basic theoretical approach will be looked into. As a result, the debate has shifted in recent years from whether criminal culpability should be imposed on individuals to whether it should be imposed on corporations. In essence, this is a replicating process that leads to the formation of new aggregation and self-identity models that are tailored to the particular structure and operations of business entities.

## 1. Familiar Liability Models for Imposing Corporate Liability

The two basic models that are sought for laying down corporate criminal liability are the vicarious liability model and direct liability model which were developed by the Anglo-American law and have their origin in tort law.[7] One thing that needs mentioning at the very beginning is that despite these models being different from each other they have the characteristics to acclimatize and imitate the imposition of criminal liability on individuals. So, it was observed that there was a shift from the civil to the criminal sphere with respect to basic legal structures. The major characteristics to make someone liable under criminal law are *actus reus* and *mens rea* which of course is easier to establish in matters of human beings. By taking the help of the above-said

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7 Sanskriti Singh and Lipsa Dash, "Criminal Liability of Corporations" 21 IOSR-JHSS (2016).

doctrines it is more or less established that such human characteristics can be applied to corporations as well to establish their wrongdoings fairly.[8] Such an approach can be debatable as it can be said to be a nonconformity from the principles laid down in the penal system.

There are common starting points for these two models. First, both models primarily target individuals who laid the groundwork for the offence by their actions and, if necessary, their mental state. The two models then develop supplementary legal frameworks to hold the corporation accountable for the behaviour and thought patterns of the said human being whose action is under scrutiny.[9]

### 2.1 The Doctrine of Vicarious Liability

It is a well-established fact that companies have a separate legal personality because of which their status is different than anyone who works in it. This concept raises concern in matters of laying down criminal liabilities as the company takes the defense of the corporate veil and would absolve itself of any criminal activities. Here comes the importance of liability models which would not allow the juristic entity which is the company here to free itself from the act that it has committed. One of the most important and sought-after models here would be a vicarious liability. This doctrine attributes the activities of an agent or employee to a principal or an employer to make them liable as well. This particular concept was hence, reiterated in the realm of penal law.[10]

The two stages that have to be established in this situation are, firstly, proving that the offence along with all the elements has been committed by the conduct of the agent or the employee. The second stage would be to lay down the conduct of the latter on the principal or employer and this is done only because of the relationship that has been established between them under law. The supplementary framework of legal fiction declares that to impose culpability, it is necessary to prove that the principal has acted through an agent, then only he is presumed to have done it himself. In other words, according to the law, an act committed by an employee is considered an act committed by the employer, and knowledge held by an agent or employee is considered knowledge held by the principal or employer. The employer or principal was not required by law to act or to have actual knowledge. The law is aware that these are two distinct and independent entities and in reality, probably only one of them might be genuinely involved in such actions. Still, fictionally it is presumed that because one is subordinate to the other, the latter shows obedience to the command of the superior, hence, one's thoughts are easily said to be the thoughts of the other. The act of one under such a situation can bind the others too. The vicarious responsibility doctrine was expanded by

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8 Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", 4 *Buffalo crim. law rev.* 641, 651 (2001).

9 *Id.*

10 Francis B. Sayre, "Criminal Responsibility for the Acts of Another" 43 Harv. L. Rev. 689 (1930).

the courts, which adopted the method created to hold a human principal or employer accountable for the actions of an agent or employee and applied it to situations in which the employer or principal is a legal entity.[11]

The significance of the doctrine of vicarious liability cannot be denied. It has been helpful in various areas of infringement be it consumer protection laws, environmental laws, etc.[12] Due to the narrow application of this theory at the criminal level and its recurrent restriction to crimes with absolute or strict liability, it was unable to provide a complete response to the problem of criminalizing legal entities.

The development of criminal vicarious liability can be credited to the Federal Courts in the United States which was further refined into the doctrine of *respondeat superior*.[13] Here what needs to be proved is that the employee had the required authority to do a particular action within the scope of his employment which is inducted as a crime. Secondly, it has to be shown that the act committed was in continuance of the corporation's business interests. This doctrine generally highlights the law of agency irrespective of the hierarchy of the employee in the corporation as long as the above two conditions are satisfied. The addition that can be made here is that the act which was done by the employees should also be sanctioned by the corporate management thereby making the liability model more pragmatic in its application and fair in its approach.

Indian legal position and approach has been that corporate criminal liability is always vicarious because a company is consisted of many individuals and not one and this was highlighted in the case of Commonwealth v. Beneficial Finance Co.[14] Here for the offence of bribe three corporations were held liable. One was held liable for the acts of its employee and another was held accountable for the acts its directors and the last was for the act of its vice-president. The Indian Courts also accept the concept of vicarious corporate criminal liability.[15]

The very first question which may be asked here is that whether a director of the company should be made liable for the acts of other officers and employees just because he manages and controls the affairs of the corporation and will the answer be different if it can be shown that the director did not have any knowledge about the wrongdoings which were taking place. This is an age-old concept which lays down that whenever any outsider suffers damages due to the acts of a servant then the master will also be held liable

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11 Jennifer A. Quaid, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" 43 McGill law j. 67, 70 (1998).

12 Vijay Kumar Singh, *Corporate Power to Corporate Crime: Understanding Corporate Criminal Liability in India* (Satyam Law International, New Delhi, 2013).

13 Amanda Pinto and Martin Evans, *Corporate Criminal Liability* 9 (Sweet & Maxwell, London, 3rd edn., 2013).

14 275 N.E.2d 33 (1971)

15 Sumit Baudh, "Corporate Criminal Liability: A Review In Light Of Tata-Ulfa Nexus" 10 NLSIULR:The Student Advocate 44 (1998).

along with the servant for such an act of the latter, in other words this is known as 'respondeat superior' rule. Similarly, directors having the control of the administration of the company are made liable for the acts of the company according to this rule. For example section 138 and 141 of the Negotiable Instrument Act, 1881 dealing with bouncing of cheque is deemed to be a criminal offence and the directors, managers, secretary of the company are made vicariously liable if this offence is committed due to their negligence or collusion. Apart from Companies Act and Negotiable Instrument Act, complaint is also filed under sections 406, 409 and 420 of the Indian Penal Code 1860 by which the directors are implicated along with the company. It was time now to answer the most burning question, whether a director can be implicated only because he manages the affairs of the enterprise even though he has not been involved personally, that is even if he has not acted in a conniving manner will it justify for the Judiciary to summon him for the purpose of vicarious liability.[16]

The Supreme Court of India has brought some relief in corporate field by stating that a statute which has no words as similar to section 5 of the Companies Act 1956 which is section 2(60) under the new Act or of section 141 of the Negotiable Instrument Act 1881 which lays down strictly that directors are vicariously liable, cannot implicate the directors on this principle. Thus, Indian Penal Code 1860 having no similar provision cannot bring charges upon the directors vicariously when they have no knowledge of the wrongdoings. This view was laid down in S K Alagh v. State of UP.[17]

### 2.2 The Doctrine of Direct Liability: Is it a More Logical Approach?

The doctrine of vicarious liability has its own set of flaws and restrictions which eventually gave rise to the development of the direct liability doctrine. Unlike vicarious liability, this doctrine was explicitly created keeping in mind the imposing of liability on corporations. This doctrine tries to duplicate the imposition of criminal liability on natural persons.[18] The idea of personifying the legal body serves as the foundation for the direct liability doctrine. This doctrine tries to look into the activities as well as *mens rea* of particular individuals who are regarded as corporate organs of the business entity. They act within the limit of their authority and on behalf of the corporate body, and their actions are taken to be the behaviour of the legal entity itself. This is the reason why the said doctrine is also known as the theory of corporate organs or the "alter ego" doctrine because individuals working in a company personify the same under specific situations. Therefore, a company may be held legally accountable for committing the crime itself, similar to the liability laid down on an individual offender, within the bounds established by

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16 Praveen Agrawal, "Directors Vicarious Criminal Liability - End Of Nightmare" *Justicus India* (2010)

17 (2008) 5 SCC 662

18 Brent Fisse, "Sentencing Options Against Corporations" 1 Crim. L.F. 211 (1990).

the corporation's status as a legal personality.[19] The 'Alter Ego model' was first time recognized and upheld by the Supreme Court of India in *Standard Chartered Bank* v. *Directorate of Enforcement*[20] and in *Iridium India Telecom Ltd.* v. *Motorola Incorporated*.[21]

In one of the most recent cases *Sunil Bharti Mittal* v. *Central Bureau Of Investigation*[22] the Special Judge following the judgment of Iridium case reiterated that the fault of the company can be attributed to its managing heads because of the alter ego doctrine. The Supreme Court stepped in here to clarify few things and said that the criminal activities of the directing head can be attributed to the company but the reverse cannot happen until and unless it can be proved through evidence that they had an active role to play and they had an intention to commit the act. Secondly if any particular statute clearly makes them vicariously liable then they can be held to be guilty. The judgement ultimately leads to their acquittal whereby many directors and managers took a sigh of relief.

One similarity between the doctrine of direct liability and the doctrine of vicarious liability is that both follow a two-tiered structure. First, in order to decide whether a particular individual can be regarded as a corporate organ the performance of that person is looked into and after that, the identification process would be sought. Unlike vicarious liability wherein the concept of attribution prevails, direct liability is underlined with the notions of identification and personification which is said to be more practical in its approach. Corporations can never take any action on their own and thereby they are dependent directly or indirectly on human agents working for them. Such an identification law should be present in statutes that can act as a stepping stone in solving various issues relating to corporate criminal liability. In order to make things easier, the corporate organs who act as the representatives are usually presumed to be the Board of Directors because they are responsible for all the corporate policy decisions. This liability model is said to be more logical because from the criminal framework the personification of the legal body implies that, at the time of the criminal act the behaviour and intent of the corporate organ is that of the corporation itself.

English law developed the theory of corporate organs.[23] The USA has also accepted this theory many a time.[24] The main issue that is associated with this said theory is how can one decide and identify someone as a corporate organ. There are no set rules to decide the same and it can be agreed that individuals who are associated with the company act in different ways and, thus, anyone who acts or speaks on behalf of the company cannot be always

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19 Jennifer Moore, "Corporate Culpability Under the Federal Sentencing Guidelines" 34 Ariz. L. Rev. 743 (1992).

20 AIR 2005 SC 2622.

21 AIR 2011 SC 20.

22 (2015) 4 SCC 609.

23 *Tesco Supermarkets, Ltd. v. Nattrass*, 1972 A.C. 153

24 *State v. Adjustment Dep't Credit Bureau Inc.*, 1971 483 P.2d 687.

imputed as its alter ego rather he will only be identified with the company.[25] The common approach that can be taken here is to follow the rule of hierarchy at the same time while keeping the ambit open for the law to take into consideration any individual's behaviour associated with the company if it appears to be questionable. English law views the corporate organs as the "very ego and center of the personality of the corporation . . . the directing mind and will of the corporation."[26] The senior managers are hence, said to fairly represent the company because of their position and power to decide the policies of the company. To conclude they are said to be the navigators of the company and act as the stewards of the ship who are regarded as the brain of the company that they work for. All those individuals who do not form a part of the head of the organization and are not associated with the daily decision-making process would not fall under the hierarchy rule when it comes to determining if they can come under the concept of the corporate organ. Such a case would attract the functional standard.

The first stage in this technique is to evaluate the legal body's structure and organisation, as well as the qualified rank and powers of the human agent in question within the corporate hierarchy. The investigation is thorough and does not rely merely on the title and description of the individual's job. To meet its demands and to make it easier to identify a human agent as the legal body's 'brain', a claim that the person in issue belongs to the team of the corporation's top management must be made. One must also demonstrate that, as a result of the management's power, the individual in question partakes in the formulation and molding of business policy, rather than just its execution. Furthermore, one must assess the person's unlawful activity in order to determine if it should be seen, functionally and under the settings of the case, as the corporation's use of force. This is important to understand because it also makes certain exclusions, for instance, the CEO of the company even though belonging to a high rank committed an accident and injured a pedestrian on his way to the office for a meeting will not come under the framework of corporate crime as it is not related to the corporation. Hence, such acts cannot be said to be acts of the legal entity.

## 3 The Aggregation Model: Concept of Collective Knowledge

The aggregation model for imposing criminal liability is a newer model and it has its influence on sociology and management. The vicarious liability approach needed to be worked upon as it was a theory based on fiction facing hurdles in matters for laying down liability concerning corporate crime; hence, the aggregation model is said to be an expansion of the previous liability models. This model is more appropriate in matters of those large corporations having a much more complex structure in which segregating or pinpointing a

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25 *Tesco Supermarkets Ltd.*, A.C. at 171 (per Lord Reid).

26 *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, 1915 A.C. 705, 713

particular individual head becomes difficult.[27] This model is also known as collective knowledge theory. This theory is even more implausible from the standpoint of the fiction as laid down under vicarious liability. In terms of concept, this development should be considered as a bridge between the imitation models discussed above and the self-identity model, which will be discussed later on.

The concept of collective knowledge tries to establish the mental element of the body corporate by drawing a link between the thoughts of different individuals working in the said company whose actions are under scrutiny. The corporation is credited with the body of information that each of the individual agents possesses separately and, in a way, the vicarious liability rules are also upheld here in some sense. It works like a train of events whereby each individual's knowledge and intent are linked with the company even though they are not aware of what the others are doing within the company nor they have worked conjointly. This is how the creation of a criminal offence can be proved and similarly, nothing prevents the behaviour of several agents from being combined into a single act of negligence, albeit there are no distinct judicial precedents for this. In a pattern peculiar to the aggregation model, the scrapping and merging of multiple aspects into one offence and, as a result, the imposition of criminal culpability on the company, may change innocent conduct of agents or employees into criminal acts or omissions. Even if the circumstances reveal that none of the agents or employees is free of any criminal intent. The notion of this model was well explained by the Court of Appeal in United States v. Bank of New England[28] where it said that corporations compartmentalize information by breaking down certain tasks and processes into minor parts. The sum of those elements is the corporation's understanding of a specific operation. Here it does not make a difference if one person in charge of one part of the operation knows about the act of the other employee who is in charge of something else.

The origin of the aggregation model can be outlined back to the nineteenth century. In the early 1950s, the phrase "collective knowledge" was coined.[29] This evolution may have been influenced by sociological terminology like "collective memory." Since then, collective knowledge has been employed in a great number of instances, especially when it is difficult to identify a human culprit working inside the framework of a legal entity whose actions and thoughts contain the elements of the offence.[30] On the surface, in matters of proving will or intent the aggregation model can be of great importance. This

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27 Charles Walsh and Alissa Pyrich, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?" 47 Rutgers L. Rev. 605, 625 (1995).

28 821 F.2d 844, 856 (1st Cir. 1987).

29 *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951).

30 Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", 4 *Buffalo crim. law rev.* 641, 644 (2001).

generalisation, on the other hand, needs to be examined with caution and precision.

### 3.1 The Borders of the Aggregation Model: Collective Knowledge Vis-a-vis Collective Criminal Intent

The existence of the mental element required for conviction for criminal offences is not established by proving knowledge. This shows that prosecuting a company solely based on its employees' collective knowledge lowers the severity of the violation from one requiring proof of intent to one requiring no proof of will. Establishing knowledge does not mean the creation of intent to commit the crime which is an essential criterion to lay down culpability. At the same time, these two phrases have not shown competing approaches and have most often been observed as semantic differences but one cannot deny focusing on the meticulous understanding of these two terms.[31]

Many federal courts have acknowledged corporate collective knowledge as well, separating it from collective intent or recklessness. It is believed, that attributing *mens rea* of intent to a corporate entity is contingent on one of the corporation's employees fully developing this culpable frame of mind.[32] The attributes of knowledge should be linked to at least one individual for establishing the liability of the corporate body which later on can be distributed among different employees and this is how the collective knowledge is perceived in relation to corporate entities. Hence, absolute criminal intent either through willfulness or recklessness cannot be laid down on a corporate body by applying the collective principle if there is no way to prove that there was criminal intent present in any one of the single employees of the corporate body. The two distinct concepts which are, knowledge and emotional element here cause a conceptual problem that sometimes does not allow or questions the composition of the mental element of the corporation.[33]

The rational element in *mens rea* can be separated easily whenever necessary not letting it accumulate into the whole thing for laying down liability. However, it's difficult to see how the emotional component of criminal intent might be separated. The reason for this is that the rational element is concerned with cognition, or knowing and comprehending things. It is possible to gather or spread information. As a result, it appears that it is conceivable to combine a lot of information known to numerous persons into a single whole, and potentially this can be added as information "accessible" to legal authority. The emotional component, on the other hand, is thought to be unique to humans. It expresses aspirations, apathy, or hope, all of which are understood

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31 Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", 4 *Buffalo crim. law rev.* 641, 667 (2001).

32 *First Equity Corp. of Fla. v. Standard & Poor's Corp.,* 690 F. Supp. 256, 260 (S.D.N.Y. 1988).

33 Eli Lederman, "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity", 4 *Buffalo crim. law rev.* 641, 668 (2001).

in their totality. As a result, it's difficult to comprehend how this element may be dismantled or reassembled from fragments of various people's awareness. This element can't be divided or accumulated because it's either existing in the consciousness or it's not of the concerned person. It's debatable whether it can determine that the aggregation of the partial mental state of multiple people generated the mental state required by such an offence in the business environment. The contrast between the knowledge and the emotional element is rational and desirable. It is built on a solid behavioural foundation. Desires and preferences, on the other hand, cannot be collected because they are fleeting and contradicting. For example, one may know about a particular thing and the other officer may have knowledge about something else and still, it can be presumed that the corporation knows about both things. On the other hand, if it is seen that one officer's desires are inconsistent with the desire of another then we cannot assume that the legal body desires both of these things at the same time. Therefore, in a restricted manner, the said liability model will be useful when one can see that along with awareness when an agent of the corporate body has a desire to fulfill the aspect of *mens rea*. Such a situation can come under ambits of recklessness or willfulness.

### 3.2 Willful Blindness: A Determinate

The Willful Blindness doctrine should only be used in cases where the perpetrator of the crime has a strong suspicion about a factor being present about which he vouches not to have knowledge about. In such a situation that particular fact which is in question is never probed into by the concerned person dreading that if the said fact is proven then he would not be in a position to deny the same.[34] The courts only wished to provide a mechanism for assessing culpability in situations where an agent's or a legal body's working procedures are guilty. As a result, according to these scholars, one condition for employing the model is that the person who acquires one component of knowledge should also be made liable for the other component of knowledge that he otherwise would know of if he did not deliberately prevent himself from acquiring the same only to avoid the creation of criminal intent.[35] This proves the presence of deliberate blindness. It cannot be maintained, however, that the agents of this body wished or intended to remain anonymous to avoid confirming a suspicion or misgiving about the presence of specific conditions or an occurrence. It's also debatable whether the corporate entity intentionally created such divisions whereby it prevented the streaming of information from one agent to another so that the environment becomes a complex one for the imputing of liability in matters of crime.[36] The creation of knowledge can be presumed to be obstructed by an agent either

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34 *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

35 Thomas A. Hagemann and Joshef Grinstein, "The Mythology of Aggregate Corporate Knowledge: A Deconstruction" 65 Geo. Wash. L. Rev. (2010).

36 Robin Charlow, "Willful Ignorance and Criminal Culpability" 70 Tex. L. Rev. 1351 (1992).

recklessly or negligently, so legal policies with respect to the aggregation model should be enacted keeping such limitations in mind.

### 3.3 The Aggregation Model: Drawbacks

The aggregation model is seemingly developing. The possibility of the model being applicable in a holistic manner has not yet been finally decided. The legal systems which are more vigilant than the others have not yet approved of collecting the element of knowledge by looking into the state of mind of all the people connected with the concerned corporation in matters of laying down the liability factor. The issues associated with this model can be summed up here: to begin, it must be taken into consideration that any decision which has been taken by a group is to a great extent conceptually different from a decision that has been taken individually. Aggregation, in certain cases, does not always lay down a straightforward result rather it may take on a new meaning. Second, an additional argument might be made against the aggregation model's foundation, claiming that the entire concept of common knowledge stems from corporate overcriminalization and that the personification metaphor is now dominating its creators. Thirdly, the aggregation model lacks to bring simultaneity between *actus reus* and *mens rea*. Given the artificial structure established by such action, the criterion for a strong relationship between cognition and action cannot be realised under the circumstances of aggregation. It is impossible to assert that this information cultivated and produced unlawful behaviour, or depending on this knowledge an act or omission arose even though one corporate agent is oblivious about the knowledge possessed by others.[37]

The activities of all the workers being imputed on the corporations may not seem fair at times but such a case is never a question of concern when human beings are solely involved and have proper brains to direct their behaviours. Such human being at times is also protected from criminal culpability for instance, in matters of mental instability, etc. Therefore, laying metaphors between human beings and legal entities would not solve the issue of liability. In short, this theory tries to over-personify to solve the subject of corporate criminal liability.[38]

It appears that these obvious challenges have accelerated the expansion of the idea that criminal culpability of legal bodies should be considered from a different viewpoint, using a conceptual framework distinct from that used to address human liability. The model of independent self-identity presented below elucidates this concept the best.

## 4 The Model of Separate Self-Identity

The self-identity model's creators believe legal bodies run through a complex and diverse system and such a multifaceted process of working is

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37 Alan R. White, "The Identity and Time of the Actus Reus" 41 Crim. L. Rev. 148 (1977).

38 Michael E. Tiger, "It Does the Crime But Not the Time: Corporate Criminal Liability in Federal Law" 17 Am. J. Crim. L. 211, 223 (1990).

stimulated by human agency and other procedures. The study of this model reveals that it is a continuation of the above-discussed models. To sum up, all models for laying down criminal culpability on legal entities can be described as variants on the same theoretical path of evolution. The line starts with adaptation and imitation concepts, continues with the aggregation approach, and ends with the self-identity paradigm. The concept of a corporate personality is central to this process. It starts with an approach that denies the corporate personality any sense of selfhood and emphasizes its complete reliance on a particular, distinct human agent. It then moves on to the concept of numerous aspects, possibly related to one unit, enclosing the reasoning aspect of the legal body's arrangement, and last of all to the construction of a blend of individual persons and the corporate legal entity which will result in the amalgamation of the corporate personality. Other viewpoints, on the other hand, underline the fundamental distinctions in the approach and construction between the self-identity model and the others. It's worth noting, for example, the primary liability of a corporation is focused upon in the new model unlike the adaption model of vicarious responsibility and the identification model of direct liability where the act of a corporate agent/organ is relied on to draw corporate culpability.[39] Followers of the self-identity model further argue that the preceding models' plainly derivative nature imbues them with an artificiality that prevents the development of a holistic approach to the essence of the modern company.[40]

## 5 Conclusion: Paving A Path for Future Discussion

Understanding and fixing the liability notion is essential for the study of corporate criminal liability because it will help to solve a bigger issue of enacting corporate sanctions unanimously in such situations which is still a blur. The question that can be asked here is whether a separate idea of corporate blameworthiness will be beneficial in the study of corporate crime theories. Any corporate culpability model will be a success only if it is capable of making a stark difference between human agents and the corporate entity because corporate actions and expressions would be different than human desires as is established above in the research paper. At the same time, it can be argued that the desires of the human agent especially those belonging to the managerial level can be duplicated into the policies and structures of the business entity. The decision-making powers of the company through such policies make them accountable for the wrongful acts they commit. Secondly, their role in society is another factor for scrutinizing their actions minutely. There are many mutual advantages that a company and society provide each other with, hence, any immoral actions on the former's part against the latter should have a negative consequence on them. The growth of corporate powers throughout the world has established the fact that corporate criminality can take many variations and forms. Keeping this in mind it is essential to come up

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39 Eric Colvin, "Corporate Personality and Criminal Liability" 6 Crim. L.F. 1-2 (1996).

40 Morton J. Horwitz, "Santa Clara Revisited: The Development of Corporate Theory" 88 W. Va. L. Rev. 173 (1985).

with different ways, theories, models, etc. for measuring liability which can either be a combination of the above-discussed models or an expansion of the same. Thus, corporate culpability in isolation can assist as a groundwork upon which a more comprehensive framework for corporate liability can be built.

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# Role of the Constitutional Courts in Constitutionalising the Fundamental Canons of Environmental Protection: An Indian Perspective

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**Abstract**

*Over the years, concerns related to environmental degradation have engaged the attention of policymakers, legislators, and the judicial branch. World over there has been a multipronged approach to combat the menace of environmental degradation. The policymakers have come up with path-breaking initiatives, legislators have enacted laws to buttress the extant legal regime on environmental protection whereas the judiciary has interpreted the laws in a manner so as to afford greater protection to the ecosystem much beyond the textualist import of the legislations. In this paper, an attempt has been made to analyze the role of the Constitutional Courts in constitutionalizing the fundamental canons of environmental protection by laying out a rights-based framework through its purposive interpretation of Article 21 of the Constitution. This paper also aims to analyse the role of the constitutional courts in relying upon religious tenets to not only bolster the cause of environmental protection but also obviate steps countenanced on taking the religion as a ground for perpetuating practices inimical to the protection of the environment.*

## Introduction

This paper deliberates the role of the constitutional courts in protecting the environment by drawing convergence between environmental concerns, religious tenets, and constitutional jurisprudence. It touches upon the constitutional aspect of environmental protection while at the same time reflecting on the role of the constitutional courts in relying upon religious tenets to not only bolster the cause of environmental protection but also obviate steps countenanced on taking the religion as a ground for perpetuating practices inimical to the protection of the environment. This paper has been

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divided into five parts. Part I of the Paper sheds light on the international legal regime related to environmental protection; Part II focuses on the role of the constitutional courts in carving out the 'right to clean' environment from Article 21 of the Constitution. Part III deliberates upon the judicial practice of constitutionalizing the fundamental canons of environmental protection. Part IV provides an account of the role of the constitutional courts in relying on religious tenets for the purposes of promoting the cause of environmental protection. This part of the paper provides an account of the judicial approach toward harmonizing the right to live in a clean and pollution-free environment with the freedom of religion under Article 25 of the Constitution[1]. Part V sums up the role of the Supreme Court in constitutionalizing the fundamental canons of environmental protection in India.

## I ENVIRONMENTAL POLLUTION & TRANSACTIONAL LEGAL REGIME

Environmental protection is a core ideal for most nation-states throughout the world; keeping in view the centrality that this issue has assumed, owing to the deleterious impact of pollution on our fragile ecosystem. World over, there is unanimity in combating the sources of environmental pollution and restoring the ecological balance. This objective of restoring the ecological balance and pristine nature of our ecosystem envisages a multipronged approach at the societal level by synergizing the efforts of various stakeholders in the direction of combating the menace of environmental pollution. This stratagem focuses not only on combating the sources of environmental pollution but also on generating consciousness within society for promoting practices that would protect the environment by bringing home the fact that environmental pollution poses an existential threat to humankind.

In order to achieve the ideal of a clean and pollution-free environment; a host of steps are being undertaken at the transnational level. These steps have fructified in garnering international consensus on the need to undertake coordinated measures for the prevention of environmental pollution.[2] At the

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1 Article 25 provides:(1) 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, practise and propagate religion (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

2 An outcome of these efforts has been in the form of Stokholm Declaration( 1972), the Rio Declaration (1992), Agenda 21, UN Convention of Biodiversity, Kyoto Pact.

pivot of all these efforts is the realisation that the menace of environmental pollution can be curbed through a concerted effort directed towards; a) initiating policy measures at the governmental level to curb the pace of environmental degradation b) enacting laws to combat the factor responsible for environmental degradation.(c) incentivising best practices related to minimising the impact of the pollutants, (d) generating awareness among the masses on the need for protecting the environment. Most of the aforementioned practices have been adopted on the grounds with a fair degree of success. However, it is a fact that the pace with which the environment is degrading has not ebbed. Amongst a number of factors that may explain the continual degradation of our ecosystem; ill-planned urbanization and industrialization are the primary causes of environmental pollution.

## II RIGHT TO CLEAN ENVIRONMENT- A CONSTITUTIONAL PERSPECTIVE

In India, the Constitutional jurisprudence has firmly entrenched the right to live in a clean and pollution-free environment as a fundamental right through a catena of judicial dictums. The right to a clean environment has been judicially recognized as a derivative right of Article 21 of the Constitution[3]. Article 21 of the Constitution which recognizes the right to life has been liberally construed by the constitutional courts to carve out a constitutional space for a variety of rights including the right to live in a clean and pollution-free environment. In fact, it a truism that most of the environmental jurisprudence within India is pivoted around Article 21 of the Constitution[4]. This purposive approach toward interpreting the expression right to life has adopted by the judges of the Supreme Court by drawing inspiration from Justice Field's dissent in Munn v Illinois wherein the learned judge observed that No State "shall deprive any person of life, liberty, or property without due process of law," says the Fourteenth Amendment to the Constitution. By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of[5] the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life for its growth and enjoyment, is prohibited by the provision in question if its efficacy be not frittered away by judicial decision[8].

In Francis Coralie Mullin v Union Territory of Delhi, Justice Bhagwati drawing inspiration from Justice Field observed that :

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of

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3 Subhash Kumar v State of Bihar (1991) 1 SCC 598.

4 Article 21 provides- No person shall be deprived of his right to life and personal liberty except according to procedure established by law.

5 U.S. 113 (1876) at P. 143.

> life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human being[6].

In Subhash Kumar v. State of Bihar, Justice K.N.Singh observed that the " Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life[7]. Similarly, in In M.C. Mehta v Union of India, the Supreme Court emphatically declared that "Every Citizen has a fundamental right to fresh air and live in a pollution-free environment".[8] Apart from the recognition of the right to live in a clean environment as a fundamental right; Part IV of the Constitution enjoins the State to take steps for the protection of the environment[9]. Furthermore, Article 51 A (g) enjoins a fundamental duty upon every citizen to protect and improve the natural environment[10].

## III. CONSTITUTIONALISING THE INTERNATIONAL NORMATIVE FRAME WORK RELATED TO ENVIRONMENTAL PROTECTION

Indian constitutional jurisprudence on environmental protection has closely followed the developments in international law on environmental protection. The Parliament of India has enacted several legislations to give effect to the country's obligation under various international instruments. In doing so a distinct corpus of environmental legislation has come to the fore like the Environment Protection Act, Air Pollution Act, Water Pollution Act, Biodiversity Act, etc. The Indian judiciary has played a seminal role in constitutionalising the fundamental canons of environmental protection reading these canons into Article 21 of the Constitution and thus affording these canons constitutional protection. These fundamental canons of environmental protection have their source in various international instruments and can be broadly categorized into the following[14]:

a) Polluter Pays Principle[11]
b) Precautionary Principle [12]
c) Principle of Intergenerational equity[13].

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6 (1981) 1SCC 608 at Para 8.
7 Supra Note 4 at Para 7.
8 (1992) 3 SCC 256.
9 Article 48-A provides: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.
10 Article 51-A(g) provides-It shall be the duty of every citizen of India— to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures; [14] Max Valverde Soto, GENERAL PRINCIPLES OF INTERNATIONALENVIRONMENTAL LAW, ILSA Journal of Int'l & Comparative Law, (1996) [Vol. 3:193] PP. 205, 206. [15] M.C.Mehta v Kamal Nath AIR 2000 SC 1997.
11 See Principles 21 and 22 of the Stockholm Declaration.
12 See, Rio Declaration of 1992
13 See, Stockholm Declaration of 1972

d) Sustainable use of natural resources[14]

e) Public Trust Doctrine[15]

Over the years, the constitutional jurisprudence in India has evolved in direction of embedding these fundamental environmental principles within the rubric of Article 21 of the Constitution. In order to appreciate this stellar role played by the Supreme Court it would be instructive to refer to some of the landmark cases. In Enviro- Legal Action vs. Union of India, the court declared that the principle of polluter pays is a sound principle and that the "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on"[15]. In M.C.Mehta v Union of India, Justice Kuldip Singh observed that "Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology The Precautionary Principle and the Polluter Pays Principle has been accepted as part of the law of the land"[16]. In Vellore Citizens Welfare Forum v Union of India, Kuldip Singh J., while alluding to the precautionary principle and polluter pays principle observed that "we have no hesitation in holding that the precautionary principle and polluter pays principle are part of the environmental law of the country"[17]. The learned judge further observed that referred to the principles of sustainable development, and intergenerational equity as being part of the environmental law[18]. In M.C..Mehta v Kamal Nath[19], the Supreme Court propounded the doctrine of public trust drawing inspiration from the Roman and English law on 'Public Trust Law. In the instant case, Justice Kuldip Singh while laying bare the doctrine of public trust observed that :

> The Public Trust Doctrine primarily rests on the principle that certain resources like air sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins the Government to protect the resources for the enjoyment of the general

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14 The goal of Sustainable Development has been incorporated in a number of international instruments like Agenda 21, Stockholm Declaration, 2030 Agenda for Sustainable Development adopted by the United Nations.

15 The principle of public trust has its origin in the American case of Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892). However, it has now been assimilated as a part of international environmental jurisprudence.

16 AiIR 1988SC 1115.

17 (1996) 5 SCC 648 at Para 14.

18 Ibid., at Para 11

19 Supra note 15 at P.20.

> public rather than to permit their use for private ownership or commercial purposes[20].

One of the primary objectives of the Court constitutionalising these fundamental canons appears to be its growing concern over the unabated environmental degradation that India is experiencing in the face of growing urbanization and industrialization. However, the Supreme Court has in a number of its dictums highlighted the need for balancing the considerations of environmental conservation with the right to development. In fact, in one its dictums the Apex Court has observed that " Conservation and development need not be viewed as binaries, but as complementary strategies that weave into one another. In other words, conservation of nature must be viewed as part of the development and not as a factor stifling development"21.

## IV. ENVIRONMENTAL ADJUDICATION & RELIGIOUS TENETS

In the realm of environmental adjudication, the constitutional courts apart from relying on the constitutional text have drawn inspiration from religious scriptures to afford protection to the ecologically fragile river systems, glaciers, and other water bodies. As one writer has succinctly put it "All the religions that find their echo in India, have environmental overtones for the observance of an ecological code of conduct and thus show reverence towards nature and its creation".[22]. In the famous Ganga River case, the Supreme Court came up with a number of directions for curbing the efflux of sewage effluents into the river Ganga; considered a holy river in the Hindu religious scriptures. Interestingly, the Uttarakhand High Court in one of its pronouncements declared that the river Ganga and Yamuna has the status of a legal person and have all the corresponding rights, duties, and liabilities. It is pertinent to mention that the constitutional court invoked the sacred religious character of this river as one of the grounds for according to these rivers the status of a legal person. Similarly, the Uttarakhand High Court in Lalit Mignani's case extensively referred to the Hindu religious scriptures in according to the status of legal person to the ecologically important Himalayan glaciers like the Gangotri and Yamunotri[23]. In the instant case the court observed that :

> We by invoking our parenspatriae jurisdiction, declare the glaciers including Gangotri and Yamunotri…..legal entity/legal person/juridical person/moral person/an artificial person having the status of a legal person". In doing so the court also relied upon Hindu religious scriptures by observing that "Both Ganga and Yamuna rivers are revered as deities by Hindu"[24]

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20 (1997) 1 SCC 388 at Para 25.

21 Association for Protection of Democratic Rights and Anr vs State of West Bengal (2021) SCC Online 259 at Para 3.

22 Furqan Ahmad, ORIGIN AND GROWTH OF ENVIRONMENTAL LAW IN INDIA, 2001, Vol. 43, No. 3 (JulySeptember 2001), pp. 358-387 at P.359. [20] 2017 SCC OnLine Utt 392.

23 Lalit Miglani v State of Uttarakhand 2017 SCC OnLine Utt 392.

24 Ibid., at Para 32.

The Uttarakhand High Court in taking this bold initiative relied upon Supreme Court rulings[25], writings of Salmond,[26] and well-established canons of environmental protection. However, this ruling has generated a debate around the newly conferred status of a juristic person to the twin rivers. It has been contended that the High Court's decision has implications beyond jurisdictional limits as the rivers traverse the territories of different states[27]. Both of the above-cited judgments are a part of the judicial stratagem to preserve water bodies by not only appealing to their critical role in the preservation of the ecosystem but also their sanctity from a religious standpoint[28]. This approach of the constitutional courts in drawing convergence between environmental concerns and religious tenets and then weaving it into the fabric of the environmental jurisprudence marks an important direction in the realm of environmental adjudication. Apart from it, this adjudicatory trend may be beneficial in sensitizing the masses about the need to protect the environment by linking it to the spiritual well-being of the masses.

At times the constitutional courts are faced with a dilemma when in the course of environmental adjudication, the courts are called upon to reconcile or harmonize the competing rights; freedom of religion with the right to live in a clean environment. This adjudicatory exercise entails calibrating the twin rights on the touchstone of the greater public good. There have been a number of cases wherein the constitutional courts have had to undertake the arduous task of weighing the aforementioned rights and according to primacy to either of the competing community claims. While adverting to this scenario the Apex Court in one of its judgments observed that a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by another and also with the reasonable and valid exercise of power by the state in light of the directive principles in the interests of social welfare as a whole"[29]. Such cases have brought to the fore another aspect of linkages between religion and environmental adjudication wherein the freedom of religion is supposedly taken as a ground for justifying an activity that seemingly has a deleterious impact on the environment[30]. These cases primarily relate to high-decibel activities which allegedly are a cause of noise pollution. Such cases ordinarily involve the use of voice amplifiers within religious places; a detailed analysis of these cases reveals a discernible trend

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25 See, (1969) 1 SCC 555; (1999) 5SCC 50; (2000) 4 SCC 146.

26 Salmond on Jurisprudence (12TH edn.,1966).P305.

27 See, Subhojit Biswas, "*Humanizing the Ganga and Yamuna: A Boon or Bane*" 5.1 NLUJLR 91 (2004) at P.100

28 See, Mrinalini Shinde, "*Legal Transplants as seen in the comparative analysis of judicial decisions on the environmental personhood or rivers*" 7.2 RSSR 85(2021) P.102

29 Acharaya Maharajshri Narandraprasadji Anandprasadji Maharaj v State of Gujarat (1975) 1SCC11 at P.20.

30 P.S.Jaswal and Nishta Jaswal, Environmental Law, Allahabad Law Agency (3RD edn., 2009). PP. 402, 403

towards proscribing or regulating the use of voice amplifying devices while upholding the right of the community to live in a clean and noise-free environment[31].

## V. CONCLUSION

The Supreme Court of India has played a pivotal role in constitutionalising the fundamental canons of environmental protection by judicially recognizing these canons as adjuncts of the fundamental right to live in a clean and pollution-free environment and in doing so courts have at times relied on the religious scriptures. The role of religion in this exercise of constitutionalising the fundamental principles albeit in an ancillary way highlights the judicial creativity in the domain of environmental adjudication The interplay between the fundamental principles of environmental jurisprudence and religious tenets has brought to the fore two distinct approaches to the part of the courts. In the first approach, the courts have relied upon religion as an ancillary medium to strengthen environmental protection measures by drawing a spiritual connection to underscore the importance of a clean and pollution-free environment. Secondly, the courts have accorded primacy to environmental rights in the face of competing claims of religious freedom in relation to an activity that seemingly in the wisdom of the court's trenches upon the former right.

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31 Church of God (Full Gospel) in India vs KKR Majestic Colony Welfare Association and ors (2000) 7 SCC 282.

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# The Socially Excluded Third Gender: A Legal Perspective

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**Abstract**

*On the streets of Indian villages one sometimes comes across an unusual sight of a group of closely shaven persons in female attire, singing and dancing, making overtures to the onlookers, cracking sexually charged jokes at men and making loud clapping sounds with their hands. To people these individuals may look very interesting and outlandish freaks of nature. Not because they sing and dance but because of their ambivalent physical appearance. They shave, smoke and talk like men but dress and behave in a more feminine way. On seeing them, one question which would immediately strike relates to who are these people, male or female? And if they are neither males nor females, then what? In the Indian society these peoples are popularly referred to as 'Hijras', 'Khusras', 'Asexuals', 'Neutrals', 'Eunuchs', etc. All the terms included in the nomenclature are used to describe the identity of these people who have one thing in common and perhaps the most decisive one that there is something wrong with their sexual organs. So one can say that, for years we have looked at Hijras, but never seen or understood them.*

**Keywords:** *Third Gender, Hijras, identity, stigma, Neutrals, Eunuchs etc.*

## Introduction

In our society, we speak the language of rights loud and often. But, do the marginalized really have access to these rights? Individuals are denied their rights in the name of sex, sexuality, caste and religion. Social exclusion is a situation where certain groups or community within a society are systematically disadvantaged because they are discriminated against. These groups are often differentiated by race, ethnicity, age, sexual orientation, religion, caste or gender. The third gender people who are extremely marginalized from the mainstream society are also included in the category of socially excluded in the Indian context. The moment the person decides to assert their gender identity as a third gender (hijra), the family casts them out of the house. The family's rejection is often conditioned by the wider societal intolerance towards gender non-conformity (PUCLK, 2001).[1]

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1 People's Union of Civil Liberties- Karnataka, "Human Rights Violations Against Sexuality Minorities in India: A PUCL-K Fact Finding Report About Banglore" 2001.

Who exactly are these *Third Gender people or Hijras*? There is not one but a number of descriptions given by few scholars who have attempted in-depth studies on them. One of the beliefs is that they are castrated males and hermaphrodites. Reddy (2006)[2]uses the term Hijra in her study and argues that hijras, as one knows, are men who desire to be feminine; they might be hermaphrodite by birth, or men who choose to castrate themselves or those who merely wear feminine attire. A "real hijra" is said to be like an ascetic or sannyasi (a wandering, homeless ascetic)- completely free of sexual desire. Today, some of them refer to themselves as belonging to the "third" gender. Serena Nanda (1999)[3] in her work argues, "He (*hijra*) is a third gender role in India, who is neither male nor female but contains the element of both". She argues that hijras express the most common view, held by both hijras and people in the larger society, that the hijras are an alternative gender, neither men nor women.

On the streets of Indian villages one sometimes comes across an unusual sight of a group of closely shaven persons in female attire, singing and dancing, making overtures to the onlookers, cracking sexually charged jokes at men and making loud clapping sounds with their hands. To people these individuals may look very interesting and outlandish freaks of nature. Not because they sing and dance but because of their ambivalent physical appearance. They shave, smoke and talk like men but dress and behave in a more feminine way. On seeing them, one question which would immediately strike relates to who are these people, male or female? And if they are neither males nor females, then what? In the Indian society these peoples are popularly referred to as 'Hijras', 'Khusras', 'Asexuals', 'Neutrals', 'Eunuchs', etc. All the terms included in the nomenclature are used to describe the identity of these people who have one thing in common and perhaps the most decisive one that there is something wrong with their sexual organs. So one can say that, for years we have looked at *Hijras*, but never seen or understood them.

Serena Nanda (1999)[4] argues, "He (*hijra*) is a third gender role in India, who is neither male nor female but contains the element of both". She argues that *hijras* express the most common view, held by both *hijras* and people in the larger society, that the hijras are an alternative gender, neither men nor women. The *hijra* role is a magnet that attracts people with many different kinds of cross-gender identities, attributes and behaviours. Such individuals of course, exist in our own and perhaps all the societies. What is noteworthy about the *hijras* is that the role is so deeply rooted in Indian culture that it can accommodate a wide variety of temperaments, personalities, sexual needs, gender identities, cross-gender behaviours and the level of commitment without losing its cultural meaning. The ability of the hijra role to succeed as a

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2 Gayatri Reddy, *With Respect to Sex- Negotiating Hijra Identity in South India* (Yoda Press, New Delhi, 2006).

3 Serena Nanda,*Neither Man nor Woman: The Hijras of India*(Wardsworth,U.S.A, 1999).

4 Op.Cit. Serena Nanda. Ref. 3

symbolic reference point giving significant meaning to the lives of the many different kinds of people who make up the hijra community, is undoubtedly related to the variety and significance of alternative gender roles and gender transformations in Indian mythology and traditional culture.

Third gender people are subjected to different forms of the marginalization in the society. The problems related to third gender individuals include from lack of gender identity, lack of self-confidence and self-esteem, social abuse and social stigma and finally leading to overemphasized and unwanted differences and injustice at every point of their life. Third gender people are part of the society but are hidden most of the time as the society confirms only a binary classification of gender. Individuals are expected to relate themselves with the gender of their biological sex as well as the gender roles and expectations associated with that particular gender. Normally, people are characterized as males or females, those who don't express characteristics attributed to the other gender are stigmatized and seen often as social deviants. Inconsistency in the performance between biological sex and gender expression is usually not tolerated by the society (Gagne, Tewksbury and Mcgaughey, 1997)[5]. As these individuals violate conformist gender expectations, they become targeted for discrimination and oppression. Therefore, they become the members of a marginalized and vulnerable population that experiences more psychosocial and health problems than other social groups (Lombardi, 2001)[6].

The stigma of asexuality makes third gender people some kind of an outsider in the society. The stigma not makes him an outsider in relation to members of the society as such but also isolates him from his family and from the society at large. He, therefore, does not find a space in the family and consequently is forced to look for an alternate arrangement for his living. But, since their presence in the family attaches a stigma therefore they have no alternative other than to leave home and live with others of their kind(Sharma, 2009)[7].

Sharma (2009)[8], argues that having known the fact that hijras, being sexually deformed carry a stigma, this biological condition causes identity crisis for them. According to third gender people themselves, this state of theirs makes their acceptance very difficult in the society. The fear of stigma is so strong among general populace that it not only drives third gender people out of their homes but also put into danger their families' relationships within the kinship circles and also hinders formation of new relationship with others.

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5 Patricia Gagne, Richard Tewksbury and Deanna McGaughey, *Coming out and Crossing over: Identity Formation and Proclamation in a Transgender Community*(Gender and Society. Vol. 11, 1997).

6 Lombardi. E,*Enhancing Transgender Health Care*(Am J Public Health, 2001).

7 Ibid.

8 S. K. Sharma, *Hijras: The Labelled Deviants* (Gain Publishing House, New Delhi, 2009).

Being sexually deformed, they are not capable of reproducing. Inability to reproduce, in view of the cultural traditions of Indian society is socially disapproved. Any such individual is singled out in the society. It is on account of sexual deformity that the third gender people become stigmatized. In any human society there is always every likelihood that people, in general, would practice discrimination against any stigmatized individual. The sense of stigma practiced, as Goffman puts it, is the gap between what a person ought to be, "virtual social identity", and what a person actually is, "actual social identity". Anyone who has a gap between these two identities is stigmatized.

The present paper has tried to look into the whole process of exclusion and marginalization they undergo even today despite of the introduction of "*The Transgender Persons (Protection of Rights) Bill, 2019.* Before one actual see into the areas wherein their marginalisation takes place, it is important to have a look at the bill which was introduced to safeguard their interests and to include them in the mainstream society.

**The Transgender Persons (Protection of Rights) Bill, 2019**

The Transgender Persons (Protection of Rights) Bill, 2019 was introduced in Lok Sabha on July 19, 2019 and was passed on 5th August, 2019.

- *Definition of a transgender person:* The Bill defines a transgender person as one whose gender does not match the gender assigned at birth. It includes trans-men and trans-women, persons with intersex variations, gender-queers, and persons with socio-cultural identities, such as kinnar and hijra. Intersex variations is defined to mean a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes, or hormones from the normative standard of male or female body.
- *Prohibition against discrimination:* The Bill prohibits the discrimination against a transgender person, including denial of service or unfair treatment in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to, or enjoyment of goods, facilities, opportunities available to the public; (v) right to movement; (vi) right to reside, rent, or otherwise occupy property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment in whose care or custody a transgender person is.
- *Right of residence:* Every transgender person shall have a right to reside and be included in his household. If the immediate family is unable to care for the transgender person, the person may be placed in a rehabilitation centre, on the orders of a competent court.
- *Employment*: No government or private entity can discriminate against a transgender person in employment matters, including recruitment, and promotion. Every establishment is required to designate a person to be a complaint officer to deal with complaints in relation to the Act.

- *Education*: Educational institutions funded or recognised by the relevant government shall provide inclusive education, sports and recreational facilities for transgender persons, without discrimination.
- *Health care*: The government must take steps to provide health facilities to transgender persons including separate HIV surveillance centres, and sex reassignment surgeries. The government shall review medical curriculum to address health issues of transgender persons, and provide comprehensive medical insurance schemes for them.
- *Certificate of identity for a transgender person:* A transgender person may make an application to the District Magistrate for a certificate of identity, indicating the gender as 'transgender'. A revised certificate may be obtained only if the individual undergoes surgery to change their gender either as a male or a female.
- *Welfare measures by the government*: The Bill states that the relevant government will take measures to ensure the full inclusion and participation of transgender persons in society. It must also take steps for their rescue and rehabilitation, vocational training and self-employment, create schemes that are transgender sensitive, and promote their participation in cultural activities.
- *Offences and penalties*: The Bill recognizes the following offences against transgender persons: (i) forced or bonded labour (excluding compulsory government service for public purposes), (ii) denial of use of public places, (iii) removal from household, and village, (iv) physical, sexual, verbal, emotional or economic abuse. Penalties for these offences vary between six months and two years, and a fine.
- National Council for Transgender persons (NCT): The NCT will consist of: (i) Union Minister for Social Justice (Chairperson); (ii) Minister of State for Social Justice (Vice- Chairperson); (iii) Secretary of the Ministry of Social Justice; (iv) one representative from ministries including Health, Home Affairs, and Human Resources Development. Other members include representatives of the NITI Aayog, and the National Human Rights Commission. State governments will also be represented. The Council will also consist of five members from the transgender community and five experts from non-governmental organisations.
- The Council will advise the central government as well as monitor the impact of policies, legislation and projects with respect to transgender persons. It will also redress the grievances of transgender persons.

In the UT of Jammu and Kashmir, one still sees that the rights of the third gender/transgender persons are not protected and hence they are socially excluded and marginalised.

**Social Stigma, Social Exclusion and Marginalization**

One to four percent of the world population is inter-sexed, not fully male or female. After independence, however, they were de-notified in 1952, though the century old stigma continues. This stigma reduces the third gender people to individuals who are not considered human, thus devoid of all human rights. They suffer a whole lot of mental, physical and sexual oppression in the society (Narrian, 2003)[9]. Their vulnerabilities, frustrations and insecurities have been historically overlooked by mainstream society. In India, mainstream society does not accept others beyond the male-female gender norm. Those who live beyond this continuum are subject to harassments and abuses. The third gender people claim that mainstream society does not understand their culture, gender and sexuality. Dimensions of their social deprivation and harassments to them have never received attention of development sectors (Khan et. al, 2009)[10].

Many people of India believe that the hijra community regularly checks up on births that have recently taken place and even visit hospitals in search of children who are born intersexed and if they come across such a child they take it away forcibly, and in earlier times even had a legal right to do so(Talwar, 1999)[11]. However, Nanda(1999)[12], during her extensive research within the community found no evidence to support such an impression, as all the hijras she met had joined the community voluntarily. On the other hand, Sharma (2009)[13], who undertook a similar research within the community mentions of case, who was born intersexed, but whose parents regularly 'paid off' a local hijra in order to keep the child. He also mentions another case, whose brother, out of jealousy, informed the hijras about him, who then came and took him away against his wishes and those of his parents.

It has been seen that this community used to possess higher social prestige due to their specific social and cultural role but for most, that role is changing. While they used to have a power through ability to bless and curse, in contemporary world, the society ridicules gender-variant people for being different, which puts this group in a vulnerable situation and now socially they are excluded from the mainstream society. In addition, today their existence and the roles are still overlooked by the legal framework and are excluded from the economic, political and social services because of being identified as third gender or third sex. The complex gender approach has put the third gender community in the marginalized position from the beginning of their journey of life. In the transition from childhood to adolescence third gender people found

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9 Arvind Narrain,*Queer-despised Sexuality, Law and Social Change*. (Books for change publishers, Bangalore, 2004).

10 Khan et al.,*Living on the Extreme Margin: Social Exclusion of the Transgendered Population (Hijra) in Bangladesh*(Health, Population and Nutrition, 2009).

11 Rajesh Talwar, *The Third Sex and Human Rights*( Gyan publishing house, New Delhi, 1999).

12 Serena Nanda, *Neither Man nor Woman: The Hijras of India* (Wardsworth,U.S.A, 1999).

13 *Op.Cit*S. K. Sharma,. *Ref. 7*

themselves unlike other boys, for instance, they used to play with girls and feel attraction toward boys**.** While the incompatible sex-gender roles and attitudes are tolerable to some extent during the childhood period of third gender person; later on in their adolescence, it has always been disapproved as unnatural approach by the society and ultimately by the family. Therefore, third gender people are often devalued from their family members and receive different treatment in terms of clothing, properties or assets, moral supports and other opportunities compared to their other siblings who are in the binary social norm (Khan et. al, 2009)[14].

Third gender people are often discriminated against not only by wider society but by their own families, and denied the opportunity to live a full and meaningful life. The influences of predominant norms have always forced them to give up their family and other social relations and later on are included in the hijra community by adopting the traditional life and occupations that the hijra community has developed to live and survive (Khan et. al, 2009)[15]. Thus, the moment the person decides to assert their gender identity as a third gender person, the family casts them out of the house. The family's rejection is often conditioned by the wider societal intolerance towards gender non-conformity (PUCL-K, 2009)[16]. Josim (2012) [17]argues that, a basic right such as accommodation is also inaccessible for hijra community in the mainstream society.

For the transgender communities the experience of the family is frighteningly different. The institution of the family plays a significant role in the marginalization of these communities. Instead of protecting their child from the violence inflicted by the wider society, the family in fact provides an arena to act out the intolerances of the wider society. Those who violate the existing social codes which prescribe how a man or a woman is to behave are subject to daily humiliation, beatings and expulsion from the family itself. The extreme stigmatization surrounding transgressions around alternative sexuality as well as sex work makes it extremely difficult for families to accept their children. Further, there are very few cultural/social resources for families to draw upon that will enable them to understand the sexual and gender identity and behavior of their children (Harsha and Ramesh, 2016)[18].

The third gender people of Jammu region are also facing the same kind of social exclusion. A few of the third gender people visit their biological

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14 Ibid.

15 Ibid.

16 People's Union of Civil Liberties- Karnataka, "Human Rights Violations Against Sexuality Minorities in India: A PUCL-K Fact Finding Report About Banglore" 2001.

17 T. B. Josim,"Hijra: AK Omimangshito lingo (Hijra: An Unresolved Gender)"*AP (*2012).

18 T. E. Harsha and Y. Ramesh. "Transgender Community and Social Exclusion: A Sociological Study" in Sundra Raj T. (eds.): *Transgender Inclusion: Challenges and Implications* (A.P.H. Publishing Corporation, New Delhi, 2016).

families as most of them were from outside the Jammu region. Many of them had no idea about their family of origin. Secondly, because of the fear of social stigma and that their deformity can create problems for their family they didn't visit their biological family and thirdly, they were also not allowed to go by their gurus. The third gender people further argued that most of the time because of insecurity felt by their gurus, the chelas were not permitted to visit their families and when asked the Guru's they argued that the chelas might take the valuable items collected during the badhais for their native families, so they were not permitted. Most of the chelas were even not allowed to interact with the Gurus of the other dera.

Ojha (2011)[19], argues that, the various stages of grief may include shock, numbness, confusion, denial and anger. It can be particularly hard for parents to deal with uncertainty, when decisions are being delayed in the best interests of the child. Sometimes this means a parent literally cannot hear what a health professional is telling them "All I could see was his mouth opening and closing". Parents need: A physician with good information or who is able to make a referral to someone else who is more informed; information and resources as a bridge over this space of numbness, confusion and shock, and time to sift through it; a resource that provides answers to the typical questions asked by family members, schools, etc.

While hijra community is socially excluded from the mainstream social life, the civil society is not giving enough attention to this issue. Their basic rights and social acceptance with dignity are absent in every step of the development sector. Thus, a third gender individual due to sexual deformity is a stigmatized person. The stigma of asexuality makes him some kind of an outsider in the society. The stigma not only makes him an outsider in relation to members of the society as such but also isolates him from his family and from the society at large. He, therefore, does not find a space in the family and is consequently forced to look for an alternate arrangement for his living. Such a state of isolation from his kith and kins is a compulsion and not a choice. It is so as most of them express their emotional attachment with their families by saying that they wish to be with their parents, brothers and sisters. But, since their presence in the family attaches a stigma, therefore they have no alternative other than to leave home and live with others of their kind. The identity crises, therefore, forces him/her to accept an alternative way of living in a mini society of hijras (Sharma, 2009)[20]. Due to social exclusion, third gender people have to live on the extreme margins of the society.

**Social Stigma, Education and Marginalisation**

Third gender people often experience loneliness and abusive treatment in school either by the classmates or by the teachers because of their complex gender approach. For instance, the fellow students refuse to play or share the knowledge with third gender people, accused by the teachers as effeminate boy

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[19] Rekha Ojha, *Intersex Identity* (Akansha Publishing House, New Delhi, 2011).

[20] Op.Cit. S.K. Sharma. Ref. 7

for violating social norms and so on. This vulnerable hijra community, though, is willing to access the education with ordinary people; they often leave the school of the hostile environment and lack of friendly social behaviors by the society, and also fail to find safer place to have education opportunity due to their gender behaviours (Josim, 2012)[21]. Being a third gender in this world spells discrimination. They grew up as one, without education. It was found that in Jammu region, the third gender children were denied education as their names were stuck off from a well known private school when their identity was revealed. This clearly showed the extent of gender injustice done to the members of third gender community. Now these children were again readmitted to another private school where the principal knew their identity but it was kept secret from the school staff as well as from students. It was further found that even the general public also argued that the third gender children should not study with the other children because of the fear that their children might learn their culture and way of behaving. 'Should Hijra children study with the other children?' was a question asked to the general public, in order to study the stigma which, the society attaches with the community and it was found that majority of the respondents from the general public argued that third gender children should not study with the other children because of the fear that their children might learn hijra culture and way of behaving. So one finds that the general publics in Jammu region somewhere consider them as being 'outsider' in the society even after the recognition by Supreme Court of India.

While third gender (hijra) community is excluded from the mainstream social life, the civil society is not giving enough attention to this issue. Their basic rights and social acceptance with dignity are absent in every step of the development sector. Due to social exclusion, third gender people (hijras) are denied access to education. High dropout rate and low school years among them are alarming. Their dropout is not by choice but by force. Insensitive attitude of teachers towards the third gender community has adverse impact on the continuity of the education of third gender in a school.

During review of secondary sources, few examples were also looked into. A transgender from Chennai namely Naleena Prasheetha told the Times of India about the difficulties she faced during her studies. "*For transgender students on educational campuses, it is no cakewalk. While some colleges have opened their doors to them, it is still a huge struggle at the school level*", says Naleena Prasheetha, the only transgender student in Loyola college in the current batch(2016). The viscom student, who had to drop out of school after she underwent the operation, says she studied her plus two years of schooling at home and wrote the exams. The issue at the school level requires a lot more attention as gender identity and sexuality is understood during teenage. "*Even though I wanted to go back to school, I couldn't. If the authorities set a tone that everyone needs to be treated equally, students too will become aware*", she said

[21] Op. Cit. Joshim. Ref. 17

speaking on the sidelines of a conference on mainstreaming transgender at Loyola College. While her keen interest in academics made her pursue higher education, she says many others are not confident of enrolling in various institutions. This depends on how approachable educational institutions are to attract more such students.

Naleena argued that a separate category for transgender in admission forms is one step of being approachable but it shouldn't be for the sake of it. "*I had applied to four colleges when I completed schooling. While Loyola gave me admission immediately, the others were hesitant. So, the attitude of acceptance matters more than just having a 'T' option sign in forms",* She said. Naleena who is now the secretary of women welfare in the student union of the college, recalled how frightening it was when she first entered the college campus. *"Initially, there were whispers and taunts by a few but the teachers were extremely encouraging which helped me make it through my first semester. As I participated in extra-curricular events, I got to know other students who made me feel comfortable,"* she said.

**Social Stigma, Identity Crisis and Marginalization**

Deprived from family and school environment, third gender reported that, as feminine boys, they were often told that their attitudes, body-gestures, and behaviours were unlike other boys. The third gender people are confused about their sex-gender alignment: "Am I a male, female, female mind in a male body, or a third gender?" Many third gender people claimed to have a soul of a female trapped in a male body which means that the third gender people have penis like men and breasts like women to indicate that they are neither males nor females but a mix of both. Many play a double- life in this dichotomous gendered society to avoid stigma and discriminations. They wear female clothes and adopt feminine names while visiting peers. However, they wear male clothes and adapt male gestures while living with or visiting relatives. Their feminine role is denied. They cannot avoid dilemma of their identity crisis (Khan et. al., 2009)[22].

In relation to stigmatized persons, Goffman argues, "By definition, we believe that a person with stigma is not quite human. On this assumption, one exercises varieties of discrimination through which one effectively, though unthinkingly, reduce one's life chances. We construct a stigma theory, an ideology to explain his inferiority and count for the danger he (possibly) represent". He was interested in the gap between what a person ought to be, "virtual social identity," and what a person actually is, "actual social identity". Anyone who has gap between these two identities is stigmatized (Ritzer, 2000)[23].

The third gender people from Jammu region reported that maintaining two different life-styles in and outside the home created an identity crisis. A third gender individual is compelled to go through strenuous situations and

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[22] Op.Cit. Khan. Ref. 13

[23] George Ritzer, *Sociological Theory* (Mc-grawHill, USA, 2000).

struggles to be declared as a self-identified hijra in a society where it is seen as a curse. It is difficult for them to cross the boundary of male-female dichotomous gender norms and to find a healthy, safe and peaceful space in this hetero-normative society. The respondents said that feminine emotions trapped inside a masculine body were ignored and denied. Hijra sexuality and sexual behaviors conflict with her biological sex, and her biological sex mismatches with her preferred feminine gender roles. Thus, the third gender people living in Jammu region said that conflict relating to self-identity had diminished their human dignity and self-reliance. They generally use their actual social identity as third gender during badhai collection but during interaction with their relatives or during a visit to the market they used to show their virtual social identity.

India's election commission has given third sex individual an independent identity by letting them state their gender as "other" on ballot forms. Their recognition as an independent group is the first step towards official recognition of a community that has so far remained on the margins of society. The recognition comes 15 years after the third sex was granted the right to vote in 1994. Besides the electoral rolls, in 2011 census also third gender people were counted under "others" category. Meanwhile, in the landmark judgment, giving legal sanctity to the third gender, the Supreme Court on 15th April 2014 created the "third gender" status for transgender. In the judgement it is stated that these transgender, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights. It is with this recognition that many rights attached to the sexual recognition as third gender would be available to this community more meaningfully. The Supreme Court asked the centre and states to treat transgender as socially and economically backward classes of citizens and extend all kinds of reservation in educational institutions. Thus, the apex court's judgement provides opportunities to revamp and restructure their educational planning and management as well as change their classroom environment and practices to differentiated learning processes to education inclusive and accommodative of transgender learners. Instead of claiming that they are variants, they are to be considered as third gender and be included in our general educational system (Raj T, 2016)[24].

**Social Stigma, Occupation and Marginalization**

The hijra claimed inability of getting mainstream job due to lack of education, "unsual" non-conforming lifestyle unacceptable for the working environment. "We because of our feminine gesture do not have access to any job. We are always kicked out from the job on the grounds of 'destroying' the job environment". Most third gender respondents in Jammu region expressed their desire to be involved in any occupation. However, they were denied in the job market. They were involved into the occupation of badhai (blessing a

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[24] Sundra Raj T (eds.). *Transgender Inclusion: Challenges and Implications* (A.P.H. Publishing Corporation,New Delhi, 2016).

newborn child through dancing and singing) collection. Almost all the third gender people of Jammu region are into the occupation of collection of badhai during the marriage, mundan ceremonies, at the birth of a son etc. Thus, the economy of third gender people living in Jammu region was based on badhai collection. They celebrated and endowed wishes on the birth of a male child and on the marriage ceremony of the son within the families. People give them money in return to the dance they perform in their homes. None of the third gender person was found in the government profession or in any other business. Thus, the third gender people of Jammu region have no means of earning other than badhai collection. But, these days traditional hijra occupations are constrained in many ways. For example, badhai became difficult now a days, particularly in urban areas, and in rural areas, even if allowed, finally they were refused to be paid at the end of performance. These constraints influenced them in making rude remarks followed by traditional clap and lifting sarees to show their "castrated" gentials in public. When asked to the general public in Jammu region, do they have any objection if third gender people work as domestic worker in their homes, majority of the respondents argued that they would not prefer them, as they argued that they are not a part of the society and should be kept outside the society.

Thus, disowned by their families in their childhood and ridiculed and abused by everyone as "hijra" or "third gender", eunuchs earn their livelihood by dancing at the beat of drums and often resort to obscene postures, but their pain and agony is not generally noticed and this study is just a reminder of how helpless and neglected this section of society is. Thousands of welfare schemes have been launched by the government but these are only for men and women and third gender do not figure anywhere and this demand only showed mirror to society (Sharma, 2012)[25].

In a male dominant society where women itself are finding hard to make a mark, a third category of gender is added- transgender. Transgender have made advances in the last decades. The status of transgender has started to rise but they are not considered to be equal to other gender. Society is finding it difficult to accept the roles transgender play and they are discriminated, harassed, humiliated and exploited in home and at work place which makes the transgender feel stressed and depressed. Inclusion of transgender at workplace is a significant trend that encourages to have a career. Transgender experience discrimination in their everyday life. A survey by the 'National Transgender Discrimination' revealed that transgender lost job due to bias and harassment at work place, and assault. Many factors have helped transgender to occupy position in work as full or part time. The major of all is the advent of internet. Internet allowed transgender to identify and communicate with their community. They come close in contact with each

[25] Op.Cit. S.K.sharma Ref. 7

other and were not isolated because of this communication. Transgender also have the right to avail facilities that match their gender (Raj. T, 2016)[26].

Most of the third gender people(hijras) in Jammu region lived at the margins of society with very low status. Many of them got their income by performing at ceremonies or by begging. Those who perform ceremonies call themselves as "Mangla Mukhis" the people who beg only for blessings. In the words of the president of the community *"hum toh sabka mangal chahte hain, hum kisi se, dukanon mein yaa railway station par beekh nahin mangte, hum toh badhai mangte hain, issi liye hum Mangla Mukhi hain"*. But one can also see some third Gender people (hijras) begging in the market. The respondents argued that they are not into the profession of begging like other third gender people in other parts of India. However, during the fieldwork, it was also seen that some men, dressed like females begged at the traffic signals and tried to defame the third gender community in Jammu region. On being asked about them to the Mangla Mukhis of Jammu region, they argued that these are the men only who by changing their attire pretend to be third gender and beg in the city and they have often entered into conflict with them. Even the authorities don't support them (third gender people), as begging and beggars were found in and around the city.

**Social Stigma, Marriage and Third Gender**

Enforced marriage is another crucial challenge interfaced by transgender community. The heterosexual convictions and homophobia compel transgender people into marriage. Many of the parents think that marriage is a remedy for gender identity disorder. Compulsory marriages and divorces drive them in to mental depression and it leads to alcoholic consumption and other unhealthy habits (Rakhi, 2016)[27]. Similar situation was seen, in the life of Jyoti (one of the third gender respondent). On being asked, what was the main reason of leaving her home? Jyoti replied that *"Ghar mein badi problem thi, agar ghar mein rehta toh ladki se shaadi karni padti"*.

Marriage was not only a problem for the third gender people, due to biological deformity but it also became the problem for their elder/younger siblings. The third gender people, generally, hided the information regarding their biological families, because they were afraid that this would create problems for their family as well. They argued that because of their sexual deformity, there is hindrance in the marriage of their brothers and sisters. Though, social stigma was attached with the community because of their sexual deformity, but on the other hand there was social stigma in terms of marriage of their brothers and sisters also.

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[26] Op. Cit. Raj. T. Ref. 24

[27] P. Rakhi,"Social Dynamics of Exclusion: Lesson on Transgender people in Kerela" in Sundra Raj T. (eds.): *Transgender Inclusion: Challenges and Implications*. (A.P.H. Publishing Corporation, New Delhi, 2016).

Rajalakshmi (2016)[28], in his paper argues that practice of stigmatizing the hijras is at a melting pot now. With their declaration as third gender, with their national and state level enumerations, with the proliferation of literature on them through research and popular writings in the media, with increasing deliberations and social activism, their stigmatization is in a melting point. Now they have started accessing educational institutions, health centres, recreation centres, transport and communication systems which were erstwhile banned for them. In the city of Bhubaneswar, it is noted and they claim that they are now using the normal entitlements enjoyed by the city dwellers. Voter's identity, Aadhar cards, Pan Cards, ration cards are now issued to them. This puts an end to their stigmatization and forcefully accommodates them into services and supports ensured by the Government. Thus, one can conclude that, yet, as a result of their marginalization, a closely-knit subculture has evolved, and in recent years hijras are slowly emerging on the national stage, standing up for their rights (Sharma, 2009)[29]. Further, hijras argue thatsociety may hate them, but they live and bear all the tortures, abuse and exclusion from the society. They lead a socially secluded life of their own and live in isolation, i.e., away from the whole society**.**

**Conclusion**

From the above discussion it becomes clear that the third gender people face intolerance, discrimination and exclusion in the society. Their existence and the roles are still overlooked and they are excluded from the economic, political and social services because of being identified as third gender or third sex. The complex gender approach has put the third gender community in the marginalized position from the beginning of their journey of life. While judiciary has taken a significant step to overcome the stigma attached to these people, it is now society's turn to play their role and treat them at par with the other genders. The third gender people (hijras) want society to know that they want to just be looked at as a group that is different and unique in their own way. Hence from the above discussion it may be concluded that though the society views the hijras as being nasty, dirty, and a disgrace to mankind, but the hijras are careless because they have no shame in their belief and culture. They feel that it is a freedom of choice and sacrifice to engage in something as extraordinary as becoming a hijra. They think that if they do not follow their ancestors in the tradition then they would be treated badly in their afterlife. It is an honor to the hijra to have achieved that great name. Therefore, one finds through the paper that third gender people keep their head held high no matter what people in society have to say about them and their way of living. They just love being what they are.

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[28] S. Rajalakshmi,"Inclusion of the Excluded: Case of Transgenders" in Sundra Raj T. (eds.): *Transgender Inclusion: Challenges and Implications*(A.P.H. Publishing Corporation,New Delhi, 2016).

[29] Op.Cit. S.K. Sharma. Ref, 7

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# Role of the Constitution of India in Achieving Social Justice

**Dr Chandra Sen Pratap Singh***

**Abstract**

*Justice is the highest goal to be achieved by a society. Social justice is an essential concept for a welfare state. Constitution is an effective tool for attaining social justice. Social justice refers to equal treatment of all citizens without any social distinction. A great challenge before the founders of the Constitution of India was to deal with the social inequality, hierarchical structure and graded system by bridging the gap between higher and lower & men and women. The Constitution of India is an attempt to give a complete and real picture of equality as means of ensuring Justice to all. With a view to ensure equalitarian Justice as an effective instrument of social Justice, the Constitution of India incorporates various provisions that do not discriminate on the basis of religion, race, caste, sex, place of birth. The Supreme Court has acted as a balance wheel of the society while giving effect to social justice. Judiciary has revolutionised the concept of socio-gender justice through new interpretation. To achieve social justice, the Constitution of India needs to be implemented in its letter and spirit. This paper highlights the effective role of the Constitution of India and Indian Judiciary in achieving social justice.*

**Key Words:** *Justice, Social Justice, Constitution of India, Discrimination, Judiciary, Supreme Court, Equalitarian Justice*

## Introduction

Justice is the highest goal to be achieved by a society. Justice is the virtue we practice by giving people what is due to them. Justice can be ensured only in a just society. Just society is possible only in the atmosphere of social equality and therefore, social justice can be achieved only in just and equal society. Social justice is a concept necessary for the welfare state. Constitution is an effective vehicle for the achievement of social justice. The Constitution of India is the first and foremost a social document enacted, adapted and given to themselves by the people of India. Indian democracy is the largest one in the world that embraces within a very important goal to achieve social equality and justice in a very clear way. Justice is always associated with a presumption of fair treatment, equal rights and access in the legal system. Social justice is an integral part of the society. Social justice denotes the equal treatment of all

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citizens without any social distinction based on caste, colour, race, religion, sex and so on. ... Indian Constitution makers were well known to the use and minimality of various principles of justice. The Indian Constitution is unique in its contents and spirit. The constitutional scholar Granville Austin, in his magisterial work[1] , states that probably no other Constitution in the world *"has provided so much impetus towards changing and rebuilding society for the common good"*.[2]

**Problem in Retrospect**

There has been an uphill task of achieving social justice through constitutional document as the highest law of the land in every society engrained with inherent social inequality. The American and the Indian society represent this tendency in prominence. America has racial inequality- Whites Superiority and Black Negroes inferiority. India has hierarchical graded society-privileged Brahmins at the top and deprived, dis-privileged and hated *Shudras* at the lowest ladder of the society. Both societies suffered from deep-rooted prejudices against the downtrodden and women. Americans had developed unscientific dualism about White and Black Images.[3]

| **White Image** | **Black Image** |
|---|---|
| Industrious | Lazy |
| Intelligent | Unintelligent |
| Moral | Immoral |
| Knowledgeable | Ignorant |
| Enabling Culture[4] | Disabling Culture |
| Responsible | Shiftness |
| Virtuous/pious | Lascivious[5] |
| Law abiding | Criminal |

So has been the vulnerable image of Shudras/ Dalits in India. Discussing the cultural discourse Prakash Louis exposes upper caste perception of Dalits hating as[6] -

Dirty/Filthy Fellows
Thieves/Robbers
Cunning

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1 Austin, G. (1999). *Working a Democratic Constitution: The Indian Experience*. Delhi: Oxford University Press.

2 Panikkar (1955). *Hindu Society, the Crossroads*. Bombay: Asia Publishing House, p. 52, Quoted by Austin, op. cit., pp. 114-115.

3 Crenshaw, Kimberle. (1988).Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law.*Harvard Law Review, 101,* 1373.

4 An enabling culture means its beliefs, values and behaviours are in sync with one another, and they are well-aligned to support the organisational goal. When this happens, the energy of the organisation is flowing in the right direction, as people are motivated and productivity is high.

5 Feeling or revealing an overt sexual interest or desire.

6 Louis, Prakash (2003)*Political Sociology of Dalit Assertion.* New Delhi: Gyan Publishing House, p.79.

Lazy-Kamchor
Useless-Good for Nothing
Glutton-Petu, Khau
Loose Morals
Dishonest
Quarrelsome-Disunity
Ungrateful

The neglected, hated, persecuted and dis-privileged position of Shudras in Shastras is in common knowledge known to all.

The position of women in the American and the Indian perception sails on the same boat.

**Male and Female Dualism in America**[7]

| **Male (Full of Virtues)** | **Female (Full of Vices)** |
|---|---|
| Rational | Irrational |
| Active | Passive |
| Thought | Feeling |
| Reason | Emotion |
| Culture | Nature |
| Power | Sensibility |
| Objectivity | Subjectivity |
| Abstract | Conceptualised |

The perception of women based on deep rooted prejudice in India is more vulnerable. Tulsidas pronounces "Nari Sahaj JadAgya"[8] (a woman is by nature stupid) or what he puts in the mouth of Ravana saying eight evils-recklessness, mendacity, fickleness, deceit, timidity, indiscretion, impurity and callousness, always abiding in heart of a women.[9] Women were not allowed to go outside home. Manu talked of dependence of a woman on father, husband and son according to her age of childhood, youth and old age. He called it the law of the nature.[10] In the same tone Tulsidas says "Jimi Swatantra BhayeBigrahiNaree"[11] (as women get spoiled when they are independent). Similar to Manu's tone was the view of Judiciary in America when the Court in *Bradwell* v. *Illinois*[12]observed "Man is or should be, women's protector or defender; …the paramount destiny and mission of woman are to fulfill the noble and benign offer of wife and mother. This is the law of Creator." The social inequality between the Whites and Negroes in America & Upper castes and Lower castes in India or between men and women was due to deprivation of social status and economic inopportunity.

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7 Oslen. (1990). Feminism and Critical Legal Theory; American Perspective. *International Journal of Sociology*,*18*, 200-201.

8 Baal Kanda, Ramcharitmanas, 57 A.

9 Lanka Kanda, Ramcharitmanas, 15 AB 1,2.

10 Manu Smriti 9.3

11 KishkindhaKand, Ramcharitmanas, 14 (4).

12 16 Wall 141 (1973).

To deal with the rampant social inequality, hierarchical structure and graded system by bridging the gap between higher and lower & men and women was a great challenge before the founding fathers of the Indian Constitution. Men become wiser by experience. So, the framers of the Constitution of India had adopted many improvements over the American pitfalls. In the Constituent Assembly of India all the segments of society- Upper castes, Lower castes, men and women, and different religion groups representatives participated which led Granville Austin to term it (The Constituent Assembly) as microcosm in Action.[13] Many improvements became visible in view of human rights and development on world plane enforcing the principle of all men and women born equal. The Constitution of India ensures Social Justice through both the universally accepted trend of Constitutionalisation- written document enshrining all the aspirations and goals to be achieved and making fundamental rights judicially enforceable.

**Constitution and Social Justice**

The Constitution of India is the creation of 'We the people of India' enacted in exercise of sovereign power to fulfil the high ideals and aspirations. It is the body of fundamental principles according to which the organs of the State-executive, legislative and judicial and different functionaries are constituted and governed. The Constitution of India creates different organs and entrusts in them the ideal of good governance reflecting the beliefs and political aspirations of the people of India. The Constitution of India is the basic norm/grund-norm to which all organs of the State, people of India, and functionaries have to conform. As pointed out by the apex court of the country the Constitution is a permanent document written by the people and accepted by the people to govern them for all time to come.[14] All power belongs to the people and the powers entrusted to specific institutions aim to working out, maintaining and operating a Constitutional order to fulfil the objectives of welfare state through justice, social, economic and political. The people of India have brought the idea of limited and purposeful government within the framework of the Constitution. All organs have to conform to the constitutional norms putting obligation of securing social order[15] in which justice, social, economic and political shall be established. The State is obligated to minimise inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities.[16]

Social Justice is a multi-dimensional concept. Preamble, conscience of the Constitution enshrined in the Fundamental Rights and Directive Principles of State Policy all swear to secure social justice which consists in the claims of all men to advantages and to an equal share in all advantages which are commonly regarded as desirable and are in fact conducive to human well-

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13 Austin, G. (1999).*The Indian Constitution-Cornerstone of a Nation*. New Delhi: Oxford University Press, p.1.

14 *Ashok Tanwar*v. *State of H.P.*, AIR 2005 SC 614.

15 Article 38 (1), The Constitution of India.

16 *Id.*, Article 38 (2).

being. That is reason why social justice encompasses all the principles of Justice e.g., Justice of transactions or rectificatory[17]; justice by way of restitution and compensation; justice of conformity to rules or like shall be treated alike; Justice according to desert[18] or distributive justice: Justice according to need; Justice according to choice. Social Justice modifies and fixes priorities among the various principles of Justice. Professor A.M.Honore[19] very succinctly summarises the practical shape and contents of social Justice:

1. The principle of social justice requires that all men should have a claim to an equal share in all those advantages which are commonly desired and conducive to human well-being.
2. This principle is not identical with the demand for equal treatment for all men; it rather requires preferential treatment of under privileged, who lack advantages possessed by others.
3. The principle of allocation according to need is a subordinate aspect of social justice;
4. The principle of conformity to rule is also subordinate aspect of social justice. The principle is designed to secure all men two advantages; that their reasonable expectations will be fulfilled and their dignity respected;
5. Discrimination is justified only: (i) to give effect to the principle stated in two above; (ii) on the basis of the conduct, actual or potential or choice of the person to be subjected to discrimination; (iii) So far as Justice of transactions and special relations require it;
6. It is arguable that, given the rough equality of human beings, and the equal claim principle is the only principle likely in the long run to lead to social stability.

The Constitution of India is an attempt to give complete and real picture of equality as means of ensuring Justice to all. It presents a peculiar balance between equalitarian Justice and equal rational Justice (preferential treatment to equalise dis-privileged to others privileged).

**Constitutional Ways and Means to Achieve Social Justice**

With a view to ensure equalitarian Justice as effective instrument of social Justice, the Constitution of India incorporates provisions which make no discrimination on the grounds of religion, race, caste, sex, place of birth. Article 15 (1) prohibits discrimination between citizens on grounds of religion, race, caste, sex, place of birth. Clause (2) makes access to public places like shops,

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17 Rectificatory justice is concerned with rectifying transactions where someone had been treated unfairly, and so unjustly, by another. When one has inflicted harm on another and has thereby profited, it is the aim of rectificatory justice to restore equality between the parties.

18 Desert is a normative concept that is used in day-to-day life. Many believe that being treated as one deserves to be treated is a matter of justice, fairness or rightness.

19 Honore, A.M. (1968).*'Social Justice' (in) R.S. Sumers (ed) Essays in Legal Philosophy*. Oxford: Oxford University Press, p. 105; see also David Miller. (1976)*Social Justice*. Oxford: Clarenden Press.

public restaurants, hotels and place of public entertainments and use of wells, tanks, bathing ghats, roads, place of public resort wholly or partly maintained out of State funds or dedicated to the use of general public accessible to all without any disability, liability, restriction or condition based on prohibited grounds mentioned earlier. It has been done so as many untouchables were not allowed to visit public places, nor services meant for all. Article 16 (1) ensures equality of opportunity in matters of public employment under the State. Clause (2) prohibits holding of any ineligibility or being discriminated against in respect of, any employment or office under the State i.e., Union or State services on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them.

a. Article 23 (2) prohibits discrimination on the grounds only of religion, race, caste, or class or any of them while imposing compulsory service for public purposes.
b. Article 29 (2) prohibits denial of admission of any citizen into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.
c. Article 325 prohibits denial of eligibility for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.

For the purposes of Article 15, 16, 23, 29 and 325, the Constitution of India is race, religion, caste, sex blind- no discrimination on prohibited grounds. But it represents half of the truth of social justice. In graded and hierarchical society with ingrained seeds of inequality like ours making a sizable number of members of the society hated, persecuted, dis-privileged, deprived of opportunity; something more is needed to ensure social justice to citizens. In this respect the best and most convincing justification for affirmative action in favour of Black Americans lies in President Lyndon B. Jhonson's words in 1965:

> *"Freedom is not enough. You do not take a person who, for years, has been hobbled by chains and liberate him; bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair. Thus, it is not enough to just open the gates of opportunity. All our citizens must have the ability to walk through those gates."*[20]

In view of this hard reality, the Constitution of India is colour, caste etc. conscious too. What is termed in America is Affirmative action or Positive Action which allows some sort of discrimination favouring Negroes, Indian Constitution consciously incorporated such ideology in the Constitution itself. In America, it is based on executive order. In India, it has constitutional base. In India positive or Affirmative discrimination has taken the form of Preferential Treatment including reservation of seats in services, educational institutions and representative legislative bodies.

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[20] https://www.goodreads.com/author/quotes/8584459.President_Lyndon_B_Johnson.(Visited on Feb. 25, 2023,14:43 PM).

Article 16 (4) enabled State to make provision for the reservation of appointments or posts in favour of any backward class of citizens which in opinion of the State, is not adequately represented in the services under the State. Subsequently by adding Article 16 (4A)[21], reservation in promotion was ensured to SCs and STs and Article 16 (4B)[22] filling of unfilled SCs and STs quota by special drive only for them. By the Constitution (First Amendment) Act, 1951, the provision was inserted, enabling State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Clause (5) was added in 2005 by the Constitution (Ninety - third Amendment) Act, 2005 providing for the reservation of seats for the earlier mentioned classes in admissions into the educational institutions including private educational institutions whether aided or unaided by the 'State'. However, minority educational institutions have been exempted. Article 330 makes special provision for reservation for SCs and STs in the House of the People which was originally meant for 10 years. But the period has been extended successively for ten more years. At present it is for 80 years. Article 332 provides for reservation for SCs and STs in the Legislative Assemblies. At present for 80 years-since the commencement of the Constitution. Article 243 D reserves seats for SCs and STs in Panchayats for time limit as of Assemblies. There is option for backward class reservation too in Panchayats.[23] Similar is provision for reservation for SCs and STs in Municipalities[24] and option for Backward classes.[25] In addition Part XVI[26] deals with special provisions for SCs, STs, SEBCs and others.

Caste consciousness is the basis of SCs, STs and SEBCs determination. Though Judiciary recognises that SCs and STs are no castes. But in spite of their declaration by President under Articles 341 and 342, notification specify castes, races and tribes or sub castes, sub races or sub tribes. As per *IndiraSawhney* v. *Union of India*[27], caste is determinative factor for the identification of Socially and Educationally Backward classes, of course subject to creamy layer rule.

With a view to ensure complete and effective social justice, the Constitution of India is itself both caste and religion blind and conscious.

**Creative Judicial Role to Ensure Social Justice through Balancing and Engineering**

The Supreme Court has acted as balance wheel of the society while giving effect to social justice.The judiciary under our Constitution is the watchdog of the Constitution. Judiciary is not only considered as the guardian of the Constitution but also protector of fundamental rights of the citizens.

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21 77th Amendment Act 1995 and 85th Amendment Act 2001.
22 The Constitution (Eighty First Amendment) Act, 2000.
23 Article 243 D (6), The Constitution of India.
24 *Id.*, Article 243 T.
25 *Id*., Article 243 T (6).
26 *Id.*, Articles 332-342.
27 A.I.R. 1993 SC 477.

Judicial interpretation of the Constitution is as much part of the Constitution as the Constitution is.

The Supreme Court decision in *Balaji* v. *State of Mysore*[28], PB Gajendragadkar,*J.,* while delivering the unanimous decision of the Constitution Bench made a workable balance between the national interest to bring socially weaker sections of society into the main stream of national life and maintaining of merit and efficiency in society and allowed 50 percent extent of reservation leaving 50% for merit pool. On caste criterion of determination of backwardness, its decision to disallow it as sole or dominant criterion, the nine Judges took a different stand in *Indra Sawhney* v. *Union of India*[29]in view of caste as reality of the Indian society, but soften the effect by skimming of the Creamy layer of the socially and educationally backward class. The fifty percent social engineering formula was upheld and thus it is reigning since 1962 when the Balaji was decided. But, after the EWS verdict[30], the Supreme Court by 3-2 majority upheld the 103rd Constitutional Amendment providing EWS reservation and held that 10% EWS quota to "poorest of poor" among forward castes did not pose any danger to the Basic Structure of the Constitution. With this, the Court extended the net of reservation benefits to include solely economic backwardness.

**Sex Blindedness and Sex Consciousness**

As discussed earlier along with other grounds sex has been prohibited ground for any discrimination between different citizens under Articles 15 (1) and (2); Article 16 (2) and 325. It expresses sex blindedness- no discrimination on ground of sex. But, as the case of Negroes in America or Dalits in India, even among the women of different varnas, there is utter difference. The wives of Brahmins are revered as Matwa or Panditine ji and enjoy status next only to male Brahmins; wives of Kshatriyas are respected as Thakurine enjoying status next to Kshatriyas; wives of Vaishyas are respected as Sethaniji; but wives of Shudras are most vulnerable, hated/ neglected and abject sexual violence. The social inferiority of women in Indian Society, including revered Sita, subjected to give proof of chastity or Draupadi, with attempted unclothed and many more cases of persecution daily reported in newspapers as shown on television, presses the need of extending helping hands to women on sex consciousness.

Article 14 speaks of general equality in favour of women along with others. But Article 15 (3) enables State to make any provision for women (and children). This Article has saved the constitutionality of Section 14 of the Hindu Succession Act, 1956 which converts the limited rights of women to property into full ownership.[31] Due to predominant patriarchal social structure and male dominance of social mores, not many legislations have been enacted to give effect to Article 15 (3) as such. But whatever measure have been taken,

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28 AIR 1963 SC649.

29 1992 Supp (3) SCC: AIR 1993 SC 477.

30 *Janhit Abhiyan* v. *Union of India* with 32 connected matters | WRIT PETITION (CIVIL) NO. 55 OF 2019 and connected issues; NOVEMBER 07, 2022

31 *Thota Sesharathamma*v. *Thota Manikamma* (1999) 4SCC 312.

safeguards the interest, dignity of women and ensure justice to them[32], they have been given full effect by Court. The Judiciary has played very creative role in ensuring Justice to women through empowerment and treating them on par with men.

Delivering the judgment of the Supreme Court of India in *Air India* v.*Nargeesh Mirza*[33], Fazal Ali,*J.*,while striking down the provision requiring the termination of service due to the first pregnancy of an Air Hostess ruled that such termination is "not only a callous and cruel act but an open insult to Indian womanhood-the most sacrosanct and cherished institution."[34]

The learned Judge V. R. Krishna Iyer in *C.B. Muthamma* v. *Union of India*[35],to remove the stains of sex discrimination, saidthat"if a married man has a right, a married woman, other things being equal, stands on no worse footing."[36] The equalitarian Justice to woman has been constitutionally viewed under Article 39 (a), which requires State policy towards securing that the citizens, men and women, equally have right to an adequate means of livelihood and clause (d) requires that there is equal pay for equal work for both men and women.

Parliament passed Equal Remuneration Act, 1976 and the Supreme Court gave meaningful interpretation in *PUDR* v. *Union of India*[37] ensuring equal pay to women as to men in workers engaged in Asiad Game Construction in Pragati Field of New Delhi and *M/S Mackinnon Mackenzie and Co. Ltd.* v. *Audrey D. Costa*[38] ensuring equal overtime rate for women engaged in night duties.

The Supreme Court of India has enforced international standard of non-discrimination and safeguards in favour of working women. In *Geeta Hariharan* v. *Reserve Bank of India*[39], the Supreme Court allowed the equal right of the guardianship of child on the basis of the international norms. In *Apparel Export Promotion Council* v. *A.K. Chopra*[40], it enforced the right of the working women to live with human dignity and in *Vishakha*v. *State of Rajasthan*[41], the Supreme Court issued a detailed guidelines to safeguard the interest of the working women and protect them from sexual exploitation at the place of work. The creative judicial move paved way for parliamentary law on the point.

The Supreme Court of India has evolved a victim-oriented gender justice jurisprudence with a view to ensure Justice to indecent assault and rape

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32 Domestic Violence Act, 2005; See also, Criminal LawAmendments of 2013.
33 (1981) 4 SCC 335: AIR 1981 SC 1829.
34 AIR 1981 SC1831,para 30.
35 AIR 1979 SC 1868: 1980 SCR (1) 668.
36 AIR 1979 SC 1870,para 6.
37 AIR 1982 SC 1483.
38 AIR 1987 SC 1281.
39 (1992) 2 SCC 228.
40 (1999) 1SCC 759.
41 AIR 1997 SC 3011.

victims. Thus, in *Democratic Working Women's Forum* v. *Union of India*[42] dealing with pathetic plight of domestic servants who had been subjected to indecent assault by army personnel in a train, the Supreme Court exercised its power to award interim compensation, a new way of remedy to do justice with victim women and issued a number of guidelines to save the rights and dignity of rape victims. The same principle was extended against individual sex offender in *Bodhisatva Gautam* v. *Subhra Chakraborty*[43] allowing interim compensation to the victim of a raped girl by her own teacher. Justice was also ensured to a raped victim of Bangladeshi woman gangraped in Pathik Niwas of Howarah Railway Station by awarding Rs. 10,00,000 (ten lakh) compensation.[44] In a number of cases the Supreme Court has come to the rescue of the dignity and privacy of even women of easy virtue.[45]

Judiciary has revolutionised the concept of socio-gender justice by innovative interpretation and eliminating narrow patriarchal taboos in services. In *Government of A.P.* v. *P.B. Vijay Kumar*[46] a new dimension was given in women empowerment through service right by reading Article 16 in light of Article 15 (3) and upheld Andhra Pradesh Government rule providing for (1) preference of women in jobs better suited for them; (ii) preference up to 30 percent for women in Jobs for which they are equally suited with men and (iii) direct recruitment to posts reserved exclusively for women. The Supreme Court rejected the plea of centre that since many army men come from rural background they would not like to work under women and ensure the right of women to get Commission in army on par with man. So has the court ensured women's right to be appointed to the posts of National Defence Academy (NDA).

**Social Justice to Depressed classes by Abolition of Untouchability and making its practice an offence**

Article 17 of the Constitution of India abolishes untouchability. It reads "Untouchability is abolished and its practice in any form is forbidden." The enforcement of any disability out of "Untouchability' shall be an offence punishable in accordance with law. Parliament has enacted laws to make Article 17 meaningful. Thus, Parliament has enacted Untouchability Offences Act, 1955 which was renamed as Protection of Civil Rights Act, 1955 and Schedule Castes, Scheduled Tribes Prevention of Atrocities Act, 1989, Employment of Manual Scavengers and Dry Latrine Prohibition Act, 1993.

The Supreme court has been alive to the injustices done to untouchables, though untouchability being abolished and its practice being declared an offence. Thus, in *Karnataka* v.*AppaBaluIngale*[47] , the Supreme Court

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42 (1995) 1 SCC 14.

43 AIR 1996 SC 922.

44 For detail study on the point see Prasad, Anirudh&Singh, Chandra Sen Pratap. (2012).*Judicial Power and Judicial Review.* Lucknow: Eastern Book Company.

45 *State of Maharashtra* v. *Madhukar NarainMandikar* (1991) 1 SCC 57, *State of Punjab* v. *Gurmeet Singh* (1996) 2 SCC 384.

46 AIR 1995 SC 1648:(1995)4 SCC520.

47 AIR 1993 SC 1126.

of India held the respondent guilty who had stopped Harijans from using the new constructed tank on gunpoint. Justice K. Ramaswamy observed that such practices are based on deep rooted practices. In *SafaiKaramchariAndolan*v. *Union of India*[48], the Supreme Court of India directed the State for the effective enforcement of the Act through rehabilitation and for payment for any injuries or loss of life in carrying out any scavenging or severe cleaning job.

**Conclusion and Suggestion**

A just society is that society in which ascending sense of reverence and descending sense of contempt is dissolved into the creation of a compassionate society.[49]The Constitution of India stands for social justice. The concept of social justice is a revolutionary concept which provides meaning and significance to life and makes the rule of law dynamic. The State is committed to secure it as Preambular Commitment and commitment under Article 38 of the Constitution. Much has been achieved, but not to the extent, the founding fathers intended to wipe out every tear from every eye. There are serious economic and social inequalities in the society. It becomes necessary to redistribute some of the important resources to the citizens to enable them in a level playing field. Social justice is required for equal treatment of people in terms of the laws and policies of the society, but also, that they enjoy some basic equality of life conditions and opportunities.

Constitutional aspiration to secure social justice has been sufficiently diluted due to non- implementation of provisions in letter and spirit. The ingrained prejudices of hierarchical society and vested interests have caused great loss to the constitutional intendment. Reservational justice has been frustrated on illogical and incoherent approaches. Reservational justice to the SEBCs, SCs and STs is objected to as breeding caste-consciousness and divisiveness but a new category of recipient have emerged through the Constitution (One Hundred and Third Amendment) Act, 2019 and upheld by the Supreme Court, inserting clause (6) to Article 16 which reads, "Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten percent of the posts in each category." Surprisingly, no voice has been heard. The constitutionally intended 49.5 (SCs& STs 22.5% + 27% for SEBCs) is still a distant dream.

Untouchability has been constitutionally abolished to promote social equality and ensure that people belonging to 'lower' castes have access to temples, jobs and basic necessities like water etc., but is still alive in social mores. There is hardly a day on which no incident of atrocity on Dalits is not reported. The reporting about rape victim women sails on the same boat.

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49 B.R. Ambedkar, *Annihilation ofCaste*; https://www.goodreads.com/quotes/7227066-a-just-society-is-that-society-in-which-ascending-sense. (Visited on Feb. 26, 2023,22:10 PM).

Different States have also taken effective measures to redistribute important resources, like land, by instituting land reforms by the abolition of Zamindari System.It is to be noted that both the President of the Constituent Assembly Dr. Rajendra Prasad and Chairman, Drafting Committee Dr. B.R. Ambedkar had warned in the Constituent Assembly that it all depends on those who are responsible for carrying of Government - if Constitution is good and implementers are bad, it would become bad, but even if the Constitution is bad and implementer are good, the Constitution would be good. Constitution need to be implemented in its letter and spirit free from political mileages and benefits. Deep rooted social mores need to be changed through enlightenment and awareness about the real constitutional values adopted, enacted and given to themselves by the people of India.

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# Legal Recognition and Social Perspective of Live-in Relationship in India: An Appraisal

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**Abstract**

*Live-in-relationship in India is not illegal anymore. Plethora of Judicial verdicts and provision of Protection of Women from Domestic Violence Act, 2005 being the sole legislation on this subject, discussed in this article confirm the same. Despite that live in relationship is still proscribed in India. In this article an effort has been made to throw light upon the causes of society's intolerance towards the concept of live in relationship. Fast paced and ambitious life style in metropolitan cities, negligent amount of legal complexities, absence of family responsibilities, easy walk-in walk-out etc. can well be attributed towards the sudden rise in popularity of the live-in relationship. As a result live-in is turning out to be a potent threat to the institution of marriage. Time and again our society has expressed its disapproval for live in relationship on the ground of religion, morality, ethics, traditions etc, . "Popular morality" appears to be the reason behind the society's disapproval, though "constitutional morality" speaks differently.*

**Introduction:**

As we know, 'Family' is the basic contexture of society. It is the foundation upon which the edifice of society is based upon . However, conflicting individual interests often gives rise to social disputes . At this kismet law comes into play. The purpose of law is maintenance of order in the society, establishing standards, resolving disputes and protecting individual rights and liabilities. As stated by justice Oliver Wendell Homes, "the prophesies of what the Court will do in fact and nothing more pretetious, are what I mean by Law." By opining so Justice Holmes wanted to raise question on the impact of law on the society. It was designated by Karl Llewellyn, the legal philosopher. This concept proves to be veracious when it comes to the social acceptability of live-in relationship is concerned in Indian society. As we discuss further, it would appear that 'legal recognition' and 'social acceptance' does not go hand in hand. The term "Live-in- relationship" in common parlance means two persons of major age residing together without any matrimonial tie."Live-in relationship" is "uninterrupted cohabitation" made for a substantial time period of time, between partners without any legal

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sanction of marriage and they share a "common household". Live-in relationships are of different types. Firstly a boy and girl have some relation prior to the marriage and if they find compatibility in them they get married or be like that for years. This is a frequent phenomenon and less convoluted too. Secondly, there may be live-in-relationship between a wedded man with an unmarried or wedded woman and vice versa. The third category is same-sex live-in relationships. Although there is not much availability of legislation over this subject matter but Indian judiciary has been playing a pivotal role giving recognition to live-in-relationships. Live-in relationship may seem unconventional ; but it is a common phenomenon today. It deals with the matter of pre-marital sex. It may be termed as a novel & less complicated substitute of marriage. The Protection of Woman from Domestic Violence Act, 2005, although for a limited purpose, is the first Indian legislation that brought a female partner of live in relationship within its sweep. The Apex Court stressed that perhaps the term "domestic relationship" encompasses not only marriage but includes a connection "in the form of marriage," citing this provision in "The Protection of Women from Domestic Violence Act, of 2005" . It is the courts of India which time and again shedded off the shell of orthodoxy and proved its agility towards recognizing the concept of live in relation. By way of doing so it recognised the rights of live-in- partners. Inspite of legal recognition it is still being condemned by the conservative Indian society. Although there are rise in the literacy rate (The rate of literacy in India is 74.04 %, out of which 82.14 % is for males and 65.46 % for females), technological advancement etc. the question still remains whether we being the members of society have been conditioned enough to accept the concept of live-in relationship whole heartedly.

**Societal and Moral Perspective:**

In the attempt of finding out the reasons for social disapproval for Live in relationship, it appears that religious sanction is the most influential factor playing behind it. 'Marriage' and 'Live in relationship' both endorse union of two persons mostly heterosexual in nature. The prior is backed by religion and society but the later lacks the same. As we know that marriage is a well celebrated, socially and legally sanctioned institution. Hindu Law considered marriage to be a sacrament. According to Hindu religion it was sacrament for purification of body from inherited taints. It is the sole form of purification recommended for the females. Shastric Hindu Law considered marriage to be a gift of the bride to the bridegroom and did not permit dissolution of marriage during the life-time of the husband and the wife or even after death. At present, after passing of Hindu Marriage Act, 1955 it is at the same time a contract and a sacramant. On the other hand sources of Muslim law describes marriage (Nikha) to be a civil contract which has for its object the procreation and legalizing of children. It is the sunnah of The Prophet . It is a journey of life to be fulfilled as per the guidance of our Noble Prophet (PBUH). As the statement of almighty Allah, the creator, " And indeed We sent Messengers before you ( O Muhammad SAW), and made for them wives, off-springs" As per Christianity the purpose of marriage is

faithful intimacy, procreation of children and maintenance of social order . As per the Bible 'marriage is a gift from God'. It is a voluntary, sexual and public social union between a man and a woman of different families. The purpose of marriage is to serve God. Apart from these three predominant religions, every other religion in India keeps 'marriage' on a higher pedestal.

On the other hand meeting individual needs is the sole purpose of live-in relationship. Globalisation , technological and industrial advancement have restructured our social life, whether it is family structure, marriage or conjugal relationship . It is undeniable that in India the institution of marriage is considered as holy and is being held at high estimation . Because of this mental set up living together without the marital tie is still considered a taboo and being looked down upon. Regardless the same , couples are preferring living together over marriage due to the fast changing life style . at present we are having a situation where the numbers of live in couples are increasing day by day . With the increase in the numbers , conflicts of individual interests arise and with the In absence of any significant legislation the Supreme Court pioneered to lay down guidelines on this concept through its multiple judicial pronouncement from time to time . It must not be forgotten that the concept of premarital sex was never an alien in Indian society. According to Indian social norms, a woman must be a virgin before marriage. Just because of virginity, a woman is compelled to marry a man who had raped her (Asur Vivah) or had taken her away from her house (Raksas vivah).

In our daily acts, social or popular morality plays an important factor. Coming to the question of morality, it varies from place to place , community to community. For example in north, north western India where the society is mostly patriarchal, it is the custom that after marriage the bride would shift to the house of the groom. And the concept of ' Gharjamai' is generally looked down upon. On the contrary if we move towards the north-eastern India, where matriarchy is predominant, the custom is totally opposite. In that geographical region it is the husband who moves with the wife after their marriage. The wife goes out to earn livelihood and the husband takes care of the households , rares the children etc. Thus it is clear that different cultures have different sense of morality. Another example may be given of the fact that amongst the Hindus having more than one wife is considered as immoral and it is illegal as well. On the other hand amongst the Muslims having four wives, (of course on fulfillment of certain religious conditions precedent), is religiously permissible and law does not interferes with in. Therefore, it is evident that concept of morality varies from religion to religion. In the same footing the concept of morality, the flexibility of thinking process varies in the people residing in the urban area especially in the metropolitan cities with those who are residing in the rural India. The rural society is still embracing its orthodoxy whereas the Indian urban society in is warming up to the concept of Live in relationship which is fetching much popularity amongst the young and working generations living in the metro cities. The movies in bollywood also promotes "the concept of the live in relationship" and 'salam

namaste' was the first movie on the issue of live in relationship. The film stars like Rajesh Khanna, Saif Ali Khan, Salman Khan, Amir Khan, Kangna Ranawat have also been in live in relationship at one point of time or the other with Anju Mahendroo, Roza, Katrina Kaif, Kiran Rao and Hritik Roshan respectively. Thus, the common people and the film stars also preferred the live in relationship. As we know that India has been a mixed bag of thoughts so far as religion and culture is concerned. This makes Indian society differently responsive towards live in relations. Society having different attitudes towards the partners of live in relationship makes things complicated for them . It causes emotional distress for them. The reason being so in most cases the women partners and their children become the worst sufferers. Apart from unmarried youths it is also seen that married male are also residing with unmarried female , or sometimes both the partners are married etc . In those cases the resistance from their respectively families are greater because the partners are faced with competing interests with the spouses of their respective partners. In the event of the death or desertion by the male partners, the female partners and their children suffers heavily. Firstly they are denied the social recognition and the respect they deserve . Those children are being pushed towards bastardy and the series of unfortunate incidents follows with it . Needless to mention that the women and the children are the most vulnerable in these case and probably the absence of social recognition is the pivotal reason behind it .

**Legal Position in India Regarding Various Aspects of Live-In Relationship:**

**A. Legal Status of live-in couples:**

**L**ive-in relationship is not a new phenomenon in Indian legal field . It is a fact that apart from The Protection of Women from Domestic Violence Act,2005 there is no other legislation in India giving direct recognition to a partner of live-in relationship even for a limited purpose. However, time and again Indian Judiciary played the role of Messiah when it came to redress the grievances of partners and the children Live-in-relation . In absence of any specific legislation, there is an undeniable contribution in this field by Indian Judiciary since the era of Privy council. In order to preserve the veil of modesty of women and equity, justice and good conscience the Privy Council has leaned towards the presumption of valid marriage over concubinage whether it was the case of Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Blahmy or Mohabbat Ali Khan v. Md. Ibrahim Khan.

In these cases, the Privy Council took the view that "where a man and a lady are proved to have lived respectively as spouse and the law will presume unless the opposite, as obviously be demonstrated, that they were living respectively in result of a legitimate marriage and not a condition of concubinage". Later the Supreme Court reiterated this opinion of the Privy Council in the celebrated case of Badri Prasad v. Director of Consolidation , by legally recognizing a 50 years old live-in relationship, although at the same time it made the presumption of marriage rebutable as a safe against false claims. Thereafter putting rest to the argument between 'law' and 'morality' , in

Payel Sharma v. Nari Niketan , The Allahabad High Court declared that " Live-in relation may be considered as immoral to the society but it is certainly not illegal ". In this way it has given legal recognition to live-in relationships. The same line of thinking was reflected in Ramdev Food Products (P) Ltd v. Arvindbhai Rambhai Patel. In the year 2010 by interpreting Article 21 of the Constitution of India liberally and thereby taking Live-in relationship within its sweep the Supreme Court has made a landmark Judgment in the case of S.Khusboo v. Kanniammal. However it was not meant for all types of live-in relationships but made it applicable only to a certain category that is "unmarried major persons of heterogeneous sex". Further, in another app-laudable judgment of Chanmuniya v. Chanmuniya Kumar Singh Khuswala the Supreme Court of India went a step further. In this case , the Apex Court awarded maintenance to the wife saying that the provision of section 125 of the Code Of Criminal Procedure must be considered in the light of section 26 of the Protection of Women from Domestic Violence Act, 2005. The Court even went on equating the right and claim of a woman partner of live-in relationship with that of a legally married wife. However, in this case also the benefits were made available to those Live-in relations which fulfilled the following conditions; firstly, the couple must be of legal age to marry or ought to be qualified to enter into a valid legal marriage. Secondly the couples must have cohabited out of their own volition and projected themselves for a considerable period of time out to the society as being akin to spouses . It kept out of its purview relationships like 'one night stand' and any other relationship sole for the fulfillment of prurient interest. In this judgment the Apex Court was pleased to refer American court's leading case of Marvin v. Marvin the crux of the case that came up for consideration was the social obligation of a man entering into a live-in relationship with another woman, without the formalities of a marriage. In this case they have coined a new expression called 'palimony', which is a amalgamation of 'pal' and 'alimony'. The coining of the expression 'palimony' was made by , famous divorce lawyer. In this case the American court , coming out of the shadows of orthodoxy put emphasis upon express contract between couples , in absence of any statutes governing property rights. In absence of any express contract the courts out of its discretion can also apply the doctrine of 'quantum meruit', or 'equitable remedies' for example constructive or resulting trusts, if, required by the facts and circumstances of the case.

The Apex Court emerged itself as a protector in Indra Sarma v. V.K.V Sarma by upholding the right of a helpless female partners of live-in-relationships and children of such relationship by lying down the following guidelines with a proposal to the parliament for new legislation to preserve the rights of the above mentioned. It insisted upon the period of relationship by putting emphasis upon the term " at any point of time" enshrined in section 2(f) of the Protection of Women from Domestic Violence Act, 2005. Firstly , it meant a reasonable period of time , secondly, on the point of " Shared household, thirdly "Domestic Arrangement", fourthly, 'Sexual relationship', fifthly, 'Children' , sixthly, 'socialization in public' , seventh,

'intention and the conduct of the parties'. Indra Sarma *(supra)* grabbed the attention by declaring that "Live-in relationship is not a crime". Further, the bench of Justice M.Y Eqbal and Justice Amitava Roy, in their landmark judgment passed in Dhannulal v. Ganeshram decided for the presumption of valid marriage so far as the couples of Live-in relationships are concerned. It also upheld the eligibility of a woman partner to inherit to property of her male partner on his death. The High courts of the Country also did not take a back seat in the matter of recognizing Live-in relationships. After Payel Sharma , the Allahabad High Court in the year 2020 has ruled in Kamini Devi & another v. State of U.P & Ors, right to remain in a live-in-relationship comes within the ambit of 'Right to life and personal liberty' hence protected under Article 21 of the Constitution of India. Very recently the Karnataka High Court while dealing with a petition of writ of Hebeas Corpus, allowed a nineteen-year-old girl namely Nisagra to stay with her boyfriend Nikhil with whom she eloped and later married. This has been published on June 14, 2022 in the Indian Express. The Bombay High Court in Reshma Begum v. State of Maharastra, in the year 2018 put emphasis upon " prospect of a formal marriage as a sine qua non for establishing Domestic Relationship under section 2(f) of the Domestic Violence Act, 2005". Therefore the court showed its reluctance to give relief to a relationship which was not "in the nature of marriage". Further, the High Court of Punjab and Haryana in the year 2021 in the case of Sanjay and another v. State of Haryana and others was in favour of protecting a couple in a Live-in-relationship, where a society is not yet conditioned enough to accept the same. In this case the court relied upon Nanda Kumar v. State of Kerala 2018, where the Kerala High Court afforded Police protection to a Live-in couple in view of the Protection of Women from Domestic Violation Act, 2005.

**B. Legal Status vis-a-vis rights of children of live-in couples :**

It cannot be denied that, attributing bastardy on the children born live-in couples is an undignified approach of our civilised society. The ground reality is somewhat different in India. Therefore to protect the status and interests of theses children the legislature and the judiciary has a pivotal role to play. Keeping in mind the plight of these children the Apex Court in Tulsi V. Darghatiya, held that "children born from live-in relationship will no more be considered illegitimate". Though not directly but some statues provide protection in limited form the children born to live-in partners which are mentioned as follows:

**B. Section 125 of the Code of the Criminal Procedure Code :**

Section 125 of the Criminal Procedure Code aims for providing maintenance right to the 'illegitimate minor child' irrespective of their marital status and who are unable to maintain themselves. By doing so section 125 of the Code of Criminal Procedure also ensures protection for the children of live-in parents and even for a limited purpose they are being acknowledged by the Statute. In the case of Dimple Gupta v. Rajiv Gupta the Apex Court upheld that

the right of maintenance u/s 125 of Cr.P,C of an illegitimate child born out of illicit relationship.

**C. Section 16 of the Hindu Marriage Act.**

Although starting with a non-obstante clause , Sub-section 3 of Section 16 of The Hindu Marriage Act, 1955, guarantees for the children born out of a live-in relationship inheritance rights from the properties of its parents which may be the parent's ancestral and self-acquired properties. The same was also held in the case of Bharata Matha & Anr v. R. Vijaya Renganathan & Ors. This ratio was adopted in Jinia & Ors v. Kumar Sitaram However, the same was criticised by Justice Ganguli in Parayankandiya Eravakanapravan Kalliani Amma(Smt.)& Ors. v. S.K Devi & Ors. It is opined there that in view of the intent of the legislation behind the enactment of section 16 of the Hindu Marriage Act was to eliminate the differences between legitimate and illegitimate children. Giving the illegitimate children a restrictive right is against the directive if the state policy as enshrined in article 39(f) and also to the right to property as enshrined in article 300A of the Constitution. In way of doing so the Act even for limited purpose awards legitimacy to the children born to live-in parents. At the same time this provision is violation of principle of equality before the law and equal protection of law by not treating the children born to live-in partners with the children born to married couples. Children of married couples are guaranteed with the right of inheritance from their parents as well as from the family property but so far as children born to live-in couples are concerned they can only inherit the property of its parents.

The Muslim law appears to be rigid when it comes to granting of legitimacy either to the live-in partners or their children. Indra Sharma advocated for effective and adequate protection, especially for the female partner and their children born out of live-in relationship, as such relationship may continue for a long period and can end up into susceptibility and dependency.

**E. Hindu Succession Act, 1956:**

The is the principal piece of legislation dealing with the matter of succession amongst the Hindus. According to the "Hindu Succession Act, 1956" an illegitimate child can iherit the property of its biological mother but not from the property of his father. This issue was dealt with by the Apex Court in its landmark judgment passed in Vidyadhari V. Sukhranabai. In this case the court has accorded the children born to live-in partners with the status of "legal heirs" and consequently granted them with inheritance right. However, if looked closely this provision discriminates in between the children born to valid marriage and children born to live in couples. As a consequence this particular statutory provision does not uphold the fundamental right of equality before the law and equal protection of law as guaranteed under Article 14 of the Constitution of India. And in a wider ambit it infringes the right to life as enshrined under Article 21 of the Constitution.

**F. Evidence Act on live-in relationship:**

Section 114 of the Indian Evidence Act, 1872 deals with different kinds of presumptions. The Apex Court while granting relief to the weaker partner in a live-in relation and the children born to such couples, liberally interpreted section 114. In the landmark case SPS Bala Subramanyam v. Sruttayan presumption was raised that "when a man and a woman have been cohabiting for a considerable period of time i:e for a numbers of years and also living under the same roof , they would presumed to be legally married couples and there shall be the presumption that the children born to them are legitimate". While opining so the Supreme Court of India, made a harmonious construction between the statutes and the Directive Principle of the State Policy as envisaged in part IV Constitution of India under Article 39(f). Article 39 (f) talks about the State's responsibility to provide opportunities for the children which would ensure their development in a healthy way and protect their interests.

**Conclusion :**

History has witnessed that there had always been social resistance whenever a new idea and thought was introduced which was against the established tradition, religion social norms. The conpect of live-in relationship is also not an exception to that . Regardless of legal recognition the concept of "popular morality", still refuses live-in relation. However, it is sometimes seen that there arises conflict between "popular morality" and "constitutional morality" which have been detoured in the celebrated case of Sambrimala. As we know that in India the family bond, traditionalism are holding together the basis fabric of social life . We Indian are very much emotionally dependent upon our family. Therefore approval from the family is always important for us. But when it comes to giving approval to unconventional things such as live-in relationships even families turn their back on it . Some times due to the fear of being socially out casted or something because of the fear of religion or orthodoxy etc. What ever the reasons may be, ultimately it is the partners who suffers emotionally. In the event of termination of those relations, where the the live in partner is a female and that too is unemployed, she is destined to face a great hardship . They do not have any place to return to . Neither they can go back to their earlier family nor they are left with means of subsistence. Things get worse when children are born to such relationship and denied by the male partners. Things not only become difficult for the female partners but also for the children . They are being pushed towards bastardy, without even knowing what it is . Further problem crops up when such children are being denied the name of its father and property rights . Although as discussed above such children are given property right only to the properties of their biological parents . This again violates the principles of equality . From the discussion made in the article, it would be evident that the Indian Judiciary whether it is the Privy Council or the High Court or the Supreme Court have been dealing with various issues and aspects of live-in relationship and constantly redressing the grievances in absence of any specific

and strong legislation. Needless to mention that live-in relationship have received least protection from the legislature. It is more often being misused as a "walk-in and walk-out" relationship. It is also obvious that emotional attachment may grow in between the partners . Sometimes it is simply used for the purpose of attainment of sexual pleasure and then the partners may whisk off their responsibility. In order to establish their rights and secure further protection the partner in distress has to take recourse to the court which again costs time and involves expenditure . Therefore unless and until such the partners vis a vis their children are given social acceptance along with solid and specific legislative backing the uncertainty shall continue despite legal recognition .

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2001 SCC OnLine All 332

(2006) 8 SCC 726

(2010) 5 SCC 600 ( Para 31)

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(1976) 18 Cal.3d 660

2013 (15) SCC 755

2015 (12) SCC 301

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# An Analysis of the Juvenile Justice Act with special reference to the Amendments made in 2015

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**Abstract**

*The paper briefly reviews amendments made to the Juvenile Justice (Care and Protection of Children) Act, 2015 from time to time, with special focus on the latest amendments passed by the parliament in 2021.These latest amendments seem to start a sad regressive journey in the field of child protection and juvenile justice in the country. The paper reviews the diverse augments in this context. The amendments are related to adoption orders, appellant authority for adoption, categorization of offences against children, functions of district magistrates, designation of children's court and changes in child welfare committee rules. Many of these changes made to the JJ Act 2015 are positive and progressive. But among these, the most significant and shocking amendments are related to the issues of 'adoption' and categorization of 'offences against children'. The logic behind these amendments reduce the case of adoption and child-issues as a mere bureaucratic process which is not only against the relevant international and national policy instruments but also undermines sensitivity and competence required to process child related matters like adoption.*

**Keywords:** Juvenile Justice; Child Legislations; Child Adoption in India; Amendments to JJ Act; Offences against Children

## Introduction

India has gone through an intense and impactful journey in legislating for children and the issues that concern them in sectors like child protection, education, nutrition, abuse and so on. Right from the enactment of The Children Act, 1960 till that of the Juvenile Justice (Care and Protection of Children) Act, 2015, a huge progress had been made across these decades in ensuring that children's basic rights in India are protected and services essential for their survival, development and wellbeing are efficiently delivered to them. Many milestones were achieved in enacting relevant legislations,

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schemes and programmes that to a large extent guaranteed a safe and fulfilling childhood for children of the country[1]. The JJ Act 2015 caters to children in conflict with law and children in need of care and protection which is in line with India's obligation in light of the United Nations Convention on the rights of the child[2] and other relevant policy instruments it has ratified and signed. The government has framed policies and taken many appropriate measures to guarantee that children get their rights delivered with regard to protection, welfare and development[3]. Much of this was possible only through the contributions made by child protection cadres including activists, lawyers, social workers, researchers and volunteers who worked at grassroots across the length and breadth of India as independent or as part of civil society or non-government organizations[4]. These workers greatly demonstrated worth and vision of their practice and advocacy in the child rights domain which impacted policymakers, legislators and other stakeholders altogether throughout these decades.

**Background:**

Juvenile justice legislation in India has undergone significant changes over the years, reflecting changes in societal attitudes and understanding of children's rights. The first legislation on juvenile justice in India was the Apprentice Act of 1850[5], which provided for the welfare and protection of juvenile apprentices. However, it was not until the enactment of the Children Act of 1960 that a comprehensive legal framework for the protection and care of children was established. This act provided for the establishment of juvenile courts and the appointment of probation officers, among other provisions.

In 1986[6], the Juvenile Justice Act was enacted, which provided for the treatment and rehabilitation of juvenile offenders. This act established the Juvenile Justice Board and the Juvenile Welfare Board and laid down procedures for the trial and punishment of juvenile offenders. However, the act faced criticism for its punitive approach towards juvenile offenders and for not adequately addressing the issue of children in need of care and protection. In response to these criticisms, the Juvenile Justice (Care and Protection of

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1 Ministry of Women and Child Development, Government of India. (2019). Juvenile Justice (Care and Protection of Children) Act, 2015 - A Handbook.

2 UNCRC, see https://www.unicef.org/child-rights-convention.

3 Chakrabarti, R. (2019). Understanding Juvenile Justice in India: A Sociological Perspective. Sociological Bulletin, 68(3), 312-328.

4 HAQ: Centre for Child Rights,*for details see*https://www.haqcrc.org/child-rights/haqs-submissions-to-un/&https://www.haqcrc.org/child-rights/; Accessed before 03-01-2023.

5 Ministry of Women and Child Development, Government of India. (2000). The Juvenile Justice (Care and Protection of Children) Act, 2000. Retrieved from https:// wcd.nic.in/sites/default/files/JuvenileJusticeAct2000.pdf: Accessed before 31-12-2022.

6 National Human Rights Commission. (2017). Juvenile Justice System in India: An Overview. Retrieved from https://nhrc.nic.in/sites/default/files/-Juvenile%20Justice%-20System%20in%20India.pdf :Accessed before 03-01-2023.

Children) Act of 2000[7] was enacted, which replaced the earlier act. This act provided for a more child-friendly approach to juvenile justice and laid down provisions for the care and protection of children in need of care and protection, as well as for the rehabilitation and social reintegration of juvenile offenders. The act was amended in 2006, 2011, and 2015, with each amendment introducing significant changes to the legal framework for juvenile justice in India. For example, the 2015 amendment lowered the age of juveniles from 18 to 16 years for heinous offenses[8] such as rape and murder, a move that was controversial and faced criticism from child rights activists. In recent years, there have been calls for further reform of the juvenile justice system in India, particularly in light of the increasing incidence of crimes committed by juveniles[9]. However, any such reform must take into account the need to balance the protection of children's rights with the need to ensure public safety.

**Role of Lawyers and Child Rights Activists in Development of Juvenile Justice System in India:**

Child rights activists, NGOs, and lawyers have played a crucial role in the development of juvenile justice legislations and child protection infrastructure in India[10]. Being vocal advocates for the rights of children in India, they have raised awareness about issues such as child abuse, child labor, and trafficking, and have lobbied for the implementation of child protection laws and policies[11].Lawyers and NGOs have provided legal aid[12] to children in conflict with the law, ensuring that they receive a fair trial and that their rights are protected. They have also helped children who are victims of abuse or exploitation to access legal remedies and seek justice[13].Child rights activists, NGOs, and lawyers have conducted research and analysis to identify gaps and challenges[14] in the juvenile justice system and child protection mechanisms in India, which has greatly helped in developing policy recommendations and

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7 Ministry of Women and Child Development, Government of India. (2015). The Juvenile Justice (Care and Protection of Children) Act, 2015. Retrieved from https://wcd.nic.in/sites/default/files/JuvenileJusticeAct2015.pdf

8 Supra Note 6

9 Sharma, P. (2019). Juvenile Justice System in India: A Critical Analysis. International Journal of Legal Sciences and Research, 3(1), 10-18.

10 "NGOs and Child Protection in India." Childline India Foundation, 2012. http://www.childlineindia.org.in/child-protection-system-india/ngos-and-child-protection-india.: Accessed before 03-01-2023.

11 "Child Rights and Juvenile Justice." HAQ: Centre for Child Rights. https://www.haqcrc.org/child-rights-and-juvenile-justice/

12 Sengupta, Somita. "Role of Legal Aid and Counselling in Juvenile Justice in India." International Journal of Humanities and Social Science Research, vol. 5, no. 4, 2015, pp. 14-18.

13 "Legal Aid in India: Some Perspectives." National Legal Services Authority, http://nalsa.gov.in/la_in_india.htm.

14 "Child Protection in India: An Overview." UNICEF India. https:// www.unicef.org/india/what-we-do/child-protection.

advocacy strategies[15]. Moreover, their work in building the capacity of key stakeholders in the juvenile justice system, such as police, prosecutors, judges, and probation officers[16] has been extraordinary. They have sponsored and conducted training programs, workshops, and sensitization sessions to improve their understanding of child rights and the juvenile justicesystem. These agencies and activists have collaborated with government agencies and other stakeholders to implement child protection laws and policies effectively and have closely followed and monitored the implementation of these laws and policies and advocated for their effective implementation.Some notable child rights NGOs in India include Bachpan Bachao Andolan, Child Rights and You (CRY), Save the Children, and Prayas Juvenile Aid Centre. Many lawyers and legal aid organizations in India, such as the Human Rights Law Network, have also been actively involved in promoting the rights of children and advocating for reforms in the juvenile justice system[17].

Overall, child rights activists, NGOs, and lawyers have played a critical role in advocating for the protection of children's rights and promoting the development of a child-friendly juvenile justice system in India. Similarly, their initiatives for community mobilization to protect children's rights and prevent abuse and exploitation have been very effective. Engagementof stakeholders including parents, teachers, and community leaders to raise awareness about child rights and promote a culture of child protection has given huge dividends. While their role in monitoring the conditions in institutions and detention centers for children in conflict with the law has ensured that they are being treated in accordance with their rights. They have also reported on instances of abuse or violations of child rights to the appropriate authorities. Their advocacy for policy reforms has strengthened the juvenile justice system and improved child protection mechanisms. Moreover, rigorous recommendations to the government have also been initiated on issues from time to time such as reducing the use of incarceration for children, increasing investment in child protection programs, and improving access to justice for children. The collaborations and partnerships between government, NGOs, child rights activists, and lawyers along with other stakeholders like international organizations, and civil society groups have advanced child protection and juvenile justice reforms across Indian states. They have formed partnerships to share knowledge and resources, and to implement joint initiatives to promote children's rights. Especially, in Indian context, the lawyers and activists have worked at the grassroots level to engage with marginalized and vulnerable communities, such as street children, child laborers, and victims of trafficking, and also have provided them with support,

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15 Child Protection and Juvenile Justice System in India." National Commission for Protection of Child Rights. Available at https://ncpcr.gov.in/showfile.php?lang=1&level=1&&-sublinkid=1942&lid-=1926.:Accessed before 03-01-2023.

16 "Juvenile Justice System in India." National Legal Services Authority. Available at http://nalsa.gov.in/juvenile-justice-system-india.htm: Accessed before 03-01-2023.

17 Supra note 22

protection, and access to services, and have raised awareness about their rights and entitlements. At the same time, filing of Public Interest Litigation (PIL) by lawyers and child rights activists addressed issues related to child protection and juvenile justice in various critical occasions. PIL petitions have been instrumental in bringing attention to issues such as child labor, child trafficking, and the conditions in detention centers for children. Finally, the contribution in research and evidence-based work and advocacy generatedcritical and valid evidence on issues related to child protection and juvenile justice in Indian context. They have used this evidence to develop advocacy campaigns, policy recommendations and litigation strategies.

**The 1986 and 2015 Juvenile Justice Acts:**

The Juvenile Justice Act of 1986 and the Juvenile Justice (Care and Protection of Children) Act of 2015 are two different legislations for the protection and care of children in India. The 1986 Act was replaced with the 2000 Act and the Act was once again amended in 2015. There are several key differences between these legislations which include the over-all approach, age for juvenility, structure, range of services and other special provisions. The 1986 act was primarily residual and reductionist while focusingon rehabilitation of juvenile offenders, while the 2015 act takes a more child-centric approach[18], emphasizing the care and protection of all children, including those in conflict with the law. Moreover, the 1986 Act defined male-juveniles as those under the age of 16, while the 2015 Act initially defined juveniles as those under the age of 18[19]. However, the 2015 Act was amended in 2016 to allow for the trial of 16-18-year-olds as adults in cases of heinous offenses[20]. These amendments related to juvenility happened in the back drop of infamous Nirbaya rape and murder case. The 2015 Act became crucial for making child protection system effective at district level by emphasizing the role of Child Protection Unit, a Child Welfare Committee, and a Special Juvenile Police Unit especially for children in conflict with law[21]. Very importantly, the 2015 Act has a separate chapter on adoption[22], which was not present in the 1986 Act. It lays down detailed procedures for the adoption of children, including the creation of a Central Adoption Resource Authority[23]. It is a fact that the 2015 version of the JJ Act puts a greater emphasis on the rehabilitation and social reintegration of juvenile offenders, with provisions for their education, skill development, and mental health care[2425]. The 2015 Act

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18 The Juvenile Justice (Care and Protection of Children) Act, 2015 - Preamble.

19 Section 2 (k); Juvenile Justice (Care and Protection of Children) Amendment Act, 2016.

20 Supra Note 9

21 Chapters III, IV, V, VI, and VII. Juvenile Justice (Care and Protection of Children) Act, 2015, Chapters III, IV, V, VI, and VII.

22 Chapter VIII. Juvenile Justice (Care and Protection of Children) Act, 2015,

23 The Juvenile Justice (Care and Protection of Children) Rules, 2016

24 Chapter II, Juvenile Justice (Care and Protection of Children) Act, 2015.

provides for the care and protection of all children, including those in need of care and protection as well as those in conflict with the law. It also lays down procedures for the rescue and rehabilitation of children who are victims of trafficking, sexual exploitation, or abuse. The 2015 Act has several special provisions[26] that were not present in the 1986 Act. These include provisions for the establishment of child-friendly courts[27], the provision of legal aid to children in conflict with the law, also identifying the crucial role of the National Commission for the Protection of Child Rights in delivering justice to children in difficult circumstances[28].

**Amendments made to JJ Act in 2021:**

The Juvenile Justice (Care and Protection of Children) Act, 2015 was amended in 2021 through the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021[29]. The key changes that have been brought in the JJ Act are in the matters of adoption orders, appellant authority for adoption, categorization of offences against children, functions of district magistrates, designation of children's court and changes in child welfare committee rules. Besides, the 2021 amendment makes it mandatory for all Child Care Institutions to register themselves for the purpose of adoption. The latest amendment strengthens the child protection mechanisms by making it mandatory for Child Welfare Committees to conduct regular inspections of Child Care Institutions and ensuring that all child care institutions are registered and comply with the standards set by the government. The amendment also provides for a central database of children in need of care and protection. Moreover, the 2021 amendment streamlines the adoption procedures by reducing the time taken for adoption and allowing for inter-country adoption. It also removes the requirement of obtaining a No Objection Certificate (NOC) from the biological parents for adoption. At the same time it further recognizes foster care as a form of family-based care for children in need of care and protection. Additionally, these amendments emphasize child-friendly procedures in cases of children in conflict with the law. It mandates that such cases be dealt-with in a very sensitive and friendly manner, with the presence of legal aid, interpretation services, and psychological support. It

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25 Mishra, R., & Mishra, B. (2019). Juvenile Justice System in India: A Review. International Journal of Humanities, Arts, Medicine and Sciences, 7(1), 55-62.

26 "Juvenile Justice (Care and Protection of Children) Act, 2015: A Critical Analysis" by Harpreet Kaur and Manmeet Kaur, International Journal of Social Science and Economic Research, 2016: Available at https://ijsser.org/more2016.php?id=96: Accessed before 13-01-2023.

27 Sagar, S. (2016). Juvenile Justice System in India: An Overview. International Journal of Applied Research, 2(11), 46-51

28 Gudur, A. (2015). Juvenile Justice System in India: From Welfare to Rights. Journal of Law and Conflict Resolution, 7(2), 19-25.

29 Official notification for the 29 amendments to Juvenile Justice (Care and Protection for Children) Act 2015 was issued on 9th August 2021 and is available at https://egazette.nic.in/WriteRead-Data/2021/228833.pdf: Accessed before 03-01-2023.

mandates that all aspects of the justice system, including the police, the judiciary, and legal aid services, be made child-friendly, and also provides for stricter punishment for offenses against children. Similarly, it fixes responsibility and accountability of government officials in matter related to children by introducing provisions for the accountability in cases of violation of child rights or where officials fail to perform their duties or violate the provisions of the Act. Also, the inclusion of children with disabilities as a separate category of children in need of care and protection is quite pertinent to mention. It provides for their specific needs to be taken into account in all aspects of the child protection system.The 2021 amendmentsemphasizes the role of the Child Care Institutions by providing for their regular monitoring and evaluation, and by mandating the appointment of trained professionals as staff members.

**Critical Comment on Increased Role of District Magistrates under the 2021 Amendments:**

The role of District Magistrates (DM) has been strengthened under the JJ Amendment Act of 2021. The DM is now responsible for ensuring the effective implementation of the Juvenile Justice System in their district. They are also responsible for monitoring and evaluating the functioning of various child protection institutions, including Child Care Institutions, Juvenile Justice Boards, Child Welfare Committees, and Special Juvenile Police Units. The executive district heads are required to oversee the establishment of the Child Protection Unit[30], ensure that they are properly staffed and equipped, and monitor their performance. The DM is also required to ensure the effective functioning of the Special Juvenile Police Units (SJPU) in their district. The SJPU is responsible for investigating cases involving children in conflict with the law and ensuring that their rights are protected.It is also required to ensure that the CWC and JJB function in a child-friendly manner and that the best interests of the child are always kept in mind. In addition to the above, the JJ Act has also mandated the DM to ensure that all child-related laws are implemented effectively in their district[31]. This includes laws related to child labor, child trafficking, child marriage, and child sexual abuse. The executive is required to coordinate with various government departments and agencies to ensure the effective implementation of these laws.

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30 "Role of District Magistrates and Child Welfare Committees in the Juvenile Justice System" by Rama V. Baru and Raghuram Yennamani, Economic and Political Weekly, Vol. 52, Issue No. 41, 2017: Available athttps://www.epw.in/journal/2017/41/ commentary /role-district-magistrates-and-child-welfare.html: Accessed before 13-01-2023.

31 "Role of District Magistrate in the Implementation of Juvenile Justice System in India" by Shivangi Dixit and Devarshi Bhatt, Indian Journal of Criminology and Criminalistics, Vol. 41, No. 2, 2020: https://www.researchgate.net/publication/342585876_-Role_of_District_Magistrate_in_the_Implementation_of_Juvenile_Justice_System_in_India

Besides these additional responsibilities, the district magistrates have also been involved in adoption matters with a very high stake. The JJ Amendment Act, 2021 has made significant changes to the adoption process in India. One of the most significant changes is the shift of responsibility for issuing adoption orders from the courts to the District Magistrate.Under the earlier provisions of the Juvenile Justice Act, 2015, the courts were the final authority[32] for issuing adoption orders[33]. However, with the 2021 amendment, the DM has been given the power to issue adoption orders under certain conditions.The amendment provides that the DM may issue an adoption order if the child is declared legally free for adoption by the Child Welfare Committee (CWC) and the prospective adoptive parents have been identified by the Specialised Adoption Agency (SAA). The DM can also issue adoption orders for inter-country adoptions if the Central Adoption Resource Authority (CARA) has given its approval.This change is expected, by many, to expedite the adoption process and reduce the burden on the courts, which have been dealing with a backlog of cases. The DMs are expected to be more accessible to adoptive parents and better equipped to handle the adoption process efficiently. The amendment also provides for a time-bound process for the issuance of adoption orders by the DM.However, there are concerns about the capacity of the DMs to handle the adoption process effectively, and there are fears that this change may lead to a reduction in oversight and transparency in the adoption process. Therefore, the amendment also provides for the monitoring of the adoption process by the CWCs and the State Adoption Resource Agencies (SARAs)[34].

**Is Juvenile Justice Over-bureaucratized afterthe 2021-amendments?**

The 2021 amendments to the Juvenile Justice (Care and Protection of Children) Act have been criticized by some experts as a move towards more bureaucratization of child protection and juvenile justice in India. One of the major changes brought about by the amendments is the increase in the role of district magistrates in the process of adoption and care of children in need of protection.While some experts believe that this move towards greater involvement of district magistrates may lead to more efficient and effective child protection measures[35], others argue that it may lead to increased

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32 Juvenile Justice (Care and Protection of Children) Amendment Act, 2021: http://egazette.nic.in/WriteReadData/2021/226716.pdf

33 "District Magistrate replaces court as final authority to issue adoption orders" by Nidhi Sharma, The Economic Times, August 4, 2021: Available at https://economictimes.indiatimes.-com/news/politics-and-nation/district-magistrate-replaces-court-as-final-authority-to-issue-adoption-orders/articleshow/85022138.cms Accessed before 18-01-2023.

34 Press release on Juvenile Justice (Care and Protection of Children) Amendment Act, 2021: available at http://pib.gov.in/PressReleasePage.aspx?PRID=1749452 accessed before 01-12-2022.

35 Lok Sabha debates on Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021: http://164.100.47.4/Loksabha/Debates/New debates/Nd010821/ Fullday.pdf

bureaucracy and red tape, making it more difficult for families and individuals to adopt or care for children in need.Additionally, some experts have raised concerns about the potential misuse of power by district magistrates, who may prioritize administrative processes over the best interests of the child. It remains to be seen how these amendments will be implemented and their impact on the ground.It is important to note that the government has stated that the amendments aim to strengthen the child protection system in India and provide a better future for children in need of care and protection[36]. However, some experts have expressed concern that the increased bureaucracy may hamper the intended outcomes of the amendments. Ultimately, the success of the 2021 amendments will depend on their effective implementation and the prioritization of the best interests of the child.In addition to the concerns raised about the potential bureaucratization of child protection and juvenile justice, some experts have also criticized the 2021 amendments for their lack of focus on prevention and rehabilitation of children in conflict with the law[37]. The amendments mainly focus on the protection and care of children in need of care and protection, and increase the penalties for certain offenses committed against children.Some experts argue that a more comprehensive approach is needed to address the root causes of juvenile delinquency and prevent children from coming into conflict with the law in the first place. This could involve investing in education and vocational training programs, providing mental health support and counseling, and addressing systemic issues such as poverty, inequality, and discrimination.Furthermore, the amendments have also been criticized for their lack of consultation with children's rights organizations and other stakeholders. It is important for the government to engage in a meaningful consultation with these groups in order to ensure that the policies and laws put in place truly reflect the best interests of children.

It goes without saying that the 2021 amendments to the Juvenile Justice Act have the potential to improve[38] the child protection and juvenile justice systems in India, there are also concerns about their potential negative impacts and the need for a more comprehensive approach to address the needs of

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36 Rajya Sabha debates on Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021: available at http://164.100.47.4/newrsdebate/256/01082021/Fullday.pdf: Accessed before 19-01-2022

37 "Analysis of Juvenile Justice (Care and Protection of Children) Amendment Act, 2021" by Sandhya Gupta and S. Sreekumar, Indian Journal of Public Health Research & Development, 2021: Available at https://www.ijphrd.com/doi/pdf/10.5958/0976-5506.2021.01502.7 :Accessed before 29-07-2022

38 Juvenile Justice Act amendments 2021: A step towards stronger juvenile justice system. (2021). PRS Legislative Research. Available at: https://www.prsindia.org/policy/vital-stats/juvenile-justice-act-amendments-2021-step-towards-stronger-juvenile-justice-system: Accessed before 29-07-2022

vulnerable children[39]. Particularly, when we contextualize this over-bureaucratization along within a broader debate about bureaucracy in India, which has been criticized for being too power-centric and less focused on the needs and interests of the people it is meant to serve.One of the main criticisms of the Indian bureaucracy is that it is too hierarchical and centralized, with decision-making power concentrated in the hands of a few individuals at the top of the system[40]. This can lead to a lack of responsiveness to the needs and concerns of ordinary people, as well as lack of accountability for those in power.In the context of the 2021 amendments to the Juvenile Justice Act, some experts have raised concerns that the increased role of district magistrates in the adoption process may exacerbate this problem of power centralization. By giving district magistrates the final authority to issue adoption orders, the amendments may create a system in which administrative processes and bureaucratic requirements take precedence over the best interests of the child and the needs of families[41]. The lack of consultation raises questions about the extent to which the amendments truly reflect the needs and interests of the people they are meant to serve.

**Critical Comment on the Classification of offences under the 2021 Amendment Act:**

The JJ Act, 2015 has been path-breaking and comprehensive in its approach of dealing with offences committed against children. The Act had a broad and sensitive categorization of offences against children with an exclusive chapter on it with addition of new offences that are committed against children. At the same time the Act was clear and categorical in dealing and labelling these offences in more profound and sensitive manner. While categorizing these offences as cognizable, non-cognizable, bailable and non-bailable, it had clearly also marked the jurisdiction of courts in conducting trials for these offences. It is very important to note this legislation had increased the threshold of maximum punishments in these offences up to ten years' imprisonment and kept majority of offences under cognizable category except for the four offences. However, one of the 2021 Amendments changes the classification of eight (8) offences[42] committed against children from

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39 Das, A. (2021). India's Juvenile Justice System: Need for Reforms. India Review. Available at https://www.tandfonline.com/doi/full/10.1080/14736489.2021.1953183: Accessed before 19-08-2022

40 Chakravarty, I. (2021). Indian bureaucracy and its problems. Livemint. Available at https://www.livemint.com/Opinion/D2DkzM6NPSb2eXU6PvU6dM/Indian-bureaucracy-and-its-problems.html: Accessed before 28-09-2022.

41 Choudhury, S. (2021). New Juvenile Justice Law a Tightrope Walk. India Legal. Available at https://www.indialegallive.com/cover-story-articles/focus/new-juvenile-justice-law-a-tightrope-walk/: Accessed before 18-10-2022.

42 The Juvenile Justice (Care and Protection of Children) Amendment Act, 2021. Gazette of India. Available at http://egazette.nic.in/WriteReadData/2021/227409.pdf: Accessed before 28-03-2022

cognizable to non-cognizable offences[43]. The offences like sale and procurement of children, employment of children for begging, using minors for militant activities, violence/cruelty inflicted on children by staff of any CCI, etc have been categorized under non-cognizable offences which not only seems to be regressive but against the spirit of justice especially at a time when lives of lacs of children across the country have been disrupted in the COVID19 pandemic due to loss of parental support or other post-pandemic socio-economic adversities. The changes of classification in these offences have wide-ranging consequences for affected children and their families owing to diverse legal, economic and socio-cultural situations that govern lives of people in India[44]. By definition, in a non-cognizable offence police is not mandated to investigate the matter or register an FIR. Instead, the victim or aggrieved family has to get a direction issued from a magistrate for registering FIR and commencing an investigation. The whole process in the cases where children are victims tends to further injustice and persecution, having far-reaching consequences for children and as well as their families.

**Concluding Discussion:**

Surprisingly, as we review the latest amendments[45] done in 2021 to the Juvenile Justice (Care and Protection of Children) Act, 2015, a sad regressive journey seems to have started in the field of child protection and juvenile justice in the country. Many of these changes made to the JJ Act 2015 are positive and progressive. But among these, the most significant and shocking amendments are related to the issues of 'adoption' and categorization of 'offences against children'.

As discussed earlier that as per the provisions of the JJ Act, 2015 adoption order of a child is issued by a competent civil court due to the reason that primarily adoption of a child is a legal process that ensures and paves way for permanent legal association between the adoptive parents and the child to be adopted. In other words, a civil court as mandated in the Act does a judicial scrutiny of a case at hand and functions as a final authority in issuing an adoption order. However, the latest amendment made in 2021 to the Act authorises a district magistrate, which also includes additional district magistrate, to function as official authority to issue adoption orders. The logic that is presented for transferring this order-issuing authority to districts magistrates is that 'adoption' as such is non-adversarial in nature and does not

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43 Joshi, V. (2021). Juvenile Justice Act amendment: What's changed and what's missing? The Hindu. Available at: https://www.thehindu.com/news-/national/juvenile-justice-act-amendment-whats-changed-and-whats-missing/article35817866.ece; Accessed before 28-09-2022.

44 Singh, A. (2021). Juvenile Justice Act amendment a regressive step, undermines principle of reformative justice: Activists. The Indian Express. Available at: https://indianexpress.com/article/india/juvenile-justice-act-amendment-a-regressive-step-undermines-principle-of-reformative-justice-activists-7384148/: Accessed before 02-09-2022.

45 Supra note

require a judicial scrutiny. Moreover, it is also argued that an already laid-out administrative procedure shall be followed for legal adoptions and it is believed that this would eliminate delays in completing adoption process and that it would prevent piling of pending adoption cases. However, this logic has been severely questioned and debated across child rights' groups in the country. It is vehemently being argued that these premises on which the said amendment has been based are irrational and far from facts on the ground, and thus does not justify designating bureaucrats instead of judicial courts as having powers to issue orders for adoption[46]. In fact, it is further being argued by progressive child protection workers that the pendency or delay in issuing adoption orders in the cases brought before courts is basically due to non-completion of other formalities/procedures to be completed by bodies or offices outside the civil court like district child protection units, adoption centres, child welfare committees or police. It has also been reported by different agencies and independent researchers that a number of regions/districts in India do not have sufficient infrastructure, human resource or funds under integrated child protection scheme (ICPS), which becomes a main bottleneck for completing process of adoption cases. In addition to this, it is also a debatable issue to consider grounds of 'delay' as the main reason to decide the transferring power to issue adoption orders from courts to administrative officers.This logic reduces the case of adoption as a mere bureaucratic process which is not only against the relevant international and national policy instruments but also undermines sensitivity and competence required to process child related matters like adoption. Instead, adoption besides being a legal and administrative process is also an issue that needs a psychosocial approach which demands a professional attention to uphold child protection standards. District magistrates or other bureaucrats besides being overburdened with many roles and responsibilities at district level, may not always be professionally competent to understand the spirit and sensitivity of child protection standards in cases of adoption and to assess whether the process is in the best interest of any adopted child. Thus, empowering them to issue adoption orders could have serious consequences for the whole process of adoption. Moreover, in case of a grievance as a result of any adoption order, the aggrieved person is supposed to approach the office of divisional commissioner for redressal, which again bypasses judicial supervision and de-prioritizes the issues of children in adoption cases. The said logic even presented in the parliament behind this amendment falls flat on ground because neither the issue of *'delay'* is solved nor is there any guaranteed professional expertise in the *designated officer/s* to uphold the child protection standards in the whole process of adoption. In fact, it is being argued that the situation may further exacerbate considering the Indian scenario of bureaucracy which often seems to complicate peoples' lives by being parochial and faithful to red tape in implementing rules without looking at the larger and structural issues that govern peoples' everyday life and experience.

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[46] Supra note 44

In this background it is high time that the legislators, policy makers and other stakeholders directly concerned with these issues ought to realise the impact and consequences of these amendments to child protection law, and earnestly act in a manner to restore the holistic, child-sensitive and judicial approach to clauses of the JJ Act especially of those sections that deal with adoption and categorization of offences. The same shall be in the *best interest of the children* of this country.

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# The Sexual Harassment against Women in Cyber Space: Concept, Reality and the Law

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**Abstract**

*India in the last two decades has seen a magnificent technological growth especially after the advent of the Internet. There is higher dependency of the people towards the cyber world for completion of day-to-day tasks. However, every aspect has its negative side as well, which is the sexual cybercrime particularly referring to the women. In the era of cyber socialisation, there are plethora of sexual cybercrimes committed against women i.e., cyberstalking, revenge porn, cyber defamation, morphing, etc. The cyber criminals adopt new modes and mechanisms to attack the victims as computers and laptops have become an essence of an individual's life thereby making women an easy target. However, to prevent this, the role of the Information Technology Act, 2000 comes into play. But the question arises, till what extent this law is sufficient to curb the menace of sexual crimes against women in the cyberspace. There are various reasons of growth of such crimes such as fear of reputation and hesitation to report the incident (sociological reason), lacunas within the IT Act,2000, non-implementation of laws (legal reason), improper technology to track the cybercriminals due to her anonymity (technical reason). The researchers also seek to analyse the technological and legal gap to protect the rights of women. It is an emerging area of criminality which needs to be addressed, analysed, and solved.*

**Keywords:** Cybercrimes, Cyberspace, Sexual Harassment, Technology and Women..

## I. Introduction

In the modern times, women have been excelling in various fields, i.e., Politics, Doctors, Engineers, Lawyers, etc and making their mark in the own field worldwide. They are raising their voices and helping to greater extent in decision making process not only for our country but internationally as well.

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Various legislations have been enacted and enforced within our country for the protection of women which can be further bifurcated into:

**Women Specific Legislation**

- The Immoral Traffic (Prevention) Act, 1956[1]
- The Dowry Prohibition Act, 1961 (28 of 1961) (Amended in 1986)[2]
- The Commission of Sati (Prevention) Act, 1987 (3 of 1988)[3]
- Protection of Women from Domestic Violence Act, 2005[4]
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013[5]
- The Criminal Law (Amendment) Act, 2013[6]
- The Indecent Representation of Women (Prohibition) Act, 1986[7]

**Women Related Legislation**

- The Indian Penal Code,1860[8]
- The Indian Evidence Act,1872[9]

In the arena of cyber socialization, different sexual cyber offences have come into existence like morphing, cyberstalking, cyber defamation, to name a few. Moreover, sexual harassment of women through cyberspace is one of the new crimes that has evolved because of the continued rise of computer and internet usage. Any group in society could be the target of these crimes, although most victims are women. Women in Indian society are the true victims of cybercrimes that involve sexual harassment.

### 1.1 Meaning and Origin of Cybercrime

The cybercrimes are those offences which are committed against the individual(s) in the cyberspace, to harm them either directly or indirectly via multifaceted components. As per *Casey (2001),* cybercrimes are defined as *"any crime that invokes computers and networks, including crimes that do not rely heavily on computers".*[10] As per *Thomas and Loader (2000),* cybercrimes are *"computer-mediated activities which are either illegal or considered illicit by certain parties and which can be conducted through global electronics networks"*[11]

In the year 1969, the Advanced Research Projects Agency Network (ARPANET) was established which managed the military communication was

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1 The Immoral Traffic (Prevention) Act, 1956 (Act 104 of 1956).
2 Dowry Prohibition Act, 1961 (Act 28 of 1961).
3 The Commission of Sati (Prevention) Act, 1987 (Act 3 of 1988).
4 Protection of Women from Domestic Violence Act, 2005 (Act no. 43 of 2006).
5 *Supra* note 19 at 5.
6 The Criminal Law (Amendment) Act, 2013 (Act no. 13 of 2013)
7 The Indecent Representation of Women (Prohibition) Act, 1986 (Act no. 60 of 1986).
8 The Indian Penal Code, 1860 (Act no. 45 of 1860).
9 The Indian Evidence Act, 1872 (Act 1 of 1872).
10 E. Casey, *Digital Evidence and Computer Crime* (London Academic Press, 2011).
11 D. Thomas and B Loader, *Cybercrime: Law enforcement, security and surveillance in the information age (*Routledge London, 2000).

formed in the U.S.A.[12] It was in the year 1998, Morris, a student at Cornell University, conducted an experiment to test the *'worm'* at a larger scale. Hence, it could be considered as a turning point of beginning of an era of cybercrime.

## II SEXUAL HARASSMENT OF WOMEN IN CYBER SPACE

With in depth expansion of internet and the cyberspace, many people are coming together in close contact with each other in the online world. As per the latest report of National Crime Records Bureau (NCRB), 2020, there has been upsurge in the percentage of cybercrimes from 3.3% in 2019 to 3.7% in 2020 after an unprecedented wave of COVID-19 pandemic. One such incident is of *Bois Locker Room* in the year 2020. In the year 2019, 44,735 cases of cybercrimes were recorded, whereas in 2020, there has been steep rise as 50,035 cases were recorded.[13] 972 cases were reported pertaining to cyber stalking or bullying of vulnerable population of children and women and 3,293 cases of sexual exploitation. The cases of cybercrimes against women reported is 8379 and 10405 in the year 2019 and 2020 respectively. It was in the year 2012, where 80,000 cyber complaints were lodged in Kerala out of which 5,000 complaints primarily pertained to women by the usage of hi-tech devices.[14].

States which show the maximum cases of cybercrimes is Uttar Pradesh (11,097), followed by Karnataka (10,741) and Maharashtra (5,496). The National Capital of Delhi reported a total of 168 cases for the year 2020. The Union Agency for Fundamental Rights (FRA), provides a statistic for the year 2014 on violence against women within the European Union (EU) which states:

- 20 percent of women under the age group of (18-29 years) within the EU have been the victims of cyber harassment.
- 77 percent of women who are the victims of cyber harassment also experience at least physical/or sexual violence from an intimate partner.
- 70 percent of women population witnessed cyber stalking also experience at least physical/or sexual violence from an intimate partner.
- 5 percent of women in the European Union witnessed since the age of 15 the crime of cyber stalking.[15]

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12 V. Cerf, *A Brief History of the internet& related networks*, *Internet Society, available at:* https://www.internetsociety.org/internet/history-internet/brief-history-internet-related-networks. (last visited on August 24, 2022).

13 Press Trust of India,). *India reported 11.8% rise in cybercrime in 2020;578 incidents of fake news on social media: Data*
The Hindu, Sep 21, 2021 *available at:* https://www.thehindu.com/news/national/india-reported-118-rise-in-cyber-crime-in-2020-578-incidents-of-fake-news-on-social-media-data/article36480525.ece. (last visited on March 20, 2023).

14 The Indian Express, *Cybercrimes: Criminals target women with hi-tech devices,* July 30, 2012, available at: *http://archive.indianexpress.com/news/cyber-crimes-criminals-target-women-with-hitech-devices/981431.* (last visited on March 20, 2023).

15 European Union Agency for Fundamental Rights. (2014). *Violence against women: an EU-wide survey.*

Some of the reasons for the growth of sexual cybercrime against women is stated as follows:

- The internet/cyberspace has no boundaries and it's ever changing.
- Female and children are vulnerable targets for exploitation and other various cybercrimes.
- Due of anonymity of the unauthorised user, it becomes difficult to catch hold the real culprit.
- In majority of the cases, the cybercrimes go unreported due to fear of society, defamation, and hesitation.

**2.1 Initiatives by Government of India**

- *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* empower the users of Intermediaries and makes online social media platforms accountable. These rules provide with the speedy and robust grievance redressal mechanism for the speedy disposal of the cases. These intermediaries need to state their terms hence by communicating with the users by not modifying, uploading, hosting, publishing, or invading someone's privacy which is unlawful and not authorised by law.[16]
- The Government of India has formed, Cyber Crime Coordination Centre (I4C) under the aegis of Department of Home Affairs, to provide with a proper framework to tackle the menace of cybercrimes in a coordinated way.[17] The said Ministry came up with celebrating *"Cyber Jagrukta Diwas"* on first Wednesday of every month and observing it for atleast an hour, which focusses on creating awareness on cybersecurity. There are various topics which is needed to be covered which is bifurcated into Units. The Unit I deal with *"Cybercrimes and Safety"* covering offences like cyber stalking, cyber obscenity and online cyber crimes against women.
- A Nirbhaya fund formulated a project as *"Cybercrime Prevention against Women and Children"* which focusses on spreading and providing awareness programs along with the capacity building mechanism by training the judicial officers, prosecutors, etc.[18]
- A National Crime Reporting Portal *(www.cybercrime.gov.in)* has been devised to encourage the general public for reporting of the

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16 Government of India, "*The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*" (Ministry of Electronics and Information Technology).

17 Government of India, "Details about Indian Cybercrime Coordination Centre (14C) Scheme (Ministry of Home Affairs).

18 Government of India, "Measures to ensure safety and security of women and children on online platforms" (Ministry of Women and Child Development).

cyber crimes' incidents with primary focus on cybercrimes against women and children.[19]

- The Ministry of Home Affairs under its twitter handle, *@cyberDost* has ensured dissemination of information on cyber offences, and radio campaign with Handbook to adolescents and students. MeiTY under its flagship programme of Information Security Education & Awareness (ISEA), is creating timely awareness to the women and children by providing guidelines for the online and digital safety.
- A sole website as *(https://www.infosecawareness.in)* has been created which will be providing necessary material for awareness. A toll-free number 1930 (earlier as 155260) has been devised is an effective mechanism for online registration of cyber complaints.[20]

**2.2 Cyber Harassment**

- Sexual Harassment is not considered as a new concept. When Harassment is committed via the cyberspace it is called Cyber harassment. It includes, cheating, threatening, bullying, and blackmailing against the women. Section 354A of the Indian Penal Code, 1860[21] inserted via the Criminal law (Amendment) Act, 2013, proscribes various aspects of sexual harassment such as physical contact or sexual favours, making sexually coloured remarks and showing of pornography. Similarly, the definition of sexual harassment is provided under Section 2(n) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.[22]

  If we analyse the cyber space minutely, there are various cybercrimes which are of recent origin and the audience is oblivious of their meaning and nature. These include, Voyeurism, Cyber stalking, Doxing, Creepshots, Revenge Porn, Cyber Flashing etc. After the unprecedented wave of COVID-19 pandemic in 2020, there was an advent of new cybercrimes such as Zoom bombing which leads to sudden breakdown of the session.[23] However, the matter of concern is, the uniform definition of many crimes remains obscure.

  However, the Digital India Bill, 2023 has come into existence and plans to scrap the erstwhile Information Technology Act, 2000. The goal of the Digital India Bill, 2023 is to guarantee that there is an institutional structure for accountability and that the internet in India is accessible, unhindered by user harm or criminal activity. Emerging technologies, social media platform algorithms, artificial intelligence, user dangers,

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19 *Ibid.*

20 Government of India, "Cyber Frauds Helpline" (Ministry of Home Affairs).

21 The Indian Penal Code, 1860 (Act 45 of 1860) s. 354A.

22 Tthe Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act 14 of 2013), s.2(n).

23 Greg Elmer, Stephen J. Neville, et.al., "Zoom bombing during Global Pandemic", *Sage Publications (2021).*

internet diversity, and intermediary regulation will all be included by the legislation.[24]

## III. COMPARATIVE ANALYSIS OF SEXUAL HARASSMENT OF WOMEN IN CYBERSPACE

The sexual cyber-crimes committed has no boundaries and jurisdictions. Hence, it is a global issue and not just restricted to our country. When it's cyber space, the foreign countries are well equipped with technology and computer science as compared to India. Hence, understanding the laws, rules and regulations of different countries will help and enlighten us for upgradation to match the international standards.

### 3.1 United States of America

#### *3.1.1 Regulations against Stalking*

The crime of cyber stalking was for the first time got legal recognition in the Michigan Criminal Code, 1993.[25] This provision introduced the aspect of *'harassment'* for the very first time to link it with stalking. Under the said Code, harassment is defined as "*conduct directed toward a victim that includes repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress*"[26]

#### *3.1.2 Regulations against Online Pornography and Obscenity against women*

Usage of the obscene language and graphics in electronic communication is considered as a crime under Section 2261A of Chapter 110A, Part 1 of Title 18 USC, which includes the aspect of dating violence[27], stalking and domestic violence against the women. The creation and distribution of the obscene material is prohibited by law is provided under Chapter 71, Part 1 of Title 18 of the US Code.[28] Section 1801of Chapter 88, Part 1 of Title 18, USC deals with video voyeurism and its distribution.[29]

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24 Govt. of India, "*Proposed Digital India Act, 2023, Digital India Dialogues 09.03.23, Bengaluru Karnataka*" Ministry of Electronics and Information Technology, available at https://www.meity.gov.in/writereaddata/files/DIA_Presentation%2009.03.2023%20Final.pdf (last visited on March 18, 2023).

25 Priyal Singh, "Patriarchal Face of Cyber Stalking" 2 *International Journal of Law Management and Humanities* (2019).

26 For further reading, please see Para (b)(2) of Section 2701 of Chapter 121, USC 18 (Part 1).

27 Cyber Crime and the Victimization of Women: Laws, Rights and Regulations

28 Chapter 71, Part I of Title 18- Crimes and Criminal Procedure, US Code.

29 See Section 1801 of Chapter 88, Part 1 of Title 18, USC, for definition of video voyeurism. available at http://www.law.cornell.edu/uscode/18/usc_sec_18_00001801----000-.html (last visited on August 25, 2022).

### 3.2 United Kingdom

#### *3.2.1 Cyber stalking*

The Protection of Freedoms Act of 2012, which added additional sections 2A and 4A to the Protection from Harassment Act of 1997, recognised the crime of cyberstalking as a crime in England and Wales.[30] It is the other conventional laws which form a part of harassment involving publication in digital manner. The Protection from Harassment Act, 1997 is considered to main legislation of paramount importance dealing with cyber stalking. Section 1 of the said Act states: "*A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.*"[31] Section 4 means the aspect of '*fear factor*' which is necessary to constitute the offence of cyber stalking.[32]

#### *3.2.2 Sexual offences*

The Criminal Damage Act, 1977 does not particularly address the problem of sexually explicit defamation of women or violating women's online privacy.[33] The Computer Misuse Act,1990 proscribes on damaging, altering and penetration of the computer networks/systems.[34] The Theft Act, 1968, deals with fraudulently using the victim's identity.[35] The Equality Act, 2010 covers the aspect of online harassment primarily based on sexual purpose.[36] As per Section 67 of The Sexual Offences Act, 2003 penalises voyeurism and its distribution for which the consent is not free nor given.[37]

#### *3.2.3 Cyberflashing*

The United Kingdom is all set to make *Cyberflashing* as a specific crime under the *Online Safety Bill 121 2022-23* which was introduced in the U.K. parliament, where the imprisonment is maximum for the period of two years.[38] The aim of considering this as an offence will help the Government to be at pace with emerging crimes at the global level from time to time.

### 3.3. Australia

It is against the law to stalk someone in New South Wales, even if the stalking is done online. Section 13 of the Crimes (Domestic and

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31 The Protection from Harassment Act, 1997, s. 1
32 The Protection from Harassment Act, 1997, s. 4.
33 The Criminal Damage Act, 1977.
34 The Computer Misuse Act, 1990, s. 3.
35 Section 15, Theft Act, 1968.
36 Section 26(1) of the Equality Act 2010.
37 The Sexual Offences Act, 2003, s.67.
38 *Cyberflashing* as a specific crime under the *Online Safety Bill 121 2022-23*

Personal Violence) Act 2007 in NSW specifies a maximum sentence of five years in jail for the offence of staking or intimidation.[39]

### *3.3.1 Cyber Harassment*

The types of harassments, i.e., hacking, morphing, cloning and false impersonation, etc. have been covered under Federal Criminal Code Act, 1995 and has been amended by the Cyber Crime Act, 2001.[40] Under Section 477.1,3, 2 of Cyber Crime Act, 2000 penalises unauthorised tampering/access to computer data having a mala fide intention to commit a grave crime.[41] The divisions 477[42] and 478[43] of the Criminal Code Act, 1995 was enacted to protect profiles of women in cyber space like social media and personal websites otherwise the women can face problem and become the victim of cybercrime.

### *3.3.2 Cyber Stalking*

The crime of cyber stalking is regulated under the section 34A of Crimes Act, 1900[44] in the Australian Capital territory, Section 189 of Criminal Code Act, 1995[45] in Northern Territory, Section 359A of Criminal Code Act in Queensland, Section 19AA of the Criminal Law Consolidation Act, 1935[46] in South Australia, Section 192 of Criminal Code Act, 1924[47] in Tasmania and Section 21A of Crimes Act, 1958 in Victoria.[48]

## IV INTERNATIONAL LAWS AGAINST THE PROTECTION OF SEXUAL HARASSMENT OF WOMEN IN CYBER SPACE

### 4.1 Budapest Convention

It is also referred to as the *Convention of cybercrime* which is the only convention which is legally binding which pioneered with addressing the computer and internet related offences through the means of measures which are investigative in nature thereby increasing the cooperation between the nations globally.[49] However, India is not a

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39 Lamont Law, "Cyber Stalking on the rise during COVID-19" *Mondaq*, *available at:* https://www.mondaq.com/australia/crime/1116390/cyberstalking-on-the-rise-during-covid-19. (Last visited on March 19, 2023).

40 Act No. 12 of 1995 as amended considering amendments up to Act No. 127 of 2005

41 The Cyber Crime Code Act, 1995, s. 477.1,3,2

42 The Criminal Code Act,1995 s. 477.

43 The Criminal Code, 1995 s. 478.

44 The Crimes Act, 2000, s.34A.

45 The Criminal Code Act, 1995, s.189.

46 The Criminal Law Consolidation Act, 1935, s. 19AA.

47 The Criminal Code Act, 1924, s. 192.

48 The Crimes Act, 1958, s. 21A.

49 Convention of Cyber crime also called the Budapest Convention, 2001 is a pioneer Convention dealing with combatting the cyber crime committed in cyber space.

signatory to this Convention. However, Brazil becomes the 68th member of this convention in 2022.[50]

**4.2 Electronic Communication Privacy Act (ECPA)[51]**

This Act prohibits the following aspects:

- Mala fide access to internet network or facility.
- Data protection.

The ECPA calls for both civil and criminal penalties if there is violation of a law. Civil remedy includes damages as provided in the statute.

**4.3 European Union (EU) on Protection of Data**

The European Parliament along with the Council of EU passed the Data Protection Directive with aim of building strong legal framework and strong security thereby abiding by three objectives: protection of freedoms and rights of people when data is processed; secondly, harmonization of data protection in Europe as a whole, thirdly, restricting the outflow of data outside the jurisdiction of Europe which doesn't has necessary means of protection.[52]

**4.4 Computer Misuse Act, 1990[53]**

This Act came into existence to tackle the menace of hacking of computer. It includes three important offences which are unauthorised activity related to computer. The CMA deals with following types of cybercrimes, i.e., theft and fraud, hacking and denial of service attacks.

## V. ROLE OF JUDICIARY IN INDIA

The judiciary has played a paramount role in combating the crimes committed in cyber space through its judicial activism and intervention. It has time and again made necessary interference in safeguarding the rights and liberty of people in the society especially of women and children being the vulnerable populations. Some of them are stated as below:

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50 Council of Europe, "Brazil accedes to the Convention on Cybercrime and six stages sign the new Protocol on e-evidence" Director General Human Rights and Rule of Law, available at: https://www.coe.int/en/web/human-rights-rule-of-law/newsroom/-/asset_publisher/tmYzZ9iB8dRW/content/brazil-accedes-to-the-convention-on-cybercrime-and-six-states-sign-the-new-protocol-on-e-evidence?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fhuman-rights-rule-of-law%2Fnewsroom%3Fp_p_id%3D101_INSTANCE_tmYzZ9iB8dRW%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1. (Last visited on March 20, 2023).

51 Electronic Communications Privacy Act of 1986, U.S.A., *available at:* https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1285 (last visited on June 26, 2022).

52 Section 1 included the crime of 'hacking' for gaining access which is unauthorised to program in computer system. Section 2 punishes the act provided under Section 1 to commit or facilitate the commission of the crime. Section 3 deals with the unauthorised act aiming at impairing the operation of the computer, or to avoid access to any computer program or data.

53 The Computer Misuse Act, 1990.

- ***Manish Kathuria Vs Ritu Kohli:***[54] It is the first and landmark case on the offence of cyber stalking. A stalker Manish was stalking Ritu Kohli via making profiles of her which were fake on website named *http://www.mirc.com* thereby making unlawful intrusion into her life by posting/using her sensitive personal information and pictures. She finally filed a case under Section 509 of the Indian Penal Code, 1860, i.e., "*Word, gesture or act intended to insult the modesty of a woman.*" As a result of which Section 66A of the Information Technology Act, 2000 got introduced in 2008 which states, i.e., *Punishment for sending offensive messages through communication service, etc.*[55]
- ***Raghuraj Singh v Air force Bal Bharti School:***[56] Another famous case on cyber pornography is of *Air Force Bal Bharti school*, under which a case was registered under Section 67 of the IT Act, 2000.[57] A student at the same school was teased by the classmates to a greater extent for having a pockmarked face. To take revenge from his classmates, he forms a website with a URL named as *http://www.amazing-gents.8m.net.* On this website, sexually explicit details and contents regarding girls was uploaded on free web space as 'sexy' girls, teachers at the school. The girl's father, an Air Force officer, under Section 67 of the IT Act, 2000 registered a case with the Delhi Police cybercrime cell. The accused was sent to the juvenile home at Timarpur, Delhi. It was one week after; the accused was granted bail by the JJ Board.
- ***Prakhar Sharma v. State of Madhya Pradesh***[58] in this the accused created victim's fake account thereby using her original photograph on the Facebook profile and went on rampant posting of vulgar messages and posts with mala fide intent. The accused was made liable under Section 66C[59], 67[60] and 67A[61] of the Information Technology Act, 2000 and the hon'ble High court of Madhya Pradesh denied bail to him.
- ***Archana Sharma vs State of NCT Of Delhi & Ors. aka Bois Locker Room:***[62] is an important case post COVID-19 era. It was an Instagram group functional in May 2020, started by schoolboys in Delhi. It aimed at sharing obscene photographs of women with lewd comments, majority of them being underaged. The boys also threatened leaking of nude photographs of victims whom at the end of the day reported them. The Delhi Commission of Women condemned the crime, and a

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54 Dr. Deo, S., (2013) Cyber Stalking and Online Harassment: A New Challenge For Law Enforcement. *Bharati Law Review* 89.

55 The Information Technology Act, 2000 (Act 21 of 2000), s.66A.

56 (2001) 76 in Juvenile Court, Delhi.

57 The Information Technology Act, 2000 (Act 21 of 2000), s.67.

58 MCRC No, 377 of 2018.

59 The Information Technology Act, 2000 (Act 21 of 2000), s.66C.

60 *Supra* note 53 at 9.

61 The Information Technology Act, 2000 (Act 21 of 2000), s. 67A.

62 WP(C) 3202/2020 & C.M. 11128/2020

probe was initiated by cyber unit of Delhi Police. It was observed, majority of the accused were underaged.

- ***State of Tamil Nadu v. Suhas Kutti***[63]**:** it is considered to be the very first case on cyber harassment and cyber stalking, where a case was filed by women when obscene messages were posted online. This case also became important as in Section 65B of Indian Evidence Act, 1872 called for providing digital evidence for the very first time.

## VI CRITICAL ANALYSIS

The aspect of Sexual Harassment of women in cyberspace is critically analysed as provided below:

- In India, the legal framework for dealing with cyber harassment is likewise insufficient. The Information Technology Act of 2000, which was intended to control electronic trade and enable e-governance, does not sufficiently address cyber harassment or offer victims of the practise enough legal protection. Although the act makes it illegal to distribute sexually explicit material and engage in cyberstalking, the penalties are frequently light and have little effect on offenders.
- India is becoming more and more concerned about sexual harassment in cyberspace as more and more people utilise technology for communication and leisure. Online stalking, sexual solicitation, revenge porn, cyberbullying, and sexual harassment through email, social media, or other digital platforms are just a few examples of the many different types of cyber harassment. The problem has been made worse by the internet's anonymity, which makes it simple for offenders to conceal their identities and avoid punishment.\
- There are a number of gaps that need to be filled. The online sexual harassment, which is not now specifically addressed in the legislation, has to be added to the definition of sexual harassment. The fact that only physical sexual harassment is covered by the law at the moment needs to be changed.
- There is a paucity of knowledge and training among law enforcement authorities on cybercrime, and the Indian police are frequently ill-prepared to deal with it. As a result, cybercriminals are not deterred and conviction rates are low.

## VII RECOMMENDATIONS AND SUGGESTIONS

Based on the above-mentioned research and analysis, the following suggestions are stated below:

- India needs to sign a convention on cybercrime, e.g., *Budapest Convention*, etc to abide by the rules, regulations and to combat such crime at the global level, as it has signed global conventions on transactional organised crime and drug trafficking.

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[63] C No. 4680 of 2004

- There needs to be a holistic strategy that incorporates education, awareness-raising, and legislation reform to address the issue of cyber harassment in India. the a. The media must take greater responsibility in portraying women favourably and emphasising the risks of online abuse. In order to give victims better legal protection and to make sure that offenders are held accountable for their crimes, the legal system needs to be changed.
- Provide a thorough legislative framework that covers online harassment in particular, with precise definitions and sanctions for offenders and provide a reporting system that is simple to use, guarantees victim safety and confidentiality.
- More awareness campaigns are needed to inform the public, law enforcement, and judicial systems on the legal restrictions and ramifications of cybersex harassment and provide a reporting system that is simple to use, guarantees victim safety and confidentiality.
- Last but not least, victims of cyberbullying should be given proper support and complaint procedures, such as counselling and legal aid services.

## VIII CONCLUSION

In India, sexual harassment in cyberspace is a severe problem that needs to be addressed right away by the government, law enforcement, civil society, and individuals. There are still a lot of loopholes and difficulties that need to be resolved even if Indian law handles sexual harassment in cyberspace. These issues include a lack of knowledge and comprehension of the legal requirements, the lack of a precise definition of sexual harassment in cyberspace, and the laws' constrained applicability and efficacy in cases of global cyber harassment.

In conclusion, combating sexual harassment online necessitates a multi-stakeholder strategy that includes the public sector, business community, civil society, and individuals. While other stakeholders play their responsibilities in increasing awareness, offering support, and reducing the occurrence of such instances, the Indian government must take the lead in creating and implementing legislation to protect victims of cyber harassment.

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# Fostering Religious Identities: Reflections from North India

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**Abstract**

*This article is a socio-legal and theological perspective on the development of religious identities in India. It is based on a survey of reports on the Census of India and the province of Punjab. The authors argue that the complexity of cultural identities is not a result of the distinctiveness of religious identities. Instead, the plurality of cultures fosters a variety of religious identities in society. Moreover, an institution, religion, for example, is strengthened and defined by the mixed practices of the people. This argument reflects the journey of contestations of various religious concepts and social meanings that raise more questions and do not reach a final conclusion. However, it does not mean that, in the course of unclarity, one should not pursue the epistemological approach to find meanings of such concepts; instead, it provides more answers than just one solution to a problem. In addition, this paper is also an attempt to bring two perspectives, viz socio-legal and theological, together to discuss the concerns of society in relation to the institution of religion for which a fieldwork was carried out in the Punjab region of North India.*

**Keywords:** Law, religion, religious perspective, social identity, secular, identity politics

## Introduction

Defining 'religion' has always remained an essential question and is still an ongoing discursive issue. Contemporary times still struggle with establishing a clear definition of religion and religion-based identities. In this regard, it is crucial to consider W.C. Smith's description of religion, which emphasises that religion is not a universal term. Hence, its static definition is inadequate to define the concept of religion. Instead, he proffers an alternative conceptual dynamic engagement of a cumulative cultural tradition and its relationship with personal faith. Although he also understands that the question of the definition of the word religion, in particular, is very recent and

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euro-centric. It evolved and became a phenomenon. The contemporary idea of religion as a cultural self-regard is more concerned with identity politics. According to Smith, collective religious practices and beliefs are seen as defined by the difference they portray from each other.

In the Indian context, the complexities of socio-multicultural terrain (especially multireligious and multilingual) provided a unique idea of religiosity that defied strict categorisation. In this regard, the British colonial records struggled to define the Indian religious landscape. For example, in Punjab (including the North West Frontier Province), the Census (1891) mentions the following:

The man who worships *Bhairon* will generally worship *Vishnu*, *Garur*, *Devi* or a hundred others. He may adore *Bhairon* in the morning and a *Devi* or some local or general *Mohammadan Pir* in the evening. Indeed, not a few returned themselves as 'worshippers of all Gods', and it would often be only after some pressure from the enumerator that one or other divinity was selected at random for entry in the schedule. Generally, a man who returned as a worshipper of *Brahm* means more than that. He worships the Supreme God – *'Parmeshwar ko manta hai'* or *'Khuda ko manta hai'* – an assertion that almost all Hindus would join. Five *Pandavas*, the heroes of *Mahabharat*, were favourite objects of worship in the East and sometimes also addressed as '*Panj Pir*'. [1] Most Hindu tribes, and not a few *Musalmans*, claim descent from one or another of divine heroes and saints of early Hinduism. *Sada-Shiv* (great primaeval cause) the God that ever was and ever will be; sometimes called by the worshippers as '*Baba Adam*' (following *Musalman* terminology). Thirty-eight thousand one hundred thirty-seven (38,137) men who returned their caste at this Census as *'Jogi'* were *Musalmans*. The great propagator of this sect was *Gorakhnath*, divided into nine *Naths* and eighty-four *Sidhas* (sub-divided into *Kanphattas*, *Oghars*, *Das* etc.). Anybody of any caste, even a *Chamar*, may call himself a worshipper of *Sakhi Sarvar* and persons of all religions and all castes, especially the *Jats* and *Jhinwars*, are his followers. The *Chajju-panties*, or *Parnami*, who burnt their dead, but instead of throwing remains in the Ganges, they took these to Parnaji in Budhelkhand and buried these. They believe in the divine mission of Mohomed but have no social intercourse with *Mohammadans*. One of their sacred places is Malik Hans, in Pakpattan, where their sacred book is kept in a kind of temple and called '*Kul Jama Barup*', which is written in *Bhasha*, and its doctrines are based on a mixture of Hinduism and Islam.[2] These images of diversity established the common cord of variations re-enforcing identities through multifarious belief systems.[3]

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1 E.D. Maclagan, "The Report on the Census. *Census of India, 1891. Volume XIX. The Punjab and its Feudatories, Part 1*" (Provincial Superintendent of Census operations, Office of the Superintendent of Government Printing, Calcutta, India, 1892, 137).

2 Ibid.

3 To rightly understand what is involved in labelling a man – Hindu or Sikh, it is essential to grasp the principle that religious and social life in India is inextricably connected and that the terms in use denote a great deal more than we usually mean

**Legality of the Issue**

The artificial categorisation of multiple Indian religions and their instrumentalisation for sustaining the colonial state created fault lines. As a result, the obsession with defining religious identities entered the legal domain, where numerous judgements tried categorising religious identities based on these fault lines. For instance, the term Muslim means submission. "A Muslim is a person who follows Islam. Muslim law applies to a born Muslim or a person who is a converted Muslim. In addition, Muslim law applies to specific other categories of people, such as the Khojas, Halai Memons, Sunni Bohras of Gujarat Daoodi, and Sulaimani Bohras and Molesalam Broach Girasis." The following two cases refer to the relevance of defining person's religious identity:

> In *Azima Bibi v. Munshi Samalanand* (1912) 17 CWN 121, it was observed that a child born out of a Muslim couple would be Muslim, even if he, by choice, goes to a Hindu temple. It is because the person would be a Muslim until he does not renounce his religion and converts to another religion.
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> In *Bhaiya Sher Bahadur v. Bhaiya Ganga Baksh Singh* (1914) 41 IA 1, it was held that if a Muslim woman has a child from a Hindu man but the child from the time he was born was brought up as a Hindu, then in this case, he would be called a Hindu.

Article 25 of the Indian Constitution provides the right to convert. It guarantees freedom to practice, profess and propagate religion. However, there are many instances in which a Hindu man who intends to get married for a second time, which is prohibited under their set of family laws, purposefully converts to a Muslim to misuse it and escape from the punishment given under section 494 (bigamy) of Indian Penal Code, 1860. The Supreme court in *Sarla Mudgil v. Union of India* (AIR 1995 SC 1531) and *Lily Thomas v. Union of India* (AIR 2000 SC 1650) has held that if a Hindu married man converts his religion to Muslim just because of the reason to marry a second time, then it will be void. He will be punished under Section 494 of IPC for committing bigamy.

Under Muslim law, if a married man renounces his religion, then, in that case, his marriage ends immediately, but this is not the case for Muslim women who convert. Her marriage would not have come to an end if her marriage was done according to the rituals of Muslim law. Unless and until she was a converted Muslim and again re-embraced her faith.

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by religious beliefs. A better example of which is the word 'dharma', which need not be translated to 'religion'. We may say "we have no words to express the mass of beliefs and customs which adherence to a religious system involves in India because nothing precisely corresponds to it in modern Europe." H.A. Rose, "Report on the *Census of India, 1901. Vol. XVII. Punjab and North West Frontier Province, Part 1*" (Superintendent of Census Operations, Printed at the Government Central Printing Office, Simla, 1902, 159).

The most crucial case which needs a special mention here is; *Mohd Sadique v. Darbara Singh Guru*, Civil Appeal No. 4870 of 2015. In this case, the bench of the Supreme Court, comprising Justice Ranjan Gogoi and Prafulla C. Pant, allowed Mr Sadique's appeal against his disqualification from the assembly by Punjab and Haryana High Court. The appellant won the assembly election in 2012 from the Bhadaur constituency, which was reserved for a Scheduled Caste (SC) candidate. The respondent, Mr Darabara Singh, in his petition, had claimed that Mr Sadique is a born Muslim, therefore, can not be an SC (as per the 1950 Presidential Order). However, Mr Sadique stated that he had been brought up like a Sikh and firmly believes in the Sikh faith and values.[4] Moreover, he belongs to the Doom caste, which is seen as impure by the upper caste society regardless of the fact that to which religion the members of this particular community belong. Mr Sadique elaborated that his father used to do kirtan at the Gurudwara and used to tell them as children that they were the descendants of Mardana (who accompanied Guru Nanak in his journeys). He further explained that even those people who thought he was a Muslim did not serve him drinks because they practised untouchability because of his caste status.[5]

**Judicial Response**

Justice V.R. Krishna Iyer, a former judge of the Supreme Court, describes Hinduism as a boundless religion whose spiritual universality spans all creation, transcends temples and idols, reaches and rouses sinner and saint, identifies dynamics divinity as dwelling omnipresently, proclaiming

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4 As per the definition of THE SIKH GURDWARAS ACT 1925, "Sikh" means a person who professes the Sikh religion or, in the case of a deceased person, who professed the Sikh religion or was known to be a Sikh during his lifetime. Suppose any question arises as to whether any living person is or is not a Sikh. In that case, he shall be deemed respectively to be or not to be a Sikh as he makes or refuses to make in such a manner as the [State] Government may prescribe based on the following declaration: "I solemnly affirm that I am a Sikh, believe in the Guru Granth Sahib, believe in the Ten Gurus, and have no other religion."
"Amritdhari Sikh" means and includes every person who has taken *Khande-ka-amrit* or *Khanda Pahul* prepared and administered according to the tenets of the Sikh religion and rites at the hands of five *pyaras* (beloved ones).
A "Sahjdhari Sikh" means a person: (i) who performs ceremonies according to Sikh rites; (ii) who does not use tobacco or *Kutha* (Halal meat) in any form; (iii) who is not a Patit (a person who is a Keshadhari Sikh, trims or shaves his beard or *keshas* or who, after taking *amrit*, commits any one or more of the four *kurahits*); and (iv) who can recite *Mool Mantra*.

5 K. Malhotra, "Mohammad Sadiq: born a Muslim, brought up a Sikh". An interview titled "Congress's Mohammad Sadiq throws light on caste and identity in Punjab" published by *newslaundry* (26 May 2016), available at https://www.newslaundry.com /2016/05/26/mohammad-sadiq-born-a-muslim-brought-up-a-sikh

"ahambrahmasmi" and "tattvam asi" and defines narrow faiths, local limitations and fanatical petrifaction.[6]

Undoubtedly, a person who passes the test of 'Hinduism' laid down by the Supreme Court is a Hindu. Nevertheless, it cannot be said that person who does not pass this test is not Hindu. Here lies the crux of the matter. A person who has faith in the Hindu religion and practices or professes it is a 'Hindu'. However, a person does not cease to be a 'Hindu' and is not a less Hindu who has faith in the Hindu religion if he does not practice or profess it. Thus, even when a Hindu starts practising, professing or having faith in a non-Hindu religion, he will not cease to be Hindu unless it is conclusively established that he got converted to another faith. Similarly, a person does not cease to be a Hindu if he becomes an atheist, i.e., Buddhist and Jain or dissents or deviates from the central doctrines of Hinduism, lapses from orthodox religious practices, adopts a western way of life, or eats beef. There may be a social ban, but it does not amount to a renunciation of religion.[7]

**Theological Perspective**

The term 'Hinduism' is of recent European origin. Before the Britishers categorised communities strictly according to religion, few people in India defined themselves exclusively through their religious beliefs. Their Identities were segmented based on Locality, Language, Caste, Occupation and Sect. There is no 'Hindu' Canon. Therefore, all major issues of faith, e.g. vegetarianism, non-violence, belief in rebirth, caste etc. are subjects of debate

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6 The expression "Hindu" in section 2 of the Hindu Marriage Act 1955 is used in pari materia with the others. Section 2 of the Hindu Marriage Act, 1955 provides that this Act applies to (i) any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lignayat or a follower of the Brahmo, Prathana or Aryan Samaj; (ii) any person who is a Buddhist, Jain or Sikh by religion; and (iii) any other person domiciled in the territories to this Act extends who is not a Muslim, Christian, Parsi or Jew by religion; unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.
Explanation: The following persons are Hindus, Buddhists, Jains or Sikhs by religion, as the case may be: a)any child, legitimate or illegitimate, both of whose parents are Hindu, Buddhist, Jain or Sikh by religion; b)any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and c)any person who is a convert or re-convert to the Hindu, Buddhist, Jain, or Sikh religion.
Nothing contained in this Act shall apply to the members of any Scheduled Tribe (ST) within the meaning of clause (25) of Article 366 of the Indian Constitution unless the central government, by notification in the official gazette, otherwise directs.

7 G. Yazdani, "Definition of the Term "Hindu" - A Socio-Legal viewpoint" *available at:* https://www.researchgate.net/publication/319108504_Definition_of_the_Term_Hindu-_A_Socio-Legal_Viewpoint#fullTextFileContent (last visited October 20, 2022).

and are not dogma. There are shared ideas, practices and rituals connecting diverse people generally called 'Hindus' today, and an infinite variety in Hinduism can be seen. The textbook of *Dharma* (Legal-Code) attributed to Manu does not use the word 'Hindu' but instead offers a geographical definition of people to whom 'Dharma' applies, called the 'Land of Aryas'. Another Textual Definition is 'Vedic people' defining themselves not by geography but by 'Text,' i.e. Vedas. People of four Varnas follow 'Dharma' according to four Life Stages, i.e. *Varnashram Dharma*.[8] However, it is more like a Social System rather than a Religion.[9] It makes sense to employ the theological interpretations of religion regarding the concept of a believer. Here, an attempt is made to understand and co-relate the artificial categorisation and its fault line in the light of the textual sources.

There are five religious observances that every practising adult Muslim – both male and female – is obliged to perform. These are commonly known as the 'five pillars'. The first 'pillar' is bearing witness (shahada). It consists of speaking a two-sentence creedal formula that denotes belief in God's unicity and Muhammad's messengership. The second 'pillar' is prayer (salat). Practising Muslims observe five daily obligatory prayers facing the direction of the Ka'ba in Mecca. The third 'pillar' is the purification of wealth (zakat), with its name taken from the Arabic word *zaka*, meaning both 'to purify' and 'to increase'. The fourth 'pillar' is fasting (sawm), which concerns fasting during the lunar month of Ramadan each year. The final 'pillar' is the pilgrimage (hajj) to Mecca. It is to be performed at least once in their life by each adult and financially unencumbered Muslim.

By the above basic requirements of being a Muslim, it can be analysed that many born in Muslim families do not practice all of these but still practically for all purposes are considered as Muslims, if they continue believing at least in 'tauheed,' i.e. unicity of God and have not declared otherwise openly by changing their faith. However, many Non-muslims will probably fall into this category of definition as the possibility cannot be ruled out that millions worldwide would believe in the 'unicity of God'.

As mentioned in the British Census reports earlier, identities based on religious boundaries were relaxed, especially in Punjab and adjoining areas in north India. During the fieldwork in Sirsa (a Punjabi-speaking district of Haryana along the Punjab border), the researchers found this phenomenon visible even in contemporary times among many communities, for example, Kamboj, Thind, Mirasi etc. One of the researchers participated in a marriage function of a Kamboj family. While keenly observing the rituals, it was found that the observed, though they considered themselves Hindus and had Hindu names, had a family Peer, 'Baba Bhuman Shah' whose shrine Dera was in Sirsa

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8 A. Kumar, "Varna-Jāti Interconnection: Some Reflections on Caste and Indian Tradition" 5(3) *International Journal of Research in Social Sciences* 788-793 (2015).

9 A. Kumar, "Complexity of Varna and Jāti: A Relook at the Indian Caste System" 3(12) *International Journal of Novel Research and Development* 59-63 (2018).

itself. They also practised ancestral worship, and where interestingly, only a *chadar* (sheet) of green colour was used as an offering, not the saffron one. Besides this, they were regular visitors at the Dera of Baba Ram Rahim (Sirsa), and a few of the family members were also initiated formally by this Guru. The most surprising of all these was that they conducted marriage as per Sikh rituals, i.e. called a Pathi/Granthi. The bride and groom took four 'pheras' like Sikh marriages. The groom, however, was a 'mona' (with haircut) having a Hindu name, but for this occasion, he had tied a turban like a Sikh. Another important fact is that a *Marasi* couple visited the function uninvited to get alms and gifts. It is a usual (customary) practice and a part-time profession of the *Marasi* community to reside in those areas. The interview of the *Marasi* couple was recorded with their permission, and the same is also uploaded on youtube. They had mixed names (two out of five family members had Muslim names, whereas the rest had Hindu names). They did not visit formal religious worship places (like mosques, temples, churches or gurudwara). Instead, they were regular visitors to the shrines belonging to *Peers* and *Devtas*, especially Salasar and Ramdev Pir. Their belief system defies the strict categorical understanding of religious identities.

**Conclusion**

The classification of religious identities is an indispensable issue whether viewed from a socio-legal, historical or theological perspective. The legal cases discussed in the paper convey the complexity of this problem. In India, religious experience is a highly regional experience based upon oral traditions, practised through various cultural genres like rituals, myths, idioms, dialects etc. In such a scenario, the exercise of classification, either for legal or political purposes, distorts reality. Here, it is essential to redefine religious experience, not in universal terms, but forego it entirely. Instead, the Indian pluralistic, diverse religious identities must be understood in their cultural and regional context. The uniformity of religious identities is elitist and hegemonic, where the subaltern popular practised socio-religious cultures remain undefined. This dysfunctional understanding of religious identities in the Indian context has given rise to numerous litigations.

Moreover, the social implications of ignoring these interpenetrative identities are incredibly disruptive for a multi-cultural, multi-ethnic, multi-linguistic, multi-regional and multi-religious country like India. So eventually, the individual is central in deciding the religious faith and scriptural understanding of it. No imposition from any authority, whether social or legal, is competent enough to decide an individual's faith. The interpretation of the scripture itself is an individual exercise. Hence, no religious authority is above the individual as faith eventually is a personal affair, which should be reflected in the legal, theological and social understanding of the same.

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# Obligations and Opportunities for Protection of Geographical Indication in Kashmir: A Case Study of "Kashmiri Pashmina" and "Kashmiri Saffron"

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**Abstract**

*As a diverse nation, we have many traditional masterpieces that reflect our culture, special procedures, unique ingredients, and centuries-old heritage. Crafts and agricultural goods from Kashmir are highly regarded across the world. A variety of skilled trades have been performed throughout the state for generations. Legal protection for indigenous practices used in creating goods from a certain region is a key function of Geographical Indication, which protects the interests of all parties involved. In this paper, an endeavor will be made to examine the legal protection and challenges faced by the Kashmiri Pashmina and Kashmiri Saffron post its registration under the Geographical Indication Act, 1999. The first GI Tag holder of the State of Jammu & Kashmir was the Kashmiri Pashmina in September 2008, while the long-awaited Geographical Indication (GI) designation for Kashmiri Saffron was announced recently in July 2020. Our study attempts to analyze these products' economic viability and assess the problems hindering the progress and prosperity of the authentic Pashmina and Saffron industry in Kashmir.*

**Keywords**: *Culture, Geographical Indication, Kashmir Pashmina, Kashmir Saffron, Traditional Knowledge*

## Introduction

Jammu and Kashmir is strategically located at the crossroads of East, West, Central, and South Asia, making it a crossroads for the fusion of Hellenistic, Sinic, Iranian, and Indian philosophy and culture. Through their customs and history, the inhabitants of Kashmir achieved remarkable success

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in the fields of art and culture as well as the economy. Kashmir is renowned for its variety of handicrafts, including shawls, scarves, Sozni embroidery art & crafts, sari, Paper mache goods, etc. These items are an integral component of our nation's cultural legacy. They have been recognized as such by international organizations such as the World Trade Organization (WTO), United Nations Educational, Scientific and Cultural Organization (UNESCO), and United Nations Conference on Trade and Development (UNCTAD). [1]

The GI Act is one method established by the World Trade Organization's Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement to ensure the long-term financial viability of culturally significant activities and products throughout the globe (WTO). This strategy has been successful in preserving other cultural practices. Through GI, several regions of the globe have been able to get premiums for their goods while safeguarding their cultural heritage. Whiskey from Scotland, carpets from Persia, tea from Darjeeling, rice from Basmati, etc.[2] This safeguard has reduced the manufacturing and distribution of knockoffs and imitations sold under the original brand name. In reality, the illegal use of geographical names does more harm than good, depriving the rightful owners of the profits made from marketing and manufacturing counterfeit versions of their products.[3]

**Scope of Protection available under GI in India:**

India is a country where there is a treasure, as it is endowed with abundant natural resources of agricultural commodities and other goods that have a high market value. People who live in more rural areas of our country have a special talent and skill that allows them to produce high-quality things such as created works, adornments, materials, and other items linked to this field, and they have been involved in this line of work for a number of years. Geographical indications are inextricably entwined with provincial lifestyles, which make use of traditional methods, practices, and expertise to deliver the products that are associated with land signs.[4] These geographical indications are frequently associated with local customs, traditions, and cultures.[5]

By addressing the varying global norms for the protection and implementation of Intellectual Property Rights (IPR) in the fields of Copyright, Trademarks, Trade Secrets, Industrial Designs, Integrated Circuits, Patents, and Geographical Indications, the Agreement on TRIPS seeks to introduce fair trade. In the TRIPS Agreement of the WTO, which entered into effect in 1995,

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1 Yaseer Ahmad Mir and Mushtaq Ahmad Darzi, "Kashmir pashmina - A journey of standardization through geographical indication", 3(5) *International Journal of Applied Research* 1 (2017).

2 *Ibid.*

3 Ryan Paveza, "Moon Shawl (Chand-Dar)", 34 (1) *Art Institute of Chicago Museum Studies* 88 (2008).

4 S.M. Ghouse, "Indian Handicraft Industry: Problems And Strategies", 2 *International Journal of Management Research and Review* 1183 (2012).

5 A. Moudgil, "Geographical Indication in India", 6 *National Research Journal of Social Sciences* 1 (2021).

the term "Geographic Indication" (GI) was first used in international Intellectual Property rules.

The Indian Parliament approved the Geographical Indications of Goods (Registration and Protection) Act 1999 in December 1999 in an effort to improve the registration and protection of GIs pertaining to goods in the country. The GI Act was passed as part of India's effort to establish national IPR rules in line with the country's commitment to the TRIPS Agreement. GI right-holders may now register their GI with the centralised GI Registry in Chennai, which is recognised by all Indian jurisdictions. When a product's famed quality, reputation, or other distinguishing feature can be traced back to its specific place of origin, and the cultural and natural variables present there, we say that it has a Geographical Indication (GI). GI registration is a signal that relates the uniqueness of items with the origin to provide market transparency, price stability, and a decrease in information costs. Protecting the integrity of agricultural goods and creating recognisable labels for them may both benefit from the usage of GIs.[6]

Recently, Geographical Indications (GIs) have become more important as a form of IP protection in the Indian market. Given the market for handmade goods, it is essential that GIs be adequately protected by law to avoid their misuse[7]. In terms of the number of people who are either directly or indirectly employed by the industry, the handicraft sector is second only to agriculture. Regional Kashmiri handicrafts are in high demand across the world. However, Kashmir handicraft profitability has been diminished due to competition from replicas and misrepresenters of other nations. Therefore, there is a need to maintain the inherited uniqueness of regional handicrafts via a structure that would secure the preservation of Kashmiri handicrafts and aid in developing a distinctive brand identity.[8]

**Kashmiri Pashmina- A distinct Antiquity**

Shawls manufactured from Pashmina, the finest grade of cashmere wool, are among the most well-known textile items in the world. The pashmina goat, a unique breed found only in the upper Himalayan regions of Nepal, North India, and Pakistan is the source of the wool. Wool with fibres as fine as 12 microns (a human hair is 200 microns thick) shines uniquely because of its long, uniform fibres.[9] As a result, it's very comfortable, feathery, light, and quite toasty. When it comes to Jammu & Kashmir's handicrafts, Kashmir Pashmina is the first to get GI status. As a result of persistent lobbying by

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6 A. Moudgil, "Geographical Indication in India", 6 *National Research Journal of Social Sciences* 1 (2021).

7 *Ibid*.

8 *Id*.at 3.

9 Monisha Ahmed, "Trade in Wool and Pashmina – Historic and Contemporary", *Sahapedia* (2018), available at https://www.sahapedia.org/trade-wool-and-pashmina-%E2%80%94-historic-and-contemporary (last visited on May 15, 2023).

Pashmina weavers, the GI status of Kashmiri Pashmina was granted in September 2008.[10]

Kashmir is home to the world's finest hand-woven pashmina. It's everything is done manually. The traditional Kashmiri Pashmina is made in an 8-step process:

1. *Procuring the Pashm wool*: Once a year, either the animal is combed for its natural shedding or the raw material is shredded by hand.
2. *Preparing the Pashm wool*: The raw Pashm at this point is made up of strong hairs, oily, lumpy, discoloured wool, and many organic contaminants like manure, filth, and fragments of even skin. Women are the ones who purchase Pashm from neighbourhood shops known as Poiwanis so that they may process and twist it into yarn.
3. *Spinning the yarn*: Spinning of the wool at this stage is done on conventional charkhas called yeinders.
4. *Arranging the warp*: The yarn goes through the processes of warping, dressing, and reeling before the real weaving process can begin.[11]
5. *The weaving of fabric*: In this stage, in contrast to contemporary looms, the uniformity of the throw and catch action is continually disrupted because the fragile yarn keeps breaking, and the weaver needs to re-attach it with new Pashm Yarn. This is because the delicate yarn is being worked with.[12]
6. *Clipping the loose threads*: Once the pashmina has been weaved in this way, it is delivered to the purzgar, the clipper whose job is to remove stray hairs or nips that become entangled with the threads during the spinning process. He is also an expert at untangling and severing ties.[13]
7. *Dyeing* (Optional): The pashmina yarn is soaked in a vat of boiling water containing a predetermined amount of dye. The final step involves adding an acetic acid solution to the Pashm wool, which opens up the fibres and locks in colour.
8. *Washing, Embroidering and Packing*: Embroidery is completed after a wash. The quality and design of the embroidery add considerable value to a Pashmina. Following this step, shawls are pressed and stored away from pests in polythene bags and sheets of smooth kite paper.[14]

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10 Jaya Jaitly, "Review of The Golden Fleece", 36(2) *India International Centre Quarterly* 146 (2009).

11 *Supra* note 1 at 3.

12 Amir Sultan Lone, "The Wretched of the Paradise: The Kashmiri Shawl Weavers in the Nineteenth Century", 78 *Proceedings of the Indian History Congress* 577 (2017).

13 Chitralekha Zutshi, "Designed for Eternity: Kashmiri Shawls, Empire, and Cultures of Production and Consumption in Mid-Victorian Britain", 48(2) *Journal of British Studies* 420 (2009).

14 Ishrat Yaqoob, Asif H Sofi, Sarfaraz A Wani, FD Sheikh & Nazir A Bumla, "Pashmina shawl - A traditional way of making in Kashmir", 11(2) *Indian Journal of Traditional Knowledge* 329 (2012).

Most modern pashmina shawls are manufactured by machines in India, Nepal, and other countries in south and southeast Asia. Shawls may be fashioned from a wide variety of fibres, including wool, silk, angora wool, pashmina, and more. These manufactured shawls are undercutting the market for traditional Kashmiri pashminas made by hand. All of these items are being marketed and sold under the pashmina brand name. Thus, more Kashmiri pashmina is marketed globally than is produced in Kashmir. Copycat pashminas were mass-produced on machines all across the globe as a result of the industrial revolution and automation.[15] The fine, traditionally produced Pashmina has gradually become interchangeable with Cashmere, a product whose quality has long been established and benchmarked throughout global markets. Cashmere, an industrially manufactured kind of pashmina, has exploded in popularity across the globe. The localized pashmina industry went into direct rivalry with these industrially manufactured items rather than cultivating a unique market image and expanding on its historic assets. Thus, not only was the traditional brand image of Kashmir Pashmina tarnished, but the competitive edge that had been passed down to traditional items due to their distinctive character was also lost.[16]

**Kashmiri Saffron- A Renowned Delicacy**

In India, saffron has traditionally been cultivated in the region of Kashmir; this practice is said to have been brought there by Central Asian immigrants somewhere in the first century B.C. when the spice was referred to as Bahukam in ancient Sanskrit texts. Saffron is used to colour and flavour numerous meals throughout the Mediterranean and Asia, especially rice and fish, as well as English, Scandinavian, and Balkan bread due to its rich, exotic perfume and bitter taste. The difficulty of gathering saffron contributes to the spice's exorbitant cost. The farmers need to choose each blossom for its delicate thread carefully.[17] So that the saffron's flavour may really shine through, the threads are heated and cured. Since it requires so much more work than most other spices, saffron is among the most costly. In July 2020, India's Kashmiri saffron was given the coveted Geographical Indication (GI) label.[18]

Farmers in Jammu and Kashmir's Karewas (high lands) grow and harvest Kashmir Saffron. This crop has gained worldwide renown as a seasoning, health rejuvenator, cosmetic ingredient, and therapeutic substance. Kashmir saffron is prized for its medicinal properties, but it also symbolises Kashmir's rich cultural past and is an integral part of traditional Kashmiri

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15 Farooq Ahmad Mir & Farutal Ain, "Legal Protection of Geographical Indications in Jammu and Kashmir – A Case Study of Kashmiri Handicrafts", 15 *Journal of Intellectual Property Rights* 220 (2010).

16 *Ibid.*

17 Monisha Ahmed, "The Politics of Pashmina: The Changpas Of Eastern Ladakh", 8(2) *Nomadic Peoples* 89 (2004).

18 Mohammad Taufique, Vajahat Khursheed & Wani Suhail Ahmad, "Saffron Production in Jammu and Kashmir: Problems and Prospects", 5(4) *International Journal for Scientific Research & Development* 1534 (2017).

cuisine. High Aroma, Deep Color, and Long & Thick Threads (Stigmas) are distinguishing features of Kashmir Saffron, which are exclusive to Saffron farmed and manufactured in the Indian state of Jammu and Kashmir.[19] In contrast to other Saffrons, Kashmir Saffron is the only one in the world to be produced at the height of 1600m - 1800m AMSL (Above the Mean Sea Level). In addition, only farmers in Jammu and Kashmir use the age-old technique of separating the red and yellow sections of the stigmas by rubbing the stigmas between both the thumbs of two hands, a process that naturally intensifies the colour of the stigmas while maintaining their purity and organic status. Kashmir Saffron is the favourite option among customers and stands out for being completely chemical-free, organic, and safe.[20] The saffron available in Kashmir is of three types:

1. *Lachha Saffron*: This saffron is just the stigmas that have been removed from the blooms and allowed to dry. The stigmas of this kind of saffron are extracted from the flower without having their yellowish-coloured tails trimmed. Lachha saffron is distinguished by its stigmas, which are yellow at their base and crimson at their apex.
2. *Mongra Saffron*: Saffron of this sort has been historically prepared from the flower's removed stigmas after they have been dried in the sun. Lachha saffron becomes Mongra saffron via an additional step in the processing that is exclusive to the people of Kashmir. Kashmiri farmers use a special procedure called Loût Czhttun, which literally translates as "Tail Cutting," to harvest Lachha saffron by cutting off the yellow tail and discarding it. The farmers of Kashmir are the only ones capable of performing this seemingly simple operation, which consists of rubbing the stigmas between their thumbs to separate the yellow and red portions.[21]
3. *Guchhi Saffron*: Guchhi saffron is identical to Lachha saffron, with the exception that the stigmas of Guchhi saffron are bundled together and bound with cotton thread rather than being stored loosely in airtight containers. Guchha/Guchhi means "little bundle" in the native language. The Guchhi, on the other hand, is grown in the regions of Poochal, Kishtwar, and the surrounding territories. Typically, Poochal's farmers would sell their saffron harvest in little bundles to saffron sellers in the cities of Pampore and Srinagar.[22]

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19 Aldred F. Barker, "The Textile Industries of Kashmir", 80(4134) *Journal of the Royal Society of Arts* 309 (1932).

20 Renuka Savasere, "Cradle of Craft", 37(3/4) *India International Centre Quarterly* 286 (2010).

21 Daphne Zografos Johnsson, "The Branding of Traditional Cultural Expressions: To Whose Benefit?", *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development*, *ANU Press* 147 (2012).

22 "Government of India for Intellectual Property India (2020)", *Geographical Indications Journal No. 127, available at* https://www.ipindia.gov.in/writereaddata/Portal/IPOJournal/1_4826_1/Journal_127.pdf (last visited on May 15, 2023).

The richness of the saffron is also strongly influenced by variables such as its location and the people who harvest it. When equated to other saffron growing regions around the world, Kashmir's conventional method of planting, a time span of planting, irrigation, timing and quantity of supply of natural manure and vermicompost, etc., to the saffron fields is also unique. Other saffron growing regions around the world include: The stigmas of the plant are used primarily for the medicinal properties that it possesses.[23] These properties are utilised extensively in traditional medicine or for various purposes, including as an aphrodisiac, an antispasmodic, an expectorant, the treatment of stomach ailments, reducing stomach aches, and relieving tension. In addition to these applications, saffron is used to treat bloody diarrhoea, fever, hepatitis, liver and spleen syrose, urinary tract infections, diabetes, and skin problems. Saffron syrup, saffron glycerin, and saffron tincture are all subjects that are covered in the English pharmacy codex. Saffron may stimulate appetite and is beneficial to digestion. Because of its sedative properties, its essential oil may be helpful in treating sleeplessness that is caused by nervousness.

**Evaluating the Impact of GI tag on Kashmir's Pashmina and Saffron in the Global Markets:**

Kashmir pashmina is the first handicraft product from Jammu and Kashmir to be included in India's Geographical Indications (GI) registry. Multiple varieties of high-quality Kashmir Pashmina Shawls are available. Compared to pure Pashmina, Pashmina that has been blended with wool is more affordable. Shawls made from Kashmiri pashmina silk are renowned for their exquisite design and intricate hand stitching. Most pashmina fabrics consist of a combination of 70% pashmina and 30% silk. However, 50/50 blends are also very prevalent. The 70/30 is a tightly woven fabric that is both soft and lightweight despite its sophisticated sheen and drape. Sizes for pashmina accessories vary from the "Scarf" (12" x 60") to the "Wrap" or "Stole" (28" x 80"), and even up to the full-sized shawl (36" x 80").[24] However, the price of Pashmina may be lowered by combining it with either rabbit fur or wool. Semi-Pashmina, Raffle, and Woollen shawls are the additional options. These shawls are not authentic Pashmina but rather cheap knockoffs. Shawls created from a combination of semi-Pashmina fibre and scraps of Pashmina yarn are called semi-Pashmina. When compared to a pure pashmina shawl, the needlework on a raffle is almost identical. Shawls made of raffle and semi-pashmina weaves are widely traded in Indian markets.[25]

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23 H. Jan, "Kashmiri Saffron and the GI Tag", 1(3) *Agriculture & Environment E-Newsletter* 33 (2020), available at https://agrinenv.com/wp-content/uploads/2020/11/complete-issue-3-vol1-33-34.pdf (last visited on May 15, 2023).

24 S. Singh, "Contemporary Kashmir Pashmina Trade Policies & Practices", 3(3) *New Man International Journal of Multidisciplinary Studies* 76 (2016).

25 *Supra* note 25 at 149.

Some of the most well-known institutions whose sole purpose is the production and sale of pashmina are the Handloom Department, the Handicraft Department, SICOF (Small Scale Industrial Development Corporation Limited.), and the Handloom Development Corporation (Sales and Export), the Ministry of Textile, and private traders. Both the central government of India and the state government of Jammu and Kashmir are responsible for these institutions. These establishments engage in commerce via various channels, including conventional marketplaces like trade shows and showrooms and less conventional ones like door-to-door commerce and electronic marketplaces. They do all the website upkeep themselves. Showrooms run by private merchants may be found in many different cities. Pashmina is mainly exported from China, Mongolia, Iran, Afghanistan, Pakistan, New Zealand, Australia, Turkey, Iraq, the United States, Nepal, and India (Kashmir). However, the major importers are the United States, the European Union (including Britain, Belgium, France, Germany, and Italy), Japan, Australia, and Korea. Indian pashmina or its goods are the finest in the world and fetch larger earnings than those from the aforementioned nations because of the superior quality of the Pashmina and the embroidery.[26]

In the culinary sector, it is used as a colourant, in the textile sector as a dye or scent, and in the pharmaceutical industry for its therapeutic characteristics, making saffron the most highly valued spice in the world economically.[27] As the state of Kashmir has a monopoly on producing high-quality saffron, it is the primary economic regulator in the region, making Kashmir the world's second-largest producer of saffron after Iran. But Khorasan (Iran) rates significantly higher in output and productivity than Kashmir (India) due to its manufacturing strategy being implemented in Kashmir. Saffron has grown in its native southern Europe as well as Iran, Spain, France, Italy, Austria, Greece, Turkey, England, China, and India. On the other hand, Iran, Spain, and India are the world's three largest producers of saffron. Iran has the largest portion of the company in terms of land and output. Iran's contribution to the global area and output ranks first. Iran is responsible for 89% of the world's saffron output, whereas J&K is responsible for just 5%. Six per cent of the world's saffron supply also comes from developing nations.[28]

Today, Khorasan (Iran) and other saffron-producing countries with a smaller share of the global area of production have set an example for Kashmir (India) to follow by abolishing the traditional production and marketing system in favour of more modernised interventions. This has enabled Iran and other saffron-producing countries to deliver great saffron as well as export more compared to Kashmir (India), where farmers are still reliant on traditional

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26 *Supra* note 9.

27 *Supra* note 24 at 78.

28 *Supra* note 10 at 148.

methods of production.[29] Therefore, the issues of production efficiency of the saffron crop in Kashmir-India at reduced costs can be addressed by the abolition of conventional agronomic practices by adopting more updated methodologies of saffron farming, application of better weeding and pests control methods, improvement of irrigation facilities to saffron fields at proper timings, and adoption of modernised scientific methods based on breeding and biotechnology. In addition, postharvest loss problems may be fixed and quality improved with the use of technology intervention. Growers' optimism about the industry's potential for growth, as well as their financial success and the industry's capacity to continue exporting saffron, may be bolstered by instituting a more structured approach to marketing that emphasises direct communication between producers and buyers.[30]

**Present threats to GI Protections in Kashmir: Current Areas of Debate**

Protecting the unique qualities of Kashmiri handicrafts and delicacies like Kashmir Pashmina and Kashmir Safron by registering them under the Geographical Indication (GI) Act is a crucial step in the right direction, as it serves to protect the interests of all parties involved, especially the artisans themselves. However, there are a number of obstacles that must be overcome before GI can be fully implemented in Kashmir Pashmina and Saffron.[31] It is necessary to implement awareness among practitioners about the advantages of GI and marketing about the authenticity of Kashmir Pashmina and Saffron in domestic and international markets.

1. **Issues and Challenges faced by Kashmiri Pashmina in the Global Markets:**

Kashmir, India, is home to the world's finest hand-woven pashmina. Instead of distinguishing itself in the market and expanding on its traditional qualities, the regional pashmina industry instead chose to compete for head-on with these industrially produced items, demonstrating a lack of professionalism and lack of vision. Thus, not only was the traditional brand image of Kashmir Pashmina tarnished but the competitive edge that had been passed down to traditional items due to their distinctive character was also lost. The locally produced pashmina couldn't compete with the internationally exported, mechanically manufactured pashmina sold under the brand name "Cashmere". As a result, rebranding Kashmir Pashmina as a genuine product that appeals to the right audience is urgently required.[32]

One of the most important sectors that need urgent care and attention is the Kashmir Pashmina Industry, which falls under the category of the informal sector. The premium owing to the Brand-Value (Geographical Indications) of Kashmir Pashmina is not yielding the intended advantages to the Manufactures or Raw-Material Producers, despite the fact that a number of

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29 *Supra* note 18 at 1536.
30 *Supra* note 13 at 425.
31 *Supra* note 12 at 578.
32 *Supra* note 1 at 5.

efforts have been made by the Government of India and the Government of Jammu & Kashmir.[33] To summarise, the uneven distribution of power has resulted in small producers having very limited flexibility in negotiating the terms of their contracts. There is a lack of transparency in the information that is being shared, which, when combined with a low education level, fewer marketing experiences, a near-monopoly structure of pashmina shawls in the organised sector, and a low scale of production, prevents the benefits of GI from reaching all segments.

In addition to this, it is often seen that GIs do not have a special character with respect to manufacturing. Anyone located outside of the restricted zone is free to continue producing and selling the items so long as they do so under a different brand name.[34] The authentic pashmina cannot be distinguished from imitations by hand since it is very difficult to tell the two apart. Effective management in the future is going to be required in order to really realise the potential advantages that are engrained in the registered. This will need consistent efforts throughout the medium to long term, supported by suitable planning and significant funding in order to achieve the desired results.[35] Therefore, strategic interventions by public or quasi-public entities are an important condition for the success of the GIs projects in India; however, this is not fully defined at this time.[36]

**2. Problems pertaining to Kashmiri Saffron**

Saffron blossoms in Jammu and Kashmir somewhere between the second week of October and the first week of November, depending on the weather. Farmers in each region have a set schedule that family members follow to collect flowers early in the morning. Flowers are gathered in polythene, wicker baskets, plastic baskets, or cloth bags after being plucked from the ground. Traditional post-harvest techniques used by farmers in Kashmir result in post-harvest losses of up to 30 per cent in the quality of the product, despite the saffron's well-known inherent high quality. Since the blossoming occurs at irregular intervals owing to a lack of irrigation facilities and harvesting days are predetermined, most flowers are picked. At the same time, they are still young, resulting in a decrease in output. When farmers don't properly pack their sun-dried saffron before storing it at room temperature for six months to a year, the saffron loses most of its value. This lowers the market value of saffron and hurts the farmers' bottom line.[37]

A small group of persons dominates saffron marketing in Kashmir because a typical producer in the region has a such little yield that they cannot grade, pack, or store their product on an individual basis. These few

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33 *Supra.*

34 *Supra.*

35 *Supra.*

36 *Supra.*

37 "Government of India for Intellectual Property India (2020)", *Geographical Indications Journal No. 127, available at* https://www.ipindia.gov.in/writereaddata/Portal/IPOJournal/1_4826_1/Journal_127.pdf (last visited on May 15, 2023).

individuals serve as connectors between the farmer and the client. As a result, this results in the establishment of a plethora of intermediaries and middlemen who have been entitled to the lion's share of the financial gains that are generated by the production of saffron.[38] Brokers, local dealers, agents, corporative societies, and other types of businesses make up the various marketing channels. The saffron trade in Kashmir is highly unorganised, which means that the middlemen who sell the spice and connect the growers and buyers keep a hefty portion of the profits for themselves. The vast bulk of the saffron is dealt with via intermediaries (brokers/ Dalals).[39]

Saffron is a high-value commercial crop, but it is only grown in a few locations. Because of its perceived unique features, Kashmiri saffron is often adulterated. Controlling the addition of natural and synthetic adulterants to saffron is a difficult task because of the wide variety of substances that can be used as fillers.[40] These include, for example, honey, glycerin, oils, syrups, potassium hydroxide, pieces of other plant fibres, dried meat, and organic materials for colouring. Traders also add sugar-coated paper scraps, meshed and dried flesh fibres, coloured maize or corn stigma, slick fat oils, and glycerin to the mix in order to enhance the weight of the saffron. Tourists, who flock to the region, are eventually targeted with the same high-quality saffron. These unethical actions severely damage the saffron industry and the stigma associated with high-quality saffron.[41]

**Conclusion:**

Most Indian GIs are immersed in native folklore, ceremonies, and customs. India has a lot of potential to establish "culture tourism" around its traditional items by emphasizing the cultural aspects, particularly among overseas tourists. To reduce waste and maximize profitability, departments must improve communication and collaboration. A coordinated approach might simplify tapping into India's GIs' economic and social potential and enable the nation to benefit from maintaining its collective IPR.

Historically and geographically, Jammu and Kashmir is blessed with various unique products. Jammu & Kashmir's rich cultural heritage includes regional and ethnic items that guarantee traditional qualities, beauty, dignity, and a wide variety of shapes and styles. Its mysterious and unique qualities are what make it so irresistible. However, most of these goods face difficulties such as an inadequate brand image, a global attack from counterfeit goods inside and outside the state, etc. As a result, many Jammu and Kashmiri regional and ethnic items are still falling victim to con artists who sell knockoffs under the "Made in Kashmir" or "Kashmir Made" labels. The state's reputation in both the foreign and domestic markets has been damaged, costing it money in both arenas. This severely threatens the future of Jammu and Kashmir's ethnic and

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38 *Supra* note 18 at 1538.

39 *Supra* note 12 at 580.

40 *Supra.*

41 *Supra* note 19 at 312.

regional goods. The government of Jammu and Kashmir needs to implement policies and methods to discover goods that might benefit from geographical Indication registration, educate the public, and provide funding for purchasing and researching new GIs. The Government must provide the artisans with extensive legal assistance in addition to financial, infrastructural, and technological aid.

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# Geographical Indication: A Potential Tool for Rural Development in Jammu & Kashmir

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**Abstract**

*Geographical indication (GI), a type of Intellectual property, is a label assigned to products with a distinct geographical origin and attributes, reputations, or features that are principally attributable to that origin (WIPO, 2012).In general, GIs promote local identity, cultural traditions, and high-quality products like Champagne, Cuban cigars, Roquefort cheese, and Kashmiri hand-knotted carpets. While there is a great demand for these kinds of traditional products, GIs supply local producers in rural areas with specialized and high value-added products. Socio-cultural and agro-ecological features of a location can be highlighted through registered GI products. When a product is associated with its place of origin, it represents the culture and specific identity of the place which may be a distant and/or underprivileged region/area of a particular country or region. Small local producers can benefit from GI registration as well. In this way, they can compete against large corporations because GI registration ensures product quality in some way, and when quality is assured, registered GI product/s are treated as equal to branded product/s.In the framework of rural development, this study seeks to examine the use of geographical indications in Jammu and Kashmir alongside well-known examples from around the world and to increase awareness of the importance of GI for rural development.In addition, the article emphasizes the difficulties and concerns connected with accomplishing rural development using GIs.*

**Keywords**: *Geographical Indication, Rural development, European Union, India, Jammu and Kashmir.*

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## 1. Introduction

Globalization and the growth of international competition have forced nations to compete with one another for a large portion of the global market. On this basis countries distinguish their goods and promote their distinctiveness. "Geographical Indication (GI)" is the term used to describe a product that has unique characteristics that are specific to a given region or nation of origin.The term "GI" refers to a symbol assigned to items with a certain geographical origin and intrinsic qualities, reputations, or features related to that origin (WIPO, 2012). Generally speaking, Geographical indications promote the superiority of the product, the uniqueness of the place, and cultural traditions, such as Champagne, Cuban cigars, Roquefort cheese, and hand-knotted Kashmiri carpets.Like trademarks, GIs are used as a marketing tool by many countries.[1]

GIs supply the general public with distinctive, high-value-added goods. If these indicators are accredited to a particular region, type of human capital, or manufacturing method, they can be used to a wide variety of products. There consequence of GI tagging is two-fold. On the side of consumer, GIs lower consumer search expenses by transmitting quality indicators and enabling the consumption of high-quality products. Studies reveal that customers are more likely to spend a greater premium for these products than for conventional products.[2]On the producer end, the GI protection provides producers with a steady stream of money by encouraging them to maintain production with consistent quality and a recognized brand. GIs are primarily produced in rural areas that are still underdeveloped, so protecting them would directly benefit those producers by generating income and opening up job opportunities. Increasing economic activity linked with the manufacture of items protected by GIs has other effects on the rural economy, including the expansion of other businesses and the creation of more employment possibilities. One of the added benefits of these improvements is that they discourage rural-to-urban migration.[3]

The goal of this study, which is focused on rural development, is to look into the registered GIs in Kashmir and famous cases from around the globe that highlight the significance of GIs for rural development.

## 2. Legislative Framework for the Protection of Geographical Indications

Legal protection of GIs is necessary because illicit usage of GIs hurts both consumers and licenced producers. Not only does GI protection assist customers and producers, it also prevents the product name from becoming

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1 Bilge Doganand Ummuhan Gokovali, "Geographical Indications: the aspects of rural development and marketing through the traditional products" 62*Procedia-Social and Behavioral Science (ELSEVIER)* 761-765 (2012).

2 Combris, P., Lecocq, S. And Visser, M., "Estimation of Hedonic Price Equation for Burdeaux Wine: Does Quality Matter", 107 (441): 390, *The Economic Journal*, (1997).

3 Loureiro, M.L. and McCluskey, J.J., "Assessing Consumer Response to Protected Geographical Identification Labelling" 16(3) *Agribusiness,*309-320 (2000).

common. For instance, the sparkling wine produced in the Champagne area of France is known across the world as "Champagne." With the passage of time, however, this word has become generic, and all sparkling wine products, whether or not made in the Champagne region, are referred to as "Champagne" in other nations. As a result of France's legal struggle, the use of the term "Champagne" for sparkling wines made outside of the Champagne region is now illegal. National protection of GIs can be achieved by the use of trademark laws, anti-unfair competition legislation, consumer protection laws, and GI-specific regulations. Internationally, the most exhaustive restrictions are the "Paris Convention for the Protection of Industrial Property (1883)", "Madrid Agreement for the Repression of False and Deceptive Indications of Origin on Goods (1891)", "Lisbon Agreement for the Appellations of Origin and their International Registration (1958)", "TRIPS, 1995 (Trade Related Aspects of Intellectual Property Rights within the Framework of the World Trade Organization)", and "The EU Council Regulation on the Protection of Geographical Indications and Designations of Origin (1992)."[4]

India is a member of the TRIPS Agreement, so the Geographical Indications of Goods (Registration and Protection) Act, 1999 was enacted so that India could meet its obligations under the TRIPS Agreement. The Trade and Merchandise Marks Act of 1958 used to protect GIs. Now, the GI Act, 1999 does provide the same protection. The Act came into effect on September 15, 2003. It is worth mentioning that a product can't be accorded protection in other countries unless it is registered in the country of its origin.[5]

Geographical Indication is defined under GI Act, 1999 as "an Indication that identifies such goods as agricultural goods, natural goods, or manufactured goods as originating, or manufactured, in the territory of the country, or a region or locality in the territory, where a given quality, reputation, or other characteristics of such goods is essentially attributable to its geographical origin, and where such goods are manufactured goods one of the activities of either the production or processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be."[6]

## 3. Role of GIs in Rural Development

### 3.1. Position around the World

Geographical Indications have some extraordinary development characteristics, and with such unique characteristics, GI registration can result in increased and better-quality products that can captivate customers. As a result, after GI registration, the need for GI products increases, and consumers then decide to buy GI products that have undergone registration. Researchers have found that GIs can lead to more and higher-quality employment,

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4 *Supra* note 1 at 762.

5 Article- 22, "Protection of Geographical Indications", TRIPS Agreement, 1995.

6 The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act 48 of 1999), s. 2(e).

according to their studies. Ramirez asserts that GIs can connect entire regions to markets.[7]

Depending on the level of tradition and the excellence of the goods, GIs have the potential to turn a profit.[8]Producers receive a quality premium as a result of consumers' preference for differentiated products over standard ones.Product differentiation creates demand from people who are willing to pay more, soGIs motivate producers to increase their prices.[9]

Table 1 compares the prices of some products around the worldprior to and following GI registration. The shift in price shows that after registration, prices increased.

**Table 1: Changes in Prices after GI Registration**

| Product with GI Tag | Pre-Registration Rates | Post-Registration Rates | Growth Rate (%) |
|---|---|---|---|
| **1.** Champagne of France | $ 12 | $ 40 | 233,3 |
| **2.** Antigua Coffee Bean of Guatemala | $ 0,5 | $ 1,5 | 200 |
| **3.** Parma Ham of Italy | 39 liret | 42 liret | 7,7 |
| **4.** Jamao Coffee of Dominican Republic | $ 67 | $ 107 | 59,7 |
| 5. "Agave" of Mexico | - | - | 5000 |

***Source:*** Babcock and Clemens, 2004; Passeri, 2006.[10]

Given that the products that are eligible for GI protection are typically produced in rural areas, GI protection generates revenue in these areas by creating job opportunities. These products do not necessitate any advanced technological infrastructure or large marketing investments. As a result, without incurring significant expenses, local producers enhance their earnings and generate employment. Furthermore, local producers benefit from being able to sell their products directly to the final consumers. Moran (1993) asserts that for agricultural products, these local GI producers earn greater than other

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7 EC 2002; Quoted in Daniele Giovannucci, Tim Josling, William Kerr, Bernard O' Connor & May T. Yeung, Guide to Geographical Indications, Linking Products and their Origins, 25 (2009).

8 Belletti, G. "OriginLabelled Products, Reputation And Heterogeneity of Firms", The Socio -Economics of Origin Labelled Products in Agro-Food Supply Chains: Spatial, Institutional and Co-Ordination Aspects, Actes et Communications, No: 17, INRA, Paris, 239-260 (1999).

9 Stigler, G. J. "Public Regulation of the Securities Markets", 37 *Journal of Business,* 117-142 (1964).

10 Babcock, B.A. And Clemens R. (2004), "Geographical Indications And Property Rights: Protecting Value-Added Agricultural Products", Matric Briefing Paper 04-MBP7, Iowa State University.
Passeri, S. (2006), "International Legal Protection of GIs: European & Asian Experiences", ECAP II, Thailand, 21 April 2006.

producers who sell to large firms rather than the final consumers immediately.[11]

Traditional products are regarded as nostalgic and fascinating goods because they successfully combine natural resources and cultural practices to capture the distinctive local characteristics of a region. As a conventional product category, GIs use the geographic title of the product as a powerful marketing tool to highlight the distinctive regional identity. In this way, it will result in an increase in rural tourism activities. Callois (2004) discovered substantial evidence that GIs contribute to rural development through quality indicators in his study.[12]Economic activity is boosted by an increase in the sales of other products and tourism in the SoussMassa-Draa Region of Morocco following a surge in the sale of Argan Oil produced there in domestic and international markets.[13] Therefore, effective GI protection leads to increased GI product recognition as well as some external benefits, such as rise in the monetary activity of other sectors that have a history of and future prospects for GI products. For instance, growth in tourism activity through GI benefits not only the producer but also other industries like restaurants, gift shops, and hotels that provide lodging.

A multi-year study carried out in the European Union[14] also deduced that there are several good justifications for preserving geographic indications for development. The local economy (for instance, increased tourism) and/or local society (increased social cohesion and identity), as well as the local environment, can all be impacted indirectly by GI protection.[15] The upkeep of economic activity and habitation in rural areas as well as an improvement in their quality of life are aided by the protection of GI markets.[16] The European Union has increased the number of products with GI status by emphasizing the

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11 Moran,W. "Rural Space as Intellectual Property"12(3) Political Economy, 263-277 (1993)

12 Callois, J.M. (2004), "Can Quality Labels Trigger Rural Development? A Micro-economic Model with Cooperation for the Production of a Differentiated Agricultural Good", Working Paper 2004/6 CESAER.

13 Reviron, S., Thevenod-Mottet, E., and Benni N. (2009), Geographical indications: Creation and distribution of economic value in developing countries, Working Paper 2009/14, NCCR Trade Regulation.

14 Sylvander, Bertil& Gilles Allaire, WP3 Report: Conceptual Synthesis – Task 1, Strengthening International Research on Geographical Indications, SINER-GI PROJECT (2007). See also Daniele Giovannucci, Tim Josling, William Kerr, Bernard O' Connor & May T. Yeung, Guide to Geographical Indications: Linking Proucts and their Origins 25 (2009). https://www.origin-gi.com/images/stories /PDFs/English/E-Library/ geographical_indications.pdf

15 Giovanni Belletti, Andrea Marescotti& Alessandro Brazzini, Old World Case Study: The Role of Protected Geographical Indications to Foster Rural Development Dynamics: The Case of Sorana Bean PGI, 58 Sptinhrt International Publishing,253, 259 (2017). https://link.sprin ger.com/chapter/10.1007%2F978-3-319-53073-4_10

16 Correa, C. (2002), European Commission, Public Opinion, http:// ec.europa.eu/public_opinion/index_en.htm.

commercial viability of GIs as a key component of its agricultural and rural development strategy.[17]Additionally, GI protection of a particular product has a positive impact on other industries by generating positive externalities that benefit those industries as well as others in terms of generating income and jobs, whichhelps to stop rural-to-urban migration. In light of this, GI protection contributes to a rural economy that is sustainable while also preserving cultural heritage.[18]

### 3.2. Position in India

In India, by recognizing our unique biodiversity and traditional knowledge, GI protection has a significant impact on rural development. Origin-labeled products are among the most visible signs of locality and are frequently regarded as useful indicators by which rural development, particularly in disadvantaged areas, could be promoted. The financial gain from the market value of origin-labeled products is shared among all legitimate rural producers, strengthening the rural development and sustainability process.[19]Most importantly, after GI registration, Indian GI products like Darjeeling Tea, BanarasiSaree, Kanjeevaram Silk Saree, and PochampallyIkat Saree have seen an increase in popularity and export contribution.[20]

For instance, in India, the first GI protection was accorded to "Darjeeling" tea in 2004. The eastern region of India's West Bengal state, specifically the hilly Darjeeling district, is known for producing high-quality tea. The economic impact of Darjeeling tea has been studied in terms of different indicators (number of tea estates, area planted in tea, quantity produced, yield, etc.) after receiving GI Tag, comparing the data for the years from 1991 to 2007/08 (i.e., before and after GI registration). Table 2 below summarizes the findings of the analysis of five significant variables.

**Table 2: Impact of GI registration on Darjeeling Tea**

| Variables | Pre-Registration | Post-Registration |
|---|---|---|
| **1.** No. of Tea Estates | 80 in 1997 | 85 in 2009 |
| **2.** Area under Tea Cultivation | 17228 ha in 2000 | 17818 in 2008 |
| **3.** Production | 9.18 Million Kg in 2002 | 11.59 Million Kg in 2008 |
| **4.** Yield Per Hectare | 492 Kg/ha in 1999 | 650 Kg/ha in 2008 |
| **5.** Price | Rs. 128.52/Kg in1999 | Rs. 204.88/Kg in 2008 |

17 *Supra* note 7 at 8.

18 *Supra* note 1at 764.

19 Kundan Kishore, "Geographical Indication in Horticulture: An Indian Perspective", 23 *JIPR,* 159-166 (2018).

20 Anil K. Kanungo, Geographical Indications have the potential to be India's growth engine, The Fincial Epress (April 11, 2016), https://www.financialexpress.com/opinion/geographical-indications-have-the-potential-to-be-indias-growthengine/234813.

The Table shows the positive economic impact of GI registration on five variables.

Apart from examining the positive economic impact of Darjeeling tea after GI registration, there has also been a decrease in rural emigration. When tea estates were not working successfully in the past, some estates were closed, wages were not paid, and workers left the estates in pursuit of better employment possibilities in other Indian cities. In the seven or eight years since the registration of Darjeeling as a GI, however, no estate has been closed for economic reasons. There are now sufficient employment prospects on tea plantations, with competitive salaries and extensive fringe perks. Nobody is now moving to the plains. Rural emigration is thus virtually nonexistent throughout the entire Darjeeling tea farming region. The majority of employees who formerly left the estates have returned, and more continue to do so. There are excellent opportunities for tea tourism because visitors to Darjeeling region want to visit tea gardens and see how it is made.[21] India has increased its awareness of the need for GI protection, but that protection is not yet at the level that would be ideal. In India, GIs are distributed among product groups as shown in Table 3. Up until March 2022, there are 420 total registered GI numbers, according to the table. Comparing this figure to Germany and China, which topped the list with 15,566 and 7247 GI-tagged products, respectively, as of 2018[22] under the Lisbon System, one can draw the conclusion that registration in India is incredibly low despite the country's diverse climatic conditions and rich cultural heritage. India continues to be a non-participant in the Lisbon System and makes insufficient efforts to register with the EU.These issues lead to insufficient protection of Indian products at the global level, which allows other nations to benefit from products with Indian origins.

**Table 3: Distribution of GIs by Product Groups in India**

| PRODUCT GROUPS | NUMBER OF PRODUCTS WITH GI TAG | SHARE (%) |
|---|---|---|
| **1.** Handicrafts | 233 | 55.47 |
| **2.** Agricultural | 127 | 30.23 |
| **3.** Manufactured | 38 | 9.04 |
| **4.** Food Stuff | 20 | 4.76 |
| **5.** Natural | 2 | 0.47 |
| **Total** | **420** | **100** |

***Source:*** http://www.ipinda.gov.in

21 Tarit Kumar Datta, "Darjeeling Tea, India, Case Study, Indian Institute of Management Calcutta.

22 http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2019-chapters5.pdf

### 3.3. Status of GI Registration in Jammu and Kashmir

In terms of the number of products registered as geographical indications, Jammu and Kashmir ranks 12th.[23]Despite its rich ethnic and region-specific product range, Jammu and Kashmir's geographical indication is not very impressive due to the low number of products registered under geographical indication. Karnataka, for example, has 48 geographical indications for ethnic and traditional goods registered. Jammu and Kashmir has only registered 8 geographical indications to date, including 7 GIs in handicrafts, which have helped Jammu and Kashmir generate revenue and build enormous goodwill and reputation both at the national and global levels. The handicrafts industry is significant in the economy of Jammu and Kashmir.[24] However, in terms of the registration of some well-known agricultural products, only saffron[25] has recently received GI protection. With the Government of India's GI Tag, Kashmiri Saffron has become famous worldwide. It was brought to light in the markets of the United Arab Emirates (UAE) during the two-day UAE-India Food Security Summit 2020, which was held in Dubai from December 8 to 9.[26] Kashmiri saffron costs between 2,50,000 and 2,70,000 for one kilogram after registration.[27]

After obtaining GI Tag, the effects of Kashmiri Hand Knotted Carpets, Kashmiri Paper Machie, and Walnut Wood Carving have been examined in terms of production, employment, and exports by contrasting the data for the years 1999 to 2012-13/2016-17, or before and after GI registration. Table 4 below provides an overview of the analysis of three key variables.

**Table 4: Impact of GI Registration on Kashmiri Hand Knotted Carpets, Walnut Wood Carving and Paper Machie**

| | KASHMIRI HAND KNOTTED CARPET | | WALNUT WOOD CARVING | | KASHMIRI PAPER MACHIE | |
|---|---|---|---|---|---|---|
| **VARIABLES** | **Before GI** | **After GI** | **Before GI** | **After GI** | **Before GI** | **After GI** |
| **Production (in Crores)** | 541.00 in 1999 | 855.40 in 2017-18 | 3.08 in 1999 | 63.50 in 2012-13 | 36.20 in 1999 | 164 in 2016-17 |
| **Employment (in Lakh No's)** | 0.89 in 1999 | 1.11 in 2016-17 | 0.09 in 1999 | NA in 2012-13 | 0.092 in 1999 | NA in 2012-13 |
| **Export (Rs. In Crores)** | 326.06 in 2000-01 | 452.12 in 2017-18 | 6.06 in 2000-01 | 69.06 in 2012-13 | 12.96 in 2000-01 | 620.02 in 2012-13 |

***Source:*** Digest of Statistics 2020-21, Govt. of J&K, Directorate of Economics & Statistics.

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23 http://www.adda247.com/upsc-exam/updated-list-of-geographical-indication-tags-in-india/

24 Natasha Saqib, Abid Sultan, "*An Overview of Geographical Indication in Jammu & Kashmir,*"3*IJAR,* 299-302 (2013).

25 It is worth noting that Kashmir Saffron is a registered GI vide application no. 635.

26 http://www.tribuneindia.com, 9 Dec. 2020.

27 http://www.thegulmarg.com, 8 March, 2022.

**Table 5: Category wise registered products of Jammu and Kashmir under GI**

| Product Category | Number of Registered Products |
|---|---|
| **1.** Agriculture | 1 |
| **2.** Handicrafts | 7 |
| **3.** Manufactured | 0 |
| **4.** Food Stuff | 0 |
| **Total** | **8** |

***Source:*** Compiled from GI Registry Office, as on October 2022.

All of the eight registered products are from Kashmir, with none from Jammu and Ladakh. As a result, Jammu and Kashmir's current status reflects that it is primarily concerned with and focused on the handicraft sector. Jammu and Kashmir's myopic inclination may be detrimental to other ethnic and region-specific products. Other ethnic and regional products in Jammu and Kashmir have a lot of potential for using geographical indication. It provides a diverse product range ranging from agricultural to handmade items that can be registered under geographical indication. Jammu and Kashmir is home to many world-famous fresh fruit varieties (such as apple, cherry, grapes, and so on) and dry fruits (walnut, almond etc.). These products have a high chance of being registered under the Geographical Indication Act of 1999.[28]

It is widely accepted that effective GI-product protection, through the prevention of value loss due to copying, free riding, or usurpation, could help increase the influx of financial resources to the community involved in its production. As a result, GI is frequently mentioned as a tool with the potential to support rural development indirectly by reducing rural poor income poverty.[29]

## 4. Issues and Concerns in achieving Rural Development through GI

The ownership rights to manufactured goods, natural resources, and by-products of those resources must all be protected, and GI plays a crucial role in doing so. By providing access to markets, it also serves as a useful tool for the growth of rural businesses. Misappropriation, safeguarding indigenous and traditional knowledge and culture, enhancing market access, developing niche markets, protecting reputation, potential income effects, and rural development are the fundamental socio-economic problems relating to geographical indications that are particularly relevant to developing countries. Furthermore, it has been noted that origin-labeled goods are frequently regarded as helpful indicators for preserving regional culture and traditions and fostering rural development, particularly in underdeveloped areas.[30] The potential of

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28 *Supra* note 22 at 301.

29 Kasturi Das, "Socio-economic Implications of Protecting Geographical Indications in India," SSRN Electronic Journal, (2009).

30 Jena P R, Ngokkuen C, Rahut D B Grote, U, "Geographical Indication Protection and Rural Livelihoods: Insights from India and Thailand," 29 *Asia Pacific Economic Literature,* 174-185 (2015).

Geographical indications for rural developmentdepend upon inclusive and diverse producers who ensure local actors' participation and capability enhancement in order to reap greater benefits from the production and supply chain. The utilization of a GI's economic potential primarily depends on efficient marketing and promotional efforts to raise consumer awareness about the "Niche" acquired by the product as a result of the product-place link. In India, there are some obstacles in realizing the potential commercial benefits of GI registration.[31]

i. **Absence of Post-GI Protection System:** The biggest concern is probably the lack of an efficient post-GI mechanism to stop unethical promotion. Granting GIs to agricultural products has advanced significantly, but registering goods alone does not accomplish the goals of the Act unless it is combined with a robust enforcement system that operates in both domestic and export markets. Government intervention is essential in ensuring that registered items are safeguarded from unfair competition because the majority of producer groups lack the resources and know-how to successfully defend or promote their GI Brand. Their growth is consequently hindered.[32]

ii. **Appropriateness of object Identification:** It has been noted that products with GI Tags don't always have a large market potential because applicants frequently overlook a GI product's commercial status or prospects in both domestic and export markets. To ensure better economic benefit for producers and to hasten rural development, the government plays a significant role in creating branding strategies, particularly in foreign nations.[33]

iii. **Identification of Beneficiaries (Producers):** Many intermediaries still have a significant impact on the market, and genuine producers still depend on them to gain access to the market. The socio-economic analysis of GI Tags' effects on Malabar Pepper and Vazhakulam Pineapple producers suggested that they were not GI's intended beneficiaries because it was intended to aid in product marketing through increased brand recognition. Additionally, it was widely believed that the GI Tag benefits traders rather than farmers.[34]

## 5. Conclusion

GIs create a connection between the name of the place where a product originates and the product itself. These actions therefore serve as an efficient marketing tool for drawing consumer attention to specific geographic areas.

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31 *Supra* note 19 at 165.

32 Das. K, "Protection of India's Geographical Indications: An Overview of the Indian Legislation and TRIPS Scenario", 46 *IJIL,* 39-73 (2006).

33 The Energy and Resources Institute (TERI), "The Protection of Geographical Indications in India: Issues and Challenges, Briefing Paper, New Delhi, 2013.

34 *Ibid.*

The majority of these regions are regarded as rural, and GIs present important chances for rural development. The maintenance of economic activity and habitation in rural areas, as well as an improvement in the standard of living for rural residents, may be aided by the protection of GIs. The rural population is the main beneficiary of these kinds of products in terms of income and job creation. Geographical indications (GIs) give substantial alternative benefits for rural development by giving a direct signal to the consumer that the product originated from a certain region and is of a certain quality without requiring large investments in technology and advertising. On the consumer side, GI protection decreases search costs and information asymmetry, hence increasing consumers' willingness to pay "premium prices"

There is no doubt that Geographical Indications can bring growth and prosperity to rural areas or GI designated regions when positive and unique characteristics of the GIs are considered. However, such positive effects of GI protection cannot be realized at the local level where GIs are not properly managed. To manage Geographical Indications for development, systematic and scientific planning at various stages is required. Jammu and Kashmir has very little GI protection in comparison to other states, so it does not fully benefit from the potential advantages of GI protection. The protection of GIs increases prices, marketing power, employment, and income, according to numerous studies carried out globally. Thus, GI protection should be incorporated into Jammu and Kashmir's political agenda as a means of generating income, jobs, and marketing that will ultimately serve as a strategy for rural development.

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# Impact of Goods & Services Act, 2017 on Powerlooms of Banaras : A Socio-legal Analysis

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*"Benares is older than history, older than tradition, older even than legend, and looks twice as old as all of them put together." – Mark Twain.*

**Abstract**

*Banaras is a city of rich culture and textile heritage. The textile industry of the city has been mentioned even in Rig Veda. Banaras's textile was patronized by the princely class in the past. Most of these families owned the businesses for centuries. In 2017 weavers were brought under tax regime for the first time. The paper will analyze the policychange as GST is not just a new tax, but it is going to change the way the power-loom industries of the city functions. From finance to product pricing, from supply chain to accounts everything is going to experience a drastic flip. Thus it is very important to analyze how the centuries old weavers of the city have perceived this new tax structure. The present paper is going to focus on how the power-looms business in the city of Banaras used to run before GST and what are the changes that have been brought after this "One nation One tax" has been introduced. For analyzing the impact of GST on the power-looms of Banaras, the author has collected data from 70 samples spread across 4 major textile clusters of the city. These samples are further divided into organised and unorganised sector and chi square test has been run on the data to understand the relationship between GST and the orgainised and unorganised sector units of Banaras.*

**Keywords:** GST, Power-loom, Girasta, ITC, Subsidy, Fibre neutral rate, Zari, Mahajans, Inverted duty structure, Inverted duty credit, Anti-dumping duty.

## 1 Introduction

The Textile sector in India is a major contributor in the Indian Economy, not only in the case of GDP but also in the case of labour

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consumption as well as in export. As per data 45 million people[1] are directly dependent on the textile industry for their living. GST is a multistage consumption tax that was introduced for the first time in 2017.[2]It is levied at each stage of production, from raw material to manufacturer to distributor to wholesaler to retailer to final consumer. The final burden under this structure is actually shifted on the shoulders of the final consumer. The law also includes silk and cotton under taxation under Reverse Charge Mechanism (RCM)[3] where the buyer actually pays the taxes on behalf of the seller. GST is first of its kind for Banaras' textile Industry. It is for the first time that the weavers have been brought under an Indirect tax structure. Baranas has been the city of weavers since time immemorial. It is famous for its fine and elite variety of weaving. From English historian E P Thompson[4] to renowned anthropologist Nita Kumar[5] all have written about the weavers of Banaras, their unique work and skills. Their writing suggests that till late 1980's the city was full of hand-loom weavers but early 90's has seen a tremendous change in the city. The number of hand-looms started falling and today around 90% of the looms working in the city are power-looms[6]. Therefore the major focus of this paper is to analyze the concept of GST and its impact on the power-looms of Banaras on organized and unorganized sector business.

## 2 Literature Review:

- Mayank Kumar (2022):- In an article published in the newspaper the Hindu, the author has argued that the GST has led to an increase in the cost of production as the rate of taxes have increased for zari and threads. This has forced the weavers of Varanasi to leave their generation old craft and skill. The report further argued that weavers are not able to earn a livelihood from this craft and the majority of them are migrating to Mumbai, Delhi or other cities in search of better livelihood. Those of them who are educated are moving to West Asia for jobs.
- Dr. Purvi Kothari (2018): In this article the author has analyzed the impact and repercussions of GST on the textile sector of Surat, Gujarat. The article is based on primary research conducted by the author in five major textile zones of the city and concludes that the major impact of the changes was faced by the thread manufacturers and traders. There were initial misconceptions

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1 High Priority Sector, Udyog Mitra Bihar, available at: http:// swc.bihar.gov.in/portal/#!/agriculture-sector/textile> (last visited on Dec 27, 2022).

2 Manisha Patawari, GST: A Journey to Make India a Single Tax Economy, 4 International Journal of Trend in Scientific Research and Development Journal 1000 (2020).

3 Central Goods and Services Act, 2017 (Act 27 of 2017), s. 2(98).

4 E P Thompson, *The Making of the English Working Class,* Vintage, Newyork, 1996.

5 Nita Kumar, "The Artisans of Banaras", 53 *Economic and Political Weekl*y 59 (2016).

6 *Ibid.*

about the law, but the city has managed to recover from the initial setbacks, and the respondents have suggested that GST would benefit the textile industry in the long run.

- Shreya Roy Chawdhury (2017): In the present report, the author has discussed the various value chains of the power-loom business of Varanasi. The article throws light on the factors that have gone wrong in the case of the power-loom of Banaras. The author has suggested that the factors like illiteracy, domination of informal credit, the industry being credit run throughout the value chain, etc has negatively impacted the whole craft of the banarsi sarees.
- N. Kumar (2016): In this article the author explains the condition of weavers working in the Silk Industry in Banaras. She discusses the shift in the livelihood, ethos and lifestyle of the weavers after powerlooms have taken over the handloom industry in the city. The author has analyzed the city of weavers and suggested how the "*hunar is taken over by dimag*" because at the end of the day, weavers have to run their family. The weavers are illiterate and financially very poor. They are still trying to cope up with the changing technology, political ideology and illiteracy. The author concluded that the condition of weavers can be improved only through education and skills. Government should push towards better technology and better education for their future generation.

**3. Objectives of the study:**

a. To study the impact of GST on the business of the organized and the unorganized sector power-looms of Banaras.

b. To study the impact of GST on the wages of the workers in the organized and unorganized sector power-looms of Banaras.

c. To study the impact of the GST on the power-loom owners and weavers of Banaras.

**4. Research Questions:**

i. Whether GST has helped the weavers to increase their business?

ii. Whether the weavers are able to get the benefits of the new law?

iii. Whether the small weavers have suffered due to GST?

**5 Hypotheses:**

On the basis of available literature review following hypotheses have been framed:-

H1 – There is no association between the Form of organization and impact of GST on workers' wages.

H2 - There is no association between the Form of organization and Lay off of workers after GST.

H3 - There is no association between the Form of organization and impact of GST on Profit.

H4 - There is no association between the Form of organization and impact of GST on Turnover.

## 6. Research Methodology:

The researcher seeks to study the textile heritage of Banaras and how it has perceived the drastic but very significant policy change i.e. GST. For this purpose the researcher will divide the study into two parts primary and secondary. Secondary data was collected from books, newspaper reports, analysis of financial experts, and research articles on the subject. Primary data have been collected from 70 samples from 4 different clusters of Banaras namely, Jaitpura, Lalapura, Lohta and Madanpura. Further expert opinions have also been taken to verify the answers of the power-loom owners.

**Sampling technique**: The collection of samples is done using convenience sampling.

**Tools and technique**: Tool used for data collection is a structured questionnaire consisting of 25 questions. Since present research is a mixed research it consists of both quantitative and qualitative data.

**Test:** Chi square test has been run on the data to test the hypotheses.

## 7. Social Profile of the Power-loom Industry:

Power-looms in Banaras are majorly run by weavers who work on job work basis for the Girasta (or master weavers)and these Girasta sell their produce to the Gaddidar or the Mahajan.[7] It is Mahajan who finally sells the famous Banarasi textile to all over the world. The weaving sector of this city is dominated by the Ansari community.[8] They traditionally owned the business. But today the weaving class is suffering, they hardly manage to feed themselves.[9] Textile business is a credit run business, where credit period ranges between 3 months to 6 months. But basic raw material i.e. yarn is available only on payment basis this has forced the weaving class to depend on people who have capital. Thus the Garistha and Mahajan (capitalist class) buys the raw material and give the same to the weaver who produces beautiful sarees and other products. The most famous variety of weaving includes jacard and zari weaving on katan and kora. Banaras is a city of great "Hunar". But the condition of weavers is deteriorating day by day. While talking to different stakeholders the author observed that most of the weavers are very poor and have hardly 2 to 5 looms and his whole family is employed on those looms. The wages per saree range between Rs. 250-Rs. 300. Other than this there is another

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7 Interview:- Mr. Salim Ansari, master weaver, Banaras (conducted on 21 Dec, 2022).

8 *Ibid*.

9 Mayank Kumar, "GST implementation, rising costs slowly pushing weavers of Varanasi out of business",The Hindu, https://www.thehindu.com/news/national/gst-implementation-rising-costs-slowly-pushing-weavers-of-varanasi-out-of-business/article65963787.ece, (Last visited on Feb. 27, 2023).

division that is visible in Varanasi i.e. 10% of the market is organized sector whereas the rest 90% of the powerloom market is unorganized and scattered over the different clusters of the city.

Goods and services tax was brought in the year 2017 before that the whole industry was actually kept out of any tax at manufacturing level. The natural fibre yarns like cotton, silk, jute etc. were bought under GST and taxed @ 5%. This led to an increase in the price of yarn. As far as man-made yarns (zari, etc) are concerned under GST though the rate of tax varies from 12-18%.

**8. Comparison of old law and the new law in context of Textile Industry:-**

The Government of India has implemented GST to overcome the lacunas in the old tax system like:- multiplicity of taxes, unavailability cross utilisation of credit, remove unnecessary obstruction in the movement of goods from one state to another, multiple complianceetc[10]. The structure of integrated GST was first floated by the "Kelkar Task Force" in 2004.[11] The Parliament of India has taken more than a decade of debate and deliberation to move towards a new era of cooperative federalism. There are various countries around the world that have adopted this system and ours system is a very similar version to what Canada has adopted.

The integration of taxes has differently affected different sectors of the Indian Economy in the short run. Those sectors that fall under the old tax regime have already followed the formal system of accounting and new reforms helped them claim Input tax credit (ITC) on tax paid on earlier stages of production and thus removed the cascading effect that was there in the old system. But sectors like textile have another story to tell. Even after being one of the largest sectors of our economy it is mostly disintegrated and diverse on the basis of fabrics and techniques etc. Around 90% of the business falls under unorganised sector spread over 22 states and UTs. Therefore the new reforms have a drastic effect on them. Further the experts have demanded a fibre neutral rate of this industry but the demand has yet not been fulfilled. Some of the fibres also suffered from inverted duty structure[12] which has resulted in unnecessary blockage of credit.

**9. Power-loom Industry of Banaras and GST:**

Banaras is one of the oldest cities which is famous for its fine quality of silk sarees and craft. The Banaras Silk industry is dominated by the artisans and craftsmen who have learned these beautiful skills from their forefathers. They

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10 Dr. K.M.Bansal, GST & Customs Law, 1.6. (Taxmann Publications (P.) Ltd., New Delhi, 5th edn., 2021).

11 Finact Professional Services, Genesis of GST in India, https://www.finactservices.com/genesis-of-gst-in-india/ (last visited on Feb 22, 2023).

12 Prateek Jain, "Inverted Duty Structure under GST and how to claim its Refund", Tax Guruhttps://taxguru.in/goods-and-service-tax/inverted-duty-structure-gst-claim-refund.html#:~:text=An%20inverted%20tax%20structure%20simply,being%20sold%20at%205%25%20GST. (last visited on 25th Feb. 2023).

have been into weaving since generations. Majority of them have invested their life in learning the skills. In Indian culture Banarsi saree is considered very pious and pure. Irrespective of the status of family, the majority of Indian mothers give at least one Banarsi Saree in their daughter's wedding trousseau. Before the introduction of GST various indirect taxes were levied by both central and state government respectively on different sectors of the Indian economy but the whole of the power-loom sector of Banaras was tax exempted in the old tax system, though VAT was applicable on the Zari. In July 2017 it was the first time when the Banaras Silk Industry was brought under an Indirect tax regime. The handloom industry was exempted from GST but the finished goods from the powerloom are taxed @5%.[13] The synthetic yarns are taxed @ 12%.[14]

Powerlooms which have a turnover of Rs. 40 lakhs are liable to get registered under GST.[15] Further if a weaver is working as a job worker the minimum turnover for registration is Rs. 20 lakh (as job work is considered as a service).[16] Once a business gets registered under GST it will be liable to file a GST return every month. Powerlooms of the city who fall under the respective limits have to acquire the GSTIN and file the return. Under the old system there were no such formalities needed to be done and therefore the majority of the weavers did not have proper records of the book keeping and accounting.

Though the finished goods of these looms were mostly exempted from indirect tax, the raw material and capital goods used to attract different kinds of indirect taxes back then. These taxes paid by the manufacturer were not allowed to set off in the old regime but under GST the manufacturers are able to claim input tax credit even on the taxes paid on capital goods bought for office use (from a computer to machines). Though cash refunds are not allowed.

In the new scheme cash refunds are also allowed in case of inverted duty credit (Where inputs are taxed at a higher rate then output). Since the rates are the same irrespective of the state of production and consumption, it provides a fair market to the product and uniformity of tax.

**10. The problem faced by the textile Industry of Banaras:-**

There is no doubt that the intention of the new tax regime is to make businesses more transparent and remove the cascading effect[17] that industries used to face due to multiple taxes. Further the multi-stage tax is going to control tax evasion both direct and indirect. The researcher also analyzed that after implementation of GST, the tax collection of the state of Uttar-Pradesh has

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13 List of HSN Code and rate Finder under GST, https://cleartax.in/s/gst-hsn-lookup, (last visited on 25 Feb, 2023).

14 *Ibid.*

15 Central Goods and Service Tax Act, 2017, s. 22 (Act 27 of 2023).

16 *Ibid.*

17 See "A cascade tax inflates the price of a product due to the compounding effects of taxes on top of taxes."

increased. But when the weavers of the city were interviewed they had a different story to tell. For the analysis of the data the weavers were divided into two groups:- organised and unorganised.

**Organised Sector:-** The organised sector has experienced growth and easy market access after the implementation of GST. Further they also suggested that though the tax has increased but overall burden has been transferred to the consumer and they have been benefited by the new reforms. As far as the compliance burden is concerned they suggested that the staff was already there to maintain the accounts now the workload of the account staff has increased but at the same time they are incurring extra cost for filing of GST return every month. One major issue of GST reforms is the blockage of working capital because of inverted duty credit. During the first year of the GST regime, refunds on inverted duty credit to this particular industry were not allowed.[18]

This comes with a lot of cash crunch and blockage of working capital for the power-loom industry. However, in a welcoming move on 26/07/2018, the government heard the demand of the industry and provided for refunds with respect to inverted duty in the textile supply chain.[19] But this circular also puts a restriction where it suggests that:-

> "*Accumulated ITC, lying underutilised for the past period i.e. up to July 2018 shall lapse after the payment of GST for the month of July 2018. This created a huge dilemma for manufacturer*s".

**Illustration:-** Power loom owners indulge in manufacturing of synthetic gray fabric using synthetic yarn as a major raw material which is taxed at 12% whereas the final output i.e. grey is taxed @ 5%. This notification allowed refunds on inverted duty credit. But the same is not allowed in the case of input services taxed at a higher rate. For example: if the output is taxed @5% but a substantial input is a service which is taxed @ 18% . In this case refunds, are not allowed.[20]

This matter reached to the court of law in the case of VKC Footsteps India[21] and the High Court of Gujarat decided that "*ITC in case of input services under inverted duty structure is allowed u/s.54 of the CGST*". Whereas, when the similar matter reached the High Court of Madras, the court held that " *refund is*

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18 Alok Somani, Refunds of IGST in cse of Textile Industry, wide Notification no. 5/2017-Central tax (Rate) dated 28.06.2017, available at https://taxguru.in/goods-and-service-tax/refund-gst-itc-case-textile-industry-inverted-rated-goods.html (last visited on Feb 25, 2023).

19 Wide notification no. 20/2018-Central Tax (Rate) dated 26.07.2018 available at https://taxguru.in/goods-and-service-tax/refund-gst-itc-case-textile-industry-inverted-rated- goods.htm (last visited on Feb. 26, 2023).

20 Central Goods Service Tax Rules 2018, r. 89(5).

21 2020-TIOL-1273-HC-AHM-GST.

*a statutory right and section 54(3) provides for the refunds of inputs only but not on input services and capital goods*".[22]

To clear the confusion created by the conflicting views of High Courts, SLP was filed in the Apex Court by the Union of India against the decision of the High Court of Gujarat and an appeal was filed against the order of Madras High Court by theassessee.[23] The apex court upheld the constitutionality of Section 54(3) and Rule 89(5), which provides for the computation of refund of ITC on account of an inverted duty structure. Further, the court shows concern about the formula provided u/r 89(5) for the calculation of ITC and acknowledges that there are deviations from the prescribed standard in the formula but only because of this irregularity the whole of the Rule cannot be struck down by the court. The Court has given direction to the government to examine the same.

Some experts have commented on the judgement of the Apex Court, they suggested that "this would result in a substantial blockage of input service tax credit for some taxpayers who are eligible for such refunds".[24]

The restriction of refund of ITC on input services from the formula of calculation of refund is certainly not in favour of taxpayers. Various manufacturers who use more input services than the input goods suffer a great loss and problem of blockage of working capital. Outsourcing of manufacturing and finishing is also very common in the powerloom sector. Therefore, the government must look into this and should work out some formula such that some part of ITC on input services can be allowed as refunds since these are the intermediary services required for the manufacturing of goods which are liable to tax under GST. This will be a win-win situation for taxpayers and the government.

**Unorganised Sector:-** The weavers working in unorganised sector are in distress because of new tax regime. They suggested that their sells and profit margin both have reduced drastically after the implementation of GST. Most of them are very small weavers and are running 2-5 looms. They does not even fall under compulsory registration which has put them under a disadvantage (as they will not be able to collect ITC that they have paid while buying the raw material, which makes their good costly when compared to the big industries). Therefore most of the small weavers have got themselves registered under the Act.

So the question arises is when the tax reforms aim right then why the textile industry of Banaras are not happy with its implementation?

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22 *Transtonnelstroy Afcons Joint Venture v. UOI*, (2020-TIOL-1599-HC-MAD-GST).

23 Civil Appeal No. 4810/2021.

24 Gulveen Aulakh, "Refund of input tax credit for input services cannot be claimed: Supreme Court", avaliable at: https://economictimes.indiatimes.com/news/india/refund-of-input-tax-credit-for-input-services-cannot-be-claimed-supreme-court/articleshow/86178983.cms (last visited on November 22, 2021).

To answer this question the researcher takes a study to understand the problem of the weavers and the lacuna of the laws that has affected the silk industry of Banaras negatively.

**10. Analysis:**

The data was divided on the basis of the form of the organization and test has been run to analyze the relationship of GST and the form of organization.

**Chi Square test between form of organization and impact of GST on workers' wages:**

| | Value | df | Asymptotic Significance |
|---|---|---|---|
| Pearson Chi-Square | 1.004 | 1 | .316 |
| Correlation | .141 | 1 | .707 |
| Likelihood Ratio | 1.796 | 1 | .180 |

The result shows that there is no significant association between the form of organization and impact of GST on workers' wages as the significance value (.316) is more than the 0.05.

**Chi Square test between form of organization and Lay off of workers after GST:**

| | Value | df | Asymptotic Significance |
|---|---|---|---|
| Pearson Chi-Square | 2.837 | 1 | .092 |
| Correlation | 1.647 | 1 | .199 |
| Likelihood Ratio | 3.189 | 1 | .074 |

The result also shows that there is no significant association between the form of organization and Lay off of workers after GST as the significance value (.092) is more than the 0.05.

**Chi Square test between form of organization and impact of GST on Profit**

| | Value | df | Asymptotic Significance |
|---|---|---|---|
| Pearson Chi-Square | 7.895 | 1 | .005 |
| Correlation | 5.718 | 1 | .017 |
| Likelihood Ratio | 7.876 | 1 | .005 |

The result shows that there is a significant association between the form of organization and impact of GST on Profit as the significance value (.005) is lower than the 0.05. And it also shows that the unorganized sector affected more than the organized sector.

**Chi Square test between form of organization and impact of GST on Turnover:**

| | Value | df | Asymptotic Significance |
|---|---|---|---|
| Pearson Chi-Square | 9.850 | 1 | .002 |
| Correlation | 7.368 | 1 | .007 |
| Likelihood Ratio | 9.430 | 1 | .002 |

The result also shows that there is a significant association between the form of organization and impact of GST on Turnover as the significance value (.002) is lower than the 0.05. And it also shows that the unorganized sector affected more than the organized sector.

**9. Conclusion:**

The textile sector has a very complex value chain that needs to be understood and the government must consider the problem of inverted duty credit and blockage of working capital. Further the burden of compliance is another issue that attracts immediate attention of the government. In the current system the businesses needs to file two return every month, where the organised units are able to take the compliance burden, it is very difficult for the small weavers to manage the same. Since one of the objectives of GST was to simplify the tax system but so much of documentation and filing of 2 return every month creates unnecessary burden on businesses. Another major issue with the reforms are frequent changes with respect to form, rates etc under the Act as this will only creates chaos and confusion. The GST council shall consider quarterly changes or yearly changes in the law so that confusion can be avoided. Further the government should arrange awareness campaign with respect to positive aspect of the new tax system. For this purpose government can tie up with ICAI, ICSI, NGOs, Local CA association, etc so that a businessmen can avail maximum benefits of the provisions of the Act.

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# Socio-Legal Perspective of Maternity Health of Tribal Women: A Case Study of Budhal, Rajouri

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**Abstract**

*The constitution of India recognized the special state of tribal people – the scheduled tribes and provides safeguards to protect their rights and culture. Since the start of the 11th five year plan, a series of development initiatives have been made by the Government of India to improve and strengthen services in the public health system. Though it has been long seen the tribal people have poor health and unmet needs in the area of health as remained subsumed in rural health care. Their different terrain and environment, different social systems, distinct culture, different health needs have not been addressed appropriately till now. There have been serious efforts in the area of maternal health by providing cash incentives to increase institutional child birth and overall care for mother and child under differ schemes. Unfortunately, the outcome of such efforts has not been satisfactory.*

*This paper is based an exploratory study in ten villages of Budhal, District Rajouri, Jammu. The paper is focused on* ***a):*** *evidences and experiences on present maternity health of tribal women;* ***b):*** *the health care delivery system available for maternity health;* ***c):*** *the darkness of knowledge and information regarding affirmative action / schemes / provisions and support mechanism available to tribal women of research area.*

*The methodology included in-depth interviews with women, traditional healers and formal Health Care providers and outreach workers, observations from the community and Health functionaries & health facilities available in soundings. Group discussions with concerned respondents has also support the qualitative finding of the research. Despite a series of health initiative / intervention / programmes and schemes available to the tribal population still immense difficulties women face due to unmet needs of pregnant women, lack of faith in the system, lack of knowledge and poor implementation of the schemes. There is also darkness of knowledge and information regarding*

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*affirmative action. On the rare occasion when they do attempt access health facilities, but barriers of distance, language, cultural inappropriateness of services, and experiences of gross violations have further compounded their distrust. Hence the study suggests a reexamining of the approach of intervention and efforts to addressing needs of actual maternal health in tribal community. It is also recognized that the re-orientation of maternal health services, to be responsive to the needs of tribal women and cater to their cultural needs.*

**Keywords:** Tribal women, Maternity Health, socio-cultural need, Affirmative Action.

**Introduction**

One of the marked features of tribes is that they are geographical and social isolation from the larger Indian society. Sinha, for example, has viewed tribes as a dimension of little tradition which cannot be adequately understood unless it is seen in relation to the great tradition (Sinha 1958). As against this, Béteille sees tribes more as a matter of remaining outside of state and civilization ((Béteille 1986). But even when tribes have been living outside of state and civilization, they were not outside the influence of the civilization. Hence at this stage of their social and political formation it would not be appropriate to discuss tribes in social exclusion terms in relation to the larger Indian society[1]

There are 705 tribes accounting 8.6 % (over 104 million) of the country's population with distinct social- cultural structures and way of life. The constitution of India recognized the special state of tribal people – the scheduled tribes and provides safeguards to protect their rights and culture. Since the start of the 11th five year plan, a series of development initiatives have been made by the Government of India to improve and strengthen services in the public health system. Though it has been long seen the tribal people have poor health and unmet needs in the area of health as remained subsumed in rural health care. Their different terrain and environment, different social systems, distinct culture, different health needs have not been addressed appropriately till now. There have been serious efforts in the area of maternal health by providing cash incentives to increase institutional child birth and overall care for mother and child under differ schemes. Unfortunately, the outcome of such efforts has not been satisfactory.

Numerous reports show that the tribal population is suffering from lack of infrastructure, dev facilities and services and health and education related problems are high in tribal areas. Tribal people still suffer from inequality in health and health care system as compared to others. Tribal women have limited choices as health systems at ground level are lagging behind and hence the maternal health is at high risk.

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[1] Béteille, André.1986. 'The Concept of Tribe with Special Reference to India', Journal ofEuropean Sociology, 27(2): 297–318.

In view of the health situation of the tribal people, their needs, aspirations and rights, the two ministries of GoI [ Ministry of Health and Family Welfare (MoHFW) and the Ministry of Tribal Affairs (MoTA)] jointly constituted the Expert Committee on Tribal Health (October 2013) under the Chairmanship of Dr Abhay Bang. The committee comprised of prominent academicians, civil society members and policy makers was framed to view tribal people's health status with an objective to improve the appropriateness, access, content, quality and utilization of the health services among the tribal population finally, to suggest interventions, formulate strategic guidelines for states policy makers.[2]

The tribal people of have huge diversity with one commonality that they have poorer health indicators, greater burden of morbidity and mortality and limited access to health care services. Further, due to the absence of data on the health situation of different tribal communities' government programs remain often ad-hoc therefore, a comprehensive picture of tribal health is missing.

This paper is intending to highlight some aspects of the maternal health of tribal women of ten villages of Tehsil Budhal Rajouri. This paper is based an exploratory study in District Rajouri of Jammu. The paper is focused on a): evidences and experiences on present maternity health of tribal women; b): the health care delivery system available for maternity health; c): the darkness of knowledge and information regarding affirmative action / schemes and support mechanism available to tribal women of research areas.

**Review of Literature**

Five thousand year old history of India attracts scholar's attention towards the rich diversity of the country since pre colonial period. The tribal are an ancient segment of population in India. The Indian government identifies communities as scheduled tribes based on a community's "primitive traits, distinctive culture, shyness with the public at large, geographical isolation and social and economic backwardness" (India Ministry of Tribal Affairs 2004). Article 366 (25) of the Constitution of India refers to Scheduled Tribes as those communities who are scheduled in accordance with article 342 of the Constitution which states that only those communities who have been declared as such by the President through an initial public notification or through a subsequent amending act of Parliament will be considered to be Scheduled Tribes.

The essential characteristics, first laid down by the Lokur Committee, for a community to be identified as Scheduled Tribes, are –

- Primitive traits;
- Distinctive culture;
- Shyness of contact with the community at large
- Geographical isolation

[2] Report of the expert committee on tribal health, Tribal Health in India Bridging the Gap and a Road for the future

- Backwardness – social and economic

In 1972 the Tribal Sub Plan strategy was developed by an Expert Committee set up by the Ministry of Education and Social Welfare under the Chairmanship of Prof. S. C. Dube for the rapid socio-economic development of tribal people and was adopted for the first time in the Fifth Five Year Plan.[3]

In order to develop deeper understanding and to ensure the reliability and credibility of the proposed research, a number of articles and studies were considered to review the general view on Tribal Health Tribal women health in particular. It is a fact and a matter of concern that, even after six decades following the independence of our country, the tribal are deprived of basic health care benefits. Since the study deals with inadequate maternity health care system and poor management of its delivery in tribal areas, works, observation and research works from important studies both at national and international level have been considered.

In the present study an attempt has been made to review the available literature on health among tribal women to indicate their existing health status and to identify the gaps to suggest a practical plan of action besides pointing out the debatable issues. "Tribal populations generally have poor health outcomes, often because of a healthcare delivery system that does not cater to their needs".[4]

**Ministry of Tribal Affairs (2007a)** suggests that there is no adequate reach of health care services in tribal areas. "The infant mortality, under-5 child mortality and percentage of children under-weight in respect of Tribes are higher than that of the overall population as well as of other disadvantaged socio economic groups."

**Dimensions of Tribal Health 2000, Das**, cited understaffing of primary healthcare centres, exploitation of migrant laborers, and inadequate supplies of medicines as primary causes of underdevelopment and poor health outcomes. The widespread poverty, illiteracy, malnutrition, absence of safe drinking water and sanitary living conditions, poor maternal and child health services and ineffective coverage of national health and nutritional services have been identified in several studies as possible contributing factors to dismal health conditions prevailing among the tribal population in India. The author focuses on certain factors like infant mortality rate, life expectancy, genetic disorders, sexually transmitted diseases, nutritional status, forest ecology, child health and health care practices which are generally responsible for determining the health status and health behaviour of tribal communities.[5]

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[3] Government of India. Planning Commission. Report of the Steering Committee on Empowering the Scheduled Tribes for the Fifth Five Year Plan (1974 –1979), New Delhi,

[4] National Medicine Journal of India,Vol 18, 2005

[5] Basu, (2000) Dimensions of Tribal Health in India. Health and Population - Perspectives and Issues, 23, 61-70 at

The tribal originally depended on their native herbal medicines for cure of their illnesses. Availing the modern health care system itself is a new life style for them. It is an accepted fact in India that for some diseases like jaundice even an urbanite resorts to herbal cure. Therefore it is not surprising that tribal have evolved some successful cures out of their own ecosystem / biosphere. Use of herbal medicine in their day-to-day life is an inherent part of the tribal life.

According to Singh (2001), tribal areas are inaccessible. High immunization rates among tribal children may be achieved through targeting illiterate mothers in inaccessible areas. These first-contact primary interventions, in turn, may also lessen the increasing rates of youth mortality seen among tribal.[6]

Maternal and child health care practices were found to be largely neglected in various tribal groups, namely, Baster tribal groups, Kutia Kondhs of Orissa, Santals, Jaunsaris, Kharias, etc. Expectant mothers to a large extent were not inoculated against tetanus. From the inception of pregnancy to its termination, women consumed no specific nutritious diet. On the other hand, some pregnant tribal women.[7]

An epidemiological survey of tribal villages in southern Bihar revealed that there is no health care facility in tribal areas and noted that a lack of health awareness in the area remained the primary obstacle towards improved community health (Friedman et al. 2002).

A study on tribal women suggests that health of tribal women cannot be ignored. It becomes important because the problems of tribal women differ from one particular area to another, owing to their geographical location, historical background and the processes of social change (Chauhan et al. 1990).[7]

A survey on delivery of health care services in poor areas suggested that public health care services for the poor often involve a lot of non-financial costs such as waiting time, lack of access and inadequate facilities such as hospital beds, equipment and medicines **(Economic Survey 2006-2007**

The **methodology** included in-depth interviews with women of 10 villages of Tehsil Budhal 57 Kms away from district headquarters Rajouri, traditional healers and formal Health Care providers and outreach workers, observations from the community and Health functionaries & health facilities available in soundings. Group discussions with concerned respondents has also support the qualitative finding of the research. Despite a series of health initiative / intervention / programmes and schemes available to the tribal population still immense difficulties women face due to lack of faith in system,

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http://medind.nic.in/hab/t00/i2/habt00i2p61.pdf

6 Singh (2001) immunization status of children in BIMARU states, the journal of Pediatrics 68,(6) 495-500

7 Chauhan, Abha (1990). Tribal women and social change in India. A.C. Brothers, Etawah

lack of knowledge and poor implementation of the schemes. There is darkness of knowledge and information regarding affirmative action.

Major themes and findings:

**Maternal health, Child mortality and other child health indicators:**

The early marriage, early childbirth, low BMI among adolescent girl less than and high incidence of anemia between15 - 40 age group are known critical reasons for high maternal mortality. The fertility age is longer among women in tribal population. Tribal women are more likely to bear a child by age of 16 years, and usually have more than six children. Their behavior towards pregnancy is quite casual and normal process of life.

It was found that maternal health services provided by the government are often not in tune with the health beliefs and practices of the tribal people. Despite they have to spend their life in psychological insecurity of living in unprotected environments. They are relaxed with their tradition mechanisms to address their requirement. The same behavior they follow in birthing of child. Child birth weight was found less than 2.0 kg however, the early breast feeding was found best among tribal.

**Family welfare, Nutrition and Mental health**

The rapid urbanization, environmental changes and changing life style has further deteriorated the health conditions in terms of Hypertension, mental illness and genetic disorder of the research population. It was found the tribal pregnant and lactating women of research population were not taking the required or recommended food. Therefore, such undernourishment of mother and child leads to the risk proven pregnancies.

The low BMI, anemia and underweight is also result of poor nutrition intake. The deceased food intake and intake of various nutrients like calories, proteins and vitamins is due to the seasonal food scarcity in the research area.

Contraceptive use among the research population was found very low. Malnutrition and communicable diseases like malaria, anemia, tuberculosis and skin infection was found high. Maternal malnutrition was found notably high therefore they mostly suffer from anemia.

**Health care seeking and Infrastructure**

The peculiar feature of tribal of Jammu and Kashmir is that the population is widely spread therefore, with respect to the research population the front line workers and number of ASHAs is low and the public health systems suffer from problems of acceptability. The good number of ASHA is a very appropriate, feasible and effective way of bridging some of the health care gap. It is also reflected from the field that there a need of ANM which may help the women at door step. The delivery is conducted in the home compound with a close family member as an attendant called Dai, in a surrounding familiar to the woman. One of the women said "we don't want to go outside and other male member shouldn't touch us." The process of delivery is said to be 'impure' and so delivery takes place outside the house.

The infrastructure of health is improved to great but it was found in the research areas that the access to the health service becomes difficult as the roads are poor and restricted, lack of adequate equipment, language and social barriers, waiting time at health centers and poverty also add to problems of access.

The huge gap in human resource in health centers is attributed to a feeling of social and professional isolation, poor working conditions & environment in the government health institutions.

**Health culture and Health literature health planning**

It was found that like in other tribal communities, in Tehsil Budhal also, tribal communities have a wealth of folklore related to health. They collect a variety of leaves, fruits, seeds, and nuts, with medicinal value and use it for treatment. They also consider traditional healers act as the medium between man, nature and the supernatural entity, providing spiritual security to their communities. On the one hand, the influence of traditional faith healers is becoming more limited. On the other, the lack of acceptance in the modern health care system continues to keep the tribal people away from the public health facilities. Awareness about and acceptability of the Indian Systems of Medicine (like Ayurveda and Unani) is also low.

Further, it was also observed that maternal women are away from scientific knowledge about the causation and symptoms of the disease (nutrition, micro-organisms- infections) or the ways to prevention (safe drinking water, sanitation, personal hygiene and immunization etc) and treatment part. Awareness about the good health practice was found poor. The major finding was that they have no or low awareness about the existing schemes/ policies programmes of Government. Since they are the well not aware about the purpose of the welfare programmes therefore, the challenges are unknown.

The huge gap in human resource in health centers is attributed to a feeling of social and professional isolation, poor working conditions & environment in the government health institutions.

**Constitutional Safeguard and Implementation of Law and Schemes**

Article 42, legislations *[Factories Act of 1948, Employees State Insurance Act of 1948, Maternity Benefit Act of 1965, Mines Act of 1952, The Central Civil Service Rules of 1972, Beedi and Cigar Workers (Conditions of Employment) Act of 1966]*, Section 14, 52, 46 and law *[The Medical Termination of Pregnancy Act, 2021 provides for the requirement of opinion of one registered medical practitioner for termination of pregnancy upto twenty weeks of gestation]* are in place to benefit expecting mothers.

The government schemes Janani Shuraksha Yojana (JSY) *[to enable women especially from the vulnerable sections of society to access institutional delivery and thereby effect reductions in maternal and neonatal mortality]*, Janani Shishu Suraksha Karyakaram (JSSK) *[provides for free service guarantees at public health*

*Centers to expecting mothers]* and Reproductive and Child Health regarding maternity health is grossly inadequate and poorly implemented. The state government introduced the LADLI BETI (2015) scheme, to address the decline of female sex ratio and to ensure that mothers access a range of maternal and child health services. The ANC convergence remains poor among tribal women. Convergence of post-natal care also remains poor. No doubt tribal women benefitted by JSY but still the institution delivery is low due to the distance, lack of transport unfriendly attitude of the health workers, language and lack of trust in a culturally alien system. Despite the high rates of infant and child mortality in tribal areas and the heavy burden of diseases, full immunization coverage remains consistently low among the ST population in Budhal, Rajouri. As late as 2011, nearly 146,000 under-five tribal child deaths occurred annually in India, *(estimated on the basis of NFHS and the Census2011).*

Coverage of the ANCs was found poor. Under different schemes and norms tribal and hilly areas should have one Health Sub-centre (HSC) per 3000 population, one Primary Health Center (PHC) per 20,000 populations, and a Community Health Centre (CHC) per 80,000 populations. The area is mountainous therefore the habitations are few and far in between hence access to the health care remains difficult. CHCs are in huge deficit and huge gap in availability of functionaries. The positions with respect to availability of doctors are absent. In few villages there was severe neglect of maternal child health services. In many of these groups, expectant mothers do not even receive a single dose of tetanus toxoid vaccination.

During observing at VHND once a month, almost all women reported receiving iron folic acid (IFA) tablets, having an abdominal check-up, hemoglobin tested and blood pressure recorded, it was observed that hardly women come on their own. Then few women came and none of the women were explained what was being done and with what purpose. Women therefore did not understand why the tests were being done during antenatal check-ups. Although IFA tablets were provided to almost every woman, not a single woman had taken the full course. "It could harm the fetus and so we do not consider it proper to take any medicines. One of the pregnant woman reported, she further added that she had experienced nausea and vomiting after taking the IFA tablet and so she discontinued it.

Their socio-cultural needs within the schemes remained unattended. Despite the national health policy of 2002 suggest tailoring implementation of strategies according to the need in tribal areas. It was revealed by the respondents that the government schemes do exist in the area but due to the scattered population and geographical terrain there is a complete lack of monitoring and evaluation to gauge the impact. Thus the implementation of the health programmes is one of the key challenges in the planning process. It was also found that policy measures towards improvement in tribal health have often been limited. India's Reproductive, Maternal, Neonatal, Child and Adolescent Health Policy 2013, also recognizes the importance of addressing

inequities. Under NRHM schemes aggregate improvements are seen in maternal health indicators throughout country.

**Conclusion**

Almost seven decades after Independence and despite many constitutional provisions, the schemes and programmes to safeguard interests of expecting mothers, the health of tribal women continues to suffer. Yet the Public health system including infrastructure, human resources and governance in the tribal areas remain inadequate resulting into the poorest status of tribal health in general and tribal women in particular. The reason behind is the near absence of community participation in the planning, design and implementation of health care services. Health literacy is pill and best vaccine as a massive health education to women is cost effective intervention. Therefore re-structuring and re-strengthening of health care system in accordance with the needs and aspiration of tribal communities is required.

- The health care deliver and content must be appropriate to the needs and culture of each tribe and its locality.
- Enormous capacity building efforts are required to enable and acclimatize the health functionaries in order to perform better to the indigenous societies.
- Accessibility [physical and cultural] is of paramount importance therefore to ensure access [health care with human resource, outreach services and mobile care, knowledge and skill transfer technology] for all is to be made available.
- There is a need to ensure the designed health care should offer flexibility. The local specificifications need to be part of dynamic design to allow the changes as per the requirements.
- The target should be safe deliveries not just institutional deliveries. It is imperative to train the traditional attendants and dais and equip with the birth TBA (Trained Birth Attended) kit. Keeping socio-cultural aspect of tribal in to consideration, the tribal women should be given the choice to decide whether they want to give birth at home or in institution. Both should be safe.
- Accommodation near health centers is requiring with emergency transport facility for maternal complications. A comprehensive plan for women health with culturally sensitive fertility and infertility care is required
- The awareness about the schemes / programmes are required at ground level to the beneficiaries
- Health education and knowledge dissemination plan. Massive health literacy drives for continuous health education for women is required.

Maternal & child health problems and mal-nutrition are prevailing due to the difficult geographical terrain, distance and poor socio-economic

determinants (education, income, housing connectivity water and sanitation). Inappropriate health care services with low access and coverage, low number of health functionaries and poor monitoring and evaluation are adding further vulnerabilities to the maternal health. Professional are not willing to serve in tribal areas resulting to the severe constraints in the health human resource. However over the decades, significant improvements have taken place which is reflecting fact sheets, IMR, CMR, NFHS I, II, III, IV and RSoC and other surveys by NNMB.

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# WTO Panel and Appellate Body Interpretations of the Sps Agreement: Reflections and Considerations

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**Abstract**

*The Appellate Body and the Panels are responsible for clarification of rules and provisions as provided in the SPS Agreement. The jurisprudence developed by means of interpretation has far reaching impact on the SPS policies of the member countries. With respect to the initial burden of proof, the Appellate Body has held that the obligation is on the complaining party to prove non confinement with the SPS Agreement and later on this burden shifts to another party to oppose the claimed disparity. The SPS Agreement is silent as far as standard of review is concerned but has emphasized that the standard of proof for determination as well as for legal narration of facts has been pronounced by Article 11 of the DSU. With respect to the admissibility of scientific information, the Appellate Body has held that such information should be sought from individual experts. The Appellate Body and the Panels has also interpreted the principles of harmonization, risk assessment, precautionary principle and transparency. The narrower interpretation of special and differential treatment provisions meant for the developing countries has restricted their effective implementation.*

**Keywords:** SPS Agreement, Burden of Proof, Standard of Review, Harmonization, Risk Assessment, Precautionary Principle, Transparency, Developing Countries

## I Introduction

In the international economic relations after the rights and obligations of the sovereign states has been defined then the question arises how these rights and obligations can be enforced.[1] Secondly, the increase in volume of the international trade has led to increase in disputes and the reason for this is that larger the number of goods and services traded together with increase in

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[1] Surendra Bhandari, *The World Trade Organization and Developing Countries* 121 (Deep and Deep Publications, New Delhi, 1998).

participation of the member countries has enhanced chances of disputes.[2] The other reason for such increase is absence of an efficient mechanism for settlement of trade disputes.[3] It is thus advisable to resort to settlement mechanism which is suitable at a given situation resulting in efficient settlement of trade disputes at international level.[4]

The World Trade Organization (WTO) has provided an effective procedure for settlement of the disputes. The Dispute Settlement Body (DSB) is responsible for the settlement of disputes and the procedure for settlement of such disputes is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU has played a significant role in the multilateral trading system as it has maintained a balance between free trade on one hand and having an enforcement mechanism to protect commitments of free trade on the other.[5] The other significance is that this procedure has included strict time limits that have contributed to its effective functioning.[6] Under the WTO framework a dispute arises if a particular member country contests that another member has violated rules governing international trade and has not performed its obligations.[7] Initially, the dispute settlement procedure begins with consultation and if consultation is not fruitful then a party can request for formation of the Panel.[8] The Appellate Body is responsible to hear appeals against the decision of the Panel.[9] In addition to the settlement of disputes, the Appellate Body and the Panels are also responsible for clarification and interpretation of rules governing the member countries with respect to their rights and obligations as mentioned under the Agreements.[10]

As provided in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), a member country can initiate a dispute before the Dispute Settlement Body, if it apprehends that any other member has violated the provisions of the Agreement or has nullified the benefits accruing to it.[11] The dispute settlement is generally sought on the

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2 Information and Media Relations Division of the World Trade Organization, *10 Benefits of the WTO Trading System* 3 (WTO Publications, 2007).

3 M. S. Rawat, *International Trade and Commerce* 18-21 (Deep and Deep Publications, New Delhi, 1985).

4 Rajesh Sharma, "China – India FTA: Is the Future Imperfect?" 48 *J. World Trade* 4, 739 (2014).

5 T. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* 39 (Cameron May, London, 2006).

6 Leo D. Arcy, Carole Murray, *et.al*., *Schmitthoff's Export Trade The Law and Practice of International Trade* 507 (Sweet & Maxwell, London, 2000).

7 P. K. Vasudeva, *World Trade Organization Implication for Indian Economy* 100-101 (Pearson Education, Singapore, 2005).

8 DSU, Articles 4, 6 to 16.

9 DSU, Article 17.

10 Veronique Fraser, "Horizontal Mechanism Proposal for the Resolution of Non-tariff Barrier Disputes at the WTO: An Analysis" 15 *J. World Trade* 4, 1062 (2012).

11 SPS Agreement, Article 11.1.

following grounds under the SPS Agreement (a) regulatory measures should not restrict trade; (b) regulatory measures should be based on scientific principles; (c) regulatory measures should be based on risk assessment; (d) regulatory measures should avoid arbitrary distinctions; and (e) if a particular measure is not based on international standards, then there should be a justifiable scientific reason for such deviation.[12] The participation of the Appellate Body and the Panels is significant as they have to constantly find a balance between the member countries legitimate right to impose sanitary and phytosanitary measures while simultaneously ensuring that such measures do not construct impediments to trade. Secondly, issues of sovereignty, local quarantine, socio-cultural values of consumers and the status of scientific evidence has made these measures as one of the most disputed areas of the multilateral trading system.[13] The obligations which are hinged on scientific principles in the SPS Agreement are to be interpreted in such a manner so that these principles can reduce protectionism and strengthen principles governing growth of free trade throughout the world.[14] The jurisprudence established by the Appellate Body and the Panels involving the provisions of the SPS Agreement is mandatory on the member countries.

## II Dispute Settlement Procedure Relevant to SPS Disputes

The objective of the GATT Article XX is to maintain balance between the protectionist measures imposed by the member countries and their right to maintain regulatory autonomy. The exception under Article XX (b) deals with issues involving public health and animal and plant health protection.[15] The Appellate Body has provided for narrower exposition of the Article XX(b) and in order to restrict trade restrictive environmental, health and safety regulations. In the text of Article XX (b) there is no reference of science but the interpretation has insisted that the measure which is to be claimed as 'necessary' under Article XX (b) should be established on the basis of scientific evidence.[16] The sanitary and phytosanitary disputes can be resolved through following modes (a) bilateral efforts; (b) the Committee on Sanitary and Phytosanitary Measures (SPS Committee); (c) dispute settlement of the Office International des Epizooties (OIE) and the International Plant Protection Convention (IPPC); and (d) the WTO dispute settlement system.[17] The issues which are relevant for the Appellate Body and Panels for the settlement of SPS

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12 Todd Weiler, "International Regulatory Reform Obligations" 34 *J. World Trade* 3, 77 (2000).

13 Gavin Goh and Andreas R. Ziegler, "A Real World Where People Live and Work and Die Australian SPS Measures after the WTO Appellate Body's Decision in the Hormone Case" 32 *J. World Trade* 5, 27 (1998).

14 Sanu M. K., "The SPS Agreement, Risk Assessment and Science: In Troubled Waters?" 50 *Indian Journal of International Law* 3, 402 (2010).

15 The GATT Article XX (b).

16 Panel Report on *US-Gasoline,* WT/DS2/R, para. 6.20.

17 SPS Agreement, Article 11.3.

disputes include (a) burden of proof; (b) role of expert review groups and scientific experts; and (c) standard of review.

**Burden of Proof**

The objective of burden of proof in the adversarial system is to answer following questions that are based on proof and confirmation of facts (a) which party has to convince the decision maker on a specific issue after mentioning evidence ; and (b) what standard of proof satisfies the decision makers regarding the issue. Furthermore, there are two rules under the DSU which are relevant to the burden of proof. One is that all violations which are claimed has to be proved by the complaining party and other one is that the respondent intending to invoke general exceptions of the GATT Article XX(b) has obligation to show the necessary conditions as provided under exceptions are confirmed with.[18]

The Appellate Body in *EC-Hormones* dispute has held that the complaining party has obligation to show clearly a *prima facie* case of inconsistency regarding a specific provision of the SPS Agreement. After *prima facie* case is proved then the burden shifts on the defending party to contradict the claimed inconsistency. With reference to the term *'prima facie'* the Appellate Body held that a *prima facie* case is one in which the absence of effectual contradiction on the part of the defending party, requires the panel as a matter of law to decide in favour of the complaining party presenting the *prima facie* case.[19]

The member country imposing a sanitary and phytosanitary standard that is inconsistent or higher than the international standard bears a rebuttal burden to prove that its level of SPS protection is compatible with norms as provided under Article 5 of the SPS Agreement. The Appellate Body in *EC-Hormones* dispute has held that Article 3.3 provides a self-determining option to the member countries and the contradicting member country has a burden to establish requirements provided under this provision with respect to sanitary and phytosanitary measures not confirming to international standards are not met.

**Role of the Scientific Experts and the Expert Review Groups**

The member countries have to ensure that SPS measures should be in accordance to scientific principles and supported with adequate sufficient scientific evidence.[20] There arises a need of expert views during dispute settlement that requires factual findings on sanitary and phytosanitary measures.[21] The Panel can obtain information from experts, establish technical

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18 J. Headen and S. Sabune, "Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence" Issue Paper no 9 *International Centre for Trade and Sustainable Development (ICTSD)* 6 (2009).

19 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, paras 98, 104.

20 SPS Agreement, Article 2.2, except as permitted under Article 5.7.

21 Marc Iynedjian, "The Case of Incorporating Scientists and Technicians into World Trade Organization Panels" 42 *J. World Trade* 2, 284 (2008).

expert group and can consult international standard setting organizations.[22] The Panel can also obtain an advisory report in writing from the expert review groups.[23] The Appellate Body in *EC-Hormones* dispute held that opinion regarding any scientific matter should be taken from individual scientists rather than from expert review groups.[24] With respect to the procedure as provided under the DSU (Appendix 4), the Appellate Body stated that it can be applied only in situation where expert review group has been established and the Panels while consulting parties in the dispute can follow provisional rules in order to request opinion of sole scientific experts.[25]

**Standard of Review**

The application of standard of review arises when the Panel reviews a domestic administrative resolution and also when the Appellate Body reviews the decision of the Panel. The issue involved is the quantum of concern, the Appellate Body should provide to the findings of the Panel and interpretations of law as opposed to facts.[26]

With respect to the standard of review to be applied by the Panel, the Appellate Body in *EC-Hormones* dispute was of this view that the standard of review should neither be a *de novo* review nor a 'total deference' but essentially should be based on Article 11 of the DSU which provides for 'objective assessment of facts'.[27] However, there is some uncertainty regarding the line which should be drawn amidst a *de novo* review and one based on objective assessment of the facts. Under a *de novo* review, the Panel is entitled to impose its view on relevant scientific evidence and it is not clear that it would not be able to do this under 'objective assessment of the facts'.[28]

The SPS Agreement is silent with respect to the standard of review but the DSU under Article 11 has provided that this standard is essential for both determination of facts and for legal delineation of such facts.

## III Substantive Rights and Obligations

The scope, applicability and interpretation of the rights and responsibilities of the member countries as provided under the SPS Agreement have a great significance and relevance.

**Definition of Sanitary and Phytosanitary Measures**

The SPS Agreement under Article 1.2 has provided that the definition of SPS measures as provided under Annex A Item 1 is applicable to the provisions of the Agreement. According to the above definition it is clear that the question involving whether a particular standard is SPS measure depends

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22 SPS Agreement, Article 11.2.

23 DSU, Article 13.2 and Appendix 4.

24 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, para. 149.

25 *Id*. at 148.

26 *Supra* note 18 at 5.

27 Appellate Body Report on *EC-Hormones,* WT/DS48/AB/R, para. 117.

28 Fiona Macmillan, *The WTO and the Environment* 158 (Sweet and Maxwell, London, 2001).

on its purpose. If purpose specifies achieving the goals as mentioned in Annex A Item 1, then it is a sanitary and phytosanitary measure within the SPS Agreement. The Panel is of this view that to determine whether a particular standard is sanitary or phytosanitary in nature due consideration need to be given to the nature, purpose and legal form of the measure in question.[29]

The applicability of the SPS Agreement to a particular standard depends on following conditions (a) it should satisfy the requirements provided for sanitary or phytosanitary measure as provided in the Agreement; and (b) it should directly or indirectly affect international trade.[30] The term 'affecting' as provided under Article 1.1 of the SPS Agreement is obscure. The Panel in *EC-Approval and Marketing of Biotech Products* dispute has held that it is not mandatory that should be a demonstration in order to determine the question whether a particular SPS measure actually effects international trade.[31]

**Rights and Obligations**

The member countries should adopt sanitary and phytosanitary measures on the condition that such measures should comply with substantive and procedural requirements as provided in the Agreement itself.[32] These requirements include that a particular sanitary and phytosanitary measure should confirm to applicable scientific fundamentals and supported with adequate scientific evidence.[33] The exception to this rule is the possibility of provisionally adopting SPS measures based on available pertinent information.[34]

The requirement of scientific principles and evidence mirrors the objective of the SPS Agreement for achieving a balance between promoting international trade and enhancing sanitary and phytosanitary protection. In *Japan-Agricultural Products II* dispute, the Appellate Body addressed the question of 'sufficient scientific evidence' and stated that for a SPS measure to be based on sufficient scientific evidence there must be an objective connection between a particular SPS standard and scientific evidence. Such objective connection has to be set on a case by case basis, thereby including following factors (a) specific circumstances of the case; (b) elements of the measure at issue; and (c) character and extent of the scientific evidence.[35] The preferred means to comply with the conditions set out in Article 2.2 is to satisfy the requirements as provided in Articles 5.1 and 5.2 of the SPS Agreement.[36]

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29 Panel Report on *EC-Approval and Marketing of Biotech Products,* WT/DS291/R WT/DS292/R WT/DS293/R, para. 7.149.

30 Panel Report on *EC-Hormones (Canada),* WT/DS48/R/CAN, para. 8.39.

31 *Id*. at 7.435.

32 SPS Agreement, Articles 2.1, 3.3, 4.1, 5.1, 5.5, 5.6, 6.1 and 10.

33 SPS Agreement, Article 2.2.

34 SPS Agreement, Article 5.7.

35 Appellate Body Report on *Japan Agricultural Products II,* WT/DS76/AB/R, paras 73, 84.

36 Appellate Body Report on *Indian-Measures Concerning the Importation of Agricultural Products*, WT/DS430/AB/R, paras 5.21, 5.24, 5.26.

## IV Precautionary Measures

At the international level precautionary principle was embraced at the United Nations Conference on Environment and Development (UNCED) held at Rio de Janeiro in 1992. It is a statement pertaining to common sense and is effective in balancing competing concerns of the economic development against limited environment resources.[37]

### Definition of Precautionary Principle

Precautionary principle is based on the notion that 'it is better to be safe than sorry'.[38] It is an extensively discussed principle though its definite meaning and content is ambiguous. This ambiguity has rendered it an unsuitable guideline for decision making and has encouraged unrestricted administrative discretion. It has been argued that a more stringent precautionary approach must be applied to the food safety, though there are differences with respect to its scope and application.

### Precautionary Principle under the SPS Agreement

In the SPS Agreement precautionary principle is expressed in a limited form under Article 5.7 of the SPS Agreement. It has provided that the provisional measures can be imposed in the following circumstances (a) when the scientific evidence is inadequate; (b) when the member country has acted on the ground of accessible information; and (c) where the member country has looked for additional information which is necessary for risk assessment in a reasonable period of time.[39] The Appellate Body in *Japan-Apples* dispute has held that the precautionary principle has to satisfy the essential elements as provided in Article 5.7 of the SPS Agreement.[40] The Appellate Body further elaborated that the word 'insufficient' signifies incapacity to perform adequate risk assessment both in quantitative and qualitative terms.[41]

In *Japan-Agricultural Products II* dispute, the Appellate Body has held that Article 5.7 should be subjected to liberal and flexible interpretation.[42] It stated that following conditions has to be satisfied in order to maintain provisional sanitary and phytosanitary measures (a) the SPS measure should be imposed when appropriate scientific information is inadequate; (b) the SPS measure has to be adopted on the basis of relevant information available; (c) the member country should acquire additional information required for a more objective risk assessment; and (d) the member country within a reasonable

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37 James Cameron, "The Precautionary Principle" in Gary Sampson, Bradnee Chambers *et.al.* (eds.), *Trade Environment and the Millennium* 240-241 (United Nations University Press, New York, 1999).

38 J. Adler, "More Sorry than Safe: Assessing the Precautionary Principle and the Proposed International Bio-safety Protocol" 35 *Texas International Law Journal* 173, 195 (2000).

39 SPS Agreement, Article 5.7.

40 Denise Prevost, "What Role for the Precautionary Principle in WTO Law after Japan-Apples" 2 *Journal of Trade and Environment Studies* 4, 13 (2005).

41 Appellate Body Report on *Japan-Apples,* WT/DS245/AB/R, para. 179.

42 Appellate Body Report on *Japan-Agricultural Products II,* WT/DS76/AB/R, para. 80.

period of time should review the measure. All these requirements are cumulative and essential in determining consistency with this provision. In case any of these conditions are absent, then the measure in issue will be considered to be incompatible with requirements of Article 5.7.[43] The Panel is of this view that the member country should adhere to the above four requirements for adopting a provisional measure under Article 5.7. The application of Article 2.2 of the SPS Agreement depends on the circumstances where a measure has adhered to significant but not every requirements of Article 5.7.[44]

The Appellate Body in *EC-Hormones* dispute has stated that under international law the precautionary principle is a subject of debate though it is considered as an important principle of customary international environment law.[45] The development of the jurisprudence with respect to Article 5.7 is still in the preliminary stage.[46] In spite of the fact that the number of binding international instruments has endorsed precautionary principle, a precise definition of this concept is still missing.[47] The member countries have complied with the general principle of law regarding precautionary principle but the Appellate Body and the Panels has not given due effect to this.[48]

## V Harmonization

The SPS Agreement has advocated harmonization by encouraging the member countries to formulate domestic sanitary and phytosanitary measures according to the standards formulated by the international standard setting organizations.[49] The Codex Alimentarius Commission (CODEX) is responsible for food safety standards whereas the International Office of Epizootics (OIE) is responsible for animal health and zoonoses.[50] The bodies functioning under the framework of the International Plant Protection Convention (IPPC) is

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43 *Id*. at 89.

44 Panel Report on *EC-Approval and Marketing of Biotech Products,* WT/DS291/R WT/DS292/R WT/DS293/R, paras 7.2973, 7.2975.

45 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, para. 123.

46 Andrew T. F. Lang, "Provisional Measure under Article 5.7 of the WTO's Agreement on Sanitary and Phytosanitary Measures: Some Criticisms of the Jurisprudence So Far" 42 *J. World Trade* 6, 1104 (2008).

47 Akawat Laowonsiri, "Application of the Precautionary Principle in the SPS Agreement" in A. Bogdandy, R. Wolfrum *et.al.* (eds.), *Max Planck Year Book of United Nations Law* 570 (Koninklijke Brill N. V., Netherlands, 2010).

48 Gabrielle Marcean and Joel P. Trachtmeann, "The Technical Barriers to Trade Agreement, The Sanitary and Phytosanitary Measures Agreement and General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods" 36 *J. World Trade* 5, 848, 849 (2002).

49 Arun Goyal and Noor Mohammad (eds.), *The WTO in the New Millennium* 323 (Academy of Business Studies, New Delhi, 2001). Also refer Filippo Fontanelli, "ISO and CODEX Standards and International Trade Law: What Gets Said is Not What's Heard" 60 *International and Comparative Law Quarterly* 4, 895-932 (2011).

50 SPS Agreement, Annex A, Item 3(a) and 3(b).

responsible for worldwide plant health standards.[51] For those matters which are not covered within these international organizations, the appropriate standards formulated by other international organizations identified by the SPS Committee are applicable.[52]

**Definition of Harmonization**

Harmonization is a procedure of applying uniform sanitary and phytosanitary standards for reducing disguised restrictions on the international trade.[53] The SPS Agreement under Article 3 has advocated use of international standards for formulating and adopting sanitary and phytosanitary measures at domestic level.

The objective of Article 3 is to enhance harmonization and to ensure rights and obligations of the member countries as provided under the Agreement.[54]

The member countries has been given following three autonomous options under Article 3 with respect to harmonization (a) they should establish their sanitary and phytosanitary measures on international standards; (b) they should conform their sanitary and phytosanitary measures to international standards; and (c) they can deviate from international standards.[55] These are equally available alternatives and the burden of proof is on the complaining party to exhibit that above conditions were not confirmed to.[56] The initial two categories of measures are permissible in which only the first class of measure acquire the benefit of presumption as provided under Article 3.2 whereas the third category is permitted only in the case where it complies with the principle of risk assessment as provided in Article 5 of the SPS Agreement.

The Appellate Body in *EC-Hormones* dispute held that the phrase 'based on' under Article 3.1 is a moderate standard than 'conform to', as provided under Article 3.2. Further, it also repudiated that Article 3.3 provides that Articles 3.1, 3.2 and 3.3 are to be applied together each directing a separate condition.[57]

**Measures based on International Standards**

The Appellate Body in *EC-Hormones* dispute has held that a particular thing is said to be based on another if it is established that the former is formulated over or endorsed by the latter. The Appellate Body further stated that under Article 3.1, the member country can establish sanitary and

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51 SPS Agreement, Annex A, Item 3(c).

52 SPS Agreement, Annex A, Item 3(d).

53 SPS Agreement, Annex A, Item 2.

54 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, para. 177.

55 SPS Agreement, Articles 3.

56 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, para. 104.

57 Simon Lester, Bryan Mercurio, *et.al., World Trade Law Text Materials and Commentary* 561 (Hart Publishing, Oregon, 2008).

phytosanitay measures that are based on existing international standards and can adopt specific but not all elements of particular international standard.[58]

**Measures Conforming to International Standards**

Under Article 3.2 of the SPS Agreement there is a presumption of consistency involving sanitary and phytosanitary measure which has conformed to international standards expressing that such measures should be considered deemed to be necessary for SPS protection and consistent with the SPS Agreement.[59] The essential requirement for sanitary and phytosanitary measure to conform to international standard is that such a measure ought to include international standard completely, thereby, converting it into a domestic one. The essential requirement is that the domestic measures should be similar to an international standard in structure as well as in extent of protection it provides.

With respect to the presumption of consistency, the Appellate Body in *EC-Hormones* dispute has enumerated that the presumption is a requirement for the member countries to ensure that their sanitary and phytosanitary measures conform to international standards and the member countries not inclined to such obligation need not to be imposed with special burden of proof.[60]

**Measures Providing Higher Extent of Protection**

The SPS Agreement has provided that the member countries have right to maintain sanitary and phytosanitary measures which results in higher extent of SPS protection as provided by international standards, if there is a scientific basis or when a particular member country has determined protection suitable in accordance with the conditions as provided in the Article 5 of the Agreement.[61] The significance of this provision is that it provides a member country a right to select its individual level of sanitary and phytosanitary protection. The Appellate Body in the *EC–Hormones* dispute has enumerated that the right of the member countries to set up its own extent of protection is a free standing right and not an exception with respect to a general obligation under Article 3.1.[62]

The Appellate Body in *Japan-Agricultural Products II* dispute has held that Article 3.3 has provided 'scientific justification' for only sanitary and phytosanitary measures, in case there is interrelationship between the measure under consideration and the accessible scientific information.[63] Several stakeholders, particularly the exporters have frequently expressed dissatisfaction with respect to varying sanitary and phytosanitary measures

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58 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/RWT/DS48/AB/R, para. 171.

59 SPS Agreement, Article 3.2.

60 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/RWT/DS48/AB/R, paras 102, 170.

61 SPS Agreement, Article 3.3.

62 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/RWT/DS48/AB/R, para. 172.

63 Appellate Body Report on *Japan-Agricultural Products II,* WT/DS76/AB/R, para. 79.

which have subsequently increased the operational costs of trade. The application of the principle of harmonization to promote international trade has not been as exhaustive due to the unclear expression of Article 3 which has created considerable confusion.[64]

## VI Risk Assessment

The SPS Agreement has provided due recognition to risk assessment and has advocated scientific basis to such assessment.[65] It has provided that the member countries should impose sanitary and phytosanitary standards based on an assessment of risk to human, animal and plant health or life and such assessment should be based on procedures as developed by the international standard setting organizations.[66]

### Definition of Risk Assessment

The risk assessment is a scientific evaluation of potential entities which can result in adverse effects on health of an individual.[67] The risk assessment is defined as an evaluation of possibility of entry, creation or spread of any pest or disease within the territory of the importing member country as per sanitary or phytosanitary measures which might be applicable, and of the attached potential biological and economic outcomes. It has also been defined as an evaluation of unfavourable risk to human or animal health arising due to the presence of additives, contaminants, toxins or disease-causing organisms in their food and feed stuffs.[68] The above provision has itself provided two different definitions of risk assessment, one is whether there is a 'risk caused by disease or pest' and the second is 'risk associated with food/feed'.[69]

The Appellate Body in *Australia-Salmon* dispute has advocated following three aspects for assessing risk caused by disease or pests (a) to identify diseases whose initiation and spread is to be averted by a member country inside its territory in addition to possible biological and economic consequences related with the entry or spread of such diseases; (b) to assess the possibility of entry or spread of these diseases and associated biological and economic consequences; and (c) to assess the possibility of introduction or spread of these diseases in consonance with sanitary and phytosanitary

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64 Terence P. Stewart and David S. Johanson, "The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics" in S. Henson, John Wilson *et.al.* (eds.), *The WTO and Technical Barriers to Trade* 354 (Edward Elgar Publishing Limited, Cheltenham, 2005).

65 Marsha A. Echols, *Food Safety and the WTO: The Interplay of Culture, Science and Technology* 77 (Kluwer Law International, Hague, 2001).

66 S. R. Myneni, *The World Trade Organization* 103 (Asia Law House, Hyderabad, 2005).

67 Definition of risk assessment as provided under the Food Safety and Standards Authority of India, available at: https://www.fssai.gov.in/cms/Risk-Assessment.php (visited on December 23, 2022).

68 SPS Agreement, Annex A, Item 4.

69 Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measure: A Commentary* 17, 20 (Oxford University Press, Oxford, 2009).

measure which might be applied.[70] These above three tests were also validated by the Appellate Body and the Panel in *Japan-Agricultural Products II* and in *Australia-Salmon (Article 21.5-Canada)* disputes.[71] The SPS Agreement under Article 5 has defined the commitments of the member countries with respect to risk assessment.[72]

**Assessment of Risk to be based on Scientific Principles**

Under Article 5.1 of the SPS Agreement, the member country should confirm that sanitary or phytosanitary measures should be established on an assessment related to the conditions of risk considering risk assessment techniques evolved by the relevant international organizations. The Appellate Body in *EC-Hormones* dispute has stated that the expression 'based on' attributes to a certain objective connection between sanitary and phytosanitary measure and risk assessment. It was further deliberated by the Appellate Body that Article 5.1 let off a member country to perform its own risk assessment but can establish its sanitary and phytosanitary measures on additional evaluations carried out by the another member country and relevant international standard setting organizations.[73]

**Elements to be considered during Assessment of Risk**

The SPS Agreement under Article 5.2 has provided that following requirements should be considered during risk assessment (a) scientific information available; (b) admissible processes and production methods; (c) suitable inspection, sampling and testing methods; (d) widespread presence of particular diseases or pests; (e) presence of pest and disease free areas; (f) appropriate ecological and environmental circumstances; and (g) quarantine or any other treatment. The obligation is on the member countries to consider factors enlisted in Article 5.2 while carrying out an assessment of risk required as per requirements mentioned in Article 5.1.[74]

While discussing the objective functions as provided under Article 5.2, the Appellate Body in *EC-Hormones* dispute held that 'relevant processes and production methods' and 'relevant inspection, sampling and testing methods' are not responsive to examination which is based on laboratory methods. The risk which has to be assessed under Article 5.1 is not only a risk perceptible in a scientific laboratory but also comprises of risk to human communities like the

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70 Appellate Body Report on *Australia-Salmon,* WT/DS18/AB/R, para. 121.

71 Appellate Body Report on *Japan-Agricultural Products II,* WT/DS76/AB/R, para. 112 and Panel Report on *Australia-Salmon (Article 21.5-Canada),* WT/DS18/RW, para. 7.41.

72 Mike J. Nunn, "The Analytical Foundation of Quarantine Risk Analysis" in Kym Anderson, Cheryl Mc Rae *et.al.* (eds.), *The Economics of Quarantine and SPS Agreement* 40 (University of Adelaide Press, Adelaide, 2012).

73 Appellate Body Report on *EC-Hormones,* WT/DS48/AB/R WT/DS26/AB/R, para. 190.

74 *Supra* note 65 at 87.

authentic potential for unfavourable consequences on human health.[75] In *EC-Hormones* dispute, the Appellate Body enumerated that the assessment of risk is inclusive of risks emerging from difficulties of regulation or adherence with definite requirements.[76]

This interpretation of the Appellate Body is unclear as it has blurred out the line between assessment and management of risk. Assessment of risk involves technical and scientific analysis whereas management of risk means including economic and social value judgements.

**Economic Elements to be considered during Assessment of Risk**

As provided under the SPS Agreement, the member countries should consider economic aspects while evaluating appropriate level of protection. These admissible economic factors include (a) possible damages involving loss of production or sales in case of introduction, establishment or spread of pest or disease; (b) costs incurred with respect to control and elimination in the territory of the importing member country; and (c) corresponding cost effectiveness of optional approaches to restrict risks.[77]

The applicability of this provision is restricted to concerns of animal and plant health and not relevant to human health. The prevalence of unspecified factors does not validate withdrawal from the stipulations of Articles 5.1, 5.2 and 5.3 when read in combination with paragraph 4 of Annex A of the SPS Agreement.[78]

**Reducing Negative Effects on Trade**

Under Article 5.4 of the SPS Agreement, obligation is on the member countries to consider the objective of reducing negative effects on trade within the course of determining the suitable level of sanitary or phytosanitary protection. The Panel in *EC-Hormones* dispute has held that the requirements under Article 5.4 is consultative in character and is not obligatory on the member countries.[79]

**Achieving Consistency in Protection against Risk**

The SPS Agreement under Article 5.5 has provided that each member country should keep away from arbitrary or unjustified distinctions, when these distinctions cause unfair restrictions on the international trade. Such obligation is related to the objectives of acquiring steadiness in the extent of risk and aims at avoiding situations where the member country has imposed a

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75 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, para. 187.

76 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, para. 205.

77 SPS Agreement, Article 5.3.

78 Appellate Body Report on *Australia-Salmon,* WT/DS18/AB/R, para. 130. In order to conciliate the purpose of Article 5.6 of the SPS Agreement, the SPS measures cannot be declared to be restricting trade unless there is an availability of reasonable measures which are based on technical and economic conditions and result in appropriate sanitary and phytosanitary protection.

79 Panel Reports on *EC-Hormones (Canada),* WT/DS48/R/CAN, para. 8.169.

higher level of sanitary and phytosanitary protection for a particular situation or product whereas at the same time it is compliant in respect of another situation or product, even though both are equally dangerous. This provision has targeted two categories of SPS measures (a) one that are discriminatory in nature; and (b) one that are responsible for introducing feigned restrictions on the international trade.[80]

The sanitary and phytosanitary measures that incorporate arbitrary constraints in extent to protection are discriminatory and contribute to disguised restriction on the international trade. The provision of Article 5.5 need to be looked together with Article 2.3 of the SPS Agreement and violation of requirements of Article 5.5 entails violation of Article 2.3.[81] In *EC-Hormones* dispute, the Appellate Body held that for initiating breach of Article 5.5, the complaining party has to satisfy following three elements (a) the member country enforcing the measure should have imposed its appropriate extent of sanitary protection against risks to human health with respect to various different situations; (b) these levels of protection has shown arbitrariness and unjust variation while applying to different situations; and (c) these arbitrary and unjust variations has resulted in disguised restrictions on the international trade. The above requirements are collective in nature and important part is that all has to be present in order to demonstrate violation of Article 5.5, particularly, both second and third elements must be proved.[82] The Appellate Body in *Australia-Salmon* dispute has stated that difference in the magnitude of protection is a caution that the implementing measure is discriminatory.[83] The objective under Article 5.5 is to obtain steadiness in the implementation of the concept of appropriate level of sanitary or phytosanitary protection.[84]

**SPS Measures should not Restrict Trade**

The SPS Agreement obliges the member countries to confirm that sanitary and phytoanitary measures should not be more trade restrictive than required in order to accomplish necessary level of sanitary and phytosanitary protection considering technical and economic feasibilities.[85] There must be a substitute measure available that is significantly less restrictive to trade in order to prove violation of the above provision.[86]

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80 Veijo A. Heiskanen, "The Regulatory Philosophy of International Trade Law" 38 *J. World Trade* 1, 23 (2004).

81 Appellate Body Report on *Australia-Salmon,* WT/DS18/AB/R, para. 252.

82 Appellate Body Report on *EC-Hormones,* WT/DS26/AB/R WT/DS48/AB/R, paras 214, 215.

83 Appellate Body Report on *Australia-Salmon,* paras 140, 161.

84 Raj Bhala, *International Trade Law Interdisciplinary and Practice* 1437 (LexisNexis, Newark, 2008).

85 SPS Agreement, Article 5.6.

86 Steve Charnovitz, "Improving the Agreement on Sanitary and Phytosanitary Standards" in Gary P. Sampson, W. Bradnee Chambers *et.al.* (eds.), *Trade, Environment, and the Millennium* 181-182 (United Nations University Press, New York, 1999).

Further, if there is a sanitary and phytosanitary standard which (a) is rationally available considering technical and economic feasibility; (b) achieves appropriate level of sanitary and phytosanitary protection of the member country; and (c) is remarkably less restrictive to trade than sanitary and phytosanitary measure in issue, then that amounts to violation of provisions as provided under Article 5.6.[87] These elements are cumulative in nature and in contemplation to show deviation with the requirements of Article 5.6, collectively all has to be fulfilled and in absence of any of these elements the measure at issue would be compatible with Article 5.6 of the SPS Agreement.[88]

## VII Relevant Issues

The Appellate Body and the Panels has interpreted the provisions governing transparency, control and approval procedures, developing countries and correlation of various provisions of the SPS Agreement with that of the GATT.

### Transparency

The word 'transparency' has not been defined in the SPS Agreement. The obligation is on the member countries to inform about any modifications with respect to sanitary and phytosanitary measures and furnish information in confirming to Annex B.[89] An explanatory foot note to Annex B Item 1 indicates that the term 'SPS regulations' also includes laws, ordinances and decrees which are applicable. The scope of applicability of publication condition is not at all restricted to laws, decrees or ordinances only but also includes instruments which are identical to the instruments which are referred in the foot note.

Annex B Item 3 has provided that every member country has obligation to establish one enquiry point which is responsible to provide information to all the interested member countries. The issue was whether Annex B Item 3 (c) lays down a substantive obligation on the member countries to recognize or evaluate their 'appropriate level of protection' consequent to another member country's demand. In *Australia-Salmon* dispute, the Panel has held that Annex B Item 3 (c) has not provided for an essential obligation on the member countries for identifying and quantifying 'appropriate level of protection' nevertheless has imposed a procedural commitment in order to answer reasonable questions of the interested member countries.[90]

### Control, Inspection & Approval Procedure

The SPS Agreement under Article 8 and Annex C has provided for provisions regulating control, inspection and approval procedures. Annex C Item 1 (a) has provided for the member countries to undertake and complete the procedures without unnecessary delay. The Panel in *EC-Marketing and*

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87 Sara P. Quintillan, "Free Trade, Public Health Protection and Consumer Information in the European and WTO Context Hormone Treated Beef and Genetically Modified Organisms" 33 *Journal of World Trade* 6, 172 (1999).

88 Appellate Body Report on *Australia-Salmon,* WT/DS18/AB/R, para. 194.

89 SPS Agreement, Article 7.

90 Panel Report on *Australia-Salmon,* WT/DS18/R, para. 7.15.

*Approval of Biotech Products* dispute has explicated the term 'without undue delay' and has interpreted that the term requires approval procedures managed and achieved without unreasonable loss of time.[91]

**Provisions Specific to the Developing Countries**

The objective of the special and differential treatment principles is to provide for an equitable international economic order.[92] The requirement of the SPS Agreement is that the member countries need to consider special requirements of the developing countries while imposing sanitary and phytosanitary measures.[93] The Panel in *EC-Approval and Marketing of Biotech Products* dispute has considered it not mandatory for the developed countries to provide special and differential treatment to their developing counterparts as the phrase 'take account of' has not prescribed a definite outcome to be accomplished.[94] The Panel provided that the complaining member country has burden to establish that a particular developed country member has not given due recognition to the needs and requirements of the developing countries.[95] This non-mandatory nature of special and differential treatment provision has restricted their effective implementation.

The obligation as specified under Article 2.2 of the SPS Agreement has been associated with that of Articles 5.1 and 5.2 of the Agreement. The Appellate Body in *India-Agricultural Products* dispute stated that the preferred means of complying with Article 2.2 is to follow the course of conducting assessment of risk as per requirements mentioned under Articles 5.1 and 5.2 of the SPS Agreement.[96] This interpretation is un-amiable with respect to the interest of the developing countries as these countries are required to invest their deficient resources in conducting risk assessment and in presenting scientific evidence, hampering their ability to deal with any sanitary or phytosanitary emergency.

**Relation of the SPS Agreement and GATT Article XX (b)**

The Panel in *EC-Hormones* dispute has held that the application of the provisions of the SPS Agreement should satisfy following two requirements (a) the measure at dispute should be a sanitary or phytosanitary measure; and (b) the measure at dispute has capacity to affect international trade directly or indirectly.[97] The provisions of the SPS Agreement have imposed substantial obligations which are supplementary to the conditions necessary with respect to the applicability of the GATT Article XX (b). The objective of the SPS

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91 Panel Report on *EC-Approval and Marketing of Biotech Products,* WT/DS291/R WT/DS292/R WT/DS293/R, para. 7.1495.

92 Michael Hart, "The WTO and the Political Economy of Globalization" 31 *J. World Trade* 5, 84 (1997).

93 SPS Agreement, Article 10.

94 Panel Report on *EC-Approval and Marketing of Biotech Products,* WT/DS291/R WT/DS292/R, paras 7.1620, 7.1621.

95 *Id*. at 7.1623, 7.1624.

96 Appellate Body Report on *India – Measures Concerning the Importation of Agricultural Products,* WT/DS430/AB/R, paras 5.21, 5.24, 5.26.

97 Panel Report on *EC-Hormones (Canada),* WT/DS48/R/CAN, para. 8.39.

Agreement is to harmonize sanitary and phytosanitary measures between the member countries whereas Article XX (b) of the GATT is validate and defend violation of obligation under the GATT.[98]

## VIII Conclusion

The disputes involving provisions of the SPS Agreement tend to surge with increase in the volume of global trade and pressure from various stakeholders to address demands for food safety and protection of flora and fauna. The strict interpretation and restricted explanation of provisions of the SPS Agreement has made the goods manufactured in the developing countries inaccessible to the markets of the developed member countries. Moreover, the reason for such inaccessibility is the discretion given to the member countries to adopt standards which are more restrictive than the international standards.

The Appellate Body in *Japan-Agricultural Products II* dispute has restricted universality of the precautionary principle which has resulted limited application of this principle in the WTO framework. In *EC-Approval and Marketing of Biotech Products* dispute, the Panel restricted the mandatory nature of special and differential treatment provisions which has created hurdles in their effective implementation. The decision of the Appellate Body pronounced in *India-Agricultural Products* dispute has a wide ranging effect on the developing countries prospects as the obligation specified under Article 2.2 has been combined with that of Articles 5.1 and 5.2 of the SPS Agreement. The Panel has ruled that the scope and applicability of the norms of the SPS Agreement can be expanded covering the genetically modified plants by virtue of definition of 'pests' as given in Annex A, hence, measures imposed to regulate genetically modified plants can be termed as sanitary and phytosanitary measures.

The Committee on Sanitary and Phytosanitary Measures (SPS Committee) together with other relevant international standard setting organizations are other governance arrangements under the SPS Agreement for regulating sanitary and phytosanitary concerns among the member member countries. The Appellate Body and the Panels should accommodate CODEX, OIE and IPPC as these organizations will provide necessary scientific and technical inputs which in turn will enhance the possibilities of arriving at effective decisions.

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98 *Id.* at 8.41.

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# Multilevel Marketing in India: Need for a Comprehensive Legal Framework

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**Abstract**

*This paper discusses the relevance of multilevel marketing in the modern economy and articulates the need for its comprehensive legal regulation to protect the interest of consumers. Multi-level marketing (MLM) commonly referred to as network marketing has been adopted by direct selling companies since 1920s and is still in demand and common among the public due to its execution in the sale of multiple number of quality products that is available in the market today. Among the several direct selling companies in India, Amway India is one of the major notable global direct selling companies with wide range of quality products. Though, this marketing strategy is considered legitimate all over the globe and carried out like any other typical business pattern, still it undergoes a major shortcoming regarding its legality and functioning. Recently, many scams and frauds involved in such business model are increasing through several illegal schemes like pyramid frauds, money circulation schemes, ponzi schemes, etc. Certain specific legal frameworks have been enacted by the government to combat these scams that are getting common in such business model. Despite all the laws regulating these illegal schemes, there is no such MLM oriented legislations to regulate these companies and the MLM business model. The implementation of new Consumer Protection (Direct Selling) Rules, 2021 with special features in addition to the Direct Selling Guidelines, 2016 can to a certain extent effectively regulate the direct selling entities and the direct sellers engaged in network marketing. Yet in 2022 when the Enforcement Directorate attached assets worth crores of rupees from Amway accusing it of running a multilevel marketing scam, the question came to limelight whether the existing laws are ineffective to regulate these scams?*

**Keywords:** Multilevel marketing, consumer protection, Direct selling Rules

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## INTRODUCTION

Multi-level marketing is a very popular business model that is performed through a sales network created on behalf of the company. Hence, it is also termed as network marketing. The independent distributors or participants of this network recommend the goods and services of the companyto the consumers and earn commissions resulting from their actual sale. That is, this business model follows a marketing method wherein the distributors contribute to sale by recommending direct purchase from the company and the person whose ID is provided in course of making an order is rewarded for the recommendation when the actual sale is made. Here, the rewards to the distributors are multi-level, thereby, paving way even to the passive participants in the network to earn income.[1]Hence, Multi-Level Marketing is an incorporation of the advantages of money chain and direct selling, thus, making it a legal marketing model as it integrates the selling of products through money chain scheme. MLM can be viewed in two different perspectives. On one hand, the company view it as one of the possible ways to introduce their products in the market without bearing any sales promotion costs and not necessarily have a fixed retail location. On the other hand, it is a more suitable business model for the independent distributors as it does not involve any risk similar to that of a typical business activity and requires no capital investment.

## HISTORICAL BACKGROUND OF MLM

Network Marketing is a post-World War II phenomenon and was introduced by many companies such as Amway, Shaklee, and Mary Kay to increase their sales.[2] The evolution of this marketing model can be traced back to the early 1920s when companies of United States adopted a growing sales technique besides direct sellingas it required direct distribution of goods to consumers without a retail location. Gradually, the concept of multi-level marketingplans (MLM plans) was introduced in the mid-twentieth century that enabled consumers to get direct access to the company's products through thedistributors involved in such network marketing.This model was first established by William Casselberry and Lee Mytinger in consultation with Dr. Carl Rehnborg who is known to be the founder of California Vitamin Company. From 1934, the company established by the two partners took over the distribution of the products of California Vitamin Company which was later named as 'Nutrilite'.In 1959, two partners working in Nutrilite left the company as a result of its crisis in 1950 and initiated their own company Amway with the same marketing model. They started production of own goods and obtained patents over thousands of their products. The first product launched by the Company was an organic detergent that was natural unlike all

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1 Prof. Bogdan Gregor & Aron-Axel Wadlewski, "Multi Level Marketing as A Business Model" 1(7) *Marketing Of Scientific And Research Organizations*4, 5 (2013).

2 Ashok Kumar & Dr. Akshay Kumar Satsangi, "A Study of Multi-Level Marketing Business with Specific Reference to Amway India" 9 *International Research Journal of Management Science and Technology* 101, 102 (2018).

the others available in the market.[3]It's product lines also include other varieties of home care items, personal care products, jewellery, electronics, dietary supplements, water purifiers, air purifiers, insurance and Cosmetics.After a few years the Amway Corporation took over Nutrilite as a result of its rapid growth in the market. Subsequently, a new company named 'Shaklee' was formed by the distributors who were engaged in Nutrilite. The success of Nutrilite and the C&M marketing plan (Casselberry &Mytinger) motivated other related companies to carry out a similar marketing system. Subsequently, MLM plans became popularly accepted in the global market and now, this network model is a popular commercial business followed worldwide to enhance sales, thereby earning a good reputation for the company and its product quality.

**MARKETING MODEL IN AMWAY INDIA**

India was regardedas one of the core regions for multi-level marketing techniques with the introduction of direct selling companiesand witnessed a significant growth in its sales with major global competitors that entered India post liberalization.Amway is one of the first notable global direct selling companies to be set up in India in the year 1995 post similar structured companies like Avon, Oriflame and Tupperware in 1996.The Company was owned under a partnership byRichar De Vos and Jay Van Andel, and it sells various health-related and personal care products. Despite all these global marketers, Modicare was one of the first few Indian companies to adopt this marketing model.

Amway started its marketing in India in 1998 and is one of the oldest and most popular network marketing companies in India. However, Amway is not an Indian origin company as the name suggests, but, an American brand that uses the MLM marketing model to sell its products in the Indian market. Amway India is now one of the largest FMCG (Fast Moving Consumer Goods) companies in India besidesEmami, P&G, and GilletteIndia. It has warehouses in several cities in India including modern digitised warehouses which helped for its tremendous growth during covid lockdown challenges.[4]

**LEGALITY OF MLM COMPANIES IN INDIA WITH SPECIAL REFERENCE TO AMWAY INDIA.**

In India, there was no specific legislation to regulate multilevel marketing business model. However, the legality of these business operations is challenged due to the incorporation of various illegal schemes such as money circulation scheme and ponzi scheme. The scams resulting from such schemesare regulated in India under Prize Chits & Money Circulation Schemes (Banning) Act 1978, andPrevention of Money Laundering Act 2002, respectively. The Central Government later on passed a newConsumer

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3 Prof. Bogdan Gregor & Aron-Axel Wadlewski, "Multi Level Marketing As A Business Model" 1(7) *Marketing Of Scientific And Research Organizations*4, 8-10 (2013).

4 Muhammed Juman B.K & Dr. J Christopher, "A Study On Direct Selling Business (Amway India Ltd) In Kerala: A Case Study Of Calicut District Of Kerala" 2 *International Research Journal for Engineering and Technology* 1489, 1494 (2015).

Protection (Direct Selling) Rules 2021 to regulate the multi-level marketing operations including its digitised technology adopted by the direct selling companies and to remedy the aggrieved through its grievance redressal set up.

**PRIZE CHITS & MONEY CIRCULATION SCHEMES (BANNING) ACT, 1978**

The PCMCS Act, 1978 was introduced with the main objective to control and prevent the practice of prize chits and money circulation schemes. Regardless of its objective, the applicability of the Act is a question as it does not determine or differentiate between a legitimate multilevel marketing model and an illegal pyramid structure. Section 2(c) of Act define money circulation schemes:[5]

> *'Any scheme for making of quick or easy income, or valuable thing as a consideration for a promise to pay money, on the happening or non-happening of any event any applicable to the enrolment of members into the scheme.'*

The punishment for any person engaging in the offence of money circulation scheme is prescribed under Section 4 of the Act with an imprisonment up to 3 years, or with fine, or with both.[6] Though, the Act does not expressly mention about multilevel marketing or pyramid schemes, the Supreme Court of India in a few cases had the opportunity to interpret the laws regarding multilevel marketing scams and pyramid frauds.

In *State of West Bengal vs. Swapan Kumar Guha,*[7] Chief Justice YV Chandrachud, established two preconditions for invoking the provisions of this Act: (1) Firstly, it must be proved that offender is engaged in a scheme for making quick or easy money, and (2) secondly, the possibility of making quick or easy money depend upon the happening or non- happening of an event applicable to the enrolment of members into that scheme. The Supreme Court further pointed out that whosoever makes quick or easy money shall be liable to be punished with fine or imprisonment is an arbitrary provision as the act of merely making quick or easy money can only be achieved through engaging in such illegal schemes. This is because a person can legally earn quick income by his talents, skill and knowledge without any illegal means. For instance, a lawyer, a doctor, an engineer, an architect, a chartered accountant and other similar professionals can earn quick money by the use of their talents, expertise knowledge and experience acquired over years. Hence, the Court in this case clarified that 'money circulation scheme' means any scheme, (1) for making quick or easy money, or (2)for obtaining money or valuable thing as the consideration for a promise to pay money, on the happening or non-happening of any contingency applicable to the enrolment of members into the scheme. The Court, therefore, held that '*the deposited money on a promise of repayinga*

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5 The Prize Chits And Money Circulation Schemes (Banning) Act, 1978 (Act 43 of 1978),s. 2(c).

6 The Prize Chits And Money Circulation Schemes (Banning) Act, 1978 (Act 43 of 1978), s. 4.

7 *State of West Bengal vs. Swapan Kumar Guha*,1982 AIR 949, 1982 SCR (3) 121.

*higher rate of return does not constitute money circulation scheme as provided under Section 2(c) of the Act*.' The same was held by the Supreme Court of India in *Kuriachan Chacko case*[8] wherein the Court held that '*for the activity to constitute the offence of money circulation, it must be for making quick or easy money depending upon the happening or non-happening of an event applicable to the enrolment of members into the scheme*.'In 2005, the Madras High Court in *Apple FMCG Marketing (Pvt.) Ltd. v. Union of India*, [9]while deciding on the validity of the 'network marketing scheme' in the context of the PCMCS Act clarified that '*any scheme entered intoby the person on a promise to make quick or easy income by getting admitted as its members is 'money circulation scheme'. Hence, admitting new members into the scheme and progressing the network chain in the name of selling goods to new distributors; and a commission to the passive distributors without any effort from their part is nothing but getting quick or easy money. Therefore, such schemes dishonestly carried out through network marketing definitely falls u/S. 2(c) of the Act, 1978 thereby constituting the offence of 'money circulation scheme'*. Hence, the High Court held that multilevel marketing violates the PCMCS Act. The court based its conclusion on the following reasoning: (a) first, the scheme creates a chain of customers and the long and continuous chain ensure huge sum of quick or easy money. (b) the person does not receive the adequate value of the money he pays; (c) third, service charges are collected from these customers post the sale of goods.

With respect to the companies engaging in these schemes, as per Section 6of the Act, every person in relation to the company who is responsible for such illegal business practices shall be held liable and punished. Though the Act has been enacted with the primary objective to ban such practices; it is an exception on the State government to follow and carry out these schemes. Thus, provisions to penaliseit as a cognisable offence and to forfeit the promotion of such schemes in newspapers and publications will not be effective as it exempt the state from being subjected to the law. This weakens the PCMCS Act, 1978 by disrupting the main objective for which it was enacted.

Amway business model faced a major business challenge during 2012–2014 when they were charged for illegal pyramid scheme and fraudulent money circulation which led to the arrest of its top managerial officers. Regarding the legality of the Company's business model, it is not merely the inclusion of pyramid scheme, but also carried out with the main objective of selling its products to retail customers. The validity of a recruited distributor remains for a term of 12 months and should be renewed after this period. Amway marketing model earn returns in three ways—first, through the retail profit margin, which is the difference between the price at which a distributor purchase the product from the company and the amount for which the same is sold to the consumers; second, through the commission that every distributor in the company network can earn on the proportion of products purchased during a month; and third, through the commission that may be earned by the

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8 *Kuriachan Chacko v. State of Kerala*, 2009 (Supp.) AIR(SC) 893.

9 *Apple FMCG Marketing (Pvt.) Ltd. v. Union of India*, 2005 (2) MLJ 526.

distributor depending on the sales he was able to complete. With regard to the allegations and charges that were framed against Amway India, complaints were filed in several states such as Andhra Pradesh, Delhi, and Kerala. The complaints included that the company was engaging in illegal money circulation scheme and inducing the gullible public to join the scheme. The company was mainly charged under Sections 420, 385 read with 120(B) of IPC and also Sections 3, 4, 5 and 6 read with 2(c) of PCMCS Act 1978.The notice issued by the Andhra Government restricting the publishing of any products of the company was upheld by the High Court of Andhra Pradesh and the Supreme Court of India in *Amway India Enterprises vs. UoI*.[10]The Supreme Court in Swapan Kumar Guha decided that '*all the essential ingredients to constitute money circulation must be satisfied: - (a) making of quick or easy money, and (b) the possibility of earning quick or easy money depending on an event or non-happening of an event applicable to the admission of members into the scheme*'. The Court held the decision on the following reasons - First, the whole scheme must be structured in such a way as to encourage the entry of new members to earn more quick/easy money. Second, a considerable amount that is received by the passive participants is based on the event or contingency applicable to the admission of subsequent members into the scheme. Hence, the court noted that, on satisfaction of the above ingredients, Amway would automatically get a business of Rs. 1080 crores per annum without any service to its distributors regardless of whether they sell the products or not. In addition, the court further observed that the major portion of income that is earned by the company is from the distributors who have to mandatorily pay a subscription fee of Rs. 995/- p.a. to continue as a valid distributor and remain in the scheme. Thus, from the above observations, the Court concluded that Amway is earning quick/easy money from its distributors by making false promises on high pay which is truly possible only on the entry of new members into the scheme. Although Amway has been frequently subject to investigation as having a pyramid like structure in the guise of selling products, the Federal Trade Commission has ruled the company's sales and marketing plan as not to be an illegal pyramid scheme or any related scams.[11]

Recently, the Enforcement Directorate team from Kochi raided the houses and bank of five accused working and operating in the Karuvannur cooperative bank, as a probe into multi crore scam being committed by these bank officials. The irregularities of the bank summed up to a total of Rs. 300 crores as per the crime branch reports. But, the official disclosure of information from the bank estimates the amount to be Rs. 104 crores. Fraud has been committed by the bank in both the areas concerning loan and chit funds.

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10 *Amway India Enterprises v. UOI*, (2003) 182 CTR Ker 297.

11 R. Rajesh Babu & Pushkar Anand, "Legal Aspects of Multilevel Marketing in India: Negotiating Through Murky Waters"*Research Gate*, 359 369-371 (2015).

In the instant issue, the High Court ordered the bank to stop all payments to its depositors until the government comes up with a prioritising list.[12]

**PREVENTION OF MONEY LAUNDERING ACT, 2002**

The circulation of illegal funds or black money is still prevailing in India due to which the Union Government announced demonetisation of 500 and 1000 rupees notes on 8th December, 2016 which brought in new denominations of 2000 rupees note and replaced the designs in every currency notes.[13] This initiative was mainly taken by the Central Government in order to prevent black money and counterfeit coins. Yet, the circulation of illegal funds is present in connection with serving multiple illegal activities like drug dealing, kidnapping, smuggling, extortion and similar crimes. In order to mislead these unaccounted sums as legitimate and usable, they undergo a process called money laundering.The process comprises of three stages, namely – placement, layering, and integration.Placement is the first stage wherein the illegal money is placed or moved from its originating source to the legitimate source through financial institutions. This is a vulnerable stage where the illegal money holders holding large sums of such money dishonestly inject it into the financial system of the economy as any other legal money is used which makes it difficult for the regulatory authorities to find the truth and the illegal sources from which it is obtained.The second stage is layering which divides the said money into several small lawful transactions such as property purchase, business investments, etc even across countries as it becomes a difficult phase for the government to determine the legality of the money. And, finally in the integration stage the illegal money is completely introduced in the economy as legal and obtained from legitimate source.[14]This offence has a huge impact in the economy as it weakens the financial sector, promoting crimes and corruption, and hindering the economic growth.Hence, the Prevention of Money Laundering Act 2002 was initiated in the Parliament and came into force on 1st July 2005. The main objective of the Act is to control money laundering, and confer power on the Enforcement Directorate toconduct investigation and seize any properties so acquired from the offence of money laundering.The offence of money laundering is defined under Section 3 of the Act as:[15]

> *"Anybody who directly or indirectly takes part in or support another connected with the proceeds of crime and presenting it as a cleanuntainted property is deemed to have committed the offence of money laundering."*

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12 "Kerala: ED raids 5 accused in CPI-M controlled Cooperative Bank scam"*Business Standard*, Published on Aug 10, 2022 and accessed on Aug. 10, 2022.

13 "In an attempt to curb black money, PM Narendra Modi declares Rs 500, 1000 notes to be invalid" *The Economic Times*, Published on Nov09, 2016 and accessed on Aug 31, 2022.

14 Friedrich Schneider & Ursula Niederlander, "Money Laundering: Some Facts" *Research Gate*1, 6-8 (2010).

15 Prevention Of Money Laundering Act, 2002 (Act 15 of 2000)s. 3.

Proceeds of crime mentioned in the definition of money laundering is defined u/S. 2(u) of the Act as any property obtained as a result of criminal activity.[16]Hence, A person who obtains property or money from an illegal activity and projecting it as untainted is punishable for the offence of money laundering with rigorous imprisonment for a termof three to seven years and shall also be liable to fineup to five lakh rupees as prescribed u/S. 4 of the Act.[17]

In *M/s. Rashmi Metaliks Limited &Anr. v. Enforcement Directorate &Ors.*,[18]six accounts belonging to the petitioner was seized by ED under Sections 17(1) and 17(1-A) of the Act, 2002. The petitioner, M/s. Rashmi Metaliks Limited &Anr. thereafter, seeked for stay against the freezing order of ED in the high court of Calcutta. Here, it was noted by the Court that the power conferred on the investigating agency to conduct search and seizure must ensure that the subject matter under investigation satisfy the essential features that constitute the offence of money laundering and proceeds of crime.Hence, in order to invoke Section 17(1) of the Act, the authorised officer who is entitled to search and seizure must have received an information regarding the same and a reason to believe that the offender:(1) has in any took part in the commission of money laundering, (2) thereafter, acquired the possession of any proceeds of crime from the offence. The court further observed that before invoking this Section, the authorised officer must come to an informed finding that the exact location of the proceeds of crime or related documents connected with money laundering cannot be discovered, and the possibility of the offender to restrain the authorised officers to enter the place and carry out their investigation. Accordingly, the Calcutta High Court held that the orders of ED to freeze the petitioner's bank accounts do not satisfactorily meet these provisions under the Act, 2002 and hence, ordered stay.[19]

Jacqueline Fernandez is lately charged as an accused against a money laundering case involving conman Sukesh Chandrashekhar. Chandrasekhar who illegally obtained money worth Rs. 200 crores from the commission of extortion transferred the proceeds of the crime in the name of his wife, Leena Poulose and actors, Jacqueline Fernandez and Nora Fatehi as gift.In the matter, the ED as part of its investigation, conducted searchu/S. 17 of PMLAct, 2002 in several places connected with Sukesh Chandrashekar and his partners, and seized 16 expensive vehicles under section that were either in the name of his wife's firms or in the

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16 Prevention Of Money Laundering Act, 2002 (Act 15 of 2000) s. 2(u).

17 Prevention Of Money Laundering Act, 2002 (Act 15 of 2000) s. 4.

18 *M/s. Rashmi Metaliks Limited &Anr. v. Enforcement Directorate &Ors*, WPA 17454 of 2022.

19 M/s. Rashmi Metaliks Limited &Anr. v. Enforcement Directorate &Ors, *available at*https://livelaw.in/news-updates/ed-power-under-pml-act-quartet-test-search-seize-proceeds-of-crime-money-laundering-calcutta-high-court-206301 (last visited on Aug 31, 2022).

name of third parties, Jacqueline Fernandez and Noora Fatehi. It was hence found that Sukesh has intentionally created an illegal structure for layering and transferring proceeds of crime and thus, actively participated in the process of money laundering.[20]

The Act also provides for the establishment of an adjudicating authority[21] to receive complaints, issue notice, frame reports if the proceeds of crime are a result of money laundering and confiscate the property[22], if required.

However, besides all these provisions,one of the major lacunas in the Act is that, it initiates proceedings only on receiving complaints regarding the illegal practices rather than preventing any such frauds prior to its attempts misleading the gullible public.

**CONSUMER PROTECTION (DIRECT SELLING) RULES, 2021**

The first initiative by Central Government to govern direct selling entities was effectedthrough the implementation of Direct Selling Guidelines, 2016. Thereafter, as per the powers conferred under Sections 94 and 101(2) (zg) of the Consumer Protection Act 2019, the Central Government declared the Consumer Protection (Direct Selling) Rules, 2021to monitor and keep control over the direct selling companies. The applicability of the Rule, 2021 extends to all goods and services involved in direct selling, all models of direct selling, all direct selling companies offering products and services to consumers in India,and also to direct selling entities which is not established in India, but supplies products or services to consumers in India.[23]Unlike the 2016 guidelines, the Rules 2021 was more effective in regulating direct selling companies and also consumer friendly. The Rules necessarily requires every direct selling company to establish a grievance redressal set up for its consumersand appoint a grievance redressal officer to accept any consumer complaint within 48 working hours of receiving it and resort the complaint normally within one month of receiving. Any delay in accepting the same, the officer should make a written communication to the complainant stating the reason for the delay. The new Consumer Protection (Consumer Disputes Redressal Commissions) Amendment Rules, 2022[24] prescribes new fees to be paid by the consumer for invoking the redressal mechanisms based on the value of goods and consideration paid for the services. Sub-rule 2 of Rule 7 in the 2020 Rules is substituted by the new Rules, 2022. Another major notable

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20 "Rs 200-cr money-laundering case: Conman Sukesh Chandrashekhar says he was in a relationship with Jacqueline Fernandez, denies extortion charges" *The Economic Times*, published on Jan 06, 2022 and accessed on Aug 31, 2022.

21 Prevention Of Money Laundering Act, 2002 (Act 15 of 2000) s. 6.

22 Prevention Of Money Laundering Act, 2002 (Act 15 of 2000) s. 8.

23 Consumer protection Rules 2021, India, *available at* https://www.lexology.com/library/detail.aspx?g=e9cec8de-7337-4823-992d-5d92031a33a9, (last visited on Aug 31, 2022).

24 Consumer Protection (Consumer Disputes Redressal Commissions) Amendment Rules, 2022.

feature of the Consumer Protection (Direct Selling) Rules, 2021 is that it is not only applicable to the direct selling entities, but also the direct sellers involved in the networkutilising the online platforms for their sale.

Lately, in 2022 the Enforcement Directorate who is the investigating agent temporarily attached Amway's assets worth Rs. 757 crores in total followed by an investigation launched in 2011. The assets seized consisted of immovable and movable properties worth Rs 411.8 crore and bank balances of Rs 345.9 crores from 36 different accounts possessed by company. The Investigating Agency of ED has reached this decision as a probe into the alleged pyramid fraud and multi-level marketing scam engaged in by Amway India. The conclusions arrived by the agency are – (a) firstly, the direct selling company is running a pyramid fraud in guise of selling products, (b) secondly, the company is selling its products at a price higher than the alternative products made available by reputed manufacturers in the open market. (c) thirdly, Amway collected 27,562 crores from its business operations between 2002-03 and 2021-22, and a commission of 7,588 has been paid to its distributors from this amount. Hence, the credulous public are induced by the company to spent exorbitant price on the products not to use them, but to earn more money easily and quickly. Amway contended that they operate in continuous compliance with Consumer Protection Act (Direct Selling) Rules, 2021 as passed by the Government of India on December, 2021 to regulate multi-level marketing.[25]

**MULTI LEVEL MARKETING v. PYRAMID SCHEME**

Multi-level marketing involves distribution of goods and services through a network created with interested people to engage in the activity. It is also known as network marketing as the main objective of this business model is to sell the company products to the desired customers regardless of any retail stores. The income or money earned from this type of marketing is the commission received by the members in the network when the actual sale is effected.The distributors in this model are incorporated in a pyramid pattern in such a way that the downline members who are not actively involved in the future sale will gain from the sales effected from upline members in the network. Hence, multi-level marketing is an incorporation of direct selling and pyramid schemeand even passive participants in this network will gain from the sale of the company products.[26]

However, pyramid sales are an illegal sales structure that is often misguided as multi-level marketing. This type of sales is adopted to earn income without engaging in the active sales of any products. Unlike multi-level marketing, pyramid scheme does not involve the sale of any product to earn easy or quick income. Rather, investors are continuously recruited to earn

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25 "ED attaches Rs 757 crore worth of assets of Amway India" *The Economic Times*, Published on April 19, 2022 and accessed on Aug 31, 2022.

26 How Can Multi Level Marketing Model be Successful, *available at*https://www.mpdpartners.ch/wp-content/uploads/2019/05/multi-level-marketing.pdf (last visited on Aug 31, 2022).

money, and only a few investors who are at the very top of the pyramid will earn income from the downline investors.[27] Here, even though the investors positioned at the top of the pyramid does not put in any effort, they earn money easily from the money invested by the downline members in the scheme. One of the major challenges of this scheme is that the new investors have a high chance of losing their money invested when there is a high risk of the unavailability of any members to be further included in the scheme in future.

Regarding the validity of the two, pyramid schemes are illegal for its inability to distribute a product or provide service. Unlike multi-level marketing, pyramid scheme does not involve marketing of products to earn easy or quick income. But, the only way adopted to earn easy or quick money through pyramid scheme is to recruit interested investors into the scheme. Hence, the major difference that makes pyramid schemes illegal and network marketing legal is the absence of product or service and commission in network marketing is rewarded to the participants depending on their contribution to actual sale of company products. Whereas, the members in pyramid scheme earn money easily without any effort from the downline members who newly invest in the scheme.

**PONZI SCHEME**

Ponzi scheme has derived its name from Charles Ponzi, who in 1919 misled investors causing them to believe that they could earn a 50 percent return from their investments within a short period of 90 days. Ponzi was convicted and jailed in 1920 forcommitting the financial fraud. One of the most notable Ponzi schemes is committed by Bernard Madoff in American history, involving a huge sum of $65 billion by committing fraud on thousands of investors. He was arrested in 2008, found guilty for 11 federal offences in 2009, and was subsequently sentenced to 150 years in prison.

Ponzi scheme is an investment fraud wherein the ponzi perpetrator gives false promises to the investors guaranteeing higher rate of returns on their respective investments. Here, the trust and confidence of the investors are obtained through paying their promised returns from the principal amount received from the subsequent investors. The pyramid structure so formed in this investment scheme falls apart when the promisor escapes with all of the proceeds, or when sufficient number of new investors are not available to continue the structure further with subsequent investments. This scheme is illegal as it is carried out with the lone motive of earning easy income without involving the sale of any products.

According to Bhattacharya, he sets down three major components to constitute a Ponzi scheme: the ponzi perpetrator (1) persuades the common gullible people about an investment idea, (2) promises a high rate of return,

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[27] Prof. Bogdan Gregor & Aron-Axel Wadlewski, "Multi Level Marketing As A Business Model" 1(7) *Marketing Of Scientific And Research Organizations*4, 7 (2013).

and (3) builds credibility by initially delivering on his or her promises, thus making them believe it to be true.

In United States, the Securities and Exchange Commission (SEC) is the main regulatory authority to govern financial market. The authority, however, fails to detect these fraudulent ponzi schemes at their initial stages since these schemes rarely start as a registered business. Also, the possibility that the promoter is incorporating a Ponzi scheme into a legitimate business so carried out makes it difficult for the authority to detect the fraud at the initial stage. Or perhaps the promoter is running a legitimate business, but because it loses money, starts a Ponzi scheme to cover those losses. Obviously, in these situations, the SEC is unlikely to detect the fraud at an early stage. The operators of this scheme in order to hide its dishonest activities from SEC ensure concealment of the relevant information applicable to the scheme. For this purpose, these promoters engage less human resource to carry out their operations and employ people whom they can trust and are not likely to denounce them even after leaving the scheme. They conceal all their fraudulent activities and also ask the investors not to reveal any related information to the regulators as this will make it impossible for the investors to obtain high returns as guaranteed. The operators mainly does this to avoid themselves from getting caught red handed by the regulatory authority. Thus, the trust of their clientsare exploited, and the latter are reluctant to reveal the truth even after discovering the scheme as they become more concerned about recovering their investments than worrying about the legitimacy of the scheme. [28]

In India, theponzi scheme flourished due to lack of regulatory frameworks and remedial actions against the same. The famous of this was the Saradha scam[29]which took place in West Bengal where many investors lost their life savings in this fraudulent Scheme. Recently, in 2022, around 2 lakh investors filed complaint to the Crime Investigation Department of Economic Offences Wing, Tamil Nadu against several non-banking firms on dishonestly persuading the investors to invest in ponzi schemes. Among these, a few financial firms including Aarudhra Trading Pvt. Ltd., LNS International Financial Services and Elfine E-Com Pvt. Ltd.were found engaged in this investment scam for a total of Rs. 8,624 crores, and the same was effected alongside their legitimate business activities including stock market investments, online trading, and real estate business by promising the investors higher rate of returns ranging from 10% to 25% a month.Also, the investors were paid monthly as promised from the deposits received from subsequent investors constituting prima facie case of investment fraud wherein the existing investors are paid their returns with funds collected from the new investors. Hence, an action was initiated against these firms under Sections 406 & 420 of IPC for cheating, criminal breach of trust, and alsoother provisions under

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[28] Surendranath Jory & Mark J. Perry, "Ponzi Schemes: A Critical Analysis" *Research Gate*1, 2-3 (2020).

[29] What is Saradha Scam Case, *available at*https://www.business-standard.com/about/what-is-saradha-scam (last visited on Aug 31, 2022).

Banning Unregulated Deposit Schemes Act, Reserve Bank of India Act and The Tamil Nadu Protection of Interests of Depositors Act, 1997.[30]

The Article covers different laws regarding the above described illegal schemes or frauds that are significantly involved inpractising network marketing in the guise of selling products. The main objective for which these laws are enacted are to combat or prevent the public from participating or engaging in such schemes.However, this objective is not effectively served as it does not prescribe any adequate measures or constitute a Board to check on these scams and completely ban them from being committed. Rather, they prescribe punishments for those already committed as an attempt to prevent further commission of such offences. Whilst, the existinglegislative attempts has failed to serve the intented purpose as those with dishonest intention to earn quick and easy income through such frauds still find unethical ways to acquire money. Moreover, currently MLM business model has become popularvia digital platforms post covid pandemic as it promotes employment opportunities and is an easy way to earn money with products and zero investment. This increases the possibility of the gullible public being trapped in these scams and the perpetrators to deceive them thereby earning from such illegal means. Hence, the need for a specific mlm oriented legislation is necessary to mention strict provisions to effectively regulate these practices and create awareness in every individual about commission of such offences and their impact on the public and economic infrastructure of the nation.

**CONCLUSION AND SUGGESTIONS**

As far as the legality of multi-level marketing is concerned, the above-mentioned laws are enacted to regulate the illegal schemes which are carried out in multi-level marketing in order to conceal the true nature of the scheme. Though, multi-level marketing is legalised in India, the inclusion of these illegal schemes in its marketing strategy poses a challenge on its legitimacy. In addition to all the laws regulating the illegal schemes, the government has brought in Direct Selling Guidelines, 2016 followed by the new Consumer Protection (Direct Selling) Rules, 2021 to regulate multi-level marketing strategy and its operation in online platforms. Still, the marketing field witnessed numerous similar scams from this business model. The major reason for its increasing fraudulent activities is that it requires zero investment unlike any other typical business model. And, also the participants in this network earn rewards regardless of their involvement in product distribution. Hence, there is high chance that such networks are created in the guise of selling products with the lone motive of earning money. Some of the popular MLM Companies in India includes Amway India, Avon, Herbalife, Vestige, Oriflame, Mi Lifestyle, Modicare, etc. with the pure objective of increasing their direct sales and providing employment opportunities to the unemployed. Hence,

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30 R. Sivaraman, "Over 2 lakh depositors cheated of Rs.8,640 crore in Ponzi scheme" *The Hindu*, Published on Aug 10, 2022 and accessed on Aug 31, 2022.

MLM companies are legally recognised in India when they are created with the ultimate objective of selling their quality products regardless of the fraudulent pyramid structured companies. Besides, the frauds being committed, there should be an MLM specific legislation to regulate legal MLM practices, impose adequate punishments and penalties on illegal commissions, to constitute a board conferred with the power to supervise these practicesand holdeffective periodical checks on all direct selling companies in India to cease the illegal MLM companies carried out, if any.

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# Examining the Pre-Packaged Insolvency Resolution Proess in India

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**Abstract**

*The shift from the contemporary insolvency law towards a corporate rescue mechanism has been well incorporated in the Insolvency & Bankruptcy Code 2016 (hereinafter **"the Code")**. In a short span of six years, the Code has brought sweeping reforms in the insolvency landscape of India. The Code provides a comprehensive and time-bound insolvency resolution process for the corporate debtor offering their creditors the legal right to press claims for recovery of default. The recovery mechanism under the Code either results in corporate rescue or liquidation of the corporate debtor. The purpose of the Code is to rehabilitate and revive the financially troubled corporate debtor and prevent the extreme liquidation route.*

*The Code has undergone various amendments since its inception. An innovative approach to corporate restructuring that has emerged over the years is the pre-pack mechanism which incorporates the virtues of formal judicial proceedings and informal out-of-court settlement. The pre-pack method of insolvency resolution has been prevalent in various developed nations like the United Kingdom and the USA. It was recently introduced in India through Chapter IIIA on the Pre-Packaged Insolvency Resolution Process (hereinafter **"PPIRP")** in the Code.*

*The essence of pre-pack is formulating a restructuring or resolution plan before the commencement of insolvency. It offers a hybrid 'debtor-in-possession' and 'creditor-incontrol' model for the Micro, Small, and Medium Enterprises (hereinafter **"MSME"**). The paper analyses the provisions of PPIRP under the Code and whether it can provide an efficient and effective insolvency regime to the MSMEs. The paper further examines the impact of prepacks on the insolvency framework in India.*

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**Key Words:** Census. Insolvency, Pre-pack, MSME, Insolvency & Bankruptcy Code *2016*

**Introduction**

The human beings have acquired the basic rights and freedoms which are guaranteed to a human by virtue of him or her being a human which can neither be created nor can be abrogated by any person any government of the day. These rights include the right to life, liberty, equality, dignity and freedom of expression, thought. The right to choose one's gender identity is an essential part to lead a life with dignity which again falls under the ambit of Article 21[1] of the Indian Constitution. In considering the right of personal freedom at highest padastral and self determination, the Court held that the gender to which a person belongs must be determined by the person concerned himself or herself.

## I. INTRODUCTION

A corporation faces financial distress in its life span due to inherent distress, use of obsolete technology in production, financial or operational failure, change in consumer demand, access to funds or capital, and other factors that might not be in control of the corporation. As a result, the corporation fails to pay the debts it owes to its creditors.

The two terms widely used to determine the financial failure of an enterprise are insolvency and bankruptcy. Insolvency of a debtor company refers to its inability to pay to its creditors, whereas bankruptcy refers to a formal declaration of insolvency by the court or the tribunal. Various terminologies such as cash-flow insolvency, balance sheet insolvency, liquidation, and reorganization is associated with a corporation's insolvency. For example, cash flow insolvency is when the company's cash inflow is less than its cash outflow, resulting in its inability to pay the debts. Balance sheet insolvency arises when the book value of the company's assets is less than its liabilities. Liquidation results in the dissolution of the company and precisely refers to the sale of assets for cash to repay the creditors. Another term, reorganization, has become popular in recent years, and it denotes restructuring a financially distressed firm using financial and corporate restructuring techniques. Economic viability is an essential factor that determines the projections and prospects of the financial performance of the product or the service of the business. The corporation goes into economic and financial distress if the business does not have economic viability.[2]

The erstwhile regime regulating corporate insolvency in India was highly fragmented and lacked clarity in its application and implementation. The Insolvency & Bankruptcy Code, 2016, enacted under the recommendations of the Bankruptcy Law Reforms Committee, provides comprehensive

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1 No person shall be deprived of his life or personal liberty except according to a procedure established by law

2 Karen Hopper Wruck, *Financial Distress, Reorganization, and Organizational Efficiency*, 27(2) J. FIN. ECO. 419 (1990).

insolvency legislation ensuring a time-bound process, maximizing the value of corporate debtor's assets and balancing stakeholders' interests. It applies to companies, limited liability partnerships, individuals and partnerships. The emphasis of the Code is on the revival and rescue of a viable entity. The Code has been instrumental in revamping the insolvency framework in India by providing a streamlined Corporate Insolvency Resolution Process (*hereinafter* **"CIRP**") to resolve financially distressed companies. In addition, it provides a mechanism for equitable distribution of the debtor's assets. The prime aim of the Code is to avoid the creditor's frenzy attempt to recover the dues from the financially distressed debtor and thus preserve the common pool of assets of the debtor.[3] The success of the CIRP depends on the resolution applicant's (*hereinafter* **"RA"**) availability and willingness to invest in the distressed entity. In the Covid-19 era, most companies have been facing financial distress, and in such times, the likelihood of finding a RA is minimal. Moreover, economies worldwide are experiencing the ongoing waves of the pandemic. It would be difficult to ascertain when it will entirely subside, and the business will function as usual.

Under the Code, CIRP is available only to defaults of more than rupees 1 crore. In such a situation, the business would be under stress for longer, and the creditors would enable recovery through other means because the recovery under the Code is not possible as the default threshold would not be met. Moreover, the companies are generally disincentivized to initiate CIRP voluntarily while experiencing financial hardship due to the displacement of the current management. Similarly, the resolution professional or the liquidator is often unable to identify avoidable transactions and apply to NCLT to reverse them within the prescribed time limits.[4]

Business failures are inevitable, and the best way to deal with them is to adopt semi-formal insolvency mechanisms specifically tailored to the corporate debtor's requirement, blending elements of both formal and informal resolution processes that result in better sanctity and balances the stakeholders' interests. The prominent semi-formal insolvency resolution option is pre-pack, employed widely across jurisdictions. Developed nations like the United States and the United Kingdom have utilized pre-packaged reorganization procedures and pre-packaged administrations, enabling financially troubled firms to emerge from bankruptcy quickly. Even Singapore has introduced pre-packaged schemes to prevent the dissolution of the corporate debtor (*hereinafter* **"CD"**). Pre-pack is typically time-effective, flexible, costeffective, and less disruptive to the business. Though the inclusion of pre-pack has been the talk of the town for a while, the Code introduced the Pre-Packaged Insolvency

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3 Barry E Adler, *Financial and Political Theories of American Corporate Bankruptcy,* 45(2) STAN. LAW REV. 311 (1993).

4 Karthik Somasundram & Khyati Mehrotra, *IBC Valuations May Spike with Proceeds of Avoidable Transactions,* LAW ASIA (Jan. 22, 2023, 9:30 AM), https://law.asia/ibc-valuations-avoidable-transactions/.

Resolution Process for the Micro, Small, and Medium Enterprises in the year 2021.

## II. MICRO, SMALL AND MEDIUM ENTERPRISES IN INDIA

MSMEs are the critical accelerator of production, employment, entrepreneurship, financial inclusion and economic growth in India. The contribution of MSMEs to the Gross Domestic Product is significant, and thus they are referred to as the power engines of the economy. MSMEs create job opportunities at a meagre cost and employ a vast population. It also boosts entrepreneurship, especially in rural and semi-urban areas. MSME-related products export share of All India Exports stood at 49.4% and 49.8% for FY21 and FY20, respectively. Data from the Ministry of Micro, Small & Medium Enterprises depict that the number of micro, small and medium enterprises, respectively, are 11,735,117; 426,864; 39,467 as of November 25, 2022, in India.[5]

MSMEs are distinctly vulnerable to financial disruptions due to the inaccessibility of funds, hiring and retaining qualified workforce, and difficulty in penetrating domestic and global markets. As a result, even though MSMEs are the foundation of the economy's growth, they face difficulty in accessing the insolvency system. Moreover, the ongoing COVID-19 pandemic has further impacted the business of corporations, especially MSMEs, exposing them to financial distress for which the sector was unprepared.

The COVID-19 pandemic has struck the world as a 'crisis like no other,' shaking the economy of several countries. It has caused recession and disrupted the global value chain. It has impacted the production and distribution of goods and services, bringing the operations of many corporations to a standstill as the COVID-19 virus continues to spread. The World Bank has characterized the pandemic as one of the most severe recessions since World War II. The crisis has declined the per capita output in most economies across the globe and has resulted in business failure and potential unemployment, causing profound financial system risk. The economic impact of the COVID-19 crisis is graver than what was witnessed in the Great Depression of 1930.[6]

The definition of MSME is provided in the Micro, Small, and Medium Enterprises Development Act, 2006, which classifies MSME based on investment in plant, machinery or equipment & annual turnover. The classification is given in the below-provided table:[7]

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5 *Indian MSME Industry Analysis*, IBEF, https://www.ibef.org/industry/msme-presentation (last visited Jan. 23, 2023).

6 *COVID-19 to Plunge Global Economy into Worst Recession Since World War II,* THE WORLD BANK, https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worstrecession-since-world-war-ii (last visited Jan. 24, 2023).

7 S.O. 1702(E), Revised classification applicable wef 1st July 2020 for Micro, Small, and Medium Enterprises, Available at https://msme.gov.in/know-about-msme.

| **Composite Criteria: Investment in Plant & Machinery/Equipment and Annual Turnover** | | | |
|---|---|---|---|
| **Classification** | **Micro** | **Small** | **Medium** |
| **Manufacturing Enterprises and Enterprises Rendering Services** | **Investment in Plant and Machinery or Equipment:** Maximum Rs. 1 crore **Annual Turnover:** Maximum Rs. 5 crore | **Investment in Plant and Machinery or Equipment:** Maximum Rs.10 crore **Annual Turnover:** Maximum Rs. 50 crore | **Investment in Plant and Machinery or Equipment:** Maximum Rs.50 crore **Annual Turnover:** Maximum Rs. 250 crore |

When the Code was enacted in 2016, the minimum default threshold to initiate CIRP was prescribed as rupees one lakh.[8] MSMEs have been the worst affected by this minimum threshold. This is because the creditors could initiate the insolvency proceedings against them before the NCLT on default of an amount as meagre as "rupees one lakh." As a result, it was difficult for the distressed MSMEs to receive a resolution plan as financially sound corporate entities were unwilling to invest in a financially distressed small-scale company. However, the government revised the default threshold and increased it to rupees 1 crore during the 1st wave of the Covid-19 pandemic, thus relieving the MSMEs from a lower threshold.[9]

The Insolvency and Bankruptcy Code (Second Amendment) Ordinance, 2018, has aided the MSMEs as it relaxed the applicability of section 29A of the Code on *persons not eligible to be a resolution applicant*. The provision discusses a person's ineligibility to be RA and their eligibility to submit a resolution plan, thus restraining untrustworthy promoters from buying back assets at a subsidized price. In order to provide an exemption from section 29A to the MSMEs, the government introduced section 240A under the said amendment. The provision grants exemptions to the MSMEs by allowing a promoter who is not a wilful defaulter or has any specific disqualification as provided u/s 29A to bid for the MSME's resolution plan.[10] These exemptions

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8 Insolvency & Bankruptcy Code, No. 31 of 2016, § 4, INDIA CODE (2016).

9 Samir Malik & Aditya Sharma, *Quietus on the Threshold Limit for Filing Insolvency Proceedings*, SCC ONLINE BLOG (Dec. 24, 2022, 10:00 AM), https://www.scconline.com/blog/post/2022/06/14/quietus-on-thethresholdlimit-for-filing-insolvencyproceedings/#:~:text=The%20threshold%20was%20enhanced%20by,crore%2C%20by%20the%20Central%20 Government.

10 Prachi Apte & Sushant Kumar Das, *Treatment of MSME Insolvency under IBC*, IBBI (Dec. 20, 2022, 10:00 AM), https://ibbi.gov.in/uploads/resources/b7dfd3332bc133fde5783cf70b9371a1.pdf.

will benefit the relatively smaller companies to find takers and prevent them from liquidation.[11]

Irrespective of the amendments under the Code, the number of MSMEs liquidated has been relatively high and in total conflict with the purpose of the Code, which promises rescue, revival and rehabilitation of distressed entities. Henceforth, the need of the hour is to have an efficient alternative insolvency resolution structure for the MSMEs, providing valuemaximizing outcomes while being cost-effective.

## III. PRE-PACKS UNDER THE INSOLVENCY & BANKRUPTCY CODE 2016

### A. MEANING OF PRE-PACK

Pre-pack insolvency resolution is a combination of formal and informal debt restructuring methods aimed at restoring a financially troubled company to a stable state, thereby allowing creditors to receive their repayments in a timely manner. This process combines elements of both court-supervised insolvency proceedings and out-of-court settlements. Pre-packaged insolvency contains a reorganization plan approved by the creditors and offers a unique mechanism by giving flexibility of informal workouts and the legal sanctity of formal proceedings with appropriate defence for the stakeholders.[12]

The mechanism of CIRP under the Code is time-consuming and incurs direct and indirect costs, just like any other formal proceeding. On the contrary, informal workout like PPIRP is a flexible and low-cost alternative for resolving insolvency. The pre-pack process allows for a quick sale of the business and its assets, preserving value and potentially saving jobs. By reorganizing the company's debts and assets, a pre-pack can increase the chances of the company's long-term success.[13]

In the United Kingdom, pre-packs involve sales to connected parties or persons of the debtor, for example, sales to the associates or directors of the company. Pre-packs have multiple benefits; when the company faces financial distress, the solvent corporations in the market might not be interested in purchasing an insolvent company. In such a situation, the incumbent management alone is the one interested in buying the business of the insolvent debtor. Furthermore, it would be incorrect to state that insolvency results from bad management practices. Thus, pre-packs grant the promoters and directors

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11 Varsha Banerjee & Garima Mehra, *India: MSME's and Insolvency & Bankruptcy Code*, MONDAQ (Dec. 23, 2022, 10.30 AM), https://www.mondaq.com/advicecentre/content/3826/MSMEs-And-Insolvency-AndBankruptcy-Code.

12 Debanshu Mukherjee et al., *Pre-Packaged Insolvency Resolution under the Insolvency and Bankruptcy Code: An Overview*, VIDHI LEGAL POLICY (Jan. 25, 2023, 1:00 PM), https://vidhilegalpolicy.in/blog/pre-packagedinsolvency-resolution-under-the-insolvency-and-bankruptcy-code-ibc-an-overview/.

13 *Id.*

a second opportunity to run the company.[14] Further business failure is unavoidable, and pre-packaged insolvency provides a chance to restructure the business with lesser costs. Thus it results in a quick insolvency process focusing on the rescue and reorganization of the company.[15]

Initially, the Interim Report of the BLRC rejected pre-packs citing the infeasibility of the outof-court settlement in the Indian context. But then, the COVID-19 pandemic disrupted the economic process, severely affecting businesses and increasing insolvency cases in India. The worst affected were the small businesses and start-ups that could not sustain themselves in the market due to reduced sales and lockdown restrictions. The drastic impact of the pandemic on small businesses necessitated the policymakers to look into the feasibility of pre-packs in the Indian scenario. Henceforth, on April 4, 2021, the Insolvency and Bankruptcy Code Amendment) Ordinance 2021 introduced PPIRP for MSMEs. The amendment proposes an efficient insolvency resolution mechanism for MSMEs. It provides for a quicker, costeffective, and value-maximizing insolvency process with less disruption to the business.

### *B. CHAPTER III-A IN THE CODE*

The PPIRP is provided in the Chapter III-A of the Insolvency & Bankruptcy Code 2016. The salient provisions of the PPIRP are as follows:

**S. 54A. Corporate debtors eligible for PPIRP**

PPIRP application can be initiated for a Micro, Small and Medium Enterprise u/s 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006, when it commits a default, subject to the below-mentioned conditions:

- Not undergone PPIRP or completed CIRP during three years before initiation date;
- Not undergoing CIRP;
- Liquidation order not passed u/s 33;
- Eligible to submit a resolution plan u/s 29A;
- Financial creditors have provided the name of the Insolvency Professional to act as Resolution Professional (*hereinafter* "**RP**") for conducting PPIRP;
- Approval of proposal by the financial creditors with a minimum of 66 percent of financial debt due to creditors.
- Declaration by the majority of directors & partners stating:
  - filing of the application to initiate PPIRP by the CD within 90 days; -

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14 M.P. Ram Mohan & Vishakha Raj, *Pre-packs in the Indian Insolvency Regime*, IIMA (Jan. 27, 2023, 11:00 AM), https://www.researchgate.net/publication/344351741_Pre-packs_in_the_Indian_ Insolvency_Regime.

15 Sanjana Rao, *Insolvency Procedures- Investigating the Pre-Pack Paradigm In India*, 10 L. REV. GLC. 69 (2019), https://www.glcmumbai.com/lawreview/volume10/Sanjana%20Rao.pdf.

- name of the Insolvency Professional to be appointed as RP;

- PPIRP is not initiated to defraud any person.
    - Special resolution by the members or resolution by a minimum of $3/4^{th}$ of the total partners of the CD approving the filing of the PPIRP application.

Before seeking approval from the financial creditor, the CD must furnish the declaration, special resolution or resolution and base resolution plan to its financial creditor.

***S. 54B. Duties of insolvency professional***

The RP shall perform the below-mentioned duties:

- preparing a report stating whether the CD fulfils the requirements and whether the base resolution plan is in conformity with the mandates in section 54A;
- filing of reports and other documents with the Insolvency & Bankruptcy Board of India;
- performing other duties as specified.

**S. 54C. Application to initiate PPIRP**

A corporate applicant has to apply with the NCLT to initiate PPIRP and has to provide the following information-

- the declaration, resolution, or special resolution, and financial creditors' approval;
- insolvency professional's name and written consent;
- declaration of any transactions of the CD on avoidance of transactions or fraudulent or wrongful trading;
- information on books of account of the CD.

Within 14 days of receiving the application, NCLT has to admit or reject the application. On rejection, the applicant will be given 7 days' notice to rectify the defect. The PPIRP commences from the date of admission of the application.

**S. 54D. Time limit for completion**

PPIRP should be completed within 120 days from the commencement date. A resolution plan needs to be submitted by the RP after approval by the committee of creditors (*hereinafter* **"CoC"**) to the NCLT within ninety days starting from the commencement date. If the CoC does not approve the resolution plan, the RP will file an application with the NCLT to terminate PPIRP.

**S. 54E. Declaration of moratorium & public announcement**

The NCLT shall declare a moratorium, appoint an RP and make a public announcement of the initiation of the PPIRP on the commencement date. The moratorium will be applicable until the date on which PPIRP ends.

**S. 54F. Duties and powers of RP**

The RP will conduct PPIRP and perform the duties as provided:

- confirming the list of claims;
- informing creditors of their claims;
- maintaining a list of claims;
- monitoring the management of the company's affairs;
- informing the CoC of any breach of obligations by the BoD or partners of the CD;
- constituting the CoC, convening and attending all its meetings;
- preparing the information memorandum;
- filing applications for the avoidance of transactions or fraudulent or wrongful trading.

The RP can access the books of account, records and information available with the CD, information utility, government authorities, statutory auditors, accountants or other persons. In addition, the RP will attend meetings of members, BoD, CoC, or partners of the CD, along with appointing accountants, legal professionals and other professionals.

**S. 54G. List of claims & preliminary information memorandum**

The CD has to submit a list of claims, details of the respective creditors, their guarantees, security interests, and preliminary information memorandum to the RP within two days of the commencement date. A promoter, director, or partner who has authorized the list of claims or the preliminary information memorandum submitted by the CD must compensate every person who has sustained loss/ damage due to the omission of material information or the inclusion of misleading information in the said documents.[16]

**S. 54H. Management of CD's affairs**

The management of the affairs of the CD shall be vested in its BOD or its partners, who shall protect and preserve the property's value and manage the operations as a going concern. The members, promoters, personnel, and partners of CD shall exercise and discharge their contractual rights, statutory rights and obligations concerning the CD.

**S. 54I. Committee of creditors**

Within 7 days of the insolvency commencement date, the RP shall constitute a CoC based on the list of claims. The first meeting of the CoC shall be held within seven days of its constitution.

**S. 54J. Vesting management of CD with the RP**

By a minimum vote of sixty-six percent of the voting shares, the CoC may resolve to confer the management of the CD with the RP during the PPIRP period. The RP shall make an application for the same to the NCLT. NCLT shall pass an order vesting its management with the RP if it believes that the business of CD has been conducted fraudulently or there has been gross mismanagement during the PPIRP.

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16 Insolvency & Bankruptcy Code, No. 31 of 2016, § 77A.

**S. 54K. Consideration and approval of resolution plan**

The CD will submit the base resolution plan to the RP within two days of the pre-packaged insolvency commencement date, which shall be presented to the CoC. The CoC may allow the CD to revise the base resolution plan before approval or invitation of prospective resolution applicants. The resolution plan and base resolution plan shall comply with the requirements u/s 30 on *submission of the resolution plan*.

The CoC may approve the base resolution plan if it doesn't affect the claims of the operational creditors. If the CoC rejects the base resolution plan, the RP shall invite prospective applicants to submit a resolution plan to compete with the base resolution plan. The CoC will evaluate the resolution plans submitted by the RP and select the ones that are better than the base resolution plan. The RP will submit the resolution plan to the NCLT after approval of the CoC by a vote of a minimum of sixty-six percent of the voting shares. If CoC rejects the resolution plan, the RP will apply for termination of PPIRP.

**S. 54L. Approval of resolution plan**

NCLT will approve or reject the resolution plan within 30 days of receiving the same. If the resolution plan is rejected, NCLT will pass an order u/s 54N for terminating the PPIRP.

**S. 54M. Appeal against an order u/s 54L**

Any appeal can be filed against an order approving the resolution plan u/s 54L(1) can be filed if the approved resolution plan contravenes the law in force, or there is a material irregularity in the exercise of RP's powers, or if the resolution plan is not in conformity to criteria provided by the Board and other conditions as mentioned u/s 61(3).

**54N. Termination of the PPIRP**

Where the RP files an application with the NCLT for termination of the PPIRP, the NCLT shall, within thirty days of the date of application, pass an order terminating the PPIRP and provide for a procedure for the continuance of proceedings relating to avoidance of transaction or wrongful/ fraudulent trading. The NCLT will pass an order of liquidation of the CD and declare that PPIRP costs will be included in the liquidation costs.

**54-O Initiation of the CIRP**

The CoC may resolve to initiate a CIRP in respect of the CD at any time after the pre-packaged insolvency commencement date but before the approval of the resolution plan u/s 54K by a vote of a minimum sixty-six percent of the voting shares. NCLT can pass an order within 30 days of the intimation by the resolution professional of the decision of the CoC:

- to terminate PPIRP;
- to initiate CIRP;
- to appoint the RP as the interim resolution professional;
- to declare that PPIRP costs are to be included in the CIRP costs.

## IV. ASSESSING THE IMPACT OF PRE-PACKS

### A. ADVANTAGES

The possibility of liquidation is a significant threat to the CD, especially to the MSMEs. There are various *advantages* of the pre-packs, which have been detailed as follows:

**Cost-effective, swift resolution & flexible approach**

PPIRP has served as a cost-effective insolvency resolution mechanism offering quicker resolution as compared to CIRP under the Code. CIRP works on a set process and is inflexible, limiting its use in specific scenarios, whereas pre-packs lessen a formal procedure's cost and offer higher flexibility.

**Continuity of the business**

Under CIRP, the company's control is shifted to an Interim Resolution Professional, then to a Resolution Professional, and finally to a successful Resolution Applicant. On the contrary, PPIRP offers flexibility, and the existing management comprising suppliers, investors, employees, customers, etc., remains in control of the CD before the parties reach the final agreement. PPIRP causes minimum disruption to the business of the debtor. An attractive feature of the PPIRP mechanism is that the corporate debtor's business continues as a going concern, and the control is retained in the hands of the management, resulting in higher employee retention, unlike the conventional CIRP.

**Better returns to the creditors & lessens the burden on the adjudicating authorities**

Under the PPIRP scheme, the possibility of the liquidation of the CD reduces, yielding better returns to the creditors and maximizing the economic value of the property. In addition, since it is an out-of-court settlement, it minimizes the burden on the adjudicating authorities. Further, the mechanism under PPIRP is quicker, as a substantial portion of the proceedings is completed before approaching the NCLT.

**Avoids the possibility of hostile and conflicting takeover or buyout**

The PPIRP involves detailed negotiation and discussion with the investor or buyer, and thus there is a solid understanding of the long-term vision and business process. The possibility of conflicting or hostile buyout reduces as pre-packaged insolvency is initiated after COC's and NCLT's approval. There is sanctity and strong credibility involved in the restructuring process.[17]

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17 Santosh Kumar & Vaishali Jain, *Pre-packaged Insolvency- Exploring an Alternative Framework for Bankruptcy Resolution in India*, 107(1) ECS TRANSACTIONS 4129 (2022).

## B. CHALLENGES

### Balancing the interests of financial and operational creditors & lack of transparency

The PPIRP scheme is not devoid of challenges, and a significant concern in the scheme is to balance the interests of financial and operational creditors. It is evident that the framework is biased toward financial creditors. The scheme also lacks transparency, as there is a possibility that the financial creditors will agree with the potential investor privately, which might result in unfair treatment to the operational creditor.

### Price discovery mechanism is not followed

Moreover, in PPIRP, the insolvency practitioner is under no legal compulsion to assess the business's future viability resulting from the pre-pack sale. Further, the price discovery mechanism is not followed, in contrast to the mandate under the CIRP. Instead, the NCLT only evaluates the resolution plan based on submissions made by the creditors.

### Stringent timeline

Pre-pack has not proved feasible due to its tight timeline, precisely the 90-day window, which makes it difficult to resolve cases. Furthermore, with the automatic initiation of liquidation, the CD and its stakeholders might not even have a reasonable shot at reviving the business. On the other hand, the related parties may benefit from pre-packs by taking advantage of reengineering the balance sheet.

Currently, the pre-pack scheme is only limited to MSMEs, and according to the latest report of September 2022, only 2 cases- Delhi-based Loon Land Developers and Ahmedabad-based GCCL Infra-structure & Projects have been admitted under the pre-packaged mechanism so far. The poor response could result from hesitancy on the part of financial institutions and lack of awareness of PPIRP amongst businesses.

Even though IBC aims to facilitate exit from failed units so that capital can be reallocated to better ones, banks are uncomfortable initiating PPIRP due to voluntary haircuts, which might lead to subsequent scrutiny and investigations.[18] [19] Moreover, since the involved assets are not very large, the lenders do not feel inclined to take further risks.

## V. CONCLUSION & RECOMMENDATIONS

MSMEs play a significant role in the growth and development of an economy. They are key players in promoting job creation, encouraging entrepreneurship, and fostering innovation. In addition, they drive economic activity by supplying goods and services to consumers and in supporting larger businesses through the supply chain. MSMEs also play a vital role in

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18 *Pre-Pack IBC Resolution*, CIVILSDAILY, https://www.civilsdaily.com/news/pre-pack-ibc-resolution/ (last visited Jan. 18, 2023).

19 Banikinkar Pattanayak, *Pre-pack insolvency May Get a Facelift,* FINANCIAL EXPRESS (Jan, 23, 2023, 6:30 AM), https://www.financialexpress.com/industry/sme/pre-pack-insolvency-may-get-a-facelift/2705278/.

reducing poverty and improving living standards in rural and semi-urban areas. Furthermore, MSMEs are a foundation for local economic development and contribute to regional and national economic growth. Overall, MSMEs are a crucial component of a thriving economy.

The government has been proactively supporting the growth of MSMEs through various schemes, such as the Pradhan Mantri Mudra Yojana, the Credit Guarantee Trust Fund for Micro & Small Enterprises, Credit Linked Capital Subsidy for Technology Upgradation, and various other financial schemes. In addition, the pre-packaged insolvency resolution process for the MSMEs has further strengthened the insolvency regime in India. The mechanism helps achieve a steady and smoother tailor-made insolvency resolution of the distressed organization.

Though the Government has been bringing out many schemes for the smooth functioning of MSMEs, there are no mechanisms to check the success of these schemes. Further, these schemes would require better grass-root implementation, which is not taking place in India. Under the insolvency mechanism in the Code, the resolution plan becomes final not based on the agreement of 66% of financial creditors but on approval by the NCLT. This mandatory involvement of the judiciary impedes the speed of the pre-pack process, thus undermining its intended purpose.[20]

Further, given that pre-pack does not involve the public bidding process, it would be critical for the NCLT to satisfy that all stakeholders' interests are considered before approving the scheme.[21] Pre-packed insolvency will not be successful if a company's financial position is weak without any scope for recovery. Thus, the CD must be aware of the actual financial value of the business.

Further, there are concerns about the balance of interests of financial and operational creditors. The operational creditors do not have a decisive say in negotiations, nor the fair share, making the plan biased towards secured creditors. Further, there are possibilities of the advantage of pre-pack being taken by the related parties by restructuring the balance sheet.[22] Therefore, addressing the issue of transparency in the entire PPIRP and preventing collusion between the CD and the purchaser will also strengthen the pre-packaged framework.

Further, in order to make the pre-packaged insolvency resolution framework robust for the Indian landscape, the following recommendations have been provided to modify and relax the procedures stipulated under Chapter IIIA of Part II of the Code.

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20 Tariq Khant, *Pre-Packs for MSMEs: A Positive Step with Implementation Hurdles*, SCC ONLINE (Jan. 23, 2023, 11:00 AM), https://www.scconline.com/blog/post/2021/07/20/pre-packs-for-msmes-a-positive-step-withimplementation-hurdles/.

21 Akriti Shikha, *Pre-packs – A Speedy Resolution Process?,* ILJ (Jan. 22, 2023, 9:30 AM), https://www.indialawjournal.org/pre-packs-a-speedy-resolution-process.php.

22 *Supra* note 20.

1. **Technology-enabled process**: The PPIRP process should be technology-enabled to ensure faster and more efficient case processing. An e-platform will enable online filing of applications with the adjudicating authorities, create provision for a case management system, and storage of records of CDs, allowing quicker interaction with the stakeholders along with making the insolvency landscape technology oriented. Further, the Insolvency and Bankruptcy Board of India should provide clear and well-defined guidelines for implementing PPIRP to avoid confusion and ensure consistency in the process.

2. **Enhancing applicability of the PPIRP framework:** The PPIRP framework was introduced during the Covid-19 pandemic. Since then, there have been discussions and deliberations on enhancing the purview of applicability of the framework. Section 54A of the Code should be amended to enhance the applicability of the pre-pack framework to all prescribed categories in addition to the MSMEs.

3. **Lowering the unrelated FCs' threshold:** The threshold for unrelated FCs' should be lowered from sixty-six percent to fifty-one percent to facilitate swifter and more efficient decision-making during the PPIRP framework's pre-commencement stage. This could prove lucrative for the successful implementation of the PPIRP.

4. **Omission of the requirement for declaration in a few cases:** The requirement for MSME CDs to furnish a declaration regarding avoidance transactions or wrongful trading under section 54C (3)(c) could be omitted since it may be challenging to identify such transactions, and it may discourage bona fide CDs from using the PPIRP. The CoC can terminate the PPIRP or direct separate proceedings if they become aware of such transactions.

5. **Omission of a few provisions:** Omitting provisions relating to the possibility of a change of management under section 54J or conversion to CIRP or liquidation under 54O or 54N(4) could prevent concerns among bona fide CDs about resolving insolvency through the PPIRP. The CoC can terminate the PPIRP if they believe the continuation of the process is not viable or the management is involved in fraudulent activities, which safeguards against any abuse of the process.

6. **Promoting education, awareness & continuous monitoring:** The PPIRP is a relatively new mechanism in India, and educating and creating awareness among stakeholders about its benefits and requirements is essential. The progress of the PPIRP should be continuously monitored by the authorities to ensure that the resolution process is carried out efficiently and effectively. Further, the authorities responsible for the approval of the PPIRP, such as the CLT and COC, should be prompt in their approvals to prevent any delays in the resolution process.

Lately, the government has also been trying to rework the scheme of PPIRP to make it more feasible after it has failed to attract debtors and

creditors. In addition, the government plans to launch a campaign to raise awareness about the scheme amongst the masses. In the wake of the COVID-19 pandemic, a PPIRP for MSMEs envisaging a hybrid mechanism of negotiated debt restructuring, which is binding on all stakeholders on approval of the NCLT, would be a game-changer in the insolvency landscape if implemented cautiously.

The Deputy Governor of the Reserve Bank of India, M Rajeshwar Rao, at the International Research Conference on Insolvency and Bankruptcy held at IIM Ahmedabad, has also quoted that "*it is prudent that the lenders should perform periodic stress tests to estimate possible trajectories that the credit exposure is likely to take and calibrate their responses accordingly. Ultimately, they are responsible for safeguarding their and stakeholder's interests*." Further, he also emphasized that the group resolution process is particularly crucial in an economy like India, where credit contracts are traditionally linked with cross obligations and credit mitigating covers provided by the parent and group companies of the borrower. He also necessitated extending the applicability of pre-packs on corporates other than MSMEs.[23]

The policymakers should revisit the PPIRP mechanism under the Code and introduce the necessary amendments. Since the pre-pack is in its nascent stage, there is immense scope for improvisation, which should be addressed timely to ensure effective implementation of the prepackaged insolvency resolution process in the Indian framework.

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[23] Resolution of Stressed Assets and IBC, https://m.rbi.org.in/scripts/BS_SpeechesView.aspx?Id=1306 (last visited Jan. 20, 2023).

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# The Challenges and Possible Solutions in Protecting the Privacy of Consumers in the Digital Age: A Legal Perspective

**Dr Anant D Chinchuri***

**Abstract**

*Digitalization brought new challenges to privacy in the digital age. The consumers are playing important role in the digital market. The consumer data become an essential economic asset, similarly it has led to much concern of breach of privacy. The technology like big data, cloud computing, block-chain, AI, 5G etc. are the tools of success in business to understand and track the consumers. Emergence of the digital age, made difficult to define the best ways to balance innovation and growth as well as protecting consumer privacy. The Hon'ble Supreme Court in a number of decisions recognized the right to privacy as a subset of the larger right to life and personal liberty under Article 21 of the Constitution of India. Therefore, the time has come to shift focus from consumer protection to consumer empowerment, impose liability on service and intermediary providers, content filtering and moderation is effective in protecting consumers privacy.*

**Keywords:** Consumer, Privacy, Information Technology, Digital Age, Constitution of India

## Introduction

The digital transformation in consumer lifestyle published in the Google Trends, India Report[1], which indicates that in 2020, millions of consumers migrated online; 2021 showed the staying power over digital. From shopping to services, new users who may have begun their online journeys due to necessity are now proactively deepening their usage. Speed, convenience, and price are just a few reasons motivating more consumers to choose digital over traditional transactions. Interestingly, the average Indian uses around 10-

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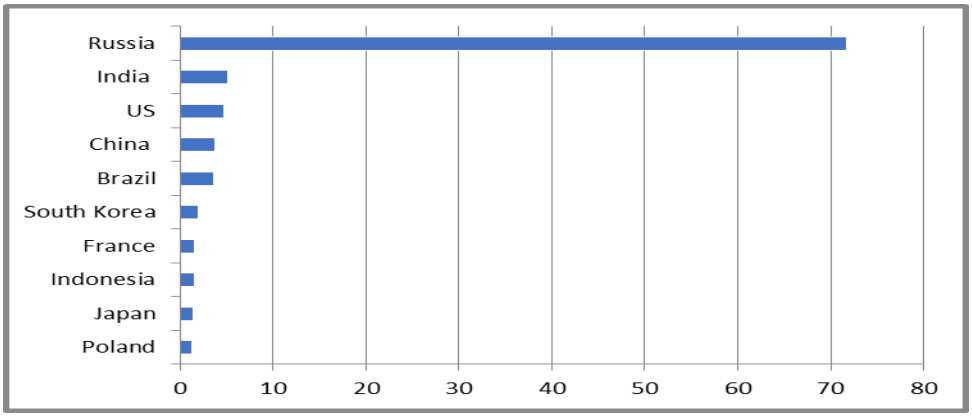
1 1-9-2019 to 31-8-2020 vs. 1-9-2020 to 31-8-2021 Available at, "https://www.thinkwithgoogle.com/intl/en-apac/marketing-strategies/search/digital-consumer-trends-india2021/#:~:text=Today%2C%20India%20has%20600%20 million,strategies%20to%20meet%20them%20there". Visited on 20-09-2022

12 Apps for their everyday necessities, which is a must for "Google" and its allied apps for various reasons.[2]This transformation has gained importance and raised concerns about digital privacy as consumers share their data for online transactions.[3]The Hon'ble Supreme Court of India emphatically recognized the right to privacy as an intrinsic part of the right to life under Article 21 of the Indian Constitution in the K. S. Puttaswamy case.[4]According to the report published by Surfashark VPN, a cybersecurity firm, India is ranked second in the world with the most data breaches (in Millions) in the first half of 2022.[5]




The above graph indicates the misuse of personal data, including the data provided by consumers during their online transactions being copied, transmitted, viewed, or stolen from data holders or illegally used without their knowledge and consent. The CERT-In directive about digital surveillance in respect of collecting personal customer data may challenge the whole ecosystem of data protection and privacy of consumers. According to GytisMalinauskas, Legal Chief, Surfshark, collecting excessive data within Indian territory without adequate protection could even lead to more breaches nationwide"[6].This situation, where there is no proper mechanism to protect users' privacy, might lead to misuse and exploitation of users' data. Such risks will increase manifold.

**Technology and Consumers: New Benefits and New Challenges**

Consumers worldwide are experiencing a period of rapid change as digital transformation provides a wide range of innovative goods and services.

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2 F. S. Dhiman, Consumer Data Rights and Protection Laws in India, 2-7-2021 Available on "https://www.caclubindia.com/articles/consumer-data-rights-protection-laws-india-45073.asp" Visited on 30-9-2022

3" A data breach is an incident in which one's information is accessed without consent. Therefore, a data breach can be said as the release of sensitive, confidential, or protected data"

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

5 Available on"https://www.livemint.com.html" visited on 6-10-2022

6 The opinion expressed by GytisMalinauskas, Legal Chief, Surfshark, available at "https://www.financialexpress.com/industry/technology/india-data-security-personal-data-leaks-surfshark-cert-in/2560424/" visited on 7-10-2022

The two technologies like the Internet of Things (IoT)[7]and Artificial Intelligence (A.I.)[8]are distinct but complimentary and combined.[9]According to European Commission, Executive Agency for Small and Medium-sized Enterprises, IoT is "an ecosystem in which applications and services are driven by data collected from devices that sense and interface with the physical world."[10]The IoT enables Internet connectivity interactions between devices, objects, and consumers. According to the Organization for Economic Cooperation Development, 2019[11](OECD) report the other technology, namely online platforms[12]and P.P.M.'s[13] digital transformation has radically changed how consumers interact in markets and with each other. Online platforms facilitate interactions between two or more separate but interdependent sets of users via the Internet. P.P.M.s are specific online platforms that "involve[s] the commercial exchange of goods and services between peers through Internet platforms."In these markets, an intermediary matches a consumer with another consumer. There are different types of P.P.M.s, with some of the best known globally, such as eBay, Uber, and Airbnb, spanning markets such as product sales, transport, and short-term accommodation services.

**Consumer benefits:**

The IoT, A.I., online platforms, and P.P.M.s offer a range of potential benefits to consumers in the areas of new and innovative consumer goods and services, providing more choices for consumers through digital assistants for ease in searching and shopping online through cost savings and including reduced transactions. A.I. offers greater personalization and constantly offers consumers more tailored products and services. Convenience, customization and remote control, especially for a number of IoT consumer products in the smart home, freeing consumers from making decisions, and avoiding the influence of behavioral biases. AI-powered products, such as digital assistants,

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7 "The Internet of Things (IoT) - is a network of physical objects to connect and exchange data with other devices over the Internet. These devices include ordinary to sophisticated tools. Available at https://www.oracle.com/in/internet-of-things" visited on 4-10-2022

8 "Artificial intelligence (A.I.) is the ability of a computer to do tasks that humans usually do; however, there are no A.I.s that can perform the wide variety of tasks that an ordinary human can do. Available at https:// www.britannica.com/technology/artificial-intelligence" Visited on 4-10-2022

9 "Challenges to consumer policy in the digital age, A background report of G20 International Conference on Consumer Policy, September 2019, Japan"

10 Available at https://data.europa.eu/doi/10.2826/45814 Visited on 6-10-2022

11 OECD 2019, p-20(9)

12 Online platforms are helpful in our daily wide variety of activities. Available on "https://www.oecd-ilibrary.org/science-and-technology/an-introduction-to-online-platforms-and-their-role-in-the-digital-transformation_19e6a0f0-en" visited on 30-9-2022

13 Project portfolio management (P.P.M.) software provides visibility, oversight, and tools to help companies prioritize and manage current projects, resources, and future needs and demands.

can make suggestions free from behavioural biases that may otherwise influence consumers.

**Challenges for consumers**

Today's consumers experience comfort and ease due to technological advancements; however, these new developments raise potential consumer issues in terms of transparency and disclosure; discrimination and choice; privacy and security; interoperability, and accountability. In addition, new technologies can raise issues around the need for after-sale support and product safety. Consumers' privacy in this disruptive technology era relies on large amounts of data having potential privacy and security risks. If e-platforms do not take appropriate measures to protect consumer data, then in such cases, it may be detrimental to consumers.

**Consumer - Big Data and its relationship with privacy**

Big data is a new paradigm of data-driven decisions generated by smartphones, televisions, social media networks, sensor-driven devices, and other such networks that users use daily. Big data looks for correlation rather than causation, the 'what' rather than the 'why'. Big data comprises various types, including text, imagery, and video. The enormous amounts of big data, rapid I.C.T. developments, and users' engagement with platforms like social media and micro-blogging sites enable unprecedented gathering, retention, and analysis of big data. Thus, big data is considered an extraordinary resource that could offer unique opportunities for all. Along with big data, metadata[14]also has the potential to reveal sensitive information about people's lives, political preferences, religion, sexual orientation, etc. Metadata can show information like particular web pages, I.P. address, location, etc. There have been cases where the Central and State governments collect metadata for various purposes. The business model of many internet companies relies on the collection of metadata to improve their services and to infer consumer behaviour to improve their products further. However, gathering, accessing, and using such data carry significant threats to fundamental freedoms and human rights. Both - big data and metadata can seriously threaten individuals' rights to keep their personal and sensitive information private and to have control over information.

**Recent incidents – Digital breach of data and privacy**

The following are a few selected significant incidents of the current period that reveal how the online world is susceptible to disruptive technology.

- **A data breach of Air India occurred in May 2021[15]**
  Air India stated that the cyber-attack had compromised personal data registered between August 26, 2011, and February 20, 2021, of more than 4 million passengers worldwide.

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14 Data that describes data

15 Available at "https://indianexpress.com/article" Visited on 3-10-2022

- **Leakage of data in dark Web: May 2021**[16]
  There was a leakage of personally identifiable information (PII) and test results of 190,000 candidates for the 2020 Common Admission Test, used to select applicants to the Indian Institutes of Management (I.I.M.s). Such a database is put up for sale on the dark Web.
- **Domino's India pizza orders delivered to dark Web: April 2021**[17]
  Domino's India website was allegedly hacked and has sensitive customer details such as names, phone numbers, email ids, and credit card details posted for sale on the dark Web, and the demand placed was ten bitcoin (roughly $535,000 or ₹4 crores) for 13 T.B. of data
- **Online sale of Big-Basket user data sold: Oct 2020**[18]
  In an online cyber-attack on Big-Basket (an online grocery platform), 20 million consumer data were sold and later leaked on the dark Web. The data contained sensitive and personal information, users' locations, and I.P. addresses.
- **S.B.I. customer's data breach: Jan 2019**[19]
  The unsafeguarded server of the State Bank of India led to a data breach of customers as the server was unsecured with a strong password. This incident led to panic among the customers.

**Consumer - Data privacy rights and its protection**

A significant rise in the extensive usage of numerous applications for various reasons led to an increase in the incidents of data and privacy breaches. One of the most common factors would be that consumers need to read the contents of the policy of the service provider or the App. Further, they click on the 'Yes' or 'Accept' button, sharing users' preferences, tastes, trending news, and the browsing habits and inclinations of the users. Leakage/sharing of such choices help the Data Fetching Companies[20]to formulate business strategies for selling their respective products, ideas, and service. An attempt to regulate and protect consumer data and privacy in India by introducing Privacy Bill 2017; and the Personal Data Protection Bill 2019; however, the Bill of 2019 was withdrawn in August 2022. The government assured that it would soon be substituted by a "comprehensive legal structure" that would be "developed to cater all the prevailing challenges and those challenges that are likely to come in future relating to the digital environment of the country."[21]Until then, India

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16 Available at "https://www.csoonline.com/article/3619514/ html#:~:text= CAT%20burglar%20strikes%20 again,who%20appeared %20for%20the%20exam". Visited on 3-10-2022

17 Available at "https://www.indiatoday.in/technology/news/story" Visited on 3-10-2022

18 Ibid

19 Supra 16

20 Fetch is data retrieval by a software program, script, or hardware device. After being retrieved, the data is moved to an alternate location or displayed on a screen.

21 Available on "https://economictimes.indiatimes.com/tech/technology/govt-withdraws-data-protection-bill-2021/articleshow/93334281.cms?utm_source= contentofinterest&utm_medium=text&utm_campaign=cppst" Visited on 8-10-2022

has to follow the General Data Protection Regulation of the European Union to some extent.[22]Currently, personal data is protected by the -

- **The Information Technology Act, 2000 (Amendment, 2008) -** contains provisions regarding the safeguarding of the online privacy[23], online fraud and hacking,[24]data protection standards for corporate bodies,[25]monitoring and collecting online traffic data,[26]surveillance, monitoring, and decryption of communications[27]etc. **"Information Technology (Reasonable security practices and procedural sensitive personal data or information) Rules, 2011"under the Information Technology Act, 2000.** Rule 3 of the said Rules defines a person's sensitive personal data or information. It includes important things such as passwords, information relating to financial transactions, medical information, biometrics, and all other information provided while availing of service, etc.
- **Consumer Protection Act, 2019 –** Looking at the revolution in digital transformation, which led to the unprecedented rise in e-commerce transactions that reported the misuse of data and breach of privacy. To protect consumer data Sec. 2(47)(ix) of the Act includes 'sharing of personal data given in confidence by a consumer as an unfair trade practice, except when mandated under the law.
- **National Institution for Transforming India** - On data privacy issues, the NITI Aayog took the initiative with an object to make and form secure data privacy laws in India, a policy framework named "Data Empowerment and Protection Architecture," after an elaborate dialogue and consultation with the stakeholders.

**Privacy - the judicial viewpoint**

The central theme is that privacy is an intrinsic part of life, personal liberty, and of the freedoms guaranteed by Part III, which entitles it to protection as a core of the constitutional doctrine. The security of privacy by the Constitution liberates it, as it were, from the uncertainties of statutory law. In several decisions, the Supreme Court of India has recognized the right to privacy as "a subset of the more extensive right to life and personal liberty under Article 21 of the Constitution of India".[28]The judicial evolution of the

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22 To protect the personal data of the residents of the E.U. member states, the GDPR also has extraterritorial applicability. The scope of GDPR extends to nations, not within the jurisdiction of the E.U. However, not all Indian businesses need to comply with GDPR.

23 The Information Technology Act, 2000, No. 21, Parliament of India, p-67

24 Ibid, p-43

25 "Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information Rules, (2011)"

26 "Information Technology (Procedure and Safeguards for Monitoring and Collection of Traffic Data or Other Information) Rules, (2009)"

27 Ibid

28 Kharak Singh v. State of Uttar Pradesh (1954) SCR 1077

right to privacy started in 1950 with the in the famous case of A.K. Gopalan v. State of Madras[29], MP Sharma v. Satish Chandra[30], Kharak Singh v. State of Uttar Pradesh[31], Govind v. State of Madhya Pradesh[32], Maneka Gandhi v. Union of India[33], R. Rajagopal v. Union of India[34]and in People's Union for Civil Liberties v. Union of India[35]the Supreme Court extended the scope of life and personal liberty and mentioned that an individual's communications come under the purview of the right to privacy. In Selvi and others v. State of Karnataka and others[36]the Supreme Court accepted a difference between physical and mental privacy. In the case of the Unique Identification Authority of India and another v. Central Bureau of Investigation[37] the Supreme Court, in its interim order, held that the data of any person must not be shared by the Unique Identity Authority of India, especially the biometric data; without the consent of the concerned person, it would be a gross violation of the privacy of an individual. Finally, the landmark judgment that settled the privacy problem of whether this right is a part of life and personal liberty is K.S.Puttaswamy v. Union of India[38].

In June 2021, the Supreme Court issued specific directions to WhatsApp regarding allegations of a data privacy breach. Further, it was also directed to submit a written undertaking to protect users' data, and the organization would not share users' personal data.

**Possible solutions**

India is set to become the 3rd largest economy in the world[39]and also is the third-largest online shopper base globally. With the speed at which digital platforms are being used for availing products/services, soon India might overtake the U.S.A. in online shopping[40]. These reports indicate how India is progressing, strengthening its economy, and occupying the top position in e-commerce activities. The digital transformation brought not only positive changes in consumerism but also encountered several challenges in the domain of privacy in general and consumer privacy in particular. Further, with the increasing complexity of the online environment, consumers may be

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29 A.I.R. 1950 SC 27
30 (1954) SCR 1077
31 (1964) 1 SCR 332.
32 1975 AIR 1378
33 AIR 1978 SC 597.
34 A.I.R. 1995 SC 264.
35 A.I.R. 1997 SC 568.
36 2010 (7) SCC 263
37 Special Leave Petition to Appeal (Crl) No(s).2524/2014.
38 Writ Petition (Civil) No. 494 of 2012
39 Available at "https://economictimes.indiatimes.com/ articleshow/ 93970401. cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst" Visited on 8-10-2022
40 Available at "https://www.businesstoday.in/latest/economy/story/" visited on 12-10-2022

vulnerable[41]to actual or potential risks and challenges, which may affect their ability to participate effectively in the digital transformation. These challenges led to severe concerns about protecting the data from its misuse. Technology is evolving with new innovative adaptions in present technology today. As digital technology is disruptive and highly susceptible, it would be appropriate to adopt a three-fold mechanism called L.E.T. (L - Legal, E-Education, and T - Technology) to safeguard the data from misuse and breach of privacy.

**Education**

The first precursor to empowered digital consumers is adequate skills, I.C.T. literacy, and affordable I.C.T. access.[42]Education and awareness, i.e., digital competence, would help reduce consumer vulnerability in the digital age. Empowered consumers with information regarding the do's and don'ts and their rights and liabilities can be the reason to overcome the challenges. "Pass it on" is an initiative developed for education and awareness campaigns in the U.S.A. to encourage consumers to share knowledge and start dialogues with family and friends, to protect against scams and fraud. Similarly, in India, the Department of Consumer Affairs (DoCA) launched campaigns named "JagoGrahakJago" and "Jagriti" to empower consumers and further generate awareness of their rights and protect from unfair trade practices. While developing education and awareness campaigns, governments should keep in mind the importance of making them accessible in formats that meet the needs of vulnerable consumers.

**Legal**

Some countries have developed specific policies targeting vulnerable consumers, such as children, to protect them in the online environment. For example, U.S.A. in relation to the protection of children[43] from online-advertising and U.K.'s policy allowing for data portability to improve switching outcomes about essential service markets, which it found were particularly problematic markets for the elderly.[44]The law applies to operators of commercial websites and online services to encourage data-driven

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41 As noted by the OECD (2014, p. 4): "Vulnerable consumers" are consumers who are susceptible to the detriment at a particular point in time, owing to the characteristics of the market for a specific product, the product's qualities, the nature of a transaction or the consumer's attributes or circumstances

42 OECD (2019), Going Digital: Shaping Policies, Improving Lives, Available at "https://www.oecdilibrary.org/docserver/9789264312012en.pdf?expires=1558509788&id=id&accname=ocid84004878&checksum=1FB2CB96062D854633E56FC0BAEA2B34" Visited on 22 -10-2022

43 The "United States Children's Online Privacy Protection Act (COPPA)" and the US FTC's COPPA Rule prohibit the collection, use, and disclosure of personal information from and about children on the Internet without appropriate parental consent.

44 U.K. C.M.A. (2019), Consumer vulnerability: challenges and potential solutions, Available at "https://www.gov.uk/government/publications/consumer-vulnerability-challenges-andpotential-solutions/consumer-vulnerability-challenges-and-potential-solutions." Visited on 22 -10-2022

innovation to improve outcomes for vulnerable consumers. Many countries have adopted/adapted their existing legislation to increase their co-operability. The Indian Consumer Protection Act of 2019 is the outcome of it. To strengthen and facilitate cross-border cooperation, several G-20 economies have signed bilateral and multilateral agreements in this regard.

If any I.T. company plans to set up a strong database in India, it has to strictly comply with various provisions of the Information Technology Act, 2000 and its related Rules. Any negligence may result in facing regulatory punishments. For the present discussion, some of the relevant and significant provisions of the Information Technology Act are Sec. 10A, Sec. 67C, Sec. 84A, and Sec 66E. Digital Signature (End entity) Rules, 2015, are applicable for digital signatures on all contracts in India. In case of any grievances, one can approach the Cyber Appellate Tribunal for settlement.

**Technology**

To promote data protection and implement reasonable security practices, developing security and privacy codes is essential. Specific to privacy, the Data Security Council of India endorses nine principles for organizations to develop a technology in such a way that adheres to notice, choice and consent, collection limitations, use limitations, access, and correction, security, disclosure to third parties, openness, and accountability. One expert suggested that it will be necessary to adopt mechanisms that ensure compliance towards the use of Privacy Enhancing Technologies (P.E.T.)[45]. Privacy-Enhancing Technologies is a system of I.C.T. measures protecting informational privacy by eliminating or minimizing personal data, thereby preventing unnecessary or unwanted processing of personal data without the loss of the functionality of the information system. Technological safeguard to protect individual privacy in India no mechanism has been implemented towards the integration of P.E.T. in digital tools and platforms to be used for citizens and by citizens. These technologies allow end users to safeguard the privacy of the personally identifiable information they willingly provide to government agencies and other service providers. However, these technologies place end users in control over the information and with whom to share. Users also get clear information about the recipients of this information.

A.I. can provide effective filtering and moderation tools. These tools can improve the pre-filtering/moderation stage and flag content for review by humans, increasing the accuracy of the moderation process. A.I. may also reduce the potentially harmful effects of content moderation on individual moderators. However, automated filtering/moderation should only be used in combination with human judgment, and the final decision to block any particular content or activity should be entrusted to the human in this loop. Using such tools may become a necessary aspect of compliance, with providers'

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[45] Rane, R., Ensuring privacy in a digital age. Livemint. Available at "http://www.livemint.com/Opinion/ucp 5me8oXUafwS1kPZSHNK/Ensuringprivacy-in-a-digital-age.html" Visited on 20-10-2022

obligation to exercise due care.[46]Such tools may significantly facilitate to reduce the incidents of privacy and data breaches.

**Conclusion**

Convenience is the game's name, and just by the push of a few buttons, a tap here or a swipe there, one could unleash inherent "super consumer." Moreover, the value adds of the "convenience economy" is even more prevalent in the post-COVID world. The pandemic is unprecedented in many ways, as millions of people have shifted offline to online for their day-to-day activities. This meteoric adoption paved the way for enormous data sharing fed regularly by consumers. In the absence of adequate safeguards and controls, there is a risk of the personal data of consumers and subjected to unauthorized access or reused for purposes other than for which it was collected in the first place.

The crux of digital transformation is to provide a wide range of digital services in innovative ways by matching the consumer with the service provider based on their proximity, user profile, past purchases, and the nature of the demand. At the same time, doing so the personal information at stake and raises privacy concerns. The technology uses personal data to identify and authenticate customers through their names, I.D.s, and contact numbers. The information is also critical to know their interest and to buy patterns so their online personas can be created. Moreover, financial data such as credit card numbers, G.P.S. coordinates, and home addresses are also collected by organizations. These data elements are prone to be misused and which lead to a threat to data security and privacy.

The Privacy Enhancing Technologies (PET) can be one of the ways to protect personal privacy in the present big data age. But P.E.T.s can never be the only measure to protect privacy. Along with privacy legislation and implementation of P.E.T.s mechanism, a multi-stakeholder approach is needed to deal with the issue of 'the right to privacy'. Different relevant stakeholders must follow some standard and independent best practices to share, collect, store, analyse, and handle personal data and information in the age of big data.

Currently, the only applicable legal requirements in India flow from the Information Technology Act, 2000 and its supplementary Rules. Further, while privacy was recognized as a fundamental right by the Supreme Court of India, a comprehensive regime mandating personal data protection still needs to be rolled out. A mechanism is required in which explicit consent from consumers is to be obtained before processing the data. Australia has exclusive laws and Rules relating to Consumer Data Rights, substantiating that technology users have the right to share or deny the data. However, the Personal Data Protection Bill was delayed in India for various unavoidable circumstances.

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46 Prof. Giovanni Sartor, New aspects and challenges in consumer protection - Digital services and artificial intelligence, Policy Department for Economic, Scientific, and Quality of Life Policies Directorate-General for Internal Policies, European Parliament, 2020 p-33

In the age of digital transformation, economic progress and good governance are impossible without the proper implementation of digital services and the active support of consumers. However, at the same time, governments/organizations must ensure that consumers are protected from harm while using different digital services and uphold the human rights framework. Hence, digital empowerment is increasingly seen as the new paradigm of good governance. However, challenges exist, and some new challenges are being added to them. Thus, the issue of personal privacy, safety, and security must be taken care of properly.

In such a scenario, the following best practices may be implemented by an organization to safeguard consumer data and privacy –

- **Be transparent:** Consider developing mechanisms and procedures enabling 'opt-in' consent. This will notify customers about the company's data processing activities and allow them to make active and deliberate choices concerning being contacted for marketing or even how their data is shared with other entities. A privacy notice is an excellent place to start, as it can help convey an organization's controls concerning data privacy and protection.
- **Visualize and minimize:** Measures such as personal data inventory creation can help visualize the life cycle of data within the organization. This step can help identify and strictly collect only the data necessary for the services and goods marketed, adhering to the principle of data minimization.
- **Consumer-first approach:** Privacy-enhancing tools may be leveraged to ensure customers can access the information being collected and understand how their information is being used. The choice to amend and delete personal data being processed by an organization could also be provided to customers. This will help create confidence and trust, showcasing an organization's bona fides.
- **Periodic audits and assessments:** Once the baseline control is built controls, then one could initiate assessing and auditing systems and procedures. Perhaps start with identifying types of data collected from customers and ascertain its flow within the organization's processes. Further, map where that data is stored and for how long. Another important item to consider is the third parties (domestic and international) with whom the organization is sharing the information and whether adequate safeguards, such as contractual obligations and access controls, are in place.

Privacy Enhancing Technologies may potentially reduce the threat of ensuring the protection of personal privacy and freedom. To have a secured environment, the appropriate laws must come as expeditiously as possible on privacy and data protection. International cooperation, a robust legal system, and technically sound consumers significantly regulate data and privacy issues in dynamic digital platforms.

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# Patent Ever Greening as Part of India-UK Free Trade Agreement: A Dilemma for India

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**Abstract**

*Free Trade Agreements (FTA) are treaties entered into by two or more nations to ameliorate the trade progression between the nations by alleviating trade barriers. The majority of the FTAs entered into by the nations today have 'investment' and 'Intellectual Property Rights' related chapters as an essential and indispensable part of them. To further strengthen the trade relations, India and U.K. are in the process of negotiating one FTA since January 2022. The six rounds of negotiations have already been completed but we are yet to receive any tangible results.*

*In October 2022, Médecins Sans Frontières (MSF), an independent French non-governmental organisation, released a part of the U.K. side of the draft IP chapter of the U.K.-India FTA. Although not released by the government of the U.K. through their official sources yet, the provisions of the draft are seen as non-favourable to the Indian patent regime. Provisions like Article B.2, B.4 and E.2 of the draft chapter could be seen to be directly affecting the provisions of the Indian Patent Act, 1970, especially provisions which prevent 'patent evergreening'. The provision, if came into effect, would adversely affect the generic drug manufacturing industry of India thereby preventing access to medicine.*

*The authors of this paper would try to analyse the effect of the clauses of the draft IP chapter from the U.K. – India FTA on the Indian patent regime. Also, the authors would examine the extent to which the clauses of the draft IP chapter would affect the generic drug manufacturing industry of India. The authors, at last, would conclude with suggestions to the governments of India and U.K. regarding the negotiation and adoption of the Free Trade Agreement.*

**Keywords:** Free Trade Agreements (FTAs),U.K.-India FTA, Patent Act of 1970, Patent Evergreening, access to medicine.

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**Introduction**

Free Trade Agreements (FTA) are treaties entered into by two or more nations to ameliorate the trade progression between the nations by alleviating trade barriers. Under FTAs, the nations transcribe their mutually agreed terms for trade and investment by facilitating the movement of goods and services. Hence, FTAs are the modern arrangement which helps member nations in the smooth trans-border movement of goods and services, leading to stronger trade and commerce ties.

Given that 'foreign investment' frequently complements international trade, the most comprehensive trade and economic agreements, like the *"Regional Comprehensive Economic Partnership Agreement"* and the *"Comprehensive and Progressive Agreement for Trans-Pacific Partnership"*, contain chapters regarding the protection of both trade and investment.[1] 'Foreign investment' has a major role in sustaining international trade as it creates 'the global value chain' through which most of the global trade materializes.

'Intellectual Property Rights' (IPRs), also, play a crucial role in trade agreements as they help in elevating bilateral trade and commerce by protecting investments in the form of innovation. The last century has seen the development and elevation in the status of Intellectual Property Rights from being considered a protector of individual rights to the status of a tool crucial for nation-building. IPR protection has transposed from being limited to international conventions (like Paris Convention and Berne Convention) to the World Intellectual Property Organization (WIPO); and later from WIPO to World Trade Organization (WTO) through GATT.

With time, we have accepted that 'trade between the nations' includes, not only, investment in the form of tangible assets, but also comprises the exchange of assets in non-tangible forms such as IPRs. Since the inception of WTO-backed 'Trade-Related Aspects of Intellectual Property Agreement' (also called *TRIPS Agreement*), IP protection has become an indispensable part of WTO's multilateral trade and investment system.[2] A majority of trade agreements in effect today, like the Bilateral Investment Treaties (BITs), Multilateral Investment Treaties (MITs) or Free Trade Agreements (FTAs), have 'investment' and 'intellectual property' chapters as an indispensable part of it.[3] 'Investment protection' clauses are primarily included for the purpose of protecting the investors from getting their assets expropriated by the

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1 Prabhash Ranjan, "Investment protection a must in India-UK FTA", *Hindustan Times (Opinion)*,October 31, 2022; available at https://www.hindustantimes.com/ opinion/ investment-protection-a-must-in-india-uk-fta-101667221474975.html

2 L. Liberti, "Intellectual Property Rights in International Investment Agreements: An Overview", *OECD Working Papers on International Investment, 2010/01*, OECD Publishing. Available at http://dx.doi.org/10.1787/5kmfq1njzl35-e.

3 M. Houde and K. Yannaca-Small, "Relationships between International Investment Agreements", *OECD Working Papers on International Investment, 2004/01*, OECD Publishing. *Available at"* http://dx.doi.org/10.1787/17146132556.

government of the host nation. The 'intellectual property' clauses are included to protect the innovations, like Patent, trade secrets, trademarks, copyrights, industrial designs, etc, that the host nation receives through the investment.

To achieve the target of a $2 trillion economy by 2030, India is in the quest to enter into an array of FTAs with multiple countries. One such FTA is under negotiation between India and the United Kingdom (U.K.) since January 2022. In January 2023, Kemi Badenoch, Secretary of State for the Department for Business and Trade, UK (an equivalent post of Minister of Commerce and Industry in India) was in New Delhi to negotiate the sixth round of the India-UK FTA.[4] Although the FTA was expected to be finalized by Diwali last year, as per the deadline set by the former British Prime Minister Boris Johnson, the negotiations could not be completed by then due to practical difficulties, given the political instability in U.K. The FTA is expected to be finalised and come into force this year.

In October 2022, *Médecins Sans Frontières* (MSF), an independent French non-governmental organisation, released a part of the U.K. side of the draft IP chapter of the U.K.-India FTA.[5] Although not released by the Government of U.K., the text contains the United Kingdom's draft proposal of the 'Intellectual Property' chapter from the FTA which is under negotiation. Going through the articles like B.2 and B.4 of the draft proposal, it could be interpreted that the U.K. is intending to further harmonize the Patent Laws of India which would dilute the existing patent regime. Also, the provisions like article E.2 of the draft show the U.K.'s intend to tighten the screws of the Indian generic medicine industry by forcing the Indian government to amend the Patent Act, 1970, specifically the provisions which prevent patent evergreening. After going through the parts of the IP chapter, it could be deduced that the implementation of the FTA, in its current form, would damage the generic drug manufacturing industry of India. Further, if implemented in its existing form, the draft proposal would adversely affect the production, supply and export of affordable generic medicines from India.

This article will critically examine the 'Intellectual Property' chapter of the draft FTA proposal and would analyse how the provisions of the draft would adversely affect India's generic medicine industry. Also, the article would examine the concept of Patent evergreening and discuss if the draft proposal, if came into effect, would force India to allow patent evergreening, which is prevented by Section-3(d) of the Indian Patent Act, 1970.

**Patent Evergreening, access to medicine and the Free Trade Agreement (FTA)**

An invention is granted patent protection if the inventor is able to prove that its invention is *Novel*, *Not-obvious* to the person skilled in the art and

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4 Economy & Policy, Business Standard, January 22, 2023. *Available at*:https://www.business-standard.com/article/economy-policy/india-fta-can-be-clinched-this-year-but-no-more-visa-offers-uk-minister-123012200515_1.html.

5 MSF responds to UK's disastrous proposal on intellectual property in UK-India Free Trade Agreement.*Available at*: https://msfaccess.org/msf-responds-uks-disastrous-proposal-intellectual-property-uk-india-free-trade-agreement.

has some *utility* or *industrial applicability*.[6] These requisites of patent protection are provided under *Section 2(j)* of the Indian Patent Act, which is compliant to *Article 27.1* of the TRIPS Agreement.

As per Ravinder & Jillian, in India, the cost of a life-saving cancer drug is more than 30 times the average income of Indian households.[7] The local generic drug manufacturing companies are able to manufacture these drugs at a much lower cost as compared to the multi-billion-dollar MNCs, but the investors of these patented drugs don't want the generic drug companies to produce the low-cost medicines. As these pharmaceutical companies have invested millions of dollars in developing the drugs, they try to recoup the same by increasing the price of medicine.

Since the enactment of the Patent Act in 1970, the country's generic drug manufacturing industry has thrived to supply generic medicines domestically and abroad. India is the largest producer of generic medicine in the world accounting for 20 per cent of the total export share.[8] As per the report by *IBEF*, India's pharma industry was worth US $42 Billion in 2022.[9] India, also called the *"Pharmacy of the World"*, is exporting more than US$10 Billion dollar worth of generic medicine every year.[10] India is the 12th largest export of pharma products in the world and Indian drug & pharmaceutical exports stood at US $24.60 billion & US $24.44 billion in FY22 and FY21 respectively.[11]

"*Medicinal & pharmaceutical products*" were among the top 5 products imported to U.K. from India.[12] The value of these imports by the U.K. was around US $583 million which accounts for approx. 4.5% of the total goods imported from India.[13] A sizable portion of all the "*Medicinal & pharmaceutical products*" imported to U.K. from India could be attributed to the generic medicine manufacture in India.

This massive generic drug industry of India, however, was under threat by the adoption of the WTO-TRIPS Agreement. The TRIPS conventions mandated the adoption of both product and process patents. India was not providing product patents prior to the enforcement of TRIPS. Although the TRIPS Agreement imposed stricter requirements for the patent grant, it also provides for flexibilities to the nations called 'TRIPS flexibilities'. One such

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6 The Patent Act, 1970, s. 2(j); Agreement on Trade-Related Aspects of Intellectual Property, art. 27.1.

7 Ravinder Gabble & Jillian Clare Kohler, "To Patent or Not to Patent? The Case of Novartis' Cancer Drug Glivec in India", 10 *Globalization & Health* 3, 5 (2014).

8 IBFE, "Pharmaceuticals Industry Report", (2022).*Available at:* https://www.ibef.org/industry/pharmaceutical-india.

9 *Ibid*.

10 Medecins Sans Frontieres, "Examples of the Importance of India as the Pharmacy of the Developing World" (2007).*Available at*:https://msfaccess.org/examples-importance-india-pharmacy-developing-world.

11 IBFE, "Pharmaceuticals Industry Report" 1 (2022).*Available at:* https://www.ibef.org/industry/pharmaceutical-india.

12 *Id*. at 6.

13 *Ibid*.

flexibility availed by India is adoption in the form of Section 3(d) of the Patent Act, 1970. The provision states;

> *"(d) The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant."*[14]

The provision was added to the Indian Patent Act through the 2005 amendments. Through this amendment, the Parliament included many '*exclusions*' under Section 3 which are "no parallel anywhere else in the world."[15] Although not provided expressly, *Section 3(d)*[16] is particular to the pharmaceutical industry due to its extensive effect on the patenting and manufacturing of the drugs. Among other clauses, *Section 3(d)* is one of the most discussed and debated provisions as it prohibits the patenting of any *"new forms of known substances and compounds"* unless it provides any form of *"enhanced efficacy"* compared to the previous one.[17] Also, the debates of Indian Parliament for the inclusion of such a clause indicate they were trying to prevent a particular kind of patenting practice prevalent in pharmaceutical industry i.e., *"Patent Evergreening"*.

*Patent Evergreening* is a concept defined by MSF as "a way for MNCs to disguise a drug that has already received a patent in order to receive a 'secondary patent' on an allegedly new drug that restarts the twenty-year period of exclusivity anew".[18] A pharmaceutical company engages in evergreening when they "extend the market exclusivity of a drug beyond the life of its original patent by obtaining multiple patents that cover different aspects of that drug, including the active ingredient, formulations, methods of manufacturing, chemical intermediates, mechanisms of actions, packaging, screening methods, and biological targets".[19] Section 3(d) of the Act is designed precisely to prohibit such kind of ever greening practices by pharmaceutical companies so that the drug, after the expiry of its primary patent, could be made available at a cheaper price.

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14 The Patent Act, 1970, s. 3(d).

15 Shamnad Basheer & Prashant Reddy, "The "Efficacy" of Indian Patent Law: Ironing Out the Creases in Section 3(d)", 5 *Scripted* 232, 234 (2008); *see also* Shamnad Basheer, "India's Tryst with TRIPS: The Patents (Amendment) Act 2005", 1 *Indian J.L. &Tech.* 15, 24 (2005).

16 The Patent Act, 1970, s. 3(d).

17 *Ibid.*

18 Du Dorothy Du, "Novartis AG v. Union of India: Evergreening, Trips, & Enhanced Efficacy under Section 3(d)" 21(2) *Journal of Intellectual Property Law* 238 (2014).

19 Liu Jodien, "Compulsory Licensing and Anti-Ever greening: Interpreting the TRIPS Flexibilities in Sections 84 and 3(d) of the Indian Patents Act," 56(1) *Harvard International Law Journal* 220 (2015). *Also see*Joanna T. Brougher, "Ever greening Patents: The Indian Supreme Court Rejects Patenting of Incremental Improvements"19 *J. Comm.Biotechnology* 54, 55 (2013).

The practice of patent ever greening has some serious implications on 'access to medicine', more particularly to developing nations and least developed nations (LDCs), as it delays the market entry of generic alternatives to the patented drug, post-expiry of the primary patent. It is well known that the generic versions of patented drugs are available at cheaper rates as the generic drug making companies were not engaged in any research and development (R&D) at the first hand and hence they don't have, per se, any R&D cost to recoup.[20] They usually reverse-engineer the patented product or patented formula and recreate the same. Also, in most cases, the marginal cost of production is extremely low and the drugs are easier to copy.[21] The cost of patented drugs is high, not because of the higher cost of production or high profiteering, but because it includes many other costs like the cost of R&D, the cost of all abortive investigations, etc.[22] In fact, David Bainbridge considers that the drug houses are not selling any substance, but a service.[23] Considering the example of *'antiretroviral'*, a patented drug for HIV treatment, the cost of the patented medicine was between $10,000/- to $15,000/-, on the other hand, the cost of a generic version of the same drug produced by Indian generic medicine producers is less than $150/-.[24] For a country like India, *Section 3(d)* is an essential part of the patent system as it prevents the patent ever greening and allows the entry of generic medicine post the expiry of the primary drug patent. The provision has already proven to be a boon for the generic drug manufacturing industry of India but it is considered to be under threat due to the ongoing negotiations between India and UK for the Free Trade Agreement. Article E.2 of the draft IP chapter released by MSF could be understood to force India to delete the provision like Section 3(d). I will be discussing the provision further in detail.

**Invalidating Section 3(d) of the Indian Patent Act and approving Patent Ever greening**

Article E.2 of the draft IP chapter provides the standards for 'Patentable Subject Matter'.[25] Other than *clause 2,* for most of it its part, Article E.2 replicates the Article 27 of the TRIPS Agreement. *Clause 2* provides for the

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20 A. Cook, "How increased competition from generic drugs has affected prices and returns in the pharmaceutical industry"*US Government Printing Office* 17 (1998),*Available at*: https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/pharm.pdf.

21 Muhammad Abbas, "Ever greening of pharmaceutical patents: A blithe disregard for the rationale of the patent system" 15(2) *Journal of Generic Medicines: The Business Journal for the Generic Medicines Sector*55(2019).

22 David I. Bainbridge, *Intellectual Property* 395 (Harlow, Pearson, 9th edn., 2012).

23 *Ibid*.

24 A. Kapczynski, "Engineered in India—patent law 2.0" 369(6)*New England Journal of Medicine*460(2013).

25 UK-India FTA: draft intellectual property chapter, available at https://www. bilaterals.org /IMG/pdf/uk-india_fta_ip_chapter_dated_april_2022_68_.pdf. *Also see* https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)02298-X/fulltext?rss=yes.

additional requirement regarding the patentability of known substances or composition. The clause mandates both India and UK to consider "any new medical use of the known substance" as patentable and grant the patent accordingly. Further, the clause provides that no party can mandate the requirement of "enhancement in known efficacy" while considering the application for the patentability of a known substance or composition.

Whenever a patent is granted on any medicinal compound, the patent would eventually expire unless the pharmaceutical company is given the opportunity to make the obvious changes in the compound and apply for a fresh patent application. Since pharmaceutical corporations invest a lot of money in developing a medicine or drug, they often try to retain the monopoly for as long as possible. To achieve this goal, the pharma companies make certain 'obvious changes' in the patented compound or find a 'new use' of the patented drug and re-file the patent application, presenting it as a new invention. The implementation of measures as provided under Article E.2 would reverse the existing patent regime of India which through Section 3(d) ensures that the old and refurbished drugs are not patented again as the provision makes it harder for the drug companies to get a patent on extended drug formulas. Since India is a major supplier of generic medicine in the world, the implementation of Article E.2 would adversely affect the availability of cheap and low-cost drugs in India as well as other countries which import generic drugs from India. The implementation would adversely affect the availability of low-cost generic alternatives to the drugs for diseases like malaria, HIV and tuberculosis. Therefore, India should oppose the inclusion of provisions like Article E.2 as making them part of FTA would adversely affect the generic pharmaceutical industry of India. The author in the next chapter would discuss the other provisions of the draft IP chapter and would assess their effect on the India Patent regime.

**Understanding India–U.K. bilateral trade relations: Negotiating a new FTA**

The bilateral trade between UK and India has increased from £11.6 billion in 2020-21 to £34.0 billion in the four quarters to the end of Q3 2022.[26] Also, the total of the UK's export to India has increased from £6.4 billion in 2021 to £14.8 billion, in the four quarters to the end of Q3 2022.[27] As per the report by the UK's Department for International Trade, India was the 12th largest trading partner of UK.[28] Also, in 2022, India became the world's 5th largest economy, overtaking the United Kingdom.[29] Additionally, pharmaceutical exports from India stood at $24.62 billion in 2021-22 whereas

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26 Department of International Trade, Government of U.K., *Trade & Investment Factsheet (India)* 1 (February 17 2023); *available on*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1136148/india-trade-and-investment-factsheet-2023-02-17.pdf

27 *Ibid*

28 *Ibid*.

29 Martin Armstrong, Statista, *Economic Progress (India)* (September 26, 2022); available at https://www.weforum.org/agenda/2022/09/india-uk-fifth-largest-economy-world

the export to the UK stood at $704.5 million. It is projected that the pharmaceutical exports of India to the UKare going to cross$583 million in 2023.

To achieve the given export targets and given the indistinguishably complex connection between trade and investment, the UK is pushing for having an 'Investment' chapter as part of the FTA under negotiation. Considering other FTAs entered into by UK, this chapter will include provisions which would limit the State's power to interfere and intervene in investments from the UK. The 'investment' chapter will act as a shield against the probable unlawful expropriation of foreign assets by India. Additionally, considering the Australia-UK FTA and UK-New Zealand FTA, the India-UK FTA is absolutely going to include 'Intellectual Property' as a chapter.[30]

The Free Trade Agreements (FTAs) are expected to function as a customised bridge between the two nations which could facilitate trade and investment by alleviating the trade barrier. In the past few decades, the FTAs have performed a crucial role by stimulating investment between the nations. The reduction in trade barriers often leads to ease of doing business and easier transfer of goods between the nations. The proposed draft IP chapter published by *Médecins Sans Frontières* (MSF), though not disclosed by the government of UK through their official sources, contains 12 chapters.[31] The chapter contains mandates beyond the WTO–TRIPS Agreement, also called TRIPS-plus provisions. This means, if entered into force, the FTA would force the government of India to provide IP protection beyond what is recommended as a *'standard of protection'* by TRIPS.

India is a country with a socialist objective in developing states. On one hand, as a rapidly growing economy India has to follow the international norm of conceding to WTO backed TRIPS agreement and providinga higher standard of IP protection; on the other hand, as a socialist nation, India has the duty towards its citizens to provide affordable healthcare to all its citizens. I will be discussing the provisions of the draft chapter further in detail.

**Compelling for further harmonization of IP laws**

The clauses of the draft IP chapter do not seem very favourable to India as a socialist nation. The United Kingdom seems to push India to further harmonize the IP Laws with that of the TRIPS Agreement. *Clause 'h'* of Article B.2.1 of the draft maintains that both nations should cooperate in IP filing procedures, IP enforcement and reducing IP infringements.[32] Further, *clause 'b'*

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30 For the U.K. - New Zealand FTA refer https://www.gov.uk/government/collections/uk-new-zealand-free-trade-agreement; For U.K.-Australia FTA refer https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6372/download

31 *Ibid*.

32 UK-India FTA: draft intellectual property chapter, available at https://www.bilaterals.org/IMG/pdf/uk-india_fta_ip_chapter_dated_april_2022_ 68_.pdf. *Also see* https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)02298-X/fulltext?rss=yes.

of Article B.2.2 insists that both parties cooperate in the international harmonization of IP and international IP enforcement.[33] *Clause 1 & 3* of Article B.4 focuses primarily on patents as it provides that both nations must work to harmonize and streamline the patent examination and grant process.[34]

India has already conceded to the USA-backed & WTO-sponsored TRIPS agreement which called for 'international uniform standards' for IP protection.[35] To make its Patent regime in conformity with the TRIPS Agreement, India started providing Product patent in 2005.[36] India maintains strict patent eligibility criteria as well as a strict patent examination process. If the given draft came into effect, it would force India to maintain lower standards for grant of patents leading to the issuance of unmerited patents. This will also reduce the existing IP flexibilities and discretions that India has under the existing patent regime. Further harmonization of IP laws due to this under-negotiation agreement would dilute the TRIPS flexibilities which are crucial for India in dealing with issues like preventing 'patent evergreening' or 'judicial independence' in IP matters. It would harm the generic drug manufacturing industry and the trade in generic medicine. By enforcing the given clauses UK may disrupt the manner in which Indian courts handle IP-related disputes.

The draft IP chapter, under Article B3, provides for the formation of a *'Working Group'* consisting of government representatives from both India and UK entrusted with the function to "review and monitor the implementation and operation of the IP chapter".[37] There is a high probability that India's representatives appointed under this group would be selected from the group of members belonging to the *'Department for Promotion of Industry and Internal Trade'* (DPIIT) (a specialised IPR agency of the Government of India established under the Ministry of Commerce). This would give the working group an opportunity to create a mechanism to interfere in the administration of the Indian Patent Act, 1970 by persuading its members.

**Tampering the patent grant procedure – elimination of pre-grant opposition**

While granting patents, the Indian patent office ensures that only genuine inventions and innovations are granted exclusivity, not forged ones. To ensure the same, the Indian Patent Act, 1970 provides for various 'safety valves' which help the patent office in deciding and rejecting the applications which are not up to the standards of the Indian patent regime. '*Patent Opposition'* is one such measure which allows any person (interested) to oppose

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33 *Ibid.*

34 *Ibid.*

35 An. Tŏk-kŭn, *WTO and East Asia: new perspectives* 30 (Cameron May, 2004).

36 Richard D. Smith, Carlos Correa, and Cecilia Oh, "Trade, TRIPS, and pharmaceuticals" 373 (9664) *The Lancet* 685 (2009).

37 UK-India FTA: draft intellectual property chapter, available at https://www.bilaterals.org/IMG/pdf/uk-india_fta_ip_chapter_dated_april_2022_68_.pdf. *Also see* https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)02298-X/fulltext?rss=yes.

the patent application before or after the grant of the patent.[38] Section 25(1) of the Indian Patent Act, 1970 provides for 'Patent Opposition' where '*any person*' may oppose a patent application after the publication, till the grant of patent.[39] This procedure is called *"pre-grant opposition"*. Further, Section 25(2) states that '*any person interested*' may file for patent opposition for a period of one year from the date of grant. This procedure is called *"post-grant opposition"*.

The pre-grant opposition proceedings allow any third party, including health organisations and generic medicine producers, to oppose the patent application irrespective of the fact if they are related to the invention. Any person can oppose the grant of a patent by providing reasons to the patent office for not approving the application. Since Indian patent office receives an enormous amount of pharmaceutical patent applications for examination, practically it is very difficult for the application examiners to consider all the information and adjudicate on the grant. The examiners often miss the technical information while considering the patent application. Through pre-grant opposition, any third party may bring to the notice of the patent office if a drug or medicine under consideration is a 'derivative' of the existing patent or the new application is only the 'new use' of the existing patent. The procedure substantially reduces the wrongful grant of a patent.

Article E.10 of the draft IP chapter mandates India and UK to provide for patent opposition, but the same could not be made available before the grant of the patent. This means, if effected, the FTA would force India to remove *clause 1* of Section 25 by amending Patent Act, 1970. This would lead to the removal of an essential safeguard which prevents the grant of weak patents. There have been instances in the past where the patent office has rejected the grant of patents for essential drugs like TB and hepatitis due to successful pre-grant opposition.[40] Also, there have been instances where generic drug manufacturing firms have opposed the patent application for the drug already available to public.[41] If came into effect, the Article would adversely affect India's generic drug manufacturing industry as they would no longer be able to oppose the grant of patent. Further, the Article is going to affect solely the Indian Patent regime because the UK patent legislation does not provide for pre-grant opposition.[42]

**Extension of patent tenure**

The patent regime post-enforcement of the WTO-TRIPS Agreement remains harmonised throughout the world. Article 33 of the TRIPS Agreements provides;

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38 Patent Act, 1970,s. 25.

39 *Ibid*.

40 Sandeep Kanak Rathod, "Patent Oppositions in India", in Carlos M. Correa & Reto M. Hilty, *Access to Medicines and Vaccines: Implementing Flexibilities Under Intellectual Property Law* 160 (Springer International Publishing, 2022).

41 *Ibid*.

42 Christopher J.Worrel, "Improving the patent system: Community sourcing and pre-grant opposition" 42 *U. Tol. L. Rev.* 835 (2010).

> *"Term of Protection: The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date."*

Every country signatory of the TRIPS Agreement provides for the protection of product and process patents for a duration of 20 years from the date of filing of the application. India, a signatory of the TRIPS Agreement, provides for the grant of the patent for 20 years; which would be calculated from the *date of filing of the application for the patent*.[43] Furthermore, neither TRIPS Agreement nor Indian Patent Act provides for an extension or renewal of the patent after the completion of 20 years.

*Clause 2* of Article E.12 of the draft IP chapter mandates the member nations to extend the term of a patent for compensating the loss of tenure due to market approval of drugs. This means India has to provide for an extension of the patent duration for the period which was taken by the market regulator for approving the medicine. This will further extend the monopoly of drug MNCs and prevent generic drug manufacturers from entering the market. As a result, the prices of these medicines would remain higher and people would not be able to get the medicine, including essential life-saving drugs, at affordable prices even after the expiry of 20 years of standard patent exclusivity. This kind of clause would adversely affect only the Indian patent system as the UK has a mechanism of "*Supplementary Protection Certificate (SPC)*", a kind of patent extension mechanism borrowed from the "European Patent Convention (EPC)".

**'Data Exclusivity' as TRIPS-plus measures under the proposed FTA**

It has been long debated that exclusive protection should be granted to the trial data submitted to the drug market approving authority.[44] Additionally, it has been argued multiple times that *Article 39.3* of the TRIPS Agreement provides for 'data exclusivity'.[45] However, this is the incorrect interpretation as the mentioned clause does not refer to the term *'exclusivity'* or *'exclusive right'*. The Article mandates the member nations to protect the undisclosed registration data regarding a new pharmaceutical or agricultural chemical product, submitted to the authority for market approval, against unfair commercial utilization.[46] The correct interpretation of Article 39.3 of the TRIPS Agreement would be such that the member nations need to follow such a procedure, for granting market approval, where they cannot publish the registration data (like test data) or share the same with any third party (like generic medicine producing firms). Hence, the TRIPS mandate requires countries to provide for *'data protection'* not *'data exclusivity'*.

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43 Patent Act, 1970, s. 53.

44 Razvan Dinca, "The Bermuda Triangle of Pharmaceutical Law: Is Data Protection a Lost Ship" 8 *J. World Intell. Prop.* 520 (2005).

45 *Ibid.*

46 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 39.3.

Article F.2.1 of the draft IP chapter mandates the member nations to provide *data exclusivity* for a period of six years.[47] This means whenever the drug market approving agencies (like the *"Central Drugs Standard Control Organisation"* of India) receive an application, they are prohibited to share any 'test data' or other 'undisclosed data' with any third party. As a result, the member nation would not be able to approve the marketing of a 'generic medicine application' by replying upon the test data submitted by the first pharmaceutical applicant, even when the original applicant's drug is not patented.

As per the existing practice, India provides for protection to the undisclosed data submitted for market approval, but it does not provide for 'data exclusivity'.[48] This practice is in compliance with the TRIPS mandates and if India acceded to Article F.2.1 of the released IP chapter, this would forbid the drug controller of India from granting marketing approval to generic drug manufacturers for six years. Also, as per the report by the World Health Organization (WHO), the submission of test data to the market approving authority would not be considered to be "unfair competition" under TRIPS.[49] Hence, if came into effect, the Article would adversely affect the 'access to medicine' as India would have to delay the approval of a generic version of an approved drug, even when the original application has no patent registration.

Removal of the patent working disclosure requirement

Subsequent to the grant of a patent, the Indian patent office takes various measures to check the working of the patent. One of such measures is provided under *Section 146* of the Indian Patent Act, 1970 when ready with *Form 27* of the schedule to the Patent Rules, 2003. The provision grants power to the Controller General of Patent, Design and Trademark (the Controller General) to call for information regarding the working of patents within the territory of India. By the very power granted to the controller, she may send a notice to the patentee or licensee requiring to furnish the information regarding the commercial working of the patent within the territory of India.[50] Vide order dt. 20th June 2022, the Controller General has directed the patent holders or licensees to submit the information regarding patent working by 30th September of every year.[51] This periodic disclosure includes the information regarding the status of production of patented goods within the territory of India, if the need of the Indian population is satisfied, and whether there is

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47 UK-India FTA: draft intellectual property chapter, available at https://www.bilaterals.org/IMG/pdf/uk-india_fta_ip_chapter_dated_april_2022_68_.pdf. *Also see* https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)02298-X/fulltext?rss=yes.

48 SrividhyaRagavan, "Data exclusivity: a tool to sustain market monopoly" 8 *Jindal Global Law Review* 250 (2017).

49 World Health Organization (WHO), *Data exclusivity and other "trips-plus" measures* 2 (2017); *available at*https://apps.who.int/iris/bitstream/handle/10665/272979/Data-exclusivity.pdf?sequence=1&isAllowed=y

50 Patent Act, 1970, s.146 ready with Form 27 of the schedule to the Patent Rules, 2003.

51 Patent (Amendment) Rule 2020, s. 4.

sufficient supply and affordability of the patented product. In this manner, the Controller General keeps a track of the working of patents and decide if the patent is able to satisfy the needs of people. Further, if the Controller General recognizes that the patentee is not able to utilise the exclusivity granted for the benefit of society, she may decide to revoke the patent or grant compulsory license over the patent.[52]

Article E.11 of the draft IP chapter bars both the member nations from providing any kind of mechanism of periodic disclosure of information regarding working patents within their territory. Since the periodic disclosure requirement is a statutory mandate under Indian Patent Act and Patent Rules, the article would require the Indian government to amend the law and remove the requirement. This requirement is crucial for a country like India because it helps in determining if patent exclusivity is being utilised to benefit Indian society. Also, in the case of a pharmaceutical patent, it will help the Controller General in determining if the patented drug is reaching the end consumer at an affordable price. The disclosure requirement under Section 146 helped Controller General previously while granting the compulsory licensing to Bayer's drug "Nexavar".[53] The removal of this statutory requirement would reduce the transparency and the Indian Patent Office's ability to determine the working of a patent.

**Conclusion and Suggestions**

It is well established that a nation could not develop by relying solely on the good and services produced within its own territory. The nations need to trade in goods and services which will eventually help them in development. Free Trade Agreements (FTAs) are one of the tools used by nations to reduce trade barriers and ease the transfer of goods and services between nations. It is also well established that the nations, when negotiating a trade agreement, like FTA, have to accommodate the requirements of the other member nation. When two nations are negotiating a trade agreement, both have to accommodate the demand and requirements of the other member up to a certain extent. But the nations have to keep in mind that while accommodating the demands of the other party, they are not causing any structural damage to their own trade regime. The nation should ensure that the terms of the agreement are not causing any major adverse impact on its own industry or people. If the trade agreement in itself is causing harm to its own people or it is adversely affecting its own industry, it means the agreement is not viable for the nations and needs reconsideration. Since India and U.K. are in the process of negotiating the Free Trade Agreement (FTA), the same onus is on both nations to negotiate and accept the policies which would help them grow

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52 Patent Act, 1970, s. 85.

53 Jorge L. Contreras, Paxton M. Lewis, and Rohini Lakshané, "Patent Working Requirements and Complex Products" 7(1) *Journal of Intellectual Property & Entertainment Law* 5 (2018); *available at* https://cis-india.org/a2k/blogs/patent-working-requirements-and-complex-products.

mutually, without causing any serious adverse impact on their domestic market.

The draft IP chapter released by *Médecins Sans Frontières* (MSF), also published by Lancet, raises some serious issues. The provisions, as discussed above, if accepted & implemented by India, would cause serious harm to the Indian generic medicine manufacturing industry. The excessive measures as suggested in the draft IP chapter would have a chilling effect on the country's ability to produce and supply low-cost essential generic medicines to millions of people worldwide. Let us understand this with the help of the tuberculosis drug *delamanid.* The patent on the formula is set to expire in 2023, but the provisions of FTA, if implemented, would extend the availability of the generic version in the market. If implemented, the measures in the draft IP chapter would result in disastrous consequences on the global supply chain of generic medicines worldwide.

The government of India needs to understand that being a country with colours of both capitalism and socialism, on one hand, it has to support the development of science, technology and innovation by granting exclusivities like Patents; on the other hand, it also has a responsibility to make the essential drugs available to its citizens at low cost. This would be achieved when the patent exclusivity is granted only for a period of 20 years, and not beyond under any circumstances. We, as a nation, need to understand that we have already chilled the Indian generic medicine industry since we extended the tenure of patent and brought our laws in conformity with the TRIPS agreement between 1995-2005.

It is recommended to the Indian government carefully scrutinise the U.K.'s side of negotiating terms in the FTA when presented. Also, it is highly recommended that transparency should be maintained by both parties while negotiating the FTA by making the updated draft agreements available so that the terms of negotiations could be scrutinised and discussed publicly. It is recommended to the Indian government, when presented with the draft, should reject the draft IP chapter in toto as most of the provisions of the chapter would adversely affect India's stand on Patent and access to medicine. Also, India should stick to its existing position of not allowing 'patent evergreening' in the pharma industry and allowing the approval of generic drugs as soon as the primary patent expires.

The existing position of India helps her in maintaining the supply of generic medicine to the world by keeping the commitment to 'access to medicines'. The proposed IP draft would hamper this commitment as it would force India to amend its Patent Act and this would eventually affect access to generic medicine. Also, the government of U.K. need to understand that, looking at the statistics of generic drugs imported from India to U.K., the measures suggested in FTA would eventually affect the access to cheaper medicines for the citizens of U.K. They need to make sure that the health of the citizens of U.K. & India should not be on the table while negotiating the FTA. At its current stage, as understood by the draft IP chapter, the U.K.-India deal could *jeopardise* access to generic medicines.

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# A Legal Perspective on Sex Trafficking: Vulnerability, Impact and Rehabilitation

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**Abstract**

*A crime that does not confine itself to the boundaries of gender or age and a crime that is an assault on the human body and the mind. Sex trafficking, can be understood as a form or organized crime wherein people, largely women, are pushed into a cycle of exploitation. These women, who are victims of being baited with the idea of opportunities, are abducted or simply sold off, are then forced into professions and spaces like commercial sex, exotic dancing, pornography, and work in massage parlours. In this article, the author talks about how sex trafficking as a problem does not restrict itself to one area or country, it's a global issue that needs to be combatted with equipment beyond legislations. The author also brings forth the mental and physical consequences of sex trafficking on the victim along with highlighting the need for rehabilitation.*

**Keywords:** Human Trafficking, Sex Trafficking, Rehabilitation, Victim, Vulnerability.

## 1. INTRODUCTION

Robert Collier[1] stated that "*Supply always comes on the heels of demand*". The social crime of sex trafficking, its prevalence and rate at which it grows, stands as a blatant contradiction to society's ever convenient stance of condemning it on paper. The empire of sex trafficking that has been created has its roots all over the world and has not only defended itself but it has preserved itself as an "acceptable" practice in several regions. Ergo**,** supply never exists without a demand. Here, it's relevant to question whether laws are enough or is a larger societal intervention required? Sex trafficking as a concept is testament of the age-old tale of women's exploitation and abuse. While this crime does not confine itself to boundaries of gender, females are statistically more impacted by this as compared to other genders. In a country like India, were

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1 Robert Collier was an American Author of self-help and New Thought metaphysical books in the 20th century.

gender-based discrimination is an accepted norm instead of a social evil, we see that over 80% of the total victims are female. Various factors including social and cultural norms, poverty, an overarching acceptance of misogynistic practices, its resulting gender inequality, etc are responsible in fuelling the social injustice of sex trafficking. Sex trafficking has become a million-dollar business, by recruiting young girls as early as 7 years of age via abduction, deceit and so on.[2]That being said, at its very core, sex trafficking is much more than these practices; it's about the mindset, it's a society that commodifies a woman's body and puts a price on her dignity. It's an assault not only of the human body but also of the human spirit and mind that leaves its victims with deep psychological scars.

Whilst we can trace the origins of Sex Trafficking as a practice to centuries before it being officially registered as a problem, the infestation of Sex Trafficking is exponentially increasing and deepening its roots all around the world and especially in developing countries like India. There is an urgent need for the global leaders to address the problem of Sex trafficking, along with a focus on rescue and rehabilitation of the victims and prevention of factors boosting this practice. But, the scarcity of research and analysis on the topic prevents proper rehabilitation of victims and identification of just how deep-rooted this issue is.

The paper aims to develop deeper understanding of the practice of sex trafficking by discussing multiple factors leading to Sex trafficking and throwing light upon various consequences of sex trafficking in distinct ways at both National and International levels. It provides basic understanding of various legal provisions in this regard and suggests ways to make the world better by efficiently addressing such problems.

## 2. UNDERSTANDING TRAFFICKING AND SEX TRAFFICKING

### 2.1 Trafficking

United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons broadly defines trafficking as forcefully recruiting, transferring, transporting, harbouring individuals by employing various forms of coercion, threat, abduction, fraud, deception, abuse of power or abuse of position of vulnerability or of giving and receiving of payments in order to gain the consent of individual achieving control for the sole purpose of Exploitation.[3] The crime is omnipresent and victimises everyone which includes children, men and women of all races, castes, religions, age and backgrounds in an undiscriminating manner using various fraudulent (fake promises, job opportunities, etc) and violent techniques to coerce the victim. It is a crime, that prevails globally and involves trading and exploitation of individuals with the

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2 Irani Machado da Silvaand Anuradha Sathiyaseelan"Status of Sex Trafficking in India: A Conceptual Paper. 2.10, *Acta Scientific Neurology* ,56-62(2019).

3 UN. Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations convention against transnational organized crime. General Assembly resolution 55/25. New York, NY, United Nations General Assembly, 2000.

intention of making profits. Taking socio-economic factors into account, some groups of people are more vulnerable to falling prey to tactics of deceit and manipulation. Following are some of the tactics employed by the traffickers to ensure compliance:

1. To ensure that the individual being trafficked stays under their control, getting the victim hooked on drugs and other illegal substances is an extremely common way of ensuring a trap of dependence. Once they get addicted to said substance, a power dynamic is created where the victim views the trafficker as a source for continued sustenance.[4]
2. Defrauding or luring individuals with the fake promises of love and marriage among or better job opportunities with promises of a good salary among unemployed or poverty-stricken individuals, is one of the most prominent tactics employed by the traffickers to recruit in labour trafficking scenario.[5]
3. The trafficker may inflict physical harm or threaten the victim to get his demand fulfilled. It is noted that the trafficker threatens to harm the victim's family, loved one's or harness one's cultural beliefs. Resistance or disobedience among the victims is treated with inhumane levels of cruelty such as burning, torture or threat to family members, etc.[6]
4. As soon as the individual has been trafficked, the grooming process takes place under which the victim is instilled with fear of death, as well as the sense of gratitude for even being allowed to live.

According to O'Connor and Healy, there are various stages involved in the process of grooming[7] namely:

- Ensnaring- At this stage, trafficker creates trust by treating victim affectionately.
- Establishing dependency- this stage isolates the victim from their friends, family, by constantly telling the victim how undeserving and disloyal other members of the victim's life are.
- Establishing Control- trafficker starts taking control of the victim by commanding and controlling victim's actions.

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4 J.Raphael and J. Ashley, J. , "Domestic sex trafficking of Chicago women and girls",(2008) Available at http://www.icjia.state.il.us/assets/pdf/Research Reports /Sex%20Trafficking%20Report%20May%202008.pdf (Last Visited on 15 July, 22)

5 M.D.Chesnay, M. D. "Psychiatric-mental health nurses and the sex trafficking pandemic" *Issues in Mental Health Nursing*,34(12) (2013)901–907

6 C.Aradau, (2004) "The perverse politics of four-letter words: Risk and pity in the securitisation of human trafficking" *Millennium Journal of International Studies*, 33, (2004) 251–277.

7 M.O'Connor and G. Healy,*The links between prostitution and sex trafficking: A briefing handbook*,published by Coalition Against Trafficking in Women (CATW) European Women's Lobby(2006) Available at(EWL)https://vawnet.org/material/links-between-prostitution-and-sex-trafficking-briefing-handbook(Last visited on July 15, 2022)

- Dominance-The trafficker dictates every action of the victim at this stage.

To delve deeper into this, taking a look at the international definition of trafficking, it mandates the presence of three principal components which are:

- Action – includes recruitment, buying and selling of individuals,
- Means- the process of recruitment via use of force
- Purpose-the purpose of recruitment is exploitation[8]

The act of trafficking can take place through various means and methods but the one assured commonality between them is the premise of exploitation. The said exploitation, if sexual in nature, can get a human trafficker up to 20 times what he/she paid for a girl. Provided the girl was not physically brutalized to the point of ruining her beauty, the pimp could sell her again for a greater price because he had trained her and broken her spirit, which saves future buyers the hassle. A 2003 study in India found that, on average, a single sex slave earned her pimp at least 250,000 rupees a year[9]and in cases where the exploitation may not necessarily be sexual in nature, it can be physical too. The physical exploitation takes place in seemingly "normal" jobs like professions of construction, food production, manufacturing, etc. In such cases, the exploitation practices take place in different ways, like poor working conditions, low wages, no social security, etc to make profits.

From a global perspective, with the digital transformation that has taken over the world and internet bringing us increased accessibility to every corner of the world, faster than ever, crimes like trafficking could be done more easily. Cyberspace is used by traffickers to recruit and exploit victims. Traffickers are making use of technology to advertise misleading opportunities and trap vulnerable individuals looking for any sort of financial assistance. With readily available personal information on social media platforms, the task of traffickers is further made trouble-free, by maintaining their anonymity while contacting victims. Moreover, other than recruiting victims the modes of exploitation have also revolutionised with the use of webcams, livestreams, etc. Such transformations have alleviated the need of transportation and accommodation of victims in a physical space. The traffickers have made great use of technology by undertaking strategies to identify vulnerable and potential individuals, and exploit them further via various means.

Traffickers use social media websites like Myspace, Twitter, and Facebook to recruit victims, they target individuals. Although research indicated that social networking sites increase an individuals' self- esteem and

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8 United Nations Human Rights, office of the High commissioner, Human Rights and Human Trafficking, Fact sheet no. 36, the International definition of trafficking, published by UNITED NATIONS, New york and Geneva, 2014

9 G. Nandini Devarmani andR.N. Mangoli , "Child Victims - An Empirical Study Of Child Trafficking In Belagavi District - 2005-2014".Available at https://www.academia.edu( Last visited on July 20 2022)

persuades one's sense of belonging.[10]But they also put one at a greater risk of falling prey to a trafficker's ill intents. Two groups that are particularly at risk here is one, homeless children who become an easy prey to recruiters and are exposed to violence in several forms.[11] And two, members of sexual minorities (members of the LGBTQ+ community). As per the findings of the national coalition for the homeless, sexual minorities are at a much higher risks of sexual violence due to homelessness and faces sexual abuse before the age of 12.[12] Due to the vulnerabilities and society's disregard for their well-being, they engage themselves in a concept known as survival sex i.e., having sex in exchange of food, shelter or some other mandatory favours necessary for their survival. This means of survival puts them at a much larger risk to fall prey into the hands of a traffickers.

### 2.2. What is Sex Trafficking?

Sex trafficking includes a wide variety of forced labour including commercial sex, exotic dancing, pornography, and work in massage parlours.[13]It's a cycle of exploitation where girls as young as 7 years of age are commercialized into prostitution.[14]It can be understood as an organized crime activity and a crime of relational nature.[15]A large component of trafficking is mentally breaking down the victim to ensure the trafficker's control over them. The traffickers ingrain a sense of fear in the victims and create a feeling of gratitude for merely letting them live; they do so by establishing trust, delivering favours and affection, purchasing expensive presents, instilling dependency, and eventually seizing all power and control. Once the trafficked women start generating revenue by selling their bodies for sex and maintain their traffickers' relationships, the grooming process is complete[16]Those girls and women trapped in the sex trade suffer indescribable brutalities such as imprisonment, rape, and mental and physical abuse just to list a few.[17] Sex trafficking is a process of making the victim feel so helpless that even despite all these brutalities, they still have to turn to the trafficker to meet their needs.

The disagreement on the universality of the practice of sex trafficking makes studying the field difficult, due to which formulating a definition to Sex

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10 H.Gangadharbatla, (2008) "Facebook me: Collective self-esteem, need to belong, and internet self-efficacy as predictors of the iGeneration's attitudes toward social networking sites"*Journal of Interactive Advertising*, 8(2)(2008) 1–28.

11 J.Albanese, *Commercial sexual exploitation of children: What do we know and what do we do about it*?, National Institute of Justice (2013)

12 O.Martinez and G. Kelle,"Sex trafficking of LGBT individuals: A call for service provision, research, and action" International Law News, 42(4)(2013) 1–6.

13 T.K. Logan, R. Walker*et.al*.,"Understanding human trafficking in the United States"*Trauma, Violence, and Abuse* 10(3) (2009) 3-30.

14 See Irani Machado da Silva, *Supra* note 1

15 M.Verhoeven, B. GestelVan*et.al*,"Relationships between suspects and victims of sex trafficking. Exploitation of prostitutes and domestic violence parallels in Dutch trafficking cases". *European Journal of Criminal Policy*, 21 (2015) 49-64.

16 See M.O'Connor*Supra* note 7

17 See Irani Machado da Silva, *Supra*note 14.

trafficking is a challenging task. Therefore, at the core sex trafficking is said to take place when an adult or a minor is forced, defrauded or coerced to involve in commercially sexual act like prostitution, pornography, or sexual performance, in exchange of money, shelter, or any commodity of value[18]. Sex trafficking is booming all around the world, especially in the developing countries due to its excessive demand. The buyer boosts the market with money, then the trafficker in the greed to earn revenue exploits the victim, who can be girl or boy, adult or minor, and are treated as commodities. Victims can be trafficked through internet, social media, neighbourhood, etc under the fake promises of love, protection, opportunity, etc. Traffickers also use violence, threats, fear, intimidation to ensure obedience and submission.

The problem of sex trafficking isn't a secluded concept, neither it is just the result of gross violation of human rights that takes place during the exploitation of victim. Sex Trafficking is fuelled by various cultural, social, political and economic conditions, which are as follows:

### *2.1. Cultural*

There isn't any universal definition to culture, yet it is the foundation stone of societies, describing its' citizens about the accepted and appropriate norms and values. In this case, when certain values or norms are affiliated with culture or traditions, it becomes difficult for a person to characterise certain values as right or wrong. One such value is the superiority of men's lives over women's, which is the root of the evil – Sex Trafficking. The dynamics of the family plays vital role in the same, consideration of girl child as burden leads to the sale of young girls by their own parents, the practice of dowry attaches the worth of a women with the amount of dowry she brings in with herself during her marriage[19]. At various occasions, women goes through a lot of violence that at times makes them more vulnerable to trafficking. Other than these various other practices like sati, female infanticide, caste system, etc which brings in the thoughts of one's superiority over others, leads to discrimination and exploitation of the inferior section by those who are considered superior.

### *2.2. Political*

Low policing and inadequate governance are the reason of the exploitation that takes place in sex industry. Taking the example of countries like Netherlands, Denmark, Austria, where the sex industry is also regulated under the proper guidelines of the government. Enforcement of guidelines ensures proper regulation of the sex industry without the violation of any individual's human rights. The countries also ensure proper health and hygiene of the parties involved and treats the individuals involved with

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18 What is Sex Trafficking? - Shared Hope International. Available at https:// sharedhope.org( Last visited on July 15, 2022)

19 M. Karmen Matusek (2016) Under The Surface Of Sex Trafficking: Socio-Economic And Cultural Perpetrators Of Gender-Based Violence In India, cultural norms as facilitating factors, the value of men's lives over women's,Published by ProQuest LLC. Available at https://digitalcommons.odu.edu/gpis_etds/8( Last visited on July 15, 2022)

various social welfare schemes. Hence, poor enforcement of proper guidelines further deteriorates the situation and makes the victim more vulnerable. Without proper regulations, the victims are put under inhabitable conditions and due to the illegality of the task, the trade is operated in a very secretive manner, making it difficult to figure out the actual trends in the process. Due to which the victims are exposed to various health problems like AIDS, HIV, etc. Hence, the battle against Sex trafficking could only be combated with proper multi-layered strategies at both national and international levels[20]. Other than this Globalization is also the reason through which humans could be commodified in most dehumanizing and exploitative ways.

### *2.3. Economical*

Along with all the other aspects, the economical aspect is the most prominent and is the driving factor of all the other aspects. Poor economic conditions lead to poverty, illiteracy, etc. Individuals with poor economic means resorts to illegal and immoral ways for making quick money, that can be selling women or girl in their home in exchange of money, or indulging oneself in sex trade by running a brothel, trafficking other victims, etc[21]. Many women under economic crisis migrate to other places in search of better opportunities to earn for their livelihood and end up becoming prostitutes, or running a brothel, themselves. Many women may seem voluntarily taking up prostitution or sex trading but actually they are forced by their economic conditions.

## 3. GLOBAL AND NATIONAL PERSPECTIVE

### 3.1. Global Perspective

Despite the lack of general consensus between nations on the issue of Sex Trafficking, the practice is extremely prevalent all over the world. One of the most widely practiced type of human trafficking is sex trafficking which involves at times recruitment of willing but most of the times those kidnapped or forced into this trade and then ultimately transported from one country to another country and finally into international sex industry. The global arena paints a picture that favours the first world countries against the third world countries. Sex trafficking is portrayed as a problem of "third world" countries, when is reality, this could not be farther from the truth. Countries like Russia are very high in their sex trafficking numbers. In a 2019 report, it was found that the top three nations of origin for human trafficking victims were the United States, Mexico and the Philippines.[22] The reason countries like the USA are never flagged for this activity is because this is a largely unreported crime. One of the most widely practiced type of human trafficking is sex trafficking which involves at times recruitment of willing but most of the times those

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20 S. Cameron and E. Newman ,*Trafficking in Humans; Social, Cultural, and Political Dimensions*, (United Nations university press, Hongkong 2008)

21 See M. Karmen Matusek,*Supra*note 19.

22 Kelly C.,"13 sex trafficking statistics that explain the enormity of the global sex trade", *USA Today,* July 29,2019, Available at https://www.usatoday.com/story/news/investigations/2019/07/29/12-trafficking-statistics-enormity-global-sex-trade/1755192001/( Last visited on November 2, 2022).

kidnapped or forced into this trade and then ultimately transported from one country to another country and finally into international sex industry.

Sex Trafficking does not limit itself by age or gender, any person, be it male, female, adult or child, all of them are vulnerable. These victims are generally forced into exploitative activities like prostitution, pornography, etc. Enslavement for forced prostitution has been prevalent sine times immemorial, and it has emerged as a profiting business for those involved in it. Unsuspecting victims are made to believe that they are being offered opportunities that will turn their lives into something they have never imagined but instead they are pushed into the vicious cycle of sex trade. Besides being forced into something that they never wanted, they also find themselves living in inhumane and unhygienic conditions on a daily basis which may even lead to contact with fatal diseases like HIV/AIDS.

Instances of International trafficking are also on the rise, whereby a large number of girls as young as ten years are trafficked from neighbouring countries like Bangladesh or Nepal and sold off to the highest buyer internationally. Majority of trafficking is forceful and in total violation of established norms of human rights. Most of the victims are forced and have to face mental and physical torture, verbal abuse, confinement and isolation, etc. Despite all countries across the globe facing the wrath of Human Trafficking and the victim count increasing year by year, the countries concerned have not undertaken any concrete steps to eliminate the instances of human trafficking. The Global Report on Trafficking in Persons 2020 by UNODC[23] provides detailed information about the pattern and routes followed for trafficking of individuals at regional, national, and international forums between 2016 and 2019. UNODC has been collecting information about trafficking of individuals for almost a decade now and it presents wide indicators of the same. According to the Report, the most common form of human trafficking (79%) is sexual exploitation. The victims of sexual exploitation are predominantly women and girls. It is noticed that different victims are recruited in trafficking to serve various purposes, for example most women are trafficked for sexual purposes while men who are detected are primarily pushed into forced labour. Whereas it has also been found that even men are also trafficked for sexual purposes and women for forced labour. Sex trafficking as a concept is not new but it has evolved at a very fast pace and because of the globalisation has found roots in the culture of multiple nations. Unsuspecting individuals from lower/middle income countries migrate to distant lands in search of better opportunities, where they are identified by the traffickers, and then transported in inhumane/unhygienic conditions to destinations unknown to most of them and without any assurance of a dignified and respectable life that they have been looking up to and finally trapped in the vicious cycle of trafficking. These situations/circumstances become a challenge for the migrants as well as the

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[23] Global Report on Trafficking in Persons - United Nations Office . Available at https://www.unodc.org › unodc › global-report-on-traff.( Last visited on November 3,2022)

nations to where they have been trafficked. Nations across the globe tend to tighten their vigil along the international borders as also the immigration laws in order to prevent infiltration of illegal migrants. Ways to prevent human trafficking is a major concern for policymakers, international organizations and human rights groups.

Nations across the world are keeping a focussed approach on the trafficking among girls and women, which in modern times has also come to be known as sex tourism and also prostitution, pornography, forced marriage, mail order bride, etc which have come to be known as the prominent examples of trafficking in modern times. In most of the cases it is noted that the individual is well aware about the conditions and dangers involved before traveling to a foreign land but the hope and greed prevent them from rationally analysing the situation at hand. It can be reasonably suggested that most of them are forced, coerced, or kidnapped for the purpose of commercial sex trade. Prostitution has been in existence all over the world but their original perpetrators remain South East Asian nations namely, Thailand and Malaysia, being the main markets of sex trade due to rapid economic industrialization, along with their changing societal structure reinforcing demoralization and servitude of women. Internationally, there are well established networks or routes to transfer the victims at the place of demand- medium-scale networks or small-scale networks, through which women or girls are transferred to clubs, brothels, of the tentative countries. Trafficking cuts across the world demographic being more prevalent in Asia, South-east Asia, Former Soviet Union, Latin America, and Africa remains the most vulnerable countries from where the victims are trafficked and sent mostly to Western Europe, North America, Australia and Japan[24]. Certain countries, like Israel where prostitution is not illegal, or the law mentions nothing about issues like prostitution or sex trade, becomes home to thousands of women migrating from distant lands like Ukraine[25]. Absence of law for making prostitution illegal or weak enforcement of law makes it is easier and profitable to run sex rackets in such countries leading to incredible earnings.

Then there are countries where prostitution has been made legal and have proper regulations or set guidelines like any other business, for example- Netherlands, Austria, Denmark, Germany, Greece, Ecuador etc, Legalising and regulating prostitution or commercial sex act reduces the risk of sex trafficking or forced prostitution. In such countries, registered sex workers also receive various social benefits, health insurances and even have to pay taxes. Timely and regular health check-up reduces their risk of catching various diseases and ensures proper health. While in countries like Bangladesh, Former Soviet Union, India, Nepal, Indonesia, prostitution is not mentioned or discussed anywhere in the law or in countries where we have weak enforcement or in case of Canada where the countries flawed system in which it is uncertain

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24 A. M. Bertone, "Sexual trafficking in women: International political economy and the politics of sex". *Gender Issues* 18, 4–22, para-1(1999)

25 *Id*, para-12

about its stand on the topic, subjects the sex workers to further dangerous situations and increases the risk of trafficking.

A report published in 2021 titled "Human Trafficking in the Context of a Global Pandemic"[26] highlights how trafficking has seen a significantly sharp rise during the pandemic. This report stood contrary to public opinion as the services the victims of sex trafficking are generally forced into, were not being availed as the virus spread through human contact. While throughout the world, lockdowns made it impossible to step out which gave an illusion that brothels, sex workers, etc. were not making any money. But the effect was just opposite and losing employment and the need for money pushed more victims into the cycle of trafficking and exploitation.

United Nations (UN) offers a global platform and assists nations in drafting laws, strategies and also with resources to efficiently enforce the drafted laws, in order to eliminate Trafficking. Some of the most prominent anti- trafficking laws are discussed below:

### *3.1.1. The Protocol to Prevent, Suppress, And Punish Trafficking in Persons, Especially Women and Children, 2000*

This is the most noteworthy instrument to tackle trafficking and prevent trade in human beings internationally. This protocol has been successful in providing a uniformly accepted definition to trafficking.[27] Article 5 requires state parties of the convention to criminalize trafficking, attempted Trafficking, and international participation in any trafficking scheme. while Article 6 of the same convention provides for domestic legislation with regard to victim compensation and legal proceedings. Other than that Article 8 provides for the safe return of victims from foreign land, with suitable documentation and without delay. Further, Article 10 recommends training and information exchange between law enforcements and immigration officials of member countries to look into the transportation practices of victims. Article 11 &12 asks for tightening border controls.

### *3.1.2. Convention on The Elimination of All Forms of Discrimination Against Women, 1979*

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26 2021 Trafficking in Persons Report is an annual publication documenting the efforts by governments of 188 countries and territories, including the United States, to combat human trafficking. The TiP Report assesses those efforts, including those of the U.S. government, according to minimum standards that track the "3Ps" of the Palermo Protocol, the prosecution of traffickers, the protection of trafficking victims, and the prevention of trafficking in persons. Available at https://osce.usmission.gov

27 The Protocol to Prevent, Suppress, And Punish Trafficking in Persons, Especially Women and Children, 2000,(also referred to as the Trafficking Protocol or UN TIP Protocol) is a protocol to the United Nations Convention against Transnational Organized Crime 2000. It is one of the three Palermo protocols, the others being the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms.

It is also known as International Bill of Rights for women, and seeks to eliminate all forms of discrimination against women and fights against the cultural or traditional gender roles defining family relations. Further the conventions require all the party states to take necessary action to combat all forms of trafficking and exploitation of prostitution of women.[28]

#### *3.1.3. United Nations Convention Against Transnational Organised Crime, 2000*

It was adopted by the General assembly on November 15, 2000 with 147 as it's signatories and 190 countries as the parties of the convention. The convention recognises the role played by global cooperation to tackle the problem of trafficking and seeks to enhance it among member nations. The adoption of the convention is an important event in fight against transnational crimes mainly trafficking.[29]

#### *3.1.4. European Trafficking Convention, 2005*

It is a broad treaty by Council of Europe [30] pertaining multiple forms of trafficking, including national and international trafficking, individual or organised crime and regardless of age and gender of the victim, with major focus upon protection of victims and their rights and prosecuting offenders. It also provides for setting up of independent monitoring mechanisms.[31]

#### *3.1.5. SAARC Convention on Preventing and Combating Trafficking In Women And Children On Prostitution, 2002*

The South Asian Association for Regional Cooperation (SAARC) has taken steps for handling with trafficking problem. The SAARC Convention was signed by India along with Member States to promote cooperation amongst Member States to efficiently deal with trafficking in women and children and to rehabilitate trafficking victims. The Convention further aims to protect women and children from international prostitution networks, particularly in SAARC region countries.

### 3.2. National Perspective

Like many other South Asian Nations, India has become a hub of this elaborate arranged network of crime. India has been placed on tier 2 watch list

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28 Convention on The Elimination of All Forms of Discrimination Against Women, 1979 is often described as the international bill of rights for women

29 The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime: The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

30 The Council of Europe Convention on Action Against Trafficking in Human Beings, 2005

31 *Ibid*

in trafficking in person's report 2007 by United states government for the fourth year consecutively.[32] It noteworthy to reiterate that the name of developing nations is always highlighted more on such lists than the developed ones. For all the evils and wrongdoings that happen in the world, people need reasons. One needs to know the "why" behind all things because man strives to exist within structure and certainty. By an extension of this fact, it can be said that it is easier to look at developing nations (like India) and find causation of sex trafficking within the "on paper" problems of the country like poverty, to chalk up the evils to "lack of development" in a way. By contrast, a country like The United States, which stands as a developed nation, attributes like poverty are not associated with the image it projects of itself. So when topics like human trafficking are being discussed, the correlations is drawn of it with a factor like poverty, won't be congruent with the image of US but will be congruent with the image of India. For countries that are developed, sometimes the answer to why human trafficking happens is simple because not all humans are good humans. And that fact is less digestible than poverty rates and development.

Now, the above stated facts definitely do not mean to imply that India does not have an infestation of Sex Trafficking, it definitely does. When one go out seeking the "why" of sex trafficking in India, wecome across a plethora of problems like the evident problem of poverty and an inherently male-centred society that has commodified women for centuries and continues to do so. Other than this the country fails to enforce the laws it makes and to deliver justice or even fulfil the minimum standards of eliminating Trafficking. Due to the secretive nature of trafficking, the actual data is under-reported which is the main reason for instances of failure in combating the problem. Indian government and various departments of the government like police, organisations, etc considers trafficking at a very low priority often leading to inefficient investigation and delayed justice. With the exponential rise in human trafficking as per the reports of various NGOs' media houses and police the Indian government, amended Immoral Trafficking Prevention Act (ITPA) and suggested the setting up of Anti-Human Trafficking Units.[33]Hence, there are several Anti Human Trafficking Units (AHTU) which exists on papers and only 27% of those are functional as revealed by the studies done by Sanjog, a resource Organisation, with the motive to calculate the efficiency of the Anti-Human Trafficking Units.[34] Overall the problem of Sex trafficking in the country is high due to rise in sex tourism but the determination of the government to tackle the problem is very low.

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32 United States Department of State, "Trafficking in Persons Report", June 2007

33 BiswajitGhosh, "Trafficking in women and children in India: nature, dimensions and strategies for prevention", *The International Journal of Human Rights,* Volume 13, Issue 5 , 716-738(2009).

34 Express News Service, "225 anti- human trafficking units exists only on Paper",*The New Indian Express*, September 01, 2020

Determining the magnitude of Sex trafficking in the country, is quite a task due to low availability of reliable data on the issue and discreet nature of the crime. It is at a rise because of high demand, more profit, and low risk due to inefficient legal framework. As stated earlier, determining the actual numbers of the trafficked individuals is hard because the instances of trafficked individuals in red light zones faces the severe problem of non- reporting or under- reporting but it is noteworthy that states sharing their boundaries with other nations and having low rate of development like Bihar, Uttar Pradesh, Odisha, etc documents less number of cases of trafficking as compared to those with better development like Maharashtra. Women are afraid to come forth even when attempts at data collection are taken up due to them being forced in businesses that are considered "illegal", they are afraid of being identified as a prostitute and punished for it before they are identified as a victim and rescued.

While at one point, the concern used to be for victims being trafficked and sold off the inter-state. Where at a time in Haryana, the sex ratio due to female infanticide was so skewed, women had to be brought in from other states so the men could find partners. These mail order brides were called "molki brides" so as to distinguish the wife that has been bought vs the one who hasn't. But eventually, the process of buying and selling started happening across international borders. A large number of girls as young as ten years are trafficked from neighbouring countries Bangladesh and Nepal; and their pay varies on the basis of their physical appearance. Most of the trafficking are forceful and leads to gross violation of human rights amounting to exploitation, torture, physical and verbal abuse, confinement, etc. Despite this, the countries concerned have not undertaken any steps to eliminate the case. There are various well – known red light zones in the country like GB road in Delhi, Kamathipura in Mumbai, Sonagachi in Kolkata. The abovementioned localities are home of the busiest brothels in the country. There are numerous cases of minor girls pushed into prostitution or as sex workers due to poverty or force or deception. One can find girls as young as 7-8 years in Sonagachi, Kolkata and in Kamathipura, Mumbai the lanes of the locality are divided on the basis of the areas the trafficked individuals belong to. [35] With the available resources it is approximated that India is home of 2 million sex workers, and 20% of those are minors.[36] Police mainly do not take any action due to the stereo-typical notions and also because of the pressure from the political parties to keep the data low.

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35 Ahn Roy, Alpert Elaine , *et.al*., "Sex trafficking of women and girls in Eight Metropolitan Areas around the world, Case studies viewed through a public lens", Division of Global Health and Human Rights Department of Emergency Medicine ,January 2010

36 Hameed, Sadika, *et. al*., "Human Trafficking in India: Dynamics, Current Efforts, and Intervention Opportunities for The Asia Foundation." Asia Foundation (2010). Available at http://asiafoundation.org/resources/pdfs/StanfordHuman TraffickingIndiaFinalReport.pdf. ( Last visited on November 4,2022)

Strict police vigilance with frequent raids is required to combat the evil of sex trafficking.Indian law on prostitution is vague, as organised prostitution in the country is illegal, but a woman can use her body for material benefits, voluntarily on an individual level. Also, conducting sexual activities within the proximity of public place is punishable in the country. Laws related to Trafficking in India are as follows :-

### *3.2.1. Constitution of India,1950*

Part III of Indian constitution provides "right against exploitation which prohibits trafficking in human beings and beggars or any other form of forced labour". Any infringement of the law would be punishable under law.[37]

### *3.2.2. Indian Penal Code,1860*

Section 370 deals with the trafficking of persons in a general manner. It provides that "whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

Section 370A deals specifically with the exploitation of a trafficked person. Commission of offence under Section 370A takes place when "any person knows that the minor has been trafficked or has certain reasons to believe the same, engages a minor in a work that includes sexual exploitation". Here the punishment is imprisonment for a term, not less than 5 years and may extend to 7 years. In the case of an adult, the punishment is not less than 3 years and it may extend to 5 years.

### *3.2.3. Suppression of Immoral Traffic in Women and Girls Act, 1956*

This Act (SITA) came into existence in 1956, but was enforced in 1958, to accomplish the terms of International Convention which was signed at New York, on May 9, 1950, to eliminate Immoral Traffic in girls and women. SITA does criminalize prostitution but it seeks to abolish commercialization of prostitution or traffic of girls or women for the sole purpose of prostitution. Hence, individual and voluntary prostitution by a woman is not an offence. SITA as a law is problematic in various ways, as the loopholes in the law promoted the creation of brothels in various ways, for instance- the client is not considered offender under this law, and pimps could only be punished for maximum three months if he knowingly engaged women in prostitution, hence this could easily be escaped under pretentious ignorance[38]. While at the Same time, prostitutes impetrated under SITA could face Jail term up to 1 year. Another drawback was that the law only concerned about street prostitution or conduct of sexual activities in the proximity of public places, which promoted prostitution behind doors.

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37 The Constitution of India,1950, art. 23

38 Malvika Kumar, "Trafficking In women and Children – an ounce of prevention is worth a pound of cure", para-6, trademark law.Available at legalserviceindia.com( Last visited on November 3 , 2022)

#### *4.2.4. The Immoral Traffic (prevention) Act, 1986*

This is another crucial Indian Law that addresses the menace of Sex trafficking also known as PITA. It is the amended version of SITA.[39] It aims to prevent immoral prostitution and trafficking in the country. This act criminalizes maintenance of brothels, and procuring, persuading and picking individuals for the sole purpose of prostitution.

In addition to above laws, Juvenile Justice (care and protection of children) Act (2015) and various state legislations like Goa Children's Act,2003 deal with the problem of trafficking and prostitution among Minors. They mainly focus upon rehabilitating minors who have fallen victim to sex trafficking. Other than these India is also party to Various International Conventions for preventing trafficking like Convention on Rights of the Child (1989), Convention on Elimination of all forms of Discrimination Against Women (1979) UN Protocol to Prevent, Suppress and Punish Trafficking in person especially women and children (2000), and SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002).But the problem is that various laws on sex trafficking are not integrated and they address the problem of sex trafficking through different and often incompatible objectives. A harmonious and integrated law is demanded to tackle such vicious crime.

The case of *Prajwala v Union of India* (2015)[40], rose one's expectations when the Ministery of Women and Child Development announced in the Supreme Court that a committee is set up to draft a comprehensive legal framework which aims to cover various aspects of trafficking after a detailed analysis of current laws and bridging the existing gaps. With the skyrocketing trends of human trafficking, urgent need was felt for a comprehensive single legislation including various forms of trafficking. Although Ms Maneka Gandhi on July 18, 2018 did introduce the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018in Lok Sabha under the Ministery of Women and Child Development. The bill was passed in loksabha on july 26, 2018 but due to the dissolution of the house the bill lapsed. The 2018 bill covered various stages of trafficking including prevention, rescue, and rehabilitation of trafficked persons, but it failed to acknowledge factors like poverty, illiteracy, etc that lead individuals towards such practices. After 2018 bill lapsed suggestions were taken by the Union Ministry of Women and Child Development for Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021.[41] Whilst the 2018 bill visited areas of concern like the process of trafficking, how to rescue and focus on rehabilitation, the 2021 bill broadens the areas of discussion to also take into account the offenses that take place outside

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39 M.Z. Khan, D. R. Singh,"Prostitution, Human Rights, Law and Voluntary Action", *The Indian Journal of Social Work*, Vol. XLVII (1987)

40 Suo Motu Writ Petition (Criminal) No. 3 Of 2015

41 Sravasti Dasgupta, "What Is Draft Anti-Trafficking Bill 2021 And How It Is Different from the 2018 Bill", *The Print*,July 9, 2021.

42 S. Shiv Singh, "Concerns remain over anti-trafficking bill", The*Hindu, July 18, 2021.*

India within the global arena. The objective of the 2021 bill is "*to prevent and counter-trafficking in persons, especially women and children, to provide for care, protection, and rehabilitation to the victims, while respecting their rights, and creating a supportive legal, economic and social environment for them,*".[42]

A noteworthy point in this Bill is that it lists down an agency and institution that would be responsible for leading the investigations, coordination and other processes necessary required for the prevention and limitation of trafficking of persons and other offenses under this Act, as well as for investigation, prosecution and coordination in cases of trafficking in persons.

## 4. IMPACT OF SEX TRAFFICKING

It is obvious to assume that the victims of the trafficking suffer from physical as well as psychological trauma, and find it difficult to cope even after the trafficking experience. But sex trafficking does not only traumatize the individuals but also impacts upon the security and health of the nation as a whole in following manner:

### 4.1. Individual Level-

At the individual level, there are devastating consequences of sex trafficking over women's physical as well as mental health. There are cases of violent pimps kicking or beating the victims, when denied compliance or obedience. Other than pimps, the men who visit the brothels to demand service are also exploitative in numerous ways. There are marks or bruises over the body of the victim, in many cases there are tattoos writing 'for sale' or other such phrases completely commodifying the victim Many victims have reported episodes of Post- Traumatic Stress Disorder, Depression, Anxiety, guilt, shame, loss of trust, while at the same time it is common to catch vaginal infections and several sexually transmitted diseases like HIV, AIDS, and in most cases Hepatitis c, due to unprotected intercourse and then repeated abortions. Most women in sex trade report of constant stomach and back pain[43]. Most of the prostitutes also resort to drugs or alcohol abuse to isolate themselves from the horror and misery they go through on the daily basis. Similar is the case with women in pornographic industries. Also, the victims of sex trafficking are at greater risk of getting murdered.

### 4.2. National and International Level

The growing industry of sex has now started demanding national and international attention. It has become important to shape domestic and foreign policies of the source and destination countries of the sex trade to combat the problem. Shaping the migration policy in important to tackle the mass movement of trafficked victims. Tightening borders is the go to method for every nation to ensure security, But the use of professional smugglers in the process to cross borders, or illegally crossing borders, often increases the

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[43] F.R.James and M.C.Tavish (2017) "Devastating consequences of Sex trafficking on Women's health", *Linacre Quarterly*, 27 Nov, 84(4): 367–379(2017)

vulnerability of the individual and exposes them to exploitation, trafficking, and human right violation. Such activities increase the rate of crime in the respective nations and pose threat to the security of the countries.

Hence, the countries should regulate migration in such a way that will ensure social and economic development and does not result in the exploitation of the rights of the individuals. Bilateral assistance between the source nations and the destination countries to reduce the risk faced by the victims also plays a vital role.[44] Such cooperation is necessary to reduce trafficking and prevent re trafficking. In European Security Strategy human trafficking is described as the prime threat to the region. Trafficking is problematic not only because of the violation of human rights but also because of the increased rates of crime, health and welfare of the citizens, national security (border control), etc. Other than that, organised network of crime that is prevalent in trafficking could also pose as a potential threat of terrorism. In the states of origin, it is necessary to address the problems of poverty, unemployment, illiteracy, etc to tackle the issue of trafficking as they are the facilitating factors.[45]

Sex trafficking is an issue which needs to be tackled immediately, as it is dangerous in all aspects including, social, political, or economical. It is a direct threat to developing economies of the world, and global peace, security, and stability.

## 5. REHABILITATION OF VICTIMS OF SEX TRAFFICKING

There are very few instances of victims escaping sex racket. As they are bounded both physically and psychologically. It has been noted that in most cases these victims are kept inside barred gates and are guarded by pimps, local boys or other prostitutes. Also, in most of the cases victims are unaware of the locality where they are kept[46]. From the psychological point of view, they fear the consequences of failing their attempt of escape. In certain cases, victims have nowhere to go, or they are made to believe that prostitution is a better choice over going back to home, because of the poor conditions of their home. Very few victims could escape the trade. These victims also do not report to police stations as they fear because of their lack of trust towards the officers, they fear that the officers will further harass them and return them to brothels. Victims could return home only to recruit more girls in to the sex trafficking. Sometimes victims are abandoned if they are no longer able to satisfy the needs of the customer, or have become HIV positive, as there are no incentives to take

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44 "An introduction to Human Trafficking: Vulnerability, Impact and Action", United Nation Office on Drugs and Crime. Available at https://www.unodc.org (Last Visited on November 10,2022)

45 James O. Finckenauer and Ko L.Chin,(2004) "Asian Transnational Organized Crime and its Impact on the United States: Developing a Transnational Crime Research Agenda" Final Report, submitted to the National Institute of Justice, United States Department of Justice, November , 2-18(2004)

46 Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery*(New York: Columbia University Press, 2009)

measures to prevent STD.[47]Although with the changing times, various NGO's have come forward to rescue and rehabilitate underage victims of the sex trafficking. Local police have also been effective is bursting such rackets and placing the victims under protection. Following measures can be taken for rehabilitation of sex trafficking victims:

### 5.1. Role of Government

Rehabilitating the victim of sex trafficking is the first step towards ensuring the survival of the survivor. Government through its agencies can effectively prevent, protect and prosecute the victims of sex trafficking through the range of powers it possesses. And it has been made possible at various instances, where the police authorities were able to burst sex rackets through mass raids and constant investigation. The governments from all around the world have passed various guidelines to combat the problem of Sex trafficking. But mere passing of rules is not all what needs to be done, enforcement is also equally important. Low priority of trafficking over other crimes is what makes the situation worse, authorities tends to treat trafficking cases on a second-hand basis which is the root of the problem. It is high time that we start seeing trafficking as Crime against state as there are national interests involved more than the crime against foreign individuals.

### 5.2. Role of NGOs

NGOs have proved their efficiency very well, in prosecuting, preventing and protecting the victims of sex trafficking. NGOs are voluntary non- governmental organisations, working towards the betterment of society in various ways, with the help of funds raised from multiple sources, including individuals, donor agencies motivated by the cause. NGOs take various steps to prevent trafficking by educating girls and women from very poor families, and recommends the government to take measures in order to prevent trafficking[48]. Further, various NGOs have come forward in supporting and protecting the survivors or those who are abandoned by the pimps as they fail to serve the demands of the customers (contacting STDs) by providing them medical aid, psychological support, education, and certain NGO's also collaborate with various corporates to provide jobs to victim on the basis of their skill. It is important so that the survivors do not get back to prostitution under financial crisis. NGOs have been able to convert the life of the victims via careers like beauticians, cook, cafeteria workers, house keepers, etc. NGOs are also instrumental in reintegrating the victim with their families.[49] Some organisations work along with the law enforcing agencies to combat trafficking

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47 "Summary of Findings:A Study of Trafficked Nepalese Girls and Women in Mumbai and Kolkata, India".Terre des Hommes publication, Nov 10, 2005, available at https://archive.crin.org( Last visited on December 12,2022)

48 D.Valarmathi and Ramesh(2017) "National initiatives for Combating Trafficking of Women in India", Volume : 7, Issue : 1,*International Journal of Social and Economic Research,67-83.*

49 Sadika Hameed, Sandile Hkatshway, "Human Trafficking in India: Dynamica, Current effort and Intervention, Opportunities, Asia Foundation" March,12, 2010.

through prosecution, one such example is "life guard centres" under Manav SevaSansthan, which operates along the Nepal borders, and provides legal aid to the victim. They also initiate Public Interest Litigation to punish the individuals operating the racket[50], like *Prjawala vs Union of India*[51]was filed when the victims of sex trafficking were kept in inhuman conditions and were denied of legal and medical aid, counselling or protection from traffickers after mass raids conducted by the Police. *BachpanBachaoAndolan vs Union of India*[52], where the attention was drawn towards the unsatisfactory working of government agencies to tackle the problem of forcible confinement and exposure to sexual harassment and abuse among the trafficked minors, *Prerana vs State of Maharashtra*,[53]where the state government was directed to sought direction for the welfare of children of commercial sex workers, etc.

There are NGOs like ApneAap Women's Collective, National Network of Sex Workers at the national level, looking after the prostitutes when government fails to do so, for instance during the global pandemic (Covid-19), these sex workers lost their livelihood and are unable to achieve normalcy anytime soon, But, they are neglected by the government and various other individuals do not come forward to help or feed them because of the stereotypes that comes with the job. In such circumstances, these organisations come forward and help them through various means mainly, dragging centre's attention towards their plight. Also, there are NGOs working at the international forum to tackle the problem of Cross- border trafficking like CAP international, International Committee on the Rights of Sex Worker in Europe etc.

### 5.3. Major Concerns While Rehabilitation

NGOs face multiple obstacles while rehabilitating the survivors of trafficking. The use of word Rehabilitation does not refer to the restoration of the victim to the former state, as the process of restoration focuses mainly upon the building of an empowered and independent individual. Achieving this, needs sufficient staff for legal and medical aid, and erosion of stereotypes that exists in our society.[54] Society is not ready to accept the prostitutes as a being and treats them disrespectfully. Also, the inadequacy of government agency to recognise trafficking as a crime against state is a major obstacle in prosecuting, preventing and protecting victims of sex trafficking. Other than this the lack of trust and the exploitative history of the victim adds to the problems, as victims

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50 S. Sen. , "A Report on Trafficking in Women and Children in India 2002-2003". (New Delhi: National Human Rights Commission, UNIFEM, Institute of Social Science, 2004)

51 *Prjawala* v *Union of India*(II) (2005) 12 SCC 136

52 *BachpanBachaoAndolanv.Union of India*, 3(2015) SCC 988

53 *Prerana v. State of Maharashtra* ,4,2003(2) Mah.L.J.105

54 2016 Trafficking in Persons Report, Country Narrative :India, Available at https://2009-2017.state.gov › tip › rls › tiprpt › countries( Last Visited on January 15,2023)

denies to cooperate with the agencies. The fears from their past chases them, that they do not come forward with their testimonies naming the pimps. It is more troublesome, when the traffickers go recruiting more girls into the business.

## 6. CONCLUSION AND SUGGESTIONS

Sex trafficking is rising all over the world, and demands immediate attention. Although multiple law enforcing agencies are making efforts to tackle this rising menace, that is not enough, due to which NGOs plan complimentary role in tackling the situation. It can also be concluded that Sex trafficking is the result of various other drawbacks like Poverty, Unemployment, illiteracy, etc. It is necessary to look into these problems in order to eliminate sex trafficking as a whole. Most important is the need to erode historically prevalent gender inequality in order to exist in the world free of this social evil. It is important for both the genders to celebrate their sexuality and treat both the genders politically and economically equals. The venture undertaken by the Indian government by lapsing a bill in order to validate a comprehensive law to eradicate Human trafficking and its key problems was very timely. It is expected of the government to adopt a wider perspective, as per the recommendations of an expert committee to tackle the heinous crime of human exploitation. Considering the clear majority that the Modi government enjoys in parliament with the devoted Women and Child Development Ministry towards eradicating such crimes, the country looks forward to a bill that will ensure the eradication of human trafficking at all levels by addressing some of the problems mentioned here and ensuring its effective implementation via the participation of various stakeholders.

Trafficking is a deep problem, but it is also the manifestation of much deeper problem in our society. Detecting and preventing trafficking is difficult because of the migration and mobility in today's world, due to which it is not possible for nations to combat it single handed, global efforts and coordination is vital to tackle this socio- legal malice. Government must undertake multiple measure to combat it, which are as follows:

1. Development of extensive region- specific programmes and policies, concerning dormant dimensions of trafficking, in order to erode the vulnerabilities of women and children specifically, to prevent recruitment of victims
2. Protection and Rehabilitation of the survivors of trafficking through proper channels is extremely important to prevent re-trafficking. Coordination and collaboration at the global level becomes very necessary to protect and rehabilitate the survivors from foreign land.
3. The main reason of the rise of sex trade is low fear of punishment among the perpetrators and high profits, due to poor enforcement of laws by the agencies. So it is necessary to prioritise the cases of trafficking and undertake investigation into the matters of sex trafficking. Increasing the rate of prosecution and punishment might instil fear among the perpetrators. This can be achieved by introducing

rewards for officers, successful in bursting ongoing sex rackets. Further, accountability on the part of the officials can also go a long way in fixing the problem.

4. It has been noted that reintegration of victim to her family or even the community is a very challenging task because of the stereotypes that exists in our society. It is important to erase such mind-sets and sensitise the society is accepting the survivors, respectfully.
5. Ancient practices prevalent in south east Asian nations like dowry, child marriage, etc are instrumental in amplifying gender-inequality, and undermining the status of a girl child, which is one of the major causes of sex trafficking. It is necessary to do away with such practices by means of empowerment of women on multiple platforms. Eliminating poverty, increasing literacy and job opportunities can also be very helpful in tackling the problem.
6. Community policing can also go a long way in combating trafficking, it is necessary to make this concept popular among civilians and NGOS. It is a concept in which police officers are appointed in distinct area, and become familiar with local inhabitants, which provides them with the deeper understanding of activities being carried out in the locality, which will further assist them in investigation.
7. Strict vigilance in certain areas, including borders, vulnerable localities, tourist destinations known for trafficking by setting up monitoring boards keeping eye on hotel business, sea routes, etc.

Hence, adoption of these long- or short-term measures by the countries of the world can be very helpful in eliminating sex trafficking.

Beyond that, we will end on the same note we started with. Where there exists a demand, there will be someone supplying goods, services and other such things to meet this demand. You can not eliminate a problem till you delve into the question of "why does the demand for this exist in the first place?". There is a major shift in mentality required where women's lives aren't seen as something to profit off of whether that is a father selling his daughter to get married or baiting helpless women with jobs and security only to pimp them out. Till we can't achieve a place where we can tackle this mentality, the legislation in isolation won't achieve the desirable effect.

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# Custodial Violence: An Act of Defiance to the Rule of Law

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**Abstract**

*The Criminal Justice System of any Nation is predominantly crucial to restoring justice in society and ensuring balance between societal interests and individual interests.In the context of Indian Criminal Justice System, despite the fact that an accused is ensured several rights and protections, the grim reality is that the accused is often made subject to various kinds of tortures and harassments in the custody. This inhumane and undignified treatment accorded to an accused indeed impedes dispensation of equal and accessible justice. Therefore, this article is an attempt to highlight the veracity of custodial violence in relation to concept of rule of law while discussing recent instances and lapses committed by functionaries in context of India's response towards prevention of torture and custodial violence. The author would also put forward certain suggestions to curb this inhumane and undignified treatment in the form of custodial violence.*

**Keywords:** Custodial Violence, Rule of Law, Police Custody, Human Rights, Judicial Custody, Judicial Intervention.

## I. CUSTODIAL VIOLENCE AND RULE OF LAW

The very idea of Rule of Law, as enshrined in the Indian Constitution and as can be inferred from the Preamble, makes the Government as well as private players, accountable under law.In the context of Criminal law, it not only aims to strike a fair balance in public interest, but also protects the legitimate rights of the disadvantaged accused against arbitrary actions and indiscriminate application of the law. Therefore, Rule of Law being a necessary corollary to natural justice principles, in the context of criminal law, makes it mandatory for every agency which is involved at any stage in the criminal justice system, to par takeits responsibility of performing actively so as to provide active-implementationofRuleofLaw,withoutwhichtherecannotbea fair criminal justice system.Also, since the principles of rule of law and due process are closely linked with human rights protection, therefore, Courts administering criminal justice, cannot turn a blind eye to vexatious or oppressive conduct occurring in relation to proceedings and no State can be

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absolved from convicting an accused as per the procedure established by law. Thus, in such a scenario,custodial violence[1]not only turns out to be the gravest violation of the rule of law in a democratic country but is a mockery of the principles of natural justice. The psychological impact of being harassed by police authorities, despite having a guaranteed Right to live with dignity under Article 21, is beyond imagination and is not just an injury to the body, but to the mind as well. Therefore, it is essential that treatment of accused persons must also conform to the basic standards of humanity and fairness.

## II. SAFEGUARDS AGAINST CUSTODIAL TORTURE: INTERNATIONAL AND NATIONAL

Gross violation of human rights by Police officials, who are meant to protect the same, is a subject matter of condemnation not only at National level but globally too. Article 5 of the Universal Declaration of Human Rights states that "*No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment*." Similarly,Article 9 of the UDHR states that "*No one shall be subjected to arbitrary arrest, detention or exile*." Influenced by the provision of the UDHR, Article 21 of the Constitution of India also specifically states that "*No person shall be deprived of his life or personal liberty except according to a procedure established by law.*" Thus, the wide powers of Police authorities should be ideally exercised within the domain of Article 21 and misuse of the same confers protection under Article 22 dealing with the menace ofPolice custody made without following proper procedure. Similarly, Article 20(3) also does away with the requirement that any person accused of any offence be a witness against himself, thus protecting them from the tortures and third-degree methods adopted by the authorities to extract confessions. On the same lines, Sections 160 and 163 of the CrPC and Section 24, 25, 26, and 27 of the Indian Evidence Act, 1872 protects an accused by making confessional statements to police whilst in their custody, as not admissible in evidence. Similarly,Section 164 CrPCalso gives an alternative mechanism of recording confessions and statements by Magistrates, to further protect them from police custody. Section 167 of the CrPC contemplates only two kind of custodies i.e. Police custody and Judicial Custody and out of which,police custody can only last for 24 hours unless further Police detention is granted by a competent Magistrate whereas Judicial custody can be for a maximum period of 90 days or 60 days, depending upon the nature of offence committed, thereby making it mandatory for the Police to complete its investigation within this period (90 days if the offence is punishable for a term not less than 10 years and 60 days for other offences). Further, Section 176 CrPC makes room for compulsory magisterial enquiry in

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[1] The term 'custodial violence' is a generic term and includes all and every type of torture such as third degree, harassment, brutality, use of force not warranted by law, illegal detention, arrest on wrongful, illegal or insufficient grounds , using filthy language, not allowing the accused to sleep, extorting confession under pressure, padding up of additional evidence, misuse of the power regarding handcuffing, not allowing to meet counsel or family member to accused, denial of food etc

case of the death of the accused in police custody. Likewise, Sections 357A-D of the CrPC deal with compensation to be provided to victims and the procedure for applying for such grant. Though various checks have also been recommended vide Law Commission of India Reports[2]from time to time, in order to regulate and control the vices of the Police Officials in consonance with the Constitutional freedoms guaranteed to arrestees under Article 20; Article 21 and Article 22(1) & (2) however, despite the acknowledgement of problems by such Committees and despite all these provisions, there is not much of a change which can be witnessed in the present scenario of custodial violence deaths. One probable reason is that recommendations given by these committees were never incorporated into the legal system by the legislature. For instance, pursuant to the 113th Law Commission of India Report,the amendment Bill for the same was introduced in 2016, but the same was never passed. Similarly, while the 152nd Law Commission of India Report, 1994 looking into various existing provisions and facets of the custodial crimes recommended special training programs for police authorities to channel their best intellect in the investigation processes and separation of investigation wing from the law enforcement wing, however, unfortunately such recommendations could not see the light of the day. Further, the Prevention of Torture Bill, 2017 drafted by 273rd Law Commission of India Report, 2017, after taking note of the existing provisions regarding custodial offences, in order to give effect to the 'United Nations Convention against Torture (UNCAT) 1984 which was signed by the Government of India but not been ratified so far, remained just as a draft only, on papers, and no action till date has been taken for its conversion into legislation. Resultantly, the picture is still dismal and indicates the need to have a stringent legislation to keep the police authorities in check and provide strict punishments for the offenders.

## III. CUSTODIAL VIOLENCE : JUDICIAL RESPONSE

In vision with the basic objective of social justice as enshrined in the Constitution demanding recognition of the rights of the accused persons and their dignity as person and citizen of India, Courts in India from time to time have emphasised on the implementation of human rights concepts in favour of the accused/prisoners and the same is evident from the fact that the concept of punishment has gone through a sea change i.e. from deterrence to

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2 Law Commission of India, 113th Report on Injuries in Police Custody (1985) focussed on the deaths in custodyand suggested an introduction of Section 114B in the Indian Evidence Act that creates a presumptive clause creating liability of the police officer if any person dies or incurs any bodily injury in the police custody; 152nd Law Commission of India Report, 1994 looked into various existing provisions and facets of the custodial crimes and recommending special training programs for the police authorities to channel their best intellect in the investigation processes and separation of investigation wing from the law enforcement wing.The 273rd Law Commission of India Report, 2017took note of the existing provisions regarding custodial offences and drafted the Prevention of Torture Bill, 2017.

reformative theory of punishment. It is felt that punishment in a civilized society must not degrade human dignity of prisoners. Also, as discussed supra, since custodial violence is not just an injury to the body, but to the mind as well, lack of effective legislation has indeed motivated the Judiciary to step up the cause and frame guidelines so that the actions of the police authorities can remain under check. The Apex Court in the case of *D.K. Basu v. State of West Bengal*[3] while quoting the definition of torture by Adriana P. Bartowthat "*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 desire to kill and destroy including yourself*" enlisted 11 guidelines with regard to arrest and detention by Police Officials in India. Several guidelines were also issued in the case of *Sube Singh v. State of Haryana*[4]for the prevention of custody torture and for empowering an independent investigating agency (preferably the respective Human Rights Commissions or the CBI) to investigate complaints of custodial violence against police personnel in addition to training and monitoring of lower-level police officers because, in the end, the brutalities start from the lower level itself. Similarly, in*Arnesh Kumar v. State of Bihar*[5] the Apex court laid down the guidelines regarding the procedure of arrest to be adopted especially the case of Section 498A. Further, inthe case of *Dalbir Singh v. State of UP*[6], the Supreme Court,while observing that strict adherence to the establishment of guilt beyond reasonable doubt in custodial violence casesadds unreasonable burden on the prosecution since there is no direct evidence implicating theoffending police officers, called upon the Courts to adopt a realistic and sensitive approach while dealing with such cases. Again ,highlighting the pathetic condition of the affected ones and the unfettered liberty enjoyed by the police authorities, the Apex Court in the case of *State of MP vs. Shyamsunder Trivedi*[7]commented on ties and brotherhood within police and ruled that Courts should not insist on direct or ocular evidence in these casesas in such cases,ocular or other direct evidence may not be available and the police officials alone can explain the circumstances in which a person in their custody died.Later, in the case of *Ashiwini Kumar v. Union of India*[8], appropriate directions were sought by Dr. Ashwini Kumar from Supreme Court of India, to fill in the gaps in law by enacting a stand-alone anti-custodial legislation as recommended by the different organs of State as necessary for the advancement of fundamental human rights. Dismissing the petition on the ground of the subject matter being a policy issue, the Court

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3 AIR 1997 SC 610

4 (2006) 3 SCC 178

5 2014 8 SCC 273

6 2009 Writ Petition (Crl.) No. 193 Of 2006

7 1995(4) SCC 262

8 Order dated September 5, 2019Miscellaneous Application No. 2560 Of 2018 In Writ Petition (Civil) No. 738 Of 2016

took an evasive approach and turned back on its consistent efforts to assist in law making in case there exists a void in law.Infact,over the recent years,recognising the importance of videography of a crime scene during investigation to improve administration of criminal justice, the Apex court in the case of *Shafhi Mohammad v. State of Himachal Pradesh*[9], directed every State to have an oversight mechanism where an independent committee can study CCTV camera footages and periodically publish a report of its observations. Later on, the Court also issued notice to the Union of India on the question of audio-video recordings of Section 161 of the Code of Criminal Procedure and installation of CCTV Cameras in Police Stations.Recently, in the case of *Paramvir Singh Saini v. Baljit Singh*[10] the Apex Court went a step further and directed all the police stations to install CCTV Cameras in their station premises equipped with night vision consisting of audio as well as video footage and to restore all the non-functioning cameras in order to ensure transparency into the interrogation process. Further, the directions provided forthe storage of data at least for 18 months and makes the maintenance of cameras and data to bethe responsibility of the concerned SHO of the police station. However, while the aforesaid directions are in place, the implementation is yet to be witnessed.

The judiciary,while acknowledging the existing problem, is also seen liberal in granting compensation to victims and their families. For instance,in *Khatri (II) v. State of Bihar,*[11] also known as BhagalPur blinding case, where Police blinded 24 prisoners by pouring acid in their eyes, was the first case where the question of granting monetary compensation to a person, who has been deprived of his right to life or personal liberty by the State, was considered by the Supreme Court and the same was answered in in the affirmative by Bhagwati, J. raising a counter "*Why should the Court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty*?"[12]

Similarly, emphasizing the right to life and liberty under Article 21, the Court also awarded compensations in various other landmark cases such as *Bhim Singh vs. State of J&K*[13], *Peoples' Union for Democratic Rights vs. Police Commissioner, Delhi Police Headquarters*[14] *and Nilabati Behera vs. the State of Orissa.*[15] Infact, in the case of *Nilabati*pertaining to custodial death, the Court while granting compensation,once again reiterated that compensation can be demanded against the State on the ground of violation of fundamental rights by State instrumentalities or servants thereby underplaying the principle of sovereign immunity.Further, it was held that every illegal detention irrespective of its duration, and every custodial violence, irrespective of its

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9 (2018) 5 SCC 311
10 (2021) 1 SCC 184
11 1981 (1) SCC 627
12 *Id.,* para4
13 1985 (4) SCC 677
14 1989 (4) SCC 730

degree or magnitude, is outright condemnable and *per se* actionable.

Thus, it can be seen that lack of effective legislation has motivated the Judiciary to step up to the cause and frame guidelines so that the actions of the police authorities can be kept under check. The renowned judgment of the Supreme Court in*D.K. Basu v. State of West Bengal*guidelines, which were well incorporated in the CrPC, has been a turnabout, especially for the investigation wing of our criminal justice system. It cannot be denied that the SupremeCourt, in all its wisdom from time to time, has issued various directives to eventually reduce incidents of custodial violence and deaths which have been notoriously on the rise in the past few years. However, if mechanisms such as CCTVs are put in place, accountability amongst police officials will definitely increase .

## IV. CUSTODIAL VIOLENCE AND LEGISLATIVE ATTEMPTS

Indeed, while one cannot deny the proactive role of judiciary in keeping check on the actions of police authorities, however, at the same time,the legislatureis also not found to beblind towards this issue and has been seen engaged in various attempts to curb this menace and which can be seen in the form of the draft Bill i.e.The Prevention of Torture Bill, 2010which was introduced to provide punishment against torture by Government officials. The Bill defined torture *as "grievous hurt or danger to life, limb and health of a person"*.However, since the said Bill suffered from various lacunas and was found to be inconsistent with the definition of torture in the Convention against Torture, though having been passed by the Lok Sabha in 2010, however, on being referred to the Select Committee by the Rajya Sabha,the bill couldnot pass. Thereafter, a fresh draft of the Prevention of Torture Bill *was released in 2017 which not only* addressed issues in relation to the initial bill, various reforms were also placed before the Government by the Law Commission. It was more coherent in accordance with United Nations Convention against Torture and other Cruelactivities.' But just like other attempts, this Bill also couldnot make its way towards its enactment as an Act.

Some of the Key features of the 2017 Bill wereas follows

i. The Bill took into account physical and mental suffering caused by cruel, inhuman and degrading treatment.
ii. The Bill provided for the stringent punishments for the offences committed such as death penalty or imprisonment for life in case of death due to torture by a public servant and minimum imprisonment for 10 yearsin case of any other harm caused
it also provided for the compensation to the victims in accordance with gravity of the offence in addition to the medical expenses and rehabilitation of the victims.
iii. The bill provided for the completion of the investigation within 3 months.
iv. Moreover, the bill provided for the case to be decided within 1 year of the alleged complaint to improve the conviction rate.
v. The State Government was made responsible for the protection of

victims of custodial violence andwas placed under the obligation to take necessary steps in this regard

## V. CUSTODIAL VIOLENCE: STATISTICAL ANALYSIS AND RECENT TRENDS

Time and again, the police officers have failed to exercise their powers within the ambit of Article 21 of the Constitution of India and thus increasing instances of police brutalities have shocked the conscience of society. According to an article published in the Indian Express, over the last 20 years, 1,888 custodial deaths were reported across the country, 893 cases registered against police personnel and 358 personnel charge-sheeted. But only 26 policemen were convicted in this period, official records show[15]."

Also, the National Crime Records Bureau (NCRB), in its reports between 2014 to 2019 revealed 33 persons (6.1% of the 537 who died in police custody) died due to injuries sustained during custody due to physical assault by police. In 2019, two of a total 85 (2.4%) deaths in police custody were attributed to assault by police. Further,according to 2019 National Crime Records Bureau (NCRB) report, 49 cases of human rights violation were lodged against various police departments across the country, for crimes like encounter killings, custodial deaths, illegal detention, torture by police, extortion and other similar crimes. A total of 85 people died in police custody in 2019 for which 23 arrests were made. However, chargesheets were filed only against eight police personnel and none of the cases resulted in conviction. Further, as per the2019 report, the highest number of custodial deaths (11) were reported from Tamil Nadufollowed by Gujarat, Punjab and Rajasthan and Odisha. In 2020, 76 custodial deaths were reported in India and a 13.63 percent increase was noticed in 2021 when 88 custodial deaths were reported and Gujarat reported the highest number of such deaths at 23, followed by Maharashtra (21), Madhya Pradesh (7), Andhra Pradesh (6) and Haryana (5). As per the data, Delhi or any other Union Territory did not report any custodial death.

It is pertinent to note that, the number of cases of custodial violence particularly, saw a rise during the nationwide lockdown imposed by the Government of India in March 2020. According to a report of National Campaign Against Torture (NCAT), 111 deaths have been recorded in police custody, despite India having one of the strictest lockdowns for months. Further 18 deaths were recorded from March 2020 to May 2020.[16] Even in the month of December 2021 custodial deaths cases registered in police custody and judicial custody were as 9 and 178 respectively. The *National Human Rights*

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15 Editorial, "1,888 custodial deaths in 20 years, only 26 policemen convicted" *The Indian Express*.November 16, 2021, *available at*: https://indianexpress.com/article/india/custodial-deaths-policemen-convicted-7624657/(last visited on Feb.23, 2023)

16 India Torture Report 2020 (March 18, 2021) available at: http://www.uncat.org/press-release/india-torture report-2020-increase-in-custodial-deaths-despite-covid-19-lockdown-at-least-one-suicide-every-week-due-to torture-in-police-custody. (last visited on February 23, 2022)

*Commission* (NHRC) of India recorded a total of 17146 deaths in the last decade in police and judicial custody. [17]According to latest data from the *National Human Rights Commission* Report (NHRC) in the seven months January to July 2020, 914 occurred in police and judicial custody. Out of which 53 happened in police custody. The NHRC recorded [18]1723 cases of deaths in judicial and police custody across the country in 2019. In these deaths 1606 deaths are happened in judicial custody and 117 in police custody that is on an average 5 deaths happened daily due to torture used by police during interrogation.

Though the report of 2019 by National Crime Records Bureau, for the year 2017, enlisted the statistical data of number of custodial deaths in India in every state and Union Territory. However, the data reported seemed to be based on a false report because the number of custodial deaths cited in the report of Uttar Pradesh were 0, despite of the fact that several cases were reported in the newspapers. Though the official number of deaths in police custody in Uttar Pradesh stood at 8 for the past two years, reports of police brutality in custody continue to surface from the state for instance ,in november 2021 *The Wire* had reported onAltaf, a man in his twenties, taken into custody on suspicion of alleged involvement with a minor girl was found dead in police custody in Kasganj. While police had claimed that Altaf died by suicide, is family had alleged brutality by police.[19] Similarly in April, 2022 in the state's Badaun region, a young Muslim man, Rehan Shah, was reportedly brutally assaulted by the state's police. His family had stated that police gave him electric shocks and also pushed a plastic pipe through his rectum. Police initially claimed that Shah was involved in cow smuggling and slaughter.[20]Another instance of police brutality during detention reported by Dainik Bhaskar came to light when Muslim youth Shahbaz Ali and his father Shavez Ali were reportedly detained and kept in police custody in Uttar Pradesh's Rampur on the pretext of interrogation as police attempted to nab two smack smugglers from a neighbouring house, However, instead of capturing the smugglers, cops held the father and son.WhileShavez was released from custody, his son in detention. alleged overnight thrashing and beating by the police.[21]Similarly, the infamous case of a father-son duo (P. Jeyaraj and J. Beniks) where they were taken into

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17 *National Human Rights Commission*Report 2020

18 *National Human Rights Commission* Report 2019

19 Sumedha Pal and Yaqut Ali," Kasganj Custodial Death: Fighting Back Is Our Only Hope, Says Altaf's Family" *The Wire*,Nov,21, 2021.available at: https://thewire.in/rights/kasganj-custodial-death-fighting-back-is-our-only-hope-says-altafs-family. (Last visited on November 21st, 2022).

20 Editorial," Badaun youth 'tortured' during questioning, five cops booked"*The Indian Express* ,June6,2022.available at : https://indianexpress.com/article/cities/lucknow/up-five-cops-booked-for-torturing-man-in-custody-7954571/. . (Last visited on November 21st, 2022).

21 Editorial, Behind India's Custodial Death Numbers Are 'Brazenly Ignored' Guidelines, Say Experts" *The Wire*,July 28,2022.available at: https://thewire.in/rights/custodial-death-uttar-pradesh. (Last visited on November 21st, 2022).

custody by the police in a town in Tamil Nadu, for allegedly violating the lockdown rules, were sexually harassed and tortured, ultimately leading to their death.[22] It garnered a lot of public resentment against the authorities and reflected lapses committed by the Police Officials and the Magistrate. This case reflected perverse exercise of power by the magistrate who remanded the deceased to judicial custody in a mechanical manner despite being under the obligation to apply his mind and not to pass an order of remand automatically or in a mechanical manner.[23]The order of remand by the Magistrate for a minor offence involving violation of a lockdown norm was unwarranted, in the light of suggestion of the Supreme for the States to decongest jails in wake of COVID-19 by granting interim bail to undertrial prisoners accused of minor offences and despite the presence of serious injuries on their bodies.As the demand for justice gained momentum, the Tamil Nadu Government, which was trying to brush aside the case as any other death due to illness, finally decided to offer compensation and Government jobs to the family of the deceased and to hand over the caseto the Central Bureau of Intelligence for a full probe.Regrettably, this casual approach of Magistrates in granting remand is not an exception, rather a norm in practice.

It is also apposite to notethat mostly persons who are victims of police torture belong to poor or vulnerable sections of the society. They tend to be soft targets because of their socio-economic status while rich and influential are able to escape this torture. The National campaign against torture counted the percentage of marginalized as 60 percent.During 2019, NACT documented death of at least four women during police custody, one committed suicide at home unable to bear custodial torture and another woman died due to torture outside police station. For example, from 3-7 July 2019, a 35 years old Dalit woman was allegedly illegally detained, subjected to torture and raped in police custody by nine police personnel at Sardarshahar police station churu district, Rajasthan. She also claimed that her 22-year-old brother-in-law died in police custody on July 6 and that police burnt his body late on July 7 to remove all evidence. Beside custodial rape, victim was also allegedly subjected to torture including plucking her nails.[24] Similarly, encounter of Vikas Dubey, a hardcore criminal, and the four accused of the Disha rape casealso raised questions as to the validity of the such encounters. Thus, it is quite apparent that the unchecked powers of police know no law and have laid hands on the

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22 Arun Janardhanan , "Explained: How Tamil Nadu Police's brutal act of revenge claimed lives of a father and son" *The Indian Express* ,September 24,2022.available at: https://indianexpress.com/article/explained/explained-tamil-nadu-police custodial-torture-father-son-killed-thoothukudi-6479190/(Last visited on Nov. 21, 2022)

23 *Manubhai R.P. v. State of Gujarat and Ors.,* (2013) 1 SCC 314

24 India: Annual Report on Torture 2019 .pg.9 available at: http://www.uncat.org/wp-content/uploads/2020/06/INDIATORTURE2019.pdf. Last visited on January 13, 2023.

innocent citizens as well as the hardcore criminals be it Mathura[25], P. Jeyaraj and J. Beniks, Vikas Dubey[26], Mohammad Arif or Jollu Shiva, etc.

## VI. SUGGESTIONS AND RECOMMENDATIONS

With all the checks around through various provisions of different enactments and the guidelines of the Apex Court, there has surely been an improvement in the present condition of custodial violence. However, Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures however, there is no law to compensate the victims of custodial violence or the relatives of the victims of custodial deaths. Though remedy is available under public law under Articles 32 and 226 of the Constitution, where compensation can be granted by Supreme Court and High Court and the initiatives taken by judiciary to accrue appropriate compensation are indeed commendable. However, the need of the hour is toremove the very causes, which lead to custodial violence, so as to prevent such occurrences by taking certain measures like- Police training, adherence to guidelines enumerated in D.K. Basu case, continuous monitoring etc. Further, to inspire the confidence of the citizens and uphold the principles enshrined in our Constitution, the urgent need of the hour is to enact the legislation wherein the definition of torture, should be as wide as possible, keeping within its ambit physical and mental torture. Stringent punishments should also be incorporated and focus should be there on the training of the police personnel from time to time. Provisions for compensation to the victims should be also be incorporated along with the provisions pertaining to payment of medical expenses and rehabilitation. Further, keeping in mind the fact that the majority of people are indigent, a provision in the legislation should alsobe made for State-sponsored psychological therapy for the prisoners, especially the under-trial ones so that the victims' pain, sufferings and trauma could be healed to an extent and they could join the mainstream society without any burden, fear and shame. Lastly, the Hon'ble Supreme Court directions in various judgements, like CCTV installation in each police station and proper functioning of central oversight committee, must be implemented in full spirit along with the mechanisms to fixthe accountability to implement these directions. Finally, India which is the largest democracy in the world should ratify the UN Convention against Torture 1984 as soon as possible as a gesture of respect that India has for human rights.

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25 *Tukaram v. State of Maharashtra*, AIR 1979 SC 185

26 *Ghanshyam Upadhyay v. State of Uttar Pradesh,* 2020 SCC OnLine SC 587

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# Media Ethics in Evolving Media Environment: A Legal Perspective

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**Abstract**

*In the growing technological world media has become a part of are daily life. From the morning tea till evening dinner media hold the eye of its viewers. There is no countries without media or press in this world and they affect the lives of human being on this planet either by way of giving political news, budget news, and fashion news and so on. Hence it become a moral obligation on the media personnel to show the original and fair news to its viewers. Hence, it becomes important that the press should take its role responsibly and should be within the sanctity. Therefore, the researcher in this paper has attempted to throw some light on media ethics concept and its obligation towards society. Further, since India is a country which is based on traditional practices and believe but with the modern innovations which give rise to the biggest question that "whether these ethics practically exists in new era or they have become a saleable product in the hands of selected few powerful persons?. In order to solve this question the researcher made an attempt to analyses the concept of media regulations and morals through the lens of the Indian mainstream media. In India, media ethics has long been associated with traditional mass media. In any event, with the improvement in technology and the introduction of the internet, traditional ethical practices are constantly put to the test.*

**Keywords:** Media ethics, Judgment, Democracy, Right of press, Communication, Media, Legal, Court, Contempt, Judiciary, Broadcasting, Constitution of India, AINEC, ASCI, Press Council of India, Right to privacy, Advertisement, Freedom, Free press, Journalists.

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## INTRODUCTION

A famous proverb of Journalism says, "If a DOG bites a man it's not NEWS, but if a MAN bites a DOG, it's News."[1] In any case, that doesn't be guaranteed to imply that you really want to adhere to "Unusual" to acquire prominence and fame. The media is playing the part of the "MIRROR" which reflects the times and society we live in. In this situation, the social obligation of the media turns out to be considerably more significant. Be that as it may, does this "MIRROR" reflect or refract? Further since media acts a bridge between the societies and state its role as informer and as an investigator of truth increases. There are no countries without media or press in this world. Hence, it becomes important that the journalism industry must stay within the bounds of the law in every country in the world. The rules controlling the press in really democratic nations are those that simply attempt to defend individual citizens' fundamental rights and to maintain peace and tranquilly, however, since press freedom is a necessary condition for democracy. These laws include those pertaining to privacy, copyright, sedition, and defamation. Print and electronic media are both reflections of the era and society in which we live. It links the world to us and us to the world. Through the image that the media paints of ourselves, both we and they are aware of the people and events that take place in other locations and nations. One's image might be improved or damaged by the media.

Because of the enormous proliferation of print and electronic media, their potential to impact public opinion, and strong rivalry for TRPs, the phrase "media ethics" has become a meaningless contradiction. The primary theoretical foundation on which ethics is built is unbiased observation, andnot5.as the observed. But, as we can see all around us, the media is more than simply an observer; it is also a distorted opinion shaper. Furthermore, the recent tendency has moved beyond the sale of media to sheer sensationalism. Regrettably, the genuine concerns of real people have become lost under the blaring headlines and noisy pulp fiction masquerading as news.

The media has a very strong mandate to reveal the truth in the nation. According to Hohfeld, power is always respectable when compared to responsibility. He asserts that legal power is the legal equivalent of legal liability and the legal opposite of legal incapacity.

The utilitarian approach was set apart from the intuitionist and egoistic ethical theories by Henry Sidgwick in his book Method of Ethics (1874)[2]. He held that having a moral sense is the essence of intuitionism, but since we frequently are unsure of what is right or wrong, it follows that we also lack a

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1 John B. Bogartto, *New York Sun* editor. Attributed in *Bartlett's Familiar Quotations*, 16th edition, 1992, p. 554.

2 Henry Sidgwick in his book Method of Ethics *First published on Tue Oct 5, 2004; substantive revision Tue Jul 9, 2019.available athttps://plato.stanford.edu/entries/sidgwick/. (Last visited 23 Jan, 2023)*

moral sense. He claimed that the intuitionist approach fails as a result. In the case of a contradiction between values, laws, and justice, utilitarianism as a method can offer the justification that intuitionism falls short of.

**OBJECTIVES OF STUDY**

This article is a study to find out the concept of Media and Ethics. Further an attempt is made to study the laws related media and ethics.The article also explores the knowledge of the concept of media ethics importance, challenges of media houses in society along with the relevant cases

**METHODOLOGY**

The research methodology used, will be doctrinal research. Apart from this various text books, research studies, journals, newspapers, magazines, International publications Articles, Internet, Net Library, Decided Cases by Apex Court & ICJ and other relevant materials concerning the subject are analyzed.

**INTRODUCTION TO MEDIA ETHICS**

The goal of ethics is to establish what is right and wrong. The moral organization of values and standards is what is referred to as ethics. These are the disciplines that focus on the advantages of local residents while weighing what is good and bad in relation to ethical obligations and commitments. For everyone in the country, media freedom is important for the rights to life and a fair trial. Ethics generally refers to a sense of duty toward each person. The survival of civilized society depends on ethics. It serves as the foundation of a sophisticated society. The field of media ethics has formalized the fundamental moral principles of accuracy, objectivity, truth, honesty, fairness, impartiality, and non-piracy. All of these fall under the umbrella of democracy. Knowing ethics puts a person in a position to comprehend, evaluate, and make wise judgments that will help them reach their ultimate goals in life. It may also aid people in giving ethical concepts careful attention. It aids a person in comprehending certain essential moral and logical truths. Authorities, values, culture, and beliefs form the framework for a proper and peaceful living in society. Human society's laws and regulations were first established by the ethics.

A true democracy cannot function without information. People must be brought up to date on national affairs and other major topics. Since the media is regarded as the foundation of society, it is their primary responsibility to inform society's citizens with accurate and fair news, information, entertainment, and discussions on legal, political, and economic issues.The media takes on the responsibilities of a leader and a persuader in addition to being an informant. The journalism profession is under a moral and ethical duty to uphold impartiality in the gathering and reporting of information in society since the media fulfils the aforementioned role of informant for a healthy democracy.

Media ethics is the area of ethics that addresses the specific ethical standards and tenets of the media. Because of its significant contribution to societal development, the media, the fourth pillar of society, has a duty to act morally, impartially, and in accordance with all existing laws. Additionally, the first thought that comes to mind when we discuss media ethics is "why does media ethics need to exist?" The necessity for moral standards arises because journalism uses a variety of communication channels, including the internet, television, and print media. This is done in order to foster national unity and cooperation and to prevent the spread of any false information that could endanger the country.

**Importance of Media Ethics**

Some of the importance of media ethics are discussed in below:

1. **Responsibility**: It is the media's duty to disseminate truthful information for the benefit of the general public. A reporter who abuses their position in the media for personal gain is unreliable and held accountable. The journalist has a responsibility to the public to offer accurate, unbiased information. His failure to uphold his moral obligation to disseminate reliable information could endanger society peace and order. For instance, during the Covid-19 era, several news channels attempted to instill a sense of dread and pressure throughout the community. As a result, many people began stockpiling food and other necessities, which led to a variety of problems.
2. **Right of Press:** The media is free to gather information, inquire about relevant topics, run surveys, hold discussions, etc. The legislative structure that protects the freedom of expression is supported by media ethics. In other words we can say that media ethics are the legal framework that protects the freedom of individual to express his or herself.
3. **Independence**: an independent media can give the truth and veracity in the news it delivers to the people, journalists should always be free to express their thoughts and acquire information. However, this does not imply that it should rule the government or any other institution in society. A free press with ethics steers a society to fair governing institutions and acts as a protector of a country's democracy; thus, the media must be independent but loyal to the country and its citizens.
4. **Impartiality:** Members of the media should be objective when it comes to news and the expression of any form of opinion. Media ethical guidelines for fair play Religion, public and private rights should all be treated properly by the media.
5. **Social welfare**: the media serves as a social watchdog in society, protecting cultural legacy as well as social ideals. Whereas they also serve as society changers through their modern cultural interchange, all of this should be done with the goal of minimising harm and enhancing advantages for social welfare and the public. As a result, the media also serves as a social welfare institution for society.

6. **Shaping the public** perception**:** It plays a significant part in influencing how the public perceives issues, sets the agenda for public discourse, and has a significant impact on politics, the economy, culture, and governance. News media and journalism also play a significant role in shaping public perception in democratic societies.

**Challenges With Indian Journalism**

The rapid advancement of media information technology has created numerous barriers for all levels of acceptable ethical behavior. The difficulties in pursuing media ethics include political issues, sporadic changes in the legislation, the priority of personal gain, and safety. There have been many more instances of ethical norm and principle violations in India, including paid news consumption, the dissemination of fake news, engaging in sensationalism and inflating insignificant stories, making false headlines, invasion of privacy, and factual distortion. Following are some of the issues with media ethics:

1. **Paid News:** Paid news is a trend in the media that describes how major media organizations routinely produce positive pieces in exchange for money. These days, ethical violations of this nature in journalism are all too widespread. Politicians and businesspeople are the ones who advertise in the media for elections, to market their goods, or to enhance their public image.
2. **Biased reporting:** By harming society by their careless job, the media can also be a source of conflict. Media reporting faces significant problems, including openly adopting sides and bias in reporting. In addition, numerous mainstream news organizations and their journalists have been exposed for conducting biased media investigations, lobbying for private interests, blackmailing, manipulating news stories, engaging in malicious and defamatory reporting, and waging campaigns of propaganda and misinformation.
3. **Misuse of Freedom of speech by Press:** In India, everyone has the fundamental right to free speech and expression. There is rising worry around the nation that several Indian news media sources have violated journalistic standards and ethics frequently, turning into habitual offenders. In fact, many who oppose the news media's unethical behavior are calling for strict regulation in favors of the inefficient self-regulatory system, and their voices are becoming more and more audible every day. The problems with invasions of privacy, censorship, pornography, media violence, confidentiality, objectivity, television and children, advertising, propaganda, and other things are all results of transgressions of established media ethics standards and widely accepted social norms in some societies.
4. **Technological difficulty:** Traditional media has difficulties as a result of digital and advanced technology. The difficulty of conducting media work ethically is also a result of government meddling in the industry**.**
5. **Lack of proper laws for e-media:** The ethical problem is to develop guidelines for handling rumors and corrections in an online

environment that are trustworthy and uphold the moral principles of accuracy, verification, and transparency. Invasion of personal privacy and dishonesty are tools made possible by the incorrect use of digital and other new media. The difficulty for media ethics is striking a balance between protecting journalists' safety and giving the public factual and accurate information.

6. **Lack of humanity while reporting news**: Media professionals' departures from recognized ethical standards and societal traditions have aroused the wrath of critics, sparked public protests and attacks on media institutions, and given rise to numerous additional topics for discussion and debate.

**Laws Related To Media Ethics**

Ethics Is The Hypothetical Science. The Tenets Of Ethical Codes Are Tradition, Religious Convictions, And Social Practices. The religious tenets, Indian customs, and values form the foundation of Indian ethics. Indian ethics are rooted on culture, family, traditions, religions, and norms and laws for each individual in society for the benefit of the populace as a whole. However, there are various ethical code adopted by media with reference to the above rooted practices in the society. Some of the code which India adopted was the press council of India, All India Newspapers Editors Conference (AINEC), Parliamentary Code was and Advertising Standards Council of India (ASCI) approved a Code of Self Regulations in 1985 and in 1995 A Guides to Journalistic Ethics brought out by Press Council of India.

**1. All India Newspapers Editors Conference (AINEC) 1968**[3]

In 1968 All India Newspapers editor's conference (AINEC) formulated the following code of conduct for media:

1. A free press can flourish only in a free society.
2. The press has a vital role to play in the consummation of the fundamental objectives enshrined in our Constitution, namely, democracy, secularism, national unity, and integrity and the rule of law. It is the duty of the press to help promote unity and cohesion in the hearts and minds of the people, and refrain from publishing material tending to excite communal passions or inflame communal hatred.
3. To this end the press should adhere to the following guidelines in reporting on communal incidents in the country:
   a) All editorial comments and other expressions of opinion, whether through articles, letters to the Editor, or in any other form should

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3 All India Newspaper Editors' Conference: Code of Ethics for the Press in Reporting and Commenting on Communal Incidents Adopted in 1968. Available on http://www.columbia.edu/itc/journalism/j6075/edit/ethiccodes/ALLIND1.html (last visited 2/4/2022).

be restrained and free from scurrilous attacks against leaders or communities, and there should be no incitement to violence.

b) Generalized allegations casting doubts and aspersions on the Patriotism and loyalty of any community should be eschewed.

c) Likewise, generalized charges and allegations against any community of unfair discrimination, amounting to inciting communal hatred and distrust, must also be eschewed.

d) Whereas truth should not be suppressed, a deliberate slanting of news of communal incidents should be avoided.

e) News of incidents involving loss of life, lawlessness, arson, etc. should be described, reported, and headlined with restraint in strictly objective terms and should not be heavily displayed.

f) Items of news calculated to make for peace and harmony and help in the restoration and maintenance of law and order should be given prominence and precedence over other news.

g) The greatest caution should be exercised in the selection and publication of pictures, cartoons, poems, etc. so as to avoid arousing communal passions or hatred.

h) Names of communities should not be mentioned nor the terms "majority" and "minority" communities be ordinarily used in the course of reports.

i) The source from which casualty figures are obtained should always be indicated.

j) No facts or figures should be published without fullest possible verification. However, if the publication of the facts or figures is likely to have the effect of arousing communal passions, those facts and figures may not be given.

**2 Advertising Standards Council Of India (ASCI)(1985)[4]**

It attempts to ensure the veracity of statements made in commercials and to protect consumers against deceptive advertising. It also makes sure that commercials don't go against the generally accepted norms of decency in society. Additionally, it protects against the indiscriminate use of advertisements to advertise dangerous goods. However, the codes of ethics for advertising offer basic guidelines for behavior, advice against profanity and immorality, and prohibit the use of national symbols. The code also provides that Advertising should be planned so that it complies with the law, as well as with national moral, artistic, and religious feelings. Further, it should not be allowed to run advertisements that are meant to offend or bring a bad name.

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4 Indian Broadcasting Foundation's Self-Regulatory Content Guidelines For Non-News & Current Affairs Television Channels Available on https:// www.ibfindia.com/advertising-standards-council-india-asci (last visited 2/4/2022)

Advertisements should not profit from the ignorance or superstition of the general public and so on.

### 3 Press Council of India[5]

The Press Council of India is a statutory quasi-judicial autonomous authothat was reestablished in the year 1979 under the Press Council Act, 1978, of the Indian Parliament. Its dual objectives are to uphold press freedom and maintain and improve the standards of Indian newspapers and news organisations. According to the first Press Commission's recommendations, it was first established in 1966 under the Indian Press Council Act, 1965, with the same twin goals. However, the 1965 Act was revoked in 1975, and the Press Council was disbanded under a state of was reestablished under it in 1979. The Council has frequently urged the media to report with prudence and restraint. It concurs that efforts should be taken to foster an atmosphere in which the press can best balance its exercise of freedom and responsibility through self-regulation. That is the main goal that Press Council wants to advance and uphold. Some of the guidelines/norms given by the press council of India to journalists are mention below.

1. **Accuracy and Fairness**
   - According to press council of India the Press must refrain from publishing content that is unreliable, without merit, unprofessional, deceptive, or twisted. It is important to report on all aspects of the main problem or topic. Unfounded rumours and hypotheses shouldn't be presented as reality.
   - Newspapers have a responsibility to respond positively to rumours that threaten the reputation of financial institutions with a public face.
   - While it is the journalists' responsibility to report on wrongdoings that come to their attention, such reporting must be supported by concrete facts and evidence.
   - Newspaper should keep in mind that their responsibility is to gather the news and put it in context, not to generate news.
   - The leader's comments shouldn't be misinterpreted or misquoted by the publication. The quotes used in the editorial should reflect the genuine meaning of what is being attempted to be said by them.
2. **Advertisements**
   - Publication shall not contain any advertising that directly or indirectly encourages the production, sale, or consumption of cigarettes, tobacco products, wine, beer, liquor, or other intoxicants.

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5 Press council of India 1978 act. Available on https://www.presscouncil.nic.in (last visited on 4/5/2022).

- Newspapers are not allowed to publish advertisements that are intended to offend or hurt the religious sentiments of any community.
- When publishing advertisements, newspapers should include the payment information.
- Newspapers are prohibited from publishing any advertisements intended to pass for news reports by using the names and photos of India's President and Prime Minister.

3. **Caste, religion and community**
   - In general, it is best to avoid referring to someone or a group of people by their caste, especially if the context suggests otherwise or associates a certain deed or habit with that caste.
   - Newspapers are recommended against using the term "Harijan," which has drawn criticism from some, and instead should refer to Schedule Caste in accordance with Article 341c. As the watchdogs for the weaker sectors of society, they should bring the issues facing these groups to the public's attention.
   - It is hoped that the press will use its power to support and contribute to maintaining societal harmony.

4. **Caution Against Defamatory Writings**
   - Newspapers should refrain from publishing anything that is flagrantly false or libellous toward any person or organisation unless there is adequate proof to support the claim and dissemination will benefit the public as a whole after appropriate care and investigation.
   - When there is no public interest at stake, the truth is not an adequate justification for the publication of disparaging, slanderous, and defamatory material against an individual.
   - No personal remarks that could be taken as being disparaging toward a deceased person should be published, with the exception of very rare instances where it would be in the public interest.

5. **Right to privacy**
   - A person's right to privacy is protected by the press, unless there is a legitimate public interest that outweighs it. It is crucial to use extra caution when reading reports that could stigmatize women.
   - When discussing crimes involving the rape, kidnapping, or kidnapping of women, or child sexual assault, or when raising concerns about the chastity, morality, or privacy of women, names, pictures, or other details that might reveal their identities shouldn't be made public.

6. **Other related provisions**
   - Photographs should not be released when reporting crimes like rape, kidnapping, or sexual assault of children. Although such publishing has no valid public benefit, it can make the victims unpopular.

- Media should abide by the laws and regulations of freedom of speech and expression under Article 19, clause (2) of the Indian Constitution when reporting on information that would damage reputation, the interests of the state and society, individual rights, and other factors.
- Only publish news, opinions, or remarks relevant to communal disputes after adequate justification and fact-checking. the careful dissemination of information that fosters the development of a climate favorable to societal concord, amity, and peace.

## 4. CONSTITUTION OF INDIA

The Indian Constitution is the country's fundamental law. Any law that contradicts or deviates from the requirements of the constitution is invalid. It is founded on the ideas of justice, social, equality, and fraternity, which ensure the respect of every human being as well as the unity and integrity of the nation. Press freedom is not specifically addressed in the Constitution. Article 19(1)(a) ensures freedom of expression and the right of the media to express themselves freely. However Art. 19 (2) imposes reasonable restrictions on the media coverage. Further, the constitution indirectly deals with the ethics a media should follow.

## INSTANCES OF VIOLATIONS OF MEDIA ETHICS

The fundamental principles of media writing are objectivity, neutrality, veracity, correctness, and civil responsibility. News organisations, reporters, and broadcasters frequently flout the "code of ethics" when acquiring notable material and later broadcasting it to the public. This could be However, it is not fair to single out the press and the broadcast media for criticism. The media outlets employed the technique of "reconstruction" of the crime scene and occurrence to heighten the buzz and readers' interest in the story. The news was also widely circulated on the internet. It was necessary to sensationalize the news in order to keep it important and current in the public eye. The terms "in the public interest" and "interest to the public" are clearly distinguished by ethical principles and legal requirements. Viewership, owner pressure, coercion from items influential and useful news sources, and the selective dissemination and retention of news by media as a result of one or more of the aforementioned factors.

- **Aarushi Talwar Murder Case[6]:** A prime example is the Aarushi murder case, which sparked a media firestorm. AarushiTalwar, a young girl, and a housekeeper were killed in 2008 in an upscale neighborhood in Delhi. The double murder case received extensive media attention, and a discussion on the scope of the media was sparked by the style and syntax of the reporting. Without adequate confirmation from the relevant authority, the media declared guilt and innocence. The Supreme Court intervened on behalf of the investigative agency (the CBI) in response to the media's

[6] Dr. Rajesh Talwar And Another V. Central Bureau Of Investigation 2013 (82) ACC 303

relentless lobbying and issued a restraining order prohibiting any controversial or dramatic reporting on the case. Justice AltamasKabir stated [7]"We are asking the press not to sensationalize something which affects reputations." The media outlets employed the technique of "reconstruction" of the crime scene and occurrence to heighten the buzz and readers' interest in the story. The news was also widely circulated on the internet. It was necessary to sensationalize the news in order to keep it important and current in the public eye. The terms "in the public interest" and "interest to the public" are clearly distinguished by ethical principles and legal requirements. But still it can be said that the media overlooked its responsibilities and can be blamed for violation of ethics.

- **26/11 Mumbai terror attack:** The 26/11 rescue mission was the subject of dramatic live broadcast arranged by the news channels. Neelamalar, Chitra, and Darwin (2009)[8] said that compared to electronic media, newspapers' coverage of the 26/11 terror attacks was more ethical and impartial. But this might be attributed to the nature of print media, which had time to confirm and present the correct information as opposed to television, which needed to produce its broadcasts quickly and had to continually focus on breaking news by being first. This illustration unequivocally demonstrates media ethics being broken. There is no doubt that the television was a more dominant presence and that the images broadcast by the TV cameras were posted by the social-media sites. The television channels may argue that the live feeds were accessible in the social networking sites and the internet, but there is no doubt that the broadcast tv was a more prominent presence. The popularity of the transmission and the financing of advertisements weakened ethical values. Making a quantitative analysis of the national channels' ad revenue at the time of the live broadcast would make for an intriguing study.
- **Sushant Singh Rajput case:** The media's repeated coverage of the relationship between actor Sushant Singh Rajput and his companion Rhea Chakraborty is another instance of transgressions of media ethics. In this instance, the actor, 34, was discovered hanged in his Bandra area apartment on June 14. Rhea Chakraborty, Sushant's live-in partner, and her family were essentially "convicted" by some media outlets before law enforcement agencies could wrap up their investigations, and they were even referred to as "vishkanya," "khalnayika," and "kalajadogarni."

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7 Aarushi-Hemraj murder case: Talwars seek reports of scientific tests. Available on ibnlive.com/news/aarushi-hemrajmurders . (last visited on 21 Dec, 2022)

8 The print media coverage of the 26/11 Mumbai terror attacks: A study on the coverage of leading Indian newspapers and its impact on people, M. Neelamalar, P. Chitra and Arun Darwin, Journal Media and Communication Studies Vol. 1(6) pp. 95-105, 2009.

The PCI asserted that the media is advised not to "conduct its own parallel trial or foretell the decision to avoid pressure during investigation and trial".[9]

- **The Ayodhya Dispute:** The most famous instance in India is the Ayodhya Dispute. This situation has theological, historical, and political underpinnings. A land parcel close to Lord Rama's birthplace of Ayodhya is the subject of the dispute. The most challenging issues in this condition arise between two distinct communities, namely Hindus and Muslims, who bordered the territory that included both Hindu and Muslim residents. On December 6, 1992, violent Hindu extremists attacked and destroyed the renowned Babri Masjid, which is believed to have been built where a Ram Mandir once stood and Lord Rama was worshipped. A petition for the title to the land was filed in the Allahabad High Court as a result of the violent rioting that this act of destruction sparked. The case eventually became more heated, and 18 years later the final decision was made. The decision was made keeping in mind the religious sensibilities of both sides. The decision was made keeping in mind the religious sensibilities of both sides. The 2.77-acre Ayodhya property will be divided into three equal parts by the court. One-third of the land was given to the Sunni Waqf Board, another third to the Hindu Mahasabha for the Ram temple, and the remaining third to NirmohiAkhara (Hindu Religious group).Although the Press Council of India claims that the media should be more cautious in delivering sensational news that can disturb the peace of the public at large, for a long time, the media had been assessing this case, with little media conversations and consequential topics relating to the case acting only as a window into the difficulties that existed between the two parties throughout India.
- **The Gyanvyapi Mosque Dispute:** Another instance of unethical behaviour by the media is the gyanvyapi mosque issue, in which the media is still actively publicising the conflict between the two communities despite a lack of facts and evidence. The Shiv temple was allegedly destroyed in 1669 with the support of Mughal Emperor Aurangzeb, and the Gyanvyapi Mosque was built on its remains, according to Swayambhu Lord Vishveshwar followers. The followers now demand that the land be reclaimed so that the temple can be built there.

## CONCLUSION

Today For publishing claims on things like political power, popularity, and financial gain, etc., the media is under a lot of responsibility. The media keeps an eye on the nation's good governance. In addition to upholding moral norms, journalists must act independently to zealously protect their

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[9] The Indian express, Sushant singh Rajput case: Press Council asks media not to carry out its own 'parallel tria'. Available at https://www.newindianexpress.com/nation/2020/aug/28/sushant-singh-rajput-case-press-council-asks-media-not-to-carry-out-its-own-parallel-trial-2189565.html. (last visited on 23 mar 2023)

independence and constitutional rights. Everywhere in the world, journalists are essential to educating the public and fostering understanding. They must consequently continue to be mindful of concerns like justice, responsibility, and accuracy. Throughout the many phases of their investigations, reporters must continually reflect on matters of ethics and be prepared to defend their choices to editors, peers, and the general public. The ethical approach to complete things is typically more difficult, but if reporters are serious about preserving the integrity of their media, they must be prepared to take on this challenge. When disseminating news stories, the Indian media has traditionally stood on a high moral position. True news and statements help to build successful democracies, but the media does not hold them accountable by attaching only sponsored news and political news. But it is also a fact that the presence of the powerful new media with ethic can create a better nation. Although it can be said that the term media ethics are a self- regulatory norm but still there a need for strong and stringent rules for the media professional to be followed. As in today's scenario the lot of media professional are misusing there power for various purposes and reasons.

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# Right to Parenthood – vis-à-vis Human Rights Jurisprudence

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**Abstract**

*The evolving feminist jurisprudence over the globe has impacted not only the traditional notions of inequalities but had broadened the horizons of various facets of inequalities in male dominant societies. The Apex court of India in E.P Royappa case has held that equalities has multidimensional facets, the facets can be determined with the time. While on the other side human rights are birth rights, natural rights, person oriented rights and basic necessities for existence. The global jurisprudence has recognized parenthood as one of the human rights while as in achieving this rights there are some medical issues due to which right to parenthood or family cannot be achieved. In such situation the surrogacy is the handy remedy. However the paper is an attempt to evolve the model which will makes a balance between parenthood, family, and health of surrogate mothers. The established systems around the globe has enacted several legislations on the subject. The paper is an attempt to analyses the issues and challenges in surrogacy and the legislative mechanism for the same in India. The paper has highlighted various legislative and administrative gaps and suggests remedial measures foe the same.*

**Key words:** Surrogate, Human Rights, Right to Health, parenthood, family.

## INTRODUCTION

Whether or whether payment is made for the service, surrogacy breaches the natural rights of women as well as their fundamental human dignity. This part examines the harm which is "best case scenario" arrangements for surrogacy which will inflict the physical & emotional well-being of surrogate mother. The effects of the practice here on social institution of mother, which is otherwise lauded in law and is a cornerstone of society, will be discussed in other part of study. After establishing the significant harms causes to women and femininity, will then look into the questionable connections between surrogate and the illegal business of human trafficking.

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The claim that surrogacy can be a "empowering" experience will be refuted in each part since doctrine of consent cannot be a defense for violating human rights, and because surrogacy is fundamentally exploitative and can quickly lead to coercive circumstances. Human right is the very changing concept and is considered as fundamental for every human being. Sometimes the rights of human are claimed to be universal rights, foundational right, gender neutral right and liberty oriented rights. Surrogacy is interlinked with human rights from both sides i.e, intended parents and surrogate mothers.

**A. Recognition of Right to Health and mental well-being**

The UDHR's Article 25 specifies that "Motherhood and infancy are entitled to special care and assistance" and includes appropriate health and well-being of family. The right recognize the health family which includes all necessary things required for a healthy society or family. The ICESCR (International, Covenant on Economic, Social and Cultural Rights) which was ratified by approximate 170 governments, reiterates this right in Article 12.[1]. Affirming that "every human being is right to the enjoyment of the best achievable level of health conducive to leading a life in dignity," the UN Committee on ICESCR the body which is responsible to oversee implementation of this treaty drew on this article.

The egg donor and the surrogate mother are the only women who bear the whole burden of the severe risks that come with surrogacy. Despite the lack of long-term studies on the outcomes of donation of egg and the research reflected that the arrangement for surrogacy by the fertility clinics is somehow leading to breast cancer as well as endometrial types of cancer which are directly linked to total intracellular estrogen exposed, which occurs during the oocyte harvesting procedure.[2]

Any human tissue can become malignantly transformed by excessive stimulation. Pregnant women are frequently required to bear twins, triplets, or higher multiples *in order to maximize the interest of the intended parties.* This puts the risk of developing pre-eclampsia to the concerned parties.[3] There are also other negative effects listed on the Lupron medicine label provided by the Food and Drug Administration (heirin after FDA) of USA.[4] The distance of the mother and the child during postpartum can be both mentally and emotionally traumatic, even after giving birth. It is exceedingly uncommon for a woman to purposefully put herself in that level of risk if she is neither under any significant social, financial, nor emotional pressure.

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1 The ICESCR was adopted on December 16, 1966 and entered into force January, 3, 1976.

2 IKamphuis Esme, & Ors. , 'Are we overusing IVF?' (28 January 2014) 348. Accessed at

3 A Conde-Agudelo, JM Belizán and G Lindmark, 'Maternal morbidity and mortality associated with multiple gestations' (2000) 95, 6(1) Obstetrics & Gynecology, 899-904.

4 Ibid at 13

On the other side, "termination clauses" are frequently used in surrogacy contracts. If any surrogate children who would otherwise be born with disabilities or in multiple pregnancies, the pregnant women can have an abortion but only with the permission or direction of the intending couple.[5]

A legal dispute was aroused in the year of 2015 where a surrogate mother Melissa Cooke, who was carrying triplets, refused to carry out the (single) male commissioning party's ('C.M.') demand that she terminated one of the children. The embryos were produced utilising the sperm of C.M. and an unnamed donor's ovum. Cooke was concerned the request implied that C.M. would not be willing to care for all the children, so she moved before the court to demand her legal rights as a mother and custody of at least one child. Despite multiple court battles and appeals, Cooke was unable to obtain any parental recognition or custody even though the father's desire for an abortion did not prove to be enforceable.[6]

In fact, egg donor Katie O'Reilly wrote in the Atlantic in 2016 about her personal loss and noted that she had no say in the choice to "selectively reduce" her triplet offspring to a single child in the surrogate's womb.[7] In Melissa Cooke's case, the mother's name field on the child's birth certificates was kept blank, as permissible by California law. Cooke's controversial decision and the denial of her request for any type of parental rights show how devalued the role of a surrogate mother has become as a "womb for hire.

When vehemently contested, "termination provisions" are unlikely to be upheld in court, as was the case with Melissa Cooke. However, the overwhelming pressure to comply may amount to forced abortion, especially for the many surrogates who lack Cooke's social, economic, and legal support network, which allowed her to vehemently to object the imposition.' The Beijing Declaration and its Platform for Action, adopted in the Fourth World Conference on Women, forced abortion is listed as one of the "grave violations of women's human rights," while the Cairo Declaration, which was adopted earlier and was signed by 179 governments, promotes a pessimistic viewpoint on abortion in general.[8] Forced or compelled abortion has been called a "brutal" form of discrimination by the Committee on the Rights of Persons with Disabilities (ICPD). More generally, surrogacy is not specifically included in any international legal documents. By ensuring that men and women have "equal access to health care services, including those linked to family planning,"

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5 C.M. v. M.C., 213 Cal. Rptr. 3d 351, 363 (Ct. App. 2017);

6 Ibid.

7 Katie O'Reilly, 'When Parents and Surrogates Disagree on Abortion' The Atlantic (18 February 2016) available online at When Parents and Surrogates Disagree on Abortion - The Atlantic (Last visited January 31, 2023)

8 Report of the International Conference on Population and Development, Cairo, September 05th-13th, 1994 (1995) Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/231/26/IMG/N9523126.pdf?OpenElement (Last visited January 10th, 2023)

Article 12 of the (CEDAW) could be misconstrued as supporting the practice.[9] The ICPD similarly requests that States safeguard women's "capacity to reproduce and the freedom to determine whether, when, and how frequently to do so." Access to "techniques and services that contribute to reproductive health and wellbeing by preventing and addressing reproductive health disorders" is also particularly mentioned.[10] Such an understanding is fundamentally incorrect, though. Surrogacy's potential as "health care," as opposed to a means of socially avoiding infertility, is limited.

Despite ideological trends shifting towards a definition of "healthy" that includes wellbeing rather than merely being free from sickness, the biological underpinnings of health care and treatment for achieve a such physiological state still remain and are distinct from social interventions. The United Journal of Medicine and Healthcare defines healthcare as follows:

> The preservation or enhancement of health through the avoidance, detection, and treatment of human disease, injury, illness, and other physical and mental limitations. The science and practice of diagnosing, treating, and preventing disease is known as medicine. A wide range of medical procedures have developed over time to preserve and restore health through illness prevention and treatment.[11]

In the UK, the National Institute of National Healthcare Excellence (NICE) makes a distinction between social treatments and medical therapy:

> In terms of medicine, [intervention] may take the form of medication, surgery, a diagnostic technique, or counselling. Interventions for improving someone's nutrition or level of physical activity are examples of public health measures. Interventions in social care examples can include career help or safeguarding.

The commissioning parties' issues with reproductive health are not resolved by the surrogate by carrying a child. It is not healthcare because there is no cure or therapy. At most, it is a social intervention. It offers a youngster using different means.

Access to these services cannot be allowed at the cost of another user's human rights, especially their right to health, even if one accepts with some lobbying organizations' assertion that surrogacy is a sort of women's health

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9 Convention on Elimination of All Forms of Discrimination against Women (adopted on December 18th 1979, entered into force September 03th, 1989).

10 ICPD (n23) available at International Conference on Population and Development (unfpa.org) (Last visited November 27th, 2022)

11 'United Journal of Medicine and Healthcare, united prime publications available online at Treatment of CSVD in Alzheimer's Disease by means of Transcatheter Intracerebral Laser Exposure (untdprimepub.com) (Last visited November 14th, 2022)

therapy. As a matter of fact, the ICPD specifically specifies that women should never be subjected to "harmful behaviors and sexual exploitation."

> Governments should ensure that the provision of family planning and related reproductive health services complies with human rights, ethical standards, and professional norms. Techniques for in-vitro fertilization should be offered in compliance with the relevant ethical standards and medical regulations.[12]

Although the ICPD states that "acceptable" infertility therapy should be accessible, it is obvious that approaches fall short of this requirement when they blatantly violate the rights and dignity of other people. Whether or whether money is exchanged, surrogacy is fundamentally a procedure where one person's right to health is put at danger for another. In such cases, getting consent does not make the human rights violation any less severe.

**Maternity Protection and the Family under International Law**

The family is strongly supported by international law as a fundamental social institution. It simultaneously guards against the exploitation and manipulation of this natural unit. The family is described to as "the natural and basic group unit of society" in Article 10 of the ICESCR, especially because it was established and because it is in charge of raising and educating dependent children. States are required to provide the family with "the widest possible protection and assistance.".'[13] In accordance with Article 23 of ICCPR, both men and women who are of marriageable age are free to wed and start families'.[14] In the same way that researchers that developed IVF in the 1970s and 1980s based their work on these principles, proponents of surrogacy now use this foundation to argue again for existence of a human right to reproduce, regardless of the technology required. Maja K. Eriksson, a legal expert, claims that the family principle upheld in, among other locations, including Art 23 of the ICCPR was a "reaction against Nazi racial and reproductive policies which culminated in genocide" rather than a demand that States provide individuals who are unable to conceive on their own with a spouse and/or children.

Therefore, surrogacy is not sanctioned by international law, and it is not required to be made available. International law emphasizes the importance of maternity instead. As stated in the preamble of the same convention, CEDAW Article 4 calls on States to "take special measures targeted at preserving maternity."[15],

> "*the significant but still underappreciated contribution of women to the welfare of the family and to the advancement of society, the social*

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12 Supra Note 12

13 Art. 10 CESCR

14 Art. 23 of International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976)

15 CEDAW (n25) art. 4.

*significance of maternity, the role of both parents in the family, and the upbringing of children, as well as the knowledge that the role of women in reproduction should not be used as a justification for discrimination but that the upbringing of children requires a sharing of responsibility between men and women as well as society as a whole."*[16]

Surrogate moms have a bigger maternal function than previously believed throughout pregnancy from the standpoint of development. Even among a connected surrogate mother and the infant that is carrying, recent epigenetics research has shown the enormous impact that the prenatal environment has on gene expression. The child's life is affected over time by the mother's diet and the hormonal environment in the womb. According to study from the Universities of Portsmouth and Singapore, the interplay of genetic variations and the prenatal environments provided the best explanation for the remaining 75% of the methylation diversity between babies. 25% of the methylation variance between newborns might best be attributed to genetic differences alone. Therefore, from a biological perspective, the surrogate mother cannot be easily written off as serving a brief and distinct purpose. Asking her to socially separate her mothering duties from her body's basic needs breaks down not only the idea of parenthood but also her own identity as a whole person. Surrogacy damages parenthood rather than preserving maternity, which damages each woman's personal integrity. Each may assert the right to choose whether or not to participate in parenthood. This natural intervention throws the family's legal situation into disarray. Dividing the gestational carrier's biological capacities from her distinctive identity and motherhood compromises her human dignity and results in additional rights violations.

**A Reproductive Prostitution & Exploitation Practice.**

Two essential components of the term's definition are identified by philosopher Stephen Wilkinson in his research of exploitation:

- "The victim of exploitation has an unfairly high degree of expense or harm, or is at risk of experiencing an unfairly low level of reward;"
- "The agreement was made with the exploited person's faulty or invalid consent."[17]

The study has so far discussed the low level of gain and high degree of harm that surrogate mothers receive (or run the risk of receiving). However, it is also clear that the action qualifies as "exploitation" under the "defective or invalid consent" standard. The promise of "life-changing" sums of money in exchange for the enormous risk assumed by the woman may render such

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16 CEDAW (n25) preamble

17 Ai Ling Teh et. al., 'The effect of genotype and in utero environment on interindividual variation in neonate DNA methylomes' (2014) 24 Genome Research 1064–74

agreement voidable. Or, for those who take part in surrogacy without receiving compensation. The surrogate's unanticipated physical, psychological, and mental response to the point of separation with the child she bears and the incredibly unusual pregnancy that is about to undergo establish the idea of "informed consent."

According to the Global Monetary Fund, the market for surrogacy is rising in Ukraine, the continent's poorest country (IMF). Due to the ongoing worldwide turmoil and the average monthly wage of €237, many reduced women are persuaded to provide for their families via this unconventional technique, resulting in approximately 2,000–2,500 surrogacy contracts getting signed countrywide each year. Commissioning partners pay between €39,900 and €49,900, which represents a significant reduction from California's $120,000 fees.[18]. Unfortunately, the reality of female exploitation, which is ingrained in the structure of the enterprise, has been made clear by the great demand for the creation of children at a relatively low cost. Ukrainian media claimed that surrogates have "treated them like cattle and made fun of them.[19]

In addition, whether or whether they are compensated, women must provide upfront consent to give up control over significant medical decisions, according to surrogacy contracts. A commitment to several months of invasive medical procedures is necessary for the surrogacy process, which normally begins with IVF, a range of hormone treatments, and fertility drugs. Additionally, it calls for initiatives to place fertilized embryos in the womb. The numerous prenatal tests and treatments come next, then the actual delivery, which is maximum done via C-section. .[20] While standard medical practise typically requires a meaningful, informed conversation prior to each treatment as well as operation, with full and clear consent obtained at the time, the surrogate essentially waives the right to give explicit cooperation on interventions that influence both her body and the torso of the baby she is carrying. As was covered earlier in this chapter, the surrogate mother may even pretend to sign away her right to object to an unfavorable abortion. In contrast, there are comparatively few other situations in medicine where personal patient permission at the time of therapy is disregarded. Although they give advance approval for medical decisions, living wills and advanced directives are entirely revocable in a way that surrogate contracts are not, and they can be made without the presence of a third party.[21] In the case of Baby M, a surrogate mother from New Jersey by the name of Beth Whitehead refused to relinquish her parental rights to the child she had borne, putting the subject of surrogacy to US courts for the first time in 1987. Due to Beth Whitehead's uninformed

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18 Silvia Blanco, 'The dark side of Ukraine's surrogacy boom' El Pais (1 October 2018)

19 Madeleine Roache, 'Ukraine's 'baby factories': The human cost of surrogacy' Al Jazeera (13 September 2018)

20 Pamela Laufer-Ukeles, 'The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood' (2018) 43 North Carolina Journal of International Law 96 279, 281, 300

21 Laufer-Ukeles (n54), 36

assent and the questionable legality of the exchange of money for a child, the court nullified the surrogacy agreement she had signed. The judge agreed with the defence put up by Whitehead's attorney that "Mrs. Whitehead could not grant informed consent at the time she signed the contract until she felt the emotion of delivery and sensed the kid."

Similar worries that the practise amounted to "exploiting surrogate mothers, who cannot offer their permission freely, unconditionally, and with full comprehension of what is involved" were summed up in a 2016 report submitted by the Parliamentary Assembly of Council of Europe.[22] There is therefore a strong argument that surrogate moms, both paid and unpaid, are vulnerable targets in the surrogacy paradigm because they face a high risk of harm and are unable to provide informed consent. In fact, it is evident that surrogacy violates rights when further examined through the prism of the laws against human trafficking.

The UN Protocol to Avoid, Punish, and Punish Trafficking in Humans, Especially Women and Children, Commending the United Nations Convention on Transnational Organized Crime, often known as the Palermo Protocol, includes the following as its definition of "trafficking in persons."

- Activity: hiring, moving, transferring, harboring, or receiving individuals
- Techniques include kidnapping, fraud, deception, abuse of authority, abusing a position of vulnerability, using threats of violence or other coercive tactics, or paying or receiving money in exchange for the consent of another person to exert control over them.
- Intention: to exploit people through forced Labour, servitude-like services, and other means [23]

There are numerous parallels between human trafficking and surrogacy, few are summed up as:

- One way to directly recruit women is through advertisements offering significant sums of money for them to rent their wombs or sell their eggs as part of the surrogacy procedure. There is evidence that fertility clinics focus their efforts on recruiting women with higher economic vulnerability on university campuses and military sites in the West.
- Midwives are hired in impoverished nations to persuade women with young children and heavy financial burdens. Furthermore, some

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22 Petra de Sutter (rapporteur), Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of Europe (PACE), 2016, Ref. Doc. 13562.

23 United Nations Office on Drugs and Crime, 'Issue Paper: The Concept of 'Exploitation' in the Trafficking in Persons Protocol' (United Nations, 2015) 5.

transnational surrogacy agreements involve moving women from one jurisdiction to another in order to get around restrictive legislation.[24]

- Fraud, deceit, and coercion are pervasive in the testimonies of ethnographic studies. Many women contend that they weren't adequately informed of the dangers before signing either a surrogacy or egg donation arrangement.[25] Contracts have apparently been supplied in Asian settings in languages that the surrogates do not understand.[26] The surrogate arrangement cements an unequal power dynamic in which a wealthy party utilises either money or emotional inducement to impose control over the body—a crucial component of the person—of the party in greater socioeconomic vulnerability. Even in "best case circumstances" where complete disclosure of the risks is guaranteed and a fully informed consent is acquired This situation is an example of the misuse of a vulnerable position or the payment or receiving of money in exchange for permission to dominate another person.
- The Palermo Protocol states that term "exploitation" includes, "at a minimum," "the exploitation of other folk's prostitution or even other types of sexual exploitation, compulsory Labour or assistance, slavery or practices that are similar to enslavement, servitude, or the removing organs," despite the fact that international humanitarian law lacks a clear definition of the term.[27]

There are obvious similarities between prostitution and surrogacy. The surrogate mother and the prostitute are both expected to be able to separate their personhood from their physical form. Similar to how the prostitute's was done at the expense of her personal dignity and moral character, the surrogate's body is being made into a commodity for the benefit of someone else. Prostitution is the act of purchasing a woman's body for sexual purposes without taking on reproductive responsibility. According to the drafters of the Palermo Protocol, consent is irrelevant and cannot be used as a defence once it is established that trickery, coercion, force, or other illegal methods were utilized. '[28]Since surrogacy poses significant dangers to the gestational carrier's health and wellbeing, it invokes the "harm principle," which limits the freedom of contract. This is not an isolated instance of this phenomena; for instance, contracts to sell organs are not enforceable even if the seller is a consenting

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24 Pande 2010 (n7) 975.

25 Sheela Saravanan, A Transnational View of Surrogacy Biomarkets in India (Springer, 2018); Jennifer Lahl and Justin Baird, 'Eggsploitation' (Film, Center for Bioethics and Culture, 2011)

26 Pande 2010 (n7) 976.

27 Palermo Protocol (n60) art 3(a).

28 UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (United Nations, 2004) 270.

signing since they conflict with public policy and international law. Similar to the previous example, most States forbid euthanasia since taking another person's life, whether with or without their consent, is a violation of their dignity. The fact that a woman is willing to take part in surrogacy is not a sufficient justification for its legal acceptance. States are obligated to forbid surrogacy in their domestic laws in order to uphold their duties to safeguard the human rights and fundamental dignity of women.

**Vulnerability and Human Rights**

Vulnerability is a constant issue with ensuring rights. In the global surrogacy equation, those who are most at risk are taken into account when focusing on protecting the triangulated relations— surrogate, commissioning parent(s), and the producing child. It is necessary to refer to the commissioning parent(s), who may be exploited in the surrogacy arrangement and transaction. Their possible genetic connection to their child makes them even more vulnerable to abuse and extortion by the middlemen due to their emotional and financial vulnerabilities. The vulnerabilities of commissioning parents also need to be mentioned. (Haimowitz et al. 2010).

Although the commissioning parents are less at risk than the surrogate or the kid, those who are most at risk require the strongest societal protections. There has been a loud call for regulation of the surrogacy industry in academic and popular literature (Goodwin 2010). In order to safeguard the weak, consensus must be sought on the role of government vs. private agreements in the marketplace, and at least two significant sides of the dominant argument must be considered.

The private market place method, as mentioned by Gallager (2010), focuses on enhancing the system's functionality. The classical liberal perspective, in contrast, emphasizes ideals that Centre on safeguarding the weak from the market while fostering equity. Now that there is a drive to control the practice of global surrogacy, international private law will be considered in light of these two opposing values orientations.

**Recommendations**

Any ethical global surrogacy arrangement must be built around free and informed consent, which must be given after careful consideration of the risks is taken to inform the surrogate. Expressing the understanding that those living in great poverty could not understand what it means to be "free." Medical and socio-emotional concerns are additional dangers that have already been established (SAMA-The Resource Group for Women and Children 2012). This includes the manner in which a mother is treated following a difficult delivery, with specific guidelines about her rights and restrictions regarding additional care provided both inside the surrogacy clinic and elsewhere in the neighborhood. As a result, the following practical policy suggestions are provided:

(1) Guidelines for informed consent must be created that not only adhere to how Western societies define the procedure but also take into account the

cultural norms of women in lowresource nations, where there may be difficulties in understanding the risks of surrogacy due to issues with education and other factors. Consent must be obtained using appropriate verbal and written language, with an objective counsellor guiding the process. It is crucial to consider the context of poverty, the desperate situations that give rise to the chance for surrogacy, the global enslavement of poverty, and the knowledge that a woman may be "pressured" into the a surrogacy by a husband or other close relative in in order to achieve a fair consent process, alike conceptually and practically.

(2) Financial transactions, especially those involving the payment of surrogates, must be managed in a transparent and secure manner, even when using financial inducements to sway assent. In order to promote openness, a surrogacy clinic should be required to submit exact documentation of the amount paid to each surrogate for each pregnancy to a governmental oversight body in that country. In that country, surrogates should be compensated for a surrogate pregnancy at a defined, competitive wage regardless of the surrogate's or commissioning parent's personal circumstances (s). Furthermore, it is essential that these transactions be secure in order to give the women authority over the money while lowering the risk of a third party abusing them (e.g., a family member forcing the surrogacy arrangement for their own financial benefit). This means lessening the possibility that the woman may be coerced into the action by someone who will benefit from her earnings in a similar manner to how a pimp oversees and gains from a sex worker's employment and income.

(3) Surrogacy clinics and surrogate living conditions must be overseen in a way that is comparable with accreditation of medical facilities in order to guarantee informed consent and open financial transactions. When creating an accrediting system that holds surrogacy company owners accountable for fair and secure workplace conditions before, during, and for a certain period following the pregnancy and delivery, the rights of the mother and the unborn child must come first.

(4) Health insurance for the surrogate that will cover her medical costs throughout and after the surrogacy arrangement for a set length of time. This will guarantee that the mother receives appropriate medical care for the necessary time, particularly following the pregnancy and birth.

**Conclusion**

The ethical implications make what has been described here extraordinarily complex and challenging to navigate. The authors disagree with one another on a few different topics related to global surrogacy, which emphasizes the practice's complexity, the intensity of the arguments for and against it, and the issues with a largely unregulated industry that is thriving in low-resource nations where underprivileged women are routinely exploited. As said, there are many potential instances of exploitation and violations of

human rights in some international surrogacy arrangements, and this is cause for worry. Furthermore, nowhere in the world are the rights of a weak woman asserted to be superior to those of a relatively privileged individual or couple who are consumers. International surrogacy regulation is necessary, but norms of conduct should be set with involvement from all parties involved, notably the surrogates themselves.

Finally it can be concluded that there is need to adopt a balance between rights of surrogate mothers, intended parents, right to family and right to health. Right to parenthood and right to health both are of seminal importance and need to be respected. However in developing countries, right to health must be protected at prime level but right to parenthood need to be governed and respected without compromising healthy society. The rights of surrogate mothers and intended parents and the surrogated children's need to be protected. The property rights of surrogate children's under various personal laws need to be protected.

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# Merging the Issue of Corruption in Public Offices into the Human Rights Discourse

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**Abstract**

*Since the dawn of human society, corruption has been a plague. The menace of corruption has long been a significant source of worry for policymakers, administrators, and the general public. Long held beliefs among some people include the notion that corruption is an uncurable disease that cannot be stopped. It is a false metaphor, not just because it conveys a sense of dread, but also because it limits actions that may be taken to lessen it. Besides, for a very long time, the international community had given a little thought to the possibility of using international human rights laws to fight corruption but that is changing and now International human rights mechanisms have been paying an increasing attention to the negative impact of corruption on the enjoyment of human rights. Moreover, human rights and anti-corruption organizations function in completely different silos, is largely a myth that needs to be dispelled. In this paper, the authors would like to contribute in debunking this myth by trying to merge the corruption discussion into the human rights discourse.*

**Keywords:**. Corruption, Human Rights, Democracy, Governance, ICCPR, ICESCR.

## 1. INTRODUCTION

Corruption may be characterized as an infectious virus that damages the basic aspects of social life.[1] Corruption distorts the fundamental ideals of human dignity, fairness, and liberation for everyone, but especially for those whose rights have already been unjustly infringed, such as those living in poverty and those who are oppressed or otherwise disenfranchised.[2]

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1 Inge Amundsen, 'Political Corruption: An Introduction to the Issues,' Chr. Michelsen Institute Development Studies and Human Rights, WP 1999: 7. at p. 1.

2 Divya Prasad and Làzarie Eeckeloo, 'Corruption and Human Rights', Geneva Academy, Centre for Civil and Political Rights, pp.12-59 at p. 9.

"Corruption deepens poverty; it debases human rights, it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths."[3]

Corruption is present in all states, result of socio-economic or political system or degree of development, in both the public and private sectors. It is a global phenomenon that necessitates international collaboration, especially in the recovery of corrupt proceeds.[4] The prevalence of corrupt activities shatters the basic foundation of a democratic society, severely limiting and puncturing effective governance.[5] Money earned via corrupt methods is also a source of funding for a variety of criminal activities. The black money generated by corrupt practices is used to fund terrorism, human trafficking, drug smuggling, and other severe criminal enterprises.[6]

Corruption has been a scourge on human civilization from its inception. Whenever corruption becomes entrenched, it has the potential to ruin a country's whole economic, political, and social fabric. Corruption frequently impedes the growth of equality before the law since it contradicts the principle of equal treatment.[7] Corruption is such a demonic creature that it has the tendency to paralyses administrations and devastate a state's financial stability.[8] Corruption is a major contributor to economic under-performance and a major impediment to eradicating poverty and progress. "From 2000 to 2009 developing countries lost US$8.44 trillion to illicit financial flows, 10 times more than the foreign aid they received. The impact of corruption on development and on human rights is multifaceted; so too must be our response"[9] Each year, the money stolen via corruption is enough to feed the globe 80 times over.[10]

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3 9th International Anti-Corruption Conference, Declaration. 'The Durban Commitment to Effective Action against Corruption.' Trends Organ Crim 5, pp. 94–97 (1999) at p. 94.

4 United Nations Convention Against Corruption, 'United Nations Office on Drugs and Crime (UNODC)', United Nations, New York, 2004. Available at: t.ly/L_WU (accessed 01 January 2023).

5 *Ibid*.

6 *Ibid*.

7 Prof. Anne Peters, 'Corruption and Human Rights', Basel Institute on Governance, September 2015, at p. 16. Available at: t.ly/_h4Cq (accessed 01 January 2023).

8 IMF Staff Discussion Note, 'Corruption: Costs and Mitigating Strategies International Monetary Fund', Fiscal Affairs and the Legal Departments, at p. 8. Available at: t.ly/Bidm (accessed 01 January 2023).

9 Navi Pillay, 'Office of the High Commissioner United Nations Human Rights.' Available at: https://t.ly/uwkuc (accessed 01 January 2023).

10 Corruption and Human Rights: The Linkages, the Challenges and Paths for Progress', Harvard Kennedy School, Carr Center for Human Rights Policy, Symposium Report, 25 April, 2018 at p. 8.

Kofi A. Annan, the then secretary-General of United Nations describes, "Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism, and other threats to human security to flourish."[11] Similarly, Philip B. Heymann also observes, "A corrupt, democratic government is likely to look as if it is for the wealthy and the well-connected, not a government by and for the people. If the choice to much of the population appears to be one between elected figures serving the interests of narrow but wealthy constituencies or authoritarian governments serving much broader interests, democracy is very much at risk. ... High-level corruption is far more dangerous to democracy than low-level corruption. ... Systemic corruption is far more dangerous to democracy than occasional and sporadic corruption."[12]

According to Wraith and Simpkins, it is the jungle of Nepotism and Temptation, which is obsessed with the Scarlet thread of bribery and corruption.[13] "Corruption flourishes as luxuriantly as the bush and weeds which it so much resembles, taking the goodness of the soil and suffocating the growth of plants which has been carefully and expensively bread and tended."[14] Similarly, as pointed by Ralph Braibanti, Corruption of government or improbity has been found in all aspects of bureaucracy and source of political development.[15]

It was observed in a Preparatory Note for the United Nations Conference on Anti-Corruption Measures, Good Governance, and Human Rights held in Warsaw on November 8-9, 2006, published by the United Nations Office of the High Commissioner for Human Rights in 2006:

> "*The corrupt management of public resources compromises the Government's ability to deliver an array of services, including health, educational and welfare services, which are essential for the realization of economic, social and cultural rights. Also, the prevalence of corruption creates discrimination in access to public services in favour of those able to influence the authorities to act in their personal interest, including by offering bribes...Importantly, corruption in the rule-of-law system weakens the very accountability structures which are responsible for protecting human rights and contributes to a culture of*

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11 Koffi A. Annan, 'Foreword to United Nations Convention against Corruption', General Assembly Resolution 58/4 of 31 October 2003.

12 Philip B. Heymann, 'Corruption and Democracy', Fordham International Law Journal, 20 (1996). pp 323- 325.

13 R Wraith & E Simpkins, *Corruption in Developing Countries*, London: Allen and Unwin, 1963 as cited by Robin Theobald, 'So what really is the problem about corruption?' Third World Quarterly, Vol 20, No 3, pp 491-502, 1999 at p. 491.

14 *Ibid*.

15 Ralph Braibanti, *Reflections on Bureaucratic Corruption, Public Administration*, London, winter, edn. 1962, p. 357.

*impunity, since illegal actions are not punished and laws are not consistently upheld."*[16]

In this regard, Navi Pillay, former UN High Commissioner for Human Rights has aptly described "Corruption is an enormous obstacle to the realization of all human rights – civil, political, economic, social and cultural, as well as the right to development. Corruption violates the core human rights principles of transparency, accountability, non-discrimination and meaningful participation in every aspect of the life of the community. Conversely, these principles, when upheld and implemented are the most effective means to fight corruption."[17]

For a long time, the threat of corruption has been a major concern for policymakers, administrators, and the public at large. It is one of the crimes that has plagued almost every country on the planet. It is a worldwide phenomenon capable of impeding a country's growth and diverting its valuable resources away from the public objectives of the whole nation.[18] It "erodes trust, weakens democracy, hampers economic development and further exacerbates inequality, poverty, social division and the environmental crisis."[19]

Corruption is a widespread problem in India's administrative structure[20] and is one of India's most vexing issues, obstructing its progress and development.[21] India has a culture of corruption. With only minor changes in the amount of corruption, every sector of the governing machinery is contaminated. It has grown to such frightening dimensions that its social, economic, and political ramifications are affecting India's governance system,[22] resulting in unequal distribution in state resources.[23] There are also significant obstacles in the investigation, prosecution, and conviction of corruption cases. The judicial system is riddled with so much ambiguity, incompetence, and corruption that the legal procedure for cases involving corruption that led to a conviction appears to be a faraway fantasy.

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16 U.N. Office of the High Commissioner for Human Rights (OHCHR), 'Background Note for UN Conference on Anti-Corruption Measures, Good Governance and Human Rights', 6, Doc. HR/POL/GG/ SEM/2006/2 (Warsaw, Nov. 8-9, 2006).

17 Navi Pillay, 'Office of the High Commissioner United Nations Human Rights'. Available at: t.ly/8xw2 accessed 01 January 2023.

18 *See* Syed Umarhatbub, 'Public Rating of Corruption', The Indian Police Journal, Vol. Liv.2, April-June, (2007).

19 Transparency International, 'What is Corruption?'. Available at: t.ly/8l7q (accessed 01 January 2023).

20 *See* Christophe Jaffrelot, 'Indian Democracy: The Rule of Law on Trial', Indian Review 1 (2002), pp. 17-121 at p. 17.

21 *See* N. Vittal, *Corruption in India: The Roadblock to National Prosperity*, Academic Foundation (2003).

22 Hongying Wang & James N. Rosenau, 'Transparency International and Corruption as an Issue of Global Governance', Global Governance 7 (2001), pp. 25-49.

23 Bhikhu Parekh, 'A Political Audit of Independent India, Round Table', 362 (2001), pp. 701-09 at p. 701.

Justice V.R. Krishna Iyer, former judge of the Supreme Court of India observed:

> "*The glory and greatness of Bharat notwithstanding, do we not, even after the braggartly semicentennial noises, behave as a lawless brood, tribal and casteist, meek and submissive when political goons and mafia gangs commit crimes in cold blood, and canny corruption and economic offences ubiquitous? The criminal culture among the higher rungs and creamy layers of society, even when nakedly exposed, does not produce the public outrage one should expect, with no burst of rage from those who must speak...In this darkling national milieu, the penal law and its merciless enforcement need strong emphasis. Alas the criminals are on the triumph, the police suffer from "dependencia syndrome" and integrity is on the decadence and the judges themselves are activists in acquittals of anti-social felons. Less than ten percent of crimes finally end in conviction and societal demoralization is inevitable*"[24]

Similarly, in the opinion of the former Chief Justice of India K.G. Balakrishnan, "The real costs of corruption are difficult to measure since they involve the loss of opportunities for business and investment as well as the diversion of man-power, when it may be usefully employed elsewhere. In some instances, corruption poses a threat to national security as well as law and order."[25]

India is affected by corruption at all levels of decision-making and in the management and allocation of public funds.[26] According to Transparency International's latest Global Corruption Report in 2021, India is ranked 85$^{th}$ out of 180 countries in the Corruption Perception Index 2021.[27] However, acquiring reliable statistics on corruption cases involving government officials is difficult since it necessitates receiving prior sanction before any prosecution of officials implicated in corrupt conduct can take place. As a result, the exact number of registered cases does not correctly represent real incidences of government corruption.

Rampant corruption from Indian context isn't only a law enforcement problem in which the state's existing laws are breached and can be rectified simply by enforcing them more strictly. Corruption is rather a far more basic issue that threatens a state's social fiber, political framework, and bureaucratic structure.[28] While it is vital to strengthen the law enforcement apparatus, the main issue with corruption is how it infringes human rights. Furthermore,

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24 'Report of The Committee on Criminal Justice Reforms', (2003) (referring to the article of Justice V.R. Krishna Iyer published in The Hindu, 25 May, 1999).

25 Vinay Kumar, 'CJI favours Seizure of Assets of Corrupt Officials', The Hindu, 12 Sept. 2009. Available at: t.ly/p9H- (accessed 01 January 2023).

26 Mahesh K. Nalla & Korni Swaroop Kumar, 'Conceptual, Legal, Ethical and Organizational Dimensions of Corruption in India: Policy Implications', in *Policing Corruption: International Perspectives* (H.J. Albrecht ed., 2005) at p. 51.

27 Transparency International, 'Global Corruption Report', 2021.

28 *See* U Myint, Corruption: 'Causes, Consequences and Cures, Asia-Pacific Development Journal', Vol. 7, No. 2, December 2000.

corruption in India threatens in an accelerated manner the very foundation of India's democracy, rule of law and statehood. [29]

In the context of widespread corruption in India, the Asian Human Rights Commission in Hong Kong has observed:

> "*Corruption and the concept of a socialist, secular and democratic republic cannot go together. Corruption undermines justice, liberty, equality and fraternity, the core values of India's constitutional framework. Freedom and sovereignty have no purpose or meaning should corruption remain the central cord with which the social fabric of a country is woven and if corruption determines the balance of power in interactions among the people and between the people and their government…*"[30]

Given the fact that corruption has enormous social, economic, and political ramifications in India, there is little political consensus on taking real steps to eradicate it. In fact, politicians are seen to be among the primary culprits of the problem.[31]

In the context of India, attempts have been made at many levels to address the problem. However, until recently, the majority of these initiatives concentrated on the criminal law aspect of the corruption problem. To punish wrongdoers, law enforcement authorities have targeted corruption at all levels of government—central, state, and municipal.[32] However, mere reforms in law enforcement is insufficient to address India's corruption problem.

## 2. RELATION BETWEEN CORRUPTION AND HUMAN RIGHTS: EXISTING APPROACH

Some persons have long assumed that corruption is an incurable illness or an inescapable tragedy that cannot be reversed.[33] It is, however, an erroneous metaphor, not only because it transmits a feeling of dread, but rather because it restricts efforts to alleviate it.[34] Furthermore, for a great many years, even the international community has paid little attention to how international human

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29 Christophe Jaffrelot, 'Indian Democracy: The Rule of Law on Trial', Indian Rev. 1 (2002), pp. 17-121. at p.17.

30 ' A Responsible Government Will Listen to the People', Says AHRC, (excerpts from the statement issued by the Asian Human Rights Commission, Hong Kong, 11 April 2011). Available at: t.ly/5jIp (accessed 01 January 2023).

31 Anand Singh, 'An analytical study on political corruption in India in the last 10 years', Ipleaders. Available at: t.ly/b63d_ (accessed 01 January 2023).

32 Nagarajan Vittal, 'Corruption and the State—India, Technology, and Transparency', Harvard International Review, fall, 2001, pp. 20-25 at p. 20.

33 Manuhuia Barcham, et al., *Corruption: Expanding the focus*, (Australian National University Press, 2012), at p.12.

34 Bratu, Roxana and Kažoka, Iveta, 'Metaphors of corruption in the news media coverage of seven European countries. European Journal of Communication', 33 (1). pp. 57-72. 2018, at p. 12.

rights procedures might be utilized to combat corruption.[35] Similarly, the idea that human rights and anti-corruption institutions operate in separate compartments is partially a myth that has been debunked and is losing traction.[36]

There is no denying that problems of corruption have been garnering criminal law consequences under domestic laws.[37] As a consequence, attempts to prevent corruption should primarily focus on criminal law reform, especially enforcement machinery, and the criminal justice system's overall efficiency.[38] However, history of emerging economies has demonstrated that corruption has significant ramifications for governance, in addition, to being a crime that must be tried according to criminal law norms. Amongst the most significant consequences of corruption for government is its impact on the protection, promotion and preservation of human rights.[39]

The prevailing anti-corruption framework places perhaps too much reliance on the criminal justice system to combat corruption, a system that itself is in distress because of corruption and other issues.[40] As a result, combatting corruption is critical to rebuilding public confidence in the criminal justice system. Legal controls against corruption, on the other hand, should place a greater emphasis on promoting government transparency and accountability.[41]

The paradigm for conceiving corruption as a human rights problem differs from the prior approach in key ways. *First*, the current approach of enhancing criminal law enforcement procedures has failed to address the issue of *victimization* as a result of corruption.[42] On the other side, a human rights-based approach prioritizes the victims of corruption and puts their human rights at the center-stage of the anti-corruption initiatives.[43] It understands that corruption, in particular, in the states like India has far-reaching implications for

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35 Matthew Murray and Andrew Spalding, 'Freedom from Official Corruption as a Human Right', Governance Study at Brookings, January 2015, at p. 6. Available at: t.ly/R87j (accessed 01 January 2023).

36 International Council on Human Rights Policy, Integrating Human Rights in the Anti-Corruption Agenda, Transparency International. Available at: t.ly/vP5j (accessed 01 January 2023).

37 C. Raj Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia', Michigan State Journal of International Law, Vol. 16, Issue 3 (2008), pp. 475-572 at p. 518.

38 *Ibid*.

39 *Ibid*.

40 Dr. Justice V.S. Malimath, 'Committee on Reforms of Criminal Justice System', Government of India, Ministry of Home Affairs, March 2003. p. 75. Available at: t.ly/JsV1 (accessed 01 January 2023).

41 *See* Open Society Justice Initiative, 'Legal Remedies for Grand Corruption, The Role of Civil Society', 2019. Available at: t.ly/3IdL (accessed 01 January 2023).

42 C. Raj Kumar, 'Corruption and its impact on Human Rights in India: Comparative perspectives on improving governance', University of Hong Kong (2011), Pokfulam, Hong Kong SAR, at p. 5.

43 *Ibid*.

the administration of justice across various government institutions, leading to public distrust of the judicial system and state machinery. *Second*, a human rights-based approach to anti-corruption initiatives seeks accountability for acts of corruption and emphasizes *people's empowerment* as the main victims of corruption.[44] The mechanism through which such accountability is sought differs between the criminal law enforcement approach to establishing 'criminal culpability' and the human rights approach to demanding 'accountability' for corruption.[45]

In the former, one has to rely exclusively on the state machinery to provide accountability, but in the latter, victims are themselves empowered to ensure transparency, which leads to governmental accountability as well as the potential to seek justice through legal remedies. Recognizing the significance of transparency and accountability in government is at the heart of the human rights-based approach to countering corruption. This differs from the present criminal justice system because it targets one of the most significant repercussions of corruption: the disempowerment of individuals, particularly, the poor and disadvantaged.[46]The underlying deficiencies of the criminal justice system are evidenced in the pursuit of criminal accountability for acts of corruption, which is why the human rights approach focuses on the victims of corruption, so that citizens are empowered to maintain transparency in governance rather than relying on the state apparatus to do so.

*Thirdly*, the prevailing anti-corruption institutional apparatus has placed much too much emphasis on reactive policies—investigation, prosecution, and conviction of corrupt individuals. Although, this is important for maintaining the rule of law, access to justice also entails focusing on the individuals who are harmed by corruption and preventing new acts of corruption. Thus, in the human rights-based approach to combating corruption, the Central Information Commission (CIC) and the legal framework provided by the freedom of information act play a significant role in India. The right to information provided a fresh arena for the state to urge more integrity and assures increased public vigilance with the goal of decreasing corruption.[47]

## 3. ESTABLISHING LINKAGES BETWEEN CORRUPTION AND HUMAN RIGHTS

Establishing a link between corruption and human rights helps to find how corruption leads to the violation of fundamental human rights, by grouping human needs that must exist. The grouping is a productive way to exemplify and analyses how the basic needs of people are affected by corruption.[48] It is vital to determine when human rights are breached by acts of

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44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 *Ibid* at p. 7.

48 Zoe Pearson, 'An International Human Rights Approach to Corruption' in Peter Larmour and Nick Wolanin *Corruption and Anti-Corruption* (ANU Press 2013), at p. 45.

corruption and how acts of corruption and human rights violations are related in order to develop the concept that corruption contributes to human rights violations.[49]

The United Nations Convention Against Corruption (UNCAC) provides in its Preamble that, "Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish" [50]Undoubtedly, in response to the truly horrific malignant corruption, states have misdirected nearly billions that could have been used for productive development, such as the establishment of adequate health care needs, education, professions, safeguards for better roads, and a few numerous different necessities. As a result, the battle against corruption is crucial to the fight for human rights.

Corruption has greased the gears of exploitation and injustice at all times. "There are various links between the discourses on corruption and human rights violation. Corruption, undoubtedly, has the power to jeopardize the enjoyment of human rights in all ways, including economic, social, legal, and political rights."[51] Corruption dilutes human rights in a significant manner. Human rights abuses are a direct product of actions or manifestations of injustice of any degree, and corruption cannot exist without a violation of human rights. Institutionalized form of corruption results in the widespread victimization, weakens governance and institutions, erodes public trust, fuels impunity endangering the rule of law, inclusive government, and destabilizes the social structure of any state.[52] Corruption violates human rights as it discriminates against people; it violates the principle of equality and fairness as decisions are taken in an arbitrary manner favoring bribe-givers, as opposed to people who are legally entitled.[53]

A human rights approach to corruption emphasizes that corruption is more than mere misappropriation of funds or misuse of power; it also has negative consequences on citizens, and could result in human rights violations. It is asserted that the fight for human rights and the fight against corruption have a lot in common. Both are fighting for a human being that is organized and

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49 Shahid Ahmad Ronga, 'Linking Corruption in The Public Sector to the Human Rights Discourse', IJRAR, Volume 8, Issue 2, pp. 351-358 at p. 358.

50 United Nations Convention Against Corruption (31 October 2003, entered into force 14 December 2005) at p. 5.

51 Shahid Ahmad Ronga, 'Linking Corruption in the Public Sector to the Human Rights Discourse', at p. 358.

52 'Opening statement by Navi Pillay', High Commissioner for Human Rights, The 22nd session of the Human Rights Council in the Human Rights Case Against Corruption (2013) at p. 8. Available at: t.ly/rLlV (accessed 01 January 2023).

53 C. Raj Kumar, 'Corruption and Human Rights—Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India', Columbia Journal of Asian Law, 17 (2003), p. 31–72 at p. 31.

fair, based on equality and fairness. Human rights rhetoric provides effective resistance to numerous rights abuses, and the issue of corruption should be approached by presenting it as a violation of human rights.[54] "Utilizing existing human rights discourse and mechanisms may be highly useful in the efforts to combat corruption to ensure human rights protection, accountability and transparency on the part of governments."[55]

Corruption has a huge influence on all institutions dedicated to the preservation and advancement of human rights. In fact, it might be claimed that eliminating corruption in a range of administrative spheres would considerably improve the implementation of human rights.[56] In Symposium Report published by Carr Center for Human Rights Policy it was held that States with the worst corruption have also the poorest human rights records. Somalia, Afghanistan, South Sudan, Yemen, Iraq, and Syria, are a few notable examples.[57]In the same report it was also held that "World leaders--including Mary Robinson, Navi Pillay, David Cameron, and John Kerry--are increasingly concerned with the need to address corruption and human rights together through greater accountability under the law and synergy between efforts of UN bodies like the UN Conference on Trade and Development (UNCTAD) and international human rights conventions."[58]

In order for a democracy founded on the rule of law to endure, human rights must be safeguarded. "A Human Rights-Based Approach (HRBA) to anti-corruption responds to the people's resounding call for a social, political and economic order that delivers on the promises of freedom from fear and want."[59] The corruption issue invariably abuses human rights because it allocates resources based on unequal preferences, resulting in prejudice that presents a significant challenge to the rule of law.[60]

Corruption may wreak havoc on the *availability*, *accessibility* and *quality* of goods and services relevant to human rights. Furthermore, it jeopardizes the efficiency and validity of institutions and procedures, as well as the rule of law

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54 Shahid Ahmad Ronga, 'Linking Corruption in the Public Sector to the Human Rights Discourse,' at p. 358.

55 *Ibid*.

56 Naved Ahmad & Oscar T. Brookins, 'On Corruption and Countervailing Actions in Three South Asian Nations', The Journal of Policy Reform (2004), 7:1, pp. 21-30.

57 'Corruption and Human Rights: The Linkages, the Challenges and Paths for Progress', Harvard Kennedy School, Carr Center for Human Rights Policy, Symposium Report, 25 April, 2018. p. 8.

58 *Ibid*.

59 Navi Pillay, Office of the High Commissioner United Nations Human Rights. Available at: bit.ly/3BmUVKC accessed 01 January 2023.

60 Opening statement by Navi Pillay, High Commissioner for Human Rights, The 22nd session of the Human Rights Council in the Human Rights Case Against Corruption (2013) at p. 8. Available at: t.ly/rLlV (accessed 01 January 2023).

and, eventually, the state.[61] It is essential to analyze what is special about the recognition of corruption as a human rights violation. It can be asked that many human rights abuses occur every day around the globe, and even if corruption is recognized as a human rights violation, how does this contribute in the greater battle against corruption? As a result, the key problem becomes: to what measure does recognizing corruption as a human rights violation benefit in the battle against corruption?[62]

It's crucial to remember that simply acknowledging corruption as a violation of human rights would not be enough to put a stop to it. Nevertheless, a human-rights-based approach will considerably aid and complement the present anti-corruption measures in tackling the menace of corruption. A human-rights-based strategic approach not only draws attention to human rights abuses, but it also encourages victims and others to speak out against future crimes and seek redress for previous violations. The concept of 'empowerment' is the most important part of the human rights approach to rooting out corruption.[63]

The Human-Rights-Based Approach (HRBA) to anti-corruption provides many improvements over the regular Criminal Law-Based Approach (CLBA). *First*, HRBA creates a distinct and powerful political, social, and moral response to corruption that, notwithstanding its gravity, is clearly missing in CLBA.[64] *Second*, people's human rights are usually protected by a state's Constitution or any domestic laws, which will necessitate a thorough judicial review by courts and other institutions.[65] *Thirdly*, the acknowledgement of corruption as a breach of human rights, besides calling for international attention, may also focus on violations of the international human rights treaties ratified by a state. *Finally*, the reaction to human rights abuses is focused on efforts to empower people and the institutions so that victims of violations have adequate relief and there is opposition to further violations.[66] Therefore, in short, "the human rights approach emphasizes state accountability, which requires the state to refrain from any kind of corruption and to implement effective measures to safeguard persons from corruption-related human rights breaches. States must not just prosecute corruption, but also take steps to mitigate its detrimental consequences. The implementation of preventative

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61 Office of the High Commissioner United Nations Human Rights, Corruption and Human rights, Available at: bit.ly/3VIZVkU (accessed 01 January 2023).

62 C. Raj Kumar, 'Corruption and its impact on Human rights in India: comparative perspectives on improving governance'. University of Hong Kong (2011), Pokfulam, Hong Kong SAR, at p. 4.

63 *Ibid*.

64 C. Raj Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia', Michigan State Journal of International Law, Vol. 16, Issue 3 (2008), pp. 475-572 at p. 520.

65 *Ibid*.

66 *Ibid*.

measures will be significantly aided and enhanced by including a human rights perspective into anti-corruption initiatives."[67]

## 4. OBJECTIONS TO THE LINK BETWEEN CORRUPTION AND HUMAN RIGHT

While there is a huge support in the scholarship for the method of linking corruption to human rights, there is also a lot of criticism directed at (i) anti-corruption initiatives in general, and (ii) the approach of associating corruption to human rights. To begin with, while David Kennedy wasn't really pro-corruption, but he still opposed the international anti-corruption movement and labelled his own perspective as 'anti-anti-corruption.'[68] Kennedy questioned if an anti-corruption campaign was really necessary! His main point is that anti-corruption is a neo-colonialist agenda's 'ideological tool.'[69] He also believes that the term 'corruption' is difficult to define and that it is not always harmful to development.[70] These arguments hide the reality in that, while certain behavior may fall into a grey zone, there is a widely accepted definition of corruption that many people can agree on, and that there is a significant body of data showing corruption does actually have negative consequences for development.[71] Furthermore, the claim that anti-corruptionism is a neo-colonial agenda and therefore should be summarily dismissed, is a bit too extreme position. Kennedy's viewpoint ignores substantial appeals to combat corruption from within developing economies. For example, during the not so long protests in the Middle East (dubbed as the "Arab Spring"), scathing charges against corrupt leadership were levelled, and continue to be voiced.[72]

Goodwin and Rose-Sender, like Kennedy, are hostile to the linking of corruption to the human rights, claiming that it is an undesirable addition to the discourse. First and foremost, they protest against anti-corruption efforts in development policies. Anti-corruptionism, they believe, is not impartial, but rather a weapon of neoliberal policy pursued by institutions like the World Bank, which emphasizes the free market and uses the law to restrict the role of the state.[73] This logic is similar to Kennedy's. Anti-corruptionism does, in fact, have its origins in the work of the World Bank. However, this does not imply that all anti-corruption initiatives are dubious or neoliberal. As Nelken put it so

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67 Divya Prasad and Làzarie Eeckeloo, 'Corruption and Human Rights', Geneva Academy, Centre for Civil and Political Rights, at p. 10.

68 David Kennedy, 'The International Anti-Corruption Campaign', Connecticut Journal of International Law, 14 (1999), p. 455–465 at p. 456.

69 *Ibid*. at p. 459–460.

70 *Ibid*. at p. 460–462.

71 Toke S. Aidt, 'Corruption, Institutions and Economic Development', Oxford Review of Economic Policy, 25 (2009), pp. 271–291.

72 Stuart Levey, 'Fighting Corruption after the Arab Spring', Foreign Affairs, 16 June 2011.

73 Morag Goodwin and Kate Rose-Sender, 'Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse', in Martine Boersma and Hans Nelen (eds.), *Corruption & Human Rights: Interdisciplinary Perspectives* (Maastricht Series in Human Rights Antwerp: Intersentia, 2010), pp. 221–240.

eloquently, 'we should not take it for granted that anti-corruption or human rights proposals can only reinforce an approach to economic development that seeks to extend the sway of the free market.'[74] We can agree with Goodwin and Rose-Sender that blaming merely corruption for a country's continued poverty is a fallacy, because there are many other factors to consider.[75] Furthermore, Goodwin and Rose-Sender are correct in pointing to Western governments' and institutions' role for corruption, such as during the Cold War, and for sustaining discriminatory global trade arrangements at the expense of developing countries.[76] Nonetheless, it is seems difficult to agree with their assessment that 'this predominating focus on developing government failures in the face of our own complicity in them has of course an undeniable smack of cultural imperialism to it.'[77] As already noted, there is legitimate concern among citizens of developing world itself about corruption, which is not necessarily pushed by the West. Furthermore, in the developing world, international agencies use the language and tools of 'neo-colonial institutions': for example, the Kenya National Commission on Human Rights, that also issued reports on corruption and its relationship to human rights, has used the World Bank definition of corruption, which it considers to be the most extensive.[78] The idea that anti-corruptionism is an imperialist instrument enforced on developing countries is unsustainable in this view.

Second, Goodwin and Rose-Sender claimed that incorporating corruption into human rights is part of a larger trend of incorporating matters of international concern into human rights discourse, and they are quite skeptical of this.[79] Their main worry is that including development concerns, such as corruption, into human rights would result in the rule-based characteristic of human rights (i.e., human rights as defined by positive law) taking precedence over the political aspect of human rights (i.e., their emancipatory, symbolic value). It was stated that 'in blunting the potential of human rights, anti-corruptionism is deeply harmful to the human rights discourse where one views the empowering potential as their greatest asset.'[80] However, it might be argued

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74 David Nelken, 'Corruption and Human Rights: An Afterword', in Martine Boersma and Hans Nelen (eds.), *Corruption & Human Rights: Interdisciplinary Perspectives* (Maastricht Series in Human Rights: Antwerp: Intersentia 2010), p. 241–261 at p. 260.

75 Goodwin and Rose-Sender, 'Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse', at pp. 227–228. A similar argument is made by Joel M. Ngugi, 'Making the Link between Corruption and Human Rights: Promises and Perils', American Society of International Law Proceedings, 104 (2010) p. 246–250 at p. 249.

76 *Ibid*. at p. 228–229.

77 *Ibid*. at p. 229.

78 Wambui Kimathi, 'Corruption: A Complex Phenomenon That Undermines Government's Capability of Working for the Poor', Nguzo za Haki: a publication of the Kenya National Commission on Human Rights, issue 3 (February 2005), p. 3.

79 Goodwin and Rose-Sender, 'Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse', at p. 229–230.

80 *Ibid*. at p. 231.

that utilizing human rights mechanisms to combat corruption is empowering since it expands avenues of action that would otherwise be unavailable if a human rights approach were not used. Goodwin and Rose-Sender refer to the employment of the criminal justice system to detect and penalize corruption, but more often than not, this system fails to do so in many countries with high levels of corruption. They questioned how filing a corruption complaint with a Geneva-based treaty body would assist tackle chronic corruption.[81] True, the views of a Committee on an individual complaint will not suddenly discourage States from engaging in corrupt activities as a whole, but they will send strong signals to States and the international community as a whole, and may provide relief in specific cases. The argument that 'there are perhaps more effective mechanisms for tackling corruption'[82] misses the fact that the most effective anti-corruption strategy is a combination of all the anti-corruption techniques. Furthermore, the claim that 'corruption does not lend itself well to human rights language'[83] will be contested in the subsequent present chapter. The ICCPR and ICESCR have established a human rights framework that is capable of capturing corruption.

In light of the preceding discussion of the allegedly neoliberal character of the anti-corruption discourse, and the opposition to bringing anti-corruption into the human rights sphere altogether, it should be added that, in order to avoid neoliberal 'monopolization' of the anti-corruption debate, the human rights discourse should be used to address corruption. The human rights narrative is required to ensure that anti-corruption is viewed in the context of human dignity, and that anti-corruption efforts may extend beyond the World Bank and other 'Western' organizations.

## 5. LEGAL EFFECTS OF RECOGNIZING CORRUPTION AS A HUMAN RIGHTS VIOLATION

It should be acknowledged that it is the obligation of the state to provide human rights to its citizens by adopting definite processes or establishing mechanisms to implement international human rights norms. Human rights are infringed, when a state fails to *respect*, *protect* and *fulfil*, or *recognize* human rights under its jurisdiction.[84] However, such a conclusion must be subjected to scrutiny by assessing the violated state's actions or behaviors in respect to each right. This will be accomplished by depending on the language of human rights laws, as well as their interpretation, implementation, and intent of these laws. Furthermore, the term 'violation' should only be used in this context where a legal obligation exists.[85]

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81 *Ibid*. at p. 234.

82 *Ibid*.

83 *Ibid*. at p. 222.

84 *See* David Rutherford, 'States' Obligations Under International Human Rights Conventions', Commonwealth Secretariat, 2018.

85 James Thuo Gathii, 'Defining the Relationship Between Human Rights and Corruption', University of Pennsylvania Journal (2009) vol. 31/Iss.1. pp. 125–202, at p. 126. Available at: bit.ly/3W2ZJgb (accessed 01 January 2023.)

In most democratic states, the judicial institutions are viewed with trust and admiration. Mostly, it is the constitutional framework that ensures these judiciaries are made independent and autonomous from the other branches of the state. The most important function of the judiciary is to interpret the constitution and the other laws of the state and to adjudicate all the disputes.[86] In the South Asian context, the judiciaries of India, Sri Lanka, Bangladesh and Pakistan have made considerable advancement in interpreting the constitution and developing liberal human rights jurisprudence with a view to protect and promote the rights of the people.[87] Although the credibility, legitimacy and effectiveness of the judiciaries present in these states do vary within each state, as they are under varying socio-political challenges so far as their independence is concerned.

The bribery of judges directly violates the human right to a fair trial as enshrined under Article 14 of the ICCPR,[88] which guarantees, notably, the equality of all persons before the courts and tribunals and their entitlement 'to a fair and public hearing by a competent, independent and impartial tribunal established by law'. However, it must be also acknowledged that they have made some serious commendable efforts at varying times to uphold rule of law and the human rights. For instance, the Constitutional Court of South Africa holds that "corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms."[89] Similarly, in a 2012 judgment, the Supreme Court of India held that "corruption [...] undermines human rights, indirectly violating them", and that "systematic corruption is a human rights' violation in itself".[90] It is with this background, recognition of corruption as a human rights violation has a tendency to empower the judiciary to interpret and highlight the constitution and other state laws in alignment with the human rights norms. This could usher into a new era of the rights-

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86 C. Raj Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia', Michigan State Journal of International Law, Vol. 16, Issue 3 (2008), pp. 475-572 at p. 521.

87 C. Raj Kumar, 'Corruption and its impact on Human rights in India: Comparative perspectives on improving governance'. University of Hong Kong (2011), Pokfulam, Hong Kong SAR, at p. 72.

88 Article 14 of the ICCPR provides as follows: "(1. All 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 law…..)."

89 Constitutional Court of South Africa, South African Association of Personal Injury Lawyers v Health and Others, 28 November 2000, (CCT 27/00) [2000] ZACC 22, para. 4.

90 State of Maharashtra through CBI, Anti-Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar (Criminal Appeal No. 1648 of 2012), [2012] 9 S.C.R. 601 602, 15 October 2012, para. 14.

based jurisprudence that can ensure a governance which is considerably free from the rampant instance of corruption.[91]

The most human rights are commonly recognized by the international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child etc. The preventive strategies against the menace of corruption can be effectively developed by utilization of the human rights frameworks as provided under ICCPR and the ICESCR. The human rights framework can provide a solid bedrock upon which emancipation from the vicious tentacles of corruption including 'right to corruption-free service' can be ensured in an efficient manner.[92] Moreover, recognition of the effects of corruption as the violation of human rights as provided for under ICCPR and the ICESCR, may also lead to further attention being given to corruption within states by the respective Covenant Committees, which may be useful to highlight more explicitly the effects of corruption on human rights.[93]

Corruption affects human rights in a variety of ways. For example, the rights to food, water, education, health, and the ability to seek justice can be violated if a bribe is required to gain access to these basic rights.[94] The UN covenants contain ancillary prohibitions against discrimination that apply only in connection with the exercise or enjoyment of a right under the covenants. Article 1 of the ICCPR emphatically observes, "[a]ll people have the right of self-determination" and to "freely pursue their economic, social and cultural development.[95] Corruption clearly interferes in people's efforts to *fulfil* their economic self-determination. It also stifles the pursuit of economic, social and cultural development. The fact that corruption obstructs people's freedom to exercise their rights under the ICCPR is a strong starting point for integrating the human rights framework into the implementation of anti-corruption policies. The ICCPR also contains the autonomous equal treatment guarantee set out in Article 26, which is relevant to discrimination in the area of social rights as well as to the economic rights. The design of public sector corruption is such that it obviously discriminates against individuals, favoring bribe-givers over non-bribe-givers. Bribe givers are given preferential treatment and have the ability to sue the state that they would not otherwise have access to.

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91 C. Raj Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia', Michigan State Journal of International Law, Vol. 16, Issue 3 (2008), pp. 475-572 at p. 521.

92 *Ibid*.

93 Zoe Pearson, 'An International Human Rights Approach to Corruption' in Peter Larmour and Nick Wolanin *Corruption and Anti-Corruption* (ANU Press 2013) at p. 59.

94 Julio Bacio Terracino, 'Corruption as a Violation of Human Rights' (International Council on Human Rights Policy, Working Paper, 2008).

95 International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 171. (ICCPR), Art. 1(1).

As it contradicts the principle of equal treatment, corruption frequently thwarts the achievement of equality before the law.[96] A corruption-free governance framework ensures that the state's resources are distributed evenly and that government decision-making is based on fair, reasonable, and rational principles and as such does not discriminate against the people.

As mentioned above, corruption also affects human rights enshrined in the ICCPR. Under certain circumstances, corruption must notably be considered a violation of the ICESCR. The ICESCR, similar to the ICCPR, alludes to the principle of equality and non-discrimination in the exercise of economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights (CESCR), in one of its General Comments,[97] 'has referred to the legal obligation undertaken by state parties to the ICESCR.' Article 2(1) of the ICESCR, which lays out the States Parties' basic commitments, comprised four elements that the treaty body, the CESCR, is responsible for monitoring. Each portion serves as a springboard for concrete State responsibilities, including anti-corruption efforts. Article 2 of the ICESCR's non-discrimination clause allows states a "undertake to guarantee that the applicable rights can be exercised without discrimination."[98] It may be suggested that states should act to ensure that people are not discriminated against while exercising their rights to work, food, health, education, and other rights covered by the ICESCR. Corruption in the performance of the rights listed above is a direct breach of this duty. It is clear that corruption has damaged a variety of states' development-oriented initiatives.[99]

The effects of corruption on development are enormous, as funds provided for development on a national and international level can be siphoned off due to corruption. Other countries and multilateral lending agencies provide loans to developing countries like India for various development-related activities. As a result, societal aspirations for development-related work have been raised within the countries. However, the pursuit of development work is continually interrupted when funds are misappropriated due to corruption, causing the development process to be delayed, and in some cases, halted.[100]

## 6. CONCLUSION

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96 Prof. Anne Peters, Corruption and Human Rights, Basel Institute on Governance, September 2015, at p. 16. Available at: t.ly/_h4Cq (accessed 01 January 2023).

97 Commission on Economic, Social and Cultural Rights, General Comment 3: The Nature of State Parties Obligations (Art.2, para. 1 of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990) (ICESCR General Comment 3).

98 International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S 3.

99 C. Raj Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia', Michigan State Journal of International Law, Vol. 16, Issue 3 (2008), pp. 475-572 at p. 523.

100 Cheryl W. Gray & Daniel Kaufmann, Corruption and Development, 35 Financial & Development 7 (1998). Available at: bit.ly/3BnvBUM (accessed 01 January 2023).

The concept of corruption as a human rights violation is relatively a novel one. Human rights conventions both at the international or regional levels include no specific reference to corruption, while anti-corruption treaties hardly ever address human rights. Nonetheless, recent development at international plane point out to the fact that there is an increasing interest amongst international community and legal scholars to explore and investigate the relationship between anti-corruption measures and human rights law. This article demonstrated despite criticism and objections, how a valid linkage can be carved out between these two concepts and what legal implications of such an exercise shall entail. It was also highlighted how a human rights-based approach can greatly benefit and complement the current anti-corruption initiatives in addressing the destructiveness of the corruption. Finally, it was also shown how the synergy between these two concepts can actually help in alleviating, mitigating and arresting the rigor of menacing corruption.

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# An Economic & Legal Framework of Mahatma Gandhi National Rural Employment Guarantee Act, 2005: A Critical Analysis

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**Abstract**

*The present research paper attempts to evaluate the role of MGNREGA scheme. Particularly, the paper deliberates on the economic and legal dimensions of the scheme. It evaluates the impact of the scheme on income generation, poverty reduction, and female labour force participation rate. Further, the role of scheme during the period of Covid-19 outbreak is analyzed. The paper highlights some interesting results. It is found that the scheme has proved successful in accelerating monthly income and average wage rate. However, it is found that the rural poverty has increased by nearly 4 percentage points to 29.6 percent between 2011-2017.Furthermore, from 2012-13, it is found that the proportion of women workers participating in MGNREGA has touched a ten year high in 2022. MGNREGA is found to be shock absorbing scheme as the income loss during the pandemic seems to be compensated by increased earnings by a proportion of 20 to 80 percent.*

## Introduction

On the National Advisory Council's recommendation, the United Progressive Alliance government agreed to establish a National Employment Guarantee Act as part of the National Common Minimum Plan, which was adopted in September 2004. The Indian Parliament enacted the National Rural Employment Guarantee Act in 2005.The Act becomes effective on February 2, 2006. The scheme (each state was expected to design its own scheme based in the National Guidelines) designed under the Act[1] was implemented in a phased manner. The first phase of the implementation of this Act covered over 200 most backward districts in 2006. In phase 2, it was implemented in

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1 The National Rural Employment Guarantee Act,2005 (Act 42 of 2005).

additional 113 districts and 17 districts in Uttar Pradesh (UP) (with effect from April 1, 2007 and May 15, 2007, respectively. In the remaining rural districts of the country, the Act was notified from April 1, 2008. All rural districts are covered under MGNREGA. The nomenclature of the Act was changed on October 2nd 2009 through an amendment in the National Rural Employment Guarantee Act, from NREGA to MGNREGA[2].The Section 1(1) of the Act was amended by renaming the National Rural Employment Guarantee Act with the words the Mahatma Gandhi National Rural Employment Guarantee Act[3].The MGNREGA programme is hailed as the world's largest public works employment initiative[4].The adult members of rural households who are willing to perform unskilled manual labour now have the legal right to seek employment for at least 100 days per year on public projects according to this Act, which is consistent with the Directive Principles of State Policy of the Indian Constitution[5] which directs the states to secure all the citizens 'right to work'. This flagship scheme was initiated with the objective of "*enhancing livelihood security in rural areas by providing at least 100 days of guaranteed wage employment in a financial year to every household whose adult members volunteer to do unskilled manual work*[6].The person applying for the work under this scheme has to be provided with employment within 15 days of application [7].If the employment is not provided within the stipulated time, that person would be entitled to unemployment allowance, *provided that no such rate shall be less than one-fourth of the wage rate for the first thirty days during the financial year and not less than one-half of the wage rate for the remaining period of the financial year* [8]. As per MGNGERA 2005[9], the State Govt is liable to pay unemployment allowance to the household concerned. *The payment of unemployment allowance shall be made no later than 15 days from the date on which it becomes due for payment*[10]*. In the event of any delay, the recipient shall be entitled to compensation based on the same principles as wage compensation under the Payment of Wages Act,1936. Compensation cost shall be borne by the state government*[11].

The salient features of the Act–

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2 The National Rural Employment Guarantee (Amendment) Act, 2009 (46 of 2009) (w.e.f 2-10-2009)

3 The Gazette of India Extraordinary Notification dated 2nd October 2009, No 53

4 World Bank, *The State of Social Safety Nets 2015* (IBRD, Washington ,DC,2015)

5 Article 41 The Constitution of India, 1950

6 Preamble The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

7 Section 5 , The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

8 Chapter III , The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

9 Section 7 (3) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

10 Section 7(5) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

11 https://nrega.nic.in/netnrega/guidelines.aspx

1. Every State Government shall ……provide not less than one hundred days of guaranteed employment. The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005) in a financial year to every household in the rural areas covered under the scheme[12].
2. If an application for employment under the scheme is not provided employment within fifteen days of receipt of his application seeking employment ……..he shall be entitled to a daily unemployment allowance[13].
3. The Gram Sabha shall monitor the execution of works within the Gram Panchayat[14]. The Gram Panchayat shall be responsible for identification of the Projects in the Gram Panchayat Area[15]and fifty percent of the works under the Scheme is to be implemented through the Gram panchayats.
5. Under Schedule II Para 27 of the NAREGA 2005 the facilities of safe drinking water , shade for children and periods of rest , first aid box for emergency treatment of minor injuries shall be provided at the worksite.
6. Under Section 12 (1) of the MGNAREGA 2005, One third of the non-official members of the State Employment Guarantee Council shall be women and one third of the non- official members shall be belonging to the Scheduled Castes, the Scheduled Tribes, the Other Backward Classes and Minorities.
7. The District Programme Coordinator shall be responsible for the proper utilization and management of funds placed at the disposal for the purpose of implementing the scheme.[16]
8. The cost of material component of projects including the wages of the skilled and
9. Semi-skilled workers taken up under the Scheme shall not exceed forty per cent of the total Project costs[17].

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12 Section 4 (1) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

13 Section 7 (1) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

14 Section 17 (1) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

15 Section 16 (1) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

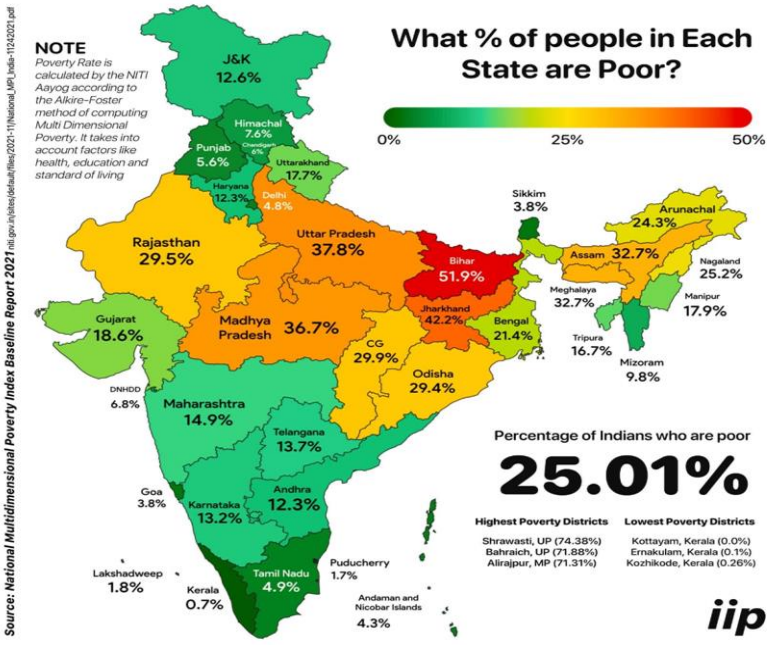
16 Section 23 (1) The Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (Act 42 of 2005)

17 Section 4 (3) The Mahatma Gandhi National Rural Employment Guarantee Act,2005 (Act 42, of 2005)

10. Funding pattern – The central government shall fund 100% of the amount required for payment of wages for unskilled manual work under the Scheme, and up to three-fourths of the material cost of the Scheme including payment of wages to skilled and semi-skilled workers[18].

**State of Poverty in India**

India is a home to 1.41 billion people[19], while as per a base line report[20] of Multi-Dimensional Poverty Index,2021 released by NITI Aayog, 25.01% of its population is identified as multi-dimensionally poor. The percentage of population as multi-dimensionally poor in rural and urban areas is 32.75% and 8.81%, respectively. While 0.909 billion[21]people live in rural areas of India, which is 63.82% of total population. India's working age population is 67%[22]of total population, a situation known as demographic dividend, when a nation possesses huge economic growth potential provided the working population if fully employed.




Source: National MPI Baseline Report 2021

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18 Section 22 (1) The Mahatma Gandhi National Rural Employment Guarantee Act,2005 (Act 42, of 2005

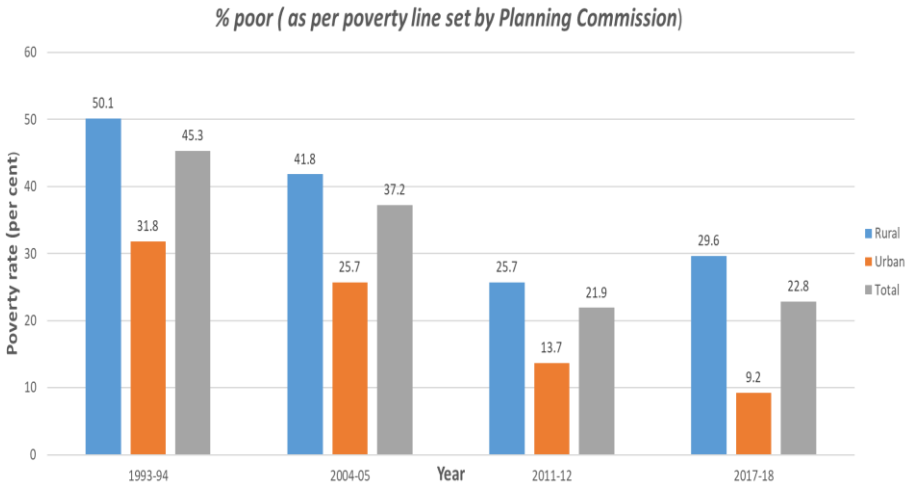
19 World Bank ,Population Data for India , available at: https://data.worldbank.org/indicator/SP.POP.TOTL?locations=IN (last visited on February 27th ,2023)

20 https://t.co/ykm8q8pm5w(last visited on February 27th,2023)

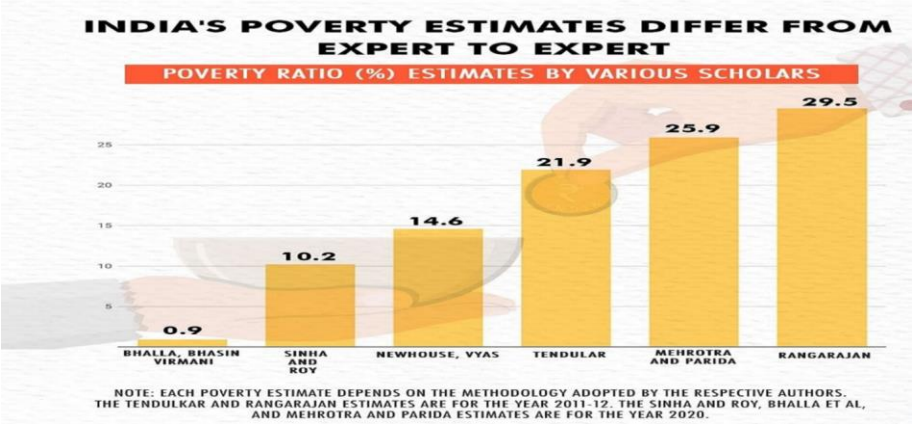
21 World Bank Rural Population-India available at:https://data. worldbank.org/indicator/SP.RUR.TOTL?locations=IN(last visited on February 27th ,2023)

22 World Development Indicators: Population dynamics available at http://wdi.worldbank.org/table/2.1 (last visited on February 20th 2023)

Government of India still uses the Tendulkar Committee's findings[23](21.9%) as the official estimate of the number of Indians who live below the poverty line. It estimates rural poverty ratio at 25.7% and urban poverty ratio at 13.7%. Findings[24] of the all-India Household Consumer Expenditure Survey conducted by National Statistical Office[25]during 2017-18, reveal that rural poverty rose nearly 4 percentage points between 2011-12 and 2017-18 to 30 % even as urban poverty fell 5 percentage points over the same period to 9%. (Source: planning commission, NSO).




Source: Planning commission, NSO




Source: IMF, World Bank, PIB

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23 Government of India, Report of the Expert group to review the methodology for estimation of poverty, (November, 2009)

24 Pramit Bhattacharya, Sriharsha Devulapalli " India's Rural Poverty has shot up" *Live Mint*, Dec. 3,2019.Available at https://www.livemint.com/news/india/rural-poverty-has-shot-up-nso-data-shows-11575352445478.html

25 http://www.cspm.gov.in/english/about.html

***MGNREGA: a lifeline to rural areas amid testing times***

The Parliamentary Standing Committee on Labour 2021 noted that, "there is no better scheme than the MGNREGS to provide sustainable livelihood to the unskilled"[26]. According to a study[27] conducted by the Centre for Sustainable Employment at Azim Premji University, Collaborative Research and Dissemination (CORD), and Civil Society partners who are members of the NREGA Consortium, increased MGNREGA earnings could replace anywhere from 20% to 80% of income losses, depending on the block. The study also came to the conclusion that it makes sense to invest more money in the programme since it will result in stronger social protection. The study further concluded by remarking "*It is also encouraging to note that, overall, MGNREGA played a positive role in absorbing some of the* economic shock. We estimate that, for households who found work in both the periods (pre-covid *and Covid), the increased earnings from MGNREGA were able to compensate for somewhere between 20 to 80 percent of income lost depending on the block. For households who had not worked in the pre-Covid year but did find work during the Covid year, we find that MGNREGA earnings compensated for anywhere between 20 percent and 100 percent of income lost from other sources[28]".*

***A hopeful trajectory: A case of female participation***

The percentage of participation[29] of women out of the total person-days generated in FY 2022-23 is 56.19% (As on Dec15,2022 PIB Dec30,2022). The proportion of women workers participating in MGNREGA, has touched a ten-year high in the ongoing financial year, since[30] 2012-13.Out of the 15 states (Kerala,Bihar,TamilNadu,Maharashtra,Rajasthan,Andhra Pradesh ,Madhya Pradesh, Karnataka, Chhattisgarh, Telangana, Odisha, Jharkhand, Assam, Gujarat, UP), that TheHindu[31] reviewed , 14 states reported an upward trend in women's participation.Female Labour Force Rate has gone up to 25.1% in 2020-21 from 18.6% in 2018 19 , there is a notable rise in Rural Female Labour Force Participation Rate from 19.7% in 2018-19 to 27.7%[32].

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26 House Praise for Employment Scheme Modi Panned, *available at*: https://www.telegraphindia.com/india/house-praise-for-employment-scheme-modi-panned/cid/1806621 (Last visited on February 14th 2023)

27 Employment Guarantee during covid-19 *available at*: https:// cse. azimpremjiuniversity.edu.in/wp-content/ uploads/2022/10/MGNREGA_Covid_ Survey_Report_Final.pdf (Visited on Jan 21,2023)

28 *Ibid 26*

29 Year-End Review -2022:Ministry of Rural Development *available at*: https://rural.nic.in/en/press-release/year-end-review-2022-ministry-rural-development (Last Visited on Feb 2,2023)

30 Editorial, "Women Break new ground Mahatma Gandhi national Rural Employment Guarantee Scheme" *The Hindu* Dec. 31,2022

31 *Ibid*

32 Available at : https://pib.gov.in/PressReleasePage.aspx?PRID=1894913 (Visited on Feb 13,2023)

India is the only country in South Asia in which poverty is significantly more prevalent among female-headed households than among male-headed households[33]. About 19.7% of people livingin female-headed households live in poverty compared with 15.9% in male headed households[34]. One in seven households is a female-headed household, so around 39 million poor people live in a household headed by a woman[35].MGNREGS could be utilized to directly augment the income of women actively engaged in public works under the scheme, and it could be leveraged to push overall agriculture wage rates for women, where agriculture is a primary source of earning for women. However, the later measure would require the reconciliation between Minimum Wages as per Minimum Wages Act (1948) and wages under MGNREGA, as suggested by "The Central Employment Guarantee Council's Working Group on Wages" and Mahendra Dev Committee[36].Khera &Nayak[37] use qualitative data collected on 1060 NREGA workers from 98 NREGA worksites spread across 10 sample districts from six north Indian states to examine the socio-economic consequences of NREGA for women workers. They report that significant benefits have already started accruing to women through better access to local employment, at minimum wages, with relatively decent and safe work conditions. Mehtabul Azam[38], establishes that NREGA has led to a significant increase in public works participation in NREGA districts. NREGA has appositive impact on overall labour participation, the positive impact is more pronounced in the case of female labour participation[39]

**MGNREGA and income generation**

Via a third-party study supported by NITI Aayog, the Indian government has evaluated the MGNREGS' implementation in terms of rising household income and reducing poverty in 2020. Some of the key findings[40] of the study are as below:

1. The Mahatma Gandhi NREGA has a significant influence on social protection, livelihood security, and democratic empowerment, making it a potent tool for inclusive growth in rural India.

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33 file:///C:/Users/Lenovo/OneDrive/Desktop/2022mpireportenpdf.pdf

34 Ibid 31

35 Ibid 31

36 Ibid 20

37 Khera, R. & Nayak, N., "Woman Workers and Perceptions of the NREGA", *Economic and Political Weekly, 44 (43). 49-57. 2009.*

38 Azam, Mehtabul, The Impact of Indian Job Guarantee Scheme on Labor Market Outcomes: Evidence from a Natural Experiment (October 10, 2011). Available at SSRN: https://ssrn.com/abstract=1941959 or http://dx.doi.org/10.2139/ssrn.1941959

39 *Ibid 28*

40 PIB, Government of India. (2020, March 29). Study to Assess the Impact of MGNREGShttps://pib.gov.in/PressReleseDetail.aspx?PRID=1810967

2. Mahatma Gandhi NREGS help the poor secure their way of life by generating long-lasting assets, enhancing water security, conserving the soil, and increasing land productivity.
3. Mahatma Gandhi NREGS has improved household standards of living by raising household income due to increases in agricultural production.
4. wages of rural workers have significantly increased because of MGNREGA
5. SC, ST, and women, as well as socially excluded communities, benefit from and are included in Mahatma Gandhi NREGA plans, which could be a significant indicator of poverty alleviation in rural regions.

The average monthly income of a person who took up the work offered under the scheme nearly doubled to a perfect Rs.1000, in April-July in FY 2020-21, from Rs.509 in the year ago period, CRISIL Research[41] has estimated. This feat was enabled by a 46% growth on-year in person-days of work, coupled with an increase of 12% in average wage(*based on average of state wage rates*) under the scheme, it added[42].

Since, FY 2020-21 witnessed a highest allocation to MGNREGS, a jump in average monthly income can be attributed to the budget allocation, number of person-days generated and wage rate under the scheme.

| Financial year | Dated | All India Wage rate (In Rupees) | % change (Y-O-Y) |
|---|---|---|---|
| 2019-20 | 01-04-2019 | 176 | 1.14 |
| 2020-21 | 01-04-2020 | 190 | 7.95 |
| 2021-22 | 01-04-2021 | 193 | 1.57 |
| 2022-23 | 01-04-2022 | 204 | 5.69 |

*Source: MGNREGS Dashboard*

***Findings of Economic Survey 2022-23***.

The number of persons demanding work under MGREGS was seen to be trending around pre-pandemic levels from July to November 2022[43]. This could be attributed to the normalization of the rural economy due to strong agricultural growth and swift recovery from Covid induced slowdown, culminating in better employment opportunities[44]. In FY23, as of March 11,2023,6.78 crore households have demanded employment under MGNREGS

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41 MGNREGA: Worker incomes double to Rs 1,000 per month, *available at*:https://www.financialexpress.com/economy/mgnrega-worker-incomes-double-to-rs-1000-per-month/2065516/ ( Last visited on Feb27,2023).

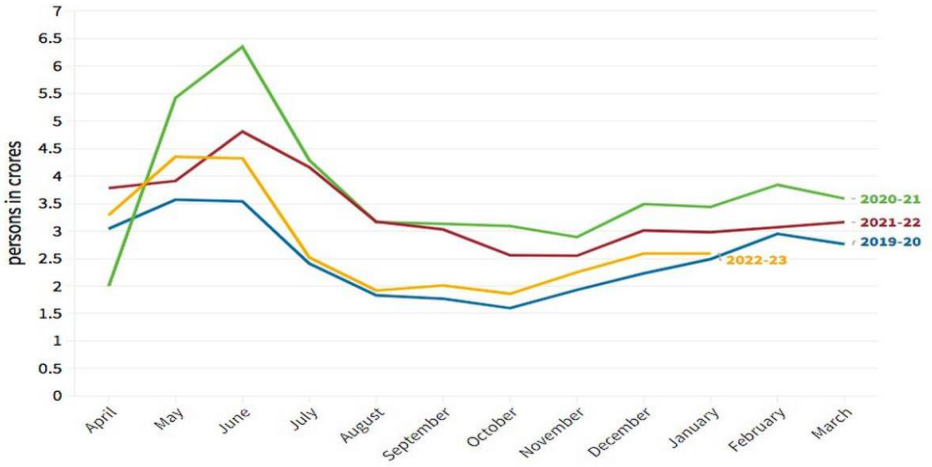
42 *Ibid 31*

43 Government of India, Report: *Economic Survey 2022-2023* (Ministry of Finance DEA ,2023).

44 Ibid 33

in 2022-23.[45] Of this, employment has been offered to 6.77[46] crore households (99.85% households that demanded employment were offered the employment). 5.98[47] crores households have availed employment (88. 20% of households that demanded employment have availed the employment). 8.4[48] Crore persons have availed of employment under the scheme

**Figure 1:Number of persons demanding work under MGNREGS**




Source MGNREGS Web portal

The survey credited the scheme with having a positive impact on income per household, agricultural productivity, and production-related expenditure[49]. The Economic further added that the scheme helped with "income diversification and infusing resilience into rural livelihoods[50].

A total number of 10.05[51] crore persons, of these employment has been offered to 10.02 crore[52] . A total of 273.09 crores person-days employment has been generated under the scheme till March 12, 2022.

Physical progress of MGNREGS in terms of person-days generated, average person-days per household, and participation of women are indicated below.

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45 MIS Report, available at: https://mnregaweb4.nic.in/netnrega/citizen_html/demregister.aspx?lflag=eng&fin_year=2022-2023&source=national&labels=labels&Digest=kODLAkQv8M9FT6WbXb7zhA (Last visited on March11,2023)

46 *Ibid 35*

47 *Ibid 35*

48 *Ibid 35*

49 Ibid 33

50 Ibid 33

51 Ibid 35

52 Ibid 35

**Progress under MGNREGS**

| Indicator | 2018-19 | 2019-20 | 2020-21 | 2021-22 | 2022-23* |
|---|---|---|---|---|---|
| **Person-days generated** | 267.9 | 265.4 | 389.1 | 363.3 | 225.8 |
| **Average person-days per household** | 50.9 | 48.4 | 51.5 | 50.1 | 40.7 |
| **Women participation (percent)** | 54.6 | 54.8 | 53.2 | 54.7 | 56.3 |

* as of Jan 6 2023 Source: Ministry of Rural development

**Budgetary allocations to MGNREGA over the years**

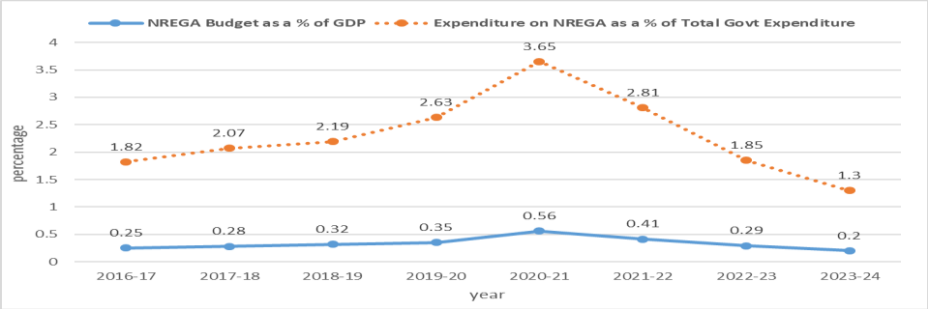
Budgetary allocations to the flagship scheme has increased successively since 2013 from Rs 32,992 crorein 2013-21 Union Budget to Rs. 60,000 crores in 2023-24 (See Table A).But in recent years, the amount actually spent on the programme has consistently exceeded what was allotted for it at the budget stage. .For instance, in 2022-23, while Rs 73000 crore was allotted to MGNREGS, supplementary allocations made later pushed up the revised estimates to Rs 89,400 crore, as funds had run out in the middle of the year. Even so, the Central govt once again allocated Rs 60,000 crore (32.8% lower than the previous year's revised estimate and 18% lower than the budget estimate for the previous year) for the scheme in budget 2023-24.

**Table A: Change in expenditure on MGNREGS between budget estimates and actuals (In Rs crores)**

| Year | Budget estimate | Actual estimate | % increase of Actual over BE |
|---|---|---|---|
| 2013-14 | 33,000 | 32,992 | -0.024% |
| 2014-15 | 34,000 | 32,977 | -3.0% |
| 2015-16 | 33,713 | 37,341 | 11.0% |
| 2016-17 | 38,500 | 48,215 | 25.0% |
| 2017-18 | 48,000 | 55,166 | 15.0% |
| 2018-19 | 55,000 | 61,815 | 12.0% |
| 2019-20 | 60,000 | 71,687 | 19.0% |
| 2020-21 | 61,500 | 1,11,170 | 81.0% |
| 2021-22 | 73,000 | 98,468 | 35.0% |
| 2022-23 | 73,000 | 89,400 | 22.0% |
| 2023-24 | 60,000 | | |

Note: actual figure for 2022-23 is the revised estimate.
Source: Union Budgets 2013-14 to 2023-24

In 2023-24, the MGNREGA budget is 1.3% of government expenditure (The govt proposes to spend Rs 45,03,097 crore in 2024, and budget allocation to MGNREGA is Rs 60,000 crore), which was 1.85% of government expenditure in 2022-23 (The govt proposed to spend Rs 39,44,909 crore in 2022-23, and budget allocation to MGNREGA was Rs 73,000 crore). This is the lowest ever allocation as a percentage of the GDP, at less than 0.2% (See Fig B).

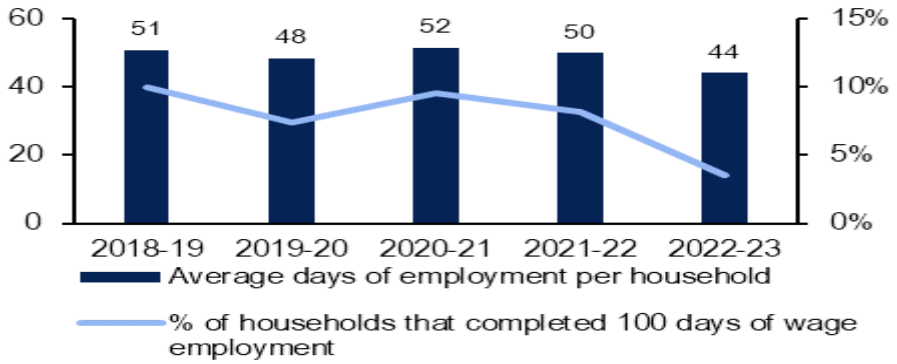



Source: Budget from 2016-17 to 2023-24

**Legal non-compliance: Falling average days of work**

The scheme has a total number of 149.5 million active workers[53].Despite the legal need for 100 days of paid employment, not all households are able to find job for that long. Over the last 5 years, the number of days of employment per household has averaged around 51%(Employment Generation Progress Reports of various years, MGNREGA dashboard, accessed on Feb2,2023). At the same time, the percentage of households with 100 days or more of continuous wage employment has not surpassed 10%.

**Average days of employment provided per household**




Source: MGNREGA Dashboard accessed on Feb 9,2023

**Work-demand pattern**

MGNREGS is a demand driven scheme. Demand is higher during the summer and lower during harvests. Between 2018-19 and 2019-2020, the demand for work remained largely the same, and peaked in 2020-21. The 15th Finance Commission noted that the slowdown in primary sectors, trade and aggregate demand during the Covid-19 pandemic severely hit the rural economies.[54]

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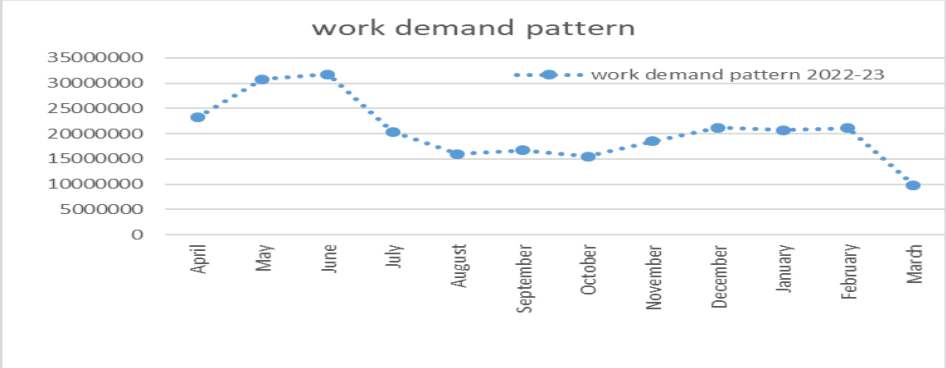
53 MIS Report available at: https://nrega.nic.in/Nregahome/MGNREGA_new/Nrega_StateReport.aspx?typeN=1

54 Finance Commission, XV Finance Commission Report in Covid Times,2021-2026 (October,2020)

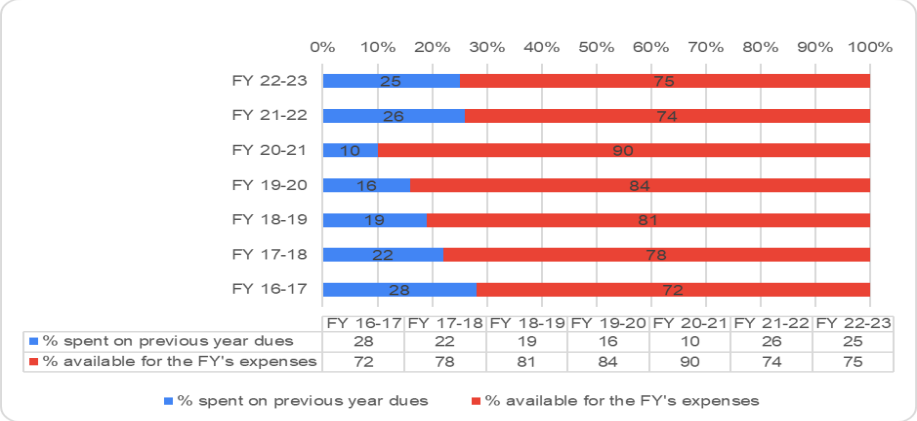



Source: work demand pattern, MGNREGA Dashboard, accessed on March5,2023

This was reflected in the increased demand for work under the scheme during the pandemic. Since then, demand for work has decreased between July and December 2022, demand reached pre-pandemic levels. The Economic Survey 2022 noted that the monthly year-on-year demand for work decreased in 2021-22 and 2022-23[55].It is also noted that the decrease in the demand for work was due to normalization of the rural economy as a result of resurgence of agriculture[56].

**Maintaining a balance: Accumulating burden amid budget cuts**

An evaluation of the data from table A clearly reflects that the budgetary allocation to the flagship scheme has successively been lower than the actual expenditure, since 2015-16 to 2022-23. On an average the actual expenditure is higher than the budgetary allocation by 27.5% from 2015-16 to 2022-23. In 2022-23, a household was provided 40.7 days of work, on average.




Source: MIS Report 7.1.2 Fig B

% of initial budget spent in clearing past dues

For the past five years, 21% of the budget has typically been used to pay back past-due debts. (Fig B). Even in this year the unpaid dues are already

55 Ibid 33

56 Ibid 33

at Rs. 16,070 crores, when 106% funds have already been utilized (source MIS Report 7.1.1, 8.8.1 and 'At a Glance report' Retrieved Jan24,2013). Over Rs. 25,800 crores would be pending at the end of FY 2022-23, an analysis by People's Action for Employment Guarantee (PAEG) estimates.

Jean Dreaze remarked rightly that "*MGNREGA is a demand driven programme, funds are supposed to respond to employment and not the other way round*". To fully honor the demand driven nature of the Act, PAEG estimates a minimum budget of Rs. 2.72 lakh crores for FY 2023-24, to provide legally guaranteed 100 days of work per household for at least those who worked in the current FY 2022-23. It is a highly conservative estimate because just 56.56% of the active job cards were offered employment in FY 2022-23 (MGNREGA dashboard accessed on Jan24,2023).

Subtracting the pending dues of Rs. 25,800 crores an administrative cost of Rs. 9892 crores (PAEG report for FY 2023-24), a meagre Rs. 24308 crores are available for current FY, just sufficient to provide 9 days of work per household on an average.

However, despite the persistent need for work, the government allocated (Rs. 60,000 crores) less than a fourth of the recommended estimate of Rs.2.72 lakh crores.

***Aadhar Based Payment System now mandatory: Privacy Concerns***

Under MGNREGS, payments to workers are directly credited to their bank accounts (MGNREGA Act, 2005, Master Circular, Ministry of Rural Development). This could be through bank/Post Office account details, or using the beneficiary's Aadhar number. To avail of the Aadhar Based Payment System (ABPS), Aadhar cards have to be linked to the beneficiary's bank account and NREGS job card. After linking, the card is authenticated. Only those beneficiaries who are successfully authenticated are eligible for ABPS. The Ministry of Rural Development also decided that all payments to NREGS beneficiaries would be made through ABPS from February 1, 2023. However, as of February 20, 2023, only 44% of total workers are eligible for ABPS.[Aadhar Authentication Status Report, MGNREGS Dashboard,accessed on Feb17,2023)] Around 5 crore workers have not been successfully authenticated. If all future payments are made only through the ABPS, a large number of workers would need to be authenticated to ensure that they get paid.

**Justifying the budget cuts to MGNREGS: A tryst with the facts**

Chief Economic advisorV. Anantha said that the allocation for the MGNREGS has been reduced in the budget for 2023-24, as more funds have been allocated to towards PMAY (G), and JJM, which are expected to provide jobs to same set of workers in rural areas[57]. However, such a line of reasoning is faulty along several dimensions. The additional budget allocation in 2023-24 over RE 2022-23 to Jal Jeevan Mission and PMAY(G) is less than the cut in

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57 Editorial, "Govt. trims budget for MGNREGS as PMAY, Jal Jeevan get more funds" *The Times of India, Feb 6 ,2023*

budget allocation to MGNREGA in 2023-24 over RE 2022-23 by Rs.8459 crores, as shown in table 1. Additionally, PMAY is a beneficiary driven material intensive scheme and JJM is mostly tender base material intensive scheme. So the additional allocation cannot compensate the loss of jobs under MGNREGA.

**Table 1**

| | RE 2022-23 | BE 2023-24 | Additional allocation over RE |
|---|---|---|---|
| **Jal Jeevan Mission** | 54,808 | 69,684 | 14,876 |
| **PMAY (Grameen)** | 48,422 | 54,487 | 6,065 |
| **MGNREGA** | 89,400 | 60,000 | 29,400 |

Source: Demand for the Grants of the dept. of Rural Dev, Dep't of Drinking water and sanitation 2023-24

While addressing the Lower House of the Parliament on December 14, 2022,Union Finance Minister Nirmala Sitharaman claimed that the demand for work under the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) is declining,"There is now very obviously a declining demand for jobs in the rural areas. In the rural areas, the demand for MGNREGA in the recent past has been coming down," Sitharaman had said[58]. Also, Chief Economic Advisor, said that India's economic recovery is complete[59]. However, the ground reality is quite opposite as depicted by data accessed on MGNREGA Dashboard Dec22,2022.

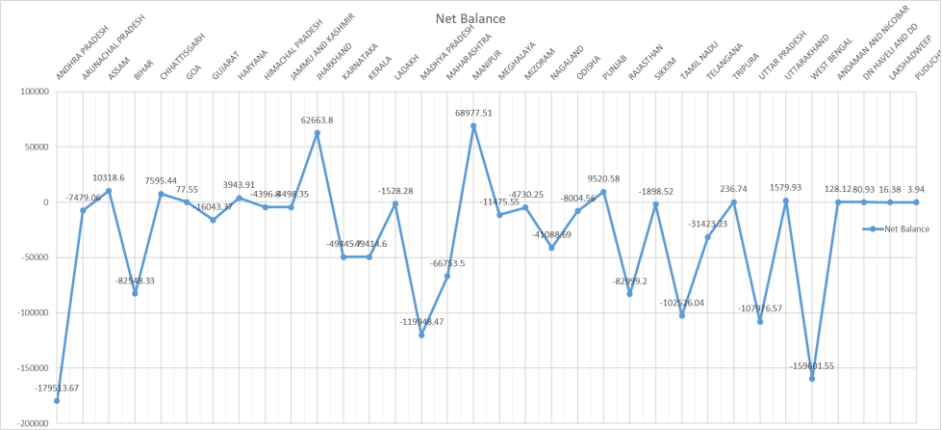
***MGNREGA Employment Demanded by Households & Persons, 2018-19 to 2022-23****

| Year | Households (crores) | % change | Persons | % change |
|---|---|---|---|---|
| 2018-19 | 5.87 | - | 9.11 | - |
| 2019-20 | 6.16 | 4.9% | 9.33 | 2.41% |
| 2020-21 | 8.55 | 3.87% | 13.32 | 4.27% |
| 2021-22 | 8.05 | -5.84% | 12.35 | -7.2% |
| 2022-23* | 6.24 | -22.4% | 9.15 | -25.91% |

Source: MGNREGS Dashboard, Ministry of Rural Development(Dec22,2022*)

58 Editorial, "Demand For MGNREGA Has Been Declining, Says Finance Minister Nirmala Sitharaman"*BQ Prime, December14,2022*

59 Editorial ,"Economic survey 2023: India's economic recovery now complete, India will perform this year" *Times of India, January31,2023*



Source: MGNREGA Dashboard, accessed on March7,2023

The demand for work in rural areas increased from 5.87 crore households in 2018-19 to 8.55 crore households in 2020-21, due to unprecedented covid-19 crisis and stringent lockdown of March 2020, when around 11.4 million[60] migrant workers, who found themselves stranded in the employment hubs of urban India, returned to their villages. The demand for work in rural areas increased from 6.16 crore households in 2019-20to 6.25 crore households in 2022-23, even when three months have not been taken into consideration in current fiscal. So empirically, the demand for work under MGNREGS has not been declining as claimed by the Ministry of Finance.

Lastly, Ministry of Rural Development in a statement said that when additional funds would be needed for, MGNRGA "Govt. of India is committed to release funds for wage and material payments for proper implementation of the scheme, as per the provisions of the Act and guidelines applicable for Central Government as well as State Government[61]". However, the trend observed in the data over the years suggests that, actual estimates have been above the Budget Estimates since 2015-16. Curiously, a significant proportion of the budget has gone into clearing the arrears of previous years(Fig A). "Derisively low budget allocation, un-remunerative NREGA wages, coupled with long delays in wage payments, withholding wages have turned many rural workers away from the employment guarantee programme[62]," said NREGA Sangharsh Morcha (NSM)adding that insufficient funds under the scheme in various states has led to "erosion of confidence" of job-seekers in the scheme.

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60 http://164.100.24.220/loksabhaquestions/annex/175/AU1056.pdf

61 Editorial "More funds for MGNREGS if needed, says Rural Development Ministry" *The Hindu Feburuary3,2023*.

62 Editorial "Activists flag 'Erosion of Confidence' in MGNREGA for drop in job demand" NEWS CLICK Sept 22, 2022.

**MGNREGS balance of various states for FY 2022-23 as on March7,2023**.

Among the 28 states, 21 have a negative balance, while among the Union Territories, UT of J&K and UT of Ladakh have negative balance as of March7,2023. The continuous trimming in allocation to the flagship scheme reflects the priority of the govt. in considering MGNREGA as a lifeline to the rural areas of India as the scheme was referred to as "a living monument of the UPA's failure" by Prime Minister Narendra Modi in a speech to Parliament on February 27, 2015.The budget cuts to MGNREGA will have negative socio-economic implications ranging from its effect on income to employment and female work participation to asset creation in rural areas.

Rajendran Narayanan,*etal(2018),* observed that payment delays are rampant in MGNREGA, also the method for the calculation of delay compensation is flawed leading to massive under-calculation of the true payable compensation[63]. In a sample of ten states for the FY 2016-17, they estimated the true total compensation payable at Rs. 36 crore, but the MIS calculations estimate it as Rs. 15.6 crore[64].

**Suggestions:**

In the Covid year, the MGNREGA wages of at least 17 states out of the major 21 states were lower than the state wages for agriculture with shortfalls ranging from 2% to 33% (Agrawal and Paikra, 2020). The shortfall was 29% in Bihar, a state that has 51.91%of its population reeling under multi-dimensional poverty[65]. Given the changing consumption patterns in rural India, it would be prudent to use Consumer Price Index-Rural (CPI-R) instead of CPI-Agricultural Labour (CPI-AL) with a revised base year to make MGNREGA an important and viable employment option (Narayanan, and, Dhorijawala, 2019). Indeed, this same recommendation has also been corroborated recently by the Parliamentary Standing Committee Report on MGNREGA. These are not only critical in boosting the economy from the demand side but are also needed from the perspective of constitutional compliance (Sanjit Roy v State of Rajasthan , 1983).

Even though the MGNREGA has significantly reduced rural poverty and increased employment opportunities, there have nonetheless been cases of Act violations in India. Some of the common violations of MGNREGA Act in India include;

1. Delay in payment of wages: One of the primary violations of the MGNREGA Act is the delay in payment of wages to workers.

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63 Narayanan, Rajendran Sakina Dhorajiwala, and Rajesh Golani .2018. "*Analysis of Payment Delays and Delay Compensation in MGNREGA*." Centre for Sustainable Employment Working Paper#5, Azim Premji University, Bangalore Available at: **https://cse.azimpremjiuniversity.edu.in/wp-content/uploads/2020/10/**Narayanan _et_al_Payment_Delays_And_Delay_Compensation_April_2018.pdf

64 *Ibid 63*

65 *Ibid 20*

Numerous factors, such as insufficient funding, a dearth of infrastructure, and corruption, may be to blame for this delay.

2. Non-payment of unemployment allowance: In case the government fails to provide employment to a registered household within 15 days of application, an unemployment allowance is to be provided as per the Act. However, in many cases, this allowance is not paid, leading to violations of the Act.
3. Abuse of funds: Another prevalent infraction of the MGNREGA Act is the misuse of funds granted for the scheme. Corruption, a lack of openness, and poor oversight can all contribute to this.
4. Campaigns to raise awareness: The government must start initiatives to raise awareness of the benefits of the programme among rural residents. As a result, the program's participation rate will rise and its audience will grow.

It is crucial to ensure that the MGNREGA Act is implemented correctly and to take strict action against those who violate the Act in order to address these violations. The government must allot sufficient cash and resources, increase accountability and openness, and train the staff members in charge of carrying out the Act. Additionally, monitoring and reporting violations of the Act can be greatly aided by civil society organizations and workers' groups. In a 2020 research paper on MGNREGA, The Institute for Social and Economic Change, Bangalore observed: "At this ratio, creating durable and sustainable assets can be difficult. Moreover, no resources have been earmarked for the maintenance of such assets and hence, the assets created under MGNREGA are of poor quality and often deteriorate very rapidly

**Legal dilution of the Act owing to reduced budgetary allocation**

There have been instances in the past where the MGNREGA's implementation has been contested in court. For instance, the Indian Supreme Court ordered the federal and state governments to make sure that workers covered by the MGNREGA received their wages on schedule in 2011. The government must compensate workers in the event of late payments, the court ordered.

The Supreme Court has ordered the federal government to look into claims of corruption and anomalies in the MGNREGA's implementation in numerous states in 2014.

The MGNREGA is a dynamic and growing law, and any infractions or disputes arising from it will continue to be dealt with through the judicial system. The following legal provisions of the Act may be jeopardized by the government if it allocates a budget for the MGNREGA plan that is less than what is necessary:

1. Every rural household whose adult members volunteer to perform unskilled manual labour must receive a minimum of 100 days of paid employment, according to Section 3(1) of the MGNREGA Act.

2. According to Section 3(2) of the Act, the government must provide sufficient cash to cover the costs associated with putting the plan into effect.
3. According to Section 4(1) of the Act, remuneration for work completed under the MGNREGA must be paid in accordance with the approved wage rate.
4. The "MGNREGA Fund" will be established according to Section 6(1) of the Act to finance the programme
5. The government is required by Section 23(1) of the Act to arrange for prompt payment of wages and unemployment benefits.

The above-mentioned provisions, particularly the requirement to provide appropriate funds to meet the expenses for implementing the system, may be broken if the government allocates a smaller budget for the MGNREGA scheme than necessary. This could result in slower wage payments, decreased employment rates, and eventually a scheme failure.

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# Significance of Judicial Independence in a Constitutional Democracy: An Analysis with Special Reference to Indian Practice

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**Abstract**

*The rationale for this two-pronged modern understanding of judicial independence is the recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different, and equally important role, namely as protector of the Constitution and the fundamental values embodied in it i.e. rule of law, fundamental justice, equality, preservation of the democratic process, etc. In other words, judicial independence is essential for fair and just dispute resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies. The judiciary if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testifies before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence. To summarize, judicial independence as a constitutional principle fundamental to the Indian system of government possesses both individual and institutional elements.*

**Keywords:** Constitution, Court, Democracy, Independence, Judicial.

## I. Introduction

Judicial independence is a cornerstone of good governance and constitutionalism. This Article opens with an analysis of the concept of judicial independence as it is used in the contemporary states and this is followed by the identification and explanation of the various mechanisms used bystates to safeguard judicial independence and its relationship with the concepts of

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democracy and human rights. Over the years, the concept of judicial independence has evolved throughout the world and today is acknowledged by many states as an important mechanism for safeguarding democracy. It forms a vital part of some aspects which give meaning to the principle of separation of powers, the protection of democracy, and constitutionalism against any contravention by the state. Over the years, governments, jurists, scholars, commentators, journalists, students, and the general public have come to appreciate the importance of an independent judiciary in realizing democracy. It is through an independent judiciary that the rule of law can be upheld in a democratic state; hence it has received "scrutiny" from all spheres of society. Most contemporary constitutions across the globe contain specific guarantees which seek to promote the functional and personal independence of the judiciary. For example, the Constitution of Greece provides that – "justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence"[1]. Sub-article (2) of article 87 indicates that "in the discharge of their duties, judges shall be subject only to the Constitution and the laws"[2] – meaning, according to Pikramenos, that "judges are not subject to other state powers or judges of higher ranks",[3] but only to the Constitution and the laws of the country.

Matters concerning appointment, salaries, pensions, and tenure of judicial officers, among other things, are normally included in Constitutions or Acts of Parliament to further strengthen and protect the independence of the judiciary in executing its functions. The US Agency for International Development Guidance for Promoting Judicial Independence and Impartiality identifies a number of sources from which interference in judicial independence may originate:

- "The executive, the legislature, local governments
- Individual government officials or legislators
- Political parties
- Political and economic elites
- The military, paramilitary, and intelligence forces
- Criminal networks
- The judicial hierarchy itself."[4]

When looked at, these sources, if there are no strong regulatory mechanisms in place, have the potential to influence or control the judicial

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1. See article 87(1) of the Constitution of Greece as revised by the Parliamentary Resolution of 27 May 2008 of the VIIIth Revisionary Parliament.
2. Ibid.
3. See "Judicial independence and judicial review of the constitutionality of laws: Constitutional guarantees and public practice in Greece" by Pikramenos M available at http://www.concourt.am/hr/ccl/vestnik/3.13- 2001/pikram.htm (accessed 03/11/2011).
4. US Agency for International Development Guidance for promoting judicial independence and impartiality (January 2002) (revised ed) at 5

system in the country, hence the importance of personal and functional independence of the judiciary to grant judicial officers' freedom and protection when executing their functions without fear or favour. Different countries follow different methods; however, there is no fixed method prescribed to ensure judicial independence. As members of the global community in the modern world, states try to meet universal standards for ensuring and safeguarding judicial independence. Countries normally borrow from other countries' Constitutions and try to comply with international law and treaties emanating from organizations of which they are members, in an effort to attain good governance and democracy. The judicial authority in South Africa as entrenched in the Constitution will be the principal guide and will be supported by examples of some other countries' provisions for ensuring judicial independence across the globe. The term of "a judicial officer" in the wide sense refers to judges, magistrates, lawyers, advocates and prosecutors in the field of law.

## II. Judicial Independence in the Contemporary Era

Judicial independence is a universal notion concerning the judicial branch of government's independence from any sort of interference by, or any influence or functioning from the other two branches namely, the executive and the legislature, bolstered by the general conception that the judiciary must at all times be effective and impartial in adjudicating cases and upholding the rule of law in a given state. The concept of judicial independence is a broad term that covers a wide field of constitutional law. It covers, among other things, the process of appointment of judicial officers; conducting of independent trials; striking a balance and cooperation among the three wings of government; and the promotion and protection of human rights and democracy in a state.

The principle of judicial independence seeks to guarantee the autonomy of judicial organs when exercising judicial authority in line with established standards (whether international, regional or local) and the given law[5].Consequently, the fundamental nature of judicial independence is to provide judicial organs with a means to "determine right from wrong without being distorted by external forces or wills" in line with established laws of the country[6].

Shirley Abrahamson argues that – "although the phrase is hard to define, the term judicial independence embodies the concept that a judge decides cases fairly, impartially and according to the facts and law, not according to whim, prejudice or fear, the dictates of the legislature or executive or the latest opinion poll"[7]. It is the law that must reign supreme and which must be applied and interpreted fairly and without fear or favour to every

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5. Ma Huaide and Deng Yi "Judicial and constitutional reform" in Yu Keping Democracy and the rule of law in contemporary China (2010) at 254.
6. Id at 54.
7. Abrahamson Shirley S "Keynote address: Thorny issues and slippery slopes: Perspectives on judicial independence" (2003) 64/1Ohio State Law Journal at 3.

citizen by independent judicial officers. The judiciary deals with different cases that affect different people from different backgrounds with different status in society.

Again, judicial officers are members of the community who may have certain religious beliefs and who belong or might belong, to certain political organizations within the society. Nonetheless, they need to rise above their backgrounds and decide cases according to the facts and the law. As Stephen Burbank puts it: "Courts are institutions run by human beings. Human beings are subject to selfish and/or venal motives and even moral paragons differ in the quality of their mental faculties and in their capacity for judgment and wisdom."[8]

It is against this background that the judiciary must be independent and impartial in executing its functions and this can be realized by creating an enabling environment for the law of the country to take control of the situation and ensure that everyone, from the executive to the legislature, and including the judiciary, abide by the law.

The importance of securing judicial independence in a given state has always been regarded as vital. However, it was not until the mid-1980s that world countries (under the umbrella of the United Nations) saw the need to document some general standards that should guide member states in realizing this notion. During the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, a number of "Basic Principles on the Independence of the Judiciary" were adopted.

Twenty Basic Principles were adopted. Among others are the following:

"(1) The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

(2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

(3) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

(4) There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject

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8. Burbank Stephen B "What do we mean by judicial independence? [Comments]" (2003) 64/1Ohio State Law Journal at 326.

to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

(5) Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

(6) The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

(7) It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions." [9] The Congress further declared that:

> "Member States have a task of securing and promoting the independence of the judiciary and that this should be taken into account and respected by Governments within the framework of their national legislation and practice and should be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general."[10]

As highlighted earlier, the notion of judicial independence complements the notions of democracy, constitutionalism, the rule of law, and the desire for good governance in a state. The 21st century saw the concept of human rights emerging as one of the most important issues that a government must prioritise when dealing with its people, with the adoption of the Universal Declaration of Human Rights (UDHR)[11] in 1945, and later the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other conventions that followed.[12]

The principle of constitutionalism implies that the government can be taken to court by its people for any act of violation, while, conversely, the government may take decisions that may appear adverse in the eyes of the public. But what is important in a constitutional and democratic state, where

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9. See http://www2.ohchr.org/english/law/indjudiciary.htm (accessed 13/10/2011).
10. Ibid
11. Article 8 of the UDHR provides that: "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law"; whereas Article 10 provides that: "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"
12. The UDHR, ICESCR and the ICCPR with its two Optional Protocol form part of what is universally known as the International Bill of Human Rights. See Fact Sheet no 2 (Rev 1) The International Bill of Human Rights. United Nations, Geneva (1996).

the rule of law reigns supreme with an impartial and independent judiciary, is that even if courts of law find against the government, court processes and judgments will be respected and executed according to the law.

## III. Various Ways of Ensuring Judicial Independence

There are many methods that can be used in the securing of the principle of judicial independence. In this section a few methods are identified, namely the Constitution and legislation; judicial service commissions or councils/boards; courts or tribunals; the process of appointment of judicial officers; international law/conventions or documents; and personal and functional independence.

- ***The Constitution and Legislation***

The notion of judicial independence in the main finds expression in the Constitution of a country. The Constitution can be regarded as the supreme mechanism for safeguarding the independence of the judiciary since other mechanisms such as the judicial service councils, the appointment process, the role of international law and how it is applied in terms of the municipal laws, usually find expression in the constitution through the courts, and by virtue of the courts' power to test the validity of any law against the provisions of the constitution.[13]

The general rule is that the Constitution indicates that "the Constitution" is the highest law in the country.[14] It makes provision for the separation of powers, a Bill of Rights, the functioning of the three wings of government, and more importantly, vests the judicial authority in "independent" courts of law.

So we find in the Constitution of the Republic of South Africa that the "judicial authority is vested in the courts which are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice".[15] It further provides for the enactment of legislation by National Parliament to complement the provisions of the Constitution in order ensure an effective and efficient administration of justice in the country. Section 180 of the said Constitution indicates that:

> "National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution including–
>
> (a) training programmes for judicial officer;
>
> (b) procedures for dealing with complaints about judicial officers; and
>
> (c) participation of people other than judicial officer in court decisions.

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13. For example, in the case of South Africa see sections 2; 39(1)(b); 174; 178 and 233 of the Constitution of the Republic of South Africa, 1996
14. For example, see section 2 of South Africa's Constitution (1996); article 1 of the Constitution of the Federal Republic of Nigeria (1999); article 2 of the Constitution of Kenya (2010).
15. Section 165(1)(2).

- ***Judicial Service Commissions or Councils***

Today most countries' Constitutions make provision for the establishment of Judicial Service Commissions or Councils/Boards in order to guarantee judicial independence. These bodies are usually composed of different people from various backgrounds – such as lawyers, politicians and academics– charged by the constitution with a responsibility of finding appropriately qualified lawyers who are fit and proper to sit on the bench and dispense justice impartially according to the law and in a way that engenders trust among the public in the judiciary.For example, Section 178 (1) of SA's Constitution makes provision for a Judicial Service Commission (JSC) composed of the Chief Justice; the President of the Supreme Court of Appeal; One Judge President; two practicing advocates; two practicing attorneys; one teacher of law from any university in SA; six persons designated by the National Assembly (NA); four permanent delegates to the National Council of Provinces (NCOP); and four persons designated by the President as head of the national executive after consulting the leaders of all parties in the NA.

Similarly, in Uganda, article 146 of the Constitution (1995)establishes a Judicial Service Commission whose function in terms of Article 147 (1) is among other things (a) "to advise the President in the exercise of the President's power to appoint persons to hold or act in any office of Chief Justice, Deputy Chief Justice, Principal Judge, Justice of Supreme Court, Justice of Appeal and a Judge of the High court, which include the power to confirm appointments, to exercise disciplinary control over such person sand to remove them from office; (c) to prepare and implement programmes for the education of, and for the dissemination of information to judicial officers and the public about the law and administration of justice; (e) to advise the government on improving the administration of justice".

- ***Courts or Tribunals***

Traditionally courts and/or tribunals are the custodians of the law in a state. According to the Bangalore Code of Judicial Conduct, "a competent, independent and impartial judiciary is likewise essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law".[16] When there is a dispute, whether among organs of the state, between the state and its citizens, or among private individuals, the courts generally act as the referee in order to find a just solution in line with the laws of the country.

Courts play an important role in shaping society both at the national and international levels. Section 4 of the Treaty establishing the European Economic Community (EEC)[17] makes provision for the establishment of a Court of Justice in Europe. Article 164 of the EEC provides that "the Court of

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16. The Bangalore Principles of Judicial Conduct 2002. Preamble at 2. Available at http://www.constitutionnet .org/vl/bangalore-principles-judicial-conduct-2002 (accessed 21/11/2011).
17. Treaty establishing the European Economic Community 1957.

Justice shall ensure observance of law and justice in the interpretation and application of the treaty". This indicates that the role of courts is not only about the settlement of cases and controversies, but that there is a duty on the courts to ensure that the law is at all times observed.[18]

Shetreet correctly argues that "courts perform an important function of adjudicating and reprimanding the parties before the court and on occasion the general public and the social and political institutions".[19] Through the judicial decisions they make, he adds, "courts are thus able to shape societal ideas and mores, to create laws and to resolve specific disputes thereby, contributing towards an ordered society and promoting good governance in a state".[20]

For all of the above to be possible the courts must be managed by an independent judiciary. As managers of courts, judicial officers must at all times be independent and be seen to be independent when applying the law. The nature of courts is that they are important institutions that form part of government and which must command respect in the eyes of the public.[21]

In its consideration of foreign law, the Constitutional Court of South Africa emphasized the importance of public confidence in the administration of justice in the De Lange[22] case as the Canadian Supreme Court had pointed out in Valente[23]. The court argued that:

> "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effectiveness. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception"[24].

- **International Law/Conventions or Documents**

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18. Barav Ami "The Court of Justice of the European communities" in Shetreet S The role of courts in society (1988) at 390.
19. Id at 468.
20. Ibid.
21. In the complaint by the justices of the Constitutional Court of South Africa to the Judicial Service Commission concerning an alleged interference and an attempt to influence two justices of the court in a pending case concerning an influential politician of the ruling party by the judge president of the Western Cape High Court, the Constitutional Court justices pointed out among other things that "public confidence in the integrity of the courts is of crucial importance for our constitutional democracy and may not be jeopardised". (See Hlophe v Constitutional Court of South Africa and Others (08/22932) [2008] ZAGPHC 289 at par 4.4.
22. De Lange v Smuts NO and Others 1998 (7) BCLR 779.
23. Valente v The Queen (1986) 24 DLR (4th) 16 at 172.
24. Id at 71.

There are many international documents or conventions or institutions that promote or strive to contribute towards the notion of judicial independence. These include, but are not limited to, the following –

- Universal Declaration of Human Rights (see articles 8 and 10).[25]
- The Basic Principles on the Independence of the Judiciary.[26]
- The Bangalore Principles of Judicial Code of Conduct.[27]
- The International Commission of Jurists (International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors).[28]
- Latimer House Principles on the Three Branches of Government.[29]

Although they are important, it must be emphasized that most of these international and regional instruments are not obligatory or binding on individual states. However, they serve as guidelines and universally accepted standards that countries are reasonably expected to abide by as members of the international community. Today many countries find it to be in their best national interest to conduct themselves in line with the contemporary norms of international practice. If individual states reject what is perceived as universal practice, they normally face isolation or sanctions from the international community.

- **The Process for the Appointment of Judicial Officers**

The process for appointing judicial officers definitely contributes to the independence of the judiciary. For judicial officers to be impartial and independent in applying the law, they must be appointed on merit, experience and qualifications. Their appointment should not be influenced by any connections or relations they might have with the president or the ruling political party or members of judicial service councils or boards.

According to the provisions of the Commonwealth (Latimer House) Principles:

> "The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary"[30].

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25. http://www.un.org/en/documents/udhr/(accessed 04/01/2022)
26. http://www2.ohchr.org/english/law/indjudiciary.htm (accessed 04/01/2022)
27. The Bangalore Principles of Judicial Conduct 2002. Preamble at 2. Available at http://www.constitutionnet .org/vl/bangalore-principles-judicial-conduct-2002 (accessed 21/11/2011)
28. http://www.unhcr.org/refworld/type,HANDBOOK,ICJURISTS,,4a7837af2,0.html (accessed 04/01/2012).
29. http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/% 7BACC92 70A-E929-4AE0-AEF94AAFEC68479%7D_Latimer%20House%20Booklet%20130504 .pdf (accessed 04/01/2022)
30. Commonwealth (Latimer House) Principles on the Three Branches of Government (November 2003) at 17.

**VI. Personal Independence**

The idea of personal independence is concerned with the personality and/ or personal security of judicial officers in relation to the performance of their functions. Judicial officers must be free and satisfied with their conditions of service. They must be protected against any kind of threat, or from any temptation that might seek to divert them from performing their core functions in terms of the law and the Constitution.

Rautenbach and Malherbe define personal independence as follows:

> "The personal independence of the judiciary means that the appointment, terms of office and conditions of service of judicial officers are not controlled arbitrarily by other government bodies"[31].

There are various factors that are normally included in Constitutions and legislation which determine the personal independence of judicial officers:

- **Appointment**
  The appointment process must be transparent and free from any influence whether from the executive or legislature or the ruling political party. The reason for transparency and freedom from internal and external influence is to ensure the impartiality of judicial officers. A transparent and free appointment process guarantees allegiance to the law rather than to individuals or certain groups or institutions.
- **Removal**
  Generally, modern Constitutions or Acts of Parliament specifically indicate circumstances under which a judicial officer may be removed from office.This means that a judicial officer cannot be removed or dismissed by anyone for any reason that is not provided for in the constitution or legislation. This is important in order to ensure that judicial officers do not fear or favour any person when adjudicating cases.
- **Terms of Office**
  Judicial officers are usually appointed for a fixed, non-renewable period. This also contributes to independence and impartiality because there will be no need to fear not being retained where decisions against some influential executive or legislative members are made. Section 176(1) of South Africa's Constitution provides that a Constitutional Court judge holds office for a non-renewable term of twelve years or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends such judge's term of office. Subsection (2) of the same section provides that other judges hold office until they are discharged from active service in terms of an Act of Parliament.
- **Remuneration**

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31. Rautenbach IM and Malherbe EFJ Constitutional law (2009) (5th ed) at 236.

According to Rosenn, "the underlying policy is to protect judges from financial retribution for rendering decisions that displease the legislature or the executive"[32]. Remuneration is a big issue in any given situation. There is a belief that where judicial officers earn low salaries, they will be susceptible to bribes and corrupt activities. It is important to offer adequate remuneration in order to guard and promote the integrity of the judiciary. The USAID Guidance for Promoting Judicial Independence and Impartiality indicates that most judges who participated in their study agreed that "respectable salaries are a necessary element of judicial independence"[33]. In recent years various countries have increased judicial officers' salaries in an effort to strengthen judicial independence in line with various international and regional guidelines promoting this notion.

In South Africa, section 176(3) of the Constitution protects this factor by providing that: "the salaries, allowances and benefits of judges may not be reduced"[34]. In the Canadian case of Valentev. The Queen[35] the court mentioned remuneration as one of the essential conditions for judicial independence. It argued that "the essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence"[36].

- **Conditions of Service**

  Principle 11 of the UN Basic Principles on the Independence of the Judiciary seeks to create a universal standard for better conditions of service for judicial officers by providing that: "the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by the law". If all the above-mentioned aspects are adequately secured it would not be easy for any influential person to find a loophole to penetrate or divert the independence of the judiciary and in this manner justice cannot be tempered with.

In the case of Mackin v New Brunswick[37] the Canadian Supreme Court emphasised the importance of judicial independence and argued that:

"Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be

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32. Rosenn Keith S "The protection of judicial independence in Latin America" (1987-1989) 19/1 InterAmerican Law Review at 15.
33. US Agency for International Development Guidance for promoting judicial independence and impartiality (January 2002) (revised ed) at 5.
34. See also the Judges's Remuneration and Conditions of Employment Act No 47 of 2001 which gives a detailed account on salaries, allowances and benefits of judicial officers in South Africa.
35. Valente v The Queen (1985) 24 DLR (4th) 161.
36. Valente v The Queen (1985) 24 DLR (4th) 161.
37. Mackin v New Brunswick (2002) 209 DLR (4th) 564.

> reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly 'communicated' to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement." [38]

The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and retirement age as provided for by Principle 11 of the UN Basic Principles of Judicial Independence, are the objective legal guarantees capable of preserving or restoring public confidence in the judicial system, thereby giving it legitimacy and strength to dispense justice impartially.

**V. Functional Independence**

The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. The notion of functional independence focuses on the way in which courts as custodians of the judicial authority in the state carry out their duties within the framework of the law and the constitution. In order to administer justice, courts must not be subject to the executive or the majority in parliament, or the whims of public opinion or media, but only to the law and the Constitution. Courts must be free from any influence or interference from other state organs.

With regard to freedom from executive or legislative interference, the functional independence aspect manifests from the court's power to review the legality of administrative acts and the constitutionality of statutory legislation. Functional independence further stretches to freedom from internal influence or interference from within the judiciary itself. For instance, although the doctrine of stare decisis[39] must be respected, it should not be misused by higher ranked judicial officers to meddle with the functioning of other officers or lower courts.

The Supreme Court of Canada in the case of The Queen in Right of Canada v Beauregard described judicial independence as follows –

> "Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases that come before them: no outsider – be it government,

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38. Id at 585.
39. Stare decisis is a legal principle which according to the Trilingual Legal Dictionary means "abide by or adhere to decided cases".

pressure group, individual or even another judge – should interfere in fact or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence"[40].

It is a general standard that judicial officers enjoy immunity against civil actions and the offence of contempt of court. This is another important rule which enhances the independence of judicial officers in applying the law without the fear or risk of "being sued for defamation every time they express an unfavourable view about a litigant or the credibility of a witness during the course of giving a judgment".

## VI. Judicial Independence in Practice: Indian Perspective

Indian democracy is founded upon the "Rule of Law." The expression "law" means a set of rules that governs the relationships of citizens with each other; regulates commerce and our lives within the community, and protects people from the unlawful acts of individuals or the state. The expression "Rule of Law" describes more generally a single, overarching rule that expresses an agreement – both as individuals and as a collective, a community – to be bound by and subject to the law. That commitment carries an explicit understanding that such adherence applies to everyone, no matter what their lineage, heritage or station in life. It means no one is above the law:

- It means that prime ministers, army generals, presidents, business titans, and judges themselves, will all face the same laws as the poorest and least advantaged person in society; and
- It means that the law will be applied fairly and evenly to all persons, taking no account of hierarchies, privilege, power or wealth.

Representations of Justicia show the goddess as blindfolded, a metaphor conveying that in order for justice to be fair, it should be dispassionate and blind to matters of authority, power or prestige. The belief in and an adherence to the Rule of Law is a cornerstone of India's constitutional democracy. It is the tool by which a truly impartial and independent judiciary carries out its work. It is the fundamental idea that each judge has sworn, upon oath, to uphold. The Rule of Law distinguishes us from other countries where no such protections exist: where tyrants and their armies and their secret police hold citizens in terror; where wrongdoers are unaccountable; where complicity goes unpunished; where democracy is illusory; and where the rights of the few can be trampled by the power of the mob, or majority.

India's parliamentary system is based upon the British tradition. India has adopted a model of governance relying on the separation of powers. Under this model, the state is divided in three branches, each with separate powers and areas of responsibility. The separation of powers seeks to ensure that the powers of each branch operate in harmony with the other branches. The Indian system of government is divided into three branches: the legislative; the

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40. The Queen in Right of Canada v Beauregard (1987) 30 DLR (4th) 481.

executive; and the judiciary. Each has separate and independent areas of power and responsibility. In its simplest form, the legislative branch creates the law, the executive branch administers and enforces the law, and the judicial branch interprets and applies the law in individual cases. The Indian Constitution requires that each branch adhere to its proper function. Through a long history, a balance has been struck among these three branches of government, keeping each branch from gaining too much power or having too much influence over the other branches. The judicial power refers to the types, levels and hierarchy of courts whose responsibility it is to interpret and apply the law, including the Constitution, statutes and regulations, jurisprudence and leading precedents. The judiciary also provides processes to resolve disputes. It administers the law impartially between individuals, and between persons and public authorities. Within the proper limits of their judicial function, judges also guarantee the observance, protection, and attainment of human rights. Judges ensure that all people are securely governed by the Rule of Law and equal justice under law.

Judicial independence means that the judiciary must be kept distinct and apart from the other branches of government. For example, in India da, judges do not participate in election campaigns or hold public office in government. The courts and judges must be shielded from improper influence stemming from the legislative or executive branches of government. Courts must also be sheltered from private or partisan interests. Judicial independence is vital to the model of governance of the state based on the separation of powers.

Despite being separate branches, there are some situations in which it makes sense for the chief justices to collaborate with the executive branch of government. Examples might include: • Providing technical support for case management; • Joining forces in the roll-out of new judicial initiatives such as e-filing; • Designing protocols for the security of members of the public, staff and judges within courthouse facilities; • Planning the design and the construction of new or renovated courthouses; or • Evaluating the impact of budgetary cuts upon judicial resources and capacities.

Thus, there is an ongoing dialogue between the judiciary and the executive power to make the system of justice function properly. However, this essential collaboration is exercised within the constraints established by the separation of powers between the legislative, the executive, and the judicial branches, which is a fundamental characteristic of the Indian political system.

The independence of the judiciary emanates from the principle of separation of powers and is generally accepted across the globe as a vital ingredient of the constitutional state. The principle of judicial independence is firmly stated in a number of documents and sets of guidelines, to which countries around the world subscribe. Judicial independence means that the courts shall be subject only to the law and that no person, institution or organ of the state may interfere with the functioning of the courts. There can be no

doubt that an independent judiciary is an indispensable condition for constitutional democracy.

In India, the independence of the judiciary is firmly entrenched in the Constitution.The Constitution contains several provisions which guarantee the principles of judicial independence and non-interference by other organs of state.The Constitution of India does not follow the doctrine of Separation of Powers in a strict sense, but it has been reiterated in many cases that the independence of the judiciary is a basic part of the Constitution. For the judiciary to be independent and impartial to serve the constitutional goals, the Judges need to act fairly, reasonably, and free of any fear and favour[41]. The Indian judiciary stands between the citizen and the State as a rampart against misuse or abuse of power by the executive. Therefore, it is absolutely essential for the judiciary to be free from executive pressure or influence that has been provided in various provisions of the Constitution.

The Constitution of India has several provisions to secure the independence of the judiciary. Firstly, The Supreme Court and High Courts are given authority to recruit their staff and frame rules[42]. The salaries and allowances of the judges are not put to the vote of the Legislatures. The administrative expenses including salary allowances and pensions of the Supreme Court and High Court judges are charged to the consolidated fund of India and the states respectively. The judges of the Supreme Court are debarred from pleading after retirement before any Court or judicial authority in India. The conduct of the judges of the Supreme Court and High Courts in the discharge of their duties shall not be discussed in the legislature[43].

Second, Politics in the appointment of judges has been avoided by prescribing high minimum qualifications for such assignments in the Constitution itself. An aspirant for such an important office must have been a judge of a High Court, at least for five years or must an advocate of a High Court be at least for ten years, or be a distinguished jurist[44].

Third, every judge is paid a high salary to maintain his status and dignity. As per Act of 1986, the Chief Justice was to draw Rs. 10,000 p.m. and the other judges of the SupremeCourt were paid Rs. 9,000 p.m.[45]. This change was given effect to w.e.f.1st April1986.This Amendment also amended Article 125 enabling Parliament to determine the salaries of the judges of the Supreme Court. In pursuance of the power conferred by article 125(2), Parliament passed the Supreme Court Judges (Condition of Services) Act.1958 , regulating such matters as leave, pension, travelling allowance, free residence, etc. for a judge

41. S.P.Gupta v.Union of India,AIR1982SC149.Also Known as 1st Judges Transfer Case.
42. Constitution of India: Article 146 and 229.
43. Constitution of India: Article 121 and 211.
44. Constitution of India: Article 124(3).
45. Note: Inserted by the Constitution (54th Amendment Act), 1986.The salary of the CJI of the Supreme Court initially fixed in the Second Schedule was Rs.5000 and of the other judges was rs.4000.

of the Supreme Court. ThisAct is lately amended by the High Court and Supreme Court judges (Condition of services) Act,1998, raising the salary of the other judges to Rs. 30,000 p.m. and that of Chief Justice Rs. 33,000 p.m. However, in the recent past, the salaries of Judges of the Supreme Court. Their salaries have been further hiked in view of such hikes of other top officers of the Government as per 6th Pay Commission report and the cabinets' generosity to hike the salaries of the top executives viz., President, Vice- President and Governor etc. as well. Three-fold hike in case of judges (Rs. 90,000) and 1, 00,000 p.m. in case of Chief Justice.The High Court and Supreme Court judges (Condition of services)Amendment Act,2018,has raised the salary of the other judges to Rs. 2,50,000p.m. and that of Chief Justice Rs. 2,80,000.In addition, they enjoy free residential accommodation, many other perks, privileges, allowances and rights as are specified in the second schedule[46].

During their term of office, their salaries and allowances cannot be altered to their disadvantage, except in grave financial emergencies. The administrative expenses of the Court are charged on the Consolidated Fund. Evidently, their salaries and allowances compare favourably with those of judges in other courts of the world.

Fourth, although the Constitution does not provide for life tenure, the existing provision of 65 years, in effect amounts to nearly the same[47]. A retiring age of 65 is, by Indian standard, very high, considering the average span of life in India and also the average fitness of persons for work in old age. Moreover, a retired judge according to Article 128 may be reappointed a judge by the Chief Justice of India, with the consent of the President. The Judges of the Supreme Court enjoy security of tenure. They are not removable from office except by an order of the President and that also only on the ground of proved misbehaviour or incapacity, supported by a resolution adopted by a majority of total membership of each House and also by a majority of not less than 2/3 of the members of that House present and voting. A retired judge of the Court is prohibited from practicing law before any Court of authority within the territory of India. The Constitution, however, permits the appointment of a retired judge for a specialized form of work by the Government, for instance for conducting inquiries and special investigations.

Fifth, The Supreme Court is equipped with full powers to make rules for regulating its practice and procedure and to take effective steps for the enforcement of its decrees and orders. Holding the Independence of judiciary was a part of the basic structure of the Constitution to secure rule of law essential for the preservation of the democratic system[48], a Bench of three learned Judges of the Supreme Court in T.Fenu Walter v. Union of India, opined that the appointment of a sitting Judge of a High Court as Chairman,

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46. Article 125(2). See also Kuldeep Singh v. Union of India ,JT2002 (Suppl. I) SC 382.
47. Constitution of India: Article 124(2).
48. S.C. Advocates on Record v. Union of India, AIR 1994Sc 268.

President,or members of any commission or Tribunal, should be made only on rare occasions.The Court laid down broad guidelines in this respect.

In India the independence of the judiciary is not limited only from executive pressure or influence, but also from any other pressure and prejudices. It has many dimensions, including fearlessness of other power centres, economic or political. Impartiality, independence, fairness and reasonableness in decision-making are the hallmarks of the judiciary. If "impartiality" is the soul of the judiciary, "independence" is its lifeblood. Without independence, impartiality cannot thrive. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where a judge can work with absolute commitment to the cause of justice and constitutional values. Its existence depends, however, not only on philosophical, ethical or moral aspects but also upon several mundane things namely security in tenure, freedom from ordinary monetary worries, freedom from influences and pressures within (from others in the judiciary) and without (from the executive). Independence of the judiciary is a part of its basic structure. The constitutional ethos of an independent judiciary cannot be permitted to be diluted by acts of implied intervention or undue interference by the executive in the impartial administration of justice, directly or indirectly.

In ***Yogi Nath D. Bagde v. State of Maharashtra***[49], the Court observed "the Presiding officer of the court cannot act as fugitive. They have also to face sometimes quarrelsome, unscrupulous and cantankerous litigants but have to face them boldly without deviating from the right path. They are not expected to be overawed by such litigants or fall to their evil designs". Holding it imperative that the High Court should take steps to protect its honest officer by ignoring ill-concerned or motivated complaints, the Apex Court observed[50] "An independent and honest judiciary is a sine qua non for Rule of Law" and that subordinate judiciary works in the supervision of the High court and that it faces problems at the hands of unscrupulous litigants and lawyers and for them, "Judge bashing " becomes a favourable pass- time.In case the High court does not protect the hones judicial officer, the survival of the judicial system would itself be in danger.

## VII. Conclusion

Democracy is a broad concept that has taken center stage when it comes to issues of good governance. It is a concept that continues to engage the attention of all spheres of society and is explored by scholars, lawyers, economists, politicians, and the populace at large. In a democracy, citizens must have confidence that justice will be administered in a fair and impartial manner and the courts will respect the Rule of Law when making decisions. If judges do not act fairly, or leave an impression that their minds are made up before the case is heard, members of the public will lose faith in the ability of

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49. AIR 1999 SC 3734.
50. Nirmala J. Jhala v. State of Gujrat, AIR 2013SC 1513.

the justice system to resolve disputes. This can lead to citizens taking the law into their own hands, which at its worst can lead to fear and open violence. Judges make every effort to avoid conduct and situations that could undermine public confidence in their impartiality. They must not, by their words or actions, appear to have prejudged a case or to favour one of the parties involved in the cases that come before them. The Rule of Law is meaningless if citizens do not have confidence that judges approach a case with an open mind and free of ties to those involved in a case.

Judicial independence enables judges to make rulings that may be unpopular. Judging is not a popularity contest and the courts must be able to uphold the legitimate rights of individuals and minority groups regardless of the views of the majority of citizens. Judges may make rulings that outrage victims of crime, the police, politicians or lobby groups, or force governments to change policies or amend the law. It is the role of the courts to do justice and uphold the Rule of Law, not to please everyone. Each case will have a winner and a loser and, no matter what the outcome, judicial independence assures that both sides will receive a fair and impartial hearing. The symbol of justice as a blindfolded figure, balancing a set of scales, serves as a reminder that justice is achieved by weighing evidence free from internal bias and outside influences. In our system of justice, judges–and in some cases juries of average citizens–balance the scales and ensure that cases are decided fairly and impartially.

The notion of judicial independence in the contemporary world has become an important mechanism for which modern states hope in order to achieve democracy, and constitutionalism, and realize the principle of separation of powers as well as upholding the rule of law. The concepts of judicial independence, democracy, separation of powers, constitutionalism, and the rule of law are interrelated. They balance each other and secure the well-being of the people, preserve peace, and national unity, and provide an effective, efficient, transparent, accountable, and coherent government in any given state.

Judicial independence is as old as constitutionalism. Members of the Judiciary are the administrators of justice. The judges strive to ensure free and impartial administration of justice in order to provide its citizens fairness in the application of the law. The duty of judges is considered to be very pious, therefore the constitution has provided for the independence of the judiciary so that they can remain impartial to serve the constitutional goals and act fairly, reasonably, and free of any fear or favour. The problem starts when the other organs, i.e. the legislature and the executive start to interfere with them. External interference erodes the profession's piousness and curtails individuals of their rights.

The above-mentioned mechanisms,i.e. the Constitution; judicial service councils/boards/commissions; courts or tribunals; the process of appointment; and international law/conventions or institutions need to be protected and promoted by governments in order to safeguard the principle of judicial

independence and render the judiciary impartial. Also, it is important for judicial officers to preserve their honour and integrity in the eyes of the public to restore public confidence in the system, by applying the law fairly and without fear or favour. A judicial system that is controlled or influenced by the other branches of government cannot be effective or efficient in carrying out its mandate, while, on the other hand, it can be a threat to justice, the law, and good governance. After all, judicial independence is a necessity for good governance and democracy.

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# A Study on Socio-Economic Status of Women in Handicrafts Industry of Kashmir

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**Abstract**

*The handicrafts industry plays a unique role in the socioeconomic structure of Jammu and Kashmir. The industry is decentralized and highly labor intensive, employing a sizeable population in the valley while preserving its rich cultural heritage. Because handicraft activities are primarily household-based, they are a more important source of income for women than men, especially for women from low-income households. Women have always played an indispensable role in the sector, contributing directly to all activities as home-based workers. These women put in long hours to create beautiful art pieces for this industry most of which have found a foothold in the international market. However, despite their vital contributions to this craft industry in particular and the economy in general, they do not receive real recognition and value for their work. They are often vulnerable to acute exploitation and low wages. These challenges not just cripple their golden hands, but also affect the quality of living adequate for their health and well-being. The study aimed to analyse the socio-economic conditions of the women working in the handicrafts industry of Kashmir. The study was limited to the districts of Srinagar and Ganderbal and the data has been collected from 120 respondents through interview schedules using snowball sampling. The result of the study revealed that artisans are facing challenges like financial constraints, lack of access to market, poor health, meager remuneration and the absence of government support.*

**Keywords:** Handicrafts industry, Women, Low wages, Exploitation, Socio-Economic Conditions.

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## I. Introduction

Handicrafts are artisanal products produced either completely by hand or with the help of simple hand tools. Theses crafts reflect the perfection, excellence of design, and the unsurpassed sense of colour of artisans who make them. Handicraft is one of the oldest and most important branches of the Indian cottage industry. The industry constitutes a significant part of the country's unorganised sector, contributing to the overall growth of current and associated sectors in terms of revenue and employment generation. Being highly labour-intensive and decentralized, the operations of handicrafts industry are spread across the country employing millions of artisans and ancillary workers, on a full or part-time basis.

In respect of Jammu and Kashmir in particular, the handicrafts industry occupies a distinctive place and has long been the economic backbone of the region. This industry is spread all over Kashmir and is engaging a sizeable population in the valley, particularly in remote rural areas as families belonging to these areas, especially women, can easily enter this sector as an occupation since it requires minimal capital investment and infrastructural facilities.

Since the handicrafts activities are largely household-based, wherein various members of the family put in joint efforts for production process. Women artisans are prominent workforce compared to men in the sector. These women often prefer to work in the close proximity of their homes in order to manage household chores along with craft activities. The sector possesses the potential to improve the livelihood of these women workers in a socially, culturally and economically sustainable manner.

## II. Women Workers in Unorganised Sector of India

In India, 93% of the total worker force is in informal sector and one-third of that workforce comprises of women. Thus collectively, they account for 96% of the female workforce in country. It is clearly evident that the informal sector in India provides livelihood for large number of women workers. The main reason for the employment of women in such large extent in the unorganized sector is due to their weaker bargaining power, low skills, ready to work for lower wages and lack of unionization.[1]

The Government has taken various steps to improve women's participation in the labour force and quality of their employment. A number of protective provisions have been incorporated in the labour laws for equal opportunity and congenial work environment for women workers. Despite the concerted efforts of the State the economic status of women is lagging far behind their male counter parts. Indian economy is to a great extent

[1] Jalisatgi, A.M. (2022). Plight of the Women Workers in Unorganized Sector—A Growing Challenge. In: Mahajan, V., Chowdhury, A., Kaushal, U., Jariwala, N., Bong, S.A. (eds) Gender Equity: Challenges and Opportunities. Springer, Singapore. https://doi.org/10.1007/978-981-19-0460-8_8

characterized by large number of people working in unorganized sectors. A majority of women work in unorganized sectors for low wages due to low level of skills, illiteracy, ignorance and surplus labour and thus face high level of exploitation. This hampers their bargaining power for higher wages and any opportunities for further development.[2]

**III. Constitutional emphasis on social and economic justice**

The Constitutional concern of social and economic justice as an elastic continuous process is to accord justice to all section of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc are languishing and secure dignity of their person.[3] Social Justice is the principles that go into the formation of a welfare state. Themes and principles of socio economic justice are amply reflected in the Preamble to the Constitution, in Part III Fundamental Rights and in Part IV the Directive Principles of the Constitution. The Preamble, Fundamental Rights and the Directive Principles form the ethical basis for the constitutional endeavour of social engineering for the creation of an egalitarian society.

The Preamble of the Indian Constitution provides for establishment of Socialist State which aims to eliminate inequality in income, status and in standard of living by extending social security and social assistance to its citizens. According to the Supreme Court of India, the principal aim of socialism is to eliminate inequality of income and standards of life and to provide decent standard of life to working people.[4] The Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and liveable with human dignity.[5]

The Constitution of India was enshrined with the provisions in a way to ensure social security to the human beings, in particular the workmen. Articles 41, 42 and 43 in Part IV of the Constitution makes specific references to the social security measures. There are other provisions which aim at avoidance of exploitative practices that put people, especially women and children, into a situation of indignity. Various provisions enumerated in the Directive Principles of State Policy that try to assure socio-economic justices to the citizens are as follows:

Article 38 is a mandate to the state to secure a social order for the promotion of welfare of the people.

Article 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.'*

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2 R.D. Dubey, Rights of Women Workers in Unorganised Sector: Legal Issues and Challenges, INDIAN JOURNAL OF LAW AND JUSTICE, Vol. 5; No. I, P. 153-163

3 Consumer Education & Research Centre vs. Union of India, (1995) 3 SCC 42, (Para 19): AIR 1995 SC 922

4 *D.S. Nakara & Others v. Union of India AIR (1983) 1 SCC 305*.

5 Air India Statutory Crop. Vs. United Labour Union, AIR 1997 SC 654

Article 38 (2), *"The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."*

Article 39 provides for equal rights to adequate means of livelihood to all citizens and distribution of wealth and material resources to sub serve common good and prevention of concentration of wealth and means of production etc.

Article 39(f) expects the State to protect the children and youth against exploitation and against moral and material abandonment.

According to Article 41, *"The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old-age, sickness and disablement, and in other cases of undeserved want."*

As per Article 42, *"The State shall make provision for securing just and humane conditions of work and for maternity relief."*

Article 43(3) requires the State to endeavour to secure by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

Article 47 casts duty upon the State to raise the level of nutrition and the standard of living and to improve public health.

Although these provisions are not enforceable in the Courts of law, the Supreme Court of India has declared that they are nevertheless fundamental in the governance of the country and it is the duty of the State to apply them in making laws.

With the emergence of judicial activism in using fundamental rights to effectuate the spirit of Directive Principles like Articles 41, 42, and 39, provisions like Articles 14 and 21 became the source of social security measures by an interpretation that right to life includes right to livelihood.[6] In *Maneka Gandhi v. Union of India,* [7] the Supreme Court of India widened the scope of Article 21 and held that Right to Life is not merely confined to physical existence, but, it includes within its ambit the right to live with human dignity. The Apex Court in Ashok Kumar Gupta v State of U.P.[8], held that the term Social Justice is a Fundamental Rights.

Supreme Court's Emphasis on Right to Health and Medical Care as a Fundamental Right in the landmark case of *Consumer Education Research Centre*

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6 Olga Tellis vs. Bombay Municipal Corporation, AIR 1986 SC 180 and Rural Litigation and Entitlement Kendra, Dehradun v. Uttar Pradesh, AIR 1985 SC 652

7 AIR 1978 (2) SCJ. 31

8 AIR 1997 (5) SCC 201

case,[9] the Court held that right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43 48A and all related to Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person. The Court engaged in social policy formulation by invoking rights approach, international human rights norms and the philosophy of social justice.

In *Randhir Singh v. Union of India*,[10] while construing Article 14 and 16 of the Constitution in the light of the Article 39 (d) and the preamble, the Supreme Court held that the principle of 'equal pay for equal work' is to be deduced from those provisions and may be adequately applicable in unequal scales of pay based on unreasonable or irrational classification, although those drawing different scales of pay do similar work under the same employer. This case is a outlook of a new judicial trend of supplementing directive principles with fundamental rights.

In *Bhartiya Dak Mazdoor Manch vs. Union of India and ors*.[11], the Court observed that an employee engaged for the same work cannot be paid less than another who performs the same duties and responsibilities and certainly not in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Anyone who is compelled to work at a lesser wage does not do so voluntarily - he/she does so to provide food and shelter to his/her family, at the cost of his/her self-respect and dignity, at the cost of his/her self-worth, and at the cost of his/her integrity. Any act of paying less wages as compared to others similarly situated, constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation.

**Objective of the study**

- To access the socio-economic conditions prevailing among the women working in handicrafts industry in Srinagar and Ganderbal district.
- To give suitable suggestions for improving the role of women in handicrafts industry

**Methodology**

To fulfill the objectives of the study primary data has been collected from the 120 women respondents engaged in different handicraft activities in Srinagar (Urban) and Ganderbal (Rural) districts using an interview schedule method. The urban and rural category will fulfill the comparative aspect of this study. The respondents were identified using snowball sampling method. The

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9 Consumer Education and Research Society vs. Union of India and Ors, 1995 3 SCC 42; reference to ILO safety standards and the Asbestos Convention of 1986; see paragraphs 3 to 17 and extensive reference to American cases in paragraph 18.

10 AIR 1982 SC 879.

11 AIR 1988 1 SCC 122

Secondary data was collected from research journals, government publications, and other published and unpublished sources.

**Data Analysis and Interpretation**

**Table 1- Area of living of respondents**

| Area of living | Frequency | Percentage |
|---|---|---|
| Urban | 60 | 50 |
| Rural | 60 | 50 |
| Total | 120 | 100 |

Table1 shows that out of 120 respondents, 50% are from Urban area and 50% from Rural.

**Table 2- Craft associated with**

| Craft | Frequency | Percentage |
|---|---|---|
| Kani Shawl | 12 | 10 |
| Paper Machie | 10 | 8.3 |
| Ari work | 15 | 12.5 |
| Crewel Work | 13 | 10.8 |
| Sozni | 35 | 29.2 |
| Tilla Work | 15 | 12.5 |
| Willow Wicker | 20 | 16.7 |
| Total | 120 | 100 |

According to the above table majority of the respondents 29.2% are associated with Sozni handicraft. 16.7% are associated with Willow wicker, 12.5% with Tilla work, 12.5% with Ari work, 10.8% with Crewel work, 10% with Kani Shawl and 8.3% with paper machie.

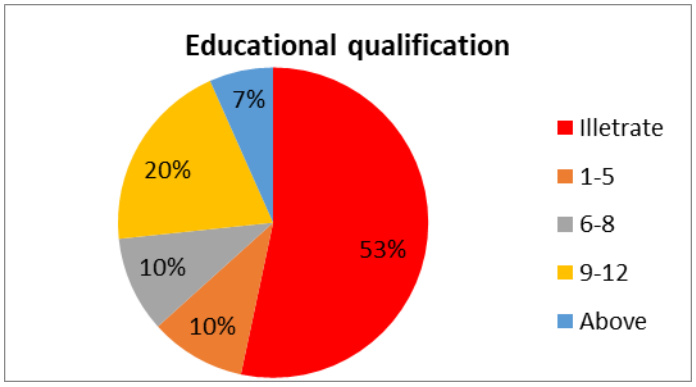
**Table 3- Age wise distribution of Female artisans**

| Age | Frequency | Percentage |
|---|---|---|
| Below 20 | 4 | 3.3 |
| 20-30 | 30 | 25 |
| 31-40 | 40 | 33.3 |
| 41-50 | 35 | 29.2 |
| 51 & Above | 11 | 9.2 |
| Total | 120 | 100 |

Looking at the above Table it is clear that 33.3% of the maximum respondents are in the age group of 31-40 years and 29.2% are in the age group

of 41-50 years. 25% are in the age group of 20-30 years, 9.2% are 51 years and above and the lowest 3.3% percent is in the below 20 age group.

**Figure 1-Educational qualification**




It is clear from the above Figure that maximum 53% of the respondents are Illiterate. While 20% have attended 9-12 years of education, 10% have attended 6-8 years and 10% have attended 1-5 years of schooling. The lowest 7% respondents have attained above 12 years of education.

**Figure 2-Type of Ration Card**

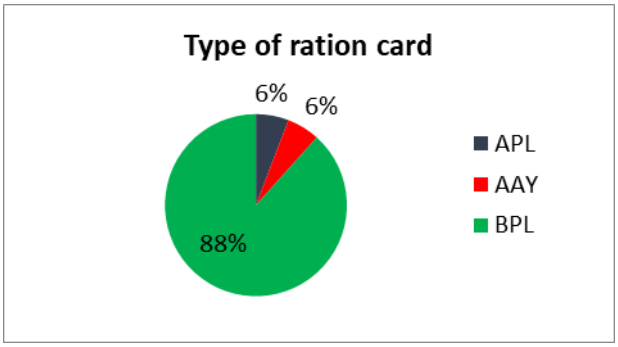
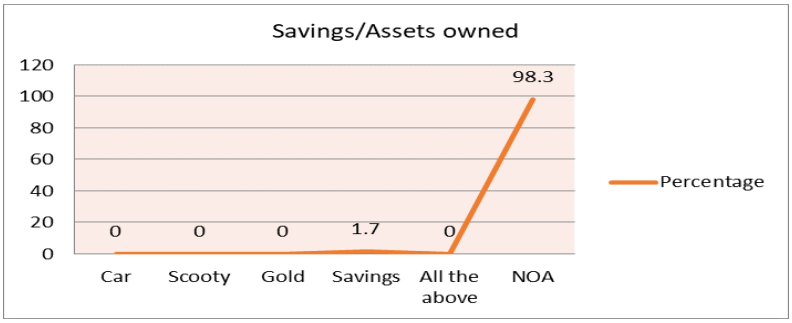


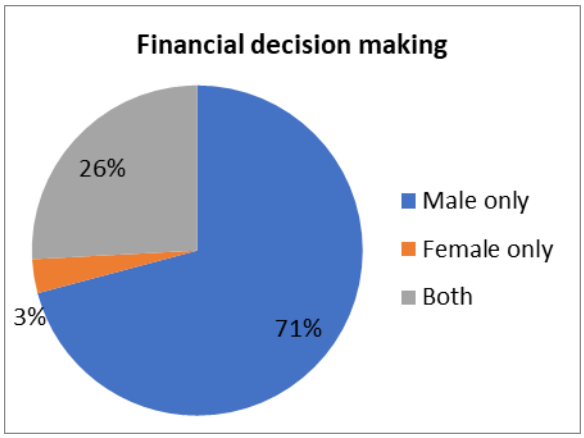

Figure 5 shows that majority of respondents 88% are BPL Ration Card holders while 6% of respondents are holding APL ration card and 6% respondents hold AAY ration cards.

**Figure 3- Savings/Assets owned**



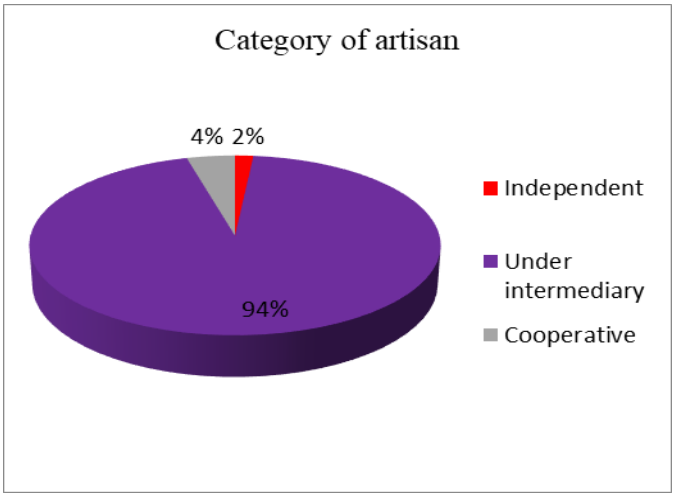
The above figure shows that 98.3% of respondents do not have any savings or assets and only 1.7% of respondents have savings.

**Figure 4- Financial decision making in the family by**



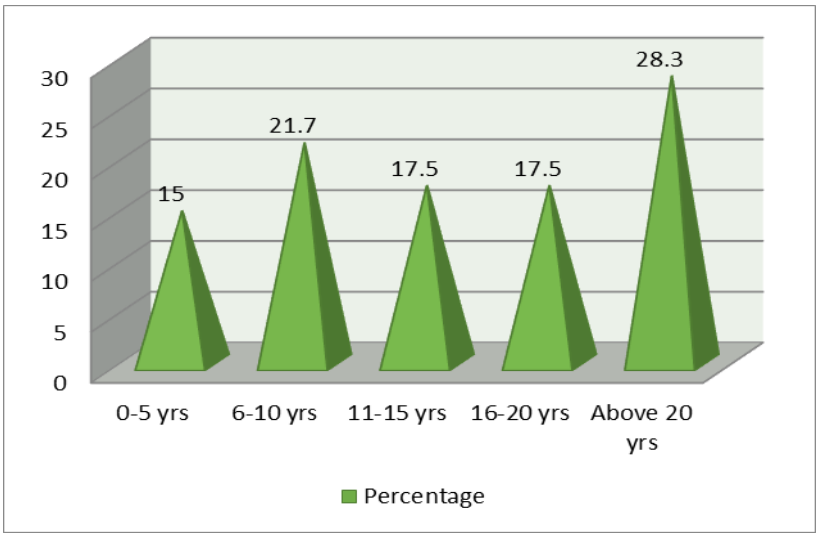

From the study of above Figure, it is known that the financial decisions in the family of maximum number of respondents 71% are taken only by male members. According to data 26% respondents take part in financial decision in the family along with men and lowest 3% respondents are female members in the family who take financial decision.

**Figure 5- Category of artisan**



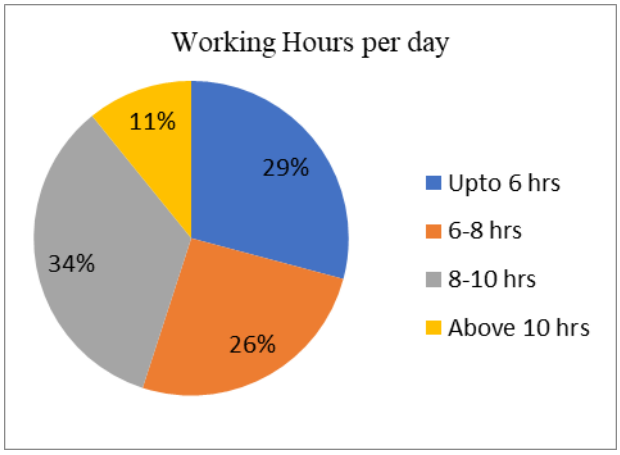

It is clear from the above Figure that maximum 94% of the respondents are working under Intermediaries. 4% of respondents are working under Cooperatives while the lowest only 2% respondents work independently.

**Figure 6- Years of work experience as artisan**



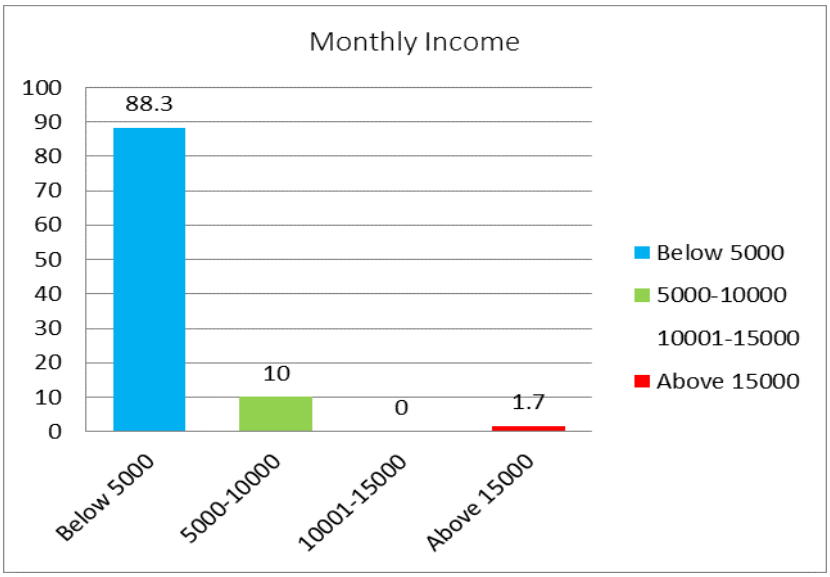

The above figure shows that maximum 28.3% respondents have work experience of above 20 years. While 21.7 % respondents have 6-10 years of work experience, 17.5% respondents have 16-20 years experience. 17.5% respondents have11-15 years work experience and the lowest 15% respondents have 0-5 years of work experience.

**Figure 7- Working Hours per day**



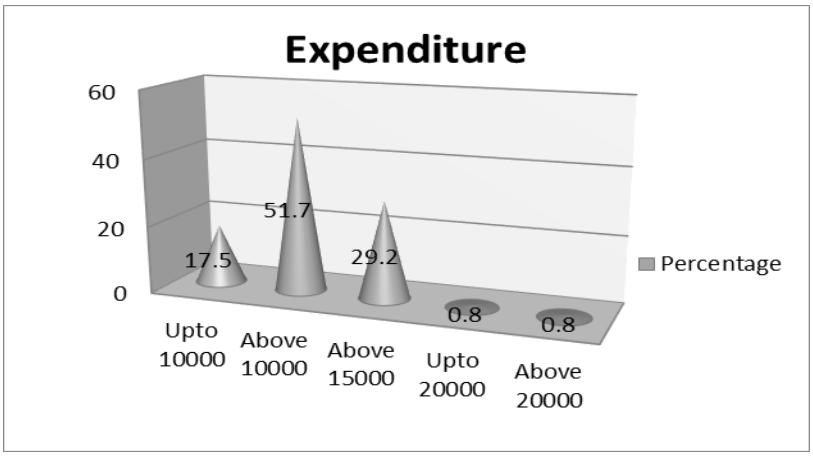

It is clear from the above figure that majority of the respondents 34% work for 8-10 hours a day while 29% respondents work daily upto 6 hours a day, 26% respondents work for 6-8 hours and 11% respondents work above 10 hours a day.

**Figure 8-Average Monthly Income**



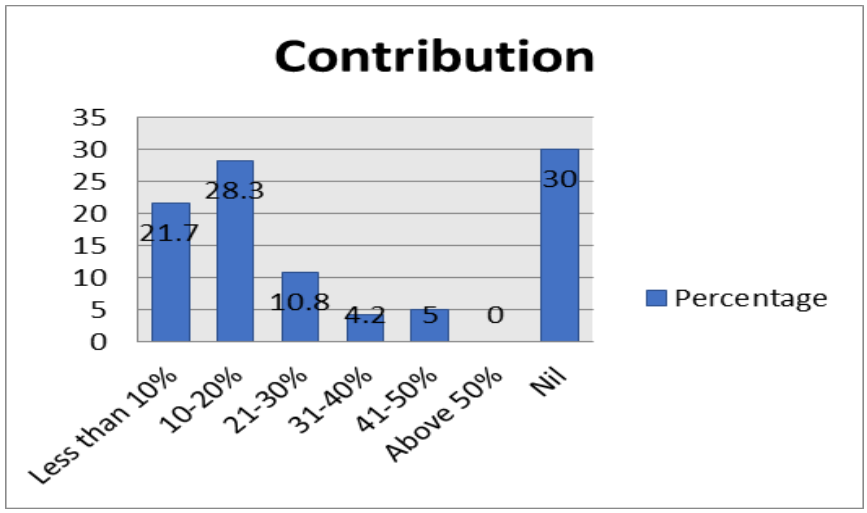

From the above data it becomes clear that maximum of 88.3% respondents earn less than 5000 rupees in a month. 10% of respondents have monthly income between 5000-10000 and only 1.7% respondent's monthly income is more than 15000.s

**Figure 9- Average Monthly Family Expenditure**



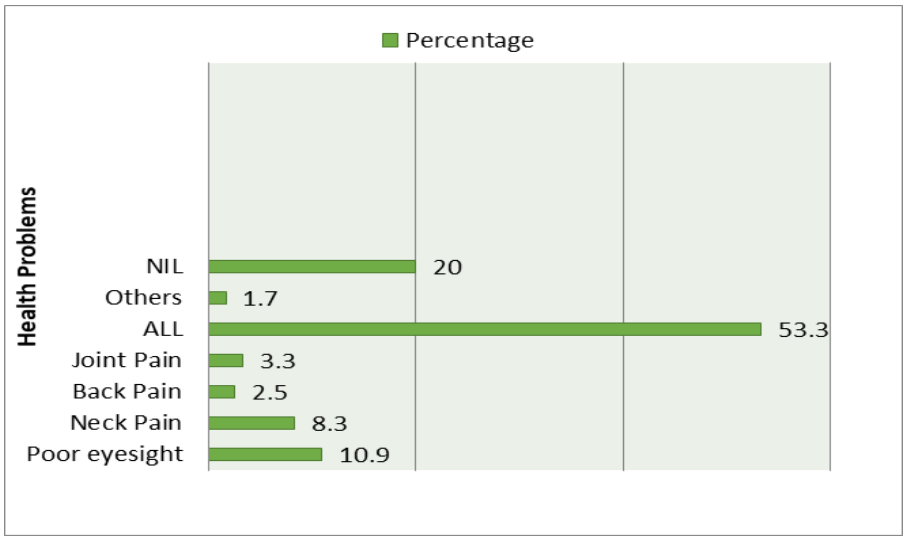

It is clear from the observation of the above data that the maximum 51.7% of respondent's monthly family expenditure is above 10000. For 29.2% respondents monthly family expenditure is above 15000 and for 17.5 respondents it is upto 10000. For 0.8% respondents monthly family expenditure is upto 20000 and for only 0.8% respondents it is above 20000.

**Figure 10-Contribution in family expenditure**




It is clear from the above data that majority of the respondents 30% do not contribute to their family expenditures. 28.3% respondents contribution from 10-20%, 21.7% respondents contribute less than 10% and 10.8% respondents contribute from 21-30%. While 4.2% respondents contribute 31-40% to their monthly family expenditures, the lowest of only 5% contribute from 41-50% and no respondent contributes above 50%.

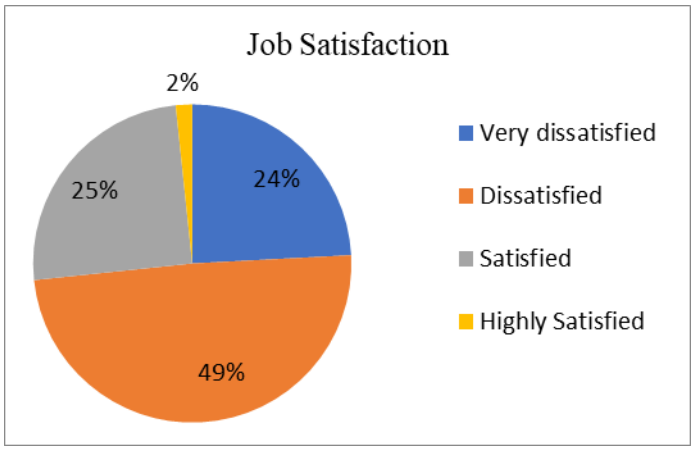
**Figure 11- Health problems due to occupation**




According to the above data, only 20% of respondents have no complaint of any health problem due to their occupation. While majority of respondents 53.3% have all the health problems. The most common health problem is Poor eyesight which 10.9 % of the artisans have; 8.3 % have Neck pain, 3.3% with joint pain; 1.7 % complain about other illness like headache,

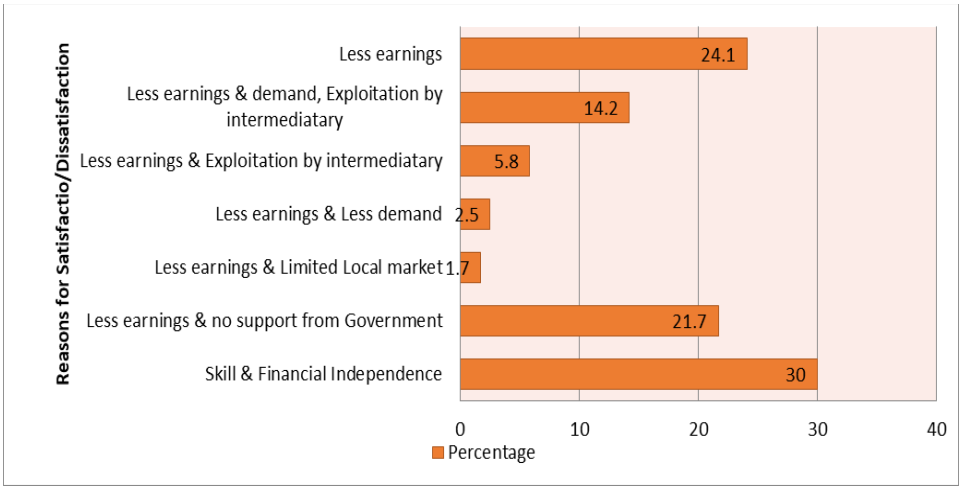
nerve problem etc. and interestingly about 28% have no complaint about their health.

**Figure 12-Job Satisfactions of Women Artisans**




Studying the above Figure, it is revealed that 49% respondents are dissatisfied with their job, 24% respondents are very dissatisfied and 25% respondents show their satisfaction with their job and the lowest only 2% respondents are highly satisfied.

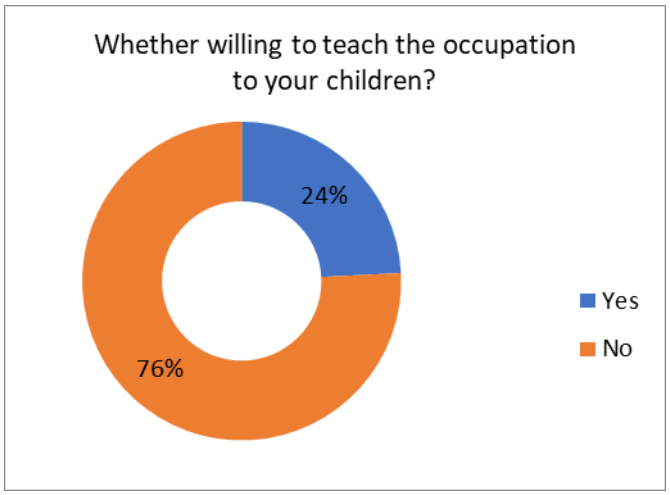
**Figure 13- Reasons for Job Satisfaction/Dissatisfaction**




Based on the above Figure, it is reflected that 30% respondents consider that handicrafts give them skill and financial independence. Majority of respondents are dissatisfied with their wok 24.1% respondents consider only less earnings as reason for their dissatisfaction whereas 21.7% are dissatisfied due to less earnings & lack of government support, 14.2% respondents are dissatisfied due to less earnings, less demand, & exploitation by intermediaries. 5.8% respondents are dissatisfied due to less earnings & exploitation by intermediaries, 2.5% respondents due to less earnings & less demand, and the

lowest 1.7% respondents due to less earnings & limited local market for final handcrafted products.

**Figure 14- Whether willing to teach the occupation to children**




The above figure makes it clear that majority of the respondents 76% are not willing to teach the craft to their children and only 24% of respondents are willing to teach.

**Findings**

1. In both the districts of Srinagar (Urban) and Ganderbal (Rural), women artisans are actively participating in handicrafts activities besides doing their household chores.
2. Majority of the respondents 29.2% are associated with Sozni handicraft both in Urban and Rural areas. In urban areas women also work with Ari work, Crewel work, Kani Shawl and with paper machie. In rural areas more women are also associated with Willow wicker and Tilla work.
3. Women of all ages from below 20 years to above 50 years work with handicrafts in both the areas. However, mostly middle-aged (31-40 years) women are engaged in the industry. Lowest 3% respondents are in the age group of below 20 years which shows that the participation of young generation is low in the industry.
4. 27% respondents are unmarried while 67% respondents are married. This shows the high participation of married women in industry.
5. Majority of respondents 53% are illiterate. It shows the literacy rate among women artisans is very low.
6. Majority of respondents 88% are holding Below Poverty Line (BPL) ration cards and 98% women artisans do not possess any assets/ have any savings. This shows that these women come from the lower and lower-middle-class families.

7. While for majority of 53.3% women artisans the craft is hereditary, yet a significant number of theses artisans 94% work under intermediaries.
8. Despite of years of working experience, the craft has failed to lift the standard of living of these women artisans particularly in rural areas.
9. Women artisans working under cooperatives in urban areas have fixed working hours (upto 6 hours a day) and are equally and regularly paid. Their monthly income lies between 5000-10000. Rest majority of artisans in both urban and rural areas work for long hours on daily basis under intermediaries (34% for 8-10, 26% for 6-8 hours and 11% work above 10 hours a day). Their daily wages are irregular and are below the minimum rate of wages that did not meet their daily needs of life. Average monthly income of these artisans is very low (less than 5000 rupees a month) when compared to their hours of work. This clearly shows the exploitation of these women in the handicrafts industry.
10. The study revealed that 27% respondents are satisfied with their job as consider that handicrafts give them skill and financial independence. Yet majority of respondents are dissatisfied due to less earnings, less demand, lack of government support, exploitation by intermediaries & limited local market for final handcrafted products. As a result majority of the respondents 76% are not willing to teach the craft to their children and only 24% of respondents are willing to teach and instead want them to find some more lucrative jobs.

**Conclusion**

Handicraft occupies a vital place in Kashmir's economy in shaping the socioeconomic fabric of society. This study indicates that though the Handicraft industry offers a massive amount of employment opportunities for women in both urban and rural areas, it has not yet succeeded in uplifting the socio-economic status of women artisans. These skilled women toil hard to earn their living. Though the work they put in earns a name for Kashmir and hefty sums to the traders, these women and their families are not able to make their ends meet. They do not receive any support from the government. Majority of women are totally dependent on the middlemen on the finances, raw material and buying the finished products and are unaware about the market value of our product. Being unorganised and informal, there are no chances of fair wages or value for their work. By providing fewer wage than they deserve these women artisans face exploitation the hands of intermediaries which continues to marginalize these artisans. Despite skilled, they have failed to lift their lives to modern living standard and are often vulnerable to social or economic eventualities. This scenario has created dissatisfaction among women artisans majority of who are not willing to teach these heritage crafts to their life and family.

**Suggestions**

1. Awareness among women artisans concerning innovative designs and current market demands, process of registration and its benefits, government welfare schemes for artisans particularly in rural areas.
2. Vocational training institutes for women artisans for their education, awareness & engagement and direct access to the mainstream markets to eliminate intermediaries from supply chain.
3. The government should help in marketing of the products.
4. Government should make efforts towards organization of the handicrafts industry through cooperatives.
5. Government should increase its reach out to artisans particularly in rural areas and timely survey should be conducted to check the socio-economic conditions of artisans.
6. The various financial policies like loans should be available easily at lower interest rates so that a skilled person can setup his own unit easily.
7. Policy initiative regarding wages or salaries and rates of various products as artisans can earn their actual and uniform earning.
8. The younger generations should be encouraged and inspired through sensitization programmes to take up selfemployment opportunity in the field of handicrafts.

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# The Surrogacy Regulation Act, 2021: An Appraisal

**Mehak Hameed***

**Abstract**

*Surrogacy has emerged as a critical component of assisted reproductive technologies, offering hope to couples facing infertility issues. India, once a global hub for surrogacy, witnessed significant legal reforms . This research article delves into the intricate landscape of surrogacy in India, focusing on the legal framework that governs this reproductive practice. This article provides a comprehensive analysis of surrogacy in India, focusing on the legal framework, eligibility criteria, rights of a surrogate .*

**Keywords**: Surrogacy, Legal Provisions, Surrogacy (Regulation) Act 2021, Altruistic Surrogacy, Assisted Reproductive Technology, Informed Consent, India.

**Introduction :**

Surrogacy means that a woman becomes pregnant and gives birth to a child with the intention of giving this child to another person or couple, commonly referred to as the 'intended' or 'commissioning' parents.[1] A surrogate mother is the woman who carries and gives birth to the child, and the intended parent is the person who is going to raise the child. The definition by the European Society for Human Reproduction and Embryology (ESHRE)[2] does not state the sexuality of the intended parents. Surrogacy can take one of two main forms: gestational surrogacy (high-tech surrogacy), where the surrogate is the birth mother but not the genetic mother of the child; or traditional surrogacy (low-tech surrogacy), where the surrogate is both the birth mother and the genetic mother. Gestational surrogacy relies on in vitro fertilization (IVF) of gametes that can originate from the intended parent(s) and/or a third party (or parties) to be transferred into the surrogate uterus. The surrogate woman who will carry the pregnancy enters into an agreement that she will give the offspring to the intended parent(s). In gestational surrogacy,

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1 Shenfield F, Pennings G, Cohen J, Devroey P, de Wert G, Tarlatzis B; ESHRE Task Force on Ethics and Law. ESHRE Task Force on Ethics and Law 10: surrogacy. Hum Reprod. 2005.

the woman who carries the child (the gestational carrier) has no genetic connection to the child.[3] Traditional surrogacy can take the form of a natural pregnancy, a pregnancy obtained by intra-uterine insemination, or a pregnancy accomplished by IVF. The surrogate provides the ovum, and the sperm is provided either by the intended father or by a third-party donor. The fertilized egg is the surrogate's own, making her the genetic mother of the child that will be born.

Surrogacy may be commercial or altruistic, depending upon whether the surrogate receives economic remuneration for her pregnancy. In commercial surrogacy, the surrogate is usually recruited through an agency, reimbursed for medical costs and paid for her gestational services. With altruistic surrogacy, the surrogate is found through friends, acquaintances or advertisement. She may be reimbursed for medical costs directly related to the pregnancy and for loss of income due to the pregnancy.[4]

**Laws of surrogacy in India**

It was back in 2002 that Commercial Surrogacy was legalized in India, which led to an increased demand from the couples who were infertile and could not produce their child biologically. The market of surrogacy was increasing rapidly as the demand from the national and the foreign couples. India is now the surrogacy capital in the world because of proper framework and legislation. The ICMR (Indian Council for Medical Research) drafted a set of guidelines in the year 2005. but the same did not have any Act to govern and regulate the same. In the case "Baby Manjhi Yamada vs Union of India"[5] the matter related to "obtaining travel documents for a baby of Japanese parents who was conceived and born in India by means of commercial surrogacy."As per the Supreme Court commercial surrogacy is legal in India. This judgment in turn coincided with the formulation of the "Assisted Reproductive Technology Bill" in the year 2008. But, no steps had been taken to formulate the Bill of the year 2008 before Parliament and hence, promoted the "Law Commission of India to raise up the issue of surrogacy" for further research. Then in the year 2009 Law Commission of India submitted the report on legislation for controlling of surrey and solving issues pertaining the same, In the year 2010 ICMR revised the guidelines and put forward a legal agreement between intended parents, surrogate mother and ART clinic before initiating the process of surrogacy. The ministry of health and family welfare further

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3 Zegers-Hochschild F, Adamson GD, de Mouzon J, et al; International Committee for Monitoring Assisted Reproductive Technology; World Health Organization. International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary on ART terminology, 2009. Hum Reprod. 2009;24:2683-7

4 FIGO Committee for Ethical Aspects of Human Reproduction and Women's Health. FIGO Committee Report: Surrogacy. Int J Gynaecol Obst.

5 Chinmoy Pradip Sharma, Surrogacy Laws in India – Past Experiences and Emerging Facets,Barand Bench , https://www.barandbench.com/columns/surrogacy-laws-in-india-past-experiences-andemerging-facets

submitted suggestions to revise the draft of Act Bill. In 2012, a study was conducted by the UN revealed "the economic scale of the Indian Surrogacy Industry which came out to be 400 million dollars a year with more than 3000 fertility clinics all over the country." Where India has led to earn the sobriquet "world capital for surrogacy", Anand in Gujarat known as "Cradle of the World". The Government of India put a complete ban on commercial surrogacy and also barred the foreign nationals, NRI's from participating in 2015. "The Union Cabinet approved the Surrogacy Regulation Bill in 2016" which allows only Indian married infertile couples to avail surrogacy services. The Bill that was passed in 2016 was different from the Bill of 2014 in many areas. However, it still continued to elude the law of surrogacy and the Bill wasn't introduced in the Rajya Sabha. Subsequently, an exact replica of the Bill of 2016 was re-introduced in the Lok Sabha termed Surrogacy (Regulation) Bill, 2019 and was passed on 25th December 2021 by the then Union Cabinet to protect the women who become an easy prey for the couples due to their financial position.

**The Surrogacy Regulation Act, 2021 and its key provisions**

This Act describes surrogacy as a procedure whereby a couple who is unable to conceive naturally owing to infertility or any other illness may apply, subject to specific conditions. It is only allowed for altruistic purposes and for couples who have proven illnesses or infertility. In an altruistic surrogacy, the surrogate receives no compensation other than the medical expenses incurred on her during the pregnancy and an insurance coverage for a period of thirty-six months covering postpartum delivery complications.

**Some of the key Provisions of the Act:**

**Prohibition of Commercial Surrogacy:**

The Act strictly prohibits commercial surrogacy. It allows only altruistic surrogacy, where a woman can act as a surrogate for a close relative, without monetary compensation except for medical expenses. This clause seeks to stop surrogacy from being commercialized and to stop vulnerable women from being exploited.[6]

**Eligibility Criteria:**

The Act lays down eligibility criteria for intending parents, surrogate mothers, and medical practitioners involved in surrogacy arrangements. The surrogate has to be between 25 and 35 years of age, and have given birth to a child of her own. Any woman cannot be a surrogate mother more than once in her entire lifetime. and as far as the intending parents are concerned the services of surrogacy are only available to Indian couples who have been married for at least five years and are not able to conceive naturally. Females should be between the ages of 25 and 50, and males should be between the ages of 26 and 55. Additionally, they must not already have any biological, surrogate, or adopted children. The pair also has to have a "certificate of

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6 Section 4 clause 2 sub clause b &c of surrogacy regulation act 2021

eligibility" that have been issued by the relevant authorities provided in the act.[7]

**Regulatory Authority Establishment:**

The Act establishes the National Surrogacy Board and State Surrogacy Boards to regulate surrogacy clinics, ensuring compliance with the law. These boards have the authority to grant or revoke licenses and monitor the clinics' activities.[8]

**Registration and Certification:**

In accordance with the Act, surrogacy and ART clinics are required to register and undergo certification. This is meant to guarantee that appropriate supervision is applied to the medical procedures related to surrogacy.[9]

**Rights of a child born out of surrogacy:**

The Act provides that a child born out of surrogacy shall be deemed to be biological child of the intending parents and is entitled to all the inheritance and any other rights and privileges which are available to natural child. And also the Act lays down that the intending couple shall not abandon the child born out of surrogacy for any reason for example any medical condition, genetic defect or sex of a child and also in case of conception of more than one child.[10]

**Rights of a surrogate:**

The Act mandates a written surrogacy agreement between the surrogate mother and the intended couple, with provisions for medical and financial responsibilities, and the surrogate's informed consent. The act also gives a right to a surrogate mother to have an option of withdrawing her consent for surrogacy before the implantation of human embryo in her womb. And also the Act provides that no procedure for surrogacy can be conducted until all the side effects and after effects of the surrogacy are not explained to the surrogate mother.[11]

**Ethical Considerations:**

The Act navigates ethical concerns surrounding surrogacy, balancing the rights and well-being of surrogates, intended parents, and the child. It addresses issues of commodification, exploitation, and consent, striving to strike a delicate balance.

**Offenses and penalties :**

Any couple who adopts a child through commercial surrogacy faces a five-year prison sentence and a fine of up to 50,000 rupees, as stipulated by this Act. Furthermore, the fine rises to 1 lakh and the term is prolonged to 10 years if the same offence is committed more than once. A maximum sentence of ten years in prison and a fine of Rs. Ten lakh are available for any person, group, or

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7 Section 4 surrogacy (regulation) Act, 2021
8 Section 17 of surrogacy (regulation) act 2021
9 Section 11 of surrogacy(regulation ) act 2021
10 Section 7&8 of surrogacy (regulation),Act 2021
11 Section 6 surrogacy (regulation) Act, 2021

clinic discovered to be involved in the exploitation of surrogate mothers or children born via surrogacy.[12]

**Conclusion:**

In conclusion, with the passing of the Surrogacy Regulation Act in 2021, surrogacy in India has changed from an uncontrolled, commercial sector to a more regulated, altruistic model. This development is a reflection of the government's attempts to strike a balance between the moral and health implications of surrogacy and to safeguard the rights and dignity of both surrogate mothers and the children born through surrogacy. However, its success will depend on effective enforcement and the ability to balance these regulations with the genuine needs of intending parents. As surrogacy continues to evolve, the legal landscape will also need to adapt to ensure that it remains ethical, transparent, and just.

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[12] Riya Mourya, "Legal Regulation of Surrogacy in India," Indian Journal of Law and Legal Research 5 (2023): 1-14