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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.

Contents

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Human Rights Awareness with Respect to Health of Tribal Communities in Kashmir: A Socio-Legal Perspective

Dr Shafia Jan*

Abstract

Human rights are important as they protect us from exploitation, discrimination, unfair treatment. It promotes and develops all the values among the people which are necessary for living a peaceful life. The present study explores the level of human rights awareness in general and health rights in particular among the tribal communities in Kashmir valley. Thus a cross sectional study was conducted on a total of 100 subjects (Gujjar and Bakerwal) communities of Kashmir valley including 56% men and 54% women with mean age of 39.60 ± 20.19 years. Respondents were interviewed about their perception towards human rights and were at the same time examined for their general health and Nutritional status. Majority of the respondents were found to have good awareness about Right to freedom and equality in dignity (78%), right to education (90%), Right to marriage and protection of family being (87%) and Freedom of belief and religion(96%). Moreover the results of the study revealed that a good percentage of the respondents i.e. 34% were underweight, 18% were found to be obese and 39% of the respondents suffered from hypertension.

Keywords : Human rights, Nutrition, diet, health, obesity, prevalence.

Introduction

Jammu and Kashmir is home to large number of tribal communities, who have settled down in almost every corner of the region. Presently state of Jammu and Kashmir region is inhabited by a large population of tribes and constitutes about 11.9 per cent of the total population.[1] Certain tribal communities in India are recognized as **Scheduled Tribes (STs)** under **Article 342 of the** Constitution of India.[2] Tribes often experience passive indifference

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1 Census of India. *Registrar General of Census.* New Delhi: GOI; 2011. Available from: wwwcensusindiagovin .

2 Constitution of India, article 342 available at Article 342: Scheduled Tribes - Constitution of India visited on 17-12-23

that may take the form of exclusion from educational opportunities, social participation, and access to their own land. Majority tribes live under poverty line and follow many simple occupations based on simple technology. Hence there per capita income is much lesser than the Indian average. [3]

Human rights includes all the fundamental freedoms and those rights which an individual can claim because he/she is a human being. It encompasses civil, political, economic, social, cultural and educational rights which are utmost necessary to live as a human being.[4] India through its parliament passed landmark legislation namely the protection of human rights act on December 18, 1993. The Protection of Human Rights Act defines **"Human Rights"** as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the **International Covenants and enforceable by courts in India.** It applies to the whole of India and in the case of J & K, it applies matters pertaining to Union List and the Concurrent list only. **Indian Constitution** incorporated several provisions of **human rights in Indian Constitution. Articles 14 to 18 of the Constitution** guarantee the **right to equality to every citizen of India. Article 19** deals with freedom of speech and expression. In case of violation of fundamental human rights the citizens can move to the Supreme Court under Article 32 and High Courts under Article 226. Freedom of religion in India is a fundamental right guaranteed by Article 25-28 of the constitution of India[5]. Further article 29 and 30 of the constitution deal with the protection of interests of minorities.[6] The only way to assure our commitment to human dignity and to promote world peace and prosperity is through human rights education, that is human rights and values must become an integral part of the entire educational system[7]

In India, there are numerous ways of safeguarding human rights related to health. India is a signatory of the **Article 25** of the **Universal Declaration of Human Rights (1948)** by the **United Nations** that grants the right to a standard of living adequate for the health and well-being to humans including food, clothing, housing and medical care and necessary social services. Article 21 of the Constitution of India guarantees a fundamental right to life & personal liberty. The right to health is inherent to a life with dignity. Articles 38, 39, 42, 43, & 47[8] put the obligation on the state in order to

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3 Haseena, V.A. (2015).Poverty and livelihood problems among the scheduled tribes in Kerala-A S tudy on Attappady. Journal of Poverty, Investment and Development, 14(1), ISSN 2422-846X

4 Lahon,S. (2022). Human rights awareness of college students: a study in collges of kamrup district of Assam. International Journal of Food and Nutritional Sciences , Vol.11, Iss.12.

5 Suresh, Devath. Human Rights in India (2019), Available at SSRN: https://ssrn.com/abstract=3768205

6 Supra note 2 at p-12

7 Sharma, M. K. (2000). Education and human rights. New Delhi: Regency

8 Supra note 2 at p- 17, 18

ensure the effective realization of the **right to health.** Recently, Government of India has introduced the National Health Bill, 2009. The bill recognizes health as a fundamental human right and states that every citizen has a right to the highest attainable standard of health and well-being. The constitution of India, under Articles 14, 15, recognizes the right to life as a fundamental right and places obligations on the Government to ensure protection and fulfillment of the right to health for all, without any inequality or discrimination. [9] All Rights available to the Citizens of India, enshrined in the Constitution or any law of the Government are equally available to the Scheduled Tribes also. Scheduled Tribes being backward and isolated from the rest of the population are not able to exercise their rights. The tribes have been suffering from various forms of social discrimination and political isolation[10] but there is significant scarcity of data on this population. The Constitution of India has several provisions to prevent discrimination of Scheduled Tribes and to protect their rights They are entitled to special provisions and safeguards for their social, economic, educational, and political development. Their interests are safeguarded by various laws and policies such as the **5th and 6gh Scheduled areas,** Forest Rights Act 2006[11], and the **PESA Act 1996**[12]**.** They also have representation in the **Parliament and State Legislatures through reserved seats.** As per Article 338-A of the Constitution of India, the National Commission for Scheduled Tribes has been set-up to, inter-alia, monitor all matters relating to the safeguards provided for the Scheduled Tribes under the Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards; and to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Tribes. Government has adopted a multi-pronged strategy for overall development of tribal people in the country, which includes support for health. Major part of infrastructure development and provision of basic amenities in tribal areas in the country is carried out through various schemes/ programmes of concerned Central Ministries and the State Governments , while the Ministry of Tribal Affairs provides additive to these initiatives by way of plugging critical gaps. One important scheme being Special Central Assistance to Tribal Sub Scheme (SCA to TSS) (hitherto known as SCA to Tribal Sub Plan (TSP). It is 100% grant from Government of India whose objective is to bridge the gap between Scheduled Tribes (ST)

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9 Thomas SV. The National Health Bill 2009 and afterwards. Ann Indian Acad Neurol. 2009 Apr;12(2):79. doi: 10.4103/0972-2327.53074. PMID: 20142851; PMCID: PMC2812745h

10 Sharma JC. Nair V, editor. Nutritional status, health, growth and development of a central Indian tribe with special reference to environment and genetic risk factors. *Anthropology of tribal health and medicine in forest environment, N KIR-TADS.* 1995:55–60

11 Forest Rights Act (2006) available at Ministry of Tribal Affairs - Government of India, visited on 17-12-23

12 **PESA Act 1996** available at PESAAct1996_0.pdf (mha.gov.in) visited on 17-12-23

population and others by providing support for health, education, sanitation, water supply etc. In 2018, an expert committee was constituted jointly by the ministry of health and family welfare and ministry of tribal affairs which after releasing the first report on tribal health in India recommended implementation of Universal health assurance **under the National Health Policy (2017)**[13] in tribal areas, Utilize **Aarogya Mitra,** trained **local tribal youth, and** ASHA workers for primary care in tribal communities with support from the gramsabha. Despite all these efforts made to improve the socio-economic conditions of tribes it is still a fact that the life situations of Scheduled Tribes (s) have improved only marginally. Moreover the prevalence of diseases among tribals such as undernutrition, obesity, and cardiovascular disease socio-cultural transformations among individuals from vulnerable groups introduce epidemiological transition, with an increase in the risks. There is a widely held belief that Indian tribes are undernourished and unaffected by lifestyle-related illnesses. However, the global paradox of obesity, under nutrition, and hypertension is currently being caused by the change in lifestyle and eating habits. According to a study[14], a number of nutritional problems are faced by tribals. Tribal groups in India have a high rate of under nutrition.[15] [16] [17] [18] According to the Indian National Family and Health Survey conducted in 2005–2006, under nutrition was prevalent among the tribes at a rate of 47–48% [19]. A low body mass index (BMI) has been linked to a higher risk of death and morbidity from chronic diseases among Asian populations, according to earlier research.[20] Another study carried out by the National Nutrition Monitoring Bureau (NNMB) in 2009 shows that 2-3% Indian tribes were overweight. Except for this study no comprehensive study on the health status of the tribes in relation to lifestyle changes exists. The High Level Committee appointed by the Prime Minister on Socio-Economic, Health and Educational Status of Tribal Communities of India, Ministry of Tribal Affairs, Govt. of India, identified Malnutrition, low

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13 **National Health Policy (2017)** available at 9147562941489753121.pdf (mohfw.gov.in) visited on 7-2-23

14 Kumar, M., Pathak, V., Ruikar, M (2020).Tribal population in India: A public health challenge and road to future J Family Med Prim Care, 9(2): 508–512

15 Gopalan, C. (1992). Nutrition in developmental transition in South-East Asia. Regional Health Paper, SEARO, No. 21. World Health Organization, Regional Office for South-East Asia. New Delhi, 1992.

16 Kar, G.C, Sarangi, .L, Nanda, A.(2007). A Study of Food Related Nutritional Deficiency in KBK Districts of Orissa. Planning Commission. Govt. of India

17 National Institute of Nutrition (2004). Indian Council of Medical Research. Annual Report. Hyderabad: ICMR.

18 National Institute of Nutrition. (2000). Indian Council of Medical Research. Special

19 Arnold, F., Parasuraman, S., Arokiasamy, P., Kothari, M. (2009). Nutrition in India. National Family and Health Survey 2005–06 (NFHS-3). Indian Institute of Population Science, Deonar, Mumbai.

20 WHO. (2000). The Asia-Pacific perspective: Redefining Obesity and its Treatment. Hong Kong: World Health Organization, Internaional Obesity Task Force, International Association for the Studyof Obesity. 2000

birth weight (LBW) and diarrhoea as major health issues.[21] Thus an attempt was made to study tribal community of Kashmir with special reference to disease pattern (assess the triple burden of non-communicable diseases such as obesity, under nutrition and hypertension). The main objective of the present investigation was to study the human rights awareness in tribal communities of Kashmir with various aspects of human rights such as right to life, security, religion, expression, education, etc as no study has been conducted out so far on tribals awareness on human rights in India.

Methodology

A total of 100 tribal respondents (Gujjar & Bakerwal), aged 20-70 years were recruited for the study. Subjects consisted of 56 males and 44 females. Systematic random sampling method was used for selection of households and respondents from two districts of Kashmir i.e. Srinagar and Ganderbal. The data was collected using survey method. A pretested validated questionnaire was administered on respondents which included recording of socio-demographic characteristics (age, gender, type of family, house type, income, educational status, family history), medical facts, assessment of Anthro-pometric parameters etc. A detailed interview was conducted by the trained researchers using the above mentioned pre tested questionnaire. A Human Rights Awareness section(HRAQ) was separately developed by the investigator. The HRAQ consists of twenty items with yes-no choice and respondents had to choose the correct alternative. For assessing the prevalence of obesity among the respondents , first weight and height measurements were taken, BMI (body mass index) was then calculated which was obtained by dividing weight in kgs by height in metre square of a person. After the computation of BMI, respondents were classified into overweight and obese catagories according to the standards given by WHO for Asian population [22] BP was recorded in all the respondents in a sitting position using mercury sphygmomanometer (HgS), Hypertension was defined as BP ≥140 mmHg systolic or ≥90 mmHg diastolic BP. This is in accordance with the Joint National Committee (JNC) V criteria.[23] A higher cut-off of BP ≥160 mmHg systolic or 100 mmHg diastolic BP was used to identify those with severe hypertension. The data analysis was carried out on the basis of objectives of the study. In each table the items were arranged in the order followed in the questionnaire. Later the results were interpreted and conclusions were drawn.

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21 Ministry of Tribal Affairs, Government of India. *Report of the high level committee on socio-economic, health and educational status of tribal communities of India*. New Delhi: MoHFW; 2014. pp. 243–7.)

22 WHO (2004). Expert consultation Appropriate Body -Mass Index for Asian population and its implications for policy and intervention strategies. *Lancet,* 363(9403), 157-163.

23 Chobanian AV, Bakris GL, Black HR, et al. Seventh report of the Joint National Committee on prevention, detection, evaluation, and treatment of high blood pressure. *Hypertension*. 2003;42:1206–1252.

Result and discussion

The demographic profile of respondents in the sample represents 56% of the respondents were males and 44% were females. As far as educational backgrounds are concerned, majority of the respondents were literates (92%). The majority of respondents (51% of them) belonged to the over-40 and under-50 age groups, while 29% belong to the over-31 and under-40 age groups. This suggests that the respondents were very mature and understood the concepts of human rights Occupation wise distribution of the respondents showed that majority of the respondents (44%) were labourers, 43% were housewives, 5% were shepherds and only 2% were farmers. In terms of family income majority of the respondents (80%) had a total family income of less than 10,000 per month (Table 4.1).

Table 4.2 shows the awareness of human rights among tribal men and women. Majority of the males were having good awareness about Right to freedom and equality in dignity and right (78%), Freedom from discrimination (62%), Right to life, liberty and security of person (63%), however less than half of the respondents were found to have awareness about Right to freedom from torture or degrading treatment (40%), Right to freedom from arbitrary arrest or exile (44%), Freedom from interference with privacy, including home, famil (34%). As evident from the table, they were well aware about Educational Rights (90% males & 60% females). Further most of the tribal men compared to women (87% & 43% respectively) were aware about Right to marriage and protection of family being their cultural rights. Table shows that most of the male respondents were aware about Freedom of belief, religion, opinion and information (90%). Most of the male respondents were aware about Right to social security (65%) but lacked knowledge about Responsibility to community essential to free and full development of the individual (37%).

Table 1: Distribution of Respondents As Per Socio-Demographic Characteristics

Variables		No.	%
	30-40	29	29
	40-50	51	51.0
	50-60	11	11.0
	60-70	9	9.0
Gender	Male	56	56.0
	Female	44	44.0
Educational background	Illiterate	08	08
	Literate	92	92
Occupation	Farmer	2	2.0
	Shepherd	5	5.0
	Labour class	44	44.0
	Housewife	43	43.0
	Others	6	6.0
Total Monthly family income(rupees/ month)	<10,000	93	80.0
	10,000-20,000	7	17.0
	30,000 & above	0	0

Table 2 Awareness of Tribal men and women about Human rights

		Men(%)	Women(%)
Civil Rights			
	Right to information	52	43
1	Right to freedom and equality in dignity and right	78	44
2	Freedom from discrimination	62	58
3	Right to life, liberty and security of person	63	37
4	Right to to freedom from slavery and servitude	55	25
5	Right to freedom from torture or degrading treatment	40	30
6	Right to freedom from arbitrary arrest or exile	44	26
7	Right to Freedom from interference with privacy, including home, family	34	36
8	Right to a nationality and freedom to change it	66	36
9	Right to freedom of movement and residence in one's own country and to leave and return at will	70	33
Educational Rights			
10	Right to Education	90	60
Cultural rights			
11	Right to rest and Leisure	84	46
12	Right to participate in the cultural life of the community	92	45
13	Right to marriage and protection of family being	87	43
14	Right to work and fair pay for work	78	22
15	Right to adequate standard of living for health and well-being	65	35
Political rights			
16	Freedom of opinion and information	68	32
17	Right to participate in government and in free elections and to equal access to public service	66	36
18	Freedom of belief and religion	96	44
Social Rights			
19	Right to social security	69	31
20	Responsibility to community essential to free and full development of the individual	37	65

Table 3: Important source of knowledge on Human Rights

Important source of knowledge on Human Rights	Men	Women
Workplace	15%	10%
Newspaper/Magazine	65%	10%
TV/Radio/Internet	71%	50%
Other	19%	15%

Source of information on human rights showed that most respondents identified the TV/Radio/Internet (71% in men & 50% in women) as the most important source of knowledge on human rights followed by respondents (65% in men,10% in women) who considered newspapers/magazines to be an important source in creating human rights awareness. Some respondents (19% men & 15% women) reported all the three not as important sources of creating awareness regarding human rights among them. They reported their personal discussions with family members as most important in creating human rights awareness among them (Table 4.3). Prevalence of non communicable diseases among tribals was assessed using WHO classification of BMI (Body mass Index) for Asians.[24] It showed that majority of the tribals (43%) belonged to normal catagory, 34% of the respondents were underweight, 18% were overweight and only 5% of the respondents were found to be obese (Table 4.4). In a similar study conducted in Kashmir in 2017[25] it was found that 90.7% respondents were underweight and 8.8% respondents were found to be normal, in contrast our results show that 34.0% respondents were underweight and 43% respondents were found to be normal thus our study results are in contrast to this study. Our results are however consistent to the results of a previous Indian study in which it was revealed that prevalence of overweight and obesity among tribals were 25.1% and 2.0% respectively among the tribal respondents. Furthermore prevalence of hypertension among the sample studied, revealed that among males as well as females, majority suffered from moderate hypertension(42.9% males and 50% females), (i.e. diastolic blood pressure = 99-109 mmHg) only 28.6% males and 12.5% females had mild hypertension (Diastolic pressure= 90-99 mmHg) and 28.6% & 37.5% of males and females were suffering from severe hypertension i.e diastolic pressure of > 110 mmHg. Mean systolic and diastolic BP were 134.25 ± 15.05 mmHg and 98.45 ± 9.49 mmHg, respectively among men and in women 140± 25.08 mmHg and 96± 8.7 mmHg.

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24 WHO. (2000). The Asia-Pacific perspective: Redefining Obesity and its Treatment. Hong Kong: World Health Organization, International Obesity Task Force, International Association for the Studyof Obesity. 2000

25 Hamid, T & Vaida, N. (2017). Astudy on nutritional status of scheduled tribe (Gujjar and Bakerwal) women of Kashmir. International Journal of Home Science, 3(3): 203-205

Table 4.4: Overweight and obesity Prevalence among respondents

Nutritional Status	BMI (wt in kgs/Ht m²)	Gender					
		Male		Female		Overall	
		No.	%	No.	%	No.	%
Underweight	<18.5	20	35.7	14	31.8	34	34.0
Normal Range	18.5 – 24.9	24	42.9	19	43.2	43	43.0
Overweight	25.0 – 29.9	9	16.1	9	20.5	18	18.0
Obese	≥30.0	3	5.4	2	4.5	5	5.0
		56	100.0	44	100.0	100	100.0

X^2 = .406; df=3; p-value =0.939

*WHO (World Health Organization) 2000. Physical Status: The Use and Interpretation of Anthropometry. Report of a WHO Expert Committee, Geneva: World Health Organization, *Technical Report Series,* 854: 1-452.Report of a WHO Expert Consultation, Geneva, 8-11 December 2008

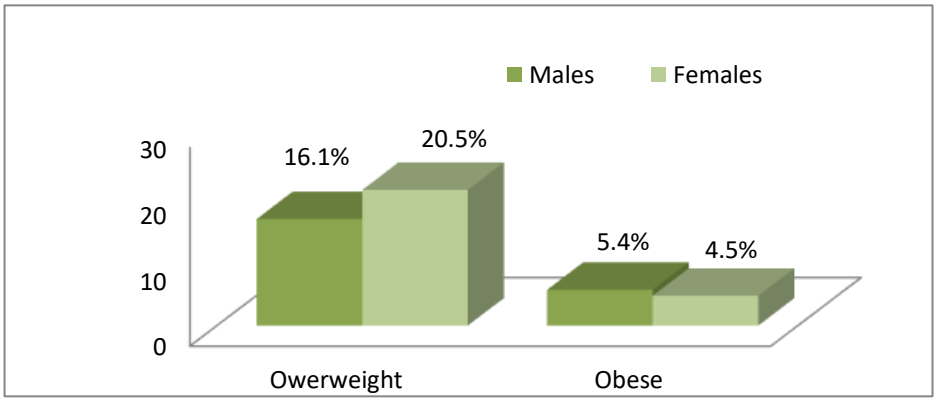

Figure 4.1 : Prevalence of Overweight and Obesity among Tribals

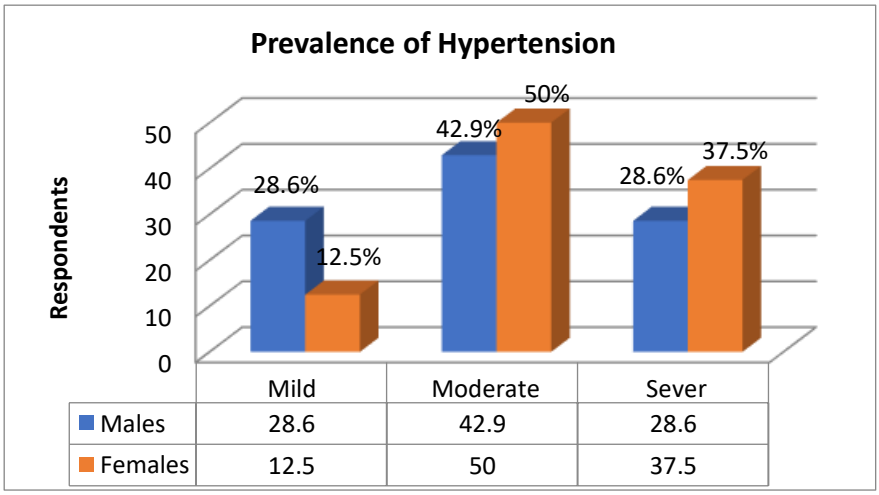

Figure 4.2: Prevalence of Hypertension according to severity

Table 4.5 Mean blood pressure (BP) values among the respondents

BP (mmHg)	Systolic BP (mean)	Diastolic BP (mean)
Males	124.25 ± 15.05	83.45 ± 9.49
Females	140± 25.08	96± 8.7

Conclusion and Recommendation

Based on the discussion and interpretation of the results of the study on the awareness of human rights among the tribal communities of Kashmir, it was found that overall they possessed a sound knowledge of human rights. It was discovered that there was a significant difference between men and women in their level of Human Rights awareness, as men were more aware of human rights than women. The reason for such results is mainly due to their social exposure. On the basis of the findings it is also noticed that mass media is also playing and important role in spreading knowledge regarding human rights among the people of Kashmir valley. The study emphasize the need to foster human rights training package for individuals of Kashmir. An effective human rights training program is important to guarantee the legitimate scattering and schooling of basic rights among individuals of Kashmir. It's vital to deal with human rights seriously for social unification and significant improvement of society. Community-based organizations like *Mahila Mandals* and self-help groups (SHGs) could be trained to administer the government schemes among tribal population.

The findings of the study also revealed a high prevalence of hypertension among the studied Indian tribes, with a high prevalence of under nutrition and overweight among women especially. The prevalence of obesity was similar among men and women. The increased prevalence of overweight along with high under nutrition and hypertension indicated that they are at a higher risk of CVD-related vulnerabilities. This alarming trend of an increasing prevalence of overweight/obesity, under nutrition, and hypertension as observed among indigenous populations of Kashmir, emphasizes the incorporation of a specific health management policy. Moreover nutrition education programmes need to be implemented for creating awareness regarding the relationship of diet and diseases.

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Relevance and Due Diligence of Intellectual Property Rights in Corporate restructuring through Mergers and Acquisitions: A Study with Special Reference to Intellectual Property Laws in India

Dr. Arneet Kaur*

Abstract

Corporation restructuring through mergers and acquisitions (M&As) has enabled thousands of organizations around the world to respond more quickly and effectively to new opportunities and unexpected pressures, thereby reestablishing their competitive advantage. The consensus is that when companies combine their core competencies through M&As, both tangible and intangible assets of the Target Company are part of the cash flows to the Acquiring Company, and the most significant of these assets is the Intellectual Property. Intellectual property (IP) is fast becoming the biggest incentive for mergers and acquisitions. M&As involving Intellectual Property Rights (IPRs) are complex transactions involving lot of complexities and intricacies. With careful planning and proper due diligence, businesses can smoothly navigate and successfully overcome the various challenges presented. Further, for an Indian company undergoing M&A transaction whether domestic or cross-border or a foreign company acquiring an Indian company, a detailed knowledge of various Intellectual Property laws in India is must.

Keywords: Mergers, Acquisitions, Intellectual Property Rights, Valuation, Due Diligence, Assignment.

1. Introduction

Intense competition, rapid technological change, major corporate scandals and rising stock market volatility have increased the burden on companies to deliver superior performance and value for their shareholders. In the modern 'winner takes all' economy, companies that fail to meet this

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challenge will face the certain loss of their independence, if not extinction. Corporation restructuring has enabled thousands of organizations around the world to respond more quickly and effectively to new opportunities and unexpected pressures, thereby re-establishing their competitive advantage.[1] In the late twentieth and beginning of twenty first century, corporate restructuring by means of mergers, acquisitions or amalgamations have become a major force and anthem of new financial and economic environment across the globe.[2]

Mergers and Acquisitions (M&As) restructuring and corporate control activities represent a new industrial force that will lead our country and other economics that practice these arts to new heights of creativity and productivity.[3] A merger is said to occur when two or more companies combine into one company. In a merger, one or more companies may merge with an existing company or they may merge to form a new company.[4] Whereas an acquisition is the purchase by one company of a controlling interest in the share capital of another existing company. The consensus is that when companies combine their core competencies through M&As, both tangible and intangible assets of the Target Company are part of the cash flows to the Acquiring Company, and the most significant of these assets is the Intellectual Property.[5] In today's idea economy where knowledge is power, the Intellectual property assets have acquired immense importance. The world is caught in frenzy to capture and harvest the Intellectual Property assets of the target or amalgamating company in case of acquisition or merger. Intellectual property (IP) is fast becoming the biggest incentive for mergers and acquisitions. Indeed they have become the driving force behind many mergers and acquisitions in the past few years.

Technology-driven M&A transactions can be the corridors to introducing innovations, increasing the speed of new product introductions, and decreasing the cost of R&D through a more efficient allocation of resources to areas of greatest competency. A recent example of the same is found in CleanTech Biofuels Inc.'s acquisition of the sophisticated technology of Biomass North America Licensing, Inc. through a strategic merger to convert municipal solid waste into cellulosic biomass and generate electricity.[6]

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1 Kawalpreet Kaur, *Impact of Takeovers: A Step Ahead or Behind*,1(2005)(Unpublished Project Report, Department of Commerce, Business & Management, GNDU.

2 D.N.S. Kumar, "Strategic Acquisition through Value Based Management: A Case Analysis", XXIV *Abhigyan*, . 42(2007).

3 J. Fred Weston et al., *Mergers, Restructuring and Corporate Control*, . xxv (Prentice Hall, Englewood Cliffs, New Jersey, 1990).

4 I.M. Pandey, *Financial Management*, 672 (Vikas Publishing House (P.) Ltd., New Delhi, 2007).

5 Kelvin King, "The Value of Intellectual Property, Intangible Assets And Goodwill", 7 *JIPR* 245 (2002).

6 Mandavi Singh, "Intellectual Property: The Dominant Force in Future Commercial Transactions comprising Mergers and Acquisitions" , 2 *IJIPL* 182 (2009).

IBM recently acquired Daksh eServices, the third-largest Indian call centre and back-office service provider, which has revenues of $60 million, for $150 million. IBM thus not only gained a core competency, but also Daksh's copyrighted software codes and related intellectual property.[7] Similarly, Microsoft's hostile Acquisition of Yahoo in 2008 at USD 45 billion is more an acquisition of intellectual property than any tangible assets or human resources.[8]

Small, medium as well as large size businesses can add significant value and revenue by exploiting the full potential of their valuable intangible rights as in the case of Microsoft and Sun Microsystems. That's why, in the context of increasing importance of intellectual property, valuation and due diligence (the process of confirming and investigating the status of Intellectual Property Assets) has become increasingly important in M&A deals. Mergers and Acquisitions involving Intellectual Property Rights (IPRs) are complex transactions involving lot of complexities and intricacies. With careful planning and proper due diligence, businesses can smoothly navigate and successfully overcome the various challenges presented.

Therefore, considering the above scenario, for the success of an M&A transaction, due diligence of IP assets acquire immense importance. Further, for an Indian company undergoing M&A transaction whether domestic or cross-border or a foreign company acquiring an Indian company, a detailed knowledge of various Intellectual Property laws in India is must. Therefore, this paper will focus on due diligence of Intellectual Property Rights with special emphasis on the legal mechanism for transfer of IPRs in India.

2. Relevance and Significance of Intellectual Property Assets in Mergers and Acquisitions

In earlier times, the concept of property meant something tangible. As time went by, property created by the scope of one's intellect became what is known as intellectual property.[9] Intellectual property is often the corporation's biggest asset. Indeed, in the 'new economy' brand names-that is trademarks, service marks and patents-are equally important as the goods and services of the business in creating a competitive advantage. The patents which embody the inventions incorporated in a company's products are also critical in protecting the patents holder rights to exclude others from marketing a particular product.[10] For example in 2012, Apple won a major patent litigation

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7 "IBM to Acquire Daksh eServices", *The Hindu*, Apr. 8, 2004.

8 H. Moore , "Market Reaction: Microsoft's Offer Looks Like a Knockout", *The Wall Street Journal*, Feb. 1, 2008 as cited in Mandavi Singh, "Intellectual Property: The Dominant Force in Future Commercial Transactions comprising Mergers and Acquisitions" , 2 *IJIPL* 182 (2009).

9 V.C. Mathews, "Indian Law and the Importance of IPR", available at *http://www.lawisgreek.com/ indian-law-and-importance-ipr,* (visited on Nov. 21, 2012) .

10 Jeanne Hamburg, "Intellectual Property Aspects of Mergers and Acquisitions", available at *http://www.nmnlaw.com* (visited on May15, 2008).

against Samsung as Samsung had infringed on Apple's intellectual property and had to pay at least $119.6 million in damages to Apple. The Samsung was found guilty by the jury for infringing Apple's utility patents as well as the design patent (iphone's array of icons across the board). The jury found that some Samsung smart phones and tablets violate Apple's patents.

Smith and Parr have calculated the following percentages of intangible assets for the, following companies: Johnson and Johnson (87.9 percent) Proctor and Gamble (88.5 percent), Merck (93.5 percent), Microsoft (97.8 percent) and Yahoo (98.9 percent).[11] The intellectual property of Gillette is 76.3 percent.[12] All these facts clearly demonstrate the immense value and critical nature of intangible assets for effective participation in the evolving knowledge economy.[13] It should come as no surprise that intellectual property often plays an important role in the sale or purchase of a business. As, when Rowntree, the UK chocolate manufacturer was acquired by the Swiss Confectionery and food giant Nestle at a price more than double the market value, it was due to the intellectual property rights of Rowntree. Such is their importance that they can double the value of a business.

Intellectual Property Rights now form a significant proportion of company assets due to modern innovative techniques as well as recent technological advancements. The importance of intangible assets has created an urgent need to value these assets in many contexts including intellectual property management, mergers and acquisitions, sales, corporate takeovers, joint ventures and licensing.[14]

3. Intellectual Property Due Diligence in Mergers and Acquisitions

A due diligence is an investigation or audit of a potential investment or entity with a certain level of care so as to ascertain its viability-commercial, financial, taxation and legal. It is a way of preventing unnecessary hassles to either party involved in a transaction.[15] It is an exercise performed by the companies to assess the potential of their IP assets and also impart comprehensive knowledge of the actual value and further assess the risk of a company's intangible assets.[16] If the due diligence of IP assets is not conducted properly it can result in undervalue or overvalue of the assets which can defeat

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11 Ted Hagelin, "A New Method to Value Intellectual Property", 30 AIPLA Q.J. 353, as quoted in Tahir Ashraf Siddique, "Pertinent Intellectual Property Issues in Mergers and Acquisitions: An Analysis", 3*CLJ 30(* 2011).

12 Karnika Seth, "Intellectual Property Due Diligence in Mergers and Acquisitions" available at *www.seth-associates.com/wp-context/uploads/%20property/%20due %diligence* (visited on March 4, 2012).

13 B. Lev, "Sharpening the Intangibles Edge", *HBR* 111 *(* 2004).

14 Amit Kumar and Arvind Giriraj, "Mergers and Acquisition Transactions: Examining the Role and Relevance of Intellectual Property", 1 *CLJ* 81 (2010).

15 Sudheendhra Putty, "Corporate Due Diligence-An Analysis", 89 *SCL 29 (*2009).

16 Anmol Mishra, " Role of Intellectual Property Acquisition or Merger" available at *http://www.legalserviceindia.com/legal/article-2693-role-of-intellectual-property-in-an-acquisition-or-merger.html (*visited on August 16, 2020).

the very purpose of acquisition of IP assets in the first place. IP due diligence is the investigation to know the worth of the company's intellectual property. It is a process of the audit to assess the quality and quantity of intellectual property of a company or business. Intellectual due diligence is often conducted during the merger and acquisition or can be carried out by a company on its IP assets in preparation for a transaction for sale of a business, or for acquiring any major license.

Although the prospects of conducting a due diligence may seem daunting, the procedure is extremely useful and can yield very profitable results for the purchaser. The need and importance of IP due diligence in M&A activity cannot be overstated. The Volkswagen story is an excellent example of the same.

Volkswagen's 1998 acquisition of Rolls Royce provides an excellent rationale for doing Intellectual Property Due Diligence (IPDD) and for doing it early. Volkswagen bought Rolls-Royce Motor Cars, the company that makes both the Rolls and the Bentley, from Vickers, but apparently forgot to do the IPDD. Volkswagen paid more than US $700 million for the designs and manufacturing facilities, but when the deal was said and done, Volkswagen could not use the famous Rolls-Royce name on its new luxury cars. Instead, BMW bought the Rolls-Royce trademarks from the actual owner, Rolls-Royce PLC, the aircraft company, for a mere US$65 million, and eventually BMW ended up making the famous car, instead of Volkswagen. The moral of the Volkswagen story is that, even thought IP is critical to many deals, the IPDD often receives scant or hasty attention and the omission can be costly. It's far better to perform the diligence early enough in the negotiations to be able to use any identified problems in the target company IP assets and to be able to negotiate a lower price.[17] A detailed investigation into a business's intellectual property from the beginning of an M&A transaction is critical as many transactions like Volkswagen (mentioned above) are adversely affected by a failure to consider and address intellectual property issues from the outset.

This situation clearly highlights the dangers that may await those who engage in transactions significantly impacted by intellectual property without taking the time or effort to undertake due diligence into that intellectual property. As a result of above factors and the increasing value of intellectual property assets in today's high technology society, intellectual property matters have become an important aspect of a traditional due diligence study.

4. Steps in conducting due diligence

Due diligence involves asking questions, interviewing people with knowledge about relevant maters, obtaining and reviewing relevant

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17 Tahir Ashraf Siddique, "Pertinent Intellectual Property Issues in Mergers and Acquisitions: An Analysis", 3 *CLJ* 30 (2011).

documents, and obtaining information from independent sources.[18] Each intellectual property due diligence investigation should be tailored to fit the specific transaction. The due diligence of IP assets should involve the following steps:

i) ***Understanding the Nature of the Transaction and Business:*** It is critical to assess the nature of the business and potential transaction as only by understanding the strategic business objectives of the company, the due diligence team can direct its efforts to identify those issues that may be material to the transaction and work to resolve those issues in a manner that help the company attain its business goals. The nature of the transaction and the companies involved affects the amount of intellectual property due diligence that is appropriate under the circumstances. For example, a start-up computer software company will typically require more emphasis on intellectual property than a manufacturer of a well established commodity.[19]

ii) ***Determine IP Ownerships:*** An important aspect of the due diligence process is confirming that the target company owns or has valid licenses for all intellectual property and technology that is used in the target company's business. This is done by reviewing documents relating to ownership of registered intellectual property and the agreements with third parties pursuant to which the target company is granted the right to use such third parties intellectual property or technology.[20]

Another closely related case that underscores the need to accurately determine value and IP ownership is the Google-Motorola acquisition. In 2011, Google purchased Motorola's mobile phone business for US$ 12.5 billion. It based its decision to purchase on the manufacturer's patent portfolio of around 17,000 patents. To the surprise of the technology market, Google sold the business to Lenovo after only two years, although it retained most of the patents in order to defend its overall Android ecosystem. In an interview with Forbes, Don Harrison, Google's head of mergers and acquisitions, stated that despite the sale of Motorola to Lenovo at a lower price, Google still came out on top.[21] Google paid less than $3.5 billion for Motorola's patent portfolio, which it retained after the sale. Google wanted to acquire the 17000 patents

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18 Edward A. Meilman and James W. Brady, "Due Diligence in Business Transactions Involving Intellectual Property Assets", *Intellectual Property Today* 20 (2003).

19 *Ibid.*

20 Morgan Lewis, "Intellectual Property Issues", available at *http://www.morganlewis.com/pubs/MandAprimer-IPissues-ENG/pdf,* (visited on Nov. 21, 2012).

21 Yetunde Okojie, "Nigeria: The Importance of IP Due Diligence In Mergers And Acquisitions", available at *https://www.mondaq.com/nigeria/patent/740668/the-importance-of-ip-due-diligence-in-mergers-and-acquisitions,* visited on August 21, 2020.

from Motorola and was not interested in retaining the company and hence it sold Motorola to Lenovo.

iii) ***Infringement Issues:*** The issue of infringement should also be addressed. The target company should fully disclose potential infringement issues to the purchasing entity whether they have been resolved or are pending. They need to be disclosed as IP infringement litigation particularly patent infringement litigation is very expensive and can take many years to resolve.[22]

iv) ***Intellectual Property Licensing Agreements:*** For IP agreements pursuant to which the target company receives a license to use a third party's intellectual property or technology ,the acquiring company should confirm that the scope of the license is broad enough to cover all current and anticipated future uses of the licensed intellectual property or technology (including the right to make modification, if applicable), contains reasonable indemnification provisions (ideally with those obligations excluded from any limitations on the licensor's potential liability), and contains ownership provisions allocating ownership of any permitted modification.[23] This will ascertain whether the company's licenses are of sufficient breadth to cover future use or modification of the technology.

v) ***Confirmation of Company's Right to Use:*** In addition to determining what intellectual property assets are held by the business itself, it is also important to explore the 'right-to-use' question. It is not always guaranteed that a holder of a patent has the right to make, use or sell its own patented product or service. A competitor may be quietly pursuing patents, trademarks or copyrights on products or services that are under parallel development by all businesses in a market niche.[24] So before acquiring a company, make sure that the target possesses the right to use the technology.

vi) ***Employee's Issues:*** In the absence of a contract, ownership of inventions (whether or not patentable) initially vests in the inventor. Therefore, the acquiring company should confirm that the target company's employees and contractors who are the inventors have executed written agreements assigning ownership of all intellectual property and technology developed by them to the target company.

vii) ***Essential Disclosures and Refrain from Proceeding without Relevant Information:*** While undertaking M& A transactions, the due diligence

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22 Morgan Lewis, "Intellectual Property Issues", available at *http://www.morganlewis.com/pubs/MandAprimer-IPissues-ENG/pdf* (visited on Nov 21,2012).

23 *Ibid.*

24 Trushil Vora and Shashank Manish, "Intellectual Property Rights in Mergers and Acquisitions", available at m *http://www.indialawjournal.com/volume3/issue2/article_by_trushilshashank.html* (visited on April24, 2010).

process should ensure that essential disclosures are made by the target company and one should not proceed without relevant information. A good example is the Daiichi–Ranbaxy deal. Japanese drug firm Daiichi Sankyo in June 2008 acquired the majority stake of more than 52.5 percent in Ranbaxy for over Rs. 15000 crore ($ 4.5 billion). . It was later discovered that a 2004 self-assessment report meant for the company's internal use, showed how the company was misrepresenting data and the company director, Malvinder Singh was aware of this information. Ranbaxy did not reveal the internal report, or its contents, to Daiichi at the time of the 2013 deal, which was a sign of bad faith. In 2013, Daiichi filed an arbitration case against Ranbaxy in Singapore. The firm had accused the Singh brothers of concealment and misrepresentation of relevant facts. Daiichi claimed that they would not have paid any price for the Ranbaxy shares, had they been aware of the self-assessment report. The former owners of Ranbaxy Laboratories Ltd., were ordered by a Singapore arbitration tribunal to pay $385 million to Japanese pharma company Daiichi Sankyo Co. Ltd., which had bought the firm in 2008.[25]

viii) ***Valuation of Intellectual Property Assets:*** Intellectual property valuation helps in arriving at the correct and accurate price and evaluating the real worth of the target company in a M&A deal. The valuation report of Intellectual Property also shows as to how the value has been worked out elaborating all assumptions which provides the real insight and is of great value to the acquirer. In order to utilize the IP asset to its full extent, value determination of an asset is the first and foremost thing that should be undertaken. It helps to speculate the profits which can be earned if the asset is acquired and further facilitates the other processes such as financial reporting, licensing and franchising, optimizing taxation policies, making any investment in research and development etc.[26]

To sum up, we can say that a detailed investigation into a business's intellectual property from the beginning of an M&A transaction is of utmost importance. Many transactions are adversely affected by a failure to consider and address intellectual property issues from the outset.[27] A due diligence study of IP rights before M&A provides critical information on the ownership of these assets, ensuring that those assets are valid and free from any defects or encumbrances and can be validly transferred by the target company. It enables the buyer to make an informed decision about the potential transaction and

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25 Yetunde Okojie, "Nigeria: The Importance of IP Due Diligence In Mergers And Acquisitions", available at *https://www.mondaq.com/nigeria/patent/740668/the-importance-of-ip-due-diligence-in-mergers-and-acquisitions*(visited on August 21, 2020).

26 Anmol Mishra, " Role of Intellectual Property Acquisition or Merger" available at *http://www.legalserviceindia.com/legal/article-2693-role-of-intellectual-property-in-an-acquisition-or-merger.html (*visited on August 16, 2020) .

27 *Supra* note 17 at. 37.

removal of any weaknesses so that the transaction can lead to fulfilment of the client's ultimate business goals. The above-mentioned due diligence issues become more complex and multifarious in cross-border mergers and acquisitions. Importantly, intellectual property rights have more impact on merger activity in industries that are more intellectual capital-intensive, and when the target country has weaker intellectual property rights protection than the acquirer country. Therefore, in case of cross-border mergers, the IP due diligence needs to be more intensive.

5. Due Diligence of Intellectual Property Assets in Mergers and Acquisitions with Respect to Indian Laws

In this era of mergers, acquisitions and reconstruction of corporate entities, the management, protection and preservation of Intellectual Property Rights related with patents, trademarks, copyrights and industrial designs have acquired enormous significance in Indian Business and Industry. In an increasing fashion value and importance of Intellectual Property Rights are the driving force behind national and international mergers in India.[28]

It is a common experience that companies and corporate entities do not give much importance to the portfolio management of their Intellectual Property Rights. If IPRs are not taken care of, then many precious and valuable Intellectual Property Rights can be lost due to failure to renew or non-prosecution of applications or proceedings. In the above scenario of due diligence of Intellectual Property Rights, before M&As, acquire great significance and particularly when there is merger and acquisition of companies, also resulting in transfer and realignment of Intellectual Property of these companies in India. While conducting due diligence of IP, it is imperative to find out the status of various Intellectual Property Rights like patents, trademarks, copyright, industrial design etc held by a company.

5.1 Patents: As compared to other types of intellectual property, patents are among the most valuable, costly and difficult to obtain. A patent is defined by the US Patent and Trademark Office as "the grant of a property right to the inventor, providing the owner the right to exclude others from making, using, offering for sale, selling, or importing the invention."[29] Superiority and prosperity of USA in all squares of technological and industrial area can be attributed to its strong and vibrant patent regime.

A patent gives its owner the right to exclude others from practicing the invention. Accordingly, the fact that the target company has patented its product is not an indicator that it is free to make and sell that product. The prudent acquirer may undertake a 'right to use' study, wherein a search is made for extant patents that might impact the most important new products

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28 Vijay Pal Dalmia, "Intellectual Property and Mergers and Acquisition", 1 *Manupatra Newsline 3(2006).*

29 "The Importance of Intellectual Property Valuation and Protection", available at *http://usa.marsh. com/NewsInsights/Thought-Leadership/Article/ID/5228/The-Importance-of-Intellectual-Property-Valuation-and-Protection.aspx* (visited on November 24, 2012).

(or services) of the target company. However, even a thorough right to use study cannot guarantee freedom from patent problems, because the patent offices are required to maintain patent applications in secrecy generally (at least for initial 12 to 18 months), and there is in general no way to acquire information about these patent applications.[30]

Still, if the seller's patents are important to its business and are used to enforce the seller's rights against its competitors, the seller's patents and patent applications should be carefully reviewed by the buyer's patent attorneys to evaluate their strength. Although an issued patent is presumed to be valid, many patents are found to be invalid, when challenged and defending a suit challenging the validity of the patent can be very expensive.[31]

Patent applications are filed in the name of the inventor. If an assignment from the inventor to the seller is not recorded with Controller of Patents, the inventor is presumed to be the owner. To avoid ownership issues, the buyer should ensure that all assignments have been obtained and that all of the seller's employees promptly execute invention assignment agreements.[32] The transferee company is required to apply to the Controller of Patents in writing for the registration of patents in its name. In a merger or acquisition transaction, the acquiring company must check the assignment records of the Controller of Patents or the Appropriate Foreign Patent Office in case of cross-border mergers and acquisitions. These due diligence studies must be conducted as regards the patents of the target company so that we can correctly value them as well as the target company in a M&A transaction.

Transfer of Patent Rights in India: A patent is recognized as a species of property and can be transferred from the original patentee to any other person.[33] A patent can be transferred from the original patentee to any other person by assignment or by grant of license in a merger or acquisition transaction. Assignment means the transfer by a party of all of its rights or interest in the property.[34] A license is a permission to make, use or exercise the patented invention which would otherwise be illegal to do so. In license, the ownership of patent remains with patentee, mere partial use is permitted.[35] Therefore, acquiring company should see that it gets the assignment of IPR's as compared to license. That's why, it's rightly said that

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30 "When Deals Involve Intellectual Property: Due Diligence into IP Rights is Essential", available at *http://www.whitecase.com/publications/detail.aspx?publication=224,* visited on October 3, 2012.

31 Louis R. Dienes and Troy Gould PC, "Intellectual Property Issues in Mergers and Acquisitions", *Bloomberg Law Reports-Mergers and Acquisitions,* Vol. 4, No. 21, available at *http://www.bloom berglawreports.com* (visited on October 4, 2012) .

32 *Ibid*.

33 P. Narayanan, *Intellectual Property Law* 59 (Eastern Law House, Kolkata, 2002).

34 As defined in Black's Law Dictionary, Quoted in M.K. Bhandhari, *Law Relating Intellectual Property Rights* 114(Central Law Publications, Allahabad, 2010).

35 *Id.* at 115.

in the event of merger or acquisition, the acquiring party should obtain equitable and record ownership of patents or at the very least, acquire the appropriate licence to use such patents. The rules for transfer of assignment or license in patents are governed by the sections 68-70 of Patent Act, 1970. These sections say that:

a) The transfer, assignment, mortgage or license should be reduced in writing in a document, embodying all the terms and conditions governing the rights and obligation between the parties.[36]

b) The written agreement is duly registered under the provisions of the Indian Patent Act.[37]

In *National Research Development Corporation of India, New Delhi v. Delhi Cloths and General Mills Co. Ltd.,*[38] it was reiterated by Delhi High Court that the assignment of a patent shall be valid only if the assignment is in writing and the agreement of assigning is reduced to the form of a document which embodies all the terms and conditions governing the rights and obligations of the parties, and the application for registration of such deed of assignment is filed with the Controller within six months of the execution of such document.

Lastly, the acquirer should also take care of the fact that whether a patent is owned individually or jointly by the seller because if the seller is co-owner, he alone cannot assign his share of patent or grant license without consent of the other co-owners. If he does so, such assignment or license will not be valid in the eyes of law, due to which buyer will not be able to realise synergies in merger.

5.2 Trademarks: Trademark is another critical area for Intellectual Property Due Diligence in M&As. A trademark is a visual symbol in the form of a word, device or a label applied to articles of commerce with a view to indicate to the purchasing public that they are the goods manufactured or otherwise dealt by a particular person as distinguished from similar goods manufactured or dealt by other persons.[39] For example, the trademark 'Lakme' distinguishes the goods of Hindustan Lever Company from those of 'Loreal' or 'Revlon'. Thus, trademark is a kind of property and is entitled to protection under law.[40] Even the section 2(1)(zb) of the Trademarks Act, 1999 defines 'Trademark' as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.

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36 The Patents Act, 1970, s.68.

37 The Patents Act, 1970, ss.69,70.

38 AIR 1980 Del. 132.

39 M.K. Bhandari, *Law Relating Intellectual Property Rights* 149 (Central Law Publications, Allahabad, 2010).

40 *London Rubber Co. Ltd. v. Durex Products* AIR 1959 Cal. 56.

The due diligence of rights related with trademarks is more difficult than patents. A company may possess registered as well as unregistered trademarks. The registration offers prima facie evidence of ownership of trademark whereas in case of unregistered trademarks one has to establish prior use and is protectable under common law principles by a passing off action only. Thus, a company with registered trademarks will become a more attractive destination for the prospective buyer because the law accords protection to the exclusive right of the registered proprietor to exploit the trademark.

In contrast to it, the unregistered proprietor of a trademark cannot have this right, instead he can bring a suit for action against any person for passing off goods or services.[41] In addition to above points, in a due diligence process, identify those trademarks of the company that may have been abandoned.

Assignability and Transmissibility: Being a species of property, a right in a trademark is transferable as any other right in property. Thus, a trademark, like any other form of intellectual property, is also capable of being transferred. Irrespective of any other law to the contrary, a trademark is assignable and transmissible subject to provision of section 37-45 of Trade Marks Act, 1999. Section 37 of the Trade Marks Act, 1999 empowers the registered proprietor to assign the trade mark and to give effectual receipts for any consideration for such assignment. However, it should be made clear that mere permission to use trademark will not amount to assignment of trademark.[42] A registered trade mark is assignable and transmissible whether with or without goodwill of the business concerned. This is so with an unregistered trademark as well.[43] The assignment can be for all of the goods or services covered by such trademark or only some of such goods or services.[44] The assignment of trademark must be in writing and specify the condition and limitations to which the assignment is subject to.[45]

Restriction on Assignment: A trademark can be transferred or assigned in India but it is subject to restrictions imposed under section 40 and 41 of the Trade Mark Act, 1999. For example, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would be in the circumstances subsist, whether under this Act or any other law, exclusive rights in more than one of the persons concerned to the use of trademarks.[46]

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41 J.P. Mishra, *An Introduction to Intellectual Property Rights* 224 (Central Law Publications, Allahabad, 2009).

42 *Ramappa v. Monappa* AIR 1970 Mad. 156.

43 *Supra* note 41.

44 B.L. Wadehra, *Law Relating to Intellectual Property 205(* Universal Law Publishing Co. Pvt. Ltd., Delhi, 4th Edn, 2007).

45 *Supra* note 39 at 171.

46 For details see, The Trade Marks Act, 1999, s.40(1).

Registration of Assignment: Registration of assignment with Registrar is necessary. The buyer in whose favour assignment is made will make an application to the Registrar for registration of assignment. The Registrar shall, on receipt of application and on proof of title to his satisfaction, register the person as a proprietor of trademark in respect of goods or services in respect of which assignment has been effected.

In *Ratansi Mulsi v. Vinod Ratilal Gandhi,*[47] the Bombay High Court has held that it is abundantly clear that without registration of the assignment or transmission, no rights can be pleaded on the ground that trade mark has been assigned or transmitted. But the Supreme Court has abundantly clarified the position in case of *CCE v. Vikshara Trading and Investment (P.) Ltd.,*[48] the Supreme Court has held that in case of non-registration of assignment of a registered trade mark, if on facts it is amply proved that assignment has taken place, mere non-registration of assignment will not vitiate the effect of assignment. But still, in M&A transactions, the acquirer company should prefer registration of trademark in its name to avoid any confusion and legal hassles.

5.3 Copyrights: The right which a person acquires in a work, which is the result of his intellectual labour, is called his copyright.[49] As literary and artistic creation is a unique feature of human being, this intellectual creativity need to be recognised and protected by law. Therefore, concept of copyright law originated whose primary function is to protect the fruits of a man's work, labour, skill or test from being taken away by other people.[50] The statutory definition of copyright according to the Section 14 of the Copyright. Act, 1957 is as follows: Copyright means the exclusive rights to do or authorize others to do certain acts in relation to:

(a) Literary, dramatic or musical works

(b) Computer programme

(c) Artistic work

(d) Cinematograph film

(e) Sound recording

The determination of the status of copyrights owned, registered and possessed by the company, is of high importance, without which no due diligence is complete. It should be found that how many registered as well as unregistered copyrights are possessed by the company, and whether these copyright have been properly assigned in favour of the company.[51] Another important aspect to be noted is that ordinarily copyright ownership vests in the author of the work. An exception to this rule arises

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47 AIR 1991 Bom 40.

48 (2004) 13 SCC 49.

49 *Supra* note 45 at 263.

50 *Ibid.*

51 *Supra* note 28 at 4.

in 'works made for hire', which are works either prepared by an employee within the scope of his employment or works specially ordered as 'works made for hire'. In these cases ownership rights vest in the employer.[52] But the person developing the work owns the copyright if he or she is a consultant or other non-employee, or if he or she develops it outside the scope of employment.[53] In these cases, most of the time it is found that the companies legally do not possess the copyright. The buyers need to be particularly cautious when the seller has hired independent contractors to develop copyrighted works.

To further illustrate, if software has been made by a developer for the company or the logo has been designed by the ad agency for the company, the copyright remains with the software developer or the artist or the slogan writer.[54] Therefore, a buyer should ascertain that company possesses the written permissions, assignments and no objection certificates from the authors and artists. If the consultant or artist does not execute an appropriate assignment he or she may be in a position to assert ownership of the resulting copyright.

Assignment and Licensing of Copyrights: In a merger or acquisition, the copyright possessed by the transferor company be transferred to the transferee company either through assignment or through licence.

(i) Assignment of Copyright:[55] The effect of assignment of rights is that the assignee becomes entitled to all rights related to copyright of the assigned work.[56] But assignment is valid only when it is in writing signed by the assignor or by his duly authorised agent. If the period of assignment is not stated, the period shall be deemed to be five years from the date of assignment and if the territorial extent of any assignment of the rights is not specified, it shall be presumed to extend within whole of India. If the assignee does not exercise the rights assigned to him within one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment instrument.[57]

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52 Louis R. Dienes and Troy Gould PC, "Intellectual Property Issues in Mergers and Acquisitions", *Bloomberg Law Reports-Mergers and Acquisitions,* Vol. 4, No. 21, available at *http://www.bloom berglawreports.com,* (visited on October 4, 2012).

53 "When Deals Involve Intellectual Property: Due Diligence into IP Rights is Essential", available at *http://www.whitecase.com/publications/detail.aspx?publication=224* (visited on October 3, 2012).

54 *Supra* note 28 at 4.

55 Assignment of Copyrights is governed by the Copyrights Act, 1957, ss.18, 19 and 19-A.

56 The Copyrights Act, 1957, s.18(2).

57 The Copyright Act, 1957, s.19.

(ii) Licensing of Copyright: In licence, the owner gives permission to do something in respect of the act in which he has an exclusive right to do, but the ownership remains with the owner. In a merger or acquisition, the buyer should ensure that it at least gets the licence of the copyright owned by the seller. The provisions of section 19 and 19-A governing mode of granting assignment will apply to licence also.

5.4 Industrial Designs: A design gives aesthetic sense and appearance to the product. To attract customers, the manufacturers give much attention to the design of the products. The creative originality of a design needs legal protection against copying.[58] Therefore, the Designs Act, 2000 provides for registration of original design and prohibits its copy by others. For industrial design, it is necessary to ascertain in the course of the due diligence, whether designs are registered or not and if renewal has become due, whether these registrations have been renewed or not.[59] The registration of design will provide its proprietor the exclusive use of the design and can be enforced through courts whereas an unregistered design can be easily copied by others.

5.5 Trade Secrets: A trade secret, by definition, is proprietary or business-related information that a company or individual uses or to which they posses exclusive rights. To be deemed a trade secret, the information must meet several requirements, it must be genuine and provides the owner with competitive advantage and is reasonably protected against disclosure. Examples of trade secrets are the recipes (e.g. Coca-Cola recipe), business methods, strategies, tactics or any other piece of information that gives the business a competitive advantage.[60] In the case of trade secrets, the focus of due diligence should be on the degree of security that is being directed to maintain the secrecy of the most important trade secrets. This is must as reasonable efforts must be made to maintain a trade secret's confidentiality. Trade secret protection can be lost through failure to demonstrate such efforts.[61] The buyer should ensure that the seller has executed confidentiality agreements with all the employees, consultants and outside parties

6. Conclusion

It is very important for a successful business in contemporary times, to be able to protect its intellectual property. As Intellectual Property is very

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58 *Supra* note 39 at 190.

59 *Supra* note 28 at 4.

60 "The Importance of Intellectual Property Valuation and Protection", available at *http://usa.marsh. com/newsinsights/thoughtleadership/Articles/ID/5228/The-Importance-of-Intellectual-Property-Valuation and Protection.aspx* (visited on November 24,2012).

61 Louis R. Dienes and Troy Gould PC, "Intellectual Property Issues in Mergers and Acquisitions", *Bloomberg Law Reports-Mergers and Acquisitions,* Vol. 4, No. 21, available at *http://www.bloom berglawreports.com,* (visited on October 4, 2012).

important in the running of a company, the same must be protected at all cost. Above all, in M&A transactions, buyers and sellers need to approach these transactions with a strategy to maximise and protect the value of these assets. If a company is considering a merger or acquisition, it is important that all intellectual property contracts be carefully reviewed and analysed to determine if the merger may have an effect on the surviving entity's ability to use the intellectual property at issue.[62] This become more important as each deal is unique and has its own constraints, otherwise precious intellectual property rights may be lost due to failure to renew or non-prosecution of applications or proceedings. The acquired company should ensure that it gets the ownership of the IPRs of the target company or at least license to use it. If it does not get to use the precious IPRs of the acquired company, it may in many instances lead to failure of mergers.

In addition to it, IPRs should be properly valued, so that correct value of the target company can be arrived at. This is also important so that acquiring company do not overpay to acquire the target. If the cost of target is too high due to faulty valuation of IPRs, then synergies to be realised from the merger will be greatly reduced. On the other hand, target company should get the full value and right premium for their business. Thus, timely due diligence and valuation of IPRs before entering into M&A transaction is indispensable for the success of such transactions. Conducting due diligence as outlined hereinafter will maximise the likelihood that material issues will be identified and if possible remedied before closing the transaction. Companies must perform necessary due diligence in advance and ask for representation from the target company, in order to avoid any further disputes and litigation.

To sum up, we can say that as the global economy races towards an information-based economy, the intellectual property will be the dominant force in future commercial transactions like mergers and acquisitions. Since Intellectual Property has come to represent a major proportion of the business especially in R&D dominated enterprises like pharmaceutical sector, it is essential that the acquirer gets what he has paid for. This makes proper due diligence and valuation of Intellectual Property Rights before entering M&A transactions indispensable.

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62 *Supra* note 17.

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Regulations and Challenges in Data Protection with Special Reference to Digital Personal Data Protection Act, 2023

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Abstract

While the widespread adoption of digital technologies has brought many benefits to the citizens, however, it's not without its share of challenges. We are grappling with concerns like invasion into personal data by big tech companies, state surveillance and cyber-crimes. The paper aims to look at the evolution of data regulation and legislations at the world level in general and in India in particular in the light of Digital Personal Data Protection Act 2023.

Keywords: Data Protection, Data Privacy, General Data Protection Regulation (GDPR)

Introduction

The dichotomy and complexities between public and private lives of individuals shape their existence and daily realities. As the world becomes digitised, these relationships play out in the context of how data is produced, used, reused and commodified.[1] Governments, Non-state actors and individuals are, at all times, creating, collecting, using and transferring personal data. The spurt in internet technologies and Big Data[2] has radically altered the way personal data is processed and stored in today's age. Data breaches have become a common phenomenon. Personal data of individuals has been leaked and infringed at levels never seen before. LinkedIn, the

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1 Oskar J. Gstrien & Annie Beaulieu, "How to protect privacy in a datafied society? A presentation of multiple legal and conceptual approaches" 35(3) *Philos. Techno* (2022) <ink.springer.com/article/10.1007/s13347-022-00497-4> accessed 15 July 2023.

2 Big Data: refers to a set of data which is huge in volume and cannot be handled, processed, analysed using the traditional tools and methods.

professional networking giant, saw breach of data of its 500 million customers by hackers in 2021.[3] Facebook, the social networking giant, also reported a breach of data pertaining to its 530 million users in 2019. Yahoo had publicly announced in 2016 that account information of around 3 billion users was accessed by a hacking group around 2013.[4]

With the incremental global movement towards digitisation, data protection assumes a critical role. Data is increasingly replacing finance as the lubricant in the economy with its ability to add value to businesses. Concomitantly, the fundamental changes brought about in generating, accessing and transferring data has necessitated corresponding changes in existing governance and regulatory regimes.[5] Data Privacy laws across the world are evolving to ensure rigorous protection of data of individuals. Most of the data protection laws focus on eliminating internal and external threats to personal data and minimising the risk of fraud and corruption.[6]

Individuals staying in the modern state often find themselves regulated by state and non-state entities. The global information-based order governs, virtually, all aspects of one's life. Our intimate details are used through legal justifications, and algorithms define our existence. A data driven society enables a handful of companies to transgress our privacy through Internet and the phone.[7] The discerning reflection of Warren and Brandeis in a scholarly published in Harvard Law Review in 1950[8] on how technology can become a bad master, seem to be nothing short of prophetic: -

> " "what is whispered in the closet shall be proclaimed from the house-tops."… The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention

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3 'Scraped data of 500 million LinkedIn users being sold online, 2 million records leaked as proof' *Cybernews*, 6, September, 2023 available at https://cybernews.com/news/stolen-data-of-500-million-linkedin-users-being-sold-online-2-million-leaked-as-proof-2/ accessed September 5, 2023.

4 Michael Hill and Dan Swinhoe 'The 15 biggest data breaches of the Century' *csoonline*, Nov, 8, 2022,<https://www.csoonline.com/article/534628/the-biggest-data-breaches-of-the-21st-century.html> accessed 15 July 2023

5 Dr. Keith Goldstein, Dr. Ohad Shem Tov and Mr. Dan Prazeres, *Right to Privacy in the Digital Ag*e, OHCHR April, 9, 2018. Available at https://www.ohchr.org/sites/default/files/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/PiratePartiesInternational.pdf

6 Zhu, F., & Song, Z, "Systematic Regulation of Personal Information Rights in the Era of Big Data" 12(1) *SAGE Open* (2022).< https://journals.sagepub.com/doi/10.1177/21582440211067529?icid=int.sj-full-text.similar-articles.2> accessed July 20, 2023

7 *Supra* Note 5 (Goldstein, Tovand and Prazeres)

8 Warren and Brandeis, 'The Right to Privacy, 193 *Harvard Law Review*) Vol.4, No. 5 (1890)

have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury".

The Clairvoyant reflections of Warren and Brandeis on the impact that technology will have on humans, holds truer for contemporary times far more than any other time in the history of human civilisation. As the world moves towards digitisation and newer technologies have taken over our lives, privacy seems to be the first casualty. Ironically, privacy is not subjected to a single, one-time violation, rather, it is exposed to a series of acts aimed towards surveillance and collection of Information.[9]

The Genesis of Data Protection Laws around the World

Data protection regime is essential for promoting investment, competition and innovation. A robust data protection regime balances the benefits and risks associated with usage of personal data. A good data protection framework not only ensures that data is stored safely but also generates a sense of security amongst public that their data will not be used for illegitimate ends. The widespread use of Big Data has led to massive changes in the way people communicate with each other and go about their day-to-day activities. An entirely new industry has come up around buying and selling of personal information to third parties which commodifies the findings drawn from the data.[10] Privacy is an integral part of right to life and liberty, it exists in all individuals despite differences of age, sex, gender and race. Right to privacy is strongly protected in key international instruments particularly the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR). Article 12 of the UDHR declares that no one shall be subjected to arbitrary interference with his family, home and correspondence and everyone has right to protection of Law against such interference and attacks. Article 17 of ICCPR also sets out the right in terms of freedom from arbitrary interference in one's family, home, correspondence and on unlawful attacks on one's honour and reputation.

At present, most jurisdictions across the world have either created, or are in the process of creating, data protection laws. Germany was a flagbearer in privacy regulation. State of Hesse created the first privacy regulation in 1970 which was followed by the first German Data Protection Act of 1978.[11] The next

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9 Vrinda Bhandari, and Renuka Sane, "Towards a Privacy Framework for India in the Age of the Internet"179,Working Paper (2016) National Institute for Public Finance and Policy New Delhi. <https://macrofinance.nipfp.org.in/PDF/BhandariSane2016_privacy.pdf> accessed 28 July 2023

10 Podesta, John et al. Big Data: "*Seizing Opportunities, Preserving Values*" Tech. rep. Executive Office of the President, White House (2014). <https://obamawhitehouse.archives.gov/sites/default/files/docs/20150204_Big_Data_Seizing_Opportunities_Preserving_Values_Memo.pdf> accessed 30July 2023

11 Olga Stepanova and Patricia Jechel , "The Privacy, Data Protection and Cybersecurity Law Review: Germany"*The Law Reviews,* 27 October 2022

big step in the direction of data protection came from the European Union Data Protection Directive, which was aimed at harmonising data protection within the European Union. The directive created baseline principles to be eventually followed by all data protection legislations globally.[12] The Data Protection directive was replaced by General Data Protection Regulation (GDPR) in 2018, which is a comprehensive privacy regulation for the new age internet. The regulation is a far-reaching initiative and addresses the concerns of individuals and entities. Many countries around the world like China, Japan, U.K, Australia, Switzerland, etc. have brought in legislation on the lines of GDPR. Thus far, around 137 countries of the world have legislated to protect the privacy and data of their citizens.[13]

Data Protection Laws in India

India, one of the second most populous countries in the world, is on the fast pace of Digitisation. As per the European Commission, digitisation in India grew at a similar pace with China. In 2022, IMF estimated India to be one of the top two fast growing economies.[14] India is also one of the leading centres for business process outsourcing with its call centres handling more than half of the global traffic. While Digitalization has brought India to the top growing economies, in order to reap the benefits of digitalization consistently, it has to address legal, economic and institutional dimensions of digitalisation.[15] India has seen considerable activity around Data Protection in recent years. Much of the progress with respect to data protection in India has stemmed from the role of an activist judiciary which has nudged the government towards creating an enabling framework for protecting personal data from the state and from the non-state actors. The Constitution of India does not explicitly contain any provision related to privacy, nor do we find a mention of the same in the Constituent Assembly debates. One must, therefore, look for the evolution of the Right through the prism of judicial decisions. The first case to delve into the issue of privacy in the context of search and seizure was *M.P Sharma V. Satish Chandra*.[16] The Supreme Court rejected the application of the Right to Privacy in the context of search and seizure by the State, clearly stipulating that Right to

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<https://thelawreviews.co.uk/title/the-privacy-data-protection-and-cybersecurity-law-review/germany> accessed August 25, 2023.

12 "International: The evolution of the right to privacy and data protection" *Data Guidance*, Jan 2023 <https://www.dataguidance.com/opinion/international-evolution-right-privacy-and-data > accessed August 25, 2023.

13 Anas Baig "Data Privacy Laws and Regulations Around the World" *Securiti,* 1 Nov. 2021).< https://securiti.ai/data-privacy-laws/> accessed 11 August 2023.

14 *Economic Survey* 2023, 12 < ndiabudget.gov.in/economicsurvey/doc/eschapter/echap02.pdf> accessed August 1, 2023

15 Dibyendi Maiti, Fulvio Castellacci, Arne Melchior, Digitalisation and Development in *Digitalisation and Development: Issues for India and Beyond* (Springer 2020) < https://link.springer.com/chapter/10.1007/978-981-13-9996-1_1> accessed August 2,2023

16 AIR 1954 SC 300.

Privacy is not a guaranteed right in the Constitution akin to the 4th Constitutional Amendment in the U.S. The next case in which the question of privacy arose was *Kharak Singh V. State of U.P.*[17] in the context of domiciliary visits by the U.P. police. Under the U.P. Police Regulation Act, the Supreme Court held that Right to Privacy was not an implicit part of Article 21. The apex court held the domiciliary visits as unconstitutional but refused to set aside the regulations.[18] Thus, the eight Judges in the case of M.P Sharma and six judges in case of Kharak Singh ruled that Right to Privacy was not a constitutionally sanctioned Right.

The next case *Govind V. State*[19] involved similar facts around domiciliary visits by M.P. police against a history sheeter. The court dismissed the petition and found that the domiciliary visits had a statutory backing. The court declared that Right to Privacy was not explicitly found in the Constitution of India and, since the Right is not clearly laid down, it is not absolute. The court, therefore, recognised a constitutional right to privacy as a facet of personal liberty which could be infringed only in the face of a narrowly made law and served a compelling state interest.[20]

The next case in which right to privacy was indirectly recognised was the Telephone Tapping Case, *People's Union for Civil Liberties V. Union of India*[21]. The case pertained to state surveillance of citizens conversations under Section 5(2) of the Telegraphic act. Citing Kharak Singh and Gobind V. State, Supreme Court held that the right to privacy was protected under Article 21 of the Constitution. The court ruled that telephone tapping is a grave violation of one's right to privacy unless it is according to the procedure established by law. Equating telephone conversations as an expression of one's free speech and expression under Article 19(1) (a), the Court opined that unless telephone tapping is protected under Article 19(2), it would be considered as a violation of Right to free speech and expression under Article 19(1)(a).

The question of bodily autonomy and privacy arose in the case of *Suchitra Srivastava V. Chandigarh Administration* [22] where in the court dwelt upon the right of a woman to abort her pregnancy. The Supreme Court overruled the judgment of Punjab and Haryana High Court which had decided that termination of pregnancy of the woman was best way forward as she was not capable of taking care of the baby. Citing Roe V. Wade the court held that right to personal privacy includes right to abortion also. With the coming in of Digital technologies and mammoth tech giants, privacy has often become a victim. In Selvi V. State the supreme court ruling in the context of

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17 AIR 1963 SC 1295 (1964) 1 SCR 332.

18 1964 SCR (1) 332.

19 (1975) 2 SCC.

20 Gautam Bhatia, "State Surveillance and the Right to Privacy in India: A Constitutional Biography" 26 Nat'l Law School India Rev 127(2014).

21 AIR 1997 SC 468.

22 (2009) 9 SCC 1

administration of various tests like polygraph, BEAP, narco-analysis and brain to the accused held that subjecting a person to the said techniques violates the boundaries of Privacy.[23] In 2017, the Supreme Court, in a path breaking Judgment in K.S. Puttasawamy V. Union of India[24], famously called the Privacy Judgment, unanimously recognised that the Right to Privacy is guaranteed by the Constitution of India. The majority overruled M.P Sharma and Kharak Singh and read privacy into Article 21 and other fundamental freedoms guaranteed under Part III of the constitution. The court further directed the union government to enact a comprehensive legislation on privacy.

The Ministry of Information and Technology set up a committee under Justice B.N. Krishna to draft a data protection regulation and study issues surrounding privacy. The committee consisted of government officials and three members from the industry. The committee proposed the first draft of the Personal Data Protection Bill 2018 which was open to public comments in July 2018. On the basis of comments received from various stakeholders, revisions were made to the bill and, consequently, Personal Data Protection Bill 2019 was introduced in the Lok Sabha. The 2019, the bill stirred considerable concerns amongst opposition members, lawmakers, and technology companies regarding the use of personal and non-personal data by the government.[25] The Bill was referred to a Joint committee of the parliament. After great deliberations 81 amendments and 12 recommendations were proposed towards a new comprehensive framework of data protection. The six year long wait for a robust data protection regime finally saw the light of the day with the Union Parliament passing The Digital Personal Data 2023 on August 11, 2023. The Act borrows most of the principles of Europe's General Data Protection Regulation 2018.

Data Protection Principles: General Data Protection Regulation 2018

In stride with the United Nations 2030 Agenda for Sustainable Development and its Sustainable Developments Goals (SDGs), adopted by Heads of State and Government at the United Nations Summit held in September 2015 (A/RES/70/1)[26], certain universal principles were appropriately laid down as guiding lights of data protection in pursuance of protection of human rights. As a part of the agenda, United Nations member states were obligated to adhere to international principles. The agenda enjoined upon the member states to 'develop communities of practice that improve the quality, relevance and use of data and statistics, consistently working with

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23 (2010) 7 SCC 263

24 (2017) 10 SCC 1

25 Dharish David, "India's Data Protection Dilemma", *East Asia Forum*'(East Asia Forum November 16, 2022) < https://www.eastasiaforum.org/2022/11/16/indias-data-protection-dilemma/ > accessed September 9, 2023.

26 "A Human right based approach to Data" UNOHCHR, 2018) <https://www.ohchr.org/en/documents/tools-and-resources/human-rights-based-approach-data-leaving-no-one-behind-2030-agenda> accessed August 22, 2023.

international human rights norms and principles'[27]. The agenda, further, highlighted the basic key principles under the United Nations Human Rights Based Approach to Data (HRBAD) as universal principles for states to follow. It is noteworthy, however, that while UN agenda forwarded these principles for its member states, even before these principles were expounded, some of the world's robust data bills were already adhering to them since a long time. Subsequent to this agenda, there is a further increase in number of countries shaping their Date Protection legislations in accordance to the universally accepted principles. The General Data Protection Regulation (GDPR) 2018, which has been considered as one of the most comprehensive and strongest drafts on Data Principles was applied to European Countries in 2018. It refashioned some of the old data protection principles existing since 1990's. UN Agenda and GDPR could be seen concurring on similar set of the principles for laying down commitment towards human rights standards. While the EU data principles have been a part of the earlier laws as well, GDPR 2018 emphasized the importance of principles for data processing.

GDPR has enshrined seven principles in the document: 1. Lawfulness, Fairness and Transparency, 2. Purpose Limitation; 3. Data Minimisation; 4. Accuracy; 5. Storage Limitation; 6. Integrity and Confidentiality; and 7. Accountability. These principles embody the spirit of the general data protection regime for the European Union countries and also encourage the movement for emerging Data Protection legislations of other countries like South Africa, Mauritius, Brazil and, more recently, India. The First Principle and universal values of Lawfulness, fairness and Transparency forms the basis on which the edifice of GDPR has been erected. These criteria are essential for ensuring that personal data is not used in an unforeseen or hidden manner. 'Lawful' here, implies that individual data must be used or processed in a legal manner and that ensures the respect of the rule of law. A 'legal ground' is a limited rationalization for processing people's data in legitimate manner. This principle also requires data to be processed only after obtaining explicit and unambiguous individual consent. GDPR details out the obligations and conditions of consent under Articles 4 and 7[28]. It robustly puts consent in the categories of free, specific, unequivocal and informed consent of individual for data processing while, at the same time, keeping the right to revoke information in the hands of individual data owners. Tackling with and ensuring the receipt of informed individual consent has been one of the most commendable practices for keeping up with the principles for data regulation under GDPR. In an attempt to set an example and to drive home the serious commitment ascribed to instances of data breaches, failure to deal with general data processing principles, ambiguous consent and non-transparency, GDPR

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27 *Supra* Note 26 at 2

28 The General Data Protection Regulation, 2018 <https://gdpr-info.eu/> accessed Aug 30, 2023.

came down heavily on Google by fining it for 57 Million USD[29] for targeted advertising. This is not a solitary case, rather, many other bigger tech giants have also been slapped with big fines from GDPR for breaches of its data principles. In an attempt to build trust of the public, GDPR, in its principles, emphasizes on 'Purpose Limitation' (Second Principle) under which it signifies the limit to data processing for the specified, explicit and determined purpose only. It is imperative that data collectors are clear at the outset regarding the purpose and intent of collecting personal data and its use should be limited to clear consent of data subject for the said purpose. There have been number of instances when policy initiatives requiring individual data have shifted their purpose in its lifecycle. For instance, in India, the Aadhar initiative, being the country's first organized Biometric database, has significantly changed in its purpose over the years to include it as a mandate for a lot of purposes which it did not originally envisage.

Data Minimisation (Third Principle) is yet another principle of GDPR that adds to the neutrality of data collection and usage. Data processors are only allowed to collect and process personal data which has been explicitly mentioned while also taking utmost care that only specific and directive information, which is necessary for the purpose at hand, is collected and processed. The unnecessary information or the information related to individual that he or she does not wish to share, cannot be extracted by any means. It is important to save people from collecting bigger data. 'With the promise and hope that having more data will allow for accurate insights into human behaviour, there is an interest and sustained drive to accumulate vast amounts of data. There is an urgent need to challenge this narrative and ensure that only data that is necessary and relevant for a specific purpose should be processed'.[30]

GDPR also incorporates Accuracy (Fourth Principle) as a part of data principle. Under this principle, individuals have the right to demand rectification and even erasure of the data gathered from them. Under GDPR, data subjects have the 'right to be forgotten' in case the purpose of data has been met and there is no legitimate reason for data storage or processing. This right to be forgotten is, however, restricted in certain conditions of the GDPR, which provides for restrictions that are essential for objectives of public interest, and by Section 43 which seeks to balance the right of erasure with the right to freedom of expression and information.

Giving importance to privacy further, GDPR also states Storage Limitation (Fifth Principle) as an important rule for data controllers. Hereby,

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[29] Satariano, Adam,"Google Is Fined $57 Million Under Europe's Data Privacy Law" *New York Times* (Jan 21, 2019) https://www.nytimes.com/2019/01/21/ technology/ google-europe-gdpr-fine.html accessed August 31, 2023.

[30] A guide for Policy Engagement on Data Protection' Privacy International < https://privacyinternational.org/sites/default/files/2018-09/Part%203 %20-%20Data%20Protection%20Principles.pdf> accessed Sept. 1, 2023

data collectors are liable to use data only till the purpose is achieved, they may not hold on to private information in their databases if the data is not related to their continuous legitimate use. This, being an important privacy principle, can help data subjects to keep their data secure and private. Derived from the needs of cyber security, Integrity and Confidentiality, that is, the Sixth Principle under GDPR, emphasizes data to be correct and safe from external and internal threats, and access to the data is limited only to authorized people while finally adhering to accountability of all related data principles mentioned above. GDPR has provided a framework that provides a holistic approach to Data Protection legislations and issues of privacy and security in the digital environment within the parameters of these defined principles of data protection. What remains most important for data protection in GDPR is to bring data subjects to the centre-stage, as the prime authority, and gives importance to them in exercising legal power over the purposes, intent and means of processing their personal data and fixing accountability (Seventh Principle) of Data Collectors & Data Users. While GDPR principles have been adopted to various degrees by many States through their data protection legislations of the world, we analyze, hereunder, how India takes up its commitment to data protection principles under the Digital Data Protection Bill 2023 which has been under much discussion and scrutiny lately.

The Digital Personal Data Protection Act 2023:

The much anticipated, and the first of its kind, Digital Personal Data Protection (DPDP) Act, 2023 has been hailed as one of the first gender neutral act for using references 'she'/'her' to individual's gender. It has been a long-awaited, online privacy legislation in India, which has come about after multiple attempts since 2018 to comprehensively incorporate the nation-specific needs. In an attempt to incorporate the best data-related global practices of the world, the legislature reviewed legislations from various countries like Australia, USA and EU. It draws from principles of data processing rules of European Union contained in GDPR which was formed in 2018. It would also seem that the GDPR has influenced the definition of "personal data" and its extension of coverage to all entities processing personal data, irrespective of their size or status. The legislation also has substantial international applications.

The Indian DPDP Act 2023 creates obligations by imposing lawful grounds for processing personal 'digital' data or personal data which has been digitalized over the time. Like the GDPR, the Indian legislation also establishes 'Purpose Limitation' obligations and, its natural corollary, a duty to remove the data after the purpose is duly met. It, therefore, tries to create a set of rights for individuals whose personal data are collected and processed, including rights to notice, access and erasure, akin to provisions laid down in GDPR.[31] In order to ensure smooth functioning, the Act envisages creation of a guiding body, the Data Protection Board of India (the Board). This Board will possess the

[31] The Digital Personal Data Protection Act, 2023

authority to investigate complaints and issue penalties for transgressions, but will enjoy the power to issue guidance or regulations. While GDPR is hailed as one the most robust and comprehensive data protection frameworks in the world, India's DPDP Act has been criticized on many counts for not living up to the neutrality and clarity of GDPR regarding individual privacy. The new enactment has been opposed not only for being incapable of addressing number of concerns regarding privacy, rather it is seen as contributing to and accentuating the existing infuriating privacy deficit in India, while expanding the range for surveillance by the central governmental agencies. Undertaking a comparative analysis of the DPDP Act 2023 vis-a-vis the principles adopted by the GDPR, we find that the Indian legislation endeavours to uphold many principles adopted by GDPR. The law in India and GDPR both emphasize the principles of lawfulness, fairness and transparency and also, explicitly and primarily, mention obtaining due and informed consent from individuals for data processing. While the GDPR have strict regulations on consent, requiring it to be given freely, be specific, informed, and unambiguous, the DPDP Act 2023 also sets similar conditions in Section 6[32] which mentions that the consent should have qualities of being specific, informed and unambiguous barring few exceptions for "some legitimate uses" consistent with Section 4.

The GDPR of 2018 requires a legal ground before individual's data can be collected and processed. The Indian DPDP Act 2023 also takes a similar approach whereby a person may process the data of a data principal for lawful purpose only, provided it meets the condition of "consent" or is utilised for "legitimate use". The 'lawful ground' that is used for collecting and processing data is, therefore, consequential, based on the language used in the Act, Without clear and elaborate understanding of these obligations, data collectors[33] or, in the Indian context, data fiduciaries (which terminology refers to a person or party processing personal data) would have to give notice and respond to access, modification or erasure, but it is to be noted that these conditions would only be applicable if the data processing is based on voluntary consent by the data principal. The legislation has come under severe criticism from various quarters since its introduction in the Parliament. It is pointed out that there is lack of specification on "legitimate use" which may allow government to use data without explicit consent for conditions as they may deem necessary. The opposing members at Lok Sabha in the Parliament of India, have preferred major objections for use of digital data without consent in

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32 Section 6, The DPDP Act 2023, "The consent given by the Data Principal shall be free, specific, informed, unconditional and unambiguous with a clear affirmative action, and shall signify an agreement to the processing of her personal data for the specified purpose and be limited to such personal data as is necessary for such specified purpose" https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023>

33 The terminology of Data Collectors has been used for the organization collecting and processing personal data under GDPR, while India has referred toData Fiduciaries to refer to the same.

an ambiguous manner. Opposition has outrightly rejected the Act, accusing it for contradicting the Fundamental Right to Privacy which the honorable Supreme Court has repeatedly upheld, and vociferously reiterated in the famous Puttuswamy judgment. There has been constant scathing attack by the opposition on dangers of government scrutiny on personal privacy.[34] Further, some of the exceptions listed in the Act allow the government to exempt activities that are "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, maintenance of public order, or preventing incitement to commit crimes if it provides notice of the exemptions"[35]. The government will not need the consent for processing data by citing requirement under these heads. These exemptions, thereby, give wide array of powers to central government which have invited criticism and concerns from many quarters. The leading human rights observer- the Human Rights Watch, resolutely criticized the legislation and espoused that 'The Indian government should amend its proposed data protection law to protect people's privacy instead of enabling unchecked state surveillance'.[36] In addition, apprehensions have been voiced by people anticipating the DPDP Act 2023 to transgress, cripple and emasculate the Right to Information legislation (RTI Act, 2005). The DPDP Act 2023 empowers the central government to withhold the access of the public to specific information to which they had access earlier under the RTI Act 2005. The legislation is widely expected to have drastic effects on access to information as it excludes array of personal information, thus, granting immunity to an official for being evasive in rendering not only personal information but also information related to HUF, corporates, associations according to the definition of 'person'. The DPDP Act 2023 has also been attacked by some for creating significant obligations on processing 'children' data, where 'child' has been defined as a minor below the age of 18 years. The Act under Section 9 states that, 'The Data Fiduciary shall, before processing any personal data of a child or a person with disability who has a lawful guardian obtain verifiable consent of the parent of such child or the lawful guardian, as the case may be, in such manner as may be prescribed'[37]. Many experts believe that this will limit access to relevant information pertaining to children and, thereby, to espousing or promoting their creativity or talent. GDPR allows for processing personal data above 16 years of age and its member states are even allowed to lower it till the age of 13.

Conclusion:

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34 Aman Singh, "Opposition raises concerns as data protection bill is tabled in Lok Sabha" *Hindustan Times* Aug 3,2023 https://www.hindustantimes.com/india-news/opposition-raises-concerns-as-data-protection-bill-is-tabled-in-lok-sabha-101691061266077.html accessed September 4, 2023

35 *Supra* Note 31 (Section 17, DPDP Act)

36 "India: Data Protection Bill Fosters State Surveillance" *Human Rights Watch* December 22, 2022) https://www.hrw.org/news/2022/12/23/india-data-protection-bill-fosters-state-surveillance accessed September 4, 2023

37 *Supra* Note 31 (Section 9, DPDP Act, 2023)

After analyzing the Digital Personal Data Protection Act 2023, it is evident that, the act is a culmination of efforts of more than a decade. While India does take guidance from tried and tested International legislations and regulations like the GDPR and its contemporaries, it has incorporated many differences to tackle the issue of personal privacy in this era of digitalization. Derived from needs of local and global frameworks, a number of values ought to be abided by when processing individual data for creating a fundamental base for a good data protection law. Towards this noble endeavour, however, it seems that the DPDP Act 2023 has been a comprehensive effort. However, questions by critics of its applicability, its dangers to personal privacy at the hands of the government loom around. The government has strived to strike a balance between protecting personal data and enabling its usage for maximizing benefits for its citizens. The welcome enactment gratifies to the digital networks and enhances India's digital leadership globally. Towards this end, as discussed, the legislation incorporated the guiding principles as envisaged by the GDPR 2018. Whether the legislation succeeds in utilizing the data without compromising on the privacy of its citizenry will be revealed in times to come.

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International Humanitarian Law: Issues and Challenges with Reference to Ukraine-Russia Conflict

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Abstract

The Ukraine conflict has exacted a profound toll on civilians, marked by widespread violations of International Humanitarian Law as reported by numerous international bodies. It is patently evident that Russian attacks exceptionally affected civilians, civilian areas, and infrastructures protected under International Humanitarian Law, including hospitals, schools, dams, and nuclear plants in Ukraine. Reports underscore that the weapons used in these attacks were highly indiscriminate, encompassing internationally prohibited cluster bombs, ballistic missiles, and explosive weapons with wide area impact. The use of prohibited weapons, including cluster munitions and imprecise explosive weapons, in densely populated areas, has resulted in significant civilian casualties and harm. These attacks raise serious concerns about Russia's adherence to IHL. Such actions contravene the core principles of IHL, potentially constituting war crimes. The paper is an attempt to analyse the issues and challenges faced by International Humanitarian law amid Russia's conduct in the conflict, focusing on alleged indiscriminate attacks and incidents involving critical infrastructure, such as the Kakhovka dam and Zaporizhzhia Nuclear Power Plant. The paper further makes an assessment to know the impact of this conflict on international law.

Keywords: Attack, International Humanitarian Law (IHL), Russia, Ukraine, Violation.

Introduction:

In recent years, the landscape of armed conflicts has witnessed a notable shift, with Non-International Armed Conflicts (NIACs) becoming increasingly prevalent. However, amidst this evolving backdrop, the ongoing conflict between Russia and Ukraine stands out as a paradigmatic example of an International Armed Conflict (IAC) according to established international legal definitions and recognition. This enduring struggle has not only captured global attention but also exemplifies the distinctive characteristics and complexities associated with IACs. The four GCs (Geneva Conventions) of 1949 and the AP-I (First Additional Protocol) of 1977 form the legal framework

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governing this IAC. These instruments, which fall under the umbrella of IHL (International Humanitarian Law), establish the legal obligations and protections that apply to the parties involved in the conflict. Both Russia and Ukraine are signatories to the GCs and their AP-I.

International Humanitarian Law plays a critical role in establishing fundamental principles that place legal obligations upon parties engaged in armed conflicts. These principles serve as a moral and legal compass in times of war, emphasizing the paramount importance of distinguishing between military targets and civilians, as well as civilian infrastructure. It is incumbent upon the parties to the conflict to adhere to these principles, and at the core of these obligations is the absolute prohibition of intentionally targeting civilians under any circumstances. Furthermore, they must take all necessary measures to prevent harm to civilians and protect civilian objects. In the pursuit of its objectives, IHL leaves no room for ambiguity when it comes to certain weapons that clearly violate its fundamental principles. Among the prohibited weapons are those with indiscriminate effects, which pose a severe threat to civilian populations. This list includes but is not limited to, vacuum or thermobaric weapons, chemical weapons, and cluster bombs. The use of such weaponry in armed conflicts, particularly in densely populated areas with civilian infrastructure, leads to a devastatingly high number of civilian casualties. These weapons not only cause immediate harm but also leave long-lasting humanitarian and environmental consequences that endure well beyond the cessation of hostilities. Therefore, upholding the principles and prohibitions laid out in IHL is not only a legal obligation but a moral imperative, essential for mitigating the suffering endured by innocent civilians caught in the midst of armed conflicts.

The protracted dispute between Ukraine and Russia in the eastern regions of Ukraine originated as an NIAC, which subsequently evolved into an IAC involving both state parties. The commencement of armed hostilities in Eastern Ukraine dates back to early 2014, following the Russian annexation of Crimea. Subsequently, pro-Russian separatists residing in the Donetsk and Luhansk regions of eastern Ukraine held a referendum seeking to assert their autonomy and secede from Ukraine. An armed conflict quickly erupted in the region; pitting forces supported by the Russian government against the Ukrainian military.[1] The conflict has since evolved into a state of active stalemate, characterized by regular shelling and skirmishes along the front line that divides the Russian-Ukrainian-controlled border regions in the eastern territories.[2] The resumption of hostilities occurred in early 2022. Following the events of 24 February 2022, it can be asserted that an international armed

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1 Sofa Cavandoli and Gary Wilson, "Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine" 69 *Netherlands International Law Review* 383–410 (2022).

2 Karen Deyoung, "U.S. releases images it says show Russia has fired artillery over border into Ukraine" *The Washington Post,* July 27, 2014.

conflict was initiated between the armed forces of Russia and Ukraine.[3] This event satisfied the criteria for the application of IHL concerning the use of force. The ensuing hostilities have resulted in a significant loss of life, with 27,449 civilian casualties.[4] According to the United Nations, the conflict has led to the internal displacement of over sixteen million people.[5] As a result of the ongoing conflict, an additional six million people from Ukraine have been forced to seek refuge in neighboring countries.[6] Notably, a significant proportion of these displaced persons have sought asylum in Poland, a member state of the NATO (North Atlantic Treaty Organization), where the United States and other allied nations have undertaken efforts to facilitate their reception and integration.[7] The armed conflict in Ukraine has had devastating impact on civilians, primarily due to the fact that the fighting has been concentrated in densely populated areas in the south and east of the country. Russian and Russian-backed forces have regularly carried out aerial bombardments and artillery attacks, causing widespread suffering and putting a heavy strain on already fragile and war-ridden health infrastructure.[8] Civilians were not safe anywhere, they were attacked in their homes, in designated shelters, and even while trying to flee to safety. Many have been restricted in their movements, unable to leave besieged areas or access essential services such as humanitarian aid and health care[9], which were either unavailable or excessively limited.

According to the reports of OHCHR (Office of the United Nations High Commissioner for Human Rights), at least ten thousand civilians have been killed, and around 17,748 have been injured[10]. However, the true number of civilian casualties is likely to be much higher, as it is difficult to collect and

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3 Clifford Krauss, "Putin's Forces Attack Ukraine" *The New York Times,* March 30, 2022.

4 UN-OHCHR, "Ukraine: civilian casualty update 24 September 2023" *Office of the High Commissioner for Human Rights,* Sep. 26, 2022.

5 IDMC (Internal displacement monitoring centre), "GRID 2023: Internal displacement and food security" *Norwegian Refugee Council,* 81 (2023).

6 UNHCR, "Ukraine Refugee Situation" *Operational Data Portal,* Oct. 3, 2023, available at < https://data.unhcr.org/en/situations/ukraine > (last visited on Oct. 5, 2023).

7 TWH, "FACT SHEET: The Biden Administration Announces New Humanitarian, Development, and Democracy Assistance to Ukraine and the Surrounding Region" *The White House,* March 24, 2022, available at < https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/ fact-sheet-the-biden-administration-announces-new-humanitarian-development- and -democracy-assistance-to-ukraine-and-the-surrounding-region/> (last visited on Oct. 5, 2023).

8 Human Rights Watch, "Ukraine: Events of 2022" *World Report 2023,* April 6, 2022, available at <https://www.hrw.org/world-report/2023/country-chapters/ ukraine> (last visited on Oct. 5, 2023).

9 OHCA, "Ukraine Humanitarian Response 2023: Situation Report" *UNOCHA Reports,* Sep. 5, 2023, available at < https://reports.unocha.org/en/country/ukraine/> (last visited on Oct. 5, 2023).

10 *Supra* note 4.

verify data in areas affected by ongoing conflict, especially in urban areas that are no longer under government control. Most documented casualties have occurred in Donetsk and Luhansk regions.[11] The initiation of hostilities targeting the city of Kharkiv commenced on the 24 of February, coinciding with the onset of comprehensive armed confrontation. At the onset of their incursion into Ukraine, Russian military units initiated a persistent and unabated series of indiscriminate bombardments upon Kharkiv, which stands as the second most populated city within the territorial boundaries of Ukraine.[12] The alleged perpetrators engaged in the consistent bombardment of residential neighborhoods on a frequent basis, resulting in the loss of life of numerous civilians and extensive damage to civilian property.[13] A significant number of the aforementioned attacks were executed through the use of cluster bombs, which are widely prohibited under international law.[14] According to the findings of Amnesty International, a total of seven instances of cluster munition strikes were meticulously documented across various residential areas of Kharkiv. During the investigation, researchers discovered the fins, pellets, and fragments of cluster submunitions, alongside remnants derived from uragan rockets, which are recognized for their capacity to transport such munitions.[15] The use of scatterable land mines and other weapons of mass destruction, particularly Grad rockets, resulted in the perpetration of indiscriminate attacks.[16] There is a comprehensive record of 28 instances of indiscriminate strikes on the city of Kharkiv, which had a pre-war population of approximately 1.4 million and experienced rapid displacement as a direct consequence of the ruthless bombardment carried out by the Russian forces during the conflict.[17]

Numerous families that opted to remain in their residences were compelled to seek shelter underground, within educational institutions, sublevel chambers, subterranean railway terminals, and various improvised havens.[18] The recurrent and indiscriminate bombardments inflicted upon residential neighborhoods within Kharkiv are deemed to be acts of aggression

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11 *Ibid*.

12 Michael Schwirtz, "Scenes from Kharkiv: Battle wreckage, the boom of artillery, and people sheltering in the subway" *The New York Times,* Feb. 25, 2022.

13 Luke Harding, and Peter Beaumont, "Ukraine facing humanitarian crisis amid relentless Russian missile attacks" *The Guardian,* March 2, 2022, available at < https://www.theguardian.com/world/2022/mar/02/ukraine-cities-bombardment-russia-attack-kyiv-kharkiv-russian-war-invasion> (last visited on Oct. 5, 2023).

14 HRW, "Ukraine: Unlawful Russian Attacks in Kharkiv" *Human Rights Watch,* Aug. 16, 2022, available at < https://www.hrw.org/news/2022/08/16/ukraine-unlawful-russian-attacks-kharkiv> (last visited on Oct. 5, 2023).

15 Amnesty International, "Anyone can die at any time: Indiscriminate attacks by Russian forces in Kharkiv, Ukraine" 4 (June, 2022).

16 *Ibid*.

17 *Ibid*.

18 *Supra* note 12.

that resulted in the loss of life and injury to a significant number of civilians. Consequently, these actions can be classified as war crimes under established legal frameworks. The veracity of this statement holds for both instances wherein cluster munitions were employed, as well as cases involving the use of other forms of unguided rockets and unguided artillery shells.[19] It is important to note that these methods of attack lack precision, thereby resulting in indiscriminate harm when deployed in close proximity to the civilian population.[20] The potential legal ramifications arise from the persistent use of imprecise explosive weapons within densely inhabited civilian areas, despite being aware of the recurring occurrence of substantial civilian casualties.[21] Such conduct may conceivably constitute the act of deliberately targeting the civilian population.

International Humanitarian Law issues:

From the perspective of the scholars of both the conflicting parties that is Russia and Ukraine have grossly violated the basic norms of IHL, in spite of being signatory to the IHL treaty mechanism. The normative framework of IHL strictly obligates the state parties to adhere to the norms such as the protection of the civilian population, maintaining the principles of distinction, attacking objects only for the purpose of military necessity, and upholding the basic principles of IHL. At the same time, the state parties are expected not to use weapons that are prohibited by international treaty mechanisms which include cluster bombing, the use of weapons against installations containing dangerous forces, objects that are designated for dual purposes, and others. These issues will be discussed in detail in the following parts.

1. Repercussions of inherently indiscriminate weapons: Russian forces' use of cluster munition and scatterable mines in Ukraine:

Russian forces have repeatedly carried out devastating and indiscriminate attacks using cluster bombs, killing, and injuring many civilians in their homes, on the streets, in parks, in cemeteries, and while waiting in line for humanitarian supplies.[22] On April 15, 2022, Russian forces used cluster munitions in and around Myru Street in the industrial neighborhood at southeast of the city center of Kharkiv. The attack took place in the late afternoon and destroyed an area larger than 700 square meters, where nine civilians were killed, while 35 were injured including a few children. Many of

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19 Human Rights Watch, "Cluster Munition Use in Russia-Ukraine War" 3 (May 29, 2023).

20 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 51(4). (Both Russia and Ukraine are parties to AP-I.)

21 Danielle Ivory, John Ismay, Denise Lu, Marco Hernandez, Cierra S. Queen, Jess Ruderman, Kristine White, Lauryn Higgins, and Bonnie G. Wong, "What Hundreds of Photos of Weapons Reveal About Russia's Brutal War Strategy" *The New York Times,* June 19, 2022.

22 *Supra* note 19 at 6.

the victims died or were injured in the courtyards between buildings, while others were injured in nearby streets and parks.[23]

Amnesty International documented and found evidence that Russian forces in its attacks have used 9N210/9N235 cluster munitions against civilians in Ukraine. Medical professionals retrieved metal shards from patient's bodies that matched the kind of prefabricated pellets found in these munitions.[24] In addition to cluster munitions, Russian forces have also used PTM-1S scatterable anti-personnel mines against civilians in residential areas in Kharkiv.[25] These mines combine the worst features of both cluster munitions and anti-personnel land mines. They are prohibited under the 1997 Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and their Destruction.[26]

Cluster bombs are inherently indiscriminate weapons. They release hundreds of submunitions over a large area, many of which fail to detonate upon impact becoming de facto landmines.[27] For these reasons, the 2008 Convention on Cluster Munitions (CCM) prohibits their use, production, stockpiling, and transfer.[28] This convention has already been joined by 110 countries making it an effective treaty to ban these highly indiscriminate weapons. Even though Russia and Ukraine are not parties to the CCM[29], yet both state parties can consider the treaty of persuasive value in guiding them during the ongoing conflict. Moreover, they are still bound by the customary

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23 Amnesty International, "Ukraine: Hundreds killed in relentless Russian shelling of Kharkiv" *Amnesty International,* June 13, 2022, available at < https://www.amnesty.org/en/latest/news/2022/06/ukraine-hundreds-killed-in-relentless-russian-shelling-of-kharkiv-new-investigation/> (last visited on Oct. 5, 2023).

24 *Supra* note 15 at 7.

25 HRW, "Landmine use in Ukraine" *Human Rights Watch,* June 13, 2023, available at < https://www.hrw.org/news/2023/06/13/landmine-use-ukraine> (last visited on Oct. 5, 2023).

26 HRW, "Landmines: Boost Support for Global Ban Treaty" *Human Rights Watch,* Nov. 17, 2022, available at < https://www.hrw.org/news/2022/11/17/landmines-boost-support-global-ban-treaty> (last visited on Oct. 5, 2023) See also UNODA, "Landmines", *United Nations Office for Disarmament Affairs,* available at < https://disarmament.unoda.org/convarms/landmines/> (last visited on Oct. 5, 2023).

27 John Borrie and Rosy Cave, "The humanitarian effects of cluster munitions: why should we worry?" 4 *Disarmament Forum* 7 (2006).

28 UNODA, "Convention on Cluster Munitions" *United Nations Office for Disarmament Affairs,* available at < https://disarmament.unoda.org/convention-on-cluster-munitions/#:~:text=The%20Convention%20on%20Cluster%20Munitions,to%20engage%20in%20prohibited%20activities.> (last visited on Oct. 5, 2023).

29 Convention on Cluster Munitions 2008, United Nations Treaty Collection, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI- 6&chapter=26&clang=_en> (last visited on Oct. 5, 2023).

international humanitarian law prohibition on the use of inherently indiscriminate weapons.[30]

The use of cluster munitions and scatterable anti-personnel mines by Russian forces in Kharkiv is a clear violation of the fundamental principle of distinction[31], humanity, precaution[32] as well as Article 51 (4), (5) of AP-I and Rules 11[33] and 13[34] of the customary international humanitarian law. Since these weapons are inherently indiscriminate in nature and pose a serious threat to civilians.

2. Violations of the principle of distinction: Russia's use of inherently indiscriminate weapons in Ukraine:

The distinction principle, a fundamental tenet of IHL, imposes an obligation upon the parties engaged in an armed conflict to always distinguish between civilians and civilian objects, and active combatants and military objectives.[35]

Russia began indiscriminate strikes on Kharkiv residential neighborhoods and Mariupol regions starting in the early days of the invasion at the end of February, resulting in forcible displacement of more than half of the city's inhabitants by late May.[36] A constant onslaught of unguided rockets and artillery munitions killed and maimed hundreds of civilians. They caused extensive destruction and damage, rendering dozens of massive multi-story buildings with hundreds of apartments each uninhabitable.[37] The weapons were wide-ranging, intrinsically imprecise, and should never be deployed in densely populated metropolitan areas.

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30 ICRC, "Rule 71. Weapons that are by nature Indiscriminate" *ICRC Customary IHL Study,* available at < https://ihl-databases.icrc.org/en/customary-ihl/v1/rule71> (last visited on Oct. 5, 2023).

31 *Supra* note 20, art. 48, 51 and 52. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 13 (2).

32 *Supra* note 20, art. 57 and 58. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977, art. 13(1).

33 Rule 11: "Indiscriminate attacks are prohibited".

34 Rule 13: "Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited".

35 *Supra* note 31.

36 Michael Ray, "Russia-Ukraine War" *Encyclopedia Britannica*, Oct. 6, 2023, available at < https://www.britannica.com/topic/war/World-government> (last visited on Oct. 6, 2023).

37 Amnesty International, "Ukraine: Russia used cluster bombs and unguided rockets in 'horrific' assault on Kharkiv" *Amnesty International UK,* June 13, 2022, available at <https://www.amnesty.org.uk/press-releases/ukraine-russia-used-cluster-bombs-and-unguided-rockets-horrific-assault-kharkiv> (last visited on Oct. 6, 2023).

Unguided rockets like Grads and Uragans, which Russian forces have frequently employed to shell Kharkiv's residential neighborhoods are inherently inaccurate and have indiscriminate effects when fired in populous areas and unable to distinguish between civilians and military objects.[38] The typical circular error probability for regular artillery rounds without precise guiding equipment is over 100 meters. Such mistakes resulted in the loss of civilian lives and caused substantial devastation and damage to homes and other civilian objects in densely constructed residential zones.[39]

As the conflict was mainly surrounded by densely populated urban areas, civilian objects, and essential infrastructure were extensively targeted and attacked with heavy explosive weapons, which ultimately caused grave risks for civilians.[40] In this conflict use of explosive weapons with wide impact areas was the main cause of civilian harm raising serious issues of indiscriminate attacks and civilian protection.

It is very evident that Russia has violated the principle of distinction on a large scale by focusing its attacks mainly on civilian residential areas and by using inherently indiscriminate weapons, which has caused excessive harm to civilians and their objects in Ukraine.

The Impact of Explosive Weapons on Civilian Infrastructures:

The use of explosive weapons with wide-area effects in civilian areas across four regions during the conflict has had a profound and devastating impact. According to the OHCHR, these attacks resulted in 1,495 civilian casualties, accounting for a staggering 70% of all civilian deaths and injuries during the specified period. It is worth noting that the actual number of casualties is likely higher, given the extensive and far-reaching consequences of such attacks on the affected regions, including Chernihiv, Sumy, Kharkiv, and others.[41]

The repercussions of these explosive weapon attacks on buildings and critical infrastructure have been nothing short of severe. Thousands of residential structures, schools, hospitals, and facilities housing essential services have suffered damage or complete destruction in these areas. In

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38 Human Rights Council, *Conference room paper of the Independent International Commission of Inquiry on Ukraine,* UNHRC, UN Doc A/HRC/52/CRP.4 (Aug. 29, 2023).

39 Geneva International Centre for Humanitarian Demining, *A Guide to Cluster Munitions* (Implementation Support Unit, Convention on Cluster Munitions, Geneva, 3rd edn., 2016).

40 ODIHR, "Second ODIHR Interim Report on alleged violations of international humanitarian law and international human rights law in Ukraine" 16 (Dec. 2022).

41 OHCHR, "UN Commission concludes that war crimes have been committed in Ukraine, expresses concern about suffering of civilians" *United Nations High Commissioner for Human Rights Press Releases,* Sep. 23, 2022, available at < https://www.ohchr.org/en/press-releases/2022/10/un-commission-concludes-war-crimes-have-been-committed-ukraine-expresses> (last visited on Oct. 6, 2023).

Chernihiv, for instance, the city endured significant damage to hundreds of houses and other structures as Russian military efforts to seize the city unfolded.[42] Similarly, entire sections of Kharkiv were left in ruins as a result of explosive strikes.[43]

Moreover, the impact on hospitals, which are typically safeguarded under IHL, has been particularly distressing. Five hospitals, including three in Chernihiv and one in Kharkiv, were harmed either through fighting or direct attacks, with fourteen of them being operational at the time of the attacks.[44] The extensive damage to these healthcare facilities has severely hampered the availability of essential medical services to the civilian population. Furthermore, educational institutions have not been spared from the consequences of these explosive weapon strikes.[45] The excessive use of explosive weapons has led to immediate and long-lasting suffering and destruction, driving people to flee their homes or live in constant fear.

It is crucial to emphasize that these direct and indirect attacks on Ukraine's critical civilian infrastructure by Russia constitute a grave violation of key principles of IHL, including the principles of distinction, precaution, and Rule 28[46] of customary international humanitarian law. Such actions demand the attention of the international community and underscore the urgent need for accountability and the protection of civilians in armed conflict.

Assessing the legality of Russian attacks within the parameters of IHL:

The sustained Russian attacks during the conflict in Ukraine have led to a significant and deeply concerning number of civilian casualties. The extensive coverage in news reports and photographic evidence vividly

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42 Marc Santora, "Deadly Russian Strike Hits City Center in Northern Ukraine" *The New York Times,* Aug. 19, 2023, available at <https://www.nytimes.com/2023/08/19/world/europe/chernihiv-ukraine-russia-strike.html> (last visited on Oct. 6, 2023).

43 Ruby Mellen, "Ukrainian cities see massive destruction" *The Washington Post,* March 14, 2022, available at <https://www.washingtonpost.com/world/interactive/2022/ ukraine-before-after-destruction-photos/> (last visited on Oct. 6, 2023).

44 *Supra* note 14.

45 Emma Farge, "More than 1,000 schools destroyed in Ukraine since war began-UNICEF" *Reuters,* Aug. 29, 2023, available at <https://www.reuters.com/world/europe/ukrainian-children-fall-behind-with-no-let-up-attacks-schools-unicef-2023-08-29/#:~:text=More%20than%201%2C000%20schools%20destroyed%20in%20Ukraine%20since%20war%20began%2DUNICEF,-Reuters&text=GENEVA%2C%20Aug%2029%20(Reuters),been%20badly%20damaged%2C%20the%20U.N.> (last visited on Oct. 6, 2023).

46 Rule 28: "Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy."

illustrates the scope and impact of these attacks,[47] which extended beyond the Donbas region and reached areas as significant as the Ukrainian capital, Kyiv.[48] This troubling pattern of violence raises questions regarding Russia's commitment to its international obligations and its adherence to fundamental principles governing armed conflicts, particularly the principles of distinction, necessity, and proportionality.

Russia has invoked the argument of "Anticipatory Self-defense" to justify its pre-emptive attacks as a means of protecting itself. However, it's important to note that this argument lacks recognition under established international law.[49] The principle of anticipatory self-defense remains unrecognized within the framework of international law, adding a layer of complexity to the legal assessment of Russia's actions.[50]

In evaluating the legality of Russian attacks, it becomes evident that these actions constitute a violation of the Geneva Conventions of 1949 and their Additional Protocols of 1977. The GCs provide the foundational standards to be upheld during times of armed conflict, with a primary focus on safeguarding civilians and non-combatants. Consequently, parties engaged in the conflict are obliged to take all necessary precautions to prevent harm to civilians. Additionally, Article 51/5/b of Additional Protocol I prohibits indiscriminate attacks, which result in civilian casualties that are disproportionate in comparison to the anticipated military advantage. This prohibition aligns with Rules 12 and 14 of customary international humanitarian law, which also prohibit attacks causing excessive civilian harm and damage.

In light of these legal obligations and principles, it becomes evident that Russia has fallen short in its compliance with the fundamental tenets of IHL.[51] The failure to ensure the protection of civilians and their objects underscores the urgency of addressing these violations within the broader context of international law and accountability for actions during armed conflicts.

Attacks on Installations containing dangerous forces:

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47 The Visual Journalism Team, "Ukraine in maps: Tracking the war with Russia" BBC News, Sep. 29, 2022, available at <https://www.bbc.com/news/world-europe-60506682> (last visited on Oct. 7, 2023).

48 David Child, Farah Najjar, and Linah Alsaafin, "Latest Russia-Ukraine updates: Battles rage for Ukraine's cities" *AlJazeera,* Feb. 27, 2022, available at <https://www.aljazeera.com/news/2022/2/25/unsc-to-vote-on-resolution-condemning-russia-invasion-liveblog> (last visited on Oct. 7, 2023).

49 Majed Dib, "Military Aggression against Ukraine: Russia's Rhetoric and the International Legal Framework" 2 *EU Policy Review* 98-109 (2022).

50 Leo Van Den Hole, "Anticipatory Self-Defence Under International Law." 19 (1) *American University International Law Review* 69-106 (2003).

51 HRW, "Russia, Ukraine & International Law: On Occupation, Armed Conflict and Human Rights" *Human Rights Watch,* Feb. 23, 2022, available at <https://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights> (last visited on Oct. 10, 2023).

The increasing intensity of Russia's attacks has been accompanied by the targeting of installations containing dangerous forces. Russia directed its strikes on dams, power stations, nuclear reactor plants, and other facilities containing dangerous forces. The invasion of Ukraine was not limited only to causing thousands of civilian casualties or refugees but also had catastrophic effects on the environment causing soil, water, and air pollution. The impact of Russian attacks also extended to neighboring European countries.[52]

In late 2022, Russia focused on attacking the facilities containing dangerous forces in Ukraine. Russia targeted energy facilities[53] with Iranian-made suicide drones[54] and hundreds of long-range missiles from sea and land. Russian missiles targeted gas stations[55] and electric railway networks.[56] Dozens of missiles were launched to target electricity generation and heating plants in Ukraine as Ukrainians suffer from a harsh winter.[57] Not only that, Russian missiles destroyed 60,000 tons of grain on the Ukrainian coast and causing severe damage to storage facilities and infrastructure.[58] The destruction of the Kakhovka Dam and the attacks on Zaporizhzhia station also led to severe damage to the environment and the civilians in Ukraine. Accordingly, this part will address the Russian attacks on facilities like the Kakhovka Dam and the Zaporizhzhia nuclear reactor station in light of the rules of IHL.

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52 Alfred Kammer, Jihad Azour, Abebe Aemro Selassie, Ilan Goldfajn, Chang Yong Rhee, "How War in Ukraine Is Reverberating Across World's Regions" *IMF Blog,* March 15, 2022, available at <https://www.imf.org/en/Blogs/Articles/2022/03/15/blog-how-war-in-ukraine-is-reverberating-across-worlds-regions-031522> (last visited on Oct. 10, 2023).

53 Olena Harmash, "Russian missiles pound Ukraine's energy system, force power outages" *Reuters,* Feb. 10, 2023, available at <https://www.reuters.com/world/europe/russian-forces-strike-ukraine-air-raid-sirens-wail-across-country-2023-02-10/> (last visited on Oct. 10, 2023).

54 Euronews with AFP, AP, Reuters, "Ukraine war: Russia uses Iran-made 'kamikaze drones' near Kyiv" *Euronews,* Oct. 5, 2022, available at <https://www.euronews.com/2022/10/05/ukraine-war-russia-uses-iran-made-kamikaze-drones-to-strike-bila-tserkva-near-kyiv> (last visited on Oct. 10, 2023).

55 John Psaropoulos, "Ukraine targets Russian fuel sites ahead of counteroffensive" *Aljazeera,* May 4, 2023, available at <https://www.aljazeera.com/news/2023/5/4/this- past-week-what-happened-in-the-russia-ukraine-war> (last visited on Oct. 10, 2023).

56 Jonathan Landay, "Russian attacks on rail system fail to paralyse 'lifeline of Ukraine'" *Reuters,* May 9, 2022, available at <https://www.reuters.com/world/europe/russian-attacks-rail-system-fail-paralyze-lifeline-ukraine-2022-05-08/> (last visited on Oct. 10, 2023).

57 HRW, "Ukraine: Russian Attacks on Energy Grid Threaten Civilians" *Human Rights Watch,* Dec. 6, 2022, available at <https://www.hrw.org/news/2022/12/06/ukraine-russian-attacks-energy-grid-threaten-civilians> (last visited on Oct. 10, 2023).

58 Paul Kirby, "Ukraine war: Russia strikes Ukraine grain after ending sea deal" *BBC News,* July 19, 2023, available at <https://www.bbc.com/news/world-europe-66242446#comments> (last visited on Oct. 10, 2023).

Attacks on the Kakhovka Dam:

The Kakhovka Dam was a water reservoir built next to the hydroelectric power station on the Dnieper River. The dam contained 18 cubic kilometers of water.[59] In June 2023, the dam collapsed due to Russian attacks, releasing huge amounts of water.[60] Several villages and agricultural lands were flooded. The floods displaced thousands of civilians and many suffered due to lack of drinking water and electricity.[61] It also had catastrophic effects on the environment and affected more than 700,000 civilians with lack of necessary facilities.[62]

Moreover, the destruction of the dam led to long-term repercussions that are no less dangerous. Kherson, Zaporizhzhia, and Dnipropetrovsk regions will face a severe scarcity of irrigation water in the long run.[63] The released water carried pollutants from gas stations, sewage, as well as chemicals and pesticides from agricultural stores causing further harm.[64]

Russia's attacks on the Kakhovka Dam, causing its destruction, is serious violation of the principles of IHL. The possible claim by Russia that the dam was a military target and being used for military purposes, therefore the Russian attack was intended to stop a Ukrainian counterattack are unacceptable claim[65], because the collapse of the dam led to disasters for the

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59 Guy Faulconbridge, "Nova Kakhovka dam breach: what do we know so far?" *Reuters,* June 7, 2023, available at <https://www.reuters.com/world/europe/what-is-kakhovka-dam-ukraine-what-happened-2023-06-07/> (last visited on Oct. 10, 2023).

60 James Glanz, Marc Santora, Pablo Robles, Haley Willis, Lauren Leatherby, Christoph Koettl and Dmitriy Khavin, "Why the Evidence Suggests Russia Blew Up the Kakhovka Dam" *The New York Times,* June 16, 2023, available at <https://www.nytimes.com/interactive/2023/06/16/world/europe/ukraine-kakhovka-dam-collapse.html> (last visited on Oct. 10, 2023).

61 Peter Beaumont, Harvey Symons, Paul Scruton, Lucy Swan, Ashley Kirk, and Elena Morresi, "A visual guide to the collapse of Ukraine's Nova Kakhovka dam" *The Guardian,* June 9, 2023, available at <https://www.theguardian.com/world/2023/jun/09/visual-guide-ukraine-nova-kakhovka-dam-collapse> (last visited on Oct. 10, 2023).

62 UN, "Ukraine: 700,000 people affected by water shortages from dam disaster" *UN News,* June 16, 2023, available at <https://news.un.org/en/story/2023/06/1137797> (last visited on Oct. 10, 2023).

63 Michael Birnbaum and Evan Halper, "Ukraine dam's destruction could 'forever' change ecosystems, officials say" *The Washington Post,* June 6, 2023, available at <https://www.washingtonpost.com/climate-environment/2023/06/06/ukraine-dam-environment-destruction/> (last visited on Oct. 10, 2023).

64 Euronews with AFP, AP, "The widespread and long-lasting consequences of the Dnipro dam disaster" *Euronews,* June 10, 2023, available at <https://www.euronews.com/2023/06/10/the-widespread-and-long-lasting-consequences-of-the-dnipro-dam-disaster> (last visited on Oct. 10, 2023).

65 Marko Milanovic, "The Destruction of the Nova Kakhovka Dam and International Humanitarian Law: Some Preliminary Thoughts" *EJIL: Talk!,* June 6, 2023, available at <https://www.ejiltalk.org/the-destruction-of-the-nova-kakhovka-dam-and-

civilian areas surrounding it. Therefore, it constitutes flagrant violation of the principles of IHL.

Article 56[66] of AP-I provides that attacks against installations that contain dangerous force such as dams and nuclear power plants constitute violation of the rules of IHL. Whenever such attacks lead to the release of dangerous force that causes immense civilian harm. The criteria specified under Article 56 was met during the attack on the Kakhovka Dam. Its destruction led to the release of huge amounts of water in the surrounding villages and agricultural lands. The floods caused the death and displacement of thousands of civilians, along with submerging thousands of hectares of fertile land.[67]

Attacks amounting to environmental genocide:

The dam water washed away chemical fertilizers from warehouses and carried with it exhausts industrial waste and machinery oils. The waters have contaminated both the Kinburn Spit National Park and the UNESCO Black Sea Biosphere Reserve, among other sites.[68] Floods laden with polluted water wiped out many rare plants, endangered animals, as well as large areas of vegetation.[69]

The massive scale destruction caused by Russian attacks on Ukrainian environmental resources amounts to widespread long-term and severe crimes[70] against the natural environment specified under AP-I.[71] The determination of environmental damage, although apparent, presents challenges in terms of quantification and measurement.

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international-humanitarian-law-some-preliminary-thoughts/> (last visited on Oct. 10, 2023).

66 Article 56: "Protection of works and installations containing dangerous forces"

67 AI, "Ukraine: Destruction of Kakhovka dam requires urgent international response, as thousands face humanitarian disaster" *Amnesty International*, June 6, 2023, available at < https://www.amnesty.org/en/latest/news/2023/06/ukraine-destruction-of-kakhovka-dam-requires-urgent-international-response-as-thousands-face-humanitarian-disaster/> (last visited on Oct. 10, 2023).

68 Julian Borger, "Dam collapse a global problem as waters may poison Black Sea, Zelenskiy says" *The Guardian*, June 8, 2023, available at < https://www.theguardian.com/world/2023/jun/08/dam-collapse-global-problem-waters-may-poison-black-sea-zelenskiy> (last visited on Oct. 10, 2023).

69 Una Hajdari, "'Biggest ecocide in Ukraine': Thousands of species threatened by breach at Kakhovka Dam" *Euronews*, June 9, 2023, available at <https://www.euronews.com/green/2023/06/07/biggest-ecocide-in-ukraine-thousands-of-species-threatened-by-breach-at-kakhovka-dam> (last visited on Oct. 10, 2023).

70 Aaron Dumont, "A 'Clear' War Crime Against the Environment?: The Destruction of the Nova Kakhovka Dam" *Völkerrechtsblog*, July 28, 2023, available at < https://voelkerrechtsblog.org/a-clear-war-crime-against-the-environment/> (last visited on Oct. 10, 2023).

71 *Supra* note 20, art. 35(3) and 55(1).

Targeting Zaporizhzhia Station:

Zaporizhzhia station, an atomic power plant located in southeastern Ukraine, is the largest nuclear station in Europe. In March 2022, Russia targeted the Zaporizhzhia atomic power plant.[72] The International Atomic Energy Agency indicated that fire caught in one of the buildings adjacent to the station[73] but the station's equipment was not damaged.[74]

Russia's attacks on Zaporizhzhia station constitute grave violation of Article 56 of AP-I. Similar to the attack on the Kakhovka Dam, the attack on the Zaporizhzhia station cannot be justified under the pretext of the station being a military target[75] under Article 56 (2) of AP-I, as there is no clear evidence of these facilities providing direct and significant military support to Ukraine.[76] Whereas, even if the station is being used for military purposes or provides a definite military advantage, Russia has not taken all the feasible precautions to avert the release of dangerous forces provided under Article 56 (3) of AP-I, thereby violating key principles of IHL. There is no doubt that the Zaporizhzhia station fulfills all the elements of Article 56 in order to enjoy protection which are:

- Containing a dangerous force
- Targeting it could lead to the possibility of unleashing dangerous forces, which would expose the lives of civilians to great danger.

The first element is clearly fulfilled by Zaporizhzhia station, as it is the largest station in Europe and among the ten largest nuclear plants around the world. With respect to the second element, which is the possibility of releasing dangerous force, it may perhaps be less clear but verified considering the possibility of radiation leak due to the bombing of the station or surrounding buildings.

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72 Calla Wahlquist and Donna Lu, "Zaporizhzhia nuclear power plant: everything you need to know" *The Guardian,* March 4, 2022, available at < https://www.theguardian.com/world/2022/mar/04/zaporizhzhia-nuclear-power-plant-everything-you-need-to-know> (last visited on Oct. 10, 2023).

73 International Atomic Energy Agency, "Nuclear safety, security and safeguards in Ukraine: 2nd Summary report by the Director General" 13-15 (Sep. 2022).

74 UN, "*Briefing Security Council, International Atomic Energy Agency Director Outlines Five Principles to Prevent Nuclear Accident at Zaporizhzhia Power Plant in Ukraine*" United Nations Meetings Coverage and Press Releases, SC/15300, May 30, 2023, available at < https://press.un.org/en/2023/sc15300.doc.htm> (last visited on Oct. 10, 2023).

75 Abby Zeith and Eirini Giorgou, "Dangerous forces: the protection of nuclear power plants in armed conflict" *Humanitarian Law and Policy Blog* (Oct. 18, 2022).

76 Marta Martsyniak, "The destruction of the Kakhovka hydroelectric power station – legal responsibilities" *EU Neighbourseast*, Sep. 6, 2023, available at < https://euneighbourseast.eu/young-european-ambassadors/blog/the-destruction-of-the-kakhovka-hydroelectric-power-station-legal-responsibilities/> (last visited on Oct. 10, 2023).

According to the principle of distinction, parties to the conflict are prohibited from targeting civilians, civilian objects, or any target that is not of a military nature. The AP-I provides that "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[77] There is no conclusive evidence to prove that the Zaporizhzhia nuclear station and Kakhovka dam were legitimate military targets. Therefore, targeting the installations containing dangerous forces in Ukraine is blatant violation of the principles of IHL,[78] for which Russia shall be held responsible accordingly.

Under the principle of precaution, parties to the conflict are committed to take all necessary measures to ensure the protection of civilians and their objects. They are obligated to choose the method of warfare that is best able to avoid civilian harm, even while targeting military objectives. While targeting facilities containing dangerous forces like dams and nuclear power stations there is a clear indication of causing excessive civilian harm by unleashing dangerous forces contained within irrespective of the anticipated military advantage.[79] Therefore, by directing attacks on the Kakhovka dam and the Zaporizhzhia nuclear station, Russia has committed breach of the principle of precaution and proportionality.

Parties to the conflict are under obligation to avoid targeting civilians and civilian objects in accordance with Article 57 (1) of the AP-I and Rule 15 of customary international humanitarian law. With respect to nuclear power plants and dams, IHL has granted another layer of protection. This is due to the risks involved in targeting these installations, as they contain inherently dangerous forces that if released, could lead to disasters regardless of the precautions taken or the military advantage anticipated. Article 56 of the AP-I, Rule 42 of the customary international humanitarian law, and Article 15 of the AP-II (Second Additional Protocol) stipulate the necessity of providing special protection to nuclear power plants and dams by the parties to the conflict.

The special protection granted to nuclear power plants extends even to military targets located inside and around the plant. The ban is based on the potential danger involved in the release of dangerous energy contained within

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77 *Supra* note 20, art. 52, ICRC, Study on Customary International Humanitarian Law, 2005, Rule 8.

78 William Alberque, "The wartime weaponisation of nuclear power stations" *IISS,* June 28, 2023, available at <https://www.iiss.org/online-analysis/online-analysis/2023/06/the-wartime-weaponisation-of-nuclear-power-stations/> (last visited on Oct. 10, 2023).

79 Tom Dannenbaum, "What International Humanitarian Law Says About the Nova Kakhovka Dam: The special rules on dams, water, food, and the environment" *Lawfare,* June 12, 2023, available at < https://www.lawfaremedia.org/article/the-destruction-of-the-nova-kakhovka-dam-and-the-heightened-protections-of-additional-protocol-i> (last visited on Oct. 10, 2023).

the station, and therefore the parties to the conflict are obligated to respect the rules of special protection[80] in addition to the general principles of the conduct of hostilities such as distinction, precaution, and proportionality. Russia did not respect this commitment because it targeted buildings near the nuclear station, resulting in fire breakouts.[81]

Russia did not comply with the principles of IHL during its active hostilities with Ukraine, as there was no warning issued for civilians before launching attacks. Russia chose the means and methods of targeting that caused exorbitant harm to civilians and their objects. Likewise, Russian strikes often resulted in large number of casualties. Moreover, Russian attacks against facilities, such as the Kakhovka dam or Zaporizhzhia nuclear station, constitute serious violations of the principles of IHL, and some of these may amount to war crimes.[82] These breaches of IHL require serious action by the International Criminal Court and Security Council to look into the crimes committed by Russia that targeted installations containing dangerous forces in Ukraine either by stepping in to investigate itself or establishing a special tribunal.

Challenges for International Human Rights Law:

Russia and Ukraine, as state parties, have ratified a core set of human rights treaties, including but not limited to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Convention against Torture.[83] These international instruments are foundational in their commitment to upholding fundamental human rights and ensuring the protection of the right to life[84], irrespective of whether a nation is in a state of war or peace. However, it is evident that Russia has violated these rights, with a particular focus on the right to life, by directly and indirectly causing casualties among Ukrainian civilians that number in the tens of thousands.[85] The gravity of these human rights violations cannot be overstated, and it is incumbent upon the international community to hold Russia accountable for these egregious actions. While the application of international human rights law during times of armed conflict is inherently complex and challenging, the duty to respect

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80 *Supra* note 20, art. 56.

81 Erika Weinthal and Carl Bruch, "Protecting Nuclear Power Plants During War: Implications From Ukraine" 53 *The Environmental Law Reporter* 10285 (2023).

82 Human Rights Council, "Report of the Independent International Commission of Inquiry on Ukraine" A/HRC/RES/49/1 UN-HRC A/HRC/52/62 (March 15, 2023).

83 *Ibid.*

84 UN-OHCHR, "International standards: Special Rapporteur on extrajudicial, summary or arbitrary executions" *OHCHR*, available at <https://www.ohchr.org/en/special-procedures/sr-executions/international-standards> (last visited on Oct. 10, 2023).

85 AI, "UKRAINE 2022" *Amnesty International,* available at <https://www.amnesty.org/en/location/europe-and-central-asia/ukraine/report-ukraine/> (last visited on Oct. 10, 2023).

and protect the rights of the Ukrainian people remains an imperative one. It is within this challenging context that the international community faces the formidable task of reconciling the principles of international humanitarian law, which govern armed conflicts, with the unwavering commitment to safeguarding fundamental human rights. Finding a balance between these imperatives is paramount in addressing the multifaceted challenges posed by the Russia-Ukraine conflict while upholding the principles and values enshrined in international human rights law.

International Criminal Law issues:

The stark reality of significant civilian casualties and the deliberate targeting of civilians and civilian objects in the Russia-Ukraine conflict emphasizes the urgent need for the jurisdiction of the International Criminal Court (ICC). Notably, Ukraine, while not being a member of the Rome Statute, has granted the ICC the authority to investigate crimes committed on its territory. According to articles 8 (2) (b) (i) and (ii) of the Rome Statute, any attack intentionally directed at civilians constitutes a war crime. While Russia is not a party to the Rome Statute, the cooperation of Ukraine with the ICC opens up the possibility of pursuing legal action against Russia for the grave violations committed during the conflict. Furthermore, judicial precedents such as the genocide against the Rohingya in Myanmar[86] serve as significant indicators of the potential for pursuing legal action against Russia. These precedents demonstrate that accountability for grave international crimes can transcend the complexities of the legal framework and jurisdictional challenges.

The challenge lies not only in establishing the legal framework for such proceedings but also in the practical and political considerations that must be navigated in the pursuit of justice. The path to accountability in complex international conflicts often involves painstaking negotiations, diplomatic efforts, and the mobilization of international support.

Conclusion:

The war in Ukraine has had a devastating impact on civilians with widespread IHL violations as reported by multiple international organizations. It is evident that Russian attacks in Ukraine were indiscriminate since they targeted civilian areas and places protected by IHL, such as hospitals and schools. The reports also indicate that the weapons employed in the strikes were highly indiscriminate, including internationally forbidden cluster bombs, ballistic missiles, and explosive weapons with wide area impact. The attacks on densely populated areas, such as Kharkiv, have caused extensive damage to civilians and forcibly displaced millions of them.

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[86] ICC, "Bangladesh/Myanmar" *International Criminal Court,* 2019, available at <https://www.icc-cpi.int/bangladesh-myanmar> (last visited on Oct. 10, 2023). See also, Kanishka Kewlani, "Three Avenues to Justice for the Rohingya" *Columbia Journal of Transnational Law,* (Feb. 17, 2022), available at <https://www.jtl.columbia.edu/bulletin-blog/three-avenues-to-justice-for-the-rohingya> (last visited on Oct. 10, 2023).

The Russian government has repeatedly denied committing breaches of IHL or war crimes, but the evidence suggests otherwise. The use of indiscriminate weapons, the targeting of civilians, the destruction of civilian infrastructure, and attacks on the Kakhovka dam and Zaporizhzhia nuclear power plant all constitute war crimes under international law. The Russian army's indiscriminate attacks violated the fundamental principles of IHL. Russia has not adhered to the core obligations of the GCs and AP-I. On the other hand, some of the attacks may also be classified as war crimes, making the International Criminal Court competent, nevertheless, bringing a case against Russia is challenging since Russia is not a signatory to the Rome Statute. Besides the Security Council's inability to take considerable measures to protect civilians due to the Russian veto, the General Assembly of the United Nations must intervene to prevent further violations of IHL and to ensure the protection of civilians in Ukraine. The international community has a responsibility to hold Russia accountable for its war crimes in Ukraine. This can be done through a variety of means, such as criminal investigations, sanctions, and diplomatic pressure. However, it is also important to provide support to the victims of war crimes and to help rebuild Ukraine after the war.

Suggestions:

- Establishment of an international criminal tribunal to investigate and prosecute war crimes committed in Ukraine, either by both the parties willingly or by the efforts of the international community and organizations.
- Imposing additional sanctions on Russia to put pressure on it to end the war and withdraw its forces from Ukraine.
- Financial and humanitarian assistance to Ukraine to help with the war effort and to rebuild after the war.
- It is important to note that the war in Ukraine is not just a regional conflict. It is a threat to international peace and security.
- The international community must stand united against Russia to hold it accountable for its war crimes and look into breaches of IHL seriously committed either by Russia or Ukraine.

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A Need for Specific Legislation on Refugee Protection: An Indian Perspective

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Abstract

` *Towards the end of 2015, three Bills were introduced in the Parliament of India to deal with refugee situations and challenges in granting refuge to them and other issues related to it. Also, in recent times, attempts have been made by the government to amend laws governing the admission and exist of refuge seekers into India, allowing many citizenships based on religious persecution. It may be noted that political policies based on ethnic or religious grounds have become the basis for the government to either allow or refuse a protection to an asylum seeker in India which stands opposed to the international obligations read with fundamental obligation imposed under Article 51 (c) of the Constitution thus creating a gap between the "is" and the "ought". This article is an attempt to analyze whether this gap between the 'is' and the 'ought' can be addressed by specific legislation on refugee protection.*

Key Words: Alien, Asylum, Constitution, Indian Judiciary, Politics, Refugee

Introduction:

India already has a framework in place for dealing with refugees, but it does not have a specific law that defines the rights and protections for refugees. Instead, India's approach to refugees is governed by various laws, policies, and administrative instructions. However, India does not have a special legislation that deals with protection and status of refugees. It has created difficulties in the implementation of policies related to refugees, such as procedure relating to their admission and stay into India, access to education and employment, and the ability to obtain documentation and legal status etc. On December 18, 2015, an Asylum Bill was proposed in the Parliament of India. The said Bill was aimed to provide for the *"establishment of an effective system to protect refugees and asylum seekers an adequate legal process and to determine and evaluate their claims. It also provided for the rights and obligations following such status and matters*

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connected therewith[1]*"*. In June 2015, the Government of India granted Indian nationality to nearly 4000 refugees from Pakistan and Afghanistan. After this, a Public Interest Litigation (PIL) was filed in the Supreme Court of India seeking the extension of permanent citizenship status, as was proposed to be extended to Pakistani Hindu refugees, to the Bangladeshi refugees. The Supreme Court, however, dismissed the PIL citing that the two situations varied in nature and character. The Ministry of External Affairs also in June 2016 proposed to amend the Citizenship Act 1955 to aid Hindu Refugees from Pakistan who had entered India with valid documents. The amendment wasadopted on 12 December 2019, allowing certain specific group of people to apply for citizenship while some other specific group, similarly situated, were denied to seek refuge. It is also pertinent to note that to accord or refuse to accord refuge in India depends solely on the discretion of the government.[2] *In the absence of any specific refugee law the governmental policies to accord refuge in India, the least that can be said, is based on ethnic or religious grounds which stands opposed to the judicial decisions, international obligations read with obligation imposed as fundamental in the governance of the country under Article 51 (c) of the Constitution thus creating a gap between the "is" and the "ought"*. Therefore, in this paper is argued whether India needs a comprehensive refugee law that defines the rights and protections for refugees and establishes a framework for their integration into society. The paper is thus divided into five parts. Part I of the paper deals with the introduction. Part II of the paper refers to the historical review of refugees in India. In part III shall be analyzed the laws and policies governing the entry and exit of refugees. In part IV, a critical approach has been adopted to examine the role of the Indian courts to guarantee certain rights to refugees and in Part V, a critical approach is adopted to examine the need of refugee law and its legal implications. Part VI lays bare to the conclusion and suggestions.

Refugees in India: Historical Review:

Since 1947, when the Indian Independence Act was passed creating India and Pakistan, an unprecedented number of refugees[3] have sought shelter

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1 The Asylum Bill, 2015 (Bill No. 334)

2 According to Bhattacharjee, *the absence of clearly defined statutory standards subjects refugees and asylum seekers to inconsistent and arbitrary government policies*. Bhattacharjee Saurabh, 'India Needs a Refugee Law' 43(9) *Economic and Political Weekly* 71 (2008), available at: https://www.jstor.org/stable/pdf/40277209.pdf?refreqid=fastlydefault%3Aee34b405aaadcd4a91d668907a33f22f&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=sear ch-results (Last visited on Feb. 03, 2023)

3 Bhattacharjee has observed that *"India is one of the most prominent refugee receiving countries in the world [and] according to Refugee International estimates, India hosts around 3,30,000 refugees"*.Bhattacharjee Saurabh, "India Needs a Refugee Law" 43(9) Economic and Political Weekly 71 – 75 (2008), available at: https://www.jstor.org/stable/pdf/40277209.pdf?refreqid=fastlydefault%3Aee34b405aaadcd4a91d668907a33f22f&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=sear ch-results (Last visited on Feb. 03, 2023); See for example Chaudhary has

in India[4], and in 1947, "*the largest ever mass migration in human history also started*."[5] Because of the partition in 1947, Muslims migrated towards East and West Pakistan, whereas Hindus[6]migrated towards India[7]and it is said that approximately 15 to 20 million people who feared persecution or were persecuted abandoned their homes, business and trade in an attempt to cross the newly formed borders.[8]The 1947 partition not only changed the demography of entire cities but also resulted in an unsettled production[9] of refugees.[10] The drafters of the Indian Constitution were well aware of these

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argued that "*India's history with refugee has been long and dramatic. While India has produced its fair share of refugee, it is more a 'refugee-receiving' country than it is 'refugee-producing'*". Chaudhary Omar "Turning Back: An Assessment of Non-Refoulement under Indian Law" 39(29) *Economic and Political Weekly* 3257-3264 (2004), available at: https://www.jstor.org/stable/pdf/4415288.pdf?refreqid=fastlydefault%3A8ccd9f1910df466e0b363d10d9acc013&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=sear ch-results&acceptTC=1 (Last visited on Feb. 03, 2023)

4 It was reported in India Global Focus that during "*2019, India will be hosting around 41,000 mandate refugees and asylum seekers registered with UNHCR. Rohingya and Afghan refugees will constitute the largest caseload under UNHCR's mandate, with a smaller number from Middle East and Africa mostly residing in urban areas*".

5 Kaur Ravinder, *Since 1947*: *Partition Narratives among Punjabi Migrants of Delhi* 70 (OUP 2007).

6 Uditi in an introduction on the immediate implications of the Independence Act of 1947 has observed that "*Indian independence took the form of the partitioning of British India into Muslim-majority Pakistan and Hindu-majority India…All over this portioned landscape, millions of minorities felt 'stranded' on the wrong side and fled to their putative homelands. This gave rise to a refugee crisis of staggering proportions and complexity*". Sen Uditi, *Citizen Refugee* 1, 2 (Cambridge University Press 2018)

7 On India's role in according protection to those who were persecuted or threatened to be persecuted, Dhawan has made reference to times even before Partition of 1947. He has highlighted that "*India's position on refugees in fact dates back to 16th and 17th centuries when India welcomed the Parsis. India, since then continued to host refugees from Tibet in 1959, Bangladesh in 1971 and from Sri Lanka from 1983*". Dhawan Rajeev, *Refugee Law and Policy in India* 32- 80 (PILSARC 2004)

8 Vijayakumar V. "A Critical Analysis of Refugee Protection in South Asia" 19(2) *Refuge* 6, 8 (2001)

9 Emanuel in his report has observed that "*what followed [the partition] was perhaps the most unparallel population shift in history. It is estimated that between 12 and 15 million crossed borders within a period of some 6 months*". *Refugees in India and Pakistan: Report by Emanuel Celler, member, Committee on the Judiciary.* Washington: U S Govt. 1954, available at: https://books.google.co.in/books?printsec=frontcover&vid=LCCN54060502&rediresc=y#v=onepage&q&f=false (Last visited on April, 13, 2013)

10 Fazila on the drastic implications that took place immediately after 1947 partition on human displacement ans mass migration has observed that almost "*some 12 million people were displaced in the divided Punjab alone, and some 20 million in the subcontinent as a whole, making it one of the largest displacements of people in the twentieth century, comparable only to the nearly contemporaneous displacements produced by the Second World War in Europe*". Fazila Vazira, *The Long Partition and the Making of Modern South Asia* (Columbia University Press 2007); See also Sarker Prosun

refugee crises and thus included specific provisions in the Constitution allowing the people to apply for citizenship in India. Article 6[11]guaranteed citizenship rights to people who migrated to India from Pakistan, while Article 7[12]provides protection for people who returned to India with a government-issued permit for resettlement or permanent return. It is pertinent to note that such local integration provided at the time of partition in the Indian Constitution was similar to one of the traditional "durable solutions" used by UNHCR as a viable long term solution for most refugees[13] and recognized under 1951 Refugee Convention. Also after 1947, the country's first mass influx[14] was met with various legislative[15] and official components intended to help and in the long run coordinate with Sikhs and Hindus integrate into society on a national level. Followed by this in 1949, China invaded Tibet, and two years later China occupied the region violently, killing, imprisoning thousands of Tibetan residents. Because of Chinese invasion[16][17], approximately

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Shuvro, *Refugee Law In India* 14 (Palgrave Macmillan 2017). According to Sarker the influx of refugees to India is not only a recent phenomenon. Refugees started flowing into India during the partition in 1947. See also Chimni B. S, *International Refugee Law* 462 (Sage Publications 2000)

11 Refer to Article 6 of the Constitution of India

12 Refer to Article 7 of the Constitution of India

13 For discussion on durable solution see generally Gil Loescher, *Beyond Charity* 148, 149 (Oxford University Press 1993)

14 It may be relevant to note that, as observed by Brett and Lester, "*geo-political dynamics since the end of the Cold War have thrown new light on root causes of refugee movements and other forced displacement, and on the responses and solutions*". Brett Rachel and Lester Eve, "Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead A Non-Governmental Organization's View" 83 (843) *International Review of the Red Cross* 713 (2001), available at: https://international-review.icrc.org/sites/default/files/S1560775500119273a.pdf (Last visited 09 April 2021); See also Chimni B. S., 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) *Journal of Refugee Studies* 350-374 (1998), available at: http://www.mcrg.ac.in/RLS_Migration/Reading_List/Module_F/4.%20Chimni,%20BS,%20Geopolitics%20of%20Refugee%20Studies,%20A%20View%20from%20the%20South.pdf (Last visited 10 April 2021). Chimni has explored in the light of shifting policies, post -1945, the geopolitics of knowledge production in the field of refugee studies.

15 For a comprehensive detail of the legislations dealing with the refugee protection in India refer to Vijayakumar V., "Judicial Responses to Refugee Protection in India" 12 *International Journal of Refugee Law* 236 (2000); see also Vijayakumar V., "*Should India Ratify the Refugee Convention and Protocol*" 2(2) *Bulletin on IHL and Refugee Law* 325 (1997)

16 Adams has focused on the newly arriving refugees from Tibet and the difficulties faced by them to integrate and accommodate into the refugees communities in India. See Adams W, "Tibetan Refugees In India: Integration Opportunities Through Development Of Social, Cultural And Spiritual Traditions" 40 Community Development Journal (2005), available at: https://academic.oup.com/cdj/article-abstract/40/2/216/379563?redirectedFrom=PDF (Last visited 10 April 2021); See also Amchok Tashi Jamyang, "In Exile, It's Not Home", (NA) *Tibetan Review: The*

80,000 Tibetans fled to India in 1959, and were issued registration certificates by the Indian government.[18] This was followed by yet another mass influx of refugees from the then East Pakistan in 1971 who sought refuge in India.[19]Also, there have been several instances of refugees from Sri Lanka, notably Tamils[20], seeking shelter in India over the years, particularly during the civil war in Sri Lanka. The refugees from Sri Lanka were accommodated[21] in the main refugee camp in parts of Tamil Nadu[22] and also refugees from Myanmar have recently sought refuge in India as well. Despite India having a long history of providing refuge to people fleeing persecution and violence in neighbouring countries, including Pakistan, Tibet, Bangladesh, Afghanistan, and Sri Lanka, the treatment and policies for refugees in India are influenced by a variety of factors, including political, social, economic, religious, and security concerns.

Monthly Magazine on all Aspects of Tibet 25-26 (2010). Amchok provides an account of the statelessness experienced by Tibetan refugees in India. See also Bhatia, Shushum *et al*., "A Social and Demographic Study of Tibetan Refugees in India" (54) *Social Science & Medicine* 411- 422 (2000), available at: https://case.edu/affil/tibet/tibetanSociety/documents/asocialDEMO.pdf (Last visited 10 April 2021. This quantitative study describes the demographic, social, and health characteristics of Tibetan refugees in India. See also Faccone Jessica & Wangchuk Tsering, '"We're Not Home": Tibetan Refugees in India in the Twenty-First Century" 7(3) *India Review* 164-199 (2008), available at: https://www.tandfonline.com/doi/abs/10.1080/14736480802261459 (Last visited 10 April 2021). Both Faccone and Wangchuk have examined to what extent, India has become home for Tibetan and how important is legal citizenship or the lack thereof to Tibetan refugees in India.

17 Chimni has observed that "*…foreign influx of refugees occurred in 1959 from Tibet and the Government of India set up a transit camp and provided food medical supplies, issued identity documents and even transferred the land for cultivation and occupation*". Chimni B. S., *International Refugee Law* 462 (Sage Publications 2000)

18 For details refer to Tibet Justice Centre, *Tibet's Stateless Nations III: the Status of Tibetan Refugees in India*., available at: http://www.tibetjustice.org/wp-content/uploads/2016/09/TJCIndiaReport2016.pdf (Last visited 18 February 2020

19 Chimni has asserted that "*they [refugees from Bangladesh] were primarily Buddhist Chakmas and other ethnic hill tribe minority groups who flew harassment from Bangladesh security forces and Muslim settlers who had moved into the relatively sparsely populated CHT from other severely crowded regions of Bangladesh*". Chimni B. S. 'Symposium on the Human Rights of Refugees: The Legal Condition of Refugees in India' (1994) 7(4) Journal of Refugee Studies 378

20 Tamils have been fleeing Sri Lanka since the 1980s due to political and ethnic persecution.

21 In 1983, the Indian Government launched the "operation Vanakkam" to provide assistance to Tamil refugees from Sri Lanka who were fleeing violence and persecution.

22 Human Rights Law Network, *Report of Refugee Population in India*, available at: http://www.hrln.org/admin/issue/subpdf/Refugee_populations_in_India.pdf , (Last visited 18 February 2020)

III. India and Refugees: Laws and Policies:

India has not ratified the Convention relating to the Status of Refugees[23] of 1951 or its Protocol of 1967, however, the government has established refugee camps and centres to provide basic amenities and support refugees.[24] It may be noted that in India refugees are not classifies as a separate group but rather as foreigners[25]and their entry and exit are primarily dealt under the Passport (Entry into India) Act,[26] 1920, Registration of Foreigners Act,[27] 1939, the Foreigners Act,[28] 1946, the Passport Act, 1967 and the Foreigners Order, 1948. The status of refugees in India, like in many countries,[29] apart from based on political policies[30] is also measured on humanitarian factors.[31]

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23 Oberoi on the Convention Relating to the Status of Refugees 1951 and 1967 Protocol on the Status of Refugees vis-à-vis India's obligation has observed that the Convention and the Protocol are *"historically Eurocentric and not responsive to the needs of developing countries."* He further explains that absence of any specific international obligation vis-à-vis refugee protection creates difficulty in approximating the 'is' to the 'ought'. Oberoi Pia A., *Exile And Belonging* (Oxford University Press 2006).

24 See Mohan Mohan S., "India, UNHCR and Refugees: An Analytical Study" 10(3) *Journal of Peace Studies* (2003), available at: http://icpsnet.org/admin/ photo_banner/ 2003July-Art4.pdf (Last visited 9 April 2021). In this article the author has sought to study how India in collaboration with UNHCR has addressed the problem of refugees and has concluded that *"…India has a major Third World country of concern in the context of refugee movements. Almost all the refugee generating factors have been active [in India] and have impinged on the refugee situation in the country"*. See also Sharma N., "Refugees of South Asia: Need for a Regional Mechanism" 1(1) *Kathmandu Law Review* (1996)103- 122 (1996), available at: http://www.mcrg.ac.in/WC_2015/Reading/D_Regional_Mechanism.pdf (Last visited 10 April 2022).

25 The legal regime of Indian Refugee Laws include the Foreigner's Act, 1946, the Emigration Act, 1983, the Passport Act, 1967, the Indian Constitution Act, 1950, the Registration of Foreigners Act, 1939, the Foreigners Order, 1948 and the Indian Citizenship Act, 2003. See for details Dr. Seyon R., "National Refugee Law on the Lines of International Law: The Need of the Hour" 5(1) *Pragyaan: Journal of Law* 49, 51 (2015)

26 Refer section 3 and 5.

27 See section 3 and 6.

28 See section 3, 3A, 7 and 14.

29 Muy Chang and Fernando, "International Refugee Law in Asia" 24(3) *New York University Journal of International Law and Politic* 9 (1992) In this article, Chang-Muy has discussed in detail the creation and development of the United Nations High Commissioner for Refugees and international refugee law.

30 According to Dhawan, special measures to respond to refugee influxes were most extensive in the aftermath of the Partition of India in 1947, the Tibetan influx in 1959 and the Bangladeshi mass influx in 1971. Dhawan Rajeev, *Refugee Law and Policy in India* 4 (PILSARC 2004)

31 Brett and Lester observed that *"there is a conceptual parallel between international refugee law and international humanitarian law. Both originated in the need to address the*

The Government of India on July 19, 2016, presented in Parliament a Bill to amend provisions of the Citizenship Act, 1955. The purpose of the Bill was to allow Hindus, Jains, Christians, Parsis and Buddhists who had flown from Pakistan, Bangladesh, and Afghanistan to India without valid travel documents, or those whose valid documents have expired, through the naturalization process to acquire Indian citizenship, and such persons would not be treated as illegal immigrants under Citizenship Act.[32] The Bill also proposed that the total qualifying period for residential qualification for the purposes of citizenship by naturalization be six years.[33]Also, another Bill that was introduced later in 2019 and received the President's assent in December 2019 known as Citizenship (Amendment) Act 2019 sought to facilitate the acquisition of citizenship by only above mentioned communities. The said Act of 2019 grants citizenship to all, except Muslim, who arrived in India before 31 December 2014.[34] It also provided that all those illegal migrants, except for Muslims, who came neighbouring States shall be entitled to citizenship of India. It also reduced the year of residency to six from eleven years to apply for citizenship. The Citizenship (Amendment) Act 2019 accommodates Hindu refugees only. It may be noted that, despite having a legitimate fear of persecution in their place of origin and being in a comparable situation, the aforementioned Act forbids Muslims from requesting any form of protection. It goes without saying that India, as a sovereign nation, can adopt a policy describing who can travel to and stay in India and who cannot, but sovereignty as 'responsibility' requires that States provide the appropriate policies to ensure protection to the people.[35] It is pertinent to note that it contravenes the

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protection of persons in the hands of a State of which they are not nationals". Brett Rachel and Lester Eve "Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead A Non-Governmental Organization's View" 83 (843) *International Review of the Red Cross* 713 (2001), available at: https://international-review.icrc.org/sites/default/files/S1560775500119273a.pdf (Last visited 09 April 2022)

32 See for details section 2 of the Citizenship (Amendment) Bill 2016

33 See for details section 4 of the Citizenship (Amendment) Bill 2016

34 See for details section 2 of the Citizenship (Amendment) Act 2019

35 Francis Deng in his work on Sovereignty as Responsibility has argued that "*sovereignty carries with it certain responsibilities for which governments must be held accountable … not only to their national constituencies but ultimately to the international community"*. Francis M. Deng *et al.,Sovereignty as Responsibility: Conflict Management in Africa* 1 (Washington, DC: Brookings Institution Press 1996). Also, Peltonen while referring to the International Commission on Intervention and State Responsibility highlights that *"Sovereignty means "accountability […] internal, to one's own population […] and internationally, to the community of responsible states […] in the form of compliance with human rights and humanitarian agreements""*. Peltonen, Hannes, "Sovereignty as Responsibility, Responsibility to Protect and International Order: On Responsibility, Communal Crime Prevention and International Law" 7 (28) *Uluslararası İlişkiler* 59, 69 (2011), vailable at: https://dergipark.org.tr/tr/download/article-file/540097 (Last visited 16 Mar. 2021); See also United Nations General Assembly, Implementing the Responsibility to Protect: Report of

international obligations incurred by India, member of the United Nations, not to discriminate on the basis of religion and would also amount to a breach of various treaty obligations, to which India is a party. It thus contradicts the fundamental obligation set forth by Article 51(c) of the Constitution which makes necessary for the State to comply with its commitment under international law and treaty obligations when dealing with organized people.[36] The denial of protection to specific group of people based on religion criteria goes against spirit of philosophy and idea of liberty and equality enshrined in the United Nation Charter.[37]The fact that India has ratified numerous international treaties and regional agreements pertaining to protecting, defending, and promoting human rights is also significant.[38]It can be safely

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the Secretary General. Para. 10(a), it has been observed that "… *the responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than the narrower idea of humanitarian intervention*". See also Syam Anasuya, "Patchwork of Archaic Regulations and Policies in India: A Breeding Ground for Discriminatory Practice against Refugees" 14(21) *Journal of International Law and Politics* 1377, 1389 (2019), available at: https://nyujilp.org/wp-content/uploads/2019/09/NYI411.pdf (Last visited 17 April 2021). She has concluded that "*India cannot forever insulate itself from international scrutiny and accountability for the treatment of refugees on its soil and at its borders*".

36 Omar Chaudhary has argued that for any refugee policies in India, it should be based on the harmonious construction between municipal as well as international standards. He has stated that

The prevention of refoulement (translated roughly as the 'turning back' of refugees), which includes both the rejection of refugees at the border as well as the deportation of refugees from inside India, lies at the very heart of refugee protection. Unfortunately, the scholars who identify the right of non-refoulement under Indian law overestimate the amount of legal protection for refugees in India. A sober assessment of Indian law reveals that refugees are not entitled to non-refoulement unless India adopts new legal obligations. Any refugee policies pursued by the government of India should be based on sound analyses of existing domestic law vis-à-vis international standards.

Chaudhary Omar, "Turning Back: An Assessment of Non-Refoulement under Indian Law" 39(29) *Economic and Political Weekly* 3257 (2004), available at: https://www.jstor.org/stable/pdf/4415288.pdf?refreqid=fastlydefault%3A8ccd9f1910df466e0b363d10d9acc013&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=sear ch-results&acceptTC=1 (Last visited on Feb. 03, 2023)

37 In this context, it will be relevant to refer to Article 1(3) of the United Nations Charter which reads as:

The purposes of the United Nations are:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouring respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

38 Ananthachari, T., "Refugees In India: Legal Framework, Law Enforcement And Security" (2001), available at: http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html (Last visited 19 February 2020).

said that such treaties and agreements adopted India[39] has a legal implication, directly or indirectly, of according protection to refugees such as like the 1948 Universal Human Rights Declaration[40] that address to refugee protection under Article 13, 14 and 15. Also, the International Covenant on Civil and Political Rights, 1966[41] (ICCPR) [42]under Article 12 and 13 deal with refugees and India is a signatory to it. It has also ratified the 1966 International Covenant on Economic, Social and Cultural Right which guarantee rights to non-nationals.[43] India is also part to the 1963 Convention on the Elimination of All Forms of Racial Discrimination and the 1979 Convention on the Elimination of All Forms of Discrimination against Women,[44] the 1989 Convention on the Rights of the Child[45] and has also signed the 1984 Convention against Torture[46] which also considerably deal with refugee related matters. India, also, on many occasions has shown interest in developing a legal space for refugee rights by signing the Bangkok Principles, a non-binding declaration, on the Status and Treatment of Refugees.[47] India is also a member in the UNHCR's Executive Committee,

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39 For further details refer to, Gorlick and Rimi. This article focuses on the relationship between international human rights standards and refugee protection. Gorlick Brian and Khan Rimi Sumbul, "Refugee Protection as Human Rights Protection: International Principles and Practice in India" 16(6), *Refuge* 40 (1997).

40 Trakroo and others have observed, and rightly so, that "*the UDHR is now considered jus cogens, these rights (Article 13, 14 and 15) are universally accepted and enforced by all State Parties, regardless of whether they have signed the 1951 Convention or the 1967 Protocol*". Trakroo Ragini *et al*., *Refugees and the Law* (2nd Edn., Human Rights Law Network 2011).

41 However India has made a reservation on Article 13 regarding the expulsion of a person lawfully present in the territory of the State.

42 Article 2 of the ICCPR contemplates that refugees have the right to equality before the law, right to equal protection of the law and non discrimination.

43 Trakroo and others have analyzed, on the implication of being party to the ICCPR, that "*this would imply that the country of asylum, if it is a signatory to this covenant, must allow persons residing in its territory to practice their own culture and social habits as well as to educate themselves and pursue economic activities, imposing only the reasonable restrictions provided for in the instrument*". Trakroo Ragini *et al*., *Refugees and the Law* 43, 44 (2nd Edn., Human Rights Law Network 2011)

44 It is observed by the authors that the protection of women, under the Convention on Elimination of All Forms of Discrimination against Women, against exploitation and other forms of rights for example education, medical care employment etc are relevant in the refugee context, since refugee women are especially vulnerable. *Id*

45 *Id* at 43, 44

46 It may be noted that India is party to various international human rights conventions and treaties and it can be safely concluded that reading them together with Article 51 (c) of the Constitution of India that it is the obligation of India to accord, which it is, protection to the victims of persecution. For details on the implication of India's international obligation refer to Gorlick Brian and Khan Rimi Sumbul, "Refugee Protection as Human Rights Protection: International Principles and Practice in India" 16(6), *Refuge* 39, 40 (1997).

47 Sen has given a brief about how and why Bangkok Principles were adopted and its reminifications of the status of refugees and observed that *"in March 1964 the*

responsible for endorsing and overseeing the material assistance initiatives conducted by the UNHCR.[48] While these principles are not legally binding, their purpose was to encourage member States to establish national laws regarding the status and treatment of refugees. They were designed to serve as a model for addressing refugee issues.

India has a rich history of offering refuge to individuals escaping persecution and turmoil on neighbouring nations, including Tibet, Sri Lanka, Afghanistan, Bangladesh, and Pakistan. India has also provided support to refugees in various ways, including by providing access to education, healthcare, and employment opportunities. Therefore, as a signatory to the various UN Convention, a member of the UNHCR Executive Committee, and a country with a history of providing refuge to people in need, India has an obligation to uphold the rights and protection of refugees and work towards finding durable solutions for their displacement.

Judicial Response to the Refugee Crises in India:

Indian courts have on many occasions evolved a wider and more humane approach protecting the rights of refugees. The courts[49] have generally taken recourse to the established principle of the rule of law set under Article 14 read with Article 21 of the Constitution which provides that the State shall not deny to 'any person' equality before law and equal protection of laws and that State shall not deprive 'any person' of his life or personal liberty except according to the procedure established by law which is just, fair and reasonable,[50] at least after the interpretation accorded to Article 21 in Manteca

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*Government of the Arab Republic of Egypt by a reference made to the Asian-African Legal Consultative Committee (AALCC) under a mandatory provision of its statutes, requested it to consider the question of status and treatment of refugees and make its recommendations thereon… which had led to the adoption of a set of recommendations known as the "Bangkok Principles" in August 1966".*Sen Uditi, *Citizen Refugee* 188-217 (Cambridge University Press 2018) 188-217

48 Oberoi discusses how India agreed to the establishment of a UNHCR office, and consequently developed a working relationship with it and although India refused to formalize the UNHCR's status, it did request membership to the UNHCR's Executive Committee, which was granted in 1995. Oberoi Pia A., *Exile And Belonging* (Oxford University Press 2006).
India is also a member of the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR), which is responsible for the implementation of the 1951 Convention and the 1967 Protocol. As a member of this committee, India has a responsibility to work with the UNHCR and other member states to support the protection and assistance of refugees.

49 For a detailed analysis of the important judicial decisions that have contributed to the conceptualization of the general trend of justice delivery in refugee matters in India refer to Sarker Prosun Shuvro, *Refugee Law In India* 27-54 (Palgrave Macmillan 2017)

50 Bhattacharjee has made an observation that *"As 'aliens' or 'foreigners', the refugees have access to rights enshrined in Articles 14, 21 and 25 of the Constitution".* Bhattacharjee Saurabh, "India Needs a Refugee Law" 43(9) *Economic and Political*

Gandhi decision.[51]The Indian judiciary has played a crucial role in responding to the refugee crises in India, particularly in ensuring the protection of refugees and upholding their rights. In several cases, the Indian courts have intervened to protect the rights of refugees and asylum seekers, directed the state government to provide food, shelter, and medical facilities to refugees who were living in refugee camps. In some other another case, directed the central government to ensure that the Rohingya refugees living in India were not deported to Myanmar where they could face persecution.

Judicial Approach

In the State of *Arunachal Pradesh* v.*Khudiram Chakma*[52], the court concentrated specifically on Section 6-A (2) of the Citizenship Act, 1955, Section 3 of the Foreigners Act, 1946; the Foreigners Order, 1948; as well as Article 19 (1) (d) and (e) of the Constitution. The Supreme Court observed that:

> *…the foreigners also enjoy some fundamental right under the Constitution of this country, is also of not much help to them. The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country, as mentioned in article 19 (1) (e), which is applicable only to the citizens of this country.*

As such Articles 19 (1) (d) and (e) are unavailable to foreigners because those rights are conferred only on the citizens. In the *National Human Rights Commission* v. *The State of Arunachal Pradesh*[53], the Court stated:

> *We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights of citizens. Every person is entitled to equality before the law and equal protection of*

Weekly, 71, 72 (2008), available at: https://www.jstor.org/stable/pdf/40277209.pdf?refreqid=fastlydefault%3Aee34b405aaadcd4a91d668907a33f22f&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=sear ch-results (Last visited on Feb. 03, 2023).

Also, it may be relevant to note the observations made by Chimni that "*the terms aliens and foreigners are used interchangeably and both denote a category of people who do not legally belong within the territory of India, meaning "a person who is not a citizen of India"*.Chimni B. S., "Symposium on the Human Rights of Refugees: The Legal Condition of Refugees in India" 7(4) *Journal of Refugee Studies* 379 (1994)

51 Raesesa has observed that the interrelated reading of fundamental rights, in the context of Maneka decision, meant that procedure must be just, fair and reasonable and thus "*procedure established by law[under Article 21], now had to comply with Article 19's requirements of reasonableness, and article 14's requirement of equal treatment and non-arbitrariness. Procedure under article 21… must be "right and just and fair, and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied""* Vakil Raeesa, "Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights" 16(2) *International Journal of Constitutional Law* 475, 487 (2018), available at https://academic.oup.com/icon/article/16/2/475/5036457?login=true (Last visited 31 May 2022).

52 AIR 1994 SC 1464

53 AIR 1996 SC 1234

> *the laws. So also, no person can be deprived of his life or personal liberty except according to the procedure established by law. This State is bound to protect the life and liberty of every human being, be he a citizen or otherwise.*

The Supreme Courts observation, initially speaking, in *Mohammad Salimullah* case in 2018 in which the deportation order of Rohingyas Muslims were challenged that the government should be sensitive to the Rohingyas and cannot be oblivious to the plight of innocent women and children. In 2021, the Supreme Court was again petitioned to rule on the legality of detaining Rohingya refugees and to instruct the government not to expel them. The Court stated that deportation should not occur unless the proper deportation procedures are followed and emphasized that:

> *There is no denial of the fact that India is not a signatory to the Refugee Convention. Therefore, serious objections are raised, whether Article 51(c) of the Constitution can be pressed into service, unless India is a party to or ratified a convention. But there is no doubt that the National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law*[54].

The judiciary, in absence of special laws on refugee protection[55], in India has played an important role in protecting the rights of refugees and asylum seekers. The Indian Constitution guarantees the right to life and personal liberty under Article 21, which has been interpreted by the courts to include the right to seek asylum. The judiciary has also interpreted the principle of non-refoulement, which prohibits the return of refugees to a country where they may face persecution, as a fundamental right under the Constitution[56].Overall, the judiciary in India has played an important role in protecting the rights of refugees and asylum seekers and upholding the principle of non-refoulement. However, there are still challenges in ensuring effective access to justice for refugees. It can be, however, safely said that the Indian judiciary has played a significant role in bridging the gap between the "is" and the "ought" and overall, the it has played a significant role in

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54 Mohammad Salimullah v Union of India AIR 2021, para 12

55 In this article Dr Vijayakumar has analyzed the need of a national law to bring uniformity and clarity that are essential in the treatment of the refugee protection. Vijayakumar V. "Judicial Responses to Refugee Protection in India" 12 *International Journal of Refugee Law* 236 (2000)

56 See for contra Saxena Prabodh, "Creating Legal Space for Refugee in India: The Milestone Crossed and the Roadmap for the Future" 19(2) *International Journal of Refugee Law* 246 (2007). Saxena, has argued that *"a plethoric of unreported cases demonstrate that the courts have treated these matters on purely technical grounds, no pronouncement on law are made nor any general guidelines laid…judicial reasoning has been mainly humanitarian and not right based, dispensing kindness not justice, and the courts has nothing to say on refugee protection"*. Thus it can be said there is a selective approach by the courts and thus it does not, properly speaking, fulfil the gap between the "is" and the "ought" and remains uncertainty on how a refugee may be treated by the courts.

protecting the rights of refugees and asylum seekers and has emphasized the need for a comprehensive refugee law to address the challenges faced by refugees in India.

Refugee Protection in India: The 'Ought To' Proposition:

On December 18, 2015 (Bhairav 2016),[57] the Asylum Bill 2015[58] the Protection of Refugees and Asylum Seekers Bill, 2015[59] and the National Asylum Bill, 2015[60] were introduced in the Parliament to provide for the establishment of effective refugee protection. The Asylum Bill 2015 provided "*for the establishment of an effective system to protect refugees and asylum seekers by an appropriate legal framework to determine claims for asylum and to provide for the rights and obligations arising from such status and matters connected therewith*". In the statement of objects and reasons of the Asylum Bill, it has been emphasized that India's practice, despite it not being party to Refugee Convention of 1951, has adopted a humanitarian approach towards refugees under the terms of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The said Bill also has exemplified the role of the judiciary in according constitutional protection to refugees. The proposed Bill sought "*to incorporate the current policy on refugees, the principles of the Constitution, and India's international obligations and provide uniformity on the recognition of asylum seekers as refugees and their rights in the country*". The Bill proposed to "*enable the Government to manage refugees with more accountability and order, while balancing humanitarian concerns and security interests of the State*"[61]. The bill also suggested establishing a commission to take calls on applications of asylum seekers which consist of a Chief Commissioner, and not less than six other commissioners to be appointed by the Centre[62]. The said Bill is divided into ten chapters. Section 4 of the Bill provides a comprehensive definition of a refugee. It states that a person will qualifies as a refugee under the Act if such person— *"(a) is outside his country of origin and is unable or unwilling to return to or avail himself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, nationality, ethnicity, membership of a particular social group or political opinion; or (b) has left his country owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing*

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57 On December 18, 2015, in the Lok Sabha three bills were introduced to deal with asylum regime. For the analysis of the Bills refer to Bhairav Acharya, "The Future of Asylum in India: Four Principles To Appraise Recent Legislative Proposals" *NUJS Law Review* (2020), available at: http://nujslawreview.org/wp-content/uploads/2017/01/2016-9-3-4-Bhairav-Acharya-The-Future-of-Asylum-in-India_-Four-Principles-to-Appraise-Recent-Legislative-Proposals.pdf (Last visited 31 May 2022).

58 The Asylum Bill, 2015, 334 of 2015, Lok Sabha

59 The Protection of Refugees and Asylum Seekers Bill, 2015, 290 of 2015, Lok Sabha

60 The National Asylum Bill, 2015, 342 of 2015, Lok Sabha

61 For details refer to the statement of objects and reasons of the Asylum Bill, 2015.

62 See Section 17 of the Bill.

public order."[63] The first part of the definition is influenced by the 1951 Refugee Convention and its 1967 Protocol. In the second part of the definition, an attempt is made to add a new dimension by expanding the definition beyond its traditional approach; however, mixed migration has not been adequately addressed in the Bill.[64] It is equally important to note that the term refugee defined under section 4 is much wider than what has been defined under section 2(d) of the National Asylum Bill or section 3(e) of the Protection of Refugees and Asylum Seekers Bill, 2015. The principles of refugee status in the Asylum Bill including criteria for recognition, exclusion clause, cancellation and revocation and provisions of non refoulement have been influenced from the 1951 Refugee Convention. The Bill, however, has a unique provision pertaining to the treatment of dependents of refugees as refugees,[65] while the Protection of Refugees and Asylum Seekers Bill, 2015 under section 6(4) only provides for a procedure for application of refugee status on the behalf of the child. Pursuant to this Bill, granting of asylum is no longer a matter of discretion. An asylum seeker will have a right to an asylum procedure as envisaged by section 10 of the Bill[66] and a right to be granted asylum after fulfilling the condition as enumerated in the Bill. It may be pertinent to note that neither the text of the 1951 Convention nor state practice provides us with a clear answer as to which guarantees of the Convention on the Status of Refugee apply to asylum-seekers pending their refugee determination. The Asylum Bill, specifically in Section 10(5) & (6), stipulates that no asylum-seeker, whether in India or at international border, can be detained or penalized solely due to their illegal entry or stay in India while their asylum application is pending determination. Additionally, upon applying for asylum, each applicant will receive a registration document from the Commission in the prescribed form. This document will be valid for six months, and will include the applicant's identity information, and it applicable, the identity information of their dependents. The document will allow them to stay in India during the asylum application process and issued without any associated fee.[67] In this regard, it is also relevant to note that Asylum Bill provides an exhaustive

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63 See section 4 of the Bill

64 Bhairav argues that "*refugees often move within large mixed flows of migrants which might include people fleeing generalized violence, torture, targeted persecution, as well as economic migrants, victims of trafficking, women and children at risk…*"Bhairav Acharya, "The Future of Asylum in India: Four Principles To Appraise Recent Legislative Proposals" *NUJS Law Review* (2020), available at: http://nujslawreview.org/wp-content/uploads/2017/01/2016-9-3-4-Bhairav-Acharya-The-Future-of-Asylum-in-India_-Four-Principles-to-Appraise-Recent-Legislative-Proposals.pdf (Last visited 31 May 2022)

65 See section 4(2) of the proposed Bill

66 See section 10 of the Bill

67 According to Walter, this is the State practice adopted by Switzerland. Kalin Walter, "The Legal Condition of Refugees in Switzerland" 7(1) *Symposium On The Human Rights of Refugees in Journal of Refugee Studies* 85(1994)

procedure for admission or rejection of a refugee as well as rights guaranteed than what was proposed in the National Asylum Bill of 2015. Section 10 of the Asylum Bill enumerates the rights and duties of asylum seekers and refugees which are similar to the Refugee Convention of 1951. The paper ends on a note similar to one with which the research began that the unlimited power of the State to regulate the entry and exit of refugees and their rights in India should be adequately addressed by specific refugee legislation which are in tune with the India's commitment to upholding international human rights for all.

Conclusion:

India does no longer have a particular regulation for refugee protection; however there are numerous legal guidelines and insurance policies that provide some degree of safety to refugees and asylum seekers. Firstly, the Constitution of India ensures sure imperative rights to all persons, together with refugees and asylum seekers, as recognized through the courts in India, such as the proper to equality, freedom of religion, and the proper to existence and non-public liberty. These rights are covered regardless of a person's nationality or citizenship status. Secondly, the Foreigners Act, 1946 gives the criminal framework for the entry, stay, and departure of overseas nationals, which include refugees and asylum seekers. Under this law, refugees can be granted long-term visas and given safety towards deportation to international locations the place they may also face persecution or harm. Thirdly, the Registration of Foreigners Act, 1939 and the Foreigners Order, 1948 require overseas nationals, which includes refugees and asylum seekers, to register with the neighbourhood police authorities upon arrival in India. This registration is integral for acquiring visas and different prison files that enable them to remain and work in India. Finally, the Indian authorities has installed more than a few insurance policies and administrative directions to supply safety and help to refugees and asylum seekers. These encompass the Policy for Grant of Long Term Visa to Nationals of Pakistan, the Policy for the Protection of Refugees and the Standard Operating Procedure for dealing with refugees and asylum seekers. These laws, however, do not define the term 'refugee' and consequently, their rights[68]remain ambiguous and uncertain. The courts in the absence of any home legislations and any precise treaty tasks have interpreted the provisions of the Constitution to accord safety of rights and pursuits to the refugees which include, amongst others, proper to safety towards refoulement, the proper to are seeking asylum, the proper to lifestyles and non-public protection and the proper to equality earlier than regulation and non-

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[68] According to Bhattacharjee "*…Indian laws and practice provides a distorted and incomplete protection to refugees. Indian Law even fails to recognize refugees as a distinct category of persons and treats them as par with all other foreigners*". Bhattacharjee Saurabh, 'India Needs a Refugee Law 49(9) Economic and Political Weekly 71 (2008), available at: https://www.jstor.org/stable/pdf/40277209.pdf?refreqid=fastlydefault%3Aee34b405aaadcd4a91d668907a33f22f&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&origin=sear ch-results (Last visited on Feb. 03, 2023)

discrimination. The courts have performed a good sized function in bridging the hole between the "is" and the "ought". Despite this India chooses to deal with refugees on their non secular foundation and political consideration, which stand hostile now not to the responsibility essential in the governance of us of a with the aid of advantage of Article fifty one (c) of the Constitution which mandates the State to endeavour to foster admire for worldwide regulation and treaty tasks in the dealings of equipped peoples with one some other however additionally in dismiss of the selections of the Superior Courts which have been instrumental in recognizing and defending quite a number rights of refugees. Though India at many events has comprehended the prerequisites which a refugee faces, although it's confined and political strategy to deal with the refugee disaster has resulted in denial of some essential protections to every other giant wide variety of refugees. This denial runs in opposition to India's worldwide and constitutional duty to endeavour appreciate for global regulation and treaties. The absence of a precise regulation for refugee safety in India has resulted in a lack of readability and consistency in the implementation of these legal guidelines and policies, which has created difficulties for refugees and asylum seekers in getting access to their rights and acquiring criminal status. Therefore, there is a want for a complete refugee regulation that defines the rights and protections for refugees and establishes a clear framework for their integration into Indian society. It is time for India to supply a serious concept for refugee policy, in consonance with global requirements and judicial choices and undertake a legislative coverage on the traces of Asylum Bill of 2015.

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Decriminalisation of Adultery: Comment on Joseph Shine v. Union of India in the light of the Recent Stand of the Parliamentary Committee

Faisal Fasil*

I. Introduction

The Parliamentary Standing Committee on Home Affairs has recommended reinstating the provision of adultery in the proposed Bill on criminal law (Bharatiya Nyaya Sanhita) to protect the sanctity of the institution of marriage.[1] Adultery is an act of consensual sexual intercourse between a man and a married woman under the circumstance where the former knows or has reason to believe that the latter is married. The act of adultery was penalised in India since the time of the inception of the Indian Penal Code in 1860. After several unsuccessful attempts,[2] adultery was eventually declared unconstitutional in 2018 by the Constitution Bench of the Supreme Court in the Joseph Shine v. Union of India.[3] Some of the questions to ponder over before retaining the decision to abolish adultery are: Is a divorce suit a sufficient deterrent for checking the infidelity on spouses who sleep out of marriage? Would it not be the most considerable mental trauma for every wife,[4] especially

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1 Include gender-neutral provision to criminalise adultery in bill replacing IPC: Parliamentary panel, *available at:* https://scroll.in/latest/1059032/include-gender-neutral-provision-to-criminalise-adultery-in-bill-replacing-ipc-parliamentary-panel (last visited on November 14, 2023).

2 Yusuf Abdul Aziz vs State of Bombay [AIR 1954 SC 321], Sowmithri Vishnu vs UOI & Anr [AIR 1985 SC 1618], Rewathi vs UOI & Others (1988) 2 SCC 72.

3 [2018] SCC Online SC 1676.

4 Discovering husband's infidelity shortly after marriage can have devastating effect on mental well being of woman, available at: https://www.livelaw.in/high-court/delhi-high-court/delhi-high-court-husband-infidelity-marriage-mental-well-being-woman-suicide-306-ipc-235783#:~:text=days%20after%20marriage.-,Justice%20Swarana%20Kanta%20Sharma%20observed%20that%20the%20emotion

if she cannot afford to part ways with her husband? Can we also not imagine a situation where children of such disturbed marriages would suffer in various forms? Does the decriminalisation of adultery conform to the social realities of the country? The author in this paper would like to critically analyse the grounds of decriminalising adultery, which may be categoried into four categories – a) discrimination, b) intrusion into private space, c) futility of penalization, and d) adultery may be the result rather than the cause.

II. Critical Analysis of Grounds of Decriminalization of Adultery

a) Discrimination

The Supreme Court stated that the provision of adultery is discriminatory because sexual intercourse with the married woman must take place without the consent of her husband. In other words, the man shall not be punished if he obtains the consent for sexual intercourse from the husband of such woman.[5] The provision of procedural law clarifies this point. Section 198 of CrPC provides that the court cannot take cognizance of the matter of adultery unless the complaint is made by the husband or in the absence of husband; the complaint should be made by the person who had taken care of the woman involved in adultery.[6] There is a merit in the argument that prosecution lies at the discretion of the husband, which essentially means treating women as property.[7] However, this procedural lacuna shouldn't be considered as sufficient reason to strike the wrong of adultery. As suggested by the present Standing Committee, the

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al%20trauma%20of,the%20extent%20of%20committing%20suicide (last visited on November 30, 2023).

5 The Indian Penal Code, 1860 (Act 45 of 1860), s.497 ("Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor").

6 "Prosecution for offences against marriage: (1) No Court shall take cognizance of an offence punishable under Chapter XX [Offences Relating to Marriage] of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence: Provided that…(2) For the purposes of sub- section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was com- mitted may, with the leave of the Court, make a complaint on his behalf…"

7 But see Revathi vs UOI & Others, (1988) 2 SCC 72 [Followed the decision of Sowmithri and added that Section 497 provides reverse discrimination in favour of a woman because even being an outsider to the marriage, she cannot be prosecuted]; Also see, Yusuf Abdul Aziz v. State of Bombay, AIR 1985 SC 1618.

Malimath Committee,[8] and the Law Commission of India,[9] the simple solution is to make it gender-neutral rather than removing it from the criminal statute. Consequently, Section 198 of CrPC should be removed.

b) **Intrusion into Private Sphere**

Justice Dipak Mishra stated that the State would enter into the private realm by considering adultery as a criminal wrong. Along similar lines, preaching for minimalist approach,[10] Justice Indu Malhotra argued that adultery is only a moral wrong by the spouse and the family members and that the society is not directly affected by it. However, as Justice Regan and others held, it directly affects public life[11]. There is a causal link between adultery and instability in society - adultery may lead to the breakdown of marriage[12], which may disrupt families and the lives of children[13], ultimately causing instability in society. If we struggle to consider adultery as a public wrong, it would be challenging to justify criminal sanction for *triple talaq,* among other things. If we struggle to consider adultery as a public wrong, it would be challenging to justify criminal sanction for *triple talaq,*[14] crimes arising out of non-fulfillment of conjugal rights like maintenance, among other things.

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8 Committee on Reforms of Criminal Justice System, Govt. of India, Ministry of Home Affairs, March 2003.

9 See the 42nd and 156th Law Commission of India Reports

10 "The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices. The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State."

11 See generally O'Regan, J., in Dawood and Another v. Minister of Home Affairs and Others 2000 (3) SA 936 (CC) ("…Entering into marriage therefore is to enter into a relationship that has public significance as well…")

12 Gravningen K, Mitchell KR, Wellings K, Johnson AM, Geary R, Jones KG, et al., Reported reasons for breakdown of marriage and cohabitation in Britain: Findings from the third National Survey of Sexual Attitudes and Lifestyles (Natsal-3), 12(3) *PLoS ON* 1, 11 (2017) (The authors argue that for the breakdown of both married and live-in relationships, adultery/unfaithfulness was a commonly cited reason).

13 Ambreen Fatima, Extramarital Affairs and Family Disruption, 10(4) *INT. J. SCI. ENG. RES.* 496, 509 (2019) [By way of a study, the author establishes a strong correlation between extra-marital affairs and the disruption of family, resulting in the destabilisation of the family set-up].

14 Muslim Women (Protection of Rights on Marriage) Act, 2019.

c) Futility of Penalization

Relying on the observations of certain foreign decisions,[15] the Court stated that it is futile to penalise if the moral commitment in marriage has been lost, and punishment to the third party is not likely to serve any purpose. There is some merit in the proposition when looked at from the perspective of the married couple, where the woman is an adulterer. However, if we view it from the perspective of the wife of the adulterer [third party], the picture would be different. We must understand that two families may be affected by one adulterous relationship. Consider the following example. The first family consists of W [wife] and H [husband] and the second family consists of W1 [wife] and H1 [husband]. If W enters into an adulterous relation with H1, both the marriages are at stake. If adultery is not a crime, H and W1 may only file a civil suit for separation but if adultery is an offence, apart from filing a petition for divorce, penal sanction will be imposed on H1. So, even assuming that penalisation will not save the first couple [W & H] but there would be sufficient check on H1 for fear of punishment. If the adulterer man is unmarried, the fear of imprisonment would be some sort of check on his wrongful intention to illegitimately penetrate and pollute someone's family. Moreover, it is tough to say that penalisation has not served any purpose because we cannot have complete data on this point because we can't have a foolproof mechanism to read the mind of every potential offender. Who knows, there might be several people who abstain from adulterous relationships due to the fear of punishment. For the sake of argument, even if we assume that penalization has not reduced the number of offences, can it be considered as valid ground to decriminalise or it should be taken as limitations of the policies of penalization. The deterrent aspect of the penalisation process need not eradicate the wrong; it would be sufficient if it may help reduce the number of incidents.[16]

d) Adultery can be a Result of Unhappy Marriage rather Than Just the Cause of it

The court classified the cases where adultery is the "cause of unsuccessful marriage" and the "result of unsuccessful marriage." Therefore, providing same treatment to both situations would be

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15 James Sibongo v. Lister Lutombi Chaka and Anr, Case No. SA77-14, 19.08.2016, Supreme Court of Namibia; Judgement of the South Korean Constitutional Court Case on Adultery, Case No: 2009 Hun-Ba17, decided on February 26, 2015; Advocacy for Women in Uganda v. Attorney General of Uganda, 2007 UGCC 1, 5 April, 2007); DE v RH, [2015] ZACC 18 77, Constitution Court of South Africa.

16 See E.g; Gary S. Becker, Crime and Punishment: An Economic Approach, 76 *J. POL. ECON*. 169, 204 (1968) ["The anticipation of conviction and punishment reduces the loss from offenses and thus increases social welfare by discouraging some offenders"].

arbitrary because it would essentially mean penalising persons whose marriage has been broken as well as those persons whose marriages are intact. The counter argument to this could be that if adultery is the cause of unsuccessful marriage, then the person should be penalized for infidelity. On the other hand, if a person is not happy with the marriage, he may take the extreme step of going for separation and then looking for some other partner instead of establishing sexual relations with women outside the marriage and then justifying his unchastity as a result of unsuccessful marriage.

III. Conclusion

The approach of the Supreme Court in Joseph Shine refrains criminal law from intruding into the private family sphere but grants licenses to people to enter others' private marital sphere and dismantle their marital bond. The scope of the law changes with the changing society. What was considered a serious offence is no more penalized. Law must cater to the needs of the present generation but the future impact should also be considered. It is very crucial to make an impact assessment of the legal change rather than just arguing on the ground of rights and individual liberty. Besides, the makers and the interpreters of law must be consistent in their respective operations. One may wonder why adultery and triple talaq are not in the same basket – public or private, depending on the perspective. If the trend continues, it won't be far fetch to imagine a situation where anybody could sleep with anyone, which essentially means going back to the Stone Age rather than considering it as progress.[17] Every change is not progress – it may be positive or negative.

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17 Khusboo vs. Kanniammal &Anr, (2010) 5 SCC 600 [In fact, it is interesting to note that the Supreme Court of India has even provided reference of certain indigenous groups who practice sexual relation outside the marital setting to justify the presence of live-in-relationship].

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The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013: Deficiencies and Barriers

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Abstract

The land is a valuable natural resource, providing different amenities in the different forms i.e. trees, crops, mineral water, etc., and to different habitats, and even a source of livelihood. However, for public welfare and developmental purpose state adopts the method of compulsory land acquisition for construction operations such as highways, rail lines, industries, hospitals connectivity etc. are This authority is ingrained from the eminent domain power. This paper is an attempt to analyze the different provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement act, 2013 and also to highlight the limitations and obstacles in the given law and administrative policies of the Government adopted in pursuance of the said Act.

Keyword: Eminent domain, Just Compensation, Victimization, Rehabilitation and Resettlement.

Introduction

The subject of land has always remained a concern for the legislators therefore the land reforms were introduced in the post-independence period. The issue of land acquisition also has been a burning issue. The matter of whether the owners of agricultural land can be propelled to provide their land on the *principle of eminent domain* has been brought forth several times. [1] Every densely inhabited developing country has to encounter this matter as it is one of the unavoidable fact of development that individuals have to locomote from

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1 Babu Sarkar. Land laws of West Bengal. Page 4. 5th ed, 2022 R.Cambray & Co.Private Ltd.

agriculture to industrial and service sectors. Nevertheless, Indian Constitution has enumerated the concept of sub serving th common good.[2] The judiciary has also upheld this motto in various instances.[3] Presently the old Land Acquisition Act, 1894 and the new law of 2013 i.e., Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 both have conferred power to the government to take lands compulsorily for public purpose. The new law of 2013 has described the term *"public purpose"* and assured acquisition for government use, public-private partnership projects, and private companies. In the case of acquisition for public-private partnership projects, it needs the approval of seventy percent of land owners. In the case of acquisition for private companies, the approval of eighty percent of land owners is essential. The cardinal ordinance for acquisition is that there must be fair compensation for acquisition. Despite that, legal provisions are very fragile in that respect. Nevertheless, the Act of 2013 has commented on compensation policy and resettlement and rehabilitation scheme, yet there have been many protests against the development projects in India. The old acquisition law of 1894 and the new law of 2013 allegedly have given immense prospects to the Government to act as a middleman between corporate giants and land owners.

Victims of Land Acquisition.

There has been a change in the role of the state with rapid economic liberalization. Apart from administrative functionaries, government's function includes design and implementation of economic policy, industrial growth in line with development needs. The government is always ambitious to maintain a sustainable productive growth and to attain international competitiveness. To begin with, the issue of land acquisition predominantly affected tribal people. Consequently, the issue of discourse revolved around the sociocultural effects of relocation. The inquiry of whether to purchase tribal land has yet to be addressed in this regard. [4]To comply with the objectives, the government has undertaken various developmental projects and to attain this end, sometimes it tied up with private partners in the industrial sector. But all such developmental projects require land, and the government exercises the power of eminent domain to meet this goal. This practice of acquiring land for mega projects has become customary across the world including India. The government for the public purposes, i.e., for naval, military, air force and armed forces, infrastructural projects, industrial corridor, construction of dams, smart cities, industries, mining activities and exploration of minerals and other development plans etc. can utilize its strength i.e. the power of eminent

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2 See the Article 39 (b) of The Constitution of India, 1950.

3 *Sasanka Sekhar Maity & Ors v. Union of India*. AIR 1981 SC 522.

4 Richard Mahapatra. Acquisition made easy. Down to Earth. 16th June, 2011. Available on: https://www.downtoearth.org.in/blog/acquisition-made-easy-33633#:~:text=To%20begin%20with%2C%20mostly%20tribals,whether%20to%20acquire%20tribal%20la. (Last visited on 28.11.23 12.00 PM).

domain to acquire and get any private land.[5] Sometimes Government in collaboration with the giant corporations exercises this power. Additionally, with the prior approval of seventy per cent of the impacted families and eighty per cent of the impacted families for private enterprises, the government may purchase land for public-private partnership projects.[6] This complex situation has thrown up numerous tensions and land disputes.

Not only have people been displaced from their land but the displacement has destroyed their culture too. The displaced people have lost their ancestral land, their home, their lively hood and so many things attached to the land. Such displacement ultimately leads to a negative socio economic impact for the people of the region or the local habitation. Following such development-induced displacement, a number of problems occur, such as food insecurity, stigma, homelessness, unemployment, and lack of access to public property resources, and so forth. The author has tried to identify and analyse various legislative endeavours towards land acquisition and victimization through this manuscript.

Constitutional Provisions:

An essential component of India's socioeconomic development is the right to property. It is an individual's fundamental right. The right to property as a fundamental right has been terminated by the 44th Amendment to the Indian Constitution. Article 19 (1) (f) and Article 31 were the primary articles protecting an individual's right to property in the Indian Constitution prior to the 44th Amendment. Article 19 (1) (f) and Article 31 were deleted by the 44th Amendment of 1978, and under Article 300A of the Constitution, the right to property has been elevated to the status of an ordinary constitutional right. Article 300A of the Indian Constitution currently protects the right to property. However, India is a country where eminent domain is a common practice. There are restrictions on the government's ability to use eminent domain. The Indian Constitution's Articles 31A, 31B, 9th Schedule, and 31C guarantee the government's right of eminent domain. In order to prevent the court from overturning the legislation pertaining to land reforms, the First Amendment to the Indian Constitution introduced the Ninth Schedule and Article 31-B. Numerous laws were added to the 9th schedule to safeguard the right to eminent domain by the 1st, 4th, 7th, 17th, 25th, 40th, 42nd, and 44th amendments.

Relevant Legal Provisions under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation And Resettlement Act, 2013:

The statute has stated about three kinds of acquisitions–

i) Acquisition of land for Government's own use and for public purposes

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5 See Section 2 (1) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement , Act 2013.

6 Ibid. Section 2 (2).

ii) Acquisition for ―public-private partnership projects‖

iii) Acquisition for ―private companies

The Act mandatorily requires the government to perform the assessment before acquiring land for public use. The assessment is required to determine the following questions:

- Whether it has ―public purpose?
- How many people are to be affected by the acquisition?
- How much private property and common property are to be affected?
- Whether the acquisition is a last option for the government?
- Whether alternative acquisition is possible?
- Whether there is a balance between the total project cost and the benefit?

The assessment is also required to determine certain matters. In this regard, the Act has stated that ― "*While undertaking a Social Impact Assessment study, the government has to consider the impact that the project is likely to have on various components such as livelihood of affected families, public and community properties, assets, and infrastructure, particularly roads, public transport, drainage, sanitation, sources of drinking water, sources of water for cattle, community ponds, grazing land, plantations, public utilities such as post offices, fair price shops, food storage godowns, electricity supply, health care facilities, schools and educational or training facilities, anganwadis, children parks, places of worship, land for traditional tribal institutions and burial and cremation ground.*"[7]

The government may exclude the assessment if the acquisition is Section 2 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, intended to be made under ―urgency clause of the Act.

Furthermore, under the proviso to sub section 2 of section 6 of the Act, the government may exclude the assessment to irrigation projects where ―Environment Impact Assessment‖ is done.

After complying with the provisions of social impact assessment, the government has to issue a ―Preliminary Notification‖.

Consultation and Public Hearing:

Social Impact Assessment relies, for its legitimacy, upon the participation of local communities. The Act requires two sets of public hearings:

Firstly, a public hearing under section 5 of the Act;

Secondly, a second hearing takes place when the ―Rehabilitation and Resettlement Scheme is being processed.

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7 Ibid.

Expert Report:

Independent assessment by impartial and neutral parties is necessary for Social Impact Assessment Reports. For that reason, an impartial multidisciplinary expert group has to be established. Section 14 of the Act allows for the lapse of a social impact assessment report.

Notification:

Section 11 of the Act of 2013 requires that a preliminary notice for acquisition be given to the general public.

Market Value:

The market value is to be measured on previous sale deeds or is to be determined by the factors mentioned in First Schedule. Besides the above, there is another provision that allows for the grant of solatium, and the method of determining solatium is mentioned in the First Schedule also. To decide the final award, the Collector decides the overall amount to be paid.

Resettlement and Rehabilitation:

The administrator must conduct an inspection following the publication of a preliminary notification of acquisition. Afterwards, an award for rehabilitation and resettlement will be given out. When the government purchases more than 100 acres of land for the public good, the rehabilitation and resettlement provisions will come into play. To that end, the government must form a committee dedicated to this purpose. When a private company buys more than 40 hectors of land in rural areas or more than 20 hectors of land in urban areas, the rehabilitation and resettlement provisions will also be applicable.

Urgency Clause:

The Act states that —"*In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of thirty days from the publication of the notice mentioned in section 21, take possession of any land needed for a public purpose and such land shall thereupon vest absolutely in the Government, free from all encumbrances. The Act further restricts the power on certain circumstances*."[8]

Acquisition Process Under The Act Of 1894:

As per the provisions of new Act of 2013, Land Acquisition Act, 1894 will be implemented under following conditions,

Firstly, if the award was made under the old law of 1894;

Secondly, if acquisition begun under the old law of 1894 but final award has not been declared.

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8 *Supra* Note 9

Retrospective Clause:

For retrospective clause‖ in ***Pune Municipal Corporation v. Harakchand Solanki*** [9] case a huge number of appeals were presented before the Apex Court. In all cases, more or less five years had elapsed after the acquisition took place under the 1894 Act. The Court referred that, the compensation is to be paid to the ―individual‖. The Court declared the acquisition as bad in law as it is contravening the Act of 2013. The Supreme Court upheld the decision in various cases.[10] The judgment has expended the jurisprudence of Section 24(2) of the said Act of 2013. A second proviso to Section 24(2) was added in the ―Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement (Amendment) Ordinance, 2014.

The Supreme Court in Radiance Fincap's case[11] stated that the Ordinance has prospective effect only. The court has upheld the decision in Karnail Kaur's case[12]and held that ― "*The Ordinance in so far as insertion of proviso to the Section 24(2) by way of an amendment is prospective. The right of appeal is a vested right….which can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise*." In ***J. L. Sarna v. Union of India***[13] the Court held, ― " *These conditions in Section 24(2) of the Act are unqualified. It does not matter as to what was the reason behind the non-payment of compensation or for not taking possession. If the legislature wanted to qualify the above conditions by excluding the period during which the proceedings of acquisition of land were held up on account of stay or injunction by way of an order of a Court, it should have been expressly spelled out.*"[14]

Committees and Authorities:

The State Government will establish the ―State Monitoring Committee‖ for state projects, and the Central Government may form the ―National Monitoring Committee‖ for national and interstate projects. Committees for overseeing development projects and other matters may be established by the government. Authorities for Land Acquisition, Rehabilitation, and Resettlement shall be composed of the relevant government. The authorities

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9 (2014) 3 SCC 183

10 *Bharat Kumar v. State of Haryana* (2014) 3 SCALE 393*; Bimla Devi v. State of Haryana* (2014) 6 SCC 583; *Shiv Raj v. Union of India* (2014) 6 SCC 564*; Surender Singh v. Union of India* W.P.C. 2294/2014 decided on September 12, 2014; *Girish Chabra v. Lt. Governor of Delhi*, W.P.C.2759/2014 decided on September 12, 2014; *Raman Grover v. Union of India,* W.P.C.13814/2009 decided on August 22, 2014; Ashwal Vaderra v. Union of India, W.P.C.1897/2014 decided on July 30, 2014

11 *M/s. Radiance Fincap (P) Ltd. and others v. Union of India and others* C.A.4283/2013 decided on January 12, 2015

12 *Karnail Kaur's and others v. the State of Punjab and others* I.A. No.8 of 2013 in C.A. No.7424/ 2013 decided on January 22, 2015

13 W.P.(C) 4965/2000,decided on March 10, 2015

14 Ibid.

will provide speedy remedy, relating to ―rehabilitation and resettlement‖ and ―compensation‖ to the displaced people.[15]

Special Provisions:

According to the Act of 2013, acquisition in tribal areas may only be carried out in extreme cases when there are no other options. There is additional legislation to safeguard the interests of schedule caste and schedule tribe in addition to the Act of 2013. The 2006 Forest Rights Act is a little but important law.

Private Purchase:

Act of 2013 has made provisions for private purchase. If any person other than government or Government Company or Government aided or controlled association intends to purchase land through private negotiations more than twenty hectares in urban areas or more than forty hectares in rural areas and for which payment of ―Rehabilitation and Resettlement Costs under the Act of 2013 is required, he has to apply to the Collector. Thereafter the collector shall pass an award.

No Change In Public Purpose:

Change from the original purpose of acquisition is not permissible under the Act. But the change is permissible on the ground of ―unforeseen circumstances.[16]

Provisions For Land Lease:

The Act states that instead of acquisition Government may take land under ―land Lease.[17]

Return To Unutilized Land:

When any piece of land acquired remained status quo or unused for a significant period of time, it shall be returned to the owner.[18]

Exempted Laws:

Large tracts of land are often the subject of acquisitions, which necessitate a phased approach. This method is primarily used when building roads, laying railroads, erecting poles to connect power lines, and other projects. The issue arises when the legislation is applied to a situation in which acquiring a portion of land is necessary and the acquisition of the remaining land has already been completed. Chaos would ensue. The difficult part is that, depending on when their land was acquired―before or after the new law went

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15 Section 51 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and

16 Section 99 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

17 Section 104 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

18 Section 101 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

into effect—individuals within the same project would receive varying amounts of compensation. To prevent chaos, cases that would have come to a conclusion would need to be reopened.

To address the issue, the new law of 2013 has been modified to exempt a class of projects that are crucial to the country's social and economic development. In this regard, thirteen enactments are exempt from the new law's jurisdiction under the Fourth Schedule of the Act of 2013. However, as of right now, these exempt laws are subject to the 2013 Act's provisions regarding compensation, rehabilitation, and resettlement, thanks to the new Ordinance and related Order.

Drawbacks of the Act Of 2013:

Determination of Market Value:

In determining market value, market value is to be measured under the Act on the basis of the sale deeds and that must be multiplied by a factor stated in the First Schedule. In India, calculating the market value is extremely difficult due to running of a parallel economy involving black money.[19]

No Rehabilitation and Resettlement in Temporary Acquisition:

There are certain limitations to the rehabilitation and resettlement provisions. The Act has not made any rehabilitation and resettlement provision for the temporary acquisition. Another limitation to the provision for rehabilitation and resettlement is that, the provision shall apply where government acquires more than one hundred acres of land for public interest and for that purpose Government has to constitute a rehabilitation and resettlement committee.[20] In the Act there is a provision which ensures participation of representatives from affected people but the provision is limited for the acquisition of 100 acre or more than 100 acre of land.[21] The provision for rehabilitation and resettlement shall also apply when a private company purchases more than 40 hectors of land in rural areas or when it purchases more than 20 hectors of land in urban areas.[22]Therefore for all types of acquisition the provisions are not applicable. Another limitation is that, government is exercising huge power in appointing various rehabilitation and resettlement authorities i.e., Administrator for rehabilitation and resettlement; Commissioner for rehabilitation and resettlement;[23]

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19 Section 26 (1) (b) and Explanation 1 of section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

20 Section 45 the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

21 Section 45 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

22 Section 46 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

23 Section 44 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

Rehabilitation and resettlement committee;[24]National Monitoring Committee for rehabilitation and resettlement; [25]State Monitoring Committee for rehabilitation and resettlement.[26]

Limitation to Prior Consent:

Where the government intends to acquire land for ―public private partnership projects‖ or for ―private companies‖, it has to fulfill ―prior consent‖ clause. But the Act has made exceptions to the aforesaid provisions for ―urgency clause and for the acquisition for government's own use.

Exemption Laws:

The Fourth Schedule of the Act of 2013 has exempted thirteen enactments from the purview of the Act. The Ordinance promulgated by the Government on 31 December 2014 has brought about an amendment to this effect. With the new Ordinance and respective Order of 2015389 these exempted laws are now bound by the provisions of the 2013 Act in so far as they relate to compensation, rehabilitation, and resettlement.

Delay Payment Etc:

The problem of delayed payment and dishonesty in the process of payment has been remained unchanged.

Exemption From Social Impact Assessment:

Under the Act if the government intends to acquire land by ―urgency clause‖, the government has not to conduct social impact assessment. Apart from the above provisions there is another relevant provision. If government wants to acquire land for the construction of irrigation projects and where environment Impact assessment has already been done, social impact assessment is not required.

***Private Purchase And Conditional Rehabilitation And Resettlement*:**

When land is purchased privately, the rehabilitation and resettlement provision is conditional. Appropriate Governments or States are required to prescribe limits for private purchase. When the limits are crossed, the buyer has to ensure the rehabilitation and resettlement of all affected persons. The various States have been fixing the limits differently and thereby creating a chance of arbitrariness.392

Land Lease:

The government has applied the provision for land lease under the Act of 2013393 in various incidents. Very recently in the Buxre Diamond mining project Government has applied the provision. As per the secondary data

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24 Section 45 the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

25 Section 48 the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

26 Section 50 the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

available for the Buxre Diamond mining project, it appears to be a land acquisition even though the land has been leased out to Aditya Birla Group's Essel Mining & Industries Limited for 50 years by the government for the said project purpose. The 382 hectares of land in the Buxure forest were leased out for the diamond mining project. It would affect around 17 villages and around 7000 villagers who solely depend on forest products. Not only it would destruct the livelihood of tribal people, but also it will have a serious impact on wildlife and the ecosystem. The acquisition would lead to the cutting off of more than 2 lakh trees. Said lease for 50 years has been challenged before the Court. The court given notice to the central government, state government, and Aditya Birla Group's Essel Mining & Industries Limited for the contract made between them.

Amendments To Schedules:

Though the schedules of the Act of 2013 are accompanied by the said Act, they enjoy a different legal status from the rest of the statutes. Schedules are easier to amend. The

Government can change the schedules by a simple notification.

Reference To ―Land Acquisition, Rehabilitation And Resettlement Authority‖:

Section 64 of the Act has given wide power to the collector with regard to the reference of disputes before the ―Land Acquisition, Rehabilitation and Resettlement Authority.‖

It increases chance of biasness and arbitrariness. Interested person has to request the collector to refer the matter to the authority. Interested person has to approach for reference only if the award has been made by the collector or if the notice has been issued from collector.

Provision To Safeguard Food Security:

As per provisions of the Act irrigated multi cropped land cannot be acquired. The provision has certain limitations. If the acquisition is a last resort, government can acquire irrigated multi cropped land. When government acquires land for construction of highways, railways, district roads, irrigation cannels, power lines etc., irrigated multi cropped land may be acquired.

The Ordinance of 2014:[27]

In December 2014, the Government has promulgated an Ordinance that has amended the Act of 2013. The following are the list of amendments made by the Ordinance, 2014:

- Amendment of sub clause (i) of clause (b) of sub section (1) of section 2 referred that ―public purpose‖ shall include infrastructure projects including ―private hospitals‖ and‖ private educational institutions‖.
- The amendment further referred that the ―consent Clause‖ as mentioned in first proviso of clause (b) of sub section (2) of section 2 shall not be

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[27] Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014

applicable for acquisition for projects, for national security or defense, rural infrastructure, housing for poor people, industrial corridor and social infrastructure projects. In this regard a new section i.e., section 10 A has been inserted by the amendment. The provision has exempted certain projects from social impact assessment, consent clause and review clause.

- A second proviso to sub section (2) of section 24 has been inserted by the amendment. The provision has exempted the period of stay order or injunction order in computing the period of five years as mentioned in the first proviso to sub section (2) of section 24.
- Amendment to section 24(2), the ‗retrospective clause 'has also been made.
- Amendment to section 87 referred that, ―Where an offense under this Act has been committed by any person who is or was employed in the Central

Government or the State Government, as the case may be, at the time of the commission of such alleged offense, no court shall take cognizance of such offense except with the previous sanction of the appropriate government, in the manner provided in section 197 of the Code of Criminal Procedure.‖

- Amendment to section 105 (3) referred as, ―The Provisions of this Act relating to the determination of compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule shall apply to enactments relating to the land acquisition specified in the Fourth Schedule with effect from 1st January 2015.[28]
- As per section 101 of the Act of 2013 if land acquired remained unused for a period of time, it shall be returned to the owner. The Ordinance alternatively allows the Government to provide for another period.

To replace the Ordinance of 2014, another Ordinance promulgated in the year 2015.[29]

Again another ordinance[30] was promulgated on 30th May 2015 to replace the previous one. The replacement Bill was referred to Joint Parliamentary Committee on 12th May 2019 for detailed examination. As per the available data in the government public domain electronic records, the Joint Parliamentary Committee has been given an extension up to the last day of the

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28 Government has accepted the recommendation by making the Right to Fair Compensation andTransparency in Land Acquisition, Rehabilitation and Resettlement (Removal of Difficulties) Order, 2015

29 Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement (Amendment) Ordinance, 2015

30 The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Second Ordinance, 2015

session 2019.[31] To remove the difficulties arose from above situation the Central Government in compliance with existing law[32] has made an order.[33] The order has been commenced on the first day of September 2015.[34] To deal with various matters of ―Social Impact Assessment‖ and ―Consent‖ requirement, the Central Government in compliance with existing law[35] has made a Rule in the year 2014.[36]Further to deal with certain aspects of compensation, rehabilitation, and resettlement, the Central Government in compliance with existing law[37] has made a Rule in 2015.[38]

Conclusion

It is the task of the State to implement the laws. But State has become an arbitrator to mediate between the claims and interests. The misuse of the land acquisition laws has been apparent. Two clauses ‗public purpose and ‗urgency clause', since the Act of 1894 and Act of 2013 gave the government the authority to determine what constitutes public purpose and what constitutes urgency. They neglected the idea of greater benefit and arbitrarily exploited the authority of eminent domain. Faultiness in the Act has sparked a backlash against the government in the country. The states like Jharkhand, Odisha and Chattisgarh, Gujrat, West Bengal, Andhra Pradesh, Uttarakhand, etc., have experienced violent protests and internal disturbance against the private projects. It is the government's obligation to have conducive conditions for everyone so the government can establish a situation in which no one will suffer. The government's compensation, rehabilitation, and resettlement schemes have been delayed. The method of receiving the compensation in acquisition laws is overly long and it is making impacted communities undercompensated and landless. Another issue is that the acquisition laws assume there is no unwilling landowner and proceeds to purchase property

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31 https://prsindia.org/billtrack/the-right-to-fair-compensation-and-transparency-in-land-acquisition rehabilitation-and-resettlement-second-amendment-bill-2015 (accessed on 13th July, 2021)

32 Section 113 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013,

33 Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement (Removal of Difficulties) Order, 2015

34 https://dolr.gov.in/acts-rules-policiesacts/acts (accessed on 26th August, 2021)

35 Clause (a), (c), (d), (t) and (u) of sub section (2) of Section 109 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

36 Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement (Social Impact Assessment and Consent) Rules, 2014

37 Sub section (1), clause (b), (e), (f), (g), (h), (i), (m), (o), (p), (r), (s), (t), (u) of sub section (2) of section 109 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

38 Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement (Compensation, Rehabilitation, and Resettlement and Development Plan) Rules, 2015

without looking for another means or solution. Protests and agitations against the acquisition will continue until an open and equitable process is established. The inadequacy and flaws in the compensation, rehabilitation, and resettlement scheme should be eliminated. The land acquisition laws are very much poor with a lot of weaknesses. There are lots of lacunas in the new laws of 2013. Beside these in December 2014, the Government has promulgated an Ordinance that has mentioned about the amendment of the Act of 2013. Recommendations for amendment of new law of 2013 are not been formulated in favor of affected people's right. The major shares of the recommendation have been kept to make an added advantage for the government. Since land and construction are inextricably intertwined, and development is incomplete without land, land acquisition is unavoidable for developing countries like us. However, the forcible acquisition is not the solution; instead, we must properly resolve the concerns.

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The Intricacies of Sports Arbitration: Indian and International Perspective

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Abstract

The sports industry is not merely about games; it intricately intertwines various stakeholders like sports clubs, athletes, governing bodies, viewers, and more. The financial boom in the sports industry has been marred by commercial and contractual disputes, doping scandals, preferential treatment, and other malpractices. Consequently, there arose a pressing need for a swift and effective dispute resolution mechanism, leading to the burgeoning prominence of arbitration in sports. This research paper aims to scrutinise sports arbitration within national and international institutions. It will extensively examine the Court of Arbitration for Sport (CAS), delving into its organisational structure, regulatory framework, scope of subject matters, and its role in handling varied conflicts. Furthermore, this paper seeks to analyse the interplay between Arbitration and Sports Disputes in India, shedding light on the current status of Sports Arbitration in India.

Keywords: Sports, Arbitration, Disputes, Court of Arbitration for Sport, Indian Court of Arbitration for Sports.

Introduction

The globalisation and commercialisation of sports have catapulted it into a colossal industry, intertwining it intricately with the realm of law. This evolution has not just expanded the sports domain but has fundamentally altered its essence, shifting it from a mere recreational pursuit to a commercial powerhouse.[1] The rapid surge in the sports sector, marked by staggering monetary inflows, has redefined success, rendering victory as the ultimate pursuit, eclipsing the traditional ethos of participating for the sheer joy of it.

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[1] Westerbeek, H. and Hahn, A., 2013. The influence of commercialisation and globalisation on high performance sport. In *Managing high performance sport* (pp. 271-286). Routledge.

Consequently, the time-honoured Olympic motto seems adrift in this sea of change.[2]

In this realm where fortunes abound, conflicts naturally surface, and the legal arena witnesses an upsurge in sports-related litigations. The substantial sums involved in major sports foster an environment ripe for contention. From contractual disagreements to administrative hurdles and even shades of criminality, the spectrum of disputes is wide-ranging. Yet, a standardised framework for resolving these disputes remains elusive. Notably, courts often refrain from intervening in disciplinary decisions of sports bodies, except in cases of glaring breaches of fairness and proportionality. This hands-off approach underscores the need for expeditious resolution mechanisms and specialised bodies well-versed in the nuances of sports law. The absence of a definitive protocol for sports dispute resolution necessitates a more streamlined and responsive approach to navigate the multifaceted issues that arises.[3] The establishment of Arbitration as an avenue for extrajudicial conflict resolution is a response to the perceived unpredictability of court outcomes, which often lack consistency. Additionally, judges may not possess comprehensive familiarity with certain intricate business matters, particularly those entrenched in specific industries. In the realm of sports disputes, parties embroiled in conflicts typically resort to three primary avenues for resolution: internal bodies within sporting federations, litigation in courts, or Alternative Dispute Resolution (ADR).[4]

Sports arbitration, a vital facet akin to arbitration in other sectors, involves submitting sports-related disputes to an impartial entity for conclusive and obligatory decisions. Despite procedural similarities, sports arbitrations present distinct challenges setting them apart from other arbitration forms.[5] The contemporary approach to dispute resolution in sports emphasises alternative methods over traditional court trials, streamlining processes through specialised "dispute resolution routines." This divergent approach acknowledges the unique complexities inherent in sports-related conflicts, necessitating tailored methodologies for swift and effective resolution beyond the conventional judicial framework.[6]

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2 Smart, B., 2018. Consuming Olympism: Consumer culture, sport star sponsorship and the commercialisation of the Olympics. *Journal of Consumer Culture*, *18*(2), pp.241-260.

3 Mitten, M.J. and Opie, H., 2012. "*Sports law": implications for the development of international, comparative, and national law and global dispute resolution* (pp. 173-222). TMC Asser Press.

4 Burger, C.J., 2000. " Taking Sports out Of the Courts": Alternative Dispute Resolution and the International Court of Arbitration for Sport. *J. Legal Aspects Sport*, *10*, p.123.

5 Paulsson, J., 1993. Arbitration of international sports disputes. *Arbitration international*, *9*(4), pp.359-370.

6 Kucukgungor, E., 2003. Arbitration and Alternative Dispute Resolution in Sports Law Disputes. *Banka Huk. Dergisi*, *22*, p.47.

Court of Arbitration for Sport

Organisational Structure

Established in 1984 in Lausanne, Switzerland[7], the Court of arbitration for sport (CAS) commenced operations, witnessing a modest caseload in its initial years, averaging merely three cases[8] annually. Lausanne, declared the arbitration hub by Article S1 of the CAS Code, remains the epicentre, even during specialised Ad Hoc Divisions (AHD) convened for major sporting events, ensuring expeditious justice.[9] Originally, the 1984 code mandated the appointment of 60 CAS members, selected by the IOC, International Federations (IF), National Olympic Committees (NOC), and the IOC President[10], each group nominating 15 members, with an additional 15 picks granted to the IOC President.[11] However, concerns surfaced within the first decade regarding CAS's autonomy[12], prompting the signing of the crucial "Agreement related to the Constitution of the International Council of Arbitration for Sport" (The Paris Agreement) in 1994 to address these apprehensions.

The genesis of the 1994 agreement stemmed from an instrumental ruling by the Swiss Federal Tribunal (SFT), Switzerland's ultimate civil law arbiter, in the Gundel vs FEI[13] case. An equestrian rider, implicated in a horse doping incident, faced CAS award, resulting in a reduction of suspension from three months to one.[14] Despite this, Gundel appealed the CAS decision to the SFT, citing concerns about the tribunal's impartiality. The SFT acknowledged the limited influence of the FEI on CAS operations but expressed unease regarding the IOC's significant involvement. The SFT flagged concerns over IOC funding, its authority to appoint a substantial CAS contingent (IOC 15 + IOC President 15), and its ability to modify CAS statutes.[15] Consequently, the SFT underscored the imperative for CAS reform to fortify its independence.

The Paris Agreement sparked a comprehensive overhaul of the CAS, reshaping both its financial framework and organisational setup. Emphasising

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7 Lindholm, J. (2019). The Court of Arbitration for Sports and Its Jurisprudence - An Empirical Enquiry into Lex Sportiva. T.M.C. Asser Press, p. 3.

8 Ibid.

9 Code of Sports Related Arbitration, 2021, Article S1 (CAS Code).

10 History of the CAS, Court of Arbitration for Sports TAS-CAS URL: https://www.tas-cas.org/en/general-information/history-of-the-cas.html#:~:text=In%201983%2C%20the%20IOC%20officially,Secretary%20General%2C%20Mr%20Gilbert%20Schwaar. (Accessed on 23 November 2023)

11 Ibid.

12 Lindholm, J. (2019). The Court of Arbitration for Sports and Its Jurisprudence - An Empirical Enquiry into Lex Sportiva. T.M.C. Asser Press, p. 3.

13 *Gundel v. FEI*, ATF 119 II 271 (Swiss Supreme Court).

14 *Gundel v. FEI*, CAS 92/A/63 (Court of Arbitration for Sports).

15 History of the CAS, Court of Arbitration for Sports TAS-CAS URL: https://www.tas-cas.org/en/general-information/history-of-the-cas.html#:~:text=In%201983%2C%20the%20IOC%20officially,Secretary%20General%2C%20Mr%20Gilbert%20Schwaar. (Accessed on 23 November 2023)

autonomy from influential international bodies like the IOC, particularly highlighted in the Gundel case (Gundel v FEI/CAS)[16], reforms aimed at bolstering efficiency. A key change birthed the International Council of Arbitration for Sports (ICAS), supplanting the IOC's role in CAS operations. Additionally, the CAS underwent structural bifurcation into the "Original Division" and the "Appellate Division," accompanied by the codification of the CAS Code, marking significant milestones in its evolution.[17]

The ICAS, comprising 20 members, among them 12 appointments by the IOC, IFs, and NOCs, followed by these 12 members selecting the remaining 8.[18] Responsible for appointing CAS arbitrators[19], numbering from 150[20] to over 300, ICAS also designates the Secretary of the CAS's Court Office, entrusted with managing the tribunal's workload.[21]

Within the ICAS framework, Division Presidents are appointed for CAS's two divisions[22], crucial in assembling panels mandated to deliberate on cases. Notably, while this structural division guides Division Presidents, individual arbitrators listed by CAS possess the flexibility to participate in either division. Moreover, recognising FIFA's embrace of CAS as its appellate body, CAS maintains a distinct roster of football-specific arbitrators, catering to expertise in this domain—a measure signalling specialisation within the tribunal's composition.[23]

Following the Paris Agreement reforms, CAS's autonomy faced scrutiny in 2003[24] over a case involving two Russian skiers (Larissa Lazutina and Olga Danilova) barred from the 2002 Winter Olympics.[25] The SFT's decisive ruling in favour of CAS reaffirmed the tribunal's independence.

Regulatory Framework

Fundamentally an international arbitral tribunal, the CAS aligns with key international agreements like the New York Convention 1958 and the UNCITRAL Model Laws of 1985. These agreements form the bedrock of global arbitration, dictating the framework for CAS proceedings. Mandating an

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16 Civil Court, Swiss Fed. Trib. (15 Mar. 1993). Summarised in Olympic Review, July-Aug. 1993, p. 305.

17 Yan, W., 2023. Court of Arbitration for Sport: Rules and Issues. *Open Journal of Social Sciences*, *11*(1), pp.64-75.

18 Code of Sports Related Arbitration, 2021, Article S4 (CAS Code)

19 Code of Sports Related Arbitration, 2021, Article S13 (CAS Code)

20 Code of Sports Related Arbitration, 2021, Article S6 (CAS Code)

21 Code of Sports Related Arbitration, 2021, Article R33 (CAS Code)

22 Lindholm, J. (2019). The Court of Arbitration for Sports and Its Jurisprudence - An Empirical Enquiry into Lex Sportiva. T.M.C. Asser Press, p. 3.

23 Thielemann, K., 2019. The Court of Arbitration for Sport: Where are the Sidelines to its Authority?. *NCJ Int'l L.*, *45*, p.47.

24 *Larissa Lazutina & Olga Danilova v CIO, FIS & CAS*, ATF 129 III 445. (Swiss Supreme Court).

25 *Lizotina v. IOC*, CAS 2002/A/370 (Court of Arbitration for Sports).

arbitration agreement[26], they render any award vulnerable to annulment sans this requirement.[27] The CAS Code mirrors key principles from these agreements[28], emphasising the necessity of arbitration agreements for both Ordinary and Appellate Jurisdictions.[29] However, the structure of these agreements can diverge. Notably, Appellate Jurisdiction agreements frequently integrate within a country's NOC regulatory statute. This distinction underscores the critical role of these agreements in shaping CAS proceedings, warranting meticulous adherence to arbitration prerequisites for jurisdictional validity.[30]

As per Article R28 of the CAS Code, Lausanne, Switzerland, stands as the seat for all CAS proceedings, necessitating a dive into Swiss law for the applicable curial regulations. The Swiss Private International Law Act (PILA) emerges as the guiding framework for tribunals seated in Switzerland[31], including the CAS—an international tribunal rooted in Swiss jurisdiction. PILA governs critical facets such as arbitrability, challenges to CAS awards, and procedural matters.[32] Consequently, CAS awards fall within the purview of potential challenges and annulment within the Federal Supreme Court of Switzerland (SFT)[33], akin to precedents like the Gundel case. This legal landscape underscores the instrumental role of PILA in shaping the CAS's legal contours and the avenue for redress through Switzerland's apex judicial body.

The CAS Code serves as a complementary framework governing CAS disputes. It consists of two parts: one delineating organisational aspects[34] and another detailing procedural rules[35], complementing the PILA. Notably, while some rules align, the CAS Code provides nuanced and expanded procedural guidance, surpassing PILA's scope in certain facets.[36]

In determining the substantive law for disputes, Art 187 of the PILA grants the arbitral tribunal the authority to decide based on parties choice or

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26 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article II

27 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Article V(a)

28 Code of Sports Related Arbitration, 2021, Article R27 (CAS Code)

29 Code of Sports Related Arbitration, 2021, Article R38, R48 (CAS Code)

30 Diaconu, M., Kuwelkar, S. and Kuhn, A., 2021. The court of arbitration for sport jurisprudence on match-fixing: a legal update. *The International Sports Law Journal*, *21*(1-2), pp.27-46.

31 Federal Statute on Private International Law, 1987, Article 176 (Switzerland).

32 History of the CAS, Court of Arbitration for Sports TAS-CAS URL: https://www.tas-cas.org/en/general-information/history-of-the-cas.html#:~:text=In%201983%2C%20the%20IOC%20officially,Secretary%20General%2C%20Mr%20Gilbert%20Schwaar. (Accessed on 23 November 2023)

33 Federal Statute on Private International Law, 1987, Article 190(2) (Switzerland).

34 Code of Sports Related Arbitration, 2021, Article S1 to Article S26 (CAS Code)

35 Code of Sports Related Arbitration, 2021, Article R27 to Article R70 (CAS Code)

36 Lindholm, J. (2019). The Court of Arbitration for Sports and Its Jurisprudence - An Empirical Enquiry into Lex Sportiva. T.M.C. Asser Press, p. 3.

the law most closely linked to the case. However, the CAS Code amplifies this by prioritising the application of pertinent regulations. Within CAS, these regulations stem from federations involved, like the Tennis Anti-Doping Programme or broader frameworks such as the World Anti-Doping Code. Remarkably, while parties agreed-upon law remains secondary in the CAS Code, the emphasis on pertinent regulations aligns the dispute resolution with the specific governing principles inherent to the sports federations, augmenting the tribunal's contextual and tailored approach to dispute resolution.[37]

Jurisdiction

For CAS jurisdiction, beyond a valid arbitration agreement, the CAS Code mandates the dispute to be inherently "sports-related." Despite its broad framing, this prerequisite typically encompasses most arising cases, embracing a spectrum of scenarios. The Code's expansive definition includes matters touching on principles of sport, financial interests, and activities associated with or linked to the sporting realm. This inclusive approach ensures the tribunal's oversight over a diverse range of disputes within the sporting domain, underscoring its role as a specialised adjudicator in matters inherent to sports.[38]

The necessity of an arbitration agreement stands as a fundamental pillar in legitimising a CAS claim, resonating widely within the realm of international arbitration and upheld by the precepts of the New York Convention[39]. Such agreements, binding sports disputes to CAS jurisdiction, manifest in diverse forms. While commonly integrated within contracts, they also surface within constitutive documents of international federations or frameworks governing tournaments and competitions. Notably, the International Olympic Committee, since 1996, mandates participating athletes to endorse waivers, stipulating CAS as the exclusive adjudicator for disputes rather than resorting to conventional litigation. These varied manifestations of arbitration agreements underscore the adaptability of the CAS framework, extending its purview across a spectrum of sporting contexts and contractual arrangements.[40]

The CAS comprises Ordinary and Appellate Jurisdictions, each governed by distinct procedural rules and arbitration agreements. Appeals arbitration agreements are commonly embedded within governing body statutes, exemplified by FIFA's statutes[41] outlining CAS jurisdiction specifics.

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37 Code of Sports Related Arbitration, 2021, Article R58 (CAS Code)

38 Code of Sports Related Arbitration, 2021, Article R27 (CAS Code)

39 Code of Sports Related Arbitration, 2021, Article II (CAS Code)

40 Gubi, J. (2008). "The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns." Fordham Intellectual Property, Media & Entertainment Law Journal, 18, pp. 997. Available at: https://ir.lawnet.fordham.edu/iplj/vol18/iss4/4.

41 FIFA Statutes, Regulations Governing The Application Of The Statutes Standing Orders of The Congress, Sep. 2020. Available at: https://resources.fifa.com/image/upload/fifa-statutes-2020.pdf?

The Appeals Arbitration Procedure prevails, handling 75-90% of cases[42], primarily centered on doping and disciplinary issues.[43]

Subject Matters

Despite its broad jurisdiction, the CAS caseload reflects a concentration among a limited spectrum of sports. While 73 sports have sought CAS intervention, a vast majority engaged the tribunal infrequently, with 26 sports involved in solitary cases.[44] Football emerges as the dominant force, constituting up to 38% of CAS disputes.[45] Cycling, swimming, athletics, and equestrian pursuits round out the top five, emphasising the selectiveness of sports contributing substantially to CAS caseload. Notably, while diverse sports like wakeboarding, netball, and billiards have utilised CAS services, their sporadic appearances underscore the concentrated reliance of a handful of sports on the tribunal for dispute resolution.

Doping reigns supreme, constituting 45% of CAS cases, while contract, transfer disputes, non-doping disciplinary actions, and eligibility collectively form 40%. Surprisingly, while doping and football disputes seem correlated, football-related cases dominate contract and transfer disputes, diverging from the anticipated link between doping and football conflicts.[46]

The CAS jurisprudence leans heavily on football-related cases. Consequently, a non-footballer's contractual dispute might involve football-specific regulations, shaping the court's precedent, potentially influencing cases unrelated to the sport at hand.

What varieties of conflicts does the CAS handle?

In 2021 and 2022, CAS recorded approximately 1000[47] and 830[48] arbitrations, showcasing a wide gamut from commercial matters in sports to intricate, field-specific disputes. The tribunal's docket spans diverse cases, from straightforward commercial disputes to nuanced, sports-centric incidents.

Sports Arbitration in India

Over the past decade, the sports industry and entertainment sphere have experienced a remarkable upsurge, marked by increased viewership and substantial investments in various sporting leagues. This surge has sparked a heightened demand for a robust framework dedicated to resolving sports-

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42 Lindholm, J. (2019). The Court of Arbitration for Sports and Its Jurisprudence - An Empirical Enquiry into Lex Sportiva. T.M.C. Asser Press, p. 3.

43 Ibid.

44 Lindholm, J. (2019). The Court of Arbitration for Sports and Its Jurisprudence - An Empirical Enquiry into Lex Sportiva. T.M.C. Asser Press, p. 3.

45 Lindholm, J. (2019). The Court of Arbitration for Sports and Its Jurisprudence - An Empirical Enquiry into Lex Sportiva. T.M.C. Asser Press, p. 3.

46 ibid

47 CAS Bulletin 2021 p. 2. Available at https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2022.pdf (Accessed on October, 24 2023)

48 CAS Bulletin 2022 p. 2. Available at https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2022.pdf (Accessed on October, 24 2023)

related disputes effectively. Sporting events not only serve as platforms for global recognition but also significantly contribute to national prestige and economic growth. India, post-independence, recognised the potential in utilising sports as a multifaceted asset. Consequently, the country embarked on a journey to establish a structured and organised sports community, mirroring global developments in the sports arena while initiating its own advancements in the field.[49]

In the Indian constitutional framework, sports-related matters fall within the jurisdiction of State Governments as per Entry 33 of the State List, while issues concerning international sports are overseen by the Union Government under Entry 10 of List 1. However, despite the allocated responsibilities, many private entities actively undertake roles within the country's sports landscape. The challenge arises when these independent bodies, such as the Board of Control for Cricket in India (BCCI), wield significant authority and influence over sports events but are not subject to the same statutory obligations as governmental bodies, eluding constitutional accountability.[50] Consequently, they operate outside the ambit of Article 12 of the Constitution that applies to state entities. Establishing an entity dedicated to efficient dispute resolution in the sports domain is crucial to address this discrepancy. The creation of the Sports Arbitration Centre of India (SACI) aims to bridge this gap by providing a dedicated mechanism tailored to the intricate needs of effective sports dispute resolution. SACI's inception signifies a necessary step towards ensuring accountability and fairness within India's sports ecosystem, offering a specialised platform to resolve sports-related disputes effectively and impartially.[51]

The aftermath of the 1982 Asian Games prompted a significant recognition for the need to foster sports and education. Consequently, the inception of the Sports Authority of India (SAI) in 1984 marked a key moment, establishing an autonomous registered society aimed at catalysing the nation's sports landscape.[52] The launch of the National Sports Policy in the same year stood as an initial milestone in India's sports development journey.[53] While it encapsulated the collective aspirations and ideals for advancing the Indian sports community, a notable trend revealed a lack of active interest and inclination towards nurturing sports as a skill. As a result, the policy primarily emphasised bolstering sports infrastructure and integrating physical education into school curriculums. However, it fell short in establishing a structured environment with defined regulations and empowered institutional

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49 Pachnanda, V., 2012. Lex Sportiva: The Importance of Arbitration in Sports in India. *Nat'l LU Delhi Stud. LJ*, *1*, p.115.

50 Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649 (Supreme Court of India)

51 Arbitration In Sports. Webnyay. Available at: https://www.webnyay.in/blog/38.

52 Manjunatha, V., 2018. Sports authority of India-Leading the sport culture towards youth progression-new challenges.

53 Clarke, J. and Mondal, S., 2022. Sport policy in India. *International Journal of Sport Policy and Politics*, *14*(4), pp.729-741.

frameworks to enforce them effectively, revealing a need for more organised and equipped governance within the sports realm.[54]

Following the shortcomings of the 1984 National Sports Policy, a fresh policy was crafted in 2001 through collaborative efforts of the State, Central Government, Olympic Association, and National Sports Federation.[55] This policy aimed to elevate international sporting excellence and promote a wider participation in sports activities. Despite its focus on integrating physical education into academic curricula, it encountered obstacles due to its reliance on the Central and State Governments for enforcement, lacking effective legislative backing for seamless implementation.[56]

Indian Court of Arbitration in Sports

In 2011, the genesis of the Indian Court of Arbitration for Sports (InCAS) unfolded in response to directives from the International Olympic Committee and the affirmative decision of the Indian Olympic Committee. This visionary entity was forged with the collective wisdom of eight esteemed members, all revered for their distinguished service as retired judges within the judiciary. Dr. A.R. Lakshmanan, a luminary and former Justice of the Supreme Court of India, assumed the esteemed chairmanship, lending his sagacity to steer the InCAS. Among the seven eminent members standing alongside Dr. Lakshmanan on this esteemed panel were Justices M R Culla, R S Sodhi, B A Khan, Usha Mehra, J K Mehra, Lokeshwar Prasad, and S N Sapra.[57]

The advent of the Indian sports arena witnessed a historic milestone in dispute resolution—an unprecedented initiative dedicated to addressing the intricacies of Sports conflicts in India. This pioneering stride marked the inception of a tailored domain for settling disputes, a ground-breaking effort aimed at expeditiously resolving sporting disputes. The impetus behind this decisive move stemmed from the realisation that the lifespan of a sportsperson is finite, rendering the luxury of prolonged inquiries or litigations untenable. It was a decisive step geared towards ensuring expeditious adjudication, acknowledging the time-sensitive nature of a sportsperson's career, where every moment lost in protracted legal processes can be detrimental.[58]

The fundamental objective of this arbitral committee was to create a platform where the voices of Indian sportspersons could be heard and their issues judiciously addressed in the wake of any controversies. Additionally, it aimed to circumvent the protracted delays characteristic of Indian court

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54 Shirotriya, A.K. (2019). "Conceptual Framework for Redesigning the Sports Policy of India." International Journal of Physical Education Health & Sports Sciences.

55 Ibid.

56 Nandakumar, T.R. and Sandhu, J.S., 2014. Factors influencing international sporting success-an analysis of Indian sports system. *International Journal of Sport Management, Recreation & Tourism*, *14*, pp.13-31.

57 Rawat, M. (2021). "Choice of Law in Court of Arbitration for Sport: An Overview." SSRN (23-1-2021).

58 Chandiramani, P., 2021. Dispute Resolution System in Indian Sports & Need for Its Betterment. *Legal Spectrum J.*, *1*, p.1.

proceedings when handling cases involving athletes. Notably, the avenue for appeal from this court of arbitration extends to the Court of Arbitration for Sport (CAS) based in Lausanne, Switzerland—an institution established by the International Olympic Committee in 1983. Both InCAS within the Indian context and CAS within the global framework wield absolute authority, fortified by the backing of the International Olympic Committee.

In CAS navigates a diverse spectrum of disputes, categorised into two primary domains:

1. Disputes of Commercial Nature: This category predominantly involves intricate issues pertaining to the execution and fulfilment of contracts within the sporting arena. These encompass a wide array of contractual facets such as sponsorships, event staging agreements, television rights negotiations, player or coach transfers—essentially encompassing employment or agency contracts.
2. Disputes of Disciplinary Nature: Primarily encompassing instances related to disciplinary infractions, this category notably encompasses doping-related issues. Instances may involve allegations of player misconduct including violence, the use of banned substances such as steroids or other doping agents, and instances of abuse directed towards referees. Such disputes hold direct ramifications for the players, often leading to punitive actions such as bans. These adjudications are critical as they uphold the integrity and ethical standards within the sporting realm, safeguarding the sport's essence and fair play.

With the inauguration of InCAS in 2011, a wave of optimism swept through the realm of Indian sports, heralding the promise of a robust mechanism for resolving disputes. However, as is often the case with many well-intentioned initiatives in the bureaucratic landscape of India, the grand designs often stumble at the hurdle of execution. InCAS, despite its promising inception, swiftly faded into obscurity. In the years following its establishment, a sobering realisation emerged regarding its inefficacy.

The faltering trajectory of InCAS can be primarily attributed to a critical deficiency: the lack of comprehensive knowledge in sports law and its intricate subtleties among those tasked with arbitrating sporting disputes. Entrusted to retired justices from the Supreme Court and High Courts, these distinguished individuals, albeit possessing eminent legal acumen, were often navigating uncharted waters in the realm of sports law, grappling with cases devoid of prior experiential wisdom. This shortfall gradually eroded the effectiveness of InCAS, culminating in a fading presence and a consequential shift towards the Court of Arbitration for Sport (CAS) and foreign arbitration bodies. This evolution dealt a significant blow to the Indian sporting fraternity, leaving it bereft of a much-needed governing mechanism to regulate and

oversee its operations, highlighting the pressing need for a more adept and specialised approach to sports dispute resolution within the nation's borders.[59]

National Sports Federations

In the wake of the Sushil Kumar v. Union of India[60] case in 2016, essential changes were initiated concerning the protection of athletes rights and the establishment of an effective dispute resolution mechanism within the Constitution of National Sports Federations. The Ministry of Youth Affairs and Sports responded by issuing guidelines entitled "Safeguarding the Interests of Sportspersons and Provision of Effective Grievance Redressal System in the Constitution of National Sports Federations." These guidelines aimed at two core objectives:

1. Creation of a transparent, equitable, and efficient grievance redressal system to safeguard the interests of individuals involved in sports.
2. They mandated all sports federations to incorporate provisions in their contracts and Constitutions enabling athletes to appeal to the CAS in instances where they disagree with a decision made by the federation or association. This directive was a significant move towards ensuring fair and unbiased dispute resolution, empowering athletes to seek recourse through an external, impartial forum like the CAS when dissatisfied with the rulings of their respective sports bodies.[61]

Presently, most sporting conflicts in India resort to internal commissions designated by the respective Sports Authorities/Federations or State bodies. Litigation in the Supreme Court or High Courts becomes the next recourse if the commission route fails.[62] The glaring necessity for a dedicated dispute resolution mechanism within sports prompts several recommendations. The Law Commission of India proposes the establishment of a contemporary law specifically tailored for sports dispute resolution. It advocates the creation of a specialised Sports Arbitration body in India, aiming to address the complexities effectively and provide a practice-friendly platform for swift and fair resolution of disputes within the sports industry.[63]

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59 Singh, R., 2018. An Appraisal of Law Relating to Sports in India: A Critique. *International Journal of Behavioral Social & Movement Sciences*, *7*(1), pp.41-59.

60 2016 SCC Online Del 3660.

61 Safeguarding the Interests of Sportspersons and Provision of Effective Grievance Redressal System in the Constitution of National Sports Federations.pdf URL: https://yas.nic.in/sites/default/files/Safeguarding%20the%20interests%20of%20sportspersons%20and%20provision%20of%20effective%20Grievance%20Redressal%20System%20in%20the%20Constitution%20of%20National%20Sports%20Federations_.pdf (Accessed on October 05, 2023)

62 Majumdar, A., & Dey, K. (2020, August 25). "Significant Judgments on Arbitration and Conciliation Act, 1996 – May 2020 to July 2020 – Litigation, Mediation & Arbitration – India."

63 Ghosh, A., Mondal, P. and Das, S.S., 2013. Development of sports and sports facilities in India. *International Journal of Research Pedagogy and technology in Education and Movement Sciences*, *2*(02).

Sports Arbitration Centre of India

In response to this gap in the sports industry's dispute resolution landscape, the Sports Arbitration Centre of India (SACI) emerged in 2021. Launched by Minister of Law and Justice, Kiren Rijiju, SACI, situated in Ahmedabad, Gujarat, serves as an autonomous body focused on expediting sports-related disputes and addressing broader issues within the domain.[64] Supported by SE TransStadia Pvt. Ltd., based in Ahmedabad, and legally backed by the Ministry of Law and Justice, SACI's establishment is poised to revolutionise the national sports sector. It aims to cultivate a robust reputation by swiftly, transparently, and accountably resolving disputes and other challenges within the sports sphere, thereby bolstering the sector's credibility and establishing itself as a vital institution in the realm of sports governance and conflict resolution.

The emergence of the Sports Arbitration Centre of India (SACI) directly responds to the nuanced requirements of the burgeoning sports landscape within the country. It stands as an impartial and streamlined platform exclusively dedicated to resolving disputes within the sporting community. As an initiative stemming from the Ministry of Law and Justice, SACI not only embodies independence but also brings a newfound level of accountability previously absent from such endeavours. Prior initiatives aimed at fostering sports development in India often fell short due to a lack of comprehensive foresight. Mere infrastructure expansion couldn't adequately support the needs of athletes; there was a dire need for appropriate regulations, rights, and a robust framework governing sports activities.

Access to these essential rights for all athletes became imperative. The implementation of this vision necessitated the establishment of an efficient redressal mechanism—a crucial platform for addressing disputes. Traditional judicial systems, laden with administrative hurdles and lacking expertise in sports-related matters, proved inadequate in swiftly and effectively resolving such disputes. Consequently, the creation of a dedicated Sports Arbitration Centre in India stands as a critical safeguard for athletes. It not only ensures time efficiency but also boasts the necessary expertise to navigate and appropriately resolve disputes that might arise in the realm of sports.

This institution offers a paradigm shift by championing efficient resolution mechanisms tailored to the intricate demands of the sports industry. Its foundation represents a fundamental step toward upholding athletes rights and fostering a conducive environment for the burgeoning sports community in India.

Post the SACI inauguration, a critical pursuit involves educating the community about their rights and regulations. India, while lagging in dispute resolution, has focused on sports infrastructure development, marking a shift towards commercialisation. The imminent need, however, lies in formalising

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64 "Kiren Rijiju Inaugurates Country's First Sports Arbitration Centre, Says it Will Have Far-Reaching Impact." The Times of India, 26 September 2021.

and structuring systems to offer comprehensive support and amenities for athletes growth and advancement.

Merits and Distinctive characteristics of Institutional Sports Arbitration

Speed

Sports arbitration stands out primarily for its swiftness, a critical factor distinguishing it from traditional arbitration. The expeditious resolution of sports disputes is imperative, necessitating a conclusion before a specific sporting event unfolds. Consider a scenario where an arbitral tribunal allows an athlete to participate in the Olympics; the value of such a decision diminishes significantly if issued after the event concludes.

The epitome of this swift resolution manifests in the ad hoc division of the CAS operational during major international sporting spectacles like the Olympics[65] or FIFA World Cup. Astoundingly, the Ad Hoc Rules for the Olympic Games mandate arbitral awards within 24 hours of arbitration application lodging, while the FIFA World Cup adheres to a 48-hour time frame.

This rapid adjudication ensures the seamless progression of competitions and upholds the integrity of sporting outcomes by pre-empting retrospective appeals that could alter results. However, within this accelerated domain, arbitrators navigate a delicate balance, ensuring due process while adhering to the exceptionally short timeframes for parties to prepare submissions.

Further illustrating the pace of sports arbitration are expedited proceedings, contingent upon parties mutual cooperation. While tribunals cannot unilaterally impose swift procedural deadlines, event organisers often rally support for expedited arbitration to secure pre-competition resolution.[66]

An intriguing facet lies in the availability of provisional measures even before the formal constitution of the arbitral tribunal. Sports arbitration bodies, notably CAS, entertain requests for preliminary relief, such as stays of execution, before the tribunal's appointment. This highlights the system's efficacy in promptly addressing urgent matters, showcasing its ability to grant orders comparable to state courts ex-parte relief within similar timelines.[67]

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65 In a ground-breaking shift during the 2016 Rio Olympics, a significant paradigm emerged within the realm of anti-doping measures. For the very first time, an international sports tribunal assumed the mantle of a first-instance authority specifically dedicated to doping-related affairs. This monumental development took shape through the inception of the Court of Arbitration for Sport (CAS) ad hoc anti-doping division.

66 Kaufmann-Kohler, G. (2001). Arbitration at the Olympics. The Hague.

67 Eskis¸ehirspor Kulübü v UEFA, CAS 2014/A/3628, para. 15.

Crucially, the effectiveness of sports arbitration is bolstered by the compliance of sports governing bodies with CAS orders.[68] Notably, sports arbitration rules expressly prohibit parties from seeking provisional measures from state courts, emphasising the autonomy and efficacy of the internal arbitration process. This underscores the key role played by CAS in showcasing its ability to provide swift interim protection[69], mitigating the need for external judicial intervention.[70]

Special expertise

The CAS's policy of maintaining a restricted pool of arbitrators, while limiting the parties autonomy in arbitrator selection, received validation from the Swiss Supreme Court in the Lazutina case. The rationale behind this approach is to ensure a panel of specialised arbitrators well-versed in sports law, fostering expedited and consistent decision-making processes.[71]

However, the expediency often associated with sports arbitration is not without its challenges. The time constraints imposed, notably within CAS procedures, are notably short. For instance, the stringent deadlines for filing appeals[72] demand swift and precise actions from parties involved, leaving minimal room for extension. Such timelines cascade into a rigorous timetable for filing submissions and evidence, culminating in the objective of a final award within three months from receiving the case file.[73]

These swift proceedings pose practical challenges for both parties and their legal representatives. The truncated timeframes for submissions, both procedural and substantive, render sports arbitration, particularly CAS arbitration, an arduous terrain to navigate. Consequently, it becomes

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68 Rigozzi, A., & Robert-Tissot, F. (2015). 'Consent' in Sports Arbitration: Its Multiple Aspects. In E. Geisinger & E. Trabaldo-de Mestral (Eds.), ASA Special Series No. 41 – Sports Arbitration as a Coach for Other Players (pp. 59–94). Huntington, NY.

69 In the case of CAS 2011/A/2472, a decisive moment arose when the Court of Arbitration for Sport (CAS) mandated the Saudi Arabian Football Federation (SAFF) to promptly respond, within a mere 24-hour window, to a club's plea for participation in the esteemed King's Cup Final. This decisive action positioned the CAS to swiftly issue an authoritative directive, effectively averting any potential disruption to the integrity of the competition.

70 In instances of pressing necessity and urgency, the Court of Arbitration for Sport (CAS) possesses the authority to issue ex parte orders. This prerogative allows for decisive action to be taken unilaterally, safeguarding the expeditious resolution of critical matters within the realm of sports arbitration.

71 Lazutina, L., & Danilova, O. v CIO, FIS & CAS, ATF 129 III 445, para. 3.3.3.2, Yearbook Comm. Arb'n XXIX (2004), pp. 206, 219. (Original French text: ASA Bull. 2003, pp. 601 et seq.)

72 Rigozzi, A. (2008). Le délai d'appel devant le Tribunal arbitral du sport - Quelques considérations à la lumière de la pratique récente. In Le temps et le droit - Recueil de travaux offerts à la Journée de la Société suisse des juristes (pp. 255-272). Basel.

73 The prescribed time frame is frequently extended, notably in instances where the intricate nature of the case significantly contributes to the creation of a comprehensive and extensive written decision.

imperative for parties to engage legal counsel well-versed in international arbitration procedures and sports law, given the limited time available for comprehensive research during the arbitration process.

The complex interplay of burgeoning case law, escalating procedural complexities, and the evolving expectations from arbitrators and counsel present a hurdle for aspiring lawyers seeking to establish themselves in sports arbitration. The inclination toward experienced practitioners familiar with CAS proceedings and jurisprudence exacerbates the challenge for newcomers to gain footing in this specialised field.[74] While the publication of CAS Code Commentaries has eased this dilemma to some extent, the competitive nature of this domain continues to pose hurdles for new entrants aiming to earn the trust of parties seeking experienced counsel in CAS arbitration.[75]

Consistency and transparency

The ascent of the CAS as a global arbiter in sports disputes has fostered a harmonised landscape for legal decisions, fostering a reservoir of jurisprudence essential for sports arbitration practitioners. While confidentiality is a fundamental tenet, CAS distinguishes itself by its inclination to publicise awards in appeals cases, bolstering transparency within the sports legal realm. This practice has culminated in the extensive dissemination of CAS awards[76], from the digest in three volumes to contemporary formats like bulletins and an accessible online repository.[77]

An intriguing facet of sports arbitration lies in the weight attributed to arbitral awards as influential precedents rather than binding directives. Previous awards, although non-binding, carry considerable persuasive authority, setting a precedent that subsequent tribunals within the same sports arbitration domain tend to uphold. Deviations from established jurisprudence warrant explicit rationale within the award text, underscoring the significance attached to consistency in adjudicatory practices.[78]

Despite the inevitability of divergent conclusions, especially in novel issues, the establishment of a coherent body of case law typically garners deference from subsequent tribunals.[79] The principle of deference prevails,

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74 Mavromati, D., & Reeb, M. (2015). The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials. Wolters Kluwer.

75 Noth, M., & Rigozzi, A. / Hasler, E. (2013). Sports Arbitration under the CAS Rules. In Arroyo (Ed.), Arbitration in Switzerland – The Practitioner's Guide. Kluwer Law International.

76 Reeb, M. (1998). Digest of CAS Awards Volume I. Bern.

77 CAS Jurisprudence URL: http://jurisprudence.tas-cas.org/sites/caselaw/ help/ home.aspx (Accessed on October, 17 2023)

78 Kaufmann-Kohler, G. (2007). Arbitral precedent: Dream, Necessity or Excuse? Arbitration International, pp. 357-378.

79 Rigozzi, A., & Quinn, B. (2013, November 27). Inadvertent Doping and the CAS: Review of CAS jurisprudence on the interpretation of article 10.4 of the Current WADA Code. Law in Sport. URL: http:// www.lawinsport.com/articles/anti-doping/item/inadvertent-doping-and-the-cas-part-i-review-of-cas-jurisprudence-

signifying a general inclination among tribunals to uphold prior rulings unless distinct circumstances warrant differentiation or new arguments are presented, thereby affirming the evolving but anchored nature of sports jurisprudence.[80]

Cost

Contrary to the prevailing notion of affluent footballers, many individual athletes rely primarily on government aid or modest sponsorships, pitted against well-endowed sport's governing bodies in arbitration. This asymmetry in financial resources necessitates safeguarding the underdog, ensuring they are not unduly coerced by their more resourceful counterparts. The imbalance is exacerbated by the inherent pressure felt by athletes, dissuading them from entering legal disputes against their employers or governing bodies, given the latter's dominance within their respective sports.

Amidst this landscape, the CAS offers several reassuring aspects for financially constrained athletes. Firstly, the moderate filing fee of 1,000 Swiss francs presents a manageable entry point. Additionally, the system of contributions toward legal costs and the arbitration cost regime, especially in cases solely of disciplinary nature, provide further relief.

CAS, through article R64.5 of its Code, exercises discretion in granting prevailing parties contributions towards legal fees and expenses. This practice assures all parties involved, as the financial burden in case of defeat seldom mirrors the actual legal costs incurred. However, it is worth noting that even victorious parties can only anticipate recovering a portion of their legal expenses.[81]

Another financial relief for athletes pertains to arbitration costs, particularly in cases exclusively disciplinary, such as anti-doping proceedings. Article R65 of the CAS Code explicitly states that no arbitration costs shall burden the involved parties in such instances.[82] The compulsory nature of

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on-the-interpretation-of-article-10-4-of-the-current-wada-code (Accessed on October, 23 2023)

80 Juventus FC v Chelsea FC, CAS 2013/A/3365, A.S. Livorno Calcio S.p.A. v Chelsea FC, CAS 2013/A/3366.

81 The Swiss Federal Supreme Court, in a passing observation, highlighted the potential benefit of the Court of Arbitration for Sport (CAS) delineating the scope of 'contribution' as outlined in Art. R64.5 of the Code. This delineation would provide a structured framework for arbitrators discretionary powers in these matters (refer to the decision by the Swiss Supreme Court 4A_600/2010 of 17 March 2011 at 4.2, translated freely). While this clarification could enhance predictability, it might simultaneously curtail arbitrator's flexibility in considering all facets of a case. The expectation remains that unless CAS arbitrators misuse their discretion and thoroughly justify cost-related decisions within their awards, issuing specific guidelines may not be imperative.

82 It is crucial to highlight that even when parties are obligated to cover arbitration costs, CAS arbitrators operate on an hourly rate that typically stands considerably lower than their standard commercial fees. This practice reflects a commitment to

sports arbitration often leaves athletes with no alternative if they aspire to compete at elite levels.[83] Consequently, the aspect of legal aid assumes significance, considering that arbitration denies athletes access to aid available in state courts. Article S6 of the CAS Code introduces the provision for a potential legal aid fund, seeking to facilitate access to CAS arbitration for financially disadvantaged individuals.[84] Guidelines have been delineated, outlining exemptions for eligible athletes from court fees and advance arbitration costs, along with provisions for pro bono counsel.

Enforcement

Enforcement in sports arbitration is an intriguing facet where the recourse to the New York Convention[85] for award enforcement remains a seldom-tread path. Remarkably, sport's governing bodies typically exhibit spontaneous compliance with arbitral decisions, wielding robust internal mechanisms to ensure the implementation of awards upon their members.[86] This proactive approach often obviates the necessity for external enforcement measures.

An interesting dimension in this domain is the endorsement by the Swiss Supreme Court of these 'private enforcement systems'. Notably, a CAS award affirming FIFA's imposition of sanctions against a football club found to be non-compliant with FIFA disciplinary rulings was upheld, demonstrating the court's recognition of such systems as consistent with public policy.[87]

An evolving sphere of significance for Swiss practitioners in sports law involves the enforcement of select CAS financial awards. This pertains to leveraging asset freezing procedures within local Swiss courts. With numerous football clubs and national associations engaged in competitions overseen by governing entities based in Switzerland, there is a burgeoning recognition of this avenue as a viable recourse to recover outstanding sums.[88]

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fairness and accessibility within the CAS framework, ensuring a more equitable and reasonable structure for all involved parties.

83 X [Guillermo Canas] v ATP Tour [& TAS], 4P. 172/2006 of 22 March 2007

84 Noth, M., & Rigozzi, A. / Hasler, E. (2013). Sports Arbitration under the CAS Rules. In Arroyo (Ed.), Arbitration in Switzerland – The Practitioner's Guide. Kluwer Law International.

85 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

86 The significance of the New York Convention resonates notably in its function of precluding state courts from entertaining substantive actions in cases where a contractual agreement for CAS arbitration exists. This critical role underscores the international enforcement of arbitration agreements, channelling disputes away from state jurisdictions to uphold the authority and efficacy of CAS arbitration.

87 Verdict by the Swiss Supreme Court 4P.240/2006 of 5 January 2007.

88 Robert-Tissot, F. (2016). Enforcement of claims in football-related matters – A practitioner's view (Available remedies to obtain the payment of monetary claims, in particular based on Court of Arbitration for Sport (CAS) awards). Football Legal, Issue 5, May, pp. 106–120.

Confidentiality

As stipulated within the CAS Code, proceedings are to be kept confidential unless mutually consented to by both parties. This stringent adherence ensures absolute consistency and confidentiality throughout CAS proceedings. Such confidentiality stands as a paramount asset, safeguarding the reputation and integrity of individuals or entities entwined within the intricate tapestry of the sports world.[89]

Preservation of Relationships

Unlike adversarial litigation, arbitration often focuses on resolving disputes amicably. This approach can help in preserving relationships between athletes, teams, leagues, and other stakeholders within the sports industry.

Specialised Rules and Procedures

These institutions often have established rules and procedures specifically designed for sports-related disputes. These rules take into account the unique nature of sports, allowing for effective and fair resolutions.

Lacunas associated with the Institutional Sports Arbitration

Limited Transparency Concerns

While confidentiality can safeguard sensitive information, excessive confidentiality might lead to limited insight into the reasoning behind arbitration decisions. This lack of transparency could result in parties feeling dissatisfied or unclear about the basis of the final verdict, especially in cases involving public interest or where accountability is crucial.[90]

Costs and Fees

While arbitration is often considered cost-effective compared to litigation, it still involves expenses. These costs may escalate in complex cases, involving multiple hearings, expert witnesses, administrative fees, and legal representation. This financial burden might discourage some parties from pursuing arbitration or cause financial strain, especially for smaller entities or individuals.

Potential for Bias or Lack of Diversity

The selection of arbitrators might raise concerns about neutrality or potential biases. Arbitrators may have connections or affiliations within the sports industry, potentially impacting their impartiality. Additionally, the pool of available arbitrators might lack diversity in terms of expertise, background, or representation, affecting the fairness of the process.[91]

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89 Özeke, H.B. (2018). Law in Sports: International Sports Arbitration. Lexology. URL: https://www.lexology.com/library/detail.aspx?g=26d596bc-2e14-414e-a59d-ff23bbbe12f8 (Accessed on October 27, 2023)

90 du Sport, T.A., 2016. Court of Arbitration for Sport. *Athletics–Olympic Games Rio 2016*.

91 Goh, C.L. and Anderson, J., 2021. Unveiling the Criticisms of the Court of Arbitration for Sport. *Available at SSRN 3951894*.

Resource Inequality

Parties with more financial resources might gain an advantage in arbitration by affording top-tier legal representation or exerting greater influence on the process. This resource disparity can lead to an uneven playing field and potentially impact the fairness of the final decision.

Limited Precedent and Consistency

Unlike court decisions, arbitration awards do not set legal precedents. This absence of consistent legal guidance might result in uncertainty in interpreting and applying sports-related laws in subsequent cases, potentially leading to inconsistency in decisions.[92] Addressing these challenges often involves continuous improvements in arbitration practices, ensuring transparency, diversity in arbitrator selection, cost-effectiveness, and a balance between confidentiality and public interest. Balancing these aspects contributes to a more robust and trusted sports arbitration system.

Conclusion

The sports industry has emerged as a significant economic powerhouse globally, with events like IPL, FIFA, and Asia Cup significantly contributing to countries GDP. Amidst soaring revenues, tight event schedules, and fleeting player careers, arbitration has gained prominence as a key dispute resolution mechanism. Particularly in sports law, where time sensitivity prevails, arbitration stands out as an imperative solution. It uniquely aligns with the urgency of resolving disputes within specific timelines, making sports arbitration indispensable in meeting the contemporary demands of the industry. Arbitration, hailed for its effectiveness, enjoys widespread trust in the sporting realm, witnessing a surge in sports arbitration cases due to its proven success in dispute resolution in recent years.

The paramount challenge confronting sports arbitration is erecting frameworks to prevent a decline in award quality amid the escalating caseload, safeguarding the integrity and excellence of arbitration outcomes. A compelling solution involves creating top-tier Domestic Sports Arbitral Tribunals for national conflicts and specialised international arbitral bodies for global disputes within each sport. This dual framework ensures high-quality resolutions at both national and international levels, fostering effective dispute resolution.

Recommendations

In the Indian context, meticulous measures must be adopted in official dispute resolution for sports.

1. A crucial stride involves establishing a centralised, esteemed arbitration authority for sports disputes, an initiative championed by the central government, marking a commendable progression.

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92 Wójtowicz, P., 2016. Sport arbitration and interim measures–a Swiss glance. *Acta Iuris Stetinensis*, (15 (3)), pp.169-189.

2. The deployment of specialised arbitrators and mediators, adept at handling the array of disputes falling within the jurisdiction of centre, stands paramount.
3. Embedding within the institutional arbitration framework designated 'specialist mediators/arbitrators' tailored for nuanced concerns like doping, corruption, and administrative mismanagement would be imperative.
4. Ensuring robust post-case follow-ups and redressal mechanisms for athletes and their legal representatives fosters comprehension and empowerment amidst the dispute resolution process.
5. A proposal can be propelled by the Indian legislature to add an exclusive part of "sports arbitration" in the Arbitration and Conciliation Act, 1996, so that disputes related to sports can viably and effectively resolved.

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Casus Omissus in Statutory Interpretation: Analysing Judicial Approaches and Contemporary Challenges

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Abstract

This paper is an attempt to investigate the interplay between casus omissus and established principles of statutory interpretation and to identify instances where these principles are harmonized or in conflict. To explore the role of judicial discretion in resolving casus omissus scenarios and its effects on the consistency and predictability of legal outcomes.

I. Introduction

Separation of power is an integral part of fundamental features of constitution of India[1]. Legislature enacts the law and judicial bodies interpret it. The primary function of the judiciary is to interpret the laws in force. Enacted laws are developed by legal professionals, and the text is anticipated to allow little space for interpretation or construction. Courts are frequently witnessed unravelling the meaning of complex words and statements and resolving contradictions. The traditional doctrine dictates that courts refrain from filling voids in statutes[2]; their role is to declare or adjudicate the law, encapsulated by the Latin principle '*jus dicere non facere*'[3]. The age-old practise of applying legislative laws has resulted in the formation of specific norms of interpretation or construction[4]. As the dictum stated above suggests, The judicial officer must ease out all the difficulties that arise while interpretating the law. But how does one apply such judicial mind in the direction which is congruent to that of law makes mind? A simple answer to this question is with the help of rules of

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1 Article 50, The Constitution of India

2 Jeffrey A. Pojanowski, "Reading Statutes in the Common Law Tradition," 101 Va. L. Rev. 1357 (2015)

3 Bryan Garner, Black's Law Dictionary, 9th edition (2009), West Publishing Co., United States of America.

4 *Supra* at Note 2

interpretation. According to the doctrine of *casus omissus*[5], if a specific situation is left out of the scope of a statute even if it fits the clear intent of the law and the omission looks to have been made accidentally or unintentionally, the court cannot incorporate the excluded case by making up for the omission.

Courts are generally not empowered to insert missing elements (*Casus omissus*) into statutes. However, it remains imperative for courts to earnestly strive to uphold the legislative intent. In doing so, courts should exercise caution when adopting interpretations that render any portion of the statute meaningless or ineffective[6]. Instead, their foremost endeavor should always be to harmonize relevant provisions, thereby furthering the statutory remedy's intended purpose[7]. A fundamental guiding principle in interpretation is that when the language of a statute is clear and unambiguous, there is no need for further elaboration. In such cases, the plain and ordinary meaning of the words themselves most accurately conveys the legislature's intent. This underscores the importance of adhering to the clarity of statutory language, recognizing that precision in expression is key to sound interpretation. If the legislature purposefully fails to include an analogous law in a later statute, or even if there is a *Casus Omissus* in a statute with otherwise clear and unambiguous language, the court lacks the authority to engraft on that statute or introduce something that it believes to be a universal principle of justice and equity under the guise of an analogous interpretation or implication. To do so would be to encroach on the legislative branch's domain. In contrast to *jus dare*[8]*, jus dicere* is the main purpose of a court of law[9]. The legislature's will are the highest law of the state and must be obeyed to the letter. Judicial authority is never used to carry out the judgements of the judges; rather, it is always used to carry out the legislative, or otherwise known as statutory, will. Because of this, when the legislature expressly states its intent in the language of a statute, it is the responsibility of the court to give that intent full effect without questioning the wisdom or policy of the law and without engrafting, adding, or inferring anything that is inconsistent with the lawgiver's express intention[10].

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5 Oxford reference, Oxford University Press <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095554444> (Last accessed on 01.09.2023)

6 Aishvarya Gupta, "Casus Omissus: An Analysis" (Sept. 20, 2012), <https://ssrn.com/abstract=2154881 or http://dx.doi.org/10.2139/ssrn.2154881>(Last accessed on 01.09.2023)

7 Timothy Endicott, "Adjudication and th e Law," Oxford J. Legal Stud. 27, no. 2 (Summer 2007): 311-326.

8 It refers to the act of conferring or bestowing legal rights or privileges upon individuals or entities by a governing authority, such as a government or a legal institution. This phrase is often used in discussions related to the granting of legal entitlements, permissions, or privileges within a legal framework.

9 *Supra* at note 3

10 Hansraj Gupta v. Dehra Dun Mussorie Electric Tramway Co. Ltd., AIR 1933 PC 63, p. 65., Karnataka State Financial Corporation v. N. Narsihmahaiah, AIR 2008 SC 1797.

Thus, *Casus Omissus* illustrates the long-standing conflict between the judiciary and the legislative. This is so that when a *casus omissus* is exposed by the legislature, the courts are less likely to intervene. The law is not what the judiciary in their monopoly of knowledge declare it to be; rather, the law is what the judges understand the statute to be[11]. Although it could be preferable, the Court's role is to interpret the law as it already stands, not to create a new one. It is true that when interpreting a statute, a construction may be applied to it that alters the precise meaning of the text and even the sentence structure in order to satisfy the obvious legislative intent, but this is only permitted in situations where the court is under duress to act in order to prevent a serious injustice, prevent a statute from becoming null and void, or for any other equivalent reason. No court has the authority to proceed on the grounds that the legislature is erroneous since there is a clear presumption that it is not prone to error.

In this paper, the Author aims to simplify the concept of interpretation of statutes by highlighting the modern day role of doctrine of *casus omissus* by discussing various judicial approaches to bridge the gaps emerging in the dynamic society and concluding it by examples that come in handy while interpretating such case.

II. Basic Terminologies

2. 1 What is interpretation?

Sir John William Salmond, a prominent legal scholar in his book "*Salmond on Jurisprudence*[12]" where he discusses the principles of legal interpretation states that "Interpretation is the process by which the court seeks to ascertain the meaning of the legislature through the medium of the authoritative form in which it is expressed."

Ronald Dworkin[13], a renowned legal philosopher, emphasizes the role of courts in determining meaning and resolving legal conflicts through interpretation as "Interpretation is the process by which the courts determine the meaning of a legislative text and apply it to resolve a legal dispute."

Sir Rupert Cross and Sir J.W.F. Allison, in their book "*Bennion on Statutory Interpretation*[14]," provide "Interpretation is the art of finding the true sense of any form of words, whether spoken or written, but so far as we are concerned here, it is confined to the interpretation of written or printed documents."

The art of determining the genuine meaning of an enactment by giving the statute's terms their natural and ordinary meaning is referred to as interpretation. It is the process of determining the true meaning of a statute's

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11 G.P. Singh, Principles of Statutory Interpretation, 12th Edition (2011), Lexis Nexis Butterworths, Wadhwa Nagpur, Haryana.

12 Salmond, Sir J. W., & Fitzgerald, P. J. (1966), (12th ed.). Sweet & Maxwell

13 Ronald Dworkin, Law's Empire (1st ed., 1986).

14 Published in 2020, but it builds on the work of previous editions authored by Sir David Keane.

language. Interpretation refers to the process of ascertaining the interpretation of a statute by determining the legislature's intent in enacting that statute. It is employed when the language of an enactment is unclear or there is a great deal of uncertainty. There exist no role of interpretation if the elucidation of the words in the enactment is obvious.

2.2 What are rules of interpretation of statutes ?

The canons of statutory construction, commonly referred to as the principles of statutory interpretation, constitute a set of rules and procedures that courts and judges use to comprehend and apply the meaning of statutory legislation. These guidelines aid in ensuring that laws are read uniformly, equitably, and in line with the intention of the legislature. They are essential in settling contentious issues and ensuring that the law is applied fairly. Rules for statutory interpretation are essential instruments in the practise of law. For instance, the literal interpretation of the rule "No dogs allowed in the park" requires that it only apply to animals designated as "dogs." In contrast, the golden rule[15] allows for exceptions when a literal interpretation results in absurdities, such as when it says "No vehicles allowed in the park." The mischief rule[16] considers the issue that a legislation seeks to address; as a result, "disturbing the peace" in a noise pollution law would concentrate on noise disruptions. The term "consumer protection" is expanded on purpose to enact stringent toy safety regulations. The phrase "cars, trucks, motorcycles, and other vehicles" excludes unrelated modes like bicycles because of rules like ejusdem generis, which groups comparable goods. "Apples, oranges, and bananas" excludes additional fruits due to *expressio unius*[17], which limits items that are not specifically specified. The definition of "weapons, firearms, and ammunition" in Noscitur a sociis encompasses related objects since it interprets words in the context of their contemporaries. Last but not least, the presumption against retroactivity guarantees that January 1st tax adjustments only apply to future income. These guidelines help courts read laws consistently, upholding the purpose of the legislature while averting unforeseen effects.

III. *Casus Omissus*

The Latin phrase "*Casus Omissus*" means "omitted case" or "omitted situation." When a statute or written law is quiet on or ignores a certain item, condition, or problem that has come up in a legal dispute, it is referred to be an

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15 Explanation by Lord Wensleydale: "In construing statutes, we are not justified in departing from the plain meaning of the words used, unless we can discover some positive ground for so doing; but we are justified in departing from the plain meaning if we find in the statute as a whole a clear intention to do an act which would be illegal and unjust in the doer."

16 This rule is attributed to the case of Heydon's Case (1584)

17 A Latin term literally meaning "the expression of one thing is the exclusion of the other".

instance of statutory interpretation[18]. In essence, it denotes a legislative gap or absence in the law when the legislation lacks clear instructions on how to handle a certain circumstance. The Latin maxim "*casus omissus pro omisso habendus est*" is the source of the term "*casus omissus*," which signifies that a case that is missing is to be taken to have been done so on purpose. The enduring conflict between the legislative and the judiciary is also reflected in *Casus Omissus*. The courts often don't get involved when a *casus omissus* is discovered. Therefore, under certain circumstances, the legislature may add suitable language to the act to cover the *casus omissus*[19].

In Indian jurisprudence, Justice P.N. Bhagwati[20] recognized *casus omissus* as instances where the language of a statute does not provide a clear answer to a legal question due to its omission or silence on the matter. Halsbury's Laws of England[21], a comprehensive legal reference work, defines *casus omissus* as "an omission or oversight in a statute which results in a situation not being covered by it." The notion of *casus omissus* is a technique for legislative interpretation. *Casus omissus* occurs when a statute makes specific provisions for several enumerated cases or objects but fails to make any provision for a case or object that is either analogous, similar, or identical to those already enumerated[22]. Such an instance, item, or circumstance may have been "omitted by inadvertence or because it was overlooked or unforeseen." This entire circumstance is known as *casus omissus*. The usual opinion is that such omissions or deficiencies cannot be filled up by the courts.

Due to legislative gaps[23], *casus omissus* scenarios in India and England have some commonalities. When it comes to statutory interpretation, the word "*casus omissus*" is recognised in India and refers to circumstances in which a legislation provides no clear direction on a particular subject. The Supreme Court of India has been instrumental in settling these disputes, frequently turning to international agreements, just principles, and constitutional clauses. To determine legislative purpose and constitutional principles, the theory of purposive interpretation is frequently used. Similar statutory gaps are filled in England through statutory interpretation, but the process is different because of the common law history[24]. In order to manage *casus omissus* situations, the legal system in the United Kingdom uses common law principles, court precedents, and well-established rules of interpretation like the "golden rule"

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18 Bryan Garner, Black's Law Dictionary, 9th edition (2009), West Publishing Co., United States of America.

19 Padma Sundara Rao v. State of Tamil nadu (2002) 3 SCC 533

20 Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244.

21 https:// www.bbk.ac.uk/library/downloads/Guide-to-using-lexislibrary-halsbury.pdf (Last accessed on 09.09.2023)

22 *Id.*

23 Where some topics or events are not expressly covered by legislation

24 Anatoliy Kostruba, Mykola Haliantych, Svitlana Iskra, and Andrii Dryshliuk, "Legal Gaps: Concept, Content, Problems of the Role of Legal Doctrine in Overcoming them," Statute Law Review, Volume 44, Issue 2, August 2023, hmac016, https://doi.org/10.1093/slr/hmac016, Published: 12 January 2023.

and the "mischief rule." When interpreting laws and filling in legal gaps, English courts may also take equity and fairness into account. These discrepancies are a result of different legal customs and the significance of court rulings in each legal system[25].

3.1 Key Characteristics

3.1.1 Statutory Silence:

Situations known as *casus omissus* occur when a legislation or written law is quiet about something or does not specifically address it. Due to this omission, the law is silent on the particular matter at hand in the relevant legal action and neither includes applicable provisions nor offers clear guidance. The statute therefore appears to have a legislative gap as a result. "Statutory silence," within the doctrine of *casus omissus*, refers to a critical legal scenario where a written law or statute fails to contain specific provisions that directly address a particular matter or circumstance[26]. In essence, the statute remains mute or devoid of any language that explicitly governs the situation at hand. This legislative omission creates what is known as a "legislative gap" or a *casus omissus* in the law, leaving unresolved questions about how the legal system should handle or adjudicate the unaddressed issue[27]. The absence of clear statutory guidance in such cases can result in legal uncertainty and ambiguity, as parties involved in legal disputes may hold differing interpretations of how the law should apply to the situation. To bridge this gap, courts and judges are tasked with the responsibility of interpreting and applying the law[28]. This process involves a comprehensive assessment of the existing statutory language, legislative intent, established legal principles, and relevant precedents to arrive at a just and reasoned decision. Judges often exercise a degree of discretion when interpreting statutes that exhibit statutory silence, aiming to maintain the overall integrity of the legal system[29]. In some instances, legislative bodies may choose to amend the statute in question to explicitly address the omitted matter, thereby eliminating the legislative gap and providing clear statutory guidance for future cases.

3.1.2 Legislative oversight or intentional omission:

Legislative omission refers to a deficiency or oversight that occurs within legislative texts, whether due to intentional neglect or inadvertence, when the appropriate legislative authority drafts regulations pertaining to specific matters, rights, or guarantees outlined in the constitution. This omission can manifest as the absence of regulatory provisions addressing a

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25 Sir Peter Benson Maxwell, Maxwell on the Interpretation of Statutes (13th ed., LexisNexis Butterworths 2000)

26 E. L. Overholt, "Statutes: Construction: The Legislative Silence Doctrine," California Law Review 43(5), 907–910 (1955), https://doi.org/10.2307/3478430.

27 Para 10, Swadeshi Cotton Mills v. Union of India (1981) 1 SCC 664

28 Mangilal v. State of M.P. (2004) 2 SCC 447

29 Bryan Camp, "Interpreting Statutory Silence," Tax Notes Vol. 128, No. 3, p. 501, August 2010, Texas Tech Law School Research Paper No. 2010-23, Texas Tech University School of Law

particular subject[30]. It stems from the legislator's failure to fulfill their constitutional duty to enact necessary legislation, a situation known as legislative abstention. Consequently, a legislative void emerges, which can infringe upon or weaken the rights, guarantees, or issues that require legislative attention for their proper regulation or to enhance their effectiveness[31]. It involves the intentional omission of specific provisions from a statute because those matters are adequately covered by existing laws, regulations, or established legal principles. This form of legislative drafting demonstrates a judicious effort to streamline and avoid redundancy in the legal framework.

In a positive sense, legislative oversight highlights the efficiency and prudence of lawmakers. It signifies their ability to recognize when certain issues or areas of law are already well-regulated and do not require further statutory intervention[32]. This approach can contribute to the clarity and conciseness of legislation, making it more accessible and comprehensible to the public and legal professionals. Moreover, legislative oversight can reflect a commitment to the principle of limited government intervention, respecting the autonomy of other legal systems, such as common law or regulatory agencies, to address specific matters comprehensively. It demonstrates lawmakers' trust in the effectiveness of these alternative mechanisms and their belief in the importance of not burdening the legal system with unnecessary provisions[33]. In essence, legislative oversight, when viewed positively, underscores the wisdom and careful consideration that lawmakers employ when determining the scope and content of legislation, ensuring that statutes remain clear, relevant, and focused on addressing real legal needs.

IV. Changing Judicial Approaches

"The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna[34]" In situations where the legislative framework falls short, the directions issued by the higher judiciary to address gaps[35] in the law until the legislature enacts substantive legislation represent a constitutional prerogative aimed at achieving justice. It is crucial to recognize

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30 Randolph Clarke, "Intentional Omissions," Noûs 44, no. 1 (2010): 158–77, http://www.jstor.org/stable/40660482.

31 Dr. Sura Harith Abdulkareem, "The Effect of the Legislative Omission on the Effectiveness of Administration in Confronting the Corona Virus: A Study in Iraqi Law," Palarch's Journal of Archaeology of Egypt/Egyptology 17(7), 15327-15353 (ISSN 1567-214x).

32 María Susana VILLOTA BENAVIDES, "The Constitutional Control over Legislative Omissions in the Context of Social State of Law," Revista de la Facultad de Derecho y Ciencias Políticas 2012, vol. 42, no. 117, pp. 455-479, ISSN 0120-3886.

33 12 Principles of Good Governance, coe.int/en/web/good-governance/12-principles (Last accessed on 21.09.2023)

34 Rattan Chand Hira Chand v. Askar Nawaz Jung, (1991) 3 SCC 67

35 *Supra* at Note 22

that judges, in response to the evolving needs of society, effectively contribute to the development of legal principles. This judicial law-making, commonly referred to as judge-made law, is formally acknowledged under Article 133 of the Constitution[36]. The term "*other competent authority*" in this context encompasses the judiciary as well. It is essential to emphasize that such judicial actions should not be misconstrued as activism[37]. The Constitution, through various provisions, has explicitly vested the courts with the authority to engage in this form of law-making. Articles 324, 226, 227, 141, and 144[38] confer substantial powers upon the judiciary, reinforcing the notion that the Constitution entrusts the courts with the responsibility to legislate judiciously when necessary[39].

General approach "A matter which should have been provided but actually has not been provided in a statute cannot be supplied by the courts, as to do so will be legislation and not construction[40]." In situations of *casus omissus*, where a statute is silent or lacks explicit provisions for a specific matter, courts employing a literal interpretation approach rely on the exact wording of the statute to determine its application to the unaddressed situation. This approach assumes that the legislature's intent, even in cases not directly covered by the statute, is embedded in its language[41]. Analogous statutes come into play when dealing with *casus omissus* scenarios. Courts compare the unaddressed matter to existing statutes or legal principles that cover similar subjects, effectively filling the legislative gap by drawing parallels to related areas of law. The mischief rule assists in understanding the purpose behind a statute, making it applicable to cases of *casus omissus*. When a legislative gap arises, this rule helps courts identify the problem or mischief the statute intended to remedy, allowing for a more informed interpretation and application to the unaddressed issue[42]. Purposive interpretation is particularly relevant when dealing with *casus omissus* situations. It focuses on discerning the broader legislative purpose behind the statute, enabling courts to adapt the law to unanticipated circumstances in line with the underlying legislative intent[43].

Initial approaches involved that the Court can only interpret the law when interpreting a provision; it cannot enact it. The legislature has the authority to change, modify, or abolish a law if it is being abused or subject to abuse of the legal system. The judicial interpretive procedure cannot provide

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36 Constitution of India, 1950

37 Prof. Dr. G.B. Reddy and Pavan Kasturi, "A Comprehensive Analysis on Judicial Legislation in India https://www.scconline.com/blog/post/2022/03/04/a-comprehensive-analysis-on-judicial-legislation-in-india/#_ftn28 (Last accessed on 22.09.2023)

38 *Id*

39 *Supra* at Note 7

40 Hansraj Gupta V. DMET Co. Ltd. AIR 1933 P.C.63

41 https://www.bailii.org/uk/cases/UKHL/1987/5.html

42 https://www.bailii.org/uk/cases/UKHL/1994/3.html

43 *Supra* at Note 17

the legislative *casus omissus*[44]. Two constructional principles, one pertaining to *casus omissus* and the other to the overall interpretation of the act, seem to be well established. A *casus omissus* cannot be provided by the court under the first principle unless there is a clear necessity for it and when the justification for it can be found in the four corners of the statute itself. However, a *casus omissus* should not be easily inferred, so all the parts of a statute or section must be construed collectively and each clause of a section must be construed in light of the context and other clauses thereof for the construction to be fair[45].

For example, The Supreme Court ruled that when a statute's language is clear and unambiguous, there is no room for the Casus Omissus doctrine to be applied or for pressing external assistance into service because the words used by the statute speak for themselves and it is not the role of the court to merely add words or expression to suit what it believes to be the legislature's purported intention[46]. In another case, The Apex Court observed that even if there is defect or omission in the words used by the Legislature, the Court cannot correct or make up the deficiencies especially when literal reading thereof produces an intelligible result.[47] The fascinating aspect of the social dynamics shaped by judge-made law is its emphasis on evolution rather than revolution. This approach has garnered broad acceptance over time. It's important to recognize that the Supreme Court is often confronted with complex issues that demand a multifaceted understanding. These challenges may require the insights of economists, the practical experience of executives, the analytical skills of politicians, and the historical perspectives of historians[48]. There are instances when the judiciary must assume legislative responsibilities. Through this process, the judiciary has effectively contributed to the development of legal principles.

Criteria for international adoption: A counsel named Lakshmi Kant Pandey[49] sent a letter to the Supreme Court accusing social groups and for-profit adoption companies that helped place Indian children with foreign parents of negligence and fraud. He based his letter on an empirical study done by The Mail, a foreign publication. The Court had to examine directly into Section 8 of the Guardians and Wards Act, 189026, as there is no Indian statute governing the adoption of Indian children by foreign parents. In circumstances of adoption of children, this established the normative as well as procedural precautions to be followed. The judgment[50] placed a strong emphasis on legislation aimed at protecting young children from maltreatment and

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44 Trading Company, Ujjain v. Commissioner of Sales Tax, (2000) 5 SCC 515.

45 Shiv Shakti Coop. Housing Society, Nagpur v. M/s. Swaraj Developers & Ors., (2003), S.L.P. (C) No. 19030 of 2002

46 S.P.Gupta V. President of India AIR 1982 SC 149

47 Raghunath har Dareja v. Funjad National Dank (2007) 2 SCC 230

48 "A Comprehensive Analysis on Judicial Legislation in India," SCC Online Blog (March 4, 2022), (last accessed on 21-9-2023)

49 Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244.

50 *ibid*

measures that can stop them from being coerced into professions that are inappropriate for their ages and physical capabilities. In order to secure the kid against exploitation and human trafficking, several precautions and processes have been stated in the judgement written by Bhagwati, J. He believed that only biological parents could provide children with a comfortable environment, but in the event that a kid is abandoned, attempts should be taken to identify the biological parents. The following stage would be to seek for adoptive parents in the child's country of origin.

Guidelines for prevention of water pollution in River Ganga[51] : To stop the leather tanneries from depositing both household and commercial trash and effluents in the River Ganga, attorney M.C. Mehta filed a mandamus-style writ suit. The Supreme Court provided rules for preventing Ganga water pollution and agreed with the petition calling for the environment to be established a graded topic in schools and colleges in order to increase awareness among all students.

The Vishakha Guidelines: The dispute arose after a long-running legal effort to address the issue of sexual harassment of women at work in India in Vishaka v. State of Rajasthan[52], which was unsuccessful because many Indian States failed to adequately apply the Vishaka recommendations. In order to assist achieve gender parity by ensuring women may work with dignity, decency, and proper respect, the Court declared that the recommendations had to be put into action in form, content, and spirit. To guarantee that the Vishaka recommendations were fully implemented, it also issued a number of directions that were to be obeyed by State officials as well as entities in the private and public sectors.

Directions for sale and purchase of Acid[53] : To stop the selling of acid, instructions were established. The Court ruled that only those with a proper identification card should be able to purchase acid. The necessity for the chemical must be justified by the buyer, and transactions have to be notified to the police. In order to control the sale of acid as soon as is practical, the Court ordered the Chief Secretaries of the States and the person in charge of the Union Territories to adhere with the directive provided in the order and to design regulations that are consistent with the example rules established by the Centre.

After examining the aforementioned major decisions, it may be concluded that where there is a legal void or no explicit legal principles, judges create the law. The judge injects life and blood into the dry skeleton provided by the legislature and creates a living organism suitable and adequate to meet the needs of the society. However, when existing laws do not provide all the resources to deliver justice or "complete justice", judges do tend to find the law

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51 M.C. Mehta (2) v. Union of India, (1988) 1 SCC 471.
52 (1997) 6 SCC 241.
53 Laxmi v. Union of India, (2014) 4 SCC 427

within the framework of legislation[54]. The rationale given follows that the judiciary can only become involved if the policy being created is completely arbitrary, not supported by any logic, or both; otherwise, policy decisions should be left to the discretion of the people's elected representatives.

V. Challenges: Restrictive vs Expansive views

To quote Justice K. Ramaswamy[55] "The role of the Judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality[56]." We can observe a very expansive view. On the other hand, to quote Justice Y.V. Chandrachud[57] "The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits." We can observe a very restrictive approach. To Comprehend the matter, a complicated interaction of variables results in the various strategies judges take when dealing with *casus omissus*, whether limited or expansive[58]. One important factor is the judges' judicial philosophy. Conservative judges may take a restrictive attitude, emphasising strict obedience to statutory text, whereas judges with more progressive outlooks may choose an expansive interpretation that takes into account changing cultural values[59]. Additionally, the legal interpretation techniques they use are crucial, with literalists favouring a more restrictive approach and supporters of purposive interpretation working to further legislative goals even in the absence of explicit language from the law. Personal histories, life experiences, cultural norms, and the particular circumstances of each case all influence the variety of responses[60].

The activist standpoint on judicial creation of law advocates that the constitutional and legislative provisions be interpreted to fit the demands of the time, or that new laws, whether procedural or substantive, be established via the use of directives or orders[61]. The judiciary is not willing or entering into the legislative sphere to decipher the constitutional provisions and statutes, in contrast to the conservative/traditional approach to judicial legislation, regardless of systemic necessities. One of the numerous kinds of judicial

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54 P.N. Bhagwati, Judicial Activism in India https://media.law.wisc.edu/m/4mdd4/gargoyle_17_1_3.pdf (last accessed on 22-9-2023).

55 Ravichandran Iyer v. Justice A.M. Bhattacharjee, (1995) 5 SCC 457]

56 Prof. Dr. G.B. Reddy and Pavan Kasturi, "A Comprehensive Analysis on Judicial Legislation in India https://www.scconline.com/blog/post/2022/03/04/a-comprehensive-analysis-on-judicial-legislation-in-india/#_ftn28 (Last accessed on 22.09.2023)

57 Former Judge, Supreme court of India

58 *Ibid* at Note 46

59 Amit Pandey and Akshita Tripathi, "Concept of Justice under Indian Constitution," Constitution (May 16, 2022), https://articles.manupatra.com/article-details/Concept-of-Justice-under-Indian-Constitution (Last accessed on 24.09.2023)

60 *Supra* at Note 6.

61 *Supra* at Note 46

activism is the process by which judges make laws, whereby the conventional method of doing so can be informally referred to as judicial passivism. Example being, In **Rajesh Sharma v. State of U.P**[62], a Supreme Court division bench ruled that vengeful wives were abusing Section 498-A IPC[63]135 and eight orders were given. The District Legal Services Authority was instructed to establish a Family Welfare Committee in every district in India. All Section 498-A complaints were to be directed to this committee, and no arrests were to be made until the committee's report was received. The above-mentioned decision of the two-judge bench was overturned by the Supreme Court's three-judge panel in Social Action Forum for Manav Adhikar v. Union of India[64] because there is no statute requiring the creation of family welfare committees.

5.1 The Legislative And Executive Censure

Criticism from both the executive and legislative branches regarding the judiciary's handling of *casus omissus* situations centers on several key concerns. Foremost among these is the issue of judicial activism, where judges are seen as overstepping their role by making policy decisions or filling legislative gaps[65]. Critics argue that such activism can disrupt the balance of power and encroach upon the legislature's domain of law-making. Furthermore, concerns are raised about the potential erosion of the separation of powers, as the judiciary's proactive approach blurs the lines between the branches of government. Another contention is the accountability of judges, who are not elected officials, for their decisions in *casus omissus* scenarios. Critics stress the importance of adherence to the principle that judges should interpret and apply laws rather than create new ones. Finally, there is apprehension that judicial decisions in these situations may introduce legal uncertainty, as they may rely on judges' subjective interpretations and lead to inconsistent outcomes. These criticisms reflect a complex debate over the appropriate role of the judiciary in addressing legislative gaps. Even Mr. Arun Jaitley, the previous Union Finance Minister, expressed harsh criticism for this. According to him[66], the idea that judicial activism results from the phenomena that occurs when other institutions fail to do their duties is one that I have heard frequently. It is an inadequate defence. It has a fault since any State organ can be ordered to do its duties if it is not performing them. The proper constitutional strategy would never be to usurp authority... by any other entity. What if the judiciary was the target of the same defence in reverse? Judges are

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62 (2018) 10 SCC 472.

63 Indian Penal Code,1860

64 (2018) 10 SCC 443.

65 Anatoliy Kostruba, Mykola Haliantych, Svitlana Iskra, and Andrii Dryshliuk, "Legal Gaps: Concept, Content, Problems of the Role of Legal Doctrine in Overcoming them," Statute Law Review, Volume 44, Issue 2, August 2023, hmac016, https://doi.org/10.1093/slr/hmac016, Published: 12 January 2023.

66 Ananthakrishnan G., National Law Day: Judicial Activism Based on Flawed Premise, says Arun Jaitley, (26-9-2023), The Indian Express, https://indianexpress.com/article/india/national-law-day-judicial-activism-based-on-flawed-premise-says-arun-jaitley-4954840/ (Last accessed on 23.09.2023)

not performing their jobs, and arrears are still owed. So, does that authority need to be used right now by someone? The response is no... Therefore, it is crucial that the line delineating the division of powers is upheld. In light of this, it is impossible to lose sight of the fine line itself via argumentation.

A recent tussle between legislative and judiciary can be observed in the case of Supriyo @ Supriya Chakraborty & Anr. v Union of India[67] where one of the issues is whether members of the LGBTQIA+ community[68] have a right to marry, can the Supreme Court make a declaration to this effect?. This is a classic example of *casus omissus* where legislative failed to foresee a case that arose over time and is put up before the adjudication authoroities. In the context of *casus omissus*, where the law is silent on a specific matter, the judiciary might essentially fill a legislative gap. While this isn't traditional law-making by the legislature, it is a necessary function of the judiciary to ensure that the law remains relevant and consistent with evolving societal values.

VI. Concordant Approach: A Philosophical Need

6.1 Judicial Discretion:

It plays a pivotal role when judges are confronted with *casus omissus* situations, where existing laws do not explicitly address specific matters or circumstances[69]. In such scenarios, judges are tasked with the responsibility of interpreting the law and making decisions that effectively fill the legislative gap[70]. This exercise of judicial discretion is both a power and a challenge, as it can significantly impact the legal landscape and the lives of those affected by the court's decisions. One key aspect of judicial discretion in *casus omissus* cases is the inherent flexibility it affords judges. Unlike straightforward cases where the law is clear and unambiguous, *casus omissus* requires judges to delve into the spirit and purpose of the law, often taking into account broader legal principles and constitutional rights[71]. This flexibility allows judges to adapt the law to changing societal norms and values, ensuring that justice prevails even in situations that legislators did not anticipate[72]. However, the exercise of judicial discretion is not without its complexities and potential pitfalls. The very flexibility that empowers judges can also lead to varying interpretations

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67 W.P. (C) 1011/2022

68 LGBTQIA+ is an acronym that brings together many different gender and sexual identities that often face marginalization across society. The acronym stands for lesbian, gay, bisexual, transgender, queer, questioning, intersex, asexual, and the + holds space for the expanding and new understanding of different parts of the very diverse gender and sexual identities. (https://www.gsrc.princeton.edu/lgbtqia-101)

69 Ch8.Pdf," Ujala.Uk.Gov.In (Uttarakhand Judicial & Legal Review), https:// Ujala.Uk.Gov.In/Files/Ch8.Pdf.

70 Barry Hoffmaster, "Understanding Judicial Discretion," Law and Philosophy 1, no. 1 (Apr. 1982): 21-55

71 *Id.*

72 The Bangalore Principles of Judicial Conduct," (2002), https://www.unodc.org/ pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (Last accessed on 21.09.2023)

and outcomes. Different judges may approach the same *casus omissus* scenario differently, resulting in a lack of consistency and predictability in the legal system. This diversity of interpretation can give rise to legal uncertainty, which is a concern for both legal practitioners and the general public. The exercise of judicial discretion can blur the lines between the judiciary and the legislature. Critics argue that judges should refrain from creating new laws or policies, emphasizing that the primary role of the judiciary is to interpret and apply existing laws[73]. When judges actively fill legislative gaps, they may be perceived as overstepping their boundaries and engaging in judicial activism.

6.2 Preservation of Legislative Intent[74]:

It intent is a key tenet of statutory interpretation. Courts are faced with the difficult challenge of determining what the legislature would have intended had they taken the unsolved circumstance into consideration when they meet *casus omissus* situations, which are occasions when current laws do not specifically cover certain issues or scenarios. This idea emphasises how crucial it is to uphold the legislative intent and guarantee that judicial rulings adhere to the letter and spirit of the law[75]. This entails taking into account the overarching goals of the law as well as the legislative history, discussions, and committee reports. Judges hope to close the legislative gap without going beyond their authority by reconstructing the legislature's fictitious purpose about the *casus omissus* in this way[76]. The objective is to maintain the law's applicability and effectiveness in addressing unanticipated scenarios while yet adhering to the legislative power's limitations. This procedure frequently entails weighing conflicting interpretations and taking the potential outcomes of each strategy into account. Although it is a noble guiding concept, maintaining legislative intent is not without difficulties. Judges' interpretations of the legislative intent may differ, which might result in inconsistent applications of the law[77]. Since legislatures may have several members with opposing viewpoints, figuring out the hypothetical goal of a legislative body can be difficult. Therefore, mindfulness is vital.

6.3 Avoidance of Judicial Legislation[78]:

This principle underscores the judiciary's commitment to respecting the boundaries of its role, aiming to apply the law as it exists without venturing into the realm of law-making unless absolutely necessary. Fundamentally, this concept acts as a check against judicial activism and the possibility for the

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73 *Supra at Note 53*

74 Gerald C. Mac Callum, Jr., "Legislative Intent," The Yale Law Journal, Vol. 75, No. 5 (April, 1966) https://openyls.law.yale.edu/bitstream/handle/20.500.13051/15074/40_75YaleLJ754_April1966_.pdf?sequence=2 (Last accessed on 22.09.2023)

75 Gerald C. Mac Callum, Jr., "Legislative Intent," 75 Yale L.J. 754 (1966).

76 *Id.*

77 *Id.*

78 Eric S. Fish, "Constitutional Avoidance as Interpretation and as Remedy," Michigan Law Review, Vol. 114, Issue 7 (2016) < https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1260&context=mlr>(Last Accessed on 22.09.2023)

judiciary to usurp the power of the legislative branch[79]. Although judges are essential to the interpretation of laws, they are not elected officials entrusted with enacting new legislation. Instead, even if there are any gaps or omissions in the law, their main responsibility is to implement it as written[80]. This strategy upholds democratic governance's integrity and the division of powers. Judges are required to interpret and apply the law in *casus omissus* situations, where the law is ambiguous or insufficient to handle the particular problem at hand. This interpretation is intended to fill the legislative vacuum in a way that is compatible with the legislative intent and more general legal principles rather than to establish new laws[81]. Judges use a purposeful method of legislative interpretation to strike this difficult balance. They take into account the statute's content in addition to its legislative background, its setting, and its overall objectives. By doing this, courts attempt to ascertain how the legislature would have intended to approach the unresolved issue if it had been taken into account while the legislation was being enacted[82].

Judges must carefully use their judgement in the delicate interplay of these principles, attempting to uphold legislative purpose wherever feasible, and refraining from passing judicial legislation until absolutely necessary for the sake of justice[83]. The law ultimately acts as a beacon of justice in a legal environment that is always changing because of these principles, which act as guiding lights and illuminate the way towards fair, consistent, and principled legislative interpretation[84]. The above discussion highlights the need of striking a fine balance throughout shift from restrictive to expansive. While adopting a broad perspective, it admits that the court must take care not to overstep its bounds or take on legislative duties. In addition, it must interpret the law in a way that efficiently fills in the gaps while maintaining the fundamental principles of justice without becoming a law itself[85]. Hence, The hypothesis stands proved.

VII. Wrapping Up : The Balanced Approach

When examining judge-made law in the context of *casus omissus*, a noteworthy relationship emerges. *Casus omissus* situations occur when legislation fails to explicitly address specific matters or circumstances. In such cases, judges often step in to provide interpretations, guidance, or even directives to fill the legislative gaps. Judge-made law, in addressing *casus omissus*, can play a pivotal role. It can serve as a means to push the legislature

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79 R. Shunmugasundaram, "Judicial Activism and Overreach in India," <https://core.ac.uk/download/pdf/112282.pdf> (Last Accessed on 22.09.2023)

80 *Supra* at Note 6.

81 *Ibid.*

82 *Id.*

83 Diego M. Papayannis, "Independence, Impartiality, and Neutrality in Legal Adjudication," pp. 33–52, DOI: 10.4000/revus.3546 (Last accessed on 24.09.2023)

84 *Supra* at Note 53

85 *Supra* at Note 7

to recognize and rectify these omissions in the law[86]. When judges make decisions or provide guidance on unaddressed issues, it acts as a compelling signal to lawmakers that certain areas require legislative attention. This process encourages the legislature to introspect on its shortcomings and take necessary corrective actions, ultimately enhancing the legal framework.

Simultaneously, the reliance on judge-made law in *casus omissus* scenarios can instill credibility and reliability in the legal system. The judiciary's ability to adapt and address evolving societal needs fosters trust among the public, as they witness the responsiveness of the legal system. However, it's important to acknowledge that judge-made law can also introduce an element of uncertainty and potential conflicts[87]. When judges are compelled to fill legislative gaps through their decisions, it may lead to disputes and friction between the branches of government. Additionally, such decisions may not always align with the principles of natural justice, which demand that individuals should know the law before it is enforced. The use of judicial discretion in *casus omissus* cases has drawbacks[88]. It gives courts the authority to modify the law to meet changing society demands and safeguard individual rights, but it also raises the possibility of ambiguity and dispute[89]. It is still difficult to strike the proper balance between judicial discretion and adherence to the principle of the separation of powers, which is necessary to ensure that the judiciary may solve legislative deficiencies while maintaining the fairness and predictability of the legal system[90].

To conclude, Academics, attorneys, and judges need to revisit the functions assigned to the three spheres of the State by the Constitution[91]. The boundaries of judicial legislation must also be investigated and supported by logic if judges have the right to legislate and judicial legislation is recognised by the Constitution. Even if it is welcomed should it be permanent or interstitial should also be considered. Alike judicial review, Judge-made law shall also have to satisfy legitimacy. Ultimately Judges are not legislators, but finishers, refiners and polishers of legislation[92].The *casus omissus* concept emphasises how flawed all legal systems are. It serves as a reminder that, despite their thoroughness, legislation can seldom account for every circumstance that could occur in the future. In this situation, judicial strategies show up as a set of rules. Using their discretion, judges can modify the law to meet changing social

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86 *Supra* at Note 63

87 *Supra* at Note 6

88 *Supra* at Note 53

89 *Id.*

90 Vidhan Vyas, "Casus Omissus for Cross-Breeding of Entities: NCLAT Conundrum," International Journal of Law, Management & Humanities, Volume 4, Issue 4 (2021), ISSN 2581-5369.

91 *Supra* at Note 7

92 Corocraft Ltd. v. Pan American Airways Inc., (1969) 1 QB 616 : (1968) 3 WLR 1273 (CA).

demands while still upholding the original legislative objective[93]. This delicate balance is evidence of the judiciary's function as the protector of justice. But there are many obstacles on the way. The legal system may become unclear due to the variety of interpretations that might result from judicial discretion. Judges frequently have to decipher the complexities of legislative history and purpose in the diligent search to maintain legislative meaning. In the meanwhile, the requirement to prevent judicial legislation emphasises the need for moderation in a time of constantly growing jurisprudence[94]. *Casus omissus* serves as a reminder that the law is a living, breathing creature that is formed both by legislative draughts and by the judges' expert interpretations of those draughts. Judges must use their knowledge, sagacity, and dedication to justice to overcome these obstacles[95]. The doctine of *Casus Omissus* is evidence of how flexible and dynamic the judicial system is. The judicial system's dedication to pursuing justice is put to the test using judicial techniques as a compass and challenges as a testing ground[96]. The court's fundamental mission is to interpret the law objectively, not subjectively, and to ensure that justice remains the cornerstone of the legal system, steadfast and unflappable in the face of uncertainty. This is where the judiciary finds its true purpose[97].

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93 Bryan Camp, "Interpreting Statutory Silence," Tax Notes Vol. 128, No. 3, p. 501, August 2010, Texas Tech Law School Research Paper No. 2010-23, Texas Tech University School of Law

94 *Supra* at Note 6.

95 *Id.*

96 *Supra* at Note 7.

97 *Supra* on note 27

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Issue of Criminalization of Marital Rape: An Indian Legal Perspective

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Abstract

Criminalization is the act of making something criminal, or making it against the law. It is the process by which behaviours and individuals are transformed into crime and criminals. Having a guilty mind is the condition precedent in giving birth to the spirit of criminality and deviant behaviour within the mind of a human body. Therefore, followed by the law of nature guilty minds and innocent minds cannot cohabit within the same personality. Hence, while applying/reflecting the approach of criminalization in respect of any acts it is necessary to justify that act as an outcome of having a guilty mind primarily which is known as mens rea in the criminal law. This paper is an attempt to find answer to this question whether martial rape be criminalized or not in India.

Keywords: Marital rape, criminalization, sexual relations, institution of marriage,

Introduction

'Rape' is a word with which we all are more or less acquainted even though the legal definition may not be known to everyone. Howsoever, it is a known fact to almost everyone that the common identifiable aspect behind considering an act as 'rape' there must have been presence of sexual intercourse between a man and a woman and the same must be without the willingness of the later. However, the question is whether there can be rape between married couple in the name of 'marital rape'. To understand this, first of all, it is necessary to make out what the expression 'marital rape' actually means. Explaining this, it can be mentioned that marital rape or spousal rape is the act of sexual intercourse with one's spouse without the spouse's consent. The lack of consent is the determinant factor here and involvement of physical violence is not required to be proved. It is considered as one form of domestic violence and sexual abuse. Sexual intercourse within marriage without spouse's consent is now classified as 'rape' in various countries and there is an increasing trend

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of criminalization' thereof even though sexual intercourse was mostly considered as right of spouses in so far as the historical perspective is concerned[1]. The issues of sexual and domestic violence within marriage started gaining attention at the international level since the second half of the Twentieth century even though the concept of marital rape has been kept outside the purview of the criminal law in various legal system. History is witness to the fact that the issue of marital rape has been criminalized under only certain legal systems prior to 1970s. Soviet Union was the first country to develop law on the point of criminalizing marital rape in an affirmative direction in the year 1922[2]. Subsequently, the same approach was followed in legal system of Poland and Czechoslovakia in the year 1932 and 1950 respectively.[3]

Later on, in the second half of the 20th Century legal system in some other countries namely Sweden, Norway and Slovenia had also been redesigned to criminalize marital rape. Even the then newly formed country Yugoslavia also followed the same path in the seventh decade of the 20th Century. In due course, several other countries namely Austria, Switzerland, Israel, Australia, Spain, Finland, Belgium, Ireland, France, Germany, Italy, Cyprus, Greece followed the path of criminalization of marital rape in one way or other. As of now, more or less 150 countries have developed their laws in the direction of criminalizing marital rape[4]. Thus, it is evident that the trend of criminalizing marital rape is on its way to rise in different parts of the world.

The Indian Perspective—The Existing Stand:-

As far as the Indian perspective is concerned; rape has been defined u/s.375 of the Indian Penal Code wherein the offence of rape has been criminalized. The definition includes within itself both sexual intercourse as well as other sexual penetration such as oral sex within the definition of 'rape'. However, the application of this section has been excluded in case of sexual intercourse or sexual acts between husband and wife by virtue of Exception 2. It is pertinent to point out that the above stated exception clause does not state any specific reason behind exclusion of sexual intercourse or sexual acts between husband and wife from the purview of rape.[5] Since the core focus of

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1 *See Generally*: Marital Rape: Consent, Marriage, and Social Change in Global Context. (2016). United Kingdom: Oxford University Press. Pp. 9-10. *See Also*: Shaw, H. (2000). Marital Rape: An Examination of the Legal and Attitudinal Evolution of the Concept of Rape in Marriage. : City College of New York.

2 Wilma, R. (1996). *Russian women in politics and society.* (1st ed., p. 160). Greenwood Publishing Group.

3 Elman, R. A. (1996). *SEXUAL SUBORDINATION AND STATE INTERVENTION Comparing Sweden and the United States* (2nd ed., p. 90). Greenwood Publishing Group.

4 Shah, D. (2021). *The Sight of Lawyer* (1st ed., p. 132). Suvidhi Publishing House.

5 The exemption excludes rape committed in a marriage, if the age of the wife is more than fifteen years. However, the Supreme Court struck down this part of the

the provision is upon the consent, it is possible that an undisputable presumption of consent operates when the relationship between the victim and the perpetrator is that of marriage. However, simultaneously, there is also a possibility that it was a legislative decision to exclude the operation of this section from married relationships considering the sanctity that this institution has assumed in our society. This is probable since there are sections in the IPC where spouses are exempt from its application.[6] Nevertheless, it is quite relevant to point out that while the law does not criminalize marital rape, a specific form of marital rape is criminalized, i.e., non-consensual sexual intercourse when the wife and husband are living separately on account of judicial separation or otherwise[7].

Thus, it can be mentioned that under the provision of the Indian Penal Code, marital rape has been kept outside the purview of the criminal law mainly on the basis of the issue of consent. In case of marriage husband and wife are living together and this living together raises a presumption that the wife has consented to sexual intercourse by husband.

Contextually, it is relevant to point out that 42nd Law Commission Report[8][9] wherefrom two important suggestions were developed. One was in relation to sexual intercourse during technical subsistence of marriage and the other was regarding non-consensual sexual intercourse between women aged between twelve and fifteen. In the report it was stated that in the former case, the allegation of rape cannot be brought, even though there was no specification of reasoning whereas in case of the later the report suggested for providing punishment under a separate section and preferably not be termed as 'rape'. In short, it can be mentioned that the 42nd Law Commission Report highlighted the presumption of consent which operates when a husband and wife live together and the differentiation between marital rape and other rape, where the former is viewed as less serious as compared with the later. However, the report remained silent about the issue i.e., whether the exception clause must be retained or deleted. The Law Commission once again dealt with

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exception clause in Independent Thought v. Union of India, (2017) 10 SCC 800 : AIR 2017 SC 4904.

6 See e.g., The Indian Penal Code, 1860, Ss.136, 212 & 216

7 "Section 376B: Sexual intercourse by husband upon his wife during separation: Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine. Explanation - In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375"

8 Since the law has been amended at various intervals subsequent to this report, the importance of this report is restricted to understanding the prism through which the Law Commission views marital rape.

9 Law Commission of India, Indian Penal Code, Report No. 42 (June 1971), Available at: http://lawcommissionofindia.nic.in/1-50/report42.pdf [Accessed Date: July 29,2023].

question as to validity of the clause in its 172nd Law Commission Report[10] but the argument of criminalizing marital rape was rejected since it feared that criminalization of marital rape would lead to *"excessive interference with the institution of marriage"*[11]

However, in 2012, a reverse approach was observed when a committee[12]constituted under the Headship of Justice J.S. Verma [Retd.] recommended for marital rape criminalization. This committee was formed in light of the nation-wide agitation seeking to make criminal law more efficient to deal with cases of heinous sexual assault against women. The committee published the 'Report of the Committee on Amendments to Criminal Law' ('J.S. Verma Report')[13] in 2012. This report discussed how the immunity granted in case the perpetrator is the husband of the victim stemmed from the outdated notion of women being the property of men and irrevocably consenting to the sexual needs of their husband.[14] It remarked how this immunity has been withdrawn in numerous jurisdictions and in the modern concept of marriages between equals, such an exception clause does not stand anywhere[15]. However, this recommendation was not accepted. Upon being questioned in a Parliament Session in 2015, the idea of criminalization of marital rape was dismissed with the view that it cannot be applied in a country like India where marriage is more like a sacrament than a contract.

Impacts of Criminalization:

It has been already narrated that marital rape is yet to be criminalized in India, even though there had been certain recommendations from certain authorized bodies towards criminalizing the same. However, the key point of analysis in this paper is based on one possibility or a question i.e., should marital rape be a crime in India? In answering the same, it is necessary to examine the arguments both in favour as well as against the criminalization.

Arguments Favouring Criminalization: -

As already mentioned, the root of entire debate in India as to criminalization of marital rape is based on the exception clause as provided under the Indian Penal Code u/s.375 as Exception 2. Accordingly, all the arguments [both in favour and against] are based on the point of relevancy of

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10 Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000), Available at http://www.lawcommissionofindia.nic.in/rapelaws.htm [Accessed Date: June 9, 2023]

11 *Id.*, ¶*3.1.2.1.*

12 This committee was formed in light of the nation-wide agitation seeking to make criminal law more efficient to deal with cases of heinous sexual assault against women. According to Government of India Notification No. SO (3003), December 12, 2012, this committee was constituted to submit a report in merely thirty days

13 Justice J.S. Verma Committee, Report of Committee on Amendments to Criminal Law (January 23, 2013)

14 Id.,72.

15 Id.,73-77

that exception clause in so far as the Indian perspective is concerned. As of now, the notable points that are favouring criminalization of marital rape in India are as under:-

- A marriage should not be viewed as a license for a husband to forcibly rape his wife with impunity.
- The marital exception to the IPC's definition of rape was drafted on the basis of Victorian patriarchal norms **which did** not support the contention of gender equality.
- The Victorian norms as above-noted also did not allow to confer ownership over property upon married women and merged the identities of husband and wife under the 'Doctrine of Coverture.' Explaining this, it can be mentioned that the Coverture Doctrine was a legal doctrine in English Common Law [on the basis of which Indian Penal Code has been drafted] in which married woman's legal existence was considered to be merged with that of her husband, so that she had no independent legal existence of her own. Upon marriage, coverture provided that a woman became a *feme covert*, whose legal rights and obligations were mostly subsumed by those of her husband. Since, the Indian Penal Code was drafted on the basis of the English Common Law system, proponents favouring criminalization of marital rape are of the viewpoint that the Exception 2 is compromising the identity of married women and hence its criminalization is significant and justified
- Article 14 to the Constitution of India has conferred right to equality on any person and accordingly Indian women deserve to be treated equally under Article 14 and in addition, it is the human right of every individual that they do not deserve to be ignored by anyone including by their spouse. Moreover, a married women has the same right to control her own body as does an unmarried woman.
- The issue of bodily integrity is another important aspect which is providing a base to the claim of criminalization of marital rape in India to its supporters. The aspect of bodily integrity is considered to be a part of right to life under Article 21 to the Constitution of India. Accordingly, it is the right of a woman to refuse sexual relations with her husband as the right to bodily integrity and privacy as an inherent part of Article 21 to the Constitution of India. The similar approach was reflected even in the ruling of the Apex Judicial Body too in its verdict in ***Suchita Srivastava v. Chandigarh Administration***[16] **and** ***State of Karnataka v. Krishnappa***[17] case respectively**.**
- Marital rape is not a ground of divorce in any personal laws and even the Special Marriage Act, 1954 too. Therefore, it cannot be used as a

16 (2009) 14 SCR 989, (2009) 9 SCC 1

17 AIR 2000 SC 1470

ground for divorce and cruelty against the husband. This is how, women have to remain helpless and keep suffering in silence unless and until the act of marital rape is criminalized[18].

Arguments Against Criminalization: -

Just as there are many arguments in favor of marital rape, there are also many arguments against it. Among the arguments presented against it so far, the main arguments are as follows:-

Misuse of the law

Misuse of the law is a matter of major concern and is coming in the way of criminalization of marital rape in India. Explaining this, it can be mentioned that India has witnessed the enormous growth of filing false rape cases against males under the provision of the Indian Penal Code. The National Crime Records Burrow has reported that 74% cases filed u/s.376 are false and ended with acquittal of husbands. However, in this portion of the paper, the term 'misuse' is not getting used to explain the misuse of rape law in India but also the approach towards 'misuse' of other protective provisions that were developed to protect interest of women. Accordingly, misuse of Sections 498-A and 304-B of the Indian Penal Code is also being covered within the discussion under this portion of the research work. In 1983, both these provisions of the Indian Penal Code (IPC) were enacted to make it easier for an Indian wife to seek redressal for harassment by the husband's family.

The offences under these sections were made non-bailable and hence arrest was automatic under these provisions. Therefore, mere filing a complaint under these sections were given the status of sufficiency in terms of giving birth to the result of immediate arrest and it was then a matter of discretion of the Court to grant or refuse bail. Moreover, both these offenses were made non compoundable too and hence once filed, the case cannot be withdrawn by the petitioner. In this context, it must be pointed out that Section 498A and 304B were inserted under the Indian Penal Code at one point of time when the issue of inculcating the spirit of falsification was not only unknown by unthinkable too in terms of bringing allegations under this section. Therefore, the issue of making this provision non bailable was relevant and a reflection of legitimate wisdom on the part of the legislative authority. However, considering this opened window of automatic arrest, and the common perception of Indian society as to truthfulness of the allegations under this section, the provision started getting misused drastically.

The seriousness of the matter was acknowledged by various High Courts in various cases from time to time and even the Supreme Court of India also expressed deep concern regarding misuse of the same law in several cases.

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[18] See Generally: Kadyan, S., & Unnithan, N. P. (2023). The continuing non-criminalization of marital rape in India: A critical analysis. *Women & Criminal Justice*, 1-14. See Also: Gupta, B., & Gupta, M. (2013). Marital rape: current legal framework in India and the need for change. *Galgotias J Legal Stud*, *1*(1).

It is very important to mention here that in the case of **Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273**, the Supreme Court of India took a firm stand in 2017 to curb the practice of misuse of the Section 498-A by issuing necessary direction to put an end to the practice of automatic arrest in respect of cases u/s.498-A. The text of the direction is given below:-

> *All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.PC.* [19]

However, even after that there has not been much significant changes in the tendency of filing complaints under Section 498-A. contextually, it is significant to refer one piece of writing by Deepika Narayan Bharadwaj, who wrote in one article in 2020

> *[A] total of 111,549 cases were registered under 498A in 2020. Of these, 5,520 were closed by Police citing as false and over-all 16151 cases were closed by police either because they were false or there was a mistake of fact or law or it was a civil dispute etc. That is 14.4% of cases were closed by police for not finding merit in the case. 96,497 men, 23,809 women were arrested under 498A last year making total arrests under this section 120,306.* [20]

The logic behind giving reference to the above stated details is simple. It is just to point out that even after issuing direction by the Apex Judicial Body, the trend of filing false cases under Section 498-A could not be resisted till now. Considering such background and time frame, criminalizing marital rape will be another law that disgruntled wives will use falsely. While this does not dismiss the fact that marital rape does happen and there are real victims out there, the argument is that this law would be used against innocent men far more than being used to get justice for real victims.

In this context, it is very relevant to give reference to one of the recent cases namely Vivek Kumar Maurya vs State Of UP in Criminal Misc. Bail Application No. - 23551 of 2023 and whose Neutral Citation No. is 2023: AHC:151058 and cited in 2023 LiveLaw (AB) 237 that was pronounced as recently as on July 27, 2023. In this case, there was filing of bail application on behalf of the applicant Vivek Kumar Maurya, with a prayer to release him on bail in Case Crime No. 143 of 2020, under Sections 363, 366, 376, 323, 504, 506, 354, 354-A IPC and 3/4 POCSO Act Police Station Sarnath, District- Varanasi, during pendency of trial. He was alleged to have committed several criminal offences namely abduction of minor girl with intent to marry, commission of offence of rape, beating, threatening, outraging her modesty, sexual harassment

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19 [no signal] Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 ¶ 25, p.5 (July 2, 2014)

20 Bhardwaj, D. N. (2021, August 30). *NCRB Report 2020 Crimes Against Women Cases Registered v/s. False; Conviction v/s Acquittal*. Https://Voiceformenindia.com/. Retrieved July 27, 2023, from https://voiceformenindia.com/ncrb-report-2020-crimes-against-women-cases-registered-v-s-false-conviction-vs-acquittal/

and penetrative sexual assault. To put things in perspective, the Bench then while elaborating on the facts of the case envisages in this judgment that,

> *[T]here is allegation in the First Information Report that prosecutrix, resident of Varanasi, was made to enter into physical relationship with applicant for about one year on false promise of marriage, when she was student of B.Sc., Part-1. Whenever prosecutrix talked to applicant about their marriage he used to avoid her request. On 3.5.2019, when prosecutrix was going to college, applicant enticed her from the way at 7 a.m in the morning and took her to Delhi at his aunt's place where he made physical relationship with her. Father of the prosecutrix gave an application at the police station on 4.5.2019 about her abduction by applicant. Thereafter the father and mother of the applicant pressurised the father and mother of prosecutrix and they threatened them of life in case they made any statement before the police against their son, the applicant. Therefore, father of prosecutrix withdrew the compliant made to the police on 7.5.2019 and prosecutrix was dropped back to her house by the applicant and co-accused persons, but the activities of the applicant did not changed. Again whenever there was no one in the house of the prosecutrix applicant used to come and make physical relationship with prosecutrix by extending false promise of marriage. On 27.8.2019 at 8 a.m applicant took the prosecutrix to the registrar and got their marriage registered. Thereafter he took the prosecutrix to Lucknow where he made physical relationship with her. After four days he again made physical relationship with prosecutrix and brought her to a dharamshala in Mugalsarai and repeated the same act. Next day he took her to a room situated in Lanka, Varanasi; then to house of his Mama at Maduwadeeh where he repeated the same offence against her. At her Mama's place he compelled her to make physical relationship with his cousin (Mamas' son) also. When the aforesaid son of his Mama touched her inappropriately she raised alarm, thereafter applicant and son of his mama abused and beated her. Applicant stated that he has married her only to physical enjoyment. Thereafter applicant asked her to go away otherwise she will be killed by giving her poison. Applicant called his father, uncle and brother, who are co-accused, and all of them abused her and sexually molested her. They beated her and dropped her in injured condition on the road at 11 p.m on 5.9.2019. The passers-by helped her and she called her mother and she took her to her house. Thereafter she was treated at home by her mother by home-made medicines. On 6.9.2019 accused persons came again to her house and threatened the prosecutrix and her family of life, if she makes any complaint to the police. On 18.2.2020 again co-accused persons came to her house and abused her and asked her family to leave their village and go away. Thereafter the First Information Report was lodged on 9.3.2020 with regard to the incident dated 3.5.2019 by the prosecutrix herself.*[21]

The Bench also notes,

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[21] [no signal] Vivek Kumar Maurya vs State Of UP And 3 Others ¶ 4, pp.1-2 (July 27,2023)

> *[A]fter hearing the submissions of learned counsel for the parties, it appears that First Information Report has been lodged on the basis of false allegations and incorrect facts. The prosecutrix has not fully supported the allegations made in the First Information Report in her statement recorded under section 164 Cr.P.C. The allegation regarding the offences committed by cousin of applicant (Mama's son) is missing in her statement. New allegation has been made that the co-accused family members of applicant compelled her to make signatures on blank paper. The marriage of the prosecutrix and applicant was registered. No divorce, dissolution of marriage or judicial separation of couple through court has taken place.*[22]

Most significantly, the Bench minces just no words to make it indubitably clear in another paragraph that,

> *[T]his court finds that large number of cases is coming in courts wherein girls and women take undue advantage by lodging First Information Report on false allegations after indulging in long physical relationship with the accused. The time has come that courts should be very cautious in considering such bail applications. The law is heavily biased against males. It is very easy to make any wild allegations in First Information Report and implicate anyone on such allegations as in the present case.*[23]

The Bench unequivocally also acknowledges,

> *[T]he lodging of the FIR is being done invariably by giving a written application at the police station which is always fraught with danger of the false implication like in the present case. Such applications are drafted by experts in courts or the Munshi/Head clerk in police station. The experts are aware of the ingredients of each and every provisions of penal law. They incorporate the allegations in such a way so that accused may not be able to get even bail easily and early. Just a cursory glance at allegations made in the First Information Report is sufficient for the court to throw the file, without any application of mind further. The State of affairs has gained alarming proportion. An honestly written First Information Report is very short and is shorn of any unnecessary and false allegation. This is the test, but it is seldom realized.* [24].

However, it is worth mentioning the specific three observations of the Court in three consecutive paragraphs of this judgment in the undernoted manner:-

> *[T]he culture of openness being spread by social media, movies, T.V. shows, etc., is being imitated by adolescent/young boys and girls but when their*

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22 [no signal] Vivek Kumar Maurya vs State Of UP And 3 Others ¶ 9, p.5 (July 27,2023)

23 [no signal] Vivek Kumar Maurya vs State Of UP And 3 Others ¶ 10, p.5 (July 27,2023)

24 [no signal] Vivek Kumar Maurya vs State Of UP And 3 Others ¶ 12, pp.5-6 (July 27,2023)

> *conduct comes in conflict with Indian social and family norms and it comes to protecting the honour of the family of the girl and the honour of girl, such maliciously false First Information Reports are lodged. Such First Information Reports are also lodged when after living in live-in-relationship for sometime/long time, dispute takes place between the boy and girl on any issue. Nature of partner unfolds before the other partner with time and then when they realize that their relationship cannot continue for life, trouble starts. Since girls/women have upper hand when it comes to protection of law, they succeed easily in implicating a boy or man in the case like of the present nature. The traditional perception of such crimes has become irrelevant. The effect of social media, movies, etc., in raising the awareness level of adolescents and loss of innocence at comparatively younger age is clearly discernible. The traditional presumption of innocence has given way to an untimely loss of innocence resulting in unforeseen deviant behaviour of adolescents which the law never contemplated earlier. Law is dynamic concept and it requires a re-look in such matters very drastically*[25].

The Court also observed,

> *[T]his Court is finding that genuine cases of such sexual offences are now exception. The general rule is of false implication in cases of sexual offences. Implication in case of sexual offence is a sure shot way of punishment before trial. Bails are normally not granted easily and early. In cases where implication is made under POCSO Act situation become worse. Incarceration of accused in jail for few months or for years is certain. Training of judicial officers in their training institute is still in line with the old concept of bail in cases of sexual offences. The treating of all the wild allegation in F.I.R as gospel truth without keeping eye on the ground realities is causing lots of injustice.*[26]

The Allahabad High Court, in this judgment, has further observed,

> *[T]he courts and judges are part of the society. What is happening in society should always be kept in mind while applying law. Wherever an offence takes place, the expert (mostly lawyer in district court or munshi/head clerk of police station) is consulted. He enquires about the family members of an accused, his influential friends and well-wishers, local and also stationed outside. He also enquires whether the informant side has enmity with someone or with whom it wants to settle score. Then the expert implicates all those with whom the informant/complainant has other grievances, not connected the offence being complained whatsoever, since the lodging of complaint / F.I.R against all enemies in one stroke is encashed as an opportunity. Their roles are so meticulously shown in the F.I.R that even the most experienced of the judges falter. For the courts at district level, it is quite hazardous to grant bail in matters of such serious and meticulously made allegations because of*

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25 [no signal] Vivek Kumar Maurya vs State Of UP And 3 Others ¶ 13, p.7 (July 27,2023)

26 [no signal] Vivek Kumar Maurya vs State Of UP And 3 Others ¶ 14, pp.7-8 (July 27,2023)

> *fear of disciplinary proceedings by the higher courts. This is one of the reasons why the district courts refuse to grant even bail, not to say about granting of acquittal in most of the cases only because of the seriousness of allegations. Whether allegations are prima facie credible or are proved or not is not very relevant at their level. They just get rid themselves of such cases by refusing to grant relief, which is also part of their training at the very threshold of joining of their service in their training institute. This is how the injustice gets perpetrated because of the role of expert who drafts the F.I.R / complaint. In case the honest statement of complainant / informant is recorded in writing by the officer-in-charge of the police station soon after the incident and the role of expert get excluded in lodging of report, cases of false implication will come down*[27].

Thus, the Case of ***Vivek Kumar Maurya*** *vs* ***State Of UP And 3 Others*** has reflected the trend of filing false cases against men in India in a very crystal clear fashion. It is true that at the end bail application was granted to the accused in this present case after considering the facts and circumstances of the case but that in no way undermines the seriousness of the alarming trend of the filing false cases against married men in India in respect of committing sexual offences and this is where the importance lies on this particular case because, it has accepted this fact in unambiguous language as specified above. However, it is neither the first case nor the only case wherein false accusation of rape has been brought. There had been similar instances earlier too and on this point it is relevant to refer to another recent judgment in *Manoj Kr. Arya vs State of Uttarakhanad and Another*[28] wherein Hon'ble Justice Sharad Kumar Sharma observed,

> [*I*]*n fact, the offence under Section 376 of the IPC as of now in this modernised society is being misused as a weapon by the females to be misutilized, as soon as there arise certain differences between herself and her male counterpart, and rather it is being used as a weapon to duress upon the other side for a number of undisclosed factors, and it cannot be ruled out, that the provisions contained under Section 376 of the IPC are being rampantly misused by the females*[29].

Thus, it is crystal clear that the higher judiciary in India is raising/has raised its concern from time to time regarding misuse of laws that have been made to prevent the sexual abuse against women. It is not the case that all the misuse related cases were pertaining to the allegation of rape but the growing trend of this tendency is a matter of serious concern in modern times. In addition to above stated very recent cases relating to misuse of rape laws, there had been many other instances where similar incidents have been found. However, considering the aspect of recent likewise examples, the above stated

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27 [no signal] Vivek Kumar Maurya vs State Of UP And 3 Others ¶ 15, pp.8-9 (July 27,2023)

28 Criminal Misc. Application No. 79 of 2021

29 [no signal] Manoj Kr. Arya vs State of Uttarakhanad and Another ¶ 14, p.5 (July 5,2023)

two instances have been referred here. In short, it can be mentioned that the trend of misusing rape laws in India has revealed the undernoted bitter but unavoidable realities in our country:-

- Innocent men are being falsely accused of rape and are getting acquitted later on.
- There are several instances where consensual relationship or cohabitation continued for long time and thereafter as and when there had been any disagreement, woman brought allegation of rape against the man.
- In many cases, there are ongoing secret affairs but as and when it comes to the knowledge of people, the woman brought allegation of rape against the man so as to come out of embarrassment.
- Whenever, a man is accused of rape, he gets arrested immediately and both print as well as electronic versions of newspapers are covering it as a front page item whereas the same spirit does not get reflected as and when there is/has been acquittal. This is, how, the balance remains women friendly in such cases.

Therefore, criminalizing marital rape will solidify the basis of this misusing tendency of rape law by using the social sympathy and empathy in favour of women and that, in turn, will unavoidably generate an avoiding/escaping tendency amongst men towards marriage. As a result, family system in our country will face an 'existence crisis'

Burden of proof

The burden of proof or the onus of proof is an extremely complex issue that has prevented marital rape from being criminalized. In the case of marital rape, one has to consider that cohabitation is a part of any marriage. Now, if marital rape itself is crime, the question remains on whom is the burden of proof and what is that burden. For example, if the burden falls on the wife, the argument remains that a mere allegation of dowry violence can ruin not just the husband's life, but the entire family's life. If the burden of proof is on the husband, the fact remains that the husband must prove a negative, which is itself a challenging task[30].

Breakdown of the institution of Marriage

If marital rape is recognized, many marriages can break up without a proper trial. Since, there is no other option but the statement of the wife to prove the charge of forced intercourse, a man has no means of proving himself innocent. Now, it has already become an open secret that many men are forced to commit suicide due to fake women abuse and domestic violence in the country. So, if marital rape is legalized then many innocent men will be

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30 See Generally: Dhamodaran, S. S. (2023). Marital Rape In India. *Journal of Legal Studies & Research*, *9*(1), 223-232. See Also: Bhakat, P., & Kumar, Y. (2022). Chapter-20 Marital Rape in India: An Unspoken Voice. *In the 21st*, 365.

punished or forced to commit suicide in the coming days. Naturally, people's faith in the institution called marriage can be lost. The argument also extends to both parties in a relationship trying to be "legally careful" in the normal course of marriage should such allegations come up.

The Latest Development:

The above stated narration has made one point very clear that the criminalization of marital rape remained a highly debatable issue in India till date. When there are ample arguments favouring the criminalization, arguments against the same can also not be ignored. However, in recent past, the matter has reached till Supreme Court of India to reach at a unanimous stand through various petitions. Earlier, the Delhi High Court had given a split verdict on a petition to criminalize marital rape. An appeal was filed in the Supreme Court. The Karnataka High Court had on March 23 last year said exempting a husband from allegation of rape and unnatural sex with his wife runs against Article 14 (equality before law) of the Constitution[31]. As far as the up-to-date phenomena is concerned; it is pertinent to point out that the Apex Court of our country on 19th July 2023 said that it would list a batch of petitions before it that are pertaining to the matters related to marital rape. The Chief Justice of India said these matters are to be heard by a three-judge bench and these will be listed up for hearing after the five-judge constitution benches conclude hearing some of the listed cases.[32]

It may be noted that the Center was earlier asked to respond to a petition filed in the Apex Court challenging the constitutionality of the 'exception' on the issue of marital rape and on March 22, fixed the date of hearing as May 9. Solicitor General Tushar Mehta said that this issue will have an impact on the society. He also said that the Center had asked the states to give their views on the matter a few months ago. Earlier in 2017, the central government had opposed the criminalization of marital rape by filing an affidavit in court. Later, the center again said that the opinion on marital rape is being reconsidered.[33]Howsoever, as of now the matter is under profound judicious consideration of the Hon'ble Supreme Court of India and it is necessary to wait till the hearing by the three judges bench on this issue.

Conclusion

At the end of this research work, this conclusion can be drawn that criminalization of marital rape is undoubtedly a debatable issue in India. However, as of now, an exact answer either by the legislature or judiciary is yet to be developed. Probably the only accurate answer is both yes and no. Mere criminalizing marital rape will not be helpful. In stead, there is a need for

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31 Vishwanath, A. (2023, July 30). Supreme Court to list marital rape petitions for hearing: What are the issues, arguments involved? *The Indian Express*. https://indianexpress.com/article/explained/explained-law/sc-marital-rape-issues-and-arguments-8848358/

32 *Id.*,

33 Id.

rectifying and filling the gaps in existing laws and doing away with archaic ones that tend to function against the well-being of women and the society as a whole. It is required to have public consultation. Before taking any final call on this issue of criminalizing or non-criminalizing marital rape, it will be apt to listen to the views of people belonging to all the age groups in our country. It is crucial to repair the existing pitfalls under Indian rape law in this regard but simultaneously, it must be remembered that the pattern of Indian culture and civilization cannot be compared with that of western society. It must be remembered that concept of marital rape as understood internationally, cannot be applied in verbatim in the Indian context on account of the obvious reason that the nature and application of the concept of marriage in India is far different from that of western world. Accordingly, the interpretation of the expression 'marital rape' is bound to be different in the Indian society. Law, as a bridge of social solidarity must not encourage any such amendment or change in this regard that the very basis of the concept of 'family' gets questioned. Therefore, the dealing with the issue of criminalization of marital rape must be done in such a fashion so that a balance between individual interest and collective interest gets maintained and the former must not be prioritized over the later.

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Reproductive Health Rights of Women in India: A Legal Perspective

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Abstract

The welfare of the family and individuals is the ultimate purpose of the right to procreate. Reproductive health care might be constructed using the existing initiatives in family welfare, child survival, maternal and child health, the safe motherhood effort, and postpartum care in all Indian hospitals. This paper is an attempt to examine the laws that are currently in vogue in India to protect women's reproductive health rights and issues related therewith.

Key Words: Reproductive health, pregnancies, MTP Act, Surrogacy.

Introduction

The preservation of sexual and reproductive health rights (SRHR) and access to reproductive healthcare are essential for human well-being, economic development, and planetary prosperity. Protecting the rights to sexual and reproductive health is India's duty. The laws and rules that are now in place in India regarding SRHR leave a lot of potential for improvement. There have been serious violations of women's rights to bodily autonomy and access to sexual and reproductive health care, especially those from poor communities. Despite general agreement that such rights are crucial to a person's right to life, the method of implementing reproductive rights has long been contentious. Menstruation leaves and abortion are just two examples of how modern society has partially recognized women's rights while ignoring other marginalized groups' fundamental human rights.

Evolution of the Definition of sexual health

The first-time sexual health was mentioned was in the Cairo, 1994, International Conference on Population and Development (ICPD) Programme for Action, which stated that reproductive health "also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases." It continued, "People can have a fulfilling and safe sexual life, and

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they have the potential to reproduce and the choice to choose if, when, and how frequently to do so. The Fourth World Conference on Women in 1995 specifically addressed sexual health as a component of sexuality and recognized women's autonomy in this regard: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free from coercion, discrimination, and violence." These early definitions established that sexual health included the "availability, accessibility, acceptability and quality" of information, knowledge, and services, to enable making informed decisions for satisfying and safe sex. Sexual health was also established to be related to sexuality, sexual relations, including but also independent of reproduction and disease prevention. An important development was the recognition of sexual health as a component of women's rights and gender.

The General Comment 14 (2000) of the Committee on Economic, Social, and Cultural Rights (CESCR) describes the responsibilities of the state with regard to sexual and reproductive health.

Determinants of Sexual Health

The physical conditions that affect (sexual) health include "access to safe and potable water, adequate sanitation, adequate food and nutrition, adequate housing, safe and healthy working conditions and environment, and health-related education and information." "Social determinants" are social norms and structures that marginalize, oppress, or stigmatize people based on their sex, marital status, age, ability, caste, race, or position as a member of a minority, in addition to their sexual orientation or gender identity. As a result, these demographic groups' vulnerability and health outcomes are heavily reliant on legal protection from abuse, torture, and discrimination.

Definition of sexual health

Sexual health, according to the WHO, is "a state of physical, emotional, mental and social well-being with regard to sexuality; it is not merely the absence of disease, dysfunction, or infirmity." A positive and respectful view of sexuality and sexual relationships is necessary for sexual health, as is the ability to enjoy joyful and secure sexual experiences free from compulsion, prejudice, and violence. All people's sexual rights must be recognized, defended, and upheld if sexual health is to be gained and maintained.

Evaluation of reproductive rights and choices in India:

Any legal system's goal is to prevent oppression and harm to citizens while discouraging and punishing unlawful behaviour. National courts and politicians in India have been instrumental in the overturning of discriminatory criminal laws, including those that could be harmful to a person's health.

Reproductive health and rights

Since the 1968 International Conference on Human Rights Declaration and the 1994 International Conference on Population and Development,

reproductive rights as human rights have been steadily acknowledged. Reproductive rights are highlighted as essential to achieving women's human rights in the International Covenant on Economic, Social, and Cultural Rights of 1996 (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW). Numerous objectives of the Sustainable Development Goals (SDGs) and the previous Millennium Development Goals (MDGs) recognize reproductive rights both explicitly and indirectly India is required to make sure that these objectives are met in its policies and legislation because it is a signatory to certain covenants and conventions. Examining national laws and regulations that are pertinent to RHR paints a complicated picture of compliance with significant gaps. For instance, current empirical data from the field and the mapping of policies and programs confirm that the "family planning program's continued implementation of goals has resulted in egregious forms of violation of reproductive rights and autonomy, particularly for women from marginalized communities.

Violation of Reproductive Rights

In general, reproductive rights are those rights which enable the freedom to choose whether or not to have children and to maintain good reproductive health. Reproductive rights include the ability to decide when to start a family, end a pregnancy, use contraception, learn about sex education in public schools, and have access to reproductive health care. To achieve gender justice and equality for women, legal protection of these rights as human rights is essential. The prevalence of maternal mortality is influenced by a number of violations and discrepancies in the access to reproductive rights. Due to their ability to get pregnant, women are disproportionately affected by violations of reproductive rights.

Provisions on Medical Termination of Pregnancy

The Medical Termination of Pregnancy (MTP) Act of 1971 in India can be viewed as the nation's first abortion law in a certain sense. It provided information about the requirements for eligibility for abortion as well as the locations where the procedure may be performed legally. The woman was obliged to get a single licensed physician's written consent within a year of the Act's passing. Two doctors will be required if the pregnancy lasts longer than twelve weeks. The "good faith" condition was the "sine qua non" of this rule, which meant that even if a woman intended to abort her own pregnancy, a threat to her physical safety was one of the main factors in determining whether the abortion would be permitted. Other cases in which abortion may be granted were pregnancy is caused by rape. If a married couple fails to use a contraceptive method or device to minimize their family size, they could be held accountable for any subsequent pregnancies. The law stipulated that abortions may only be performed in government-run hospitals or other facilities that were specifically designated by the government, and that no one under the age of 18 or who was clinically determined to be crazy could have their pregnancy terminated without consent from their legal guardian. Because

it relies on the term "women," the MTP Act of 2021, like its predecessors, is constrained in how it applies and excludes transgender people and people who identify as other gender minorities from its protections. This is despite the fact that trans people in India experience extremely high levels of violence, including rape and sexual assault. There are fewer alternatives available to a transgender or intersex person who conceives in such a situation than there would be for a cisgender woman. The significance of bodily autonomy in connection to this Act has been thoroughly analysed in cases like **Suchita Srivastava v. Chandigarh Administration and ABC v. Union of India (2017)**. The Act sets an extra maximum gestational age cap of 20 to 24 weeks for a select group of women, as described in the MTP Regulations. Women who have suffered violence (such as those who have been victims of rape or incest) or those who are otherwise at danger (such as women with disabilities or children) are not the only ones who benefit from the alterations. Up to the 20th week of pregnancy, one medical professional's judgment is adequate. This is a step up from the previous acts, although being far from perfect. A big step in the right direction is the fact that single women can now get abortions for "failure of contraception".

Section 312 of the Indian Penal Code

Despite the fact that the IPC 1860 has been the subject of several publications on abortion, its provisions were never meant to give guidance as to how abortions must be carried. Due to a lack of legislation, many abortions were performed illegally during this time, endangering the well-being of the women who sought them. This provision is still in effect and was most recently referenced on August 7, 2014, in Smt. Sumita Mukherjee vs. The State of Madhya Pradesh, where the defendant appealed to the High Court. The High Court ruled that lower courts should have considered the possibility that the prosecutrix's miscarriage had been induced in good faith to preserve her health. Therefore, the petitioner could not be prosecuted under Section 312 of the IPC. Despite the importance of this provision, no corresponding laws have been enacted. This demonstrates a lack of data on the actual state of affairs. Women are generally unable to tell authorities about the abuse they suffer, typically at the hands of their own or their in-laws' families, hence forced miscarriages carried out by hunger, torture, or other cruel tactics often go unacknowledged.

Laws on Surrogacy

Under Surrogacy (Regulation) Act,2021 it is important to remember that although commercial surrogacy is illegal in India, altruistic surrogacy is tolerated. This is done to prevent surrogacy as a means of human trafficking. The legislation specifies the requirements for the "intending pair" in which surrogacy may be used. Again, the use of binary words in this law has the effect of excluding the queer community; for example, a nonbinary person does not qualify as an "intended parent", even if they are physiologically capable of carrying a kid and hence cannot use a surrogate to have a child. The Bill discriminates against gay couples in the same way as adoption laws do.

Judicial Response

The Supreme Court's stance on women's reproductive rights is comparatively progressive.[1] Women have a right to sexual autonomy, which is an essential part of their right to personal liberty, as made abundantly clear by the court in the landmark decision in Navtej Singh Johar v. Union of India[2], which decriminalized adultery and homosexuality. Women have the constitutional right to decide how they want to produce children, as stated in Article 21 of the Indian Constitution, and the Puttaswamy judgement specifically recognized this choice.

The Supreme Court held in Independent Thought v. Union of India [3] that a girl child's human rights are worthy of respect and acceptance whether or not she is married. These verdicts have a significant impact on women's sexual and reproductive rights. In order to safeguard their rights to equality, bodily integrity, and life, we must also protect their right to safe abortion.

The Constitution already enshrines number of essential rights which are basic and fundamental in nature in the Part III and Part IV of the Constitution particularly for the progressive elevation of women in our country. Although the Indian Constitution does not directly recognize the right to health (or reproductive rights) as a basic freedom, the Supreme Court has ruled in a number of cases that the right to health and the right to prompt and adequate medical care are essential components of the right to life. The Supreme Court ruled in *Parmanand Katara v. Union of India,* a public interest litigation (PIL) involving the provision of emergency medical care to injured victims of motor vehicle accidents, that Article 21 requires the State to protect life and that medical staff at government hospitals have a duty to provide medical assistance. This commitment of medical practitioners cannot be revoked or hindered by any law, practice, or State action. According to the ruling in *Paschim Banga Khet Samity v. State of West Bengal,* the State is required to provide proper medical facilities, and it is against Article 21 for a government hospital to refuse prompt medical intervention to a person who is in need of such care. If reproductive rights are taken to their logical conclusion, they include a woman's right to carry a pregnancy to term, to give birth, and to later raise children.

Assessment of Key Areas of Reproductive Health and Rights: Issues, Gaps and Compliance

Comprehensive health rights include the rights to sexual and reproductive health. A country must have a well-developed public health system in place to guarantee the fulfilment of these rights. This system must be able to deliver comprehensive, high-quality, universally accessible health care services that are free at the point of access and, most importantly, accountable to residents.

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1 justice K.S. Puttaswamy (Retired). vs Union of India and Ors. (2017)10 SCC 800

2 IR 2018 SC 4321; W. P. (Crl.) No. 76

3 (2017) 10 SCC 800

Unfortunately, a number of problems, including limited public investment, inadequate infrastructure, including medical and diagnostic facilities, and underqualified human resources, pose a threat to India's public health system. Additionally, the health care industry has become more privatized and corporate in recent decades, and there has been a lack of strict supervision. This has caused a severe decline in the availability, price, and quality of healthcare, putting more people further away from health care on a social, economic, and geographic level, especially girls, women, and marginalized groups. Inadequate, insensitive, and harsh treatment of women—especially those from marginalized groups—at public health facilities robs them of their dignity and agency. Women become reluctant to seek care at public health institutions as a result, which affects access and reach. Women have the right to: decide on their own, in a responsible manner, how many, how far between, and when to have children. Right to attain the highest level of sexual and reproductive health which includes the right to be physically, mentally, and socially healthy with access to facilities, services, and supports for exercising your sexual and reproductive rights).

Conclusion and suggestions

For all members of society, not just women, reproductive health and access to reproductive health care are social and health issues. The ultimate purpose of the right to procreation is the welfare of the family and the individual. Governments have a duty to offer their citizens access to high-quality reproductive health care, protect their right to decide how they want to have children, and do so while also taking into account local and cultural norms and preferences. The legal and political structures need to be more sensitive to protecting the reproductive rights of people with disabilities, especially those who have mental retardation or mental illness. Additionally, there is a rising need for the legal system to be informed about the consent process for abortions. Male participation and active community involvement are essential to ensuring the best possible reproductive health care.

Reproductive health care must include the following aspects:

- ✓ Family planning requires strong government support as well as skilled, sensitive, considerate, and pleasant service providers
- ✓ As part of any safe motherhood campaign, treatment for complications like bleeding, infection, high blood pressure, and obstructed labour should be easily accessible.
- ✓ In nations where abortion is legal, maternal mortality rates would be significantly reduced with safe abortion methods and quality post-abortion care.
- ✓ Women are more prone than men to contract sexually transmitted diseases. The combination of family planning and STD/HIV/AIDS services among reproductive health services may lower the rates of STDs, including HIV/AIDS.
- ✓ Increasing men's involvement in decisions about reproductive health will increase rather than reduce women's agency.

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Digital Divide and the Right to Education: Bridging the Gap in Implementing the Right to Education Act 2009 during Covid-19 in India

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Abstract

Education is necessary for overall development of an individual. The Parliament of India enacted the Right to Education Act (RTE Act) in 2009 to fulfill the goal of universal primary education. The emergence of Covid-19 pandemic adversely impacted all of us including children and their education. Amid lockdown students had no option but to opt for online learning and teaching. A great majority of students being poor could not afford digital devices including laptop and internet connections required for online learning and teaching resulting in digital divide in education sector. The author in this research article explores the issues and challenges in relation to the implementation of RTE Act amid Covid-19 pandemic like situation in India. The research article further suggests measures to overcome such challenges. Judicial approach relating to RTE and its implementation has also been taken into account.

Keywords: Right to Education, Universal Primary Education, Digital Divide, Digital Exclusion and Internet Access.

1. Introduction

Online education in its various modes has been growing steadily worldwide[1] but the covid-19 pandemic has forced everyone to opt for this mode of learning. Amid the pandemic, online mode of learning is the only option, though it has been adopted by force not by choice. Technically speaking, there are various challenges associated with online education,

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[1] Shailendra Palvia, Prageet Aeron, Parul Gupta, Diptiranjan Mahapatra, Ratri Parida, Rebecca Rosner & Sumita Sindhi, "Online Education: Worldwide Status, Challenges, Trends, and Implications" 21 (4) *Journal of Global Information Technology Management* 233-241 (2018).

particularly in a country like India where a great majority of people are digitally excluded for various reasons including illiteracy and poverty. The government of India has started Digital India Campaign with an objective to digitally empower the country by integrating technology in day today affairs of the citizen.[2] Quality education is a key to overall development of an individual and the nation as a whole. The development and progress of a country largely depends upon the nature of education system of that country. Considering the importance of education at primary level and realizing the dream of universal education, the parliament of India has enacted the Right of Children to Free and Compulsory Education Act, 2009[3] (hereinafter referred to as the RTE Act). The RTE Act is definitely increasing the enrolment of children in school[4] but the issues and challenges surrounding its proper implementation are much more than one can imagine, particularly during the pandemic.

The Father of our Nation, Mahatma Gandhi said, "By education, I mean an all-round drawing out of the best in the child and man- body, mind, and spirit." Swami Vivekananda has opined about education as, "a manifestation of the divine perfection, already existing in man." While a well-known philosopher, Sri Aurobindo has stated that, "Education which will offer the tools whereby one can live for the divine, for the country, for oneself and for others and this must be the ideal of every school which calls itself national." Hence, education means an all-round development of an individual being who can significantly contribute in overall development of the society. There are plenty of options a child can avail to learn in physical environment of schools but, amid the covid-19 pandemic, a child has no option but to opt for online learning and teaching, where the learning environment is very limited. As per a survey report conducted by IIT Delhi Professor Reetika Khera, in rural areas only 8 percent of the children study online regularly, 37 percent do not study at all, and around half are unable to read more than a few words.[5]

1. Right to Education and the Constitution of India, 1950

The most important part of the Indian Constitution, from citizens perspective, is part III[6] that deals with fundamental rights. The horizons of the fundamental rights have been expanding—*horizontally* as well as *vertically*, with the passage of time and right to education is no more an exception. A fundamental right is binding upon the government, it cannot be taken away

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2 Honorable Prime Minister, Naredra Modi, Government of India, has launched Digital India Campaign on 1 July, 2015.

3 The Right of Children to Free and Compulsory Education, 2009. (Act No. 35 of 2009).

4 Iftikhar Islam, "A Study of Challenges of Right to Education, 2009 among Primary School Teachers of Nagaon Municipality Are" 11 (2) *International Journal of Recent Scientific Research* 37481-37484 (2020).

5 *Available at* https://www.indiatoday.in/education-today/latest-studies/story/only-8-rural-kids-attend-online-classes-75-kids-see-literacy-loss-survey-1850067-2021-09-07 (last accessed on 2 May 2023).

6 The Constitution of India, 1950. Part III deals with fundamental rights.

even by the constitutional amendment as along as the same is part of basic feature of the Constitution.[7] The constitutional courts have also played their part in protecting the civil liberties and political rights of the citizens from time to time. The parliament of India has, through 86th amendment[8], inserted Article 21-A[9] in the Constitution of India declaring right to education as a fundamental right of children in the range of 6 to 14 years. It is incumbent upon State to provide free and compulsory education. Article 51-A (k)[10] was also added through the same amendment imposing a duty upon a parent or guardian to compulsorily provide opportunities for education to his or her child in the range of 6 to 14 years. As regards the education in early childhood, Article 45[11] of the constitution has only encouraged and not mandated the Sate to take appropriate steps to provide early childhood care and education for every child until he/she completes the age of six years. Article 46[12] of the constitution emphasizes upon the promotion of educational and economic interests of scheduled castes, scheduled tribes, and other weaker sections of the society.

Taking special care of interests of minorities in India, the Indian constitution, under Article 29, has also empowered minorities to establish and administer the educational institutions of their choice. Further, the State cannot make any discrimination in granting financial aid to educational institutions run by minority itself. The state, while granting aid or recognition to minority institutions, cannot impose unreasonable restrictions as the same would completely destroy the right of community to administer the educational institutions.[13] Commenting upon the importance and need of education among children, former Education Minister M. C. Chagla has rightly said, "Our Constitution fathers did not intend that we just set up hovels, put students there, give untrained teachers, give them bad textbooks, no playgrounds, and say, we have complied with Article 45 and primary education is expanding…They meant that real education should be given to our children between the ages of 6 and 14." The main objective of the constitutional scheme is to inculcate value education among the children in its actual sense and the government is also bound to impart the same in line with the constitutional goals without any excuse.

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7 M P Singh, *V N Shukla's Constitution of India* A-41 (Eastern Book Company, 12th edition, 2013).

8 The Constitution (Eighty-Sixth Amendment) Act, 2002.

9 The Constitution of India, 1950. art. 21 A.

10 The Constitution of India, 1950. art. 51 A (k).

11 Substituted by the Constitution (Eighty-sixth Amendment) Act, 2002, section 3, for article 45 (with effective from 1st April 2010).

12 The Constitution of India, 1950. art. 46.

13 *St. Xavier's College* v. *State of Gujrat,* AIR 1974 SC 1389.

2. Judicial Perspective of the Right to Education in India

An independent judiciary is necessary for a free society and a constitutional democracy.[14] In India, the judiciary has immensely contributed to the development of constitutional law of India and broadened the scope of fundamental rights including right to education through various pronouncements.

In *Mohini Jain Case,*[15] the apex court, while declaring right to educations as a fundamental right under Article 21 of the Indian Constitution, stated as, "the right to education flaws directly from right to life. Right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by right to education." The apex court further declared that the State Government is under an obligation to provide educational facilities to at all levels to the concerned citizens.

In *Avinash Mehrotra Case,*[16] the top court, while dealing with a Public Interest Litigation in relation to a fire swept through the Lord Krishna Middle School in District Kumbakonam in the city of Madras, Tamil Nadu, has declared that, "It is the fundamental right of each and every child to receive education free from fear of security and safety. The children cannot be compelled to receive education from an unsound and unsafe building." The court further observed that every government and private school must install fire extinguisher within a period of one month and school premises must be kept free from inflammable and toxic material.

In *Deepak Rana Case,*[17] a Public Interest Litigation was filed in the High Court of Uttarakhand concerning the deteriorating conditions of primary and upper primary schools across the State of Uttarakhand. It was brought to the notice of court that in some of the class rooms students were sitting on floors as there were no chairs and desks. Toilets in many schools were unhygienic and common toilets were provided for girls and boys. Considering the urgency of the matter, the court declared that:

> *"It is the duty cast upon the State Government to provide blackboards, furniture, well equipped science laboratory and computers to the schools. There is also an urgent need of separate toilets for girls and boys. Furniture has not been provided in all the schools and only mats have been provided. Majority of girl students have no access to the hygienic toilets. The report is silent on mid-day meal. The facilities provided in the schools are primitive and not conducive and healthy to the students."*

The constitutional court, after taking note various laws dealing with the right to education in India, has further declared that:

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14 M P Singh, "Securing the Independence of Judiciary—The Indian Experience" 10 (2) *Indiana International and Comparative Law Review* 245-292 (2000).

15 *Mohini Jain* v. *State of Karnataka,* AIR 1992 SC 1858.

16 *Avinash Mehrotra* v. *Union of India,* Writ Petition (Civil) No. 483 of 2004.

17 *Deepak Rana* v. *State of Uttarakhand,* Writ Petition No. (PIL) 201 of 2014.

> *"Ours is a welfare State. Socialism is a basic feature of the constitution. Article 21-A of the Constitution of India, guarantees free and compulsory education of all children in the age group 6 to 14 years as a Fundamental Right in such a manner as the State may, by law, determine. Parliament has also enacted the Act called Right of Children to Free and Compulsory Education Act, 2009. The expression 'free and compulsory' education casts duty upon the State Government and other educational institutions to provide basic infrastructure in the schools to make the Article 21-A of the Constitution meaningful."*

Moreover, the court, in this case, has also issued ten mandatory directions to the state government, the most important being the strict implementation of the RTE Act.

The High Court of Kerala in *Faheema Shirin Case,*[18] has declared the internet access as intrinsic to right to privacy and right to education under Article 21[19] of the Indian Constitution. The court further ordered the hostel authorities to immediately withdraw the rules denying internet access from 10: 00 p.m. to 06: 00 a.m. to female students staying in the hostel premises. The Supreme Court of India, speaking through justice N V Ramana, in *Anuradha Bhasin Case,*[20] has recognised internet access in relation Articles 19 (1) (a)[21] and 19 (1) (g)[22] of the Indian Constitution i.e., freedom of speech and freedom to practice any profession or to carry trade through the medium of the internet. These judgements become more important during lockdown period when educational institutions are closed and online education is the last resort where use of internet is indispensable. Considering the importance of the internet in online teaching and learning, it is high time the constitutional court must declare internet access as an independent and full-fledged right.

Recently, the Supreme Court of India in *Action Committee Unaided Recognized Private Schools* v. *Justice for All,*[23] has asked the Government of NCT Delhi to formulate a plan of actions to fulfil the objectives of the RTE Act on matter of providing access to education to Economically Weaker Sections and Disadvantaged Groups students during the online mode of learning. Since EWS/DG students are not in position to purchase electronic devices required for online learning. The court further observed, "The digital divide has produced stark inequality in terms of access to education. Children belonging to EWS/DG suffer the consequence of not being able to fully pursue their education and many may have to drop out because of a lack of access to internet and computers." EWS/DG students constitutionally entitled to free

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18 Writ Petition. (C). No. 19716/2019. The High Court of Kerala.

19 The Constitution of India, 1950. art. 21.

20 Writ Petition (C) 1031/19. One more petition that was clubbed with this petition by the Supreme Court of India was *Ghulam Nabi Azad* v. *Union of India,* Writ Petition (C) 1164/19.

21 The Constitution of India, 1950. art. 19, cl. 1, sub cl. a.

22 The Constitution of India, 1950. art. 19, cl. 1, sub cl. g.

23 *Action Committee Unaided Recognised Private Schools* v. *Justice for All,* Petition for Special Leave to Appeal (Civil) No. 4351 of 2021.

and compulsory education under Article 21-A, under no circumstances they can be deprived of this right. Therefore, in view of initiatives taken by the constitutional courts in relation to right to education in India, one may conclude that the judiciary did its part with a sense of responsibility and now the onus is on the executive to implement the same in true spirit of law.

3. International Perspective of the Right to Education

Education is a Universal fundamental human right.[24] International legal instruments including the Universal Declaration of Human Rights, 1948 (UDHR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) have covered the right to education.

a. The Universal Declaration of Human Rights, 1948

Article 26[25] of the UDHR declares that everyone has the right to education. It emphasises that education shall be free, particularly elementary education. The UDHR, under the foregoing provision, has explicitly mentioned that elementary education shall be compulsory. Education is aimed at overall development of human personality. All member countries are mandated to enact their domestic laws in line with the UDHR.

b. The International Covenant on Economic, Social and Cultural Rights, 1966

Article 13[26] of the ICESCR directed the State parties to recognise the right of every person to education. With a view to achieving the full realisation of to education, the foregoing provision provides for free and compulsory education for everyone. It also gives emphasis upon fundamental education in case a person has not received or completed the whole period of their primary education. Article 14[27] of the ICESCR has given two-year time to state parties to progressively implement laws, providing free primary education, in their domestic jurisdiction.

c. The Convention on the Rights of Child, 1989

Article 28[28] of the Convention on the Rights of Child (hereinafter referred to as the CRC) instructed the State parties to recognise the right of child to education on the basis of equal opportunity. The foregoing provision also makes primary education compulsory and available free to all and offering financial assistance in case of need. It also emphasis upon maintenance of school discipline in accordance with dignity of a child. Article 32[29] of the CRC says that a child must be protected from economic exploitation should

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24 Jaimala Chahande, "Analysis of an Impact of Digital Divide on Right to Education in India during COVID-19 Pandemic" 2 (2) *International Journal of Legal Science and Innovation* (2020).

25 The Universal Declaration of Human Rights, 1948. art. 26.

26 The International Covenant on Economic, Social and Cultural Rights, 1966. art. 13.

27 *Ibid*. art. 14.

28 The Convention on the Rights of Child, 1989. art. 28.

29 The Convention on the Rights of Child, 1989. art. 32.

not engage in any work which is likely to interfere with his/her education. The CRC has comprehensively covered various aspects of the right of child to education.

d. Sustainable Development Goals (SDGs)

SDGs are a collection of seventeen interrelated global goals. These goals are nothing but a blueprint for achieving a better and more sustainable future for everyone. SDG 4 is aimed at inclusive and equitable quality education for everyone and further promotes lifelong learning opportunities for everyone. Most of the international covenants, international declarations and international conventions have underlined the importance of education in everyone's life.

4. Salient Features of the Right to Education Act, 2009

The Parliament of India passed the Right of the Children to Free and Compulsory Education Act in 2009 to realize the dream of universal education among children. Following are the main feature of the Right to Education Act, 2009.

- The RTE Act provides for free and compulsory education to every child in the age group of 6 to 14 years.
- The government provides for free education to all children, and all schools are managed by the School Management Committee. As far as private schools are concerned, they must admit 25 percent of the children in the school without asking for any fee.
- The RTE Act provides for the constitution and establishment of the National Commission for Elementary Education to monitor all aspects of the primary education.
- Special provisions have also been made for those children, who have not been admitted to, who have not completed, elementary education.
- The government or local authority is duty bound to establish primary schools in places where no school has already been established within a period of three years from the commencement of the RTE Act. Financial and other responsibilities for providing funds is upon both — The Central Government and the State Government.
- Any kind of physical punishment and mental harassment to the child is absolutely discarded.
- State Advisory Council must be established by the State Government. State Advisory Council would advise the State Government in relation to the implementation of the RTE Act.

5. Major Issues and Challenges Surrounding the Implementation the RTE Act, 2009 During Covid-19

During lockdown amid the pandemic, education sector had to switch from offline mode to online mode. Students specially children were nor accustomed to online learning and teaching and suddenly switching from offline mode to online mode was itself a big challenge considering the psychological, behavioral and emotional aspects of a child. Although,

implementation of the RTE is mandatory among the children from 6 to 14 years of age. Following are the major issues and challenges associated with the implementation of the RTE during covid-19 pandemic.

a. Absence of Teaching and Learning Environment

Teaching and learning environment is absent in online education system to a very large extent. Home environment is completely different from school environment. Loss of motivation and sense of self-discipline needed to study online are some of the major struggles that a child generally face.[30] Students also lack interest in attending their classes through online mode. An element of fear, which sometime helps students to learn, among students is also not there. Moreover, social and physical environment that provides an opportunity to the students to interact with each other is completely absent, and the children are deprived of opportunity to learn different skills such as cooperating with each other and feeling of brotherhood.

b. Digital Divide

Everyone has a right to education. The government has taken the responsibility to provide free and compulsory education to every child free from 6 to 14 years of age. Digital divide simply means the gap between those who have access to internet, electronic information and digital technology and those who are deprived of these services due to various reasons such as financial issues and residence in remote areas etc. Around seventy percent of population in India do not have access to any form of technology.[31] Considering the importance of technology in online mode of education, digital divide has really proved to be a major hurdle for students, specially those who are marginalised, in acquiring education.

c. Less Budgetary Allocation to Education Sector

The government allocates less than 3 percent of the GDP to education sector which is very less and in no way can effectively address issues relating to education in India particularly online education. Criticising the Union Budget 2022-2023 due to less allocation to education sector, Pradeep Kumar Choudhury, Assistant Professor, Zakir Husain Centre for Educational Studies, Jawaharlal Nehru University, has pointed out as, "Learning through TV cannot substitute the classroom teaching but the budget did not focus on teacher training, school infrastructure etc. The pandemic has highlighted the need for more teachers, better infrastructure and more

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30 "The Effect of Online Learning on Your Child: You need to know this" The Economic Times, 5 November, 2020. available at https://economictimes.indiatimes.com/industry/banking/finance/the-effect-of-online-learning-on-your-child-you-need-to-know-this/articleshow/79055386.cms? from=mdr (last accessed on 17 May, 2023).

31 Sumanjeet Singh, "Digital Divide in India: Measurement, Determinants and Policy for Addressing the Challenges in Bridging the Digital Divide Article" *International Journal of Innovation in the Digital Economy* (2010).

classrooms so that learning in rural areas, where digital resources are scarce, is not disrupted even if a pandemic hit us again."[32] The government could not even learn a lesson even during the pandemic on matters of education which is not a good sign at all, given the fact that education is key to country's development.

d. Poor Internet Connectivity

Importance of the internet services cannot be discarded during online mode of learning. In fact, without the support of the internet, it is impossible to realize the dream of online mode of education. Internet connectivity is key to education[33] specially during the covid-19 pandemic. But, unfortunately, nearly 50 percent of the students do not have access to internet in India.[34] Out of those who have internet access, a great majority suffer due to poor connectivity of the internet and continue to miss their online classes. Moreover, in most of the rural areas the broad band services have not reached yet depriving children of their right to education.

e. Monotony

Monotony and boredom associated with online learning and teaching is one of the major challenge students are facing.[35] Students specially children generally start getting bore while taking their online class for a long period of time since they are not accustomed to this mode of learning and teaching. Moreover, other options of learning among children such as learning by doing, learning by interacting, and learning through environment are almost absent. Online teaching for a long period of time can also turn into monotony for a teacher as well. Paying attention during online class is very challenging for both teacher as well as student.

f. Limited Scope for Assessment of the Students

Teacher plays a significant role in imparting education, especially in school education where memory level of teaching is the most suitable method of teaching. They do not only teach the students, but also mold them to memorize things rather than learning themselves. Teachers shape the

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32 *Available at* https://indianexpress.com/article/education/budget-2022-fails-to-focus-on-reducing-learning-gaps-caused-amid-covid-allocations-not-in-line-with-nep-2020-experts-7755013 (last accessed on 5 May, 2023).

33 Amitabh Kant, CEO, NITI AYOG. *available at* https://www.livemint.com/news/india/affordable-internet-connectivity-key-to-education-amitabh-kant-11634900606201.html (last accessed on 14 May, 2023).

34 Is Online Education Viable to All? A Survey conducted by Learning Spiral. *available at* https://www.learningspiral.co.in/news/is-online-education-viable-to-all (last accessed on 10 May, 2023).

35 Dev Ray, "5 Problems You Can Face in Online Learning and How to Deal with Them" *India Today*, 5 November 2020. *available at* https://www.indiatoday.in/education-today/featurephilia/story/5-problems-you-can-face-in-online-learning-and-how-to-deal-with-them-1738361-2020-11-05 (last accessed on 17 May, 2023).

children to be the best that they can be.[36] Proper assessment of the students by the teachers is one of the major aspects of quality teaching. Online education gives a very limited scope to the teacher to assess the overall performance of the students, as one-to-one interaction between teacher and student is almost impossible.

g. Unqualified Teaching Staff and Challenges for Teachers

Since the teachers were associated with traditional teaching style specially in primary education, they are likely to be less technologically sound and generally face technical issues. Section 23[37] of the RTE Act mandatorily laid down that all teachers teaching in primary schools must be qualified as par NCTE norms. One in six primary school teachers is not professionally trained[38] which would certainly hamper online teaching and learning process and the students are the biggest sufferers. Maintenance of discipline among the students during online teaching is also a very difficult task.

6. Towards Solutions

It is not always proper to cite the covid-19 pandemic as an excuse and deprive the children of education. There is a legal, socio-economic and political need to provide education even during the pandemic. In view of the above discussion, following are some of the recommendations to be taken into account in order to overcome the challenges faced by the students and the teachers during the pandemic.

a. Integration of Technology in Education System

The first and foremost step in the direction of providing solution to the challenges faced by the students and teachers in online mode of learning and teaching is the integration of technology in education system. Without the help of technology, the dream of universal education cannot be realized. Therefore, the government must integrate technology in education system through various channels including free distribution of electronic gadgets at least in primary schools.

b. Technical Training for Teacher

Teacher plays a very crucial role in education department, particularly in primary education. But during pandemic it was found that the teachers are not technologically sound, since they are acquainted with traditional mode of teaching and certainly there is no fault on their part. The government must take the responsibility to train them technically so as to make them

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36 Rupesh Patel, "Rules for Teacher" 2 (1) *Indian e-Journal on Teacher Education* (2015).

37 The Right of Children to Free and Compulsory Education, 2009. Act 35 of 2009. s. 23.

38 Provita Kundu, "1 in 6 Elementary School Teachers Not Professionally Trained in India" *Business Standard,* 31 January, 2019. *available at* https://www.business-standard.com/article/economy-policy/1-in-6-elementary-school-teachers-not-professionally-trained-in-india-119013100138_1.html (last accessed on 17 May, 2023).

capable enough to easily cope with the challenges arising out of online mode of teaching.

c. Role of Digital Library

Availability of digital reading material has significant role when the traditional class room teaching and learning has been shifted to e-teaching and e-learning. The Government's initiative to implement information and communication technology for imparting school education is laudable. The platforms like epathshala, Diksha, National Digital Library of India and TV Channels under the projects PM e-vidya are reaching to the students in remote areas also.

d. Budgetary Allocation Must Be in Line with the National Education Policy 2020

The government should increase budgetary allocation to education sector. The National Education Policy 2020 has reaffirmed that 6 percent of the Gross Domestic Product (GDP) must be spent on education sector. It must be noted that, the first National Education Policy 1968 has recommended that 6 percent of the GDP must be allocated to education department. Unfortunately, education sector in India has never touched this number. The country only spends around 3 percent of GDP on education sector which quite unsatisfactory. In order to make India digitally sound, the government must adhere to the recommendations given by the National Education Policy of 2020.

e. Teacher's Concerns Must be Addressed

Teacher's role and importance in education field cannot be underestimated. Their well-being, health and economic security must also be given priority by the government, since they have to adapt to unexpected conditions and teach in unprecedented ways.

f. Long term policy on Education during Emergencies

In order to ensure readiness for future exigencies, the government should frame a long-term policy on education with holistic approach.

7. Concluding Remark

For a person to develop fully, education is essential. In reality, an educated person is a more responsible citizen and helps to grow the country. All of us, including kids and their education, have been negatively influenced by COVID-19. It cannot be denied that the role of technology in everyone's life is steadily increasing. Covid-19 pandemic had adversely impacted everyone's life to a very large extent and education department is one of the most affected areas. Online education is the only feasible option during the pandemic. But the children were found to be struggling with this mode of teaching since they were accustomed to physical mode of education and suddenly were forced to online education. There are various issues associated with the implementation of the RTE Act during the covid-19 pandemic as mentioned above, and the children were deprived of their constitutional right to free and compulsory

education. The government should bring policy initiatives to effectively deal with this matter. Special measures must also be taken in order to address the problems and challenges faced by the teachers since their role and importance in imparting education cannot be underestimated specially in primary education.

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Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020: A Critical Analysis

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Abstract

The Uttar Pradesh government has passed an ordinance to deal with unlawful religious conversions, which is in contradiction with the various judgments of the Supreme Court as well as the fundamental rights provided by the Constitution of India. This paper examines the constitutionality of "The Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020 unofficially referred as the 'love jihad law' by most of the media houses and highlights the consequences of this law that affects the fundamental right of freedom of religion.

Keywords: Unlawful Conversion, Personal liberty, Fundamental rights, Love Jihad

Introduction

India is a nation of many religions and freedom of religion has been accorded constitutional protection. Articles 25 to 28 constitute significant constitutional provisions on freedom of religion. It is also pertinent to mention here that the term religion is nowhere defined in the Indian Constitution, but the term has been given expansive content by way of judicial pronouncements. Looking at the recent developments in India, one can certainly determine the importance of religion in our political and social life. At one stage the judicial authorities of the country are reminding us of all the importance of personal liberty and our freedom of conscience, on the other hand, keeping the communal conspiracy alive, theories like 'Love-Jihad' have been established by the very people who have been faithfully elected by Indian electorate**.**

In pre-Independence era anti-conversion statutes were made by Princely States such as the Raigarh State Conversion Act of 1936, the Patna Freedom of Religion Act of 1942, the Sarguja State Apostasy Act 1945 and the Udaipur State Anti-Conversion Act of 1946 which were specifically against conversion to Christianity[1]. Anti-conversion laws are promulgated on the

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1 Krishnadas Rajagopal, "Propagation without proselytisation: what the law says", The Hindu, 21st December, 2014

premise that forced or induced conversions happen and need to be prevented. Such laws are controversial because they run the risk of being abused by majoritarian forces in the country, because legislative intent of such laws can be ascertained by reading the statute holistically with the aid of various tools of interpretation, but no such tools exist to ascertain the intent behind an act of conversion, which is deeply personal (even spiritual) for some.

Inter-religious marriages are a rarity in India. Despite having legislation that provides provisions and procedures for inter-faith marriages, such arrangements are likely to be prevented by religious conservatism, casteism, and parental authorities. It is strange coming out of a land as diverse as India, which not just presents endless varieties of cultural patterns but professes all the major religions of the world.

The ordinance passed by the Government of Uttar Pradesh not only makes religious conversions that forcefully take place void, but also invalidates those conversions which are made solely for marriage; this is simply a finishing touch to an already created turmoil. Taking a leaf from Uttar Pradesh at least eight other State governments have started their projects to embargo what they describe disparagingly as "Love-Jihad". This paper revolves around the issues regarding the constitutionality of the above-mentioned Ordinance, the emergence of the Love-Jihad conspiracy, its perilous effects on the individual'sprivacy and choice rights, failure of the Special Marriage Act, 1954, and determination of its patriarchal roots.

Provisions of the Ordinance

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 contains 14 sections and 3 schedules. It aims to prohibit unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage and for the matters connected therewith.

Section 2(a) of the ordinance defines allurement in a very broad manner which includes an offer of any temptation in the form of a gift and gratification. To understand it better, let's say a man and woman of different religions were out on a date and the man offered certain gifts to the woman which is quite common, any person being the so-called aggrieved party can easily complain to the police that she/he has overheard a conversation in which a temptation (in the form a gift) was offered to the girl and this could prompt an arrest of the man offering the allurement, thus a forcible marriage is no doubt seen as an offense but now even a gift-induced wedding is an offense too.

Section 3 illustrates the same by prohibiting any conversion by use of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage. However, the section exempts reconversion to one's immediate previous religion.

Section 4 talks about persons competent to lodge FIR. It enables any aggrieved person apart from his brother/sister, parents or any person related by blood/marriage or adoption to file FIR against conversion which contravenes

the provisions of section 3 Section 5 prescribes the punishment for contravention of section 3 between one to five years imprisonment along with a fine of not less than fifteen thousand rupees. The section provides separate punishment in relation to the offence being committed against minor, women and people of scheduled caste and scheduled tribe. Further, mass conversion and subsequent conviction has been punished more severely.

Section 6 mandates the courts to declare marriages for the sole purpose of conversion or vice versa void on petition of either party.

Section 7 of the Ordinance gives power to a police officer to arrest the person under the Criminal Procedure Code without an order from the magistrate if any information is received.

Section 8, if a person sincerely desires to convert but doesn't have any intention to get married, also would have to inform the District Magistrate (DM) two months before the plan through a declaration. Interestingly, such a declaration is expected to be displayed on the notice board of the office till the time the contents of the declaration are confirmed. This not just grossly violates the right to privacy but also puts the lives of those converts at risk whose families are against it.

Section 12 reverses the rule of the burden of proof in criminal jurisprudence. It provides that the burden to prove the conversion was or by marriage will be on the person who has caused the conversion. At the same time, instead of presuming that the person accused of committing the offense is innocent until proven guilty, the ordinance proceeds on the presumption that every religious conversion is illegal. The pertinent question is that how the person who's been accused of converting is supposed to know the mind-set of the converted person? After all, it is only the person converted who can explain.

Inter-Religious Love and Marriage

Inter-religious love and marriages are tricky terrain. They challenge various norms and customs and arouse passions of religious fundamentalists. The "threat" of such intimacies has often resulted in "constructed" campaigns, expressing the anxieties and fears of conservative forces. In India, the religious extremist forces particularly has been a master at creating panics around expressions of love, be it the Valentine Day, homo-sexual love or inter-caste and inter-religious romance, posing them as one of the biggest threats to cohesive community identities and boundaries. The latest in such constructs by the Hindu right wing is the alleged "Love Jihad" or "Romeo Jihad" organization, supposed to have been launched by "Muslim fundamentalists" and youthful Muslim men to convert Hindu and Christian women to Islam through trickery and expressions of false love. In Kerala, Karnataka and Delhi, such organizations have been holding meetings, distributing pamphlets and even filing court cases, declaring that the particular religious community has devised plans for compulsive and deceitful religious conversions by winning over young women. The ramifications of such a campaign for fostering hate, for its anti-women over-tones and for creating panic, abound. The protests against such a vicious campaign have

been many. Various human rights groups, student organizations and secular bodies have voiced their concerns over this hate campaign.

Not so long ago, in a well-reasoned order of the High Court, it was held that "*religious conversions, even when made solely for marriage, constituted a valid exercise of a person's liberties*".[2] The order makes it clear that it is neither the province of the state nor any other individual to interfere with a person's choice of partner. In response to the judgment, the government of UttarPradesh has introduced an ordinance that not only makes a religious conversion that is forcefully obtained, an offense but also declares void any conversion found to be made solely for marriage[3].

Constitutionality and the Impact on Personal Liberty

Under the Constitution of India, it is the individual citizen who exercises rights and duties. However, it isn't wrong to state that these new laws treat 'religious communities' instead of individual citizens as basic entities. If implementing these laws would result in taking away this social contract that has been given by our Constitution to individuals to exercise, this fundamentally deforms the framework of Indian constitution. Right to equality (Article 14-18) is not merely a negative right not to be discriminatedagainst, but also a positive right to be treated as an equal. The Supreme Court in the case of *Shafin Jahan v. Ashokan K.M.* case held that:

> *"The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness".*

The present Ordinance by involving provisions like pre-post conversion declaration, putting burden of proof on accused and allowing person even related by blood, marriage and adoption apart from parents and brother/sisters to file FIR allows an element of unreasonableness to creep in. Given the Supreme Court's emphasis on freedom to choose a life partner, it will be interesting to see the Court's reaction on the Ordinance which has been challenged before it. Further, in *Justice K.S. Puttaswamy (Retd) v. Union of India*[4], the Apex while stated that the right to choose a life partner was a facet of right to privacy, it went on to state that any invasion of right to privacy by State must meet a threefold requirement:

1) Legality, which postulates the existence of law.
2) Need, defined in terms of legitimate social need.
3) Proportionality, which ensures a rational nexus between the

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2 Salamat Ansari v. State of U.P., 2020 SCC Online All 1382 : 2021 Cri LJ (NOC 39) 13 : (2020) 3 HLR 667 (DB)

3 https://thewire.in/law/love-jihad-ordinance-communal-rhetoric-divisive-justice-ap-shah

4 AIR 2018 SC 357.

objects and the means adopted to achieve them

The law may fare on legality aspect, but the need would be questionable and proportionality even more so because the law makes every conversion per se illegal and casts a burden on the converted person to not only make a declaration, but also prove that such conversion was not unlawful. As for the matter at hand, let's consider the consequences of some provisions of the **impugned ordinance**. Section 3 provides that "*no person shall convert or attempt to convert any other person from one religion to another by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage*[5]".

It is reasonable to the extent that conversion by coercion or fraud etc. is a matter of seriousnessand should be dealt with proper state action under law. But what is "conversion by marriage"? If a Hindu woman is marrying a Muslim man, as per her own will, what amounts to conversion here – and who gets converted? Nobody gets converted by marriage. By invoking the Supreme Court's judgment in *Puttaswamy*[6], Allahabad High Court in the case of Salamat Ansari held that an individual's ability to control vital aspects of her life come under her right to privacy and this includes the protection of decisional autonomy on affairs such as "*personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation*".

In Salamat Ansari,[7] it was held "*that religious conversion, even for marriage, constituted a valid exercise of a person's liberties*". It is unfortunate that even after 70 years of independenceall of this had to be spelled out in a secular, democratic country. Thus, the ordinance without any doubt poses a grave assault on the personal liberty of an individual and is violative of Article 2

Conclusion

Despite having multiple petitions raised and amid the protests by the opposition, the Uttar Pradesh Legislative Assembly on 24th February 2021, passed the bill with the purpose to curb religious conversions carried out by fraudulent or any other undue means, including through Marriage by voice vote.[8] This way the bill has replaced the ordinance promulgated in November last year. From being just a conspiracy theory to a full-fledged bill, "Love-Jihad" has traveled a long journey which is now a crime punishable by imprisonment. However, by establishing such developments even as the government has confirmed in the Parliament that there was no evidence of

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5 https://www.scconline.com/blog/post/2020/12/01/prohibition-of-unlawful-religious-conversion-uttar-pradesh-prohibition-of-unlawful-conversion-of-religion-ordinance-2020-brief-explainer/

6 15 (1978) 1 SCC 248: AIR 1978 SC 597

7 2020 SCC Online All 1382 : 2021 Cri LJ (NOC 39) 13 : (2020) 3 HLR 667 (DB)

8 https://www.thehindu.com/news/national/other-states/uttar-pradesh-assembly-passes-bill-on-religious- conversion-amid-din/article33925722.ece

such a theory[9], it is difficult to anticipate the consequences but more than that it is indeed diabolical. The effect of the Ordinance on the freedom of religion enshrined under article 25 to 28 of the Constitution has to be seen that whether it violates that freedom or merely regulates it. Further, the Ordinance appears to be in confrontation to several Supreme Court judgments stating that right to choose one's partner is a fundamental right protected under article 21 of the Constitution. Though the Ordinance prohibits and punishes when conversion and marriage lacks free consent, the procedural requirement to inform the administration attracts article 21. The law, however, does not apply to those couples married under the Special Marriage Act, 1954 since it has its own procedure to verify the circumstances. People of different faiths wanting to marry each other can follow the procedure laid down by the Special Marriage Act, 1954 and that does not involve any pre-marriage enquiry by the district magistrate[10]. If the couple marry under the Special Marriage Act, 1954, they just have to inform the marriage officer about the same, who shall get it published at any conspicuous place in his office and if no objection is received, the marriage can be solemnize at the end of thirty days period, but, the recent decision of High Court of Allahabad has made the mandatory public notice of marriage under the Special Marriage Act, 1954 as directory i.e. only if the couple wants to make a public notice of marriage, then only the Marriage Officer can do the same. The judgment is certain to be appealed and the decision of Supreme Court is awaited in this regard.

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Bill, 2021 is prone to abuse, and if anyone were to inspect the numerous newspapers one would be able to see theconsequences that most commonly include- intimidation, mistreatment, and arbitrary arrest. On the one hand, when the Supreme Court in one of its judgments emphasized the importanceof interfaith marriages stating, "society must learn to accept inter-caste and inter-faith marriages without hounding the couples"[11], the U.P. conversion bill not just exhibits the elements of vilifying all inter-faith marriages but places unreasonable hindrances on consenting adults in exercising their personal choice of a partner, violates their right to life, liberty, and dignity. The state must acknowledge and overcome such discrimination as it only impedes the ability of those citizens to exercise their rights. To make the Government responsible and to provide protection to those in need, multiple articles in the form of Fundamental Rights have been given to by the makers of the Indian Constitution.

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9 https://www.newindianexpress.com/nation/2020/feb/05/love-jihad-not-defined-under-existing-laws-no-case- reported-yet-government-in-parliament-2099277.html

10 Subramanium Swami, "Not just UP, other states too have 'love jihad' laws", Sunday Guardian, Dec. 5, 2020, available at: https://www.sundayguardianlive .com/news/not-just-states-love-jihad-laws (last visited on Jan. 08, 2021).

11 https://www.hindustantimes.com/india-news/sc-society-must-learn-to-accept-inter caste-interfaith-marriages- 101612809173318.html

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Recruitment and Pedagogy of Legal Education in India: Issues and Challenges

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Abstract

Legal education in India ought to be re-shaped and remodeled to meet the standards of contemporary times. Its harmony with the emerging social, economic, scientific, technological and global dimensions is the need of the hour. Apart from bar and bench domain, the increasing demand of law graduates in the fields like academics, corporate sector, taxation firms, regulatory bodies, and business groups etc. have added to the scope of legal education. This paper is an attempt to highlight the recruitment and pedagogy issues of legal education in India and the corrections to be done to elevate the legal education to meet the upcoming challenges.

Keywords: Legal Education, faulty recruitment, pedagogy, quality teaching.

Introduction

About fifty years ago legal education meant to produce law graduates who would mostly join the bar; few to bench, and fewer into teaching of the subject. Post liberalization year 1991, legal education changed from traditional scope to multi-dimensional one to meet, not only the requirements of the bar but also the requirements of globalization viz. trade, commerce and industry. Today legal education is at cross-roads. It is facing the challenges of global competition. New law subjects, with international and multi-disciplinary dimensions emerged in legal education which include International Trade, Environment, Cyber information, Education, Health, Comparative Law, Conflict of Laws, International Human Rights Law, Gender Justice, Space Law, Bio-medical law, Bio-ethics & International Advocacy etc. Unless high standards are laid down, coordinated and maintained in all the Law Schools throughout the country, the quality of the legal profession and

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administration of justice cannot improve.[1] The study of law opens up the multiple opportunities for the students especially when they are trained in specialization mode as per their inclinations. After graduating in law degree, joining advocacy is the general norm. Those choosing advocacy as a career may be trained in the art of communicating with clients, drawing up pleadings and other documents, examination of witnesses, discovery and inspection of documents research of case law etc.[2] However, there are other fields also like legal researching in furthering the cause of policy making, teaching of law, joining judicial or civil services, engaging with public legal education or Para-legal education, prepare law graduates to deal with legal, and ethical issues in different professional sectors, working in regulatory bodies to supervise the legal, as well as cross disciplinary professionalism in the country. Having said that, the issues and challenges continue to remain their which affect the efficiency and quality output of legal education. Towards the end of the 20th century and specifically in last thirty years, tremendous advances in science and technology have broken all predictions and have brought about revolutionary changes in all most all the spheres of life. The access to information has become unimaginably easy due to technological intervention.[3] This has also impacted the arena of Legal education in India.

Genesis

Legal Education in India had a long and checkered history.[4] The pattern of legal education which is vogue in India today was established during the English rule in the country. Imparting formal legal education commenced in 1857 with the establishment of three universities in the cities of Calcutta, Madras and Bombay. Though started, however, it was in the very rudimentary form with hardly any standards and qualifications prescribed for admission to the law classes. Students, besides law were free to undertake admission in other disciplines like history, geography, science etc.[5] Prior to the commencement of the Constitution in 1950, the efforts were made to streamline legal

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1 P.P.Rao, Legal Education under the Advocates Act, 1961.

2 Justice A.M. Ahmadi, Repairing the Cracks in Legal Education, presented at the First Bhandari Memorial Lecture.

3 Justice M. Jagannadha Rao, Law Students, Lawyers and Judges in the New Millennium, Delivered as Sri Satyanaryana Memorial Lecture on 1st July 2000 at Vishakhapatnam.

4 Dr. Daniel Mathew, Conceptualizing Legal Education in India: Refocusing on Forgotten Stakeholders. , p.472 of Legal Education in India –Essays in Honour of Professor Ranbir Singh, Universal Law Publishing Company, New Delhi edition 2014

5 Justice A.S. Anand, Legal Education in India: Past, Present and Future , Presented as H.L.Sarin Memorial Lecture at Chandigarh.

education in India, but with very little success.[6] Some of these developments were both provincial and national. In the Report of U.P. Unemployment Committee, 1935, Sir Tej Bahadur had observed that 'legal education has not occupied the place to which its importance entitled it; and the standard of legal education has remained very poor. The RadhaKrishnan Commission Report, 1949 observed that out colleges of law do not hold a place of high esteem either at home or abroad, nor has law become an area of profound scholarship and enlightened research.[7] Post framing of Constitution, the ethos of legal education should have undergone a change in India to fit in with the constitutional philosophy of ushering in a socio-economic transformation of the society. Under the Advocates Act, 1961 one of the functions of the Bar Council of India is to promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the Bar Councils of the States.[8] Despite the efforts made by the Bar Council of India, the professional legal education continues to suffer from a variety of drawbacks[9] particularly the issues in recruitment and pedagogy.

Faulty Recruitment

The teaching faculty remains the most important stakeholder in imparting legal education. However, the challenge in legal education which ultimately leads to poor quality of teaching remains faulty teaching recruitment and pedagogy. It is evident from this fact that law students very rarely exhibit interest for teaching law as profession. It also becomes clear from the fact that Bar Council of India which is the highest regulatory body of legal education in India has failed to effectively provide for the qualifications, conditions of service, selection criteria's, pay perks, and promotion of law teachers. The teachers working in Private Law Colleges and even in University Departments continue to work like bonded labourers on meager salary. Even some are contractually engaged for need based to be hired and fired at the sweet will of the University administration. It is pertinent to mention

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6 Important among these efforts being the Calcutta University Commission of 1917-1919, the University Education Committee of 1949, the Report of the Bombay Legal Education Reforms Committee 1935, the Report of the UP Unemployment Committee, the University Education Committee (Radha-Krishnan Commission) 1948-49, the the Report of the Bombay Legal Education Committee (Chagla Committee), 1949.

7 Dr. Lokendra Malik and Dr. Manish Arora (eds.) Legal Education in India- Essays in honour of Professor Ranbir Singh, 139 (Universal Law Publishing Company, New Delhi 2014)

8 Supra note 5.

9 Justice A.M. Ahmadi, Repairing the Cracks in Legal Education, presented at the First Bhandari Memorial Lecture.

that most of such teachers have spent more than a decade working as adhocs, to be disengaged any time. Every year they have to prove the worth in the 'carnival of interviews'. There is no doubt that qualification and recruitment criterion is laid down by University Grants Commission Rules and Regulations. However UGC is not able to take into consideration the special conditions of legal education. It equates the discipline of law with other subjects by prescribing general equal standard of qualification and recruitment criteria. Law teachers are put on par with teachers teaching arts, commerce, and science for undergraduates as if LLM is equivalent to MA. M.Com and M.Sc. This is wholly unfair considering the fact that after 10+2 LLM is 3+3+2/5 years of Study or in case of BA.LLB it is 5+2/5 of years of study whereas Masters in other disciplines is only 3+2 years of study after 10+2.[10]

It may be argued that introduction of one year LLM has eased the gap. However it may be noted that in terms of effective teaching one year LLM has not produced desired results and it is injustice with the degree itself as the scholar does not get enough time to write an effective research dissertation in the said course in addition of clearing other course papers which are core in nature. If a law teacher is engaged after Ph.D. as it is the latest criteria for Assistant Professors in the Law Schools of various universities and law colleges, it adds another three to five years after L.L.M degree. Furthermore the non-availability of legal studies of fundamental nature at higher secondary level and at degree college level in states has diminished the employment opportunity for those who aspire for teaching as profession in the discipline of law. Notwithstanding, the fact, that presently there are more than thirteen hundred law colleges in India, in addition to the university departments or law schools imparting legal education across the country. It has been noted that due to shortage of faculty, often a teacher specialized in one particular subject has to teach the different area (non-specialized) which also effects the quality of teaching.

At present the minimum standards required for eligibility to become a faculty are prescribed by the UGC. The aim was to ensure only the meritorious candidate should become a faculty member. It was certified through securing a minimum of 55% in the Master's degree (LL.M) and qualifying an objective exam, National Eligibility Test (NET) that would rigorously evaluate aptitude and competence of each candidate. While NET exam has been around for quite some time now, yet there remain doubts as to ability and efficaciousness of majority of

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[10] Dr. Stellina Jolly, Problems of Law Teaching in India: Issues and Perspectives. (2014)

the current bunch of entry level teaching faculty. It is submitted that NET is not a sufficient and reasonable criteria to determine the ability of teaching. Teaching is a skill and art. Delivery of content, body language, communicative skill, and more importantly the wider knowledge of the concerned subject are the key for teaching. Qualifying NET cannot be indicator of such traits, the way this exam is presently shaped. The entire exam becomes a memory test, an exercise of rote learning with no test of legal writing. A standard question would be two or three lines from a judgment and asking the candidate to identify the Judge who made that observation. One has to wonder what precisely is being tested her. Surely there are other ways of determining whether the candidate has read the judgment and understood the principles of law contained therein. It, therefore, raises the question of whether NET is the correct way to determine suitability of entry level faculty. Regardless of NET, the teaching ability demands to be tested on other scales. It is, therefore, not surprising that such level of disparity is being found in between what is desired and what is finally obtained in terms of quality of faculty.[11]

Faulty Pedagogy

The poor quality of teaching also owes to the kind of pedagogy followed in the country. According to the empirical survey conducted by Dr. Stellina Jolly, Professor of Law in South Asian University, New Delhi, on the quality of legal education it was found that 94% of the law students and faculties felt that there is something seriously wrong with the pedagogy where students as well as teachers does not feel encouraged and motivated. It was found that most of the time the teaching method primarily remains based on monotonous lecture method, where the lecturer read the book and made comments on it. This method of listening memorizing and reproducing during exam continued to be the general way till 19th century. The practice of questioning did not exist as everything is supposed to be self-contained in the various codes of law books. The appointment of Carl Von Savigny[12] as lecturer in the German Law School ushered an era of legal reform in the time. His idea was to involve the students actively in research. Changes started to emerge in USA with the concept of social engineering by Roscou Pound.[13] Legal education further got

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11 Dr. Lokendra Malik and Dr. Manish Arora (eds.) Legal Education in India- Essays in honour of Professor Ranbir Singh, 477 (Universal Law Publishing Company, New Delhi 2014)

12 Carl Von Savigny (1779-1861) is considered as the founder of Historical School of Jurisprudence.

13 Roscou Pound (1870-1964) is considered as one of the pioneers of American Legal Realism the modern face of Sociological school of Jurisprudence.

revolutionized in USA with Christopher Langdell[14] who came up with the concept of case methods whereby the students were given the real case like scenarios and incidents to study and apply law.[15] The role of the teacher is not only to fill in the students with contents of his narration but to bring out the hidden talent in them. The integrated students and teachers have unlimited potential for collaborating in exploring any aspect of subject of law. However, this needs a continuing education of the law teachers along with research work. It has been found that most of the law teachers after completing their LLM or Ph.D. are rarely exposed to the practical aspect of law and the courts. Since they impart theoretical knowledge, divorced from practical aspects and the result is that a fresh lawyer appears quite lost in the court room.[16] Since teaching is an intensely personal activity, the quality of legal education would largely depend upon the availability of teaching faculty of the right stamp. Therefore, the method of teaching i.e. pedagogy is of utmost importance. There is a need to strike a balance between active method i.e. case method teaching (also known as Langdell method) and the passive method i.e. the lecture method. If the students are first acquainted with the subject by the lecturer and thereafter their active participation is sought with reference to a particular case, it will enable the teacher to appreciate the receptivity and capacity of the student to understand and absorb the jurisprudential principles of the topic under discussion. This gives the opportunity to the teacher to identify such students needing greater attention.

Remedies to Overcome the Challenges

a) **Setting up of Legal Education Committee**: Legal Education Committee of Bar Council of India shall have members both from Higher Judiciary as well as Higher Academics to make it more vibrant, progressive and accommodative to the current needs.

b) **Closure and Recognition of Law Colleges by High Level Committee:** The increase in the substandard law colleges and schools across the country purely on the basis of financial considerations has marred the quality of legal education. A High level committee(s) both at central and

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14 Christopher Langdell (1826-1906) was an American jurist and legal academician who was Dean of Harvard Law School from 1870 to 1895.

15 Dr. Lokendra Malik and Dr. Manish Arora (eds.) Legal Education in India- Essays in honour of Professor Ranbir Singh, 464 (Universal Law Publishing Company, New Delhi 2014)

16 Justice A.S. Anand, Legal Education in India: Past, Present and Future , Presented as H.L.Sarin Memorial Lecture at Chandigarh.

state level should be set up by the Bar Council of India in consultation with the University Grants Commission and the Judiciary, which shall include the members from UGC, Judiciary, and Ministry of Law and Parliamentary Affairs, Govt. of India to review the affiliations and to conduct yearly inspections of the law schools and law colleges. Closure of sub-standard colleges and recognition of new law colleges should be granted as per BCI norms only by these high level committee(s) in consultation with central high level committee.

c) **Entry level cut off 50%:** An entrance test for the admission in the law shall be conducted by 'Special All India Committee' set up Legal Education Committee of the Bar Council of India or shall be conducted under the pattern of 'All India Law Entrance' to be held by Bar Council of India whereby minimum 50% and 45% marks shall be obtained to secure the admission in any law college/school of the country for unreserved and reserved categories respectively.[17]

d) **Change in the curriculum & marks break-up**: The change in the curriculum, the introduction of problem methods, the restriction of theory marks only up to 40%, and remaining 60% to be allocated for legal illustrations and problems and also for participation in moot courts.

e) **Reshaping of recruitment**: The recruitment of teaching faculty for law needs to be revisited and reshaped as per the emerging dimensions of law and not necessarily at par with other disciplines like Humanities, Science Commerce, etc.

f) **Enhancement of salary**: The appointment and Salary of law teachers in Colleges (both private and government) needs to be given at par with university teachers as per the UGC norms so that they can be secured financially to focus on quality legal education.

Conclusion

Law is not purely a professional skill confined to courts and litigants but it is a social science. Laws reflect social ethos. There has never been a dearth of ideas about the objectives of legal education not the scheme for redeeming it so as to make it more meaningful and socially relevant. The quality of legal education has a direct impact on the prestige of the legal profession. Therefore, it is the primary as well

17 ibid

collective duty of law fraternity particularly those who are administratively controlling the legal education to identify the areas of default and initiate corrective action to repair the damage.[18]

[18] ibid

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Scheduled Tribes' Right over Inheritance of Ancestral Land: Laws & Judicial Interpretations

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Abstract

Tribal communities and indigenous groups in different regions of the country contribute to India's diverse and vibrant socio-cultural aspect. These communities possess unique cultures, languages, and traditions, while maintaining a harmonious relationship with nature and safeguarding their distinctive way of living. It can also be observed that the customs and traditions are considered as an essential factor to determine the status. The application of laws upon them is different from others as their customs and traditions are preferred over general laws. These customs, usages and practices are protected by the statutory laws and in cases related to succession and inheritance, such customs challenge the personal laws. Through this paper, the researchers intend to recognize differences and challenges faced by STs in succession and inheritance over ancestral land, through law and judicial interpretations, compared to other communities.

Keywords: Schedule Tribes, Inheritance, Succession, Customs and Traditions, Personal laws, etc.

Introduction

India is home to the second largest population in the world and this population is broadly characterized on several parameters. One of such prevailing parameters is the 'religion' system, whereby every citizen is grouped under it and his status ascertains the applicability of personal laws. Every person belongs to a religion and the religion of the person determines the personal laws applicable upon them where it includes the rights related to marriage, divorce, adoption, guardianship, inheritance and succession. However, its applicability is slightly different when it is made applicable upon

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the people belonging to Schedule Tribe. The schedule tribes are indigenous people of the land who follows their customs and traditions among themselves as 'law' and are believed to be the original colonizers in a specific territory or region.

These people don't correspond within the 'religion' ambit and on the other side atheism is not lawfully recognized in India. Thus, when the codification was brought into practice, it occurred as a requirement to classify Schedule Tribe people under a religion. Because of compulsory inclusion, people belonging to Schedule Tribe were labelled as Hindu within the wide definition of 'Hindu'. As, it is believed that Hinduism is the oldest religion emanating in Indus Valley and Central Asia as the origin of Hinduism can be traced back to thousands of years.

Though most of the rights are well dictated within the Hinduism's ancient texts and manuscripts, an attempt was made by the Constituent Assembly to elucidate and to codify the Hindu laws which was intended to govern the major sect of the society.

Constituent Assembly Debates on definition of 'Hindu'

Pt. J.L. Nehru, head of 3 major committees in constituent assembly and the first Prime Minister of India, appointed Dr. B.R. Ambedkar to draft the Hindu Code Bill. Since the foundation of the bill, "the Hindu" includes "*any other person, who is not a Muslim, Christian, Parsi or Jew by religion*"[1], however a proviso was brought in to protect the custom and usage of the individuals who were not governed by the Hindu customs and usages, as "*if it is proved that 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 Code had not been passed, then, this Code shall not apply to that person in respect of those matters*"[2]. Though there are much diversities in India, the usage of words to define a "Hindu" demonstrates the intention to cover every individual who weren't covered under other religion.

On December 06, 1948, while discussing the definition of Hindu for Article 19 of the Indian Constitution, Loknath Mishra, member of Constituent Assembly states that:

> "*We have no quarrel with Christ or Mohammad or what they saw and said. We have all respect for them. To my mind, Vedic culture excludes nothing. Every philosophy and culture have its place but now (the cry of religion is a dangerous cry.) It denominates, it divides and encamps people to warring ways. (In the present context what can this word propagation' in article 19 mean? It can only mean paving the way for the complete annihilation of Hindu culture, the Hindu way of life and manners. Islam has declared its*

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1 Vasant Moon (ed.), Dr. Babasaheb Ambedkar Writings and Speeches 50-51 (Dr. Ambedkar Foundation, New Delhi, Vol. 14 Part I (Sections I to III), 2014) ISBN: 978-93-5109-064-9. Available at: https://mea.gov.in/Images/attach/amb/Volume_14_01.pdf (last visited on July 14, 2022).

2 *Ibid*., p.51.

hostility to Hindu thought. Christianity has worked out the policy of peaceful penetration by the back-door on the outskirts of our social life. This is because Hinduism did not accept barricades for its protection. Hinduism is just an integrated vision and a philosophy of life and cosmos, expressed in organized society to live that philosophy in peace and amity."[3]

Though the Constituent Assembly exclude the word 'Hindu' from Article 19. The same definition which was provided under the Hindu Code Bill was widely accepted by the assembly, however, Shri K.M. Munshi contended that:

"*…the Hindu Bill which is now before this House in its legislative capacity has defined `Hindu' so as to include the various sub-sections, but it will be more appropriate to have this definition in the interpretation clause than in this*."[4]

Later, it was defined as "*Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion*" under Article 25 Explanation II.

Constitution Assembly Debates on Schedule Tribes as Hindus

Nevertheless, the Hindu definition under the Constitution not affected the Hindu definition under the Hindu Bill (which later codified into present Hindu personal laws) and it in some way also includes the person who were not aware with the religion concept, the tribal communities. These communities do not practice or embraces a religion, they do not satisfy the essentials of a State or political entity, they are neither classified as Hindus nor peasants. They are identified on the basis of their "indigenous" nature and "rich customs and old traditions" which passes from old generation to new upcoming generation. More importantly, the customs and tradition of a tribal community might substantially differ from codified Hindu laws and even from other tribal communities too. When the Hindu Bill was brought in the Constituent Assembly for the discussion, it attracted the personal laws into democratic debate. The significance of the Bill can be highlighted in the words of Dr. Ambedkar, as:

"*No law passed by the Indian Legislature in the past or likely to be passed in the future can be compared to it (Hindu Code) in point of its significance. To leave inequality between class and class, between sex and sex which is the soul of Hindu society, untouched and to go on passing legislation relating to economic problems is to make a farce of our Constitution and to build a palace on a dung heap. This is the significance I attached to the Hindu Code*."

It was initially presented before the assembly on April 09, 1948, but it faced huge opposition and caused several controversies due to codification of

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3 Constituent Assembly of India Debates (Proceedings) - Volume VII, 6th December 1948, available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-06 (last visited on July 14, 2022).

4 *Ibid*.

new rights which were not practiced by the Hindus and it was not accepted in its original form. For instance, the Bill at several instances favors *Dayabhaga* system of inheritance and succession instead of *Mitakshara*.[5] Pt. Thakur Das Bhargava, while supporting the bill stated that:

> "*I am not prepared to acknowledge even for one moment the fact that this Assembly or the Honourable members of this house, who have the same ability as the Smritikars of the old, do not have the right of making any changes in our Shastras or Laws. I hold that the* ***members of each and every community have got the fullest rights to frame laws according to the needs of the time. Today if someone makes an appeal that this being an old custom so we must act accordingly; then about such an allegation I would submit that there is not a single custom that India has not experimented with.***"[6]

To elucidate, Pt. Thakur Das Bhargava took the example of inheritance rights within Khasi Tribes,

> "*There are certain places in India where the system of inheritance is quite different from the other parts of India. Do we not know that among the* ***Khasi tribes*** *and in some parts of Southern Punjab the entire institution of inheritance depends upon the fact that the entire property devolves upon the daughters instead of sons? There are certain parts in India where instead of the girl going to her father-in-law's place the husband of the girl is imported into the wife's family. India is such a country where every type of custom and law has been in vogue.*"[7]

A much similar illustration was shared by Shri V. I. Muniswamy Pillay, whereby he took example of *Toda* and *Badagas* tribe, as:

> "*If you study the rules regarding marriage, inheritance, adoption and all these things of Hindus in the different provinces, you will find that they are not the same. They differ in many places…I come from a district where there are a lot of hill tribes. Their marriage ceremonies, laws of inheritance etc. differ substantially from those of Hindus, although they profess to be Hindus. Among the picturesque Toda aboriginal community, there is polygamy and due to this social evil, the community is dwindling. The ceremonrials of the other tribal community of Badagas also differ from those of Hindus, although they profess to be Hindus.*"[8]

It was evident that customs were on higher level than the codified bill and they were to be protected even after enactment of the bill. The question with regard to applicability of this bill on tribal people was raised by Shri Rohini Kumar Chaudhuri, he argued that:

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5 Supra Note 1, Part One (p. 1-786).

6 Supra Note 1, p. 314. *See also* Constituent Assembly (Leg.) D., Vol. II, Part II, 25th February 1949, pp. 895-936.

7 *Ibid.*

8 Supra Note 1, p. 748. *See also* Constituent Assembly (Leg.) D., Vol. VI, Part II, 14th December 1949, pp. 611-14.

> "…*there is the question of tribal people. According to this Bill they would be considered Hindus and they are really Hindus if they have not adopted Islam or Christianity or Buddhism, etc. Are you going to thrust on them this piece of legislation? If you ask them to have this system of inheritance, they will simply revolt against you.*"[9]

To support his arguments, he took the example of Khasia tribe of Assam, as:

> *"There are different kinds of custom in Assam. Amongst the* ***Khasia people*** *of Assam the youngest daughter inherits the property. Now you are giving it to the widow, the son's widow, the widowed daughter, the son's daughter-in-law and so forth. Will they tolerate it for a moment if you introduce this legislation among them?"*[10]

To clarifies the position of laws related to inheritance for Tribal people, Dr. B.R. Ambedkar, who drafted the Hindu Bill answered to Shri Rohini Kumar Chaudhuri that:

> "*If my friend had read the definition in this code as to who is a Hindu and who is not and to whom this Code applied, he would have seen that there is a clause which merely said that persons who are not Muslims, Parsis or Christians shall be presumed to be Hindus:* ***not that they are Hindus. The result is that if a tribal individual chooses to say that he is not a Hindu it would be perfectly open to him under this Code to give evidence in support of his contention that he is not a Hindu and if that conclusion is accepted by the Court, he certainly would not be obliged by anything contained in this Bill***."[11]

Dr. B.R. Ambedkar further added that

> "…*If a tribal person does not want to be a Hindu the way is open to him to prove that he is not and the Bill will not apply to him*."[12]

The Dr. Ambedkar's answers cleared up the ambiguity related to the applicability of Hindu bill on the tribal people whereby an exception was created for them in order to protect their customs and tradition. However, if they practice Hinduism or any other recognized religion, they will not be dealt under the exception. Though it was brought for discussion in 1948 during constituent assembly tenure, due to opposition and controversies it was not enacted before 1955. After several discussions, parliamentary debates and amendments, the Hindu personal laws were enacted in 1955 whereby the whole Hindu Bill was broken down into three different acts and were enacted separately.

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9 Supra Note 1, p. 36. *See also* Constituent Assembly (Leg.) D., Vol. IV, 9th April 1948, pp. 3648-50.

10 *Ibid*.

11 Supra Note 1, p. 40 and 337. *See also* Constituent Assembly (Leg.) D., Vol. IV, 9th April 1948, pp. 3650-53.

12 Supra Note 1, p. 41. *See also* Constituent Assembly (Leg.) D., Vol. IV, 9th April 1948, pp. 3650-53.

Succession Laws and Rights over Ancestral Property After Conversion

Before 1955, person who were Hindu by religion were certainly a Hindu. But converse was not true. Person who does not have any religion such as Muslim, Christian Parsi etc. and is domiciled in the territory of India will be considered as Hindu. Conclusively, a Hindu by religion in any of its form or development includes individuals from the Buddhist and Jain communities, besides the Sikh communities, alongside other persons not professed to be Muslims, Christians, or Parsis. The Hindu laws such as Hindu Marriage Act, 1955 and Hindu Succession Act defined a Hindu and at the same it also includes exclusivity for the Scheduled Tribes—

> *"(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.*
>
> *(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section."*

A clear reading of the definition of the word "Hindu" suggests that Scheduled Tribe falling within the meaning of Article 366(25) are not included in it, unless the Central Government by notification in official gazette or otherwise allows.

Conversion of Hindu into Non-Hindu Religion

When a person converts from one religion to another religion, the inheritance of ancestral property is the major concern. Section 26 of Hindu Succession Act, 1956[13] refers to the descendants of converts are disqualified for inheritance of property and reads as- "Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens." For this purpose, if a Hindu converts to any other religion which is not governed by Hindu law. In that case, *the person converting his religion will have right over ancestral property. But it shall also be noted that descendant of a convert, however, do not have the right to such ancestral property, unless they are Hindus at the time of the succession*.[14] Such a judgment was made in *Shabana Khan v. D.B. Sulochana and Ors.*[15], where the Andhra Pradesh High Court decided that disinheritance as a result of conversion to another religion, applies only to children born to the Hindu after

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13 Act No. 30 of 1956.

14 *Smt. Butaki Bai* & *others* v. *Sukhbati* & *Ors*., AIR 2014 Chh 110.

15 2008(2) ALD 818.

such conversion and will not apply to the convert himself or herself. In *E. Ramesh And Anr. vs P. Rajini*[16], the Madras High Court also upheld the property rights of the Hindu women who converted to Islam. The High Court in its judgment stated that the bar under Section 26 of the Hindu Succession Act, 1956 does not apply to the convert but only to the descendent of the convert.

In *Balchand Jairamdas Lalwani v Nazneen Khalid Qureshi*[17], the lady (respondent) converted to Islam before her father's death and after the death of her father, was claiming her father's property. The plaintiff relied upon Section 2 and contended that as per Section 2(1)(a)(c) of the Hindu Succession Act, 1956, the Act is not applicable to the persons who are Muslim, Christian, Parsis, and Jews by religion. Therefore, it was contended that the respondent will not be governed by the act and no share will be given to her as per the provisions of the act. He further submitted that a convert otherwise will benefit from two laws that are not allowed. The respondent on the other hand supported the injunction and relied on Section 26 which states that a Convert's descendants are disqualified and there is no mention about disqualification of the convert himself or herself. It was further submitted that the respondent is a sister and is entitled to the property of her father and the conversion does not disqualify the convert to claim a proprietary right of his or her father's property.

The Bombay High Court in its judgment observed that the right of inheritance vests with an individual upon birth and in some cases, it is acquired by way of a marriage. *The court also observed that religion is a matter of individual choice and the act of conversion doesn't end relationships that are established by birth.* Finally, held that a Hindu convert is entitled to his/her father's property if the father died intestate.

Conversion of Schedule Tribe Member into other Religion

Unlike religions and Schedule Castes, there is no embargo for Schedule Tribe as that they shall belong to any religion. The most important thing required for them is the required declaration of their status as Schedule Tribe.[18] The identification factors depend upon the components of social backwardness and interrelated scope including the convenience to progress. The objective behind it is to protect the customs and identity of different tribes who are suffering from backwardness and having different cultural configurations in terms of their socio-economic status and conditions.[19] This concept is reflected in several cases whereby the tribal person converts himself into other religion,

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16 (2002) 1 MLJ 216

17 2018 SCC OnLine Bom 21174 : AIR 2018 Bom 103 : (2018) 2 AIR Bom R 816 (decided on 06 March 2018).

18 See *S. Swvigaradoss* v. *Zonal Manager*, (1996) 3 SCC 100 and *Serophina Kerketta* v. *The Government of West Bengal,* (2007) 2 SLR 118.

19 *Serophina Kerketta* v. *The Government of West Bengal*, (2007) 2 SLR 118, Para 10.

for instance, in the case of *State of Kerela & Ors*. v. *Chandramohanan*[20], it was held by the Hon'ble Supreme Court that:

> "…*A member of a tribe despite his change in religion* ***may*** *remain a member of the tribe if he continues to follow the tribal traits and customs… the question (of fact) whether the person remained a member of tribe after the conversion and continued to follow the customs and traditions of the tribe must be ascertained at trial."*[21]

This assessment clears the difference between identifying a converted tribal person as tribal or not. It can also be inferred that the customs and traditions were considered as an essential factor to determine the status. Another aspect of receiving succession rights arises from the institution of marriage and the status of child born out of such wedlock also depends on somewhat similar factors. Offshoot of a wedlock between a tribal man and non-tribal woman would attain the status of Schedule Tribe. In the case of *N.E. Horo* v. *Jahanara Jaipal Singh*[22], it was observed by the Hon'ble Apex Court that even without invoking the doctrine of domicile once the marriage of a Munda male with a non-Munda female is approved or sanctioned by the Parha Panchayat, they become the members of the community.[23] Similarly a child, born out of a marriage between a non-tribal man and tribal woman, would not acquire the Schedule tribe status per se unless the marriage is accepted by the tribe and the child is treated as a member of their own community.[24] Furthermore, a mere casual visit to the village did not amount to acceptance by the tribal community.[25]

It shall be also observed here that each and every tribe have their own customs, usages and practices which govern their community. Consequently, these practices are considered to be above personal laws and, in many cases, if it is established that a person who belong to a scheduled tribe, follows and practices the customs and traditions of tribe, the said customs and tradition would be applicable upon him instead of the religion based personal laws. In *Madhu Kishwar & Ors* v. *State of Bihar & Ors*[26], the Hon'ble Apex Court observed that:

> "…*In matters of succession the general rule of plurality would have to be applied with circumspection…. neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat Law is applicable to the custom governed tribals. And custom, as is well recognized, varies from people to people and region to region."*

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20 (2004) 3 SCC 429. See also *Ewanlangki-E-Rymbai* v. *Jaintia Hills District Council and Ors*., (2006) 4 SCC 748.

21 *Ibid* Para 5 and 20.

22 (1972) 1 SCC 771.

23 *Ibid*, Para 22.

24 *Anjan Kumar* v. *Union of India*, (2006) 3 SCC 257.

25 *Ibid*, Para 7.

26 AIR 1996 5 SCC 125.

Therefore, the customs and traditions of a tribe subside the personal laws even in the cases related to succession. Moreover, this outline can also be perceived when the Caste Disability Removal Act, 1850 was enacted by the Britishers. In several cases, the court also relied on the provision of the Caste Disability Removal Act, 1850, and stated about the same removed the stigma to inherit property in case of a conversion.

The Caste Disability Removal Act, 1850

Prior to the independence, the succession rights were protected by the Caste Disabilities Removal Act, 1850. It was applicable to all citizens irrespective of their religion or caste. This Act contains only one Section, which is as follows:

> "**Law or usage** which inflicts forfeiture of, or affects, **rights on change of religion or loss of caste to cease to be enforced**; So much of **any law or usage** now in force within India as inflicts on any person **forfeiture of rights or property**, or may be held in any way to impair to affect any right of inheritance, by reason of his or her renouncing, or having excluded from the communion **of, any religion, or being deprived of caste**, shall cease to be enforced as law in any Court"

A change of religion and loss of caste was at one time considered as grounds for forfeiture of property and exclusion of inheritance. However, this has ceased to be the case after the passing of the Caste Disabilities Removal Act, 1850.[27]

Section 1 of the Caste Disabilities Removal Act inter alia provides that **if any law or (customary)** usage in force in India would cause a person to forfeit his/her rights on property or may in any way impair or affect a person's right to inherit any property, by reason of such person having renounced his/her religion or having been **ex-communicated from his/her religion or having been deprived of his/her caste**, **then such law or (customary) usage would not be enforceable in any court of law.** The Caste Disabilities Removal Act intends to protect the person who renounces his religion or changes caste.

The Caste Disability Removal Act was applicable even on religion, in a case where, even if Christian-converted-Muslim's second marriage was valid, the succession to the properties left by him will be governed by the Indian Succession Act and s. 37, Bengal, N.W.P. and Assam Civil Courts Act; and in any event, the rights of his Christian heirs are protected under the Caste Disabilities Removal Act.[28]

However, this enactment was repealed by the Ministry of Law & Justice, Government of India on the recommendation of 248th Law Commission

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[27] *Nayanaben Firozkhan Pathan @ Nasimbanu Firozkhan Pathan* v. *Patel Shantaben Bhikhabhai & Ors*., (2018) 59 (2) GLR 1796 : (2018) 189 AIC 714 : (2018) 1 RCR (Civil) 16

[28] *John Jiban Chandra Dutta* v. *Abinash Chandra Sen*, AIR 1939 Cal 417.

Report[29] by reason of becoming unusable and obsolete either due to sufficient constitutional provisions or existence of other parallel laws.[30] Due to the repeal of this legislation, the Scheduled Tribe People were left exposed to the 'default' Hindu Personal laws.

In another case of *Mt. Ujiyara* v. *Tilochan Gond*[31], the Hon'ble Judge stated that "…Here I am presented with the case of a tribe which has always been non-Hindu. *How far, if at all, should inheritance and succession in this tribe be governed by the Hindu, law?* In this connection *it is necessary to bear in mind that although that law is primarily a personal law, it has also become attached to localities; and that, therefore a Hindu is presumed to be governed by the law of the locality in which he resides*.[32]

Moreover, these customs, usages and practices are protected by the Constitution and in many cases, such customs can even outweigh the personal laws. It was held by the Privy Council in one of its oldest cases that clear proof of custom and usage outweighed the written text of law.[33] Justice Hidayatullah, speaking for the Bench, observed in *Sant Ram and Ors vs Labh Singh and Ors*[34]:

> "*Custom and usage having in the territory of India the force of law must be held to be contemplated by the expression 'all laws in force'.*"

Section 3(a) of the Hindu Marriage Act defines 'custom' as follows: -

> "(a) the expressions, 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family: Provided that the rule is certain and not unreasonable or opposed to public policy; and provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family;"

A custom varying the general law may be a general, local, tribal or family custom. All that is necessary to prove is that the custom or usage has been acted upon in practice for such a long period and with such invariability and continuity as to show that it has by common consent been submitted to as

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29 Law Commission Report, "248th Report on Obsolete Laws: Warranting Immediate Repeal" (September, 2014). Available at: https://lawcommissionofindia.nic.in/reports/Report248.pdf (last visited on July 14, 2022).

30 The Repealing and Amending (Second) Act, 2017 [Act No. 4 of 2018]. Available at: https://egazette.nic.in/WriteReadData/2018/181639.pdf (last visited on July 14, 2022).

31 AIR 1918 Nag 7.

32 *Mt. Ujiyara* v. *Tilochan Gond*, AIR 1918 Nag 7. See also *Ram Das* v. *Chandra Dassia* [1893] 20 Cal. 409., *Fanindra Deb Raikat* v. *Rajeswar Das* [1885] 11 Cal. 463 : 12 I.A. 72., *Jugo Bundhoo Tiwaree* v. *Kurum Singh* [1874] 22 W.R. 341, *Balaji* v. *Mt. Maina Bai* (D.C.R. Part 8 No. 102.)

33 *Collector of Madura* vs. *Moottoo Ramalinga Sethupathy (Ramnad case)*, 12 M.I.A. 397 (1868).

34 1964 SCR (7) 745.

the established governing rule in any local area, tribe, community, group or family. Certainty and reasonableness are indispensable elements of the rule. This proposition was also highlighted in the landmark case of *Smt. Butaki Bai & Ors. v. Sukhbati & Ors.*[35], wherein the Chhattisgarh High Court while deciding the matter held that:

> "The Tribe-Halba is mentioned in entry seventeen in relation to Chhattisgarh in above order. It is also not in dispute that the Halba Tribe is a Scheduled Tribe within the meaning of Constitution of India notified by President of India and it is a Scheduled Tribe within the definition of Article 366(25) of the Constitution. Thus, the provisions of Hindu Succession Act, 1956 do not pro-tanto apply to the members of Scheduled Tribe as per Section 2(2) of the Act of 1956, because of non-obsantante clause in Section 2(2) of Act of 1956, as the customary law of the Scheduled Tribe has been preserved by the legislature……. *It is well settled law that the customary succession prevalent among the scheduled tribes, are being followed among the tribes in matter of succession and inheritance and they have nearly acquired the status of law*."[36]

Prevailing Practice in North-East tribal communities

As per the Census 2011, the North Eastern states has the most percent of Scheduled Tribe people such as Mizoram (94.4%), Nagaland (86.5%), Meghalaya (86.1%) etc.[37] The Constitution of India provides special protection to the tribal customary laws for North-East tribal communities. Article 244, read with Schedule VI empowers the district administration in the tribal areas of Assam, Meghalaya, Tripura and Mizoram to declare certain areas as autonomous districts. These autonomous districts or region has their district and regional councils respectively which extensively deals with wide range of matters or disputes arising in the area such as allotment of lands, managing forest lands, water resources, inheritance of property, marriage and divorces and social customs etc. District and Regional Councils safeguards the tribal laws and ensures that each tribe's custom shall not be affected or subsumed by another tribe's custom or practices. Formation of such authorities at ground level assures supremacy of the customs and traditions followed among themselves.

Conclusion

Scheduled Tribes are marginalized indigenous communities who have their own customs and traditions which are widely practiced within themselves

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35 AIR 2014 Chh 110.

36 *Ibid* Para 9 and Para 31.

37 Government of India, "ST Statistical Profile – at a glance" (Ministry of Tribal Affairs, 2011). Available at: https://tribal.nic.in/ST/Statistics8518.pdf, (last visited on Aug 05, 2022). *See also* Government of India, "Scheduled Tribes in India as revealed in Census 2011" (Ministry of Tribal Affairs, 2011). Available at: https://tribal.nic.in/downloads/Statistics/3-STinindiaascensus2011_compressed.pdf (last visited on Aug 05, 2022).

over a long period of time. These practices cover almost each perspective related to their livelihood including succession rights. Yet, these customs are not uniform in nature and it varies from community to community. Even with the developments in laws, the laws still favor customary practices. This applies to personal laws also. When India emerged from the Indus valley, atheism was not legitimately recognized in India and these religious practices shaped the present personal laws. Modern legislations amending personal laws provide for saving of pre-existing customs and usages subject to qualifying conditions. Thus, the statutory laws, ancient personal laws and customs and usages having force of law are intertwined and intermingled. The co-existence of multiple legal system within a state safeguards legal pluralism and flexibility of laws.

Like other rights within a tribal community, inheritance rights of the Scheduled Tribes shall be carried out in accordance to their customs only and no codified laws aim to impair it unless the person practices customs other than his community. Even after the conversion, if the person continues to follow and practices the old customs of his tribe, the customs will be applicable upon all viable perspectives and not personal laws. The Hon'ble Supreme Court, through several abovementioned judgements, simplified that the said customs and tradition would be applicable upon such person instead of the religion based personal laws. Therefore, it can be inferred the customs and traditions of a tribe subside the personal laws even in the cases related to inheritance.

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The Confession by Rousseau: A Jurisprudential Philosophy on Modern Democratic Self

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Abstract

Jean Jacques Rousseau's claim at being a distinct individual is linked to his notion of man as a natural being: 'noble savage' who is set out on a solitary journey to connect to his lost innocence, perhaps irredeemable, due to the corrupting influence of the civilization. Rousseau vehemently argues, in favour of connecting to the nature within oneself ('the core' distinct to each individual) and, to the natural beauty, outside of the facade of modern civilization. His glorification of the nature achieves greater significance when he speaks of it in terms of connecting to the idyllic innocence that one holds within one's being, untainted by the society. In The Social Contract (1762), for instance, he pleads for setting a new moral foundation to politics that will undo the worst of the social state and the problems of commercial society. Therefore, his narration of his life story is an attempt to reconcile with his former uncorrupted self through the act of confession. This paper proposes to discuss Rousseau's The Confessions (the text largely ignored from his entire oeuvre), as the first autobiography that formally laid down the foundation for the modern democratic sell in the core of jurisprudential philosophy. The paper analyses The Confessions, an evidently apolitical text with no apparent moral or legal ramifications, as a profound and path-breaking eighteenth century autobiography that elaborated on the sovereign individual's most exemplary features.

Keywords: Rousseau, sovereign individual, civilization, democratic self, Confessions.

Introduction to Jean Jacques Rousseau

Jean Jacques Rousseau (1712-1778), an influential 18th century philosopher, writer, and political theorist is primarily known for his works like *The Social Contract* and *Emile*. While the former work proposes a political structure that harmonizes individual freedom with the common welfare, the latter work emphasizes individualized education, rejecting rigid societal norms

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and institutions. His ideas however, have been received differently across ages. In the 18th century he is established as the greatest dissenter of the Enlightenment, embodying a revolutionary spirit. He was obsessed with freedom, and had great conviction for breaking free of monarchy, church and tradition and also was someone who vehemently criticised the notion of progress. A century later, his thoughts were appropriated to the ideals of French revolution. He also emerged as an influential figure for the Romantic literature with his credo of 'turning within the self' and the author as the maker of his own portrait. In the twentieth century, quite interestingly there are two extreme perspectives on him, few thought him to be the founder of the western democratic tradition or civil liberalism and the other school associated his ideas with totalitarianism or radical authoritarianism. It is these contrasting pulls in the hermeneutics of both his ideas and his person, that Rousseau himself was well aware of, that *The Confessions* (1781) implies this basic distinction between Rousseau as a historical figure and Rousseau as he knew himself.

Introduction to *The Confessions*

The Confessions is an exhaustive volume about Rousseau's life. At the very outset of the book, he declares that he wishes to write everything that he remembers to be true about himself. The volume is divided into twelve books and the distribution of books looks uneven and mostly arbitrary. There are books that are dedicated at length to one or two years and few books gloss over many years of his life. Nevertheless, the book follows a neat chronological order whilst assuming a dramatic beginning. Rousseau starts by describing the very intent of the book. The task, he sets out to accomplish, according to him is something without a prior model and is inimitable too:

> *I am commencing an undertaking, hitherto without precedent, and which will never find an imitator. I desire to set before my fellows the likeness of a man in all the truth of nature, and that man myself. (Rousseau 3)*[1]

Rousseau's assertion that his book of confessions is unique 'apparently' doesn't arise from the arrogance to assert literary or artistic merit. As Starobinski puts it:

> *The self, in other words, possesses a distinct form of knowledge: intuitive, immediate self understanding, derived entirely from feeling. For Jean-Jacques self knowledge is not a problem but a given: "Having spent my life in my own company, I should know myself". (180)*[2]

***The Confessions* as a sentimental self-portrait**

The emphasis in *The Confessions* is to foreground the uniqueness of the person who will be revealed in the course of the book, and that person is Rousseau himself. Here is an oft quoted statement where he reflects on the

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1 Jean Jacques Rousseau, *The Confessions*, ed. Tom Griffith (London: Wordsworth Editions Limited, 1996), Wordsworth Classics of World Literature.

2 Jean Starobinski, *Jean- Jacques Rousseau: Transparency and Obstruction*, trans. Arthur Goldhammer (Chicago: The University of Chicago Press, 1988).

power of self-knowing, and the need to know him from his perspective:

> *I know the feelings of my heart, and I know men. I am not made like any of those I have seen; I venture to believe that I am not made like any of those who are in existence. If I am not better, at least I am different. Whether Nature has acted rightly or wrongly in destroying the mould in which she cast me, can only be decided after I have been read. (Rousseau 3)*[3]

Roy Pascal in his book *Design and Truth in Autobiography* points out that the soul that Rousseau talks about is not the soul that is made known with the aid of religion, rather it is the innermost emotional disposition that can be discovered and revealed through the self only. (Pascal 41) Rousseau's claim at being a distinct individual is linked to his notion of man as a natural being: 'noble savage' who is set out on a solitary journey to connect to his lost innocence, perhaps irredeemable, due to corrupting influence of civilization. It is in this sense that his insistence on nature as panacea is to be understood, far away from the wicked and the cunning. It is thus supremely important as Rousseau would argue to connect to the nature within oneself ('the core' distinct to each individual) and to the natural beauty outside of the facade of modern civilization.

Rousseau's insistence on creativity and truth

Specifically part I of *The Confessions* stands out as the exemplary text of what later came to be known as the romantic imagination. It is proper to say that Rousseau was uniquely fitted by temperament and also by historical position to do what he did, however it is most unlikely not to find major corpus of the nineteenth and the twentieth century creative literature and even visual arts essentially influenced by his creative innovations.

Rousseau's innovation in reconstruction of the self via autobiography, what Huck Gutman terms as, "technology of the self", is that he firmly believed that the self could be judiciously poured into writing and recreated as it is by the act of reading. He is credited with the creation of vital techniques in the constitution of the self as subject. *The Confessions* is essentially reflective of a solitary, uncompromising individual's life who writes about his sensibility, adventures, joys and sorrows with hitherto unknown vigour and dedication.

The Confessions, when it was first published in 1781, scandalised Europe with its emotional honesty and frank treatment of Rousseau's sexual and intellectual development. His first encounter with Madame de Warrens, his passion for music, his sexual adventures in Venice, him giving away his children to a charitable hospital, his complex love angle with Sophie d'Houdetot and many other matters are written of with great intensity and in an unapologetic tone. However, Rousseau is essentially writing in the mode that Foucault believes is a fallacy to assume that it existed:

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[3] Jean Jacques Rousseau, *The Confessions*, ed. Tom Griffith (London: Wordsworth Editions Limited, 1996).

> *Writing unfolds like a game that inevitably moves beyond its own rules and finally leaves them behind. Thus, the essential basis of this writing is not the exalted emotions related to the act of composition or the insertion of a subject into language. Rather, it is primarily concerned with creating an opening where the writing subject endlessly disappears. (Foucault 15)*[4]

Nonetheless, Rousseau speaks of himself as an event in history, he is fairly conscious about the scrutiny that he may be subjected to. However, that doesn't discourage him from making truth claims about his narrative. His language is striking by the end of the text:

> *I have told the truth; if anyone knows things that contradict what I have just related, even though they be proved a thousand times over, he knows what is false and an imposture; and, if he declines to investigate and inquire into them together with me while I am still in the land of living, he loves neither justice nor truth. As for myself, I declare openly and fearlessly: whosoever, even without having read my writings, after examining with his own eyes my disposition, my character, my manners, my inclinations, my pleasures, and my habits, can believe me to be a dishonourable man, is himself a man who deserves to be choked. (Rousseau 645)*[5]

Rousseau doesn't feel that there was any scope for deceiving the reader, even if he wished to, he wouldn't find it easy. In vindicating his relation with his text he not only engages and answers the fundamental question of whether autobiographies are lies. But he puts a fair amount of responsibility on the reader to find out the answers. In other words, according to Rousseau the text doesn't become a site for misleading the reader, rather the text is merely a message encoded by the writer that after sincere engagement of the reader will be decoded to fashion as the appropriate manifestation of the intended message. Thus the reader is an equal in establishing the truth as is the author or the text:

> *... in simply detailing to him [the reader] everything that has happened to me, all my acts, thoughts, and feelings, I cannot mislead him, except wilfully, and even if I wished to do so, I should not find it easy. It is his business to collect these scattered elements, and to determine the being which is composed of them; the result must be his work; and if he is mistaken, all the fault will be his. But for this purpose it is not sufficient that my narrative should be true; it must also be exact. It is not for me to judge of the importance of facts; it is my duty to mention them all, and to leave him to select them. (Rousseau 169)*[6]

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4 Michel Foucault, "What is an Author" in *Language, Counter- Memory, Practice: Selected Essays and Interviews*, ed. Donald F. Bouchard, trans. F. Bouchard and Sherry Simon (Oxford: Basil Blackwell Publisher, 1977), 13-33.

5 Jean Jacques Rousseau, *The Confessions*, ed. Tom Griffith (London: Wordsworth Editions Limited, 1996).

6 Jean Jacques Rousseau, *The Confessions*, ed. Tom Griffith (London: Wordsworth Editions Limited, 1996).

While discussing the undecidability of discriminating the genre of autobiography from fiction, one important distinction that Paul de Man in his essay, "Autobiography as De-facement" elaborates upon, is the same idea that Rousseau foregrounds:

> *Autobiography seems to depend on actual and potentially verifiable events in a less ambivalent way than fiction does. It seems to belong to a simpler mode of referentiality, of representation, and of diegesis. It may contain lots of phantasms and dreams, but these deviations from reality remain rooted in a single subject whose identity is defined by the uncontested readability of his proper name: the narrator of Rousseau's Confessions seems to be defined by the name and by the signature of Rousseau in a more universal manner than is the case, by Rousseau's own avowal for Julie. (920)*[7]

The architecture of himself that Rousseau builds by writing his autobiography calls for an equal participation of the reader in terms of empathizing with that very portrayal. This is in fact the model, the proposition, that Rousseau suggests as the only way forward in establishing the truth about his inner life. He pleads to be understood or imagined only in the way he had experienced himself:

> *I should like to be able to make my soul to a certain extent transparent to the eyes of the reader; and, with this object, I endeavour to show it to him from all points of view, to exhibit it to him in every aspect, and to contrive that none of its movements shall escape his notice, so that he may be able by himself to judge of the principles that produce them. (Rousseau 169)*[8]

Futuristic psychological examination of childhood in *The Confessions*

For some critics the modern element about Rousseau's *The Confessions* is its elaborate discussion of his childhood years. Earlier the kind of autobiographical narratives we had, the spiritual or the great men writing about their great deeds, the childhood phase was usually glossed over. Childhood as a crucial phase for psychological development of an adult is a recent development. Therefore, Rousseau's elaborate focus on childhood in terms of being influential in determining an individual into what he becomes later is fairly unprecedented. He tells us in great detail about the phenomenon of growing up. During his adolescent years, or even before, he recalls how he would be falling in love with every charming girl or woman that came his way. Rousseau quotes an incident when as a young man he derived masochistic pleasure from being beaten up by his female teacher:

> *... I had found in the pain, even in the disgrace, a mixture of sensuality which had left me less afraid than desirous of experiencing it again from the same hand. No doubt some precocious sexual instinct was mingled with this feeling, for the same chastisement inflicted by her brother would not have*

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7 Paul de Man, "Autobiography as De- facement". *MLN* 94. (1979), 919-930.

8 Jean Jacques Rousseau, *The Confessions*, ed. Tom Griffith (London: Wordsworth Editions Limited, 1996).

seemed to me at all pleasant. (Rousseau 13)[9]

He unabashedly reveals similar embarrassing stories to demonstrate how his sexual life was shaped. It is in this sense Peter Abbs terms the text as a 'psychological autobiography'. He maintains that Rousseau navigated his way through the psychological self- examination about a century before the advent of psychoanalysis. Peter Abbs in his essay "The Full Revelation of the Self: Jean Jacques Rousseau and the Birth of Deep Autobiography" while commenting on Rousseau's obsessive inclination towards self analysis (after *The Confessions* he wrote other autobiographical works as well, *Rousseau*, *Judge of Jean- Jacques: Dialogues* and *The Reveries of a Solitary Walker*) writes:

> *The sheer bulk of Rousseau's reflective autobiographical writing is daunting, while the nature of the material, in its insight and its blindness, in its self-portrayal and its self-betrayal, in its moral courage and its strutting vanity, is as extraordinary as it is disorientating. Yet in spite of this- indeed, perhaps, because of it- Rousseau can be named, unambiguously, the first significant philosopher of deep personal autobiography, and one of its greatest, if most erratic, practitioners.*[10]

Since Rousseau tracks down the making of his character to his formative experiences, for this reason alone, he could be termed as a pioneer in the psychological examination of the human experience. Indeed, he anticipated Sigmund Freud a century before the latter's arrival on the stage. What enables us to look at Rousseau as a modern figure in the 18th century is that the self that he speaks of is far from heroic, it is ordinary or even what McFarland terms as 'discreditable'. The ushering in of the phenomenal shift from the objective to the subjective inevitably called for the privileging of the subject-hood. As Foucault puts it:

> *"... for a long time ordinary individuality- the everyday individuality of everybody- remained below the threshold of description. To be looked at, observed, described in detail... was privilege..." (191)*[11]

The Confessions therefore is as much his autobiography as it is an exemplary text that foregrounds or illustrates the modern idea of the self. There are two ways of looking at the word 'modern' here, one is the modern tendency of indulgence in excessive individualism, another is calling out the dialects of history and society in shaping the individual. Quite smoothly thus, Rousseau fits into both.

Moral implications of Rousseau's insistence on personal freedom

Rousseau's glorification of the nature achieves greater significance when

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9 Ibid

10 Peter Abbs, "The Full Revelation of the Self: Jean-Jacques Rousseau and the Birth of Deep Autobiography." *Philosophy Now*, 68, (2008): 7-8.

11 Michel Foucault. "What is an Author," in *Language, Counter- Memory, Practice: Selected Essays and Interviews*. ed. Donald F. Bouchard. trans. F. Bouchard and Sherry Simon (Oxford: Basil Blackwell Publisher, 1977), 13-33.

he speaks of it in terms of connecting to the idyllic innocence that one holds within, untainted by the society:

> *I can think of no worthier homage to the Divinity than the mute admiration which is aroused by the contemplation of His works, and does not find expression in outward acts. I can understand how it is that the inhabitants of the cities, who see nothing but walls, streets and crimes, have so little religious belief; but I cannot understand how those who live in the country, especially in solitude, can have none. (Rousseau 631)*[12]

Rousseau's mystical veneration of the sentimentalism and his conviction to stand for the underprivileged is why Schopenhauer in his book *On the Basis of Morality* (1840) refers to him as 'the greatest moralist of modern times'. For him courage, as he exemplified and conceived of, is the resistance in not succumbing to inhuman stratification of humans into haves and have-nots:

> *I know nothing which exercises a more powerful influence upon my heart than an act of courage, performed at an opportune moment, on behalf of the weak who are unjustly oppressed. (Rousseau 644)*[13]

Schopenhauer in the paradigm where compassion is considered to be the soul of morality writes about Rousseau:

> *He [Rousseau] is the profound judge of the human heart, who drew his wisdom not from books but from life, and intended his doctrine not for the professorial chair but for humanity. He is the enemy of all prejudice, the pupil of nature; he alone was endowed by nature with the gift of being able to moralise without being tedious, for he hit upon the truth and touched the heart. (Schopenhauer 183)*[14]

Rousseau's exploration of personal morality in *The Confessions* intersects with the writer's examination of societal norms and institutions that according to him lead to moral degradation in his book *The Social Contract*. His feelings and ideas put together reinforce the interplay between individual virtues and societal ethics. Obviously here the intent, is not to prove that both the works have been written by the same person, which anyhow is an established fact. But the purpose is to point out that his works that have apparently nothing in common seamlessly bind together personal grievances and political theories. The deeper analysis of his celebrated corpus alongside *The Confessions* demonstrate a consistent thread of valuing autonomy in personal realm in the face of alienation that will be inevitably caused by societal structures. Even though his understanding of democratic self is reflected through indulgent individualism in *The Confessions*, is regardless a strong plea for personal sovereignty as is his emphasis on a collective form of sovereignty in *The Social Contract*. The creed of empathy that he upholds in *The Confessions* is not without moral inference: demonstrating a sense of solidarity

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12 Jean Jacques Rousseau, *The Confessions*, ed. Tom Griffith (London: Wordsworth Editions Limited, 1996).

13 Ibid

14 Arthur, Schopenhauer,*The Basis of Morality* (London: G. Allen and Unwin, 1915).

with the larger community Rousseau recognizes that the well-being of the democratic self is interconnected with the shaping of the democratic society.

Relevance of sovereign individual to Jeremy Bentham's legal positivism

The tectonic shift in the legal jurisprudence occurred when the natural law school paved way for the positivist school with the advent of figures like Jeremy Bentham (1748-1832). Bentham, an English philosopher, jurist, and social reformer is a key figure in legal positivism. The natural school in law manifested from, the inherent and the higher moral principles, an apriori for the genesis and the interpretation of laws. On the contrary, for the legal positivists the quantifiable and the positive aspects of law must not be intertwined or gauged by the moral compass. In simpler words the latter school of thought suggests: what could be considered immoral, might very well be legal and vice-versa. In his work, *An Introduction to the Principles of Morals and Legislation* (1789) Jeremy Bentham vehemently argued for the separation of law and morality. Quite interestingly, he emphasized the scientific examination of legal phenomenon by application of not only a rational, but an empiricist approach to law. His insistence on consistency, clarity and objectivity has been instrumental in significantly influencing modern legal systems and shaping the discourse on, around and about law. Nonetheless, his reliance on objectivity, is to be understood in terms of the consequentialist approach to legal reasoning. What usually gets overlooked in his 'principle of utility' is his equal advocacy for the empiricist happiness- collective as well as individual. Therefore, the utilitarian calculus that he suggested was not terribly inconsiderate to pleasure or to pain. In fact as discussed about Rousseau, Bentham too is all for an exercise of individual sovereignty in making choices, but of course such choices that must not lose sight of the greater design, i.e., the framework of maximizing the overall well-being. Bentham writes:

> *Create all the happiness you are able to create; remove all the misery you are able to remove. Every day will allow you… will invite you to add something to the pleasure of others… or to diminish something of their pains.*[15]

As contemporaries, what puts Bentham alongside Rousseau in essence is that both of them did not succumb whole-hog to the overarching eighteenth century rationalist thought. Of course they differ significantly, since former maintains partial adherence to rationalist philosophy and the latter showcases none of it. Bentham's utilitarian approach is more systematic and inductive in its approach, which seeks to maximize overall happiness. However, with its empirical focus it converges with Rousseau's authenticity of subjective experiences such as pleasure or pain. As against Rousseau, Bentham for sure emphasized the notion of progress, and societal optimization, nevertheless his fundamental units on measuring societal welfare are the subjective aspects of human existence:

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15 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: T. Payne, 1789).

> *Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the other hand, the standard of right and wrong, on the other hand the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason in darkness instead of light.* [16]

My interest is to highlight how Rousseau was the first philosopher to privilege the ordinariness of any human person, hence ushering in the force and power in an ordinary person's interest. Rousseau's asseveration on inclusivity and representational role aligns with the individual's participation and responsibility in the political and legal sphere, an individual otherwise reduced to a mere subject:

> The law should be the expression of the general will.[17]

Bentham pitched in few decades later and particularly revolutionized legal thought with emphasis on laws based on utility, and most importantly transparency and codification of laws. Both philosophers challenged the conventional hierarchies of religious authority, absolute monarchies or aristocratic rules; and the passive role traditionally assigned to citizens with no subjective preferences or any prospect of individual happiness.

Conclusion

The Confessions by Rousseau's can be viewed as the eighteenth century version of St. Augustine's *Confessions* from the middle ages. However, the divergences in the two texts are too pronounced to be ignored. Being a propeller of romantic individualistic self, Rousseau's motive is to sketch a self-portrait and unlike the saint he does not engage in the unburdening of his sins through writing and thereby harmonizing himself with the Ultimate Order. Rousseau's dramatic appeal to the reader who he imagines would both establish the truth and render justice to him may come across as arbitrary. Nevertheless, Rousseau's view on man divested from metaphysical grounding as a sum total of psychological, social and political determiners lends gravity to the distinctiveness of the life lived and to the specificity of individual experience. His concept of 'self' anticipated phenomenology, which contrary to Descartian paradigm, seeks to understand the outside world by and through human consciousness, and not through rationality. He reiterates time and again that he wishes to portray a man true to his nature, that comes from the

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16 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: T. Payne, 1789).

17 Jean Jacques Rousseau, *The Social Contract* (England: Penguin Books, 2004).

experience of being in the world, not self in relation to divinity. Therefore, Rousseau's secularization of the self is a deliberate move, fed up as he was with all organized, institutionalized forms of faith and dogma. In spite of the truth in Hume's bundle theory of self which destroys the idea of a tangible self with constant emotions and memories, Rousseau proposes that there is still some underlying streak that holds the self together. Therefore, he is credited with forming an influential and controversial legacy of radical individualism which changed the mode of self-writing forever. For this reason, the value of reading his autobiography goes beyond his life story and achieves an archetypal stature, that pleads for equal credibility and democratization of all individual selves. The groundbreaking and revolutionary direction in privileging the discreditable subjecthood that helped shape the discourse around the role of the state with all emphasis on individual rights, the cornerstone idea for later day constitutional governance or democratic movements.

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Ethical Dimensions of Social Science Research in India: Upholding Integrity and Privacy Standards

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Abstract

The social sciences strive to gain an understanding of social reality, which is not only intricate but also in a constant state of flux. Social science frequently finds "social reality" or any given phenomenon "the reality" to be problematic in and of itself. Indeed, the construction and conceptualization of social phenomena are entirely contingent on the subjectivity of an observer, such as an analyst or social scientist, as well as her perspective (including value system), analytical talent, and rigor. Critique and refutation of empirically observed reality and analysis findings constitute the essence of social science investigation. Conjectures, rebuttals, and new conjectures from various aspects, dimensions, and perspectives scrutinize existing theories and available evidence. Hypotheses are generated to guide subsequent research.

Keywords: Social development, public policy, regulatory bodies, social issues, social theory.

Introduction

Social theory is evaluated according to falsifiability, refutability, and testability criteria. Therefore, constructing and deconstructing social reality constitutes an ongoing and perpetual endeavour. At any given time, the prioritization of research issues is determined by societal demands from various sectors and the researcher's conception of reality, shaped by her concern and perspective. Social science research produces vital knowledge. It is hard to clearly define research integrity or scientific integrity because professional behaviour standards can be interpreted differently (Steneck,

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2002)[1]. It is founded upon empirical evidence, utilizing critical rational reasoning. In addition to delving into dynamic social complexities, it also formulates a vision for the collective welfare that is not merely an ethereal ideal but rather grounded in the historical and cultural socio-economic milieu of the time. The conceptualization of vision must be founded upon philosophical principles that are imbued with moral and ethical values. Such a vision serves as an invaluable resource and guide for public policy. In addition to eliciting debate and contemplation regarding the present social situation, social science theorizing social reality articulates moral and ethical standards for social institutions (including economic and political ones), interpersonal relationships, and mutual obligations among individuals. When there is no legitimacy of a supreme authority, be it religious or celestial, the social sciences have the capacity and duty to initiate a dialogue regarding ethical principles, moral quandaries, and matters about the collective welfare in a democratic society constantly evolving. The Norwegian National Research Ethics Committees (2016) define *research ethics* as "a diverse set of values, standards, and institutional arrangements that contribute to shaping and regulating scientific activities" (p. 5). These include both individual and institutional aspects. Research ethics also means following a set of moral rules and professional standards in scientific work (Alper, 2008)[2], which the research institutions set (Steneck, 2006)[3]. Critical knowledge is essential for various aspects of society, including human liberation, conflict resolution, interpersonal relationship management, and the functioning of institutional structures. It is imperative for the ongoing development and modification of policies, regulations, and protocols within political and social establishments. An endeavour to establish a "new social order" is in vain without appreciating social complexities and dynamics. However, knowledge is not data or information. The foundation of the social sciences is philosophy. They are not simply factfinders. Aggregating or disaggregating information and compiling "facts" (i.e., what is to be observed, gathered, or highlighted) is entirely predicated on a theoretical lance. A researcher conceptualizes phenomena, constructs, and deconstructs categories, and articulates critical methodology to gather specific information from their theoretical perspective. Periodically, social science research shifts paradigms to discover methods for achieving the welfare of humanity. It provides insight into the subject matter, generates hypotheses for further research, and possesses a critical nature that prompts new inquiries. processes and possesses the capacity to anticipate future events. Modern democracy is deliberative in addition to being procedural and institutional. Public policy matters are subjects of contention and discourse

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1 Steneck N. H. (2006). Fostering integrity in research: Definitions, current knowledge, and future directions. Science and Engineering Ethics, 12, 53-74.

2 Alper, H. (2008). How can research integrity be best achieved? Materials Today, 11(4), 60.doi:10.1016/S1369-7021(08)70067-1

3 Steneck N. H. (2006). Fostering integrity in research: Definitions, current knowledge, and future directions. Science and Engineering Ethics, 12, 53-74.

within diverse political institutions and the broader public sphere, where civil society actors and the public engage concurrently. Research in the social sciences is crucial to such deliberation. It stimulates a "constructive" public dialogue on immediate and long-term public policy matters through theoretical frameworks, empirical investigations, and logical deductions. In their pursuit of serving the common good, the social sciences either reaffirm traditional cultural, moral, and ethical principles or establish new ones. These principles apply to interpersonal relationships, behaviour, institutional ethos, procedures, and operations. These discussions influence public policy. Public policy should not be reduced to the government and state's governance policy, although that is undeniably significant. Public policy pertains to the entirety of society, encompassing its cultural, social, economic, and ecological dimensions. In democratic societies, the state is a significant, but not the exclusive, agent that determines public policy. When we think of integrity, the first things that come to mind are sincerity, honesty, fairness, and duty (Parizeau, 1999)[4]. When we see this word used about scientific study, it can mean the morals the researchers hold and use while doing any research. Integrity in academic research means doing and reporting research in a way the scientific community accepts. Instead of telling us what research integrity is, these meanings give us ideas for making professional ethics codes everyone follows to stop research misconduct. The fact that research is now being sold has made scholars shift their attention from supporting research integrity to checking for misconduct. So, most literature about study integrity discusses avoiding wrongdoing (Khanyile et al., 2006)[5]. Integrity and misconduct are two ends of the same spectrum.

Public policy is also associated with establishing and adhering to public norms, social customs, cultural exchanges, and public morality, as well as the development, reformation, and, if necessary, delegitimization of socio-cultural institutions, both traditional and contemporary. Policies manifested through public morality and customs frequently operate independently of political authority. It ought to be so in an ideal arrangement. Furthermore, various facets of public policy undergo development in the public sphere across different periods. They may or may not enter the realm of state policymaking and are not required to do so. Diverse aspects of policy are generated and discussed in public spheres. Research in the social sciences acts as a catalyst for the process. Historiography demonstrates that a specific body of research or treatise may be disregarded, deemed "irreverent" by policymakers and civil society elites, or regarded as dissenting viewpoints in the mainstream discourse among social scientists. However, the identical

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4 Parizeau, M-H. (1999). Scientific integrity. In A. Montefiore & D. Vines (Eds.), Integrity in the public and private domains (pp.152-165). London, England: Routledge.

5 Khanyile, T., Duma, S., Fakude, L. P., Mbombo, N., Daniels, F., & Sabone, M. S. (2006). Research integrity and misconduct: A clarification of the concepts. Curationis, 40-45.

research may eventually become a beacon in guiding public policy for the greater benefit. Although these works may present and highlight unsettling concerns about the ruling classes or the prevailing ideologies of the time, they may be useful in addressing the challenge of resolving societal tensions and conflicts. Therefore, social science research in a democratic society must go beyond serving the interests of state-centric public policy. The autonomy of social scientists in devising and conceptualizing research studies, interpreting evidence, and forming hypotheses is critical not only for the advancement of the social sciences but also for the betterment of society. VK R. V. Rao has cautioned accordingly: "I would like to emphasize once more that although relevance is crucial in social science research, it should not be a limiting factor or simply comply with policymakers' desires." "Each researcher is entitled to establish the contextual framework that is significant in their research endeavours." Nevertheless, this does not imply that a researcher is exempt from accountability to any entity and conducts research purely for personal gratification or inclination. Because of this, a study must be done legally. Everyone in academia seems to favor "responsible conduct of research" (Macrina, 2014[6]; Shamoo & Resnik, 2015)[7]. In social science, it is essential for research supported by public funds to have thoroughly argued theoretical foundations and methodological rigor and be subject to critical examination by fellow scholars. Before selecting a research, topic and developing an outline of the data to be gathered and the inquiries to be answered, a scientist must inquire about the question of relevance from both comprehension and policy formulation perspectives. Rao further emphasized, "I do not doubt that social science research will have a significantly more lasting and effective influence if he takes this action." "(Nadkarni and Deshpande 2011:32 cite this source)." Amidst the rapid advancement of technology, policymakers generally agree that the social sciences and liberal arts are the foundation of a nation's identity. They provide life philosophy for the nation, the community, and the individual. The social sciences produce philosophical and theoretical knowledge that is fundamental. For a society to pursue social and economic justice, democracy, and the well-being of all its members, it is necessary to have a deeper comprehension of the historical context of complex social, cultural, economic, and political processes. Social science research (SSR) provides all disciplines with analytical instruments. Even though the state administers public funds, social scientists are not solely liable to the state for their research (including its subject matter, interpretation, and findings). Except for the fiscal procedure, they are answerable to their peers in the social sciences and the public. about human knowledge. It reveals the intricacies of social processes, provides evidence and evaluations of what works and does not work in each circumstance, and thus can enhance public policy, public services, and the

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6 Macrina, F. L. (2014). Scientific integrity: Text and cases in responsible conduct of research (4th ed.). Washington, DC: ASM Press.

7 Shamoo, A. E., & Resnik, D. B. (2015). Responsible conduct of research. Oxford, England: Oxford University Press.

caliber of public discourse. It scrutinizes decisions regarding policy, administration of organizations, and professional conduct. SSR exposes and dismantles pervasive prejudices and stereotypes among social groups and the elite. Early warnings of potential hazards and problems that society may face can be provided by rigorous research. The early detection of threats to democracy is made possible through investigating and analyzing public opinion and cultural trends. It enables policymakers and other actors to self-reflect, develop policies that promote the common good while minimizing exclusion, and devise corrective actions. Doing research is one of many things that research practitioners do, in any case. They also must make an effect if they have not spread their findings. Moreover, Once the study is done, it is the researcher's moral duty to get it published and shared (Scanes, 2007)[8].

Challenges in social science study

India's social and economic landscape is diverse and changing constantly. As a result, many new issues are coming up in social science study and public policy. These worries show how society, business, and government change, bringing problems and chances.

- **Diversity and welcoming everyone:** Differences in Caste and Gender: India still has problems with discrimination based on caste and inequality between men and women, even though there has been improvement. These differences need to be investigated through research that leads to laws that encourage inclusion.
- **Environmental Sustainability:** Climate Change and Rapid Urbanisation Climate change and rapid urbanization are two significant ecological risks. Social science studies should focus on sustainable development policies and strategies to lessen the effects on weak communities.
- **Technology and Social Inequality:** The Digital Divide and Technological Disruption Concerns about the digital gap have been raised, which means that some groups don't have as much access to technology as others. Researchers should investigate the social and economic effects of new technologies and use their findings to help make laws that ensure everyone has equal access.
- **Problems in healthcare:** getting ready for a pandemic: India's healthcare system has some holes that the COVID-19 outbreak has shown. To make people more resilient, more research needs to be done on public health, healthcare services, and being ready for pandemics.
- **Education and Getting Better at Skills:** Quality of Education: Even though education has come a long way, there are still worries about the standard and availability of schools. Research can help shape policies

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8 Scanes, C. G. (2007). Ethics of publication: Is publication an obligation for researchers [Editorial]? Poultry Science, 86(10), 2051-2052. doi:10.1093/ps/86.10.2051

that improve schooling and close the gap between cities and rural areas.

- **Migration and livelihoods:** People moving from the country to the city are changing the population and economy. Migration's effects on jobs, the problems of urbanization, and the need for balanced regional growth should all be investigated more deeply.
- **Governance and Corruption:** Accountability and openness: Strengthening governance structures and encouraging openness is vital. Social science studies can help by looking at how well policies work and suggesting changes to make people more accountable.
- **Misinformation and Polarization on social media:** As social media use has grown; people are worried about how it can spread false information and hurt public opinion. Researchers can investigate ways to reduce harmful effects and encourage responsible information sharing.
- **Dealing with crises and being strong:** Natural disasters and social resilience: India is prone to natural disasters. Community resilience, successful disaster management strategies, and policies that make it easier to handle crises are all things that can be studied.

Importance of SSR after Independence

Since attaining independence, the Indian government has acknowledged the importance of SSR. However, the social sciences were framed within a colonial "modern" or "Western science" paradigm during its infancy. Several university professors of social sciences received their degrees from Oxford, Cambridge, and Colombia. They conducted their analysis using uncritically descriptive and analytical Western categories and presupposed that science was "value neutral" P.C. Joshi astutely notes, "However, developing nations have not adopted the Renaissance ideal of the social scientist, who was a holistic individual merging theory and practice and striving for a unified understanding of the human condition and its challenges." They did not inherit the notion of a social scientist but rather that of a social critic who integrated investigation into the human condition with social activism to facilitate it. The prevailing understanding of the social scientist in 1995 was that of a technician or specialist devoid of personal biases (1995). Researchers should also know what happens when they do lousy research: they lose their authority, funding, and, most importantly, the public's trust in their work (Parry, 2014)[9].

At the outset, the Indian government also diminished SSR as a data collection endeavour, primarily to facilitate premeditated economic planning predicated on Western models and expertise. Institutes such as the Indian Statistical Institute and the Institute of Economic Growth were established after the mid-1950s to aid the Planning Commission. As the state recognized the

[9] Parry, J. (2014). Maintaining good research practice: Research integrity in the UK[Editorial]. Maturitas, 79, 239-240.doi: 10.1016/j.maturitas.2014.08.010

cultural pluralism and diversity of Indian society over time, it launched the Anthropological Survey of India. Subsequently, in 1965, the Planning Commission appointed VKR V. Rao to preside over a committee charged with social science research. The committee acknowledged the critical nature of comprehending social phenomena and human behaviour, as well as the determinants of social processes, to develop policies that foster social transformation and establish a progressive society capable of incorporating and applying scientific and technological advancements for the betterment of humanity (Anant 2011: 58). This objective was accomplished through the collaboration of VKRV Rao, the education minister at the time, a distinguished economist, and the foundation's leader. Its primary aim has been to advance social science research and facilitate its application. It will endeavour to identify and cultivate research talent and assist research endeavours.

Moreover, initiatives prioritizing quality establish vital infrastructure such as clearinghouse facilities and foster the growth of professional organizations for social scientists. It is possible to underscore that the primary aim is to advance scholarly inquiry into social reality to benefit all individuals. It should be noted, and appropriately so, that there was no endeavour to advance research solely for state policy or planning commission policy formulation.

Role of the Indian Council of Social Science Research (ICSSR) in Research Activities

The establishment of the Indian Council of Social Science Research (ICSSR) has significantly bolstered social science research in India. Amid shifting empirical social reality, the second generation of social scientists has emerged, oscillating between the earlier tradition of value neutrality and derived concepts and categories. Few individuals have initiated inquiry into the acquired knowledge. Furthermore, as higher education has become more prevalent across all regions and social classes, many social science instructors have entered the profession to instruct at an expanding array of inadequately outfitted colleges nationwide. Like most people, they aspire to the "social scientist" status; however, their education is only partially grounded in theory and methodology. Indeed, it is worth noting that the post-graduate curricula in several social science fields originated during the colonial era and were adapted from Western universities. Their societal outlook was firmly rooted in their upbringing and a vision emanating from higher social classes. It lacked empirical research and a foundation in ground-level social actuality; it promoted assertions from below. Just beginning empirical research was restricted to a handful of universities. Therefore, except for these metropolitan universities, the students could not acquire the necessary skills to conduct rigorous research that necessitates scrutinizing the provided analysis framework. Amidst this socio-educational context, the ICSSR commenced its operations. Over the past fifty years, the council has attained a significant global standing in social science research. Unexplored areas of research have emerged, presenting novel inquiries. Gender studies and other subaltern

studies have begun to emerge. With the assistance of state governments, the council has advocated for research institutes in various regions of India, considering the country's vastness and diversity. Currently, the ICSSR provides consistent financial assistance to 29 research institutes. Nevertheless, the council has encountered difficulties in meeting the demands and obstacles associated with social science research. This is partly due to the limited availability of internal funds and the scarcity of skilled researchers in social science at universities and research institutes. They should be aware of the recent trend of academic papers being taken down from respected journals, which could mean a problem with how scholarly papers are published (Dylla, 2014)[10].

Furthermore, it has been observed that most state governments have occasionally neglected to fulfil their obligation of allocating at least fifty percent of the grant to institutes within their respective states. As they strive for greater economic growth and to be the nation's leader in economic "development," they invest less in the social sciences and more in higher education to equip students with the technical expertise required by industries and the market. Entrepreneurs and private investors in education are only concerned with business and technical aspects. Social science is not a preferred academic discipline for comparatively well-equipped students. management establishments. Social science education and research have been neglected and progressively dismantled or maintained ad hoc in some states. Conversely, the quantity of higher education has expanded unprecedentedly over the past half-century. Since 1950, the number of students has increased from one lakh to 116.12 lakhs in 2008, indicating that individuals from all segments of society are increasingly motivated to pursue higher education to better their life prospects. In response to the surge in demand, the quantity of universities and colleges has multiplied significantly over the years, from 25 and 700 in 1950 to 431 and 20,677 in 2008, respectively (UGC, 2010). The figure will increase in tandem with economic expansion. However, the standard of education that fosters critical thinking has not advanced. Indeed, when assessed using any metric, it has drastically decreased in most fields and even more so in the social sciences. Approximately 50% of faculty positions at higher education institutions are unoccupied. In response to the increase in students, ad hoc teaching faculty are employed, which further strains the existing staff and prevents them from having sufficient time to read and reflect. Given the circumstances, they lack the leisure and ability to comprehend available research findings in their respective fields, let alone conduct research. More and more retractions happen because authors do questionable things like lying, copying, publishing the same work more than once, "salami publishing," and claiming fake research

[10] Dylla, F. (2014, May 19). Scientific integrity. Retrieved from https://hub.wiley.com/community/exchanges/discover/blog/2014/05/18/scientific integrity?referrer=exchanges.

results (Steen et al., 2013)[11]. These make authors pay attention and think about their work, like whether they are honest while doing this study.

The social science departments of many American universities are severely neglected. Universities provide social science research institutes with trained scientists. However, due to human and material resources limitations, universities cannot offer students rigorous research training. Therefore, a shortage of skilled human labour has resulted. Furthermore, the SSR institutes, which are only partially capable of training a limited number of researchers for Ph.D. programs, are staff-constrained due to financial constraints that prevent them from recruiting sufficient faculty or filling vacant positions. State administrations must generate funds to ensure survival when they fail to fulfil their obligations. They are responsible for raising 56% of the resources themselves. They procure funds to address their deficit through sponsored initiatives. Furthermore, most institutes are unable to occupy the available positions. A critical number of the research personnel is absent. Undoubtedly, this has an impact on the caliber of research. A researcher frequently lacks the opportunity to contemplate their findings and conclusions. The sponsored research exerts a greater influence on the research agenda than the theoretical concerns of the investigators. There are instances where researchers are prohibited from publishing their findings as scholarly articles. Private funders exhibit a transient perspective, declining to provide financial backing for research about socio-political dynamics, impoverished communities, and timely societal concerns that generate controversy. One of the primary concerns social sciences in India must address immediately is enhancing teaching quality in higher education. A VAIDYANATHAN, "Some Emerging Issues in Social Science Research in India," EPW, January 13, 2001. South Asia ranks near the bottom of the World Social Science Report (2010) regarding social science research. The industrialized countries' hegemony persists in the realm of knowledge production. Additionally, refer to Shyam Singh's "World Social Science Report: Where Are South Asia and India? "January 1, 2011, EPW." It is intricately linked, on the one hand, to the standard of secondary education and, on the other, to the availability of stable employment prospects in the market. One would anticipate that this would result in the availability of talent for social science research. However, it is worth noting that substantial research contributions could extend beyond the policy formulation process and significantly enhance the quality of instruction across all academic disciplines. Concurrently, advancing research and enhancing teaching quality is imperative in major metropolitan areas and taluka/bloc town universities and colleges. The social sciences offer a comprehensive perspective on management, technology (including information technology), the arts and humanities, and the physical sciences. They provide "technical" students, including management students, with a societal perspective. An immediate and significant challenge for the social sciences is to examine the current state of

[11] Steen, R. G., Casadevall, A., Fang, F. C. (2013). Why has the number of scientific retractions increased? PLoSONE, 8(7), e68397. doi:10.1371/journal.pone.0068397

social science education and research and place them in a regional and historical context. To accomplish this goal, it is necessary to devise approaches that enhance the competence of young scholars in the field. It will enable them to bring important concerns to the attention of society and design studies that contribute to the development of social theories rooted in our environment. Furthermore, it will satisfy the growing expectations of those from disadvantaged backgrounds excluded or neglected in social research.

The world's socio-cultural, economic, and political landscape underwent substantial transformations at the onset of the 20th century. A global system encompassing economic and socio-cultural life has emerged and is beset by numerous contradictions. A prevalent global economic system, capitalism imposes obligations on all nations regarding commodity exchange, production, and investment. Notwithstanding the expansion and dominance of global financial institutions and multinational corporations, resistance is mounting from the regional capitalist class on the one hand and from below in the form of demonstrations against the system. Local communities oppose Western hegemony and global cultural forces on an international scale. Tensions are pervasive and present themselves in diverse manifestations. The pursuit of alternative systems is becoming increasingly robust. On the political front, democratic systems are in place in many nations. The number of nations governed by authoritarian regimes diminishes with time. However, democratic systems in the most developed and emerging nations are in turmoil. There is something ubiquitous, both in democratic and authoritarian nations. Although technical and management institutions, including social work, offer social science courses, these disciplines are considered ancillary due to their status as "soft" skills or for educating students about society rather than fostering an understanding of society and relating technical expertise to social contexts. Opposition arises from below towards the political classes tasked with governing and representing the people. The margin for freedom and equality is diminishing. Diverse theories of social science (economic, democratic, social, and other theories formulated from various vantage points) that were developed in the 20th century have at best, a restricted capacity for explanation. They require re-examination and scrutiny of their underlying assumptions and hypotheses. Both domestic and international social scientists are contending with this rapidly evolving empirical reality. Unquestionably, the current level of global economic expansion could provide for the fundamental necessities of all people: food, water, clothing, shelter, primary health care, and education if it were prudently managed. However, the system encounters numerous contradictions and obstacles. As a result of accelerated economic expansion, environmental degradation is escalating to an alarming degree. Around forty percent of land is degraded globally due to soil erosion, diminished fertility, and overgrazing. Land productivity is deteriorating, with yield losses of up to fifty percent anticipated under the most direct circumstances. Rapid depletion of the groundwater table and forest cover is occurring in numerous regions across the globe. Annually, over 150 million metric tonnes of pollutants are discharged into the atmosphere, over 41 million metric tonnes of hazardous

waste are generated, and 15 million gallons of pollutants are disposed of in the nation's waterways. This situation constitutes a threat to public health. Indeed, it threatens the very existence of human civilization. Cities and rural regions are experiencing a steep escalation in inequality internationally and domestically. Acknowledging the escalating disparity, with increasing ambitions and the pursuit of dignity and equality, exacerbates the preexisting social unrest. Policymakers and social scientists face the formidable challenge of resolving this and numerous other inconsistencies within the system and governance. Despite a decline in the percentage of individuals living below the poverty line (defined as two dollars per day) in India and other countries, most of the population in developed nations continues to decline in quality of life. A significant proportion of the 1.4 billion wage laborers worldwide are employed precariously and part-time. An estimated 93% of the labour force in India is employed in the informal or unorganized sector. In contrast to the earlier modernist paradigm, this system of working conditions is legitimized and normatively justified. The laborers in this industry receive inadequate compensation that fails to provide essential "benefits" for their social, psychological, and cultural well-being. A perpetual sense of insecurity accompanies them. They are culturally and socially diverse and compete for survival. The most vulnerable are traditional community life and the ethos of cooperation and trust. When alternative social structures and value systems are absent, individuals are abandoned in the wilderness and forced to rely on whatever resources are available for survival. In the political and socio-economic spheres, gender, caste, religion, and region-based discrimination persist, whether overtly or covertly. Social psychologists and sociologists face a formidable challenge in comprehending and theorizing the dynamic social milieu. Considering secular legal institutions, industrialization, urbanization, and rapid economic growth, a significant portion of historically disadvantaged communities, including tribals and Dalits, continue to face deprivation. as well as numerous others who are socioeconomically vulnerable, persist in their state of deprivation. Ongoing socio-economic research about the opportunities and perceptions of these groups regarding the changes is crucial for enhancing their quality of life. including improvements in their health, education, and means of subsistence, as well as their life prospects. There is an immediate need for macro- and micro-anthropological studies that capture continuity and change in the subject's objective situation and subjective perception. In addition to their policy-oriented utility, they contribute significantly to the theoretical comprehension of social processes within Indian society. Present-day modern society is undergoing a period of swift transformation. The traditional community of a village has evolved. The caste system, kinship, and family are also extant. Novel intricates, interconnected Jati configurations and intricate family and kinship networks have surfaced. As for many others, the 'new' formations may be a means of coping with a shrinking space for survival, social security, or an identity crisis, while for some, they are an attempt to assert and obtain their share of power and dominance. In addition to capturing and conceptualizing the new formations (whether they are "new" and in what

manner is another question that warrants investigation), examining their formation processes, nature, and function in the social, economic, and political spheres is necessary. Likewise, transformations have been observed in religious belief systems and conduct, institutions and hierarchical structures, and relationships within and between religions. The rituals and the significance of religion in one's personal and spiritual life, as well as in community functioning, have both evolved. Concurrent with these developments have been religious institutions' organizational structures and missions. Despite an increase in the performance and participation of rituals, both traditional and modern, that reflect the religiosity of cross-sections of society, moral values such as charity, compassion, harmony, austerity, and tolerance appear to have diminished. Conventional principles such as interpersonal trust, reciprocal assistance, and regard for the welfare of others have been dismantled. It is time to conduct exhaustive research on the evolving characteristics of social and cultural institutions, including which changes have occurred and which have not, and how these institutions operate in various spheres in the twenty-first century. As a result of increased education, communication, economic growth, and urbanization, the middle class has expanded at the phenomenon scale in terms of occupation, income, and way of life. Conventionally, upper-Dwij social divisions no longer constitute the new middle class. The social composition of the area renders it cosmopolitan. However, its social consciousness suggests that it lacks cosmopolitanism. It is socially fragmented. Diverse social groups are engaged in a struggle for economic and political influence. In terms of consumption, investment, way of life, and value system, it is also economically stratified, with the lowest situated near the poorest and the highest situated near the richest. Intersecting these two socio-economic classes is a vast middle-income class that is well-educated and exposed to the media yet perpetually on the edge of survival and striving for advancement. It is dynamic in expressing its opinion on cultural and political matters, frequently oscillating between them. traditional and contemporary values. Conversely, the lower middle class is perilously close to falling into the impoverished strata, or even worse, comprises poor individuals who are toiling for survival but present themselves as middle class by their value system and consumption pattern. This social class serves as an exemplar for marginalized communities. The middle class as a collective is restless, desiring to benefit from the advantages of a globalizing economy, yet envious of the upper echelons and plagued by continuous social and economic insecurity. They hold a negative view of the political elite and the system. This course influences the public's viewpoint. It is impossible to comprehend the current social reality without comprehending the complexities of the emerging middle class and its aspirations. It substantially impacts the operation of the political and economic systems. Due to the accelerated social transformation and fierce competition, the urban upper middle classes have developed individualism, which frequently appears as obscene self-centeredness. Simultaneously, this individualistic inclination seems to be frequently subordinated to or entangled with the "collectivism" of jati, family, religion, and region in the public sphere.

Extensive socio-psychological research conducted across various regions of the country to examine the evolving characteristics of the middle class and how their value system influences public culture would be immensely beneficial in comprehending the shifting social dynamics and tensions that arise within urban India. Traditional and recently established political, cultural, and socio-economic institutions (post-independence alike) fail to fulfil their intended purpose and preserve the ideals for which they were established. There is a significant crisis concerning public morality, professional ethics, and moral values in interpersonal relationships. There is a moral crisis in society that affects every sector of society. It is necessary to address potential causes for this situation, as well as the expression of alternative moral values and their observance for the survival and well-being of the collective. Invoking ethical principles, the social sciences have historically offered a vision for social transformation in formulating social philosophy. They are required to analyze and speculate on the current situation. India has pursued social transformation along a distinct political trajectory compared to other postcolonial nations and Communist China. It is a means by which social transformation can be achieved via a democratic system. After a brief interruption, the system has persisted for more than six decades. "With an abundant faith in the common man (and woman) and the ultimate success of democratic rule, and in the full conviction that the introduction of democratic government based on adult suffrage will bring enlightenment and advance the well-being of all," the framers of the constitution stated in their adoption of the adult franchise. Social revolution is what the constitution's "spirit" intends to accomplish. Voting power was anticipated to empower individuals to advocate for freedom and equality. The democratic system has democratized society over the past six decades, granting agency to regions, communities, and genders that have been historically marginalized. The populace conveys their anticipations and demands not solely through casting ballots but also frequently through coordinated activities occurring in the interim periods between elections. Lower-strategy participation in elections has increased. with time. The electorate uses the ballot to convey their approval and disapproval of the governing parties and their respective leaders. Over the past thirty years, there has been a notable shift in public preference towards alternative political parties. Regional organizations have arisen as a means of expressing the nation's diversity. Coalition politics appear to have become an enduring force that sows discord in governance and politics. Regional ambitions have contributed to the expansion of the number of federal states. There is frequently tension in the relationship between the federal government and the provinces. Decentralization under democratic principles has increased citizen engagement in local governance. The traditional feudal power structure has been dismantled in numerous locations. Partisans hailing from historically disadvantaged communities share political influence and positions. Even though this has altered the nature of dominance at the grassroots level, the deprivation of many has not been significantly altered. Such evident

contradictions require investigation. The Indian constitution contains several provisions designed to safeguard and enhance cultural diversity.

Conclusion

Similarly, institutional arrangements are established, and strategies to safeguard and promote the interests of economically and socially disadvantaged communities have developed over time. As and when the demands from below increase, new social transformation strategies are developed. Design and program development have often occurred in response to natural and imagined pressures and political agencies. Social engineering has been successful in specific contexts. Still, it has yet to be successful in others due to insufficient or non-existent data concerning the dynamics and changes in social reality at the grassroots level. Commissions are frequently established after policy decisions or in response to increasing demands from below to gain insight into social existence. Continual, rigorous, systemic micro- and macro-studies by social science institutions are critical to prevent the formation of contradictory policies and programs and the accumulation of ad hoc data. Their scholarly research can offer valuable insights that can inform policy formulation. Such analysis can provide policymakers with crucial alternative options for achieving the goal of social transformation, thereby serving as a guide. A constant mismatch exists between the governing class's performance and the populace's expectations. The operational and structural integrity of political institutions has been compromised. These establishments need to be more capable of meeting the emerging challenges. Their reputation and credibility have frequently been called into doubt. Often, political leaders have disregarded moral and ethical standards of public life for personal or party-political power or due to political necessity. Several violations of democratic principles firmly established in the constitutions have occurred, as frequently articulated during the deliberations in the Constituent Assembly. Democracy appears to have been reduced to a marketplace where power struggles are waged.

Furthermore, it has occasionally deteriorated into a pretense designed to serve financially influential lobbies. The stage of democratic social transformation has come to an impasse. Innovative strategies for advancing democratization that satisfy the people's desires must be sought. Every political establishment—examples include the Sachar committee and the recent caste census. The electoral system, political parties, the judiciary, bureaucracy, and state and parliamentary bodies all require reforms to their structures, rules, and procedures, as well as their accountability and operation. Research on these institutions is minimal. They must be executed with an emphasis on their dynamics and processes. Critical analysis is necessary on political institutions and decision-making processes at all levels, the influence and function of diverse forces in shaping public policy, and the evolving nature of civil society in the public sphere. These are only a few of the numerous emergent issues that the social sciences must address.

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Artificial Intelligence and its Legal Implications on Advanced Technology

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Abstract

The rapid development and deployment of artificial intelligence (AI) systems is outpacing the evolution of laws and regulations to govern these technologies. As AI is incorporated into high-stakes domains like healthcare, finance, criminal justice and transportation, complex legal questions arise surrounding accountability, liability, privacy and ethics. This paper provides an overview of key legal issues posed by AI and proposes potential policy and governance mechanisms to address emerging challenges. Analysis of real-world cases reveals gaps between AI's societal impacts . A measured, proactive approach balancing innovation and responsible oversight is needed to maximize benefits while minimizing harms of thinking machines.

Key Words: Artificial, Intelligence, Computer, Risks, Harm, Machine Learning

Introduction

Recent advances in artificial intelligence (AI) and machine learning have yielded systems with unprecedented and rapidly advancing capabilities. AI is being applied across sectors including finance, justice, social services, and autonomous vehicles.[1] While the benefits are tremendous, AI also introduces new hazards and ethical quandaries that are often not well-addressed by current laws and regulations. Accidents, biases, privacy breaches and accountability gaps are increasingly arising from real-world deployment.[2] Lawmakers, regulators and scholars have called for improved oversight and governance to mitigate emerging issues as AI becomes more deeply embedded and autonomous.[3]

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Background on AI

The term artificial intelligence refers broadly to computing capabilities that would normally require human cognition and perception.[4]AI systems exhibit skills such as learning patterns from data, understanding language, planning, problem solving, and adapting behaviors. Contemporary AI relies heavily on advanced machine learning algorithms trained on large datasets.[5] AI enables technologies including facial recognition, autonomous vehicles, predictive analytics, resume screening, algorithmic trading, and smart personal assistants like Siri or Alexa.

While today's systems operate within limited contexts, continued progress is expected in developing more general, adaptable artificial intelligence.[6] Some theorists predict AI could eventually exceed human intellectual capacity across domains, with transformative or even dangerous consequences, although this remains speculative.[7] Current systems raise more practical near-term legal and ethical dilemmas warranting attention, as explored in this paper.

Emerging Legal Issues and Tensions

AI introduces uncertainties across various legal domains including liability rules, privacy protections, intellectual property, and constitutional rights. Key areas of concern include:

Accountability gaps: Who bears responsibility when AI systems make harmful errors or decisions?[8] Under product liability laws, for example, autonomous technology does not fit established paradigms of assigning blame between designers and users.[9]

Bias and discrimination: AI can perpetuate or amplify societal biases if trained on flawed datasets. This raises civil rights issues of legal responsibility.[10]

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Privacy erosion: AI relies heavily on collecting and analyzing user data, enabling increased surveillance. Protections have not kept pace.[11]

Transparency and opacity concerns: The complexity of many AI systems makes it difficult to understand their reasoning and decisions. Lack of transparency prevents auditing algorithms.[12]

Emerging behaviors: As AI becomes more autonomous, unintended behaviors or consequences may emerge. This complicates regulation.[13]

Legal personhood: At advanced levels, AI may approach human cognition. Granting legal personhood status to AI could enable rights as well as responsibilities.[14]

Real-world cases are increasingly highlighting these tensions at the intersection of law and technology that require judicious governance.

Analysis of Case Examples and Policy Needs

Review of real-world incidents substantiates gaps between emerging issues with AI systems and established legal frameworks. For example:

Litigation and accidents involving autonomous vehicles have revealed inadequacies in liability laws to assign responsibility between manufacturers and operators.[15] Courts have struggled to apply outdated negligence standards.[16]

Government use of AI for allocating resources and making predictions has raised due process issues when citizens cannot contest unfair or biased algorithmic decisions that impact them.[17]

Discriminatory outcomes from AI hiring tools, credit determination algorithms and predictive policing systems have highlighted difficulties addressing harmful biases under existing anti-discrimination laws.[18]

Deploying facial recognition for surveillance absent transparency, Auditability or consent procedures has triggered privacy disputes and proposed bans.[19]

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These cases reveal policy gaps, including the need for updated liability rules, transparency requirements proportional to risk, remedies for algorithmic harms, oversight bodies, and adaptable regulatory models suitable for evolving technologies.[20] Reasonable governance can help address legal gray areas while allowing innovation.

Policy and Governance Recommendations

Scholars have proposed various approaches to governing AI in order to maximize societal benefits while minimizing unintended consequences. Promising policy directions include:

New liability rules assigning responsibility across technology supply chains when AI causes harm, proportional to risk.[21]

Safety certification processes for higher-risk applications like autonomous vehicles and medical AI.[22]

Transparency, auditability and explainability mandates for public and private sector high-risk AI systems.[23]

Regulatory and ethics bodies to assess AI impacts, advance best practices, and inform policies across sectors.[24]

Proactive regulations specific to high-risk domains like finance, healthcare transportation and public services.[25]

Reforms enabling impacted citizens to challenge problematic algorithmic decisions affecting them.[26]

International governance frameworks to align principles and technical standards globally across borders.[27]

Investing in research and education on AI safety, accountability, ethics and social impacts.[28]

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Conclusion

The rapid growth of artificial intelligence creates pressing needs to proactively address emerging legal uncertainties and risks. Analyzing real-world cases substantiates gaps between current laws and rising challenges like liability, bias, and opacity. Reasonable governance mechanisms tailored to AI can enable society to harness benefits of these promising technologies while protecting human values. With judicious policies and oversight, the law can effectively navigate the complex landscape of thinking machines.