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KASHMIR JOURNAL OF LEGAL STUDIES

Editorial

In the contemporary and ever-evolving domain of jurisprudence, this volume endeavors to traverse the shifting contours of legal thought that define and influence our societies. The contributions herein reflect a broad spectrum of pressing legal issues, offering scholarly insights that not only interrogate established doctrines but also advocate for forward-thinking reforms.

As the legal landscape is increasingly shaped by rapid technological advancements, the need to examine the convergence of law and emerging technologies has never been more critical. In this regard, the *Kashmir Journal of Legal Studies* continues to make a meaningful contribution to legal scholarship and pedagogy, serving as a platform for rigorous academic inquiry and critical engagement.

We are pleased to note that the Journal has been indexed by the Indian Citation Index (ICI), a recognition that underscores the quality and relevance of its academic content. We gratefully acknowledge that ICI has authorized the use of its official logo in this publication—a mark of distinction we are honored to include.

At a time when foundational legal principles are subject to renewed scrutiny and reinterpretation, this journal aspires to be more than a repository of research; it seeks to foster thoughtful discourse and intellectual exploration. We extend our sincere appreciation to the contributing authors for their scholarly rigor, to the peer reviewers for their meticulous evaluations, and to the editorial team for their unwavering dedication in curating this volume.

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CONTENTS

Constitutional and Judicial Interpretation of Philosophy of Justice under the Indian Constitution: An Analysis

Dr. Bindu Sangra*

Abstract

According to the Indian Constitution, justice is the cornerstone of governance and represents the country's socioeconomic, political, and legal goals. Justice is frequently viewed as the unwavering desire to give everyone what they are entitled to. From a legal jurisprudential perspective, it is possibly very elusive in this regard. However, the constant desire to achieve the ideal of a just world and, more significantly, the conflicting demands for justice made by various groups of people who share the same legal, political, social, and territorial space make the discussion of justice especially social, economic, and political justice to be highly stimulating. Although a lot has been written and discussed about justice, it may not have been from the standpoint of temporal justice because India is thought to be a stable political-legal culture in many ways. A strong commitment to justice as a guiding concept of governance is reflected in the Indian Constitution. This ideology has been broadened and interpreted by court rulings and is embodied in a number of constitutional clauses. The Indian Constitution has a complex definition of justice that includes social, political, and economic aspects. This study explores the judicial interpretations and constitutional framework that influence India's conception of justice.

Key words: Constitution, Economic justice, Political justice, social justice

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I. Introduction

The philosophy of justice under the Indian Constitution is a dynamic and evolving concept that lies at the heart of the nation's legal framework. It is enshrined in the Constitution's preamble, which emphasizes the core values of justice, liberty, equality, and fraternity. The judiciary plays a pivotal role in interpreting these principles, ensuring that the Constitution adapts to the changing needs and values of society while preserving its fundamental principles. This delicate balance between legal continuity and societal transformation underscores the ongoing dialogue between constitutional text and judicial interpretation. Throughout India's legal history, landmark cases have shaped the understanding of justice, demonstrating how constitutional amendments and judicial decisions can either fortify or challenge the principles of justice enshrined in the Constitution. The relationship between judicial activism and restraint, particularly in the context of constitutional amendments and the doctrine of basic structure, further complicates this evolving narrative. The Indian judiciary, through its interpretative role, has not only protected individual rights but also contributed to redefining justice in the face of social, political, and cultural changes. This analysis aims to explore the complexities surrounding the constitutional and judicial interpretation of justice within the Indian legal framework. By examining significant case law, constitutional amendments, and judicial philosophies, it seeks to shed light on how the Indian judiciary has shaped and continues to shape the pursuit of justice, equality, and human dignity in contemporary India. Additionally, it will consider the impact of comparative constitutional perspectives in refining India's understanding of justice and its broader implications in a democratic society.

II. The Philosophy of Justice in the Indian Constitution

The Indian Constitution, adopted in 1950, acts as the foundation of democracy and the legal framework of India. It is significant to interpret justice in the country, providing a structured approach to guarantee rights, responsibilities, and the status of law. The Constitution embodies

a profound commitment to justice, equality and freedom, which are key philosophical ideas that guide its interpretation and application. As noted by Thuenvengadam, the Constitution reflects a global framework that faces the social, economic and political dimensions of justice, with its preambles that emphasize the objective of social justice together with political and economic justice.[1]

One of the key principles sanctioned by the Indian Constitution is the concept of fundamental rights. Articles 12 to 35 of the Constitution guarantee specific rights such as the right to equality, the right to freedom, the right against exploitation and the right to constitutional remedies. These rights form the foundation of justice in the Indian socio-legal context. For example, "Article 14 guarantees equality before the law, prohibiting discrimination for reasons of religion, race, caste, sex or place of birth." This principle is essential to ensure that all individuals have the same access to justice and legal protection, which is a crucial element of a fair judicial system. The judiciary, in particular the Supreme Court of India, plays a fundamental role in the interpretation of these principles. It has been stressed that the responsibility of the judiciary extends beyond the simple application of the law; thus, implying the active interpretation of the constitutional provisions to safeguard justice.[2] A brief reference to the catena of cases illustrate this role vividly. In a particular case, the Supreme Court has expanded the interpretation of the right to life and personal freedom pursuant to Article 21, establishing that it cannot be limited except by a fair, just and reasonable process. This interpretation approached the judicial system of India to the ideals of substantial justice, underlining not only the procedural equity, but also the need for the laws to be right and fair.[3]

In addition, the judiciary has often invoked the "directive principles of the state policy" (found in Articles 36 to 51) to improve the notion of

1 A. K. Thiruvengadam, *The Constitution of India: A contextual analysis* (Bloomsbury Publishing, 2017).
2 B. K. Sharma, *Introduction to the Constitution of India* (PHI Learning Pvt. Ltd., 2022).
3 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

justice. These principles, although not legally applicable, guide the state in the policy process and aim to guarantee social and economic justice. The case of the State of Kerala v. N.M. Thomas, is fundamental, where the Supreme Court stressed that these principles of directive should be harmonized with fundamental rights to achieve true justice.[4]

The fundamental rights, detailed in Articles 12 to 35 of the Constitution, play a crucial role in modeling justice in India. These rights protect individual freedoms and guarantee equality before the law. For example, Article 14 guarantees the right to equality, stating that the state does not deny any equality of person before the law or to equal protection of the laws. This principle is essential to establish a right society in which each individual has the same legal rights, regardless of their background or status.

Article 21, which guarantees the right to personal life and freedom, further strengthens the concept of justice. It does not limit the right to physical existence but extends to the quality of life. In a landmark case, the Supreme Court interpreted Article 21 to include the right to live with human dignity.[5] This interpretation marks a significant step in the expansion of the scope of justice in the Indian legal system, as it aligns legal rights to human rights. In addition, the role of the judiciary in making fundamental rights respect is a key aspect of justice in India. The courts have employed a PILs, which allows people to approach the courts for the application of rights on behalf of others. This mechanism has made it possible for marginalized groups to seek justice, indicating a judiciary that gives priority to social justice over rigorous legalism. The case of Vishaka vs State of Rajasthan is a remarkable example, in which the Supreme Court has established guidelines to prevent sexual harassment in the workplace. This case illustrates how the judiciary interprets the Constitution to face contemporary social issues and protect the rights of individuals.[6]

4 *State of Kerala v. N.M. Thomas,* 1975 INSC 224.
5 Supra at 3.
6 *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

III. A Holistic Approach to Rights and Social Equity

Overall, the philosophy of justice in the Indian Constitution is multifaceted, rooted in the ideals found in preamble and in fundamental rights. Through various cases of reference, the judiciary has shown its commitment in the interpretation of justice in a way that promotes human dignity and social equity. It has been underlined that this understanding of justice reflects the changing dynamics of Indian society and law, highlighting the role of the Constitution as a living document.[7] The Indian judiciary continues to model and reshape the concept of justice, making it relevant in the context of the challenges of modern India. The Indian judiciary plays a crucial role in the interpretation of the Constitution and the formation of the understanding of justice in society. This interpretation is not a mere academic exercise; it directly influences how laws are applied and how justice is perceived by citizens. The judiciary decisions may reflect and redefine the principles of justice, as established in the Constitution. The Supreme Court of India, as the highest judicial authority, usually establishes significant precedents that guide the lower courts and affect people's daily life.[8]

In the legendary case of Kesavananda Bharati the Supreme Court introduced the "doctrine of the basic structure."[9] This doctrine states that certain fundamental characteristics of the Constitution cannot be changed or destroyed by amendments. In emphasizing the basic structure, the court reaffirmed the main principles such as justice, freedom, equality and fraternity as essential for the Constitution. This interpretation became a pillar of the Constitutional law in India and reinforces the idea that justice is linked to these fundamental values.

Through the medium of PILs, the judiciary has furthered its cause in the domain of interpretation of the Constitution. In the *Mohini Jain Case* the Supreme Court considered that the right to education is part of

7 Ibid.
8 Richart Boldt & Dan Friedman, "Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation" 76, 309 *Md. L. Rev*. (2016).
9 Ibid.

the right to life under Article 21 of the Constitution.[10] Through this interpretation, the court expanded the definition of justice in addition to punitive measures to include affirmative rights, thus increasing the understanding of what justice means to the common person in India. Such trials reveal that the judiciary does not operate in isolation; instead, it is actively involved with contemporary social issues and interpretations of justice.

It has been emphasized that judicial decisions often reflect broader social values and justice debates.[11] The principles established by the courts are a reference to evaluate government laws and actions. For example, in the case Navtej Singh Johar, the Supreme Court decriminalized homosexuality by reading Section 377 of the Indian Penal Code, thus interpreting justice as recognition of the rights of marginalized communities. This case demonstrated how the judiciary can remodel the legal definitions of justice to promote inclusion and equality.[12]

These judicial interpretations not only clarify the law, but also serve as powerful tools for social change. By addressing injustices directly through innovative constitutional interpretations, the judiciary helps to articulate a more equitable view of justice in modern India. The decisions made by the courts resonate with the population, influencing attitudes and expectations about justice and justice in society. As the Indian judiciary continues to interpret the Constitution, it plays an essential role in the evolution of the philosophy of justice, making it a living and dynamic process that adapts to the needs of a changing society.

10 *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666.
11 Supra at 9.
12 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

IV. The Evolution of notion of Justice in Post-independence India: Historical Context Judicial Interpretations and the Constitutional Vision

The Constitution of India, adopted in 1950, is rooted in a complex historical context that significantly influences how justice is interpreted today. To understand this impact, it is vital to look at the events that led to the creation of the Constitution and how these events shaped the principles of justice within the legal structure.

The struggle for the independence of the British colonial domain played an important role in the formation of values and principles incorporated into the Constitution. Leaders like Mahatma Gandhi, Jawaharlal Nehru and B.R. Ambedkar had strong beliefs about justice, equality and individual rights. They imagined a society in which all citizens would have equal opportunities and would be treated fairly, regardless of their background. This view was essential in the formation of fundamental rights described in the Constitution, which ensures that justice remains a central principle of governance.

Learning from the colonial past, the Constitution emphasized the need for an independent judiciary that would act as a guardian of individual rights and freedoms. The judiciary thus became a crucial component in the interpretation and application of the values of justice, with striking cases proving this role over time. The Supreme Court interpreted this right not only in a restricted sense, but in a broader context, ensuring that any law affecting the freedom of a citizen should be fair, just and reasonable. This crucial interpretation established the foundations for a more robust understanding of justice, emphasizing the need to protect individual freedoms against arbitrary state action.[13]

In addition, the directive principles of the constitution of state policy (DPSP) play a vital role in the formation of justice in contemporary India. Although not justifiable, these principles guide the state to guarantee socioeconomic justice. Cases like Olga Tellis v. Bombay Municipal Corporation demonstrated how the judiciary can use

13 Supra at 3.

DPSPs to promote justice by connecting the impact of historical contexts on contemporary legal interpretations.[14]

The Indian Constitution was shaped by various historical cases, which played an important role in the definition of the interpretation of justice in India. In contemporary India, the interpretation of justice continues to evolve, influenced by judgments based on Kesavananda Bharati. The case serves as a point of reference in discussions on the balance between legislative power and constitutional protections. He underlines that an effective judicial system must be anchored in a framework that respects fundamental rights and maintains the ideals of democracy.

V. Expanding Justice in India: Socio-economic Rights, Equality, and Non-Discrimination

Access to justice has a different meaning in different societies. The customary idea of "access to justice" as understood is access to courts of law, which has become out of reach of people due to different reasons, for example, abject poverty, social and political backwardness, illiteracy, ignorance, procedural conventions, and the cost. It has been discussed the importance of socio-economic rights in his analysis of justice. He emphasizes that these rights are not only privileges, but are crucial to ensure a decent standard of living for all individuals.[15] In India, the Constitution explicitly mentions some of these rights under the directive principles of state policy. For example, Article 39 directs the State to ensure that citizens have adequate means of subsistence and equal pay for equal work. These principles establish the foundations for a broader understanding of justice that goes beyond legal rights.

The judiciary played a significant role in the interpretation and application of socioeconomic rights in India. In cases like *Olga Tellis v. Bombay Municipal Corporation,* the Supreme Court recognized the right to subsistence as part of the right to life under the terms of Article 21 of

14 *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

15 R. Abeyratne, "Socioeconomic rights in the Indian constitution: toward a broader conception of legitimacy." 1 *Brook. J. Int'l L*. 39 (2014).

the.[16] This striking decision has marked a change in the way justice is interpreted, stating that a person's right to live should include the ability to make a living and provide for himself and his family. This interpretation expands the traditional understanding of justice, highlighting the link between economic stability and personal dignity. Another case-have that illustrates this evolution is *Unnikrishnan v. State Of Andhra Pradesh.* In this matter, the Supreme Court considered that the right to education is a fundamental right. By framing education as a need to access other rights, the court further extends the concept of justice. Indicates that without education, individuals cannot effectively participate in society or exercise their legal rights. This case emphasizes the idea that justice is interconnected with socioeconomic factors and providing access to education is essential to achieve a fair society.[17]

The role of the judiciary in the expansion of the concept of justice through its interpretation of socioeconomic rights shows a progressive change in the way rights are seen in India. Instead of focusing only on legal justice, the Indian Constitution recognizes that true justice covers economic and social dimensions. By ensuring that all citizens can access basic needs, such as food, education and health, the Indian judiciary aligns with a broader global understanding of justice, as described in various international agreements and statements.

Another important case is *Indra Sawhney v. Union of India,* also known as the case of the Mandal Commission.[18] In this case, the Supreme Court confirmed the booking of jobs for the socially and educationally backward class. This judgment has recognized that affirmative action, although appearing to create inequalities, is a necessary measure to face historical injustices and promote equality. The Court stressed that true equality may require preferential treatment in some cases to level the playing field for marginalized groups, reflecting a progressive understanding of justice.

16 *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.
17 *Unnikrishnan J.P. v. State of Andhra Pradesh*, (1993) 1 SCC 645.
18 *Indra Sawhney v. Union of India*, (1992) 6 SCC 217.

In addition, the *Navtej Singh Johar v. Union of India* represents critical progress in the interpretation of non-discrimination. The Supreme Court decriminalized consensual relationships of the same sex by lowering section 377 of the Indian penal code, which had been used to discriminate LGBTQ+ individuals.[19] The judgment highlighted the need to support the dignity and autonomy of each individual, strengthening the principle that non -discrimination is vital for a right society. In this context, legal scholar Gautam Bhatia maintains that the recognition of different identities and the dispensation of justice should be aligned with the fundamental principles of equality sanctioned in the Constitution.[20]

In addition, in the *National Legal Services Authority case (NALSA)* the Supreme Court recognized transgender people as a third kind, affirming their right to self-identify and enjoy the same rights as other citizens.[21] This judgment was a significant step towards inclusion and reflected the understanding that justice must understand all types of gender. He stressed that equality and non -discrimination are integral not only in the law but also in the social fabric of India.

In addition, the 2017 case of *Shayara Bano v. Union of India* has challenged the practice of the Talaq instantaneous Talaq.[22] The Supreme Court has established that this practice has violated constitutional law to equality and non-discrimination for Muslim women. The judgment was celebrated for strengthening the principle according to which personal laws should not be at the expense of fundamental rights, thus expanding the scope of justice in a pluralistic society.

Through these historical judgments, the Indian judiciary has shown its commitment in the interpretation of justice as a reflection of equality and non-discrimination. The continuous evolution of legal interpretations in the context of these principles shows that justice is not

19 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
20 Guatam Bhatia, *Offend, shock, or disturb: Free speech under the Indian Constitution* (Oxford University Press, 2016).
21 *NALSA v. Union of India*, (2014) 5 SCC 438.
22 *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

only a legal concept but also a social mandate that tries to eradicate inequality and support dignity for all individuals in contemporary India. The "right to freedom of expression is one of the most essential rights recognized by the Indian Constitution. Article 19 (1) (a) guarantees this right, allowing people to express their thoughts and opinions without fear." However, the exercise of this right often leads to a complex interaction between freedom of expression and social norms. The Indian Judicial plays a crucial role in the balance of these two aspects, interpreting freedom of expression not only as a fundamental right, but also as part of a broader understanding of justice within society.

A significant case that illustrates this tension is the ruling of the 2015 Supreme Court in *Shreya Singhal v. Union of India.*[23] In this case, the Court annulled "section 66A of the Information Technology Law, 2000", which penalized users for sending offensive messages through the communication service. The court argued that the law was unconstitutional, since it imposed unreasonable restrictions on the right to freedom of expression. The trial emphasized the importance of freedom of expression in a democracy, noting that open discourse is vital to the vibrant health of society. This case demonstrates how the Judiciary actively safeguards freedom of expression against government overreach, while recognizing that certain limitations are necessary to defend morality and public decency.

However, the act of balance between freedom of expression and social norms is not easy. In another case, the Supreme Court confirmed a law that prohibited certain types of speech, illustrating a more restrictive interpretation.[24] The Court ruled that the State could impose limits on freedom of expression when such speech could lead to public disorder. This case reveals the role of the Judiciary in the justification of the limitations in freedom of expression when conflicting with public order, although it also raises concerns about where to draw the line between protecting society and quelling dissent.

23 *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.
24 *Ramji Lal Modi v. State of Uttar Pradesh*, (1957) SCR 860.

Another relevant case is the 2012 judgment in the *Indira Gandhi v. Raj Narain*, where the Supreme Court reiterated that the right to freedom of expression cannot be stopped simply because it offends social norms.[25] The court declared that freedom of expression is essential for democracy, and any limitation must be carefully analyzed to ensure that it does not suppress legitimate expression. This willingness to rigorously examine the reasons for restricting the discourse indicates the commitment of the Judiciary to defend the constitutional right, even when facing challenges rooted in the public feeling.

VI. Public Interest Litigation (PIL) and Access to Justice

The concept of individual rights versus collective-good is also evident in the 2020 ruling on the Citizenship amendment act, 2020. The law aimed to grant citizens to non -Muslim refugees in neighboring countries, which led protests throughout the country. The Supreme Court is reviewing the act and the matter is still pending, and its next decision will reflect how the Judiciary balances the national security concerns against the rights of persons who could be affected by law. These cases highlight the continuous tension between protecting the rights of Specific groups and address the fears of the largest population with respect to immigration and demographic changes.

Loughlin analyzes the philosophy of justice and raises questions about how laws must be interpreted in a way that avoids the tyranny of the majority. This is particularly relevant in the Indian context, where various religious, cultural and ethnic identities coexist. The role of the Judiciary in decision-making that sometimes favour individual rights over collective practices reflects the understanding that justice must also be equitable and inclusive. How the Judicial Power interprets the Constitution in such cases plays a fundamental role in the configuration of the perceptions of justice in contemporary India.

Khaitan plunges into the effectiveness of the Public Interest Litigation in the fight against systemic inequalities within Indian society.

25 *Indra Gandhi v. Raj Narain*, (1975) 2 SCC 159.

He underlines the case of the Peoples Union for Civil Liberties v. Union of India, where the Supreme Court held that the "right to food was part of the right to life under article 21 of the Constitution."[26] This decision emerged from a PIL which highlighted the fate of millions of people in the face of hunger and malnutrition. He forced the government to implement a public distribution system to ensure food security. Thanks to such decisions, the judiciary has played a proactive role in safeguarding the rights of vulnerable populations, ensuring that their basic needs are met.

The principles underlying the PIL also reflect the broader philosophy of justice, as envisaged in the Indian Constitution. The Constitution highlights not only legal law but also social, economic and political justice. Examining how the judiciary engages with the DPSP to promote social justice and well-being. The courts have often referred to these principles when they make decisions related to the rights of marginalized communities.[27] It has also been extended by Abeyratne, this argument by highlighting the responsibility of the judiciary to ensure that the State implements policies that align with the DPSP. In the historic case of Olga Tellis v. Bombay Municipal Corporation, the Supreme Court ruled in favor of the inhabitants of the slum who were expelled without appropriate rehabilitation.[28] The court has recognized the right to subsistence as an essential aspect of the right to life and stressed the need for policies that reflect the objectives of the DPSP. This decision illustrates how the judiciary can apply principles that support human dignity and justice, transforming ambitious objectives into founded realities.

The judiciary has also adopted a transformative approach in the interpretation of the DPSP when it deals with cases surrounding health, education and social well-being. For example, in the *Vishaka v. State of Rajasthan,* the Supreme Court has established guidelines to prevent

26 *Peoples Union for Civil Liberties v. Union of India*, (2003) 2 SCC 33.
27 T. Khaitan, "Constitutional Directives: Morally-Committed Political Constitutionalism" 82(4) *The Modern Law Review* 603-632 (2019).
28 *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

sexual harassment in the workplace, effectively strengthening the right to work in a safe environment.[29] This decision has recognized the importance of dignity and respect inherent in each individual, aligning the moral imperatives of the DPSP.

In addition, in the *Maneka Gandhi v. Union of India*, the Supreme Court stressed that the interpretation of "Article 21 should also consider Article 39, which obliges the State to obtain adequate livelihoods."[30] The decision underlined the interdependence of the various constitutional provisions and how they work collectively in the accomplishment of justice. The will of the judiciary to interpret these principles expands expansively its commitment to achieving substantial justice rather than a simple procedural equity.

In short, the balance between judicial activism and judicial restriction in India is dynamic. The judiciary's willingness to engage in activism has led to significant advances in human rights and the protection of marginalized groups. However, it remains a respectful recognition of the need for restriction, especially when it respects the principles of democracy and the roles of other government agencies. This continuous dialogue between activism and restriction shapes the philosophy of justice in contemporary India, making the judiciary a crucial actor in the search for a just society. The Indian Constitution is a living document, which means that it can be modified or modified to reflect the needs of the country it serves. The constitutional amendments play a crucial role in modeling the picture of justice in India. The process of these amendments has aroused an intense debate between legal scholars and professionals.

29 Supra at 32.
30 Supra at 3.

VII. Evolution of Justice in India: Constitutional Amendments and Socio-Political Influence

Roznai discusses the concept of "rooted provisions", which are some rights that cannot be easily changed.[31] The doctrine of the basic structure of the Constitution, established in the case of *Kesavananda Bharati in 1973*, refers to this idea. The Supreme Court stressed that while Parliament has the power to change the Constitution, it cannot alter the basic characteristics that support democracy and fundamental rights. This doctrine acts as a guardrail against arbitrary changes that could undermine justice, thus ensuring that principles such as equality, freedom and fraternity remain at the center of Indian governance.

The ability of the Supreme Court to break down the amendments that challenge the basic structure maintains control over parliamentary power. This dynamic is essential to understanding how justice evolves in the constitutional framework. The judiciary, interpreting these amendments, not only acts as a protector of rights but also determines the scope of justice in various contexts. When one studies the concept of justice in different democracies, one can see various interpretations and applications that can offer valuable information to India. In their work, Hirschl and Gluck provide a comparative lens to understand how different nations address their constitutional structures, shedding light on their justice philosophies and how these philosophies can inform the Indian context.[32] Hirschl argues that many democracies have moved more and more toward a more judicialized form of governance. This means that the courts play a significant role in the interpretation of laws and the guarantee of justice. For example, in countries such as Canada and South Africa, courts have emerged as proactive rights advocates, often intervening when legislative bodies seem to neglect the principles that are consecrated in their Constitutions.

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31 Y. Roznai, *Unconstitutional constitutional amendments: a study of the nature and limits of constitutional amendment powers* (2014) (Doctoral dissertation, London School of Economics and Political Science).

32 Ran Hirschl, *Comparative matters: the renaissance of comparative constitutional law* (OUP Oxford, 2014).

In addition, Hirschl and Gluck illustrate that justice is not only about the application of existing laws, but also involves a continuous and dynamic process of interpretation influenced by social values. In this sense, the disposition of the Indian judiciary to interpret its constitution in the light of changes in social norms reflects a comparative understanding of Constitutional law. The concept of "social justice" enshrined in the Constitution of India corresponds to the global movements of civil rights, adopting clues of other democracies while responding to their unique contexts.

Thus, the ideas of comparative constitutional law bring up a shared mission between democratic systems: the pursuit of justice through the continuous evolution of legal interpretations. By examining international precedents, the Indian judiciary can learn from the successes and challenges faced by other democracies, promoting a deeper and more distinctive understanding of justice in contemporary India. The discourse on constitutionalism in India is increasingly complex, reflecting the tension between the original intent of the Constitution and its evolving interpretation by the judiciary. This complexity often leads to debates on how justice is perceived and implemented in the framework of Indian constitutional law. Emerging key elements of the constitutional interpretation are both from the text of the Constitution and by the principles established in several cases of reference.

A significant aspect of constitutionalism is the balance between authority and individual rights. The Indian Constitution is built based on justice, freedom, equality, and fraternity. However, as pointed out by Loughlin, the nature of constitutionalism is often contested, leading to different opinions on how legal principles should be applied. Some scholars support a text interpretation that respects the original meaning of the constitutional clauses.[33] Others support a more dynamic interpretation that considers contemporary values and social needs. This divergence in thought is prevalent in judicial decisions taken by the courts throughout India.

33 Martin Loughlin, *Against constitutionalism* (Harvard University Press, 2022).

These debates are evident in key cases such as *Maneka Gandhi v. Union of India* and *Kesavananda Bharati v. State of Kerala.* In *Maneka Gandhi,* the Supreme Court has expanded the interpretation of the right to life and personal freedom, underlining that any law that affects these rights should not only be right, but must also join the principles of natural justice. This shift reflects a wider understanding of justice as not only the absence of oppression but as the promotion of individual dignity and freedom.

In the *case of Kesavananda Bharati*, the judiciary has established the "doctrine of the basic structure", stating that some fundamental characteristics of the Constitution cannot be changed by the amendments. This principle acts as a safeguard for justice and democracy, ensuring that the Constitution remains a living document that protects individual rights from potential legislative overcoming. Loughlin's analysis highlights how this evolutionary perspective on constitutional interpretation helps the judiciary to navigate contemporary issues, filling the gap between historical legal paintings and the realities of modern society. The critics of the approach of the judiciary claim that an expansive interpretation can lead to judicial activism, in which the judges exceed their role by making decisions that should be left to the legislator. This criticism aligns with Loughlin's observations, which suggest that while the judicial interpretation is essential, it must be balanced with respect to democratic processes. This ongoing dialogue between judicial activism and moderation models the way justice is pursued in the Indian context.

In light of these discussions, the examination of constitutionalism in India requires an understanding of the philosophical basis of justice as divided into the Constitution. Each interpretative choice made by the judiciary significantly influences not only the legal scene, but also the wider social values relating to justice in contemporary India. The discourse is in progress; the judiciary remains a critical factor in the interpretation and redefining the constitutional principles to better reflect the changing needs of society. The Indian judiciary does not work in the

void; it is strongly influenced by the socio-political context of the time. The values and needs of the company can directly model the way the laws are interpreted and applied. In a study, Brinks and Blass highlight that judicial decisions often reflect the pressure and realities of contemporary society. The Indian Constitution emphasizes justice, freedom, equality and fraternity, but the way in which these principles are issued in court is influenced by ongoing social issues and political climate.

Another critical area examined by Brinks & Blass is the influence of public opinion on judicial activism.[34] When significant parts of the company support marginalized groups, the judiciary sometimes reinterprets the laws to align with these evolving social values. The decriminalization of homosexuality through the *Navtej Singh Johar case* in 2018 illustrates this dynamic. The Court's decision not only recognized the LGBTQ+ rights, reflecting a changing social attitude, but also underlined the role of the judiciary in making justice advance through interpersonal dignity and equality.

The principle of "judicial review" indicates that the judiciary has the power to review the government's laws and actions. This power is vital, as it means that courts can invalidate the laws that are unconstitutional or unjust. However, the way this power is exercised can be influenced by socio-political contexts. For example, the judiciary can be more cautious in risking laws during politically sensitive periods, reflecting the desire to avoid conflicts with legislative or executive branches.

The Indian Constitution presents a dynamic framework for justice that evolves with the changing needs of society. The Constitution, together with its guiding principles, emphasizes equality, freedom and social justice. The Judiciary plays a crucial role in the interpretation of these principles and adapting them to address contemporary problems. According to Versteeg and Zackin, the Constitutions do not exist in a

34 Danial.M. Brinks & Abby Blass, *The DNA of constitutional justice in Latin America: Politics, governance, and judicial design* (Cambridge University Press, 2018).

vacuum; they must respond to the social and political realities of the times.[35] This adaptability is important to maintain the relevance of justice in society. Another notable example is the Navtej Singh Johar case, where the Supreme Court decriminalized the consensual relations of the same sex by eliminating section 377 of the Indian Penal Code. The court argued that the criminalization of homosexuality violated the fundamental right to equality and dignity. This fundamental decision not only advanced LGBTQ+ rights, but also demonstrated how the Judiciary adapts justice to align with changing social attitudes. It reflects an evolving understanding of individual rights and emphasizes that justice must deal with contemporary moral and social challenges.

The Judiciary also covers the philosophy of restorative justice, promoting improvement and reconciliation about mere punishment. In the case of *Vishaka v. State of Rajasthan,* the Supreme Court addressed the issue of sexual harassment in the workplace and established guidelines to guarantee a safe work environment for women. This approach changed the approach to punitive measures to protect the rights and dignity of women, which demonstrates the commitment of the Court to shape justice in a way that reflects social progress towards gender equality.

Versteeg and Zackin have argued that the concept of justice is not static; It is continuously made up of social transformations and the historical context in which it exists. The Indian Judiciary embodies this belief by getting involved with several social movements and adapting legal frameworks to meet emerging demands. As social norms change, so does the interpretation of justice within the Indian constitutional framework. Ultimately, the role of the Judiciary in this evolution is not only an interpreter of the laws but also as a proactive force that can promote progress in legal and social systems. This illustrates the commitment of the Indian legal system to defend the spirit of justice,

35 Mila Versteeg, & Emliy Zackin, "Constitutions unentrenched: toward an alternative theory of constitutional design" 110(4) *American Political Science Review* 657-674 (2016).

ensuring that it remains relevant and receptive to the needs of its people. While we look at the future of the interpretation of justice in India, it becomes clear that the relationship between the Indian Constitution and its judiciary will continue to evolve. This evolution is modeled by various challenges and trends that reflect the changing needs and aspirations of the nation. Fisher and Sen have highlighted important issues that are relevant while we consider what awaits us in the search for justice in India.[36]

VIII. Conclusion

The role of the judiciary in the interpretation of constitutional principles, such as equality, freedom, and fraternity, will be vital when society faces issues such as communism, social inequality, and economic disparities. Judicial decisions that resonate with the values of the Constitution can help to encourage social harmony and improve the rule of law. A significant trend is the growing dependence on public interest litigation. This legal mechanism allows ordinary citizens to present cases for the benefit of the public, in particular on issues concerning marginalized communities. Over time, PIL has shown that it is a powerful tool capable of dealing with social injustices, environmental concerns, and human rights violations. However, although it has opened the doors for greater access to justice, there are also concerns about improper use, especially when the cases are frivolous or for personal profit. The ability of the judiciary to manage this tendency will be crucial in determining the integrity of the judicial system. Another important challenge is the backlog of cases in the Indian courts. With millions of outstanding cases, the judiciary struggles to provide timely justice. This backlog creates frustration among citizens who seek legal recourse. Various solutions have been proposed, including the establishment of fast-tracked courts and alternative dispute resolution mechanisms to resolve disputes. The effectiveness of these solutions will

36 Louis Fisher, *Constitutional dialogues: interpretation as political process* (Princeton University Press, 2014).

play a role in modeling the trust of the public in the judicial system and its ability to support justice as required in the Constitution.

Technological progress also presents opportunities and challenges for the administration of justice. The integration of technology in the judicial process can lead to a more efficient management of cases and better access to justice. Online video conferencing and digital storage of court proceedings have already started changing the functioning of the courts. However, concerns remain for the digital gap, since not all citizens have equal access to technology. Efforts must be made to ensure that progress does not inadvertently create further obstacles to justice for the disadvantaged.

Furthermore, the role of the judiciary in the interpretation of constitutional principles, such as equality, freedom, and fraternity, will be vital when society faces issues such as poverty, social inequality, and economic disparities. Judicial decisions that resonate with the values of the Constitution can help to encourage social harmony and improve the rule of law. The reference-to-reference cases, such as *Navtej Singh Johar v. Union of India,* which decriminalized homosexuality, illustrate how the judiciary can affirm rights and promote inclusiveness.

Furthermore, the influence of political and social movements cannot be ignored. As most citizens become vocal on their rights and requests, the pressure on the judiciary to respond to these changing dynamics will increase. The judiciary must carefully navigate these pressures to maintain its independence while remaining tuned to the needs of the company.

Fisher and Sen have also underlined the importance of philosophical discourse in understanding justice.[37] The evolution interpretation of justice will be modeled by debates relating to equity, social justice, and equality. The way these debates take place in public and political spaces will have an impact on judicial initiatives and reform efforts.

37 Ronojoy Sen, *Articles of faith: religion, secularism, and the Indian Supreme Court* (Oxford University Press, 2018).

Overall, as India advances, the challenges and trends in the interpretation of justice will require an effort concerted by all the interested parties involved in the legal and Constitutional ecosystem. The resilience of the judiciary, the dynamic nature of the Constitution, and the active commitment of citizens will all contribute to modeling the future of justice in India.

Maintaining Judicial Authority While Upholding Free Speech: A Constitutional and Doctrinal Analysis of Contempt of Court Law

Dr. Rohit Moonka[*]
Dr. Silky Mukherjee[**]

Abstract

Constitutional Courts in India are entrusted with the task under the Constitution to interpret the law and also to interpret the law on the touchstone of the Constitution. While it is important for the Constitutional courts to perform its tasks effectively, it is equally important that the decorum and public image of the courts should also be protected and maintained. The control of the constitutional courts to penalize for the contempt is an indispensable deterrent in the hands of higher judiciary to avert intrusion with the institution of justice. The power of Contempt of court ensures that the authority of the Courts are respected and maintained. On the other hand, under the constitution, freedom of speech has been accorded as a fundamental right of the citizens. However, this freedom as provided under Article 19(1)(a) of the Constitution is subject to reasonable restrictions under Article 19(2) as contempt of court is one of the ground for reasonable restriction.This paper analyses the recent judicial trends of the Constitutional Courts in India to punish for contempt which has on several occasions conflicted with the freedom of speech and expression of individuals. It also takes into account the changing contour of contempt of court laws in United Kingdom and suggests the way out as to how the inconsistency is to be resolved so as to protect the administration of justice and its decorum on

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one hand at minimum sacrifice of freedom of speech and expression on the other.

Key words: Scandalizing the Court, Contempt of Court, Freedom of Speech and Expression

I Introduction

Rule of Law is one of the fundamental pillars of the Indian Constitution.[1] To maintain and uphold the Rule of Law, Constitutional courts have been entrusted with the task under the Constitution. While it is important for the courts to perform its tasks of upholding the rule of law effectively, it is equally important that the decorum and public image of the courts should not be allowed to be distorted.[2] This power to maintain and uphold the majesty of the courts has been conferred to the Supreme Court of India and all the High Courts under Articles 129[3] and Article 215[4] respectively by being the Court of record.[5] Contempt of Court Act, 1971[6] supplements this power of the Constitutional courts in addition to the Constitutional provisions. The authority of the constitutional courts to punish for contempt is an indispensable deterrent in the hands of higher judiciary to avert interference with the administration of justice. This power to punish for Contempt of court envisions mainly to deal with any such action throbbing the decorum and the authority of the courts.

On the other hand, freedom of speech and expression is a valuable privilege and a fundamental right of the citizens. Constructive reproach is one of the central components for the expansion of democracy and it is the duty of the Constitutional Courts to protect it. Contempt of court is one of the ground for reasonable restriction under Article 19(2) of the

1 Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461.
2 Mohd. Iqbal Khandey v. Abdul Majid Rather, 1994 SCC (4) 34
3 INDIA CONST. art 129
4 *Id.*
5 See generally, Delhi Judicial Service Association, Tis Hazari Court v. State of Gujarat, AIR 1991 SC 2176, In re Vinay Chandra Mishra, AIR 1995 SC 2348.
6 Contempt of Court Act, 1971, No. 70, Acts of Parliament, 1971 (India).

Constitution whereas the freedom of speech and expression is provided under Article 19(1)(a)[7]. While fair criticism of the Courts would not be unlawful, ascribing inopportune motives and inclining to bring the judges or the courts in disrepute, will undoubtedly be well contained by the contempt of court jurisdiction of the Constitutional Courts.[8]

However, the power to punish for contempt has sometimes conflicted with the freedom of speech and expression of an individual as given under Article 19(1)(a) of the Constitution of India. This inconsistency is required to be fixed in a manner to maintain a delicate balance between contempt of court and freedom of speech and expression.

II Origin and genesis of Contempt of Court law in India

The evolution of the power of contempt in India has its roots to the English monarchic rule where contempt was considered as an offence directly against the authority of the Sovereign. As civilization evolved, as per the delegated mandate, the king's powers came to be bestowed on the Judge.[9] This authority of the judge was analogous to the authority of the king which was beyond question. Any criticism or comment on the courts was considered as an accusation on the king. This power is taken as a necessary attribute of the superior court of record.[10] This practice was recognized in the judgment of R v. Almon[11] wherein it was reiterated "that any slanderous act aimed towards the judicial institutions will be equivalent to challenging the king's honour and authority."[12] The judgment of R v. Almon[13] (which is repeatedly considered to have the foundation of the contempt jurisdiction) it was further observed by Wilmot J.

7 *Id.*
8 E.M.S. Namboodiripad v. T.N. Nambiar, AIR 1970 SC 2015.
9 Brown v. Allen 344 U.S. 443 (1953).
10 Rex v Almon (1765) 97 ER 94.
11 *Id.*
12 *Id.*
13 *Id.*

"The power which the Courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempt out of Court, stands upon the same immemorial usage, as supports the whole Fabric of the Common Law"[14]

In India, the first statute on contempt of court was enacted in the form of Contempt of Court Act, 1926. This Act was later repealed since it was not found to be all-inclusive and replaced by the Contempt of Court Act, 1952. Subsequently, it was found that the 1952 Act has numerous flaws including no definition as to what constitutes contempt of the court. Subsequent to the formation of Sanyal Committee in 1961 and its recommendation after exhaustive study of contempt law of other jurisdictions, the 1952 Act was also repealed and the Contempt of Court Act, 1971[15] was enacted. Even though the 1971 Act also did not define the contempt of court but rather it provides for its classification. Section 2 of the Contempt of Court Act, 1971 bifurcated contempt into two types, civil and criminal contempt. While Section 2(b) deals with civil contempt, section 2(c) provides for criminal contempt. Civil contempt "refers to the willful disobedience to any judgement, decree, or order of a court."[16] Whereas, "criminal contempt deals with any act which scandalizes or tends to scandalize the court or prejudices or tends to prejudice any judicial proceeding or interferes or tends to interfere with the administration of justice."[17]

III Conflict with freedom of speech and expression

Despite having its roots in the English Law, which has evolved over a period of time and changed its contour, contempt law in India has not

14 *Id.*
15 Contempt of Court Act, 1971 (Act 70 of 1971)
16 *Id* at s. 2(b)
17 *Id.* at s. 2(c)

progressed as per the changing times. Lack of clarity in definition of contempt and its constituents including 'scandalizing the court' or 'prejudices or interferes with the course of justice' has become unruly horses without any limit. Even if the legislature provides the definition of 'scandalizing the court' or the definition of 'prejudices or interferes with the course of justice', the ambit of these terms are constantly progressing. Though the Contempt of Court Act provides for fair criticism which is not regarded as contempt of court.[18] However, this power to decide whether a criticism is fair or not is entrusted in the hands of the Court which also happens to be the aggrieved party in contempt of court matters. This vagueness in the application of these terms by the Supreme Court was evident in two of the earlier cases E.M. Sankaran Namboodiripad v. T. Narayanan Nambiar[19] and P.N. Duda v P. Shiv Shankar[20]. In the first case, Namboodripad who happened to be the Chief Minister of Kerala was convicted of contempt for a merely theoretical comment from a Marxist point of view on the duty of the courts. In divergence, in the later case, the contemnor who happened to be the Minister of Law, Justice and Company Affairs, Government of India as that time who while addressing a meeting of Bar Council of Hyderabad made derogatory remarks towards the Supreme Court judges attributing to the Court partiality towards affluent people, as foreign exchange violators, anti-social elements and bride burners but this was not held as contempt of court. This disparity in the interpretation of the phrase 'scandalizing the court' makes it evident that the range of contempt law is too vague and indeterminate. In fact, in Baradakanta Mishra v. Registrar of Orissa High Court & another Hon'ble Supreme Court had observed "that the offence of scandalizing the court has to be handled with care and used sparingly."[21]

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18 *Id.* at s. 5 - "Fair criticism of judicial act not contempt - A person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided."

19 E.M.S. Namboodiripad, Supra note 9

20 (1988) 3 SCC 167

21 (1974) 1 SCC 374.

On the other hand, to strengthen the element of freedom of speech and expression, the Contempt of Court Act, 1981 of the United Kingdom has abolished contempt on account of scandalizing the court altogether. In 1980, Justice Diplock observed in the case of *Defence Secretary v Guardian Newspapers*[22] that "the type of contempt which consists of scandalizing the judges is practically outmoded in England and may be snubbed." Similar observation was made in the 1911 case of *King v. Nicholls*[23] where it was opined that "if there is a just cause for challenging the veracity of a judge, it is not to be contempt of court."[24] In the United Kingdom on the suggestions of the U.K. Law Commission, scandalizing the court as a form of contempt has been excluded as provided under the Crime and Court Act, 2013.[25] However, on the contrary, the Law Commission of India observed that it was unwanted to eradicate the provision of scandalising the court as it has the potential to decline the esteem of the courts.[26]

Evidently, it is observed that the courts' are not absolutely immune from condemnation and it should be amenable to fair criticism which will enhance its respect. Unfortunately, Courts in India have still not evolved its contempt jurisdiction in comparison to other common law jurisdiction wherein contempt law has its origin.

IV Recent trends:

In the recent past, there are certain key judgments delivered by the Supreme Court on contempt of court law which were quite contentious due to its overstretching the scope of contempt. Three of them are discussed below:

1. In re: Prashant Bhushan & Anr.[27]

This criminal contempt matter was initiated based on two of the tweets of Senior Advocate Prashant Bhushan. On June 27th, 2020, he

22 (1985) 1 A.C 339, 347.
23 12 CLR 280 (1911, High Court of Australia)
24 *Id.*
25 Report No. 335, Law Commission of United Kingdom (2012)
26 Report No. 274, Law Commission of India (2018)
27 Suo Motu Contempt Petition (Crl) No. 1 of 2020.

tweeted on the social media platform that "When historians in future look back at the last 6 years to see how democracy has been destroyed in India even without a formal Emergency, they will particularly mark the role of the Supreme Court in this destruction, & more particularly the role of the last 4 CJIs."[28] Another tweet was published on twitter on June 29th, 2020 stating that "CJI rides a 50 Lakh motorcycle belonging to a BJP leader at Raj Bhavan Nagpur, without a mask or helmet, at a time when he keeps the SC in Lockdown mode denying citizens their fundamental right to access justice."[29] While taking suo moto cognizance of these tweets Supreme Court was prima facie of the view "that the aforesaid statements on Twitter have brought the administration of justice in disrepute and are capable of undermining the dignity and authority of the Institution of Supreme Court in general and the office of the Chief Justice of India in particular, in the eyes of public at large."[30]

Mr. Prashant Bhushan in his defense stated with respect to the first tweet that "it had three distinct elements which are his bona fide opinion about the state of affairs in the country in the past six years and the role of the Supreme Court and in particular the role of the last four Chief Justice of India."[31] First portion of his tweet contains his opinion "that democracy has been substantially destroyed in India during the last six years." The second portion of the tweet opined that "the Supreme Court has played a substantial role in allowing the destruction of the democracy" and the third part of his opinion "regarding the role of the last four Chief Justices in particular in allowing the destruction of the democracy."[32] Mr Bhushan further contended that "it is the essence of a democracy that all institutions, including the judiciary, function for the citizens and the people of this country and they have every right to freely

28 *Id*.
29 *Id*.
30 *Id*.
31 *Id*. at para 4.
32 *Id.*

and fairly discuss the state of affairs of an institution and build public opinion in order to reform the institution."[33]

With respect to the second tweet, Mr Bhushan submitted that "it was made to highlight the strangeness of the situation where the Chief Justice of India, Justice S.A.Bobde on one hand keeps the court virtually in lockdown due to COVID fears, with hardly any cases being heard and those heard, also by an unsatisfactory process through video conferencing and on the other hand is seen in a public place with several people around him without a mask.[34] He argued that if this is regarded as a contempt, it would throttle free speech and would constitute an unreasonable restriction on the right of a citizen under Article l9(1)(a) of the Constitution." It was also submitted that "to bona fide critique the actions of a Chief Justice of India, or a succession of Chief Justice of India, cannot amount to scandalizing the court, nor does it lower the authority of the Court as Chief Justice of India is not Supreme Court."[35] He made this observation as constructive criticism of the act of the then CJI in public while the COVID protocol was in place due to which everyone including the Chief Justice of India was obligated to follow the same.

However, the Supreme Court did not find merit in the submission of Mr. Bhushan. It was observed by the Court that "no doubt that it may be better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of bona fide concern for improvement. However, when there appears some scheme and design to bring about results which have the tendency of damaging the confidence in our judicial system and demoralizing the Judges of the highest court by making malicious attacks, those interested in maintaining high standards of fearless, impartial and unbending justice will have to stand firmly. If such an attack is not dealt with requisite degree of firmness, it may affect the national honour and prestige in the comity of nations. Fearless and

33 *Id.*
34 *Id*.
35 *Id*.

impartial courts of justice are the bulwark of a healthy democracy and the confidence in them cannot be permitted to be impaired by malicious attacks upon them."[36] Based on this, court found Mr. Bhushan guilty of criminal contempt and instead of imposing any severe punishment by showing magnanimity, sentenced him with a nominal fine of rupee one.

This contempt case was decided in a hurried manner which took little more than a month's time that too during COVID lockdown restrictions were in place and courts did not have regular hearing. There were many matters of considerable importance pending at that time before the Supreme Court but "instead of taking up matters of absolute urgency in these peculiar times of COVID restrictions, the Supreme Court of India chose to take umbrage at two tweets."[37] As it was observed in the celebrated U.S. case of Bridges v. California[38] that "an enforced silence would probably engender resentment, suspicion, and contempt for the bench, not the respect it seeks."[39] It cannot be the case with the Supreme Court of India that muzzling criticism will harness respect for it in the eyes of the people.[40] It is therefore important for the court to balance the right to freedom of speech and expression vis-à-vis contempt of court.

2. Abhyudaya Mishra v Kunal Kamra[41]; Shrirang Katneshwarkar and Ors. v. Kunal Kamra[42] and Skand Bajpai v Kunal Kamra[43]

In the bunch of these criminal contempt cases filed by different individuals against stand-up comedian Kunal Kamra who had posted quite a few tweets on the social media platform twitter with respect to

36 *Id*. at para 73.
37 Justice A P Shah, The chilling effect of criminal contempt, *available at:* https://www.thehindu.com/opinion/lead/the-chilling-effect-of-criminal-contempt/article32198138.ece (visited on August 20, 2024).
38 314 U.S. 252 (1941).
39 *Id*.
40 *Id.*
41 Contempt Petition (Crl.) No. 1 of 2020.
42 Contempt Petition (Crl.) No. 2 of 2020.
43 Contempt Petition (Crl.) No. 3 of 2020.

the Supreme Court granting interim bail to the news editor Mr. Arnab Goswami. All these petitioners had sought the necessary permission from the Attorney General for India to initiate a criminal contempt case against Mr. Kamra which was granted by the Attorney General. While granting permission Mr. AG pointed out that "after having gone through each of the alleged contemptuous tweets, they were not only in bad taste but also crossed the line between humour and contempt of the court."[44] It was further observed by the AG that "I find that today people believe that they can boldly and brazenly condemn the Supreme Court of India and its judges by exercising what they believe is their freedom of speech. But under the Constitution, the freedom of speech is subject to the law of contempt and I believe that it is time that people understand that attacking the Supreme Court of India unjustifiably and brazenly will attract punishment under the Contempt of Courts Act, 1972."[45]

These cases are still pending. It will be a test for the Supreme Court as to how it maintains the balance of freedom of speech and contempt of court law? Whether the court finds such tweets have the potential to scandalize the court and lower its authority? Or like the case of Attorney General v. Guardian Newspaper[46] wherein the newspaper Daily Mirror which was outraged by the decision of the House of Lords restraining the publication of the book 'Spycatcher' on the ground of confidentiality and prejudicial to national security, published a headline on the next day along with upside down photographs of the majority Judges and the caption it 'YOU FOOLS' which was not taken up as contempt by the courts in England whether the Supreme Court of India will also ignore such tweets of Mr. Kamra.

Whether comments by the public on the role and function of the court can be regarded as contempt? In this respect observation of Justice Katju that "a judge should have the equanimity and inner strength to remain unruffled in any situation so with broad shoulders shrug off

44 *Id*.
45 *Id.*
46 1987 (3) All. E.R. 316 (H.L.).

baseless criticism without being perturbed"[47] is a guiding light for the judges while entertaining such criminal contempt petitions.

3. Aditya Kashyap v Rachita Taneja[48]

In this case, Rachita Taneja, a 25 years old comic artist who had tweeted three post on the social media platform including cartoons involving the news editor Mr. Arnav Goswami's urgent hearing before the Supreme Court and role of the court in granting interim relief in a hurried manner which was alleged to scandalise and lower the authority of the Supreme Court by a law student Aditya Kashyap who sought permission from the Attorney General for India to initiate a criminal contempt case against her as required under the provisions of Contempt of Court Act, 1971[49] which was duly granted. Appearing on behalf of Ms. Taneja, Senior Advocate Mukul Rohatgi argued that the Supreme Court's foundation is very strong which cannot be shaken by such tweets as criticism cannot be treated as contempt. It is still to be seen in what manner the Supreme Court exercises the power of contempt with respect to such tweets to be considered as contemptuous and interference in the administration of justice as the manner is still pending but while doing so the Court also has the duty to balance the right of freedom of speech and expression of the citizens.

V Conclusion

In a democratic country like India, the judiciary is one of the organs of the government. In this scheme of government, the authority of the judges is hailed from the citizens through the constitution and therefore they must remain accountable to them who have the right to make constructive criticism of the judgments as well as the conduct of the

47 Justice Markandey Katju, Contempt of Court: Needs for a second look, *available at:* https://www.thehindu.com/todays-paper/tp-opinion/Contempt-of-court-need-for-a-second-look/article14709304.ece (visited on August 16, 2024).

48 Contempt Petition (Crl.) No. 4 of 2020.

49 Supra note 15 at Section 15

judge inside and outside the court. In a democratic country, a law like contempt which attempts to silence disagreement and criticism from the people is very much against the constitutional ethos. Courts cannot demand respect by showing its authority and silencing dissent but respect must be commanded by introducing confidence through its engagements with the people.

Recurrent usage of the contempt power by the court reveals the fundamental insecurity of the court only. It is therefore important that the powers of contempt of courts should be exercised sparingly and only when it hampers the proper functioning of the courts. The Supreme Court of India should also take lessons from the developments in the application of contempt jurisdiction in other common law jurisdictions in general and the United Kingdom in particular. Having a more broad and accommodative approach towards constructive criticism and public opinions will rather strengthen people's faith and confidence in the judiciary instead of diminishing it.

Redefining Men's Rights: Pursuing Equality in a Changing World

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Isbah Qureshi**

"Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development, and building good governance."

~ Kofi Annan

Abstract

In recent times, discussions about gender equality have broadened to encompass a critical look at men's rights, but issues specific to men frequently go unnoticed. This article examines the socio-legal aspects of men's rights today, emphasizing topics like family law, workplace fairness, mental health, and domestic abuse. The heart-breaking situation of Atul Subhash suicide in India highlights the pressing necessity to tackle the stigma associated with male mental health and the societal expectations that render numerous men susceptible. By examining legislative frameworks, societal views, and lived experiences, this research underscores the systemic difficulties encountered by men and the deficiencies in legal safeguards and support mechanisms. By exploring crucial issues such as acknowledging male victims of abuse and the mental health crisis affecting men, this paper promotes a fair approach to gender justice. Policy reform proposals seek to establish a more inclusive structure that promotes equity and well-being for all genders, ensuring the acknowledgment and protection of men's rights and responsibilities in today's society.

***Key words**:* Domestic abuse, Gender Equality, Men's rights, Mental health

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1. Historical Context and Evolution of Men's Rights

The history of womanhood has now been much studied, here in India and abroad, yet historians have been slow to recognise 'manhood', 'manliness', and 'masculinity' as social constructions requiring historical investigation and elucidation.[1] The Men's Rights Movement (MRM), primarily led by men, consists of an organized group united by their worry about social and institutional systems that they believe discriminate against men and boys. The typical complaints of Men's Rights Activists (MRA) involve family law (notably child custody and alimony), reproductive rights and accessibility, domestic abuse towards men, circumcision, military service, education, suicide rates, and health policies.[2]

The issues that fuel the Men's Rights movements can be traced as far back as 1856, when Putnam's Monthly, a magazine focusing on arts, literature, and politics, released an article named "A Word about Men's Rights." The Putnam Monthly article was ground-breaking as it identified certain men's emotions and a sentiment that persists today. This article discussed sexiest laws that oppressed men and benefited women.

In 1857, an essay titled "Men's Rights" by Mr. Todd proposed a Conference on Men's Rights was proposed. Mr. Todd in the 16th Paragraph of this essay writes:

Ah! and who feeds the iron horse and makes the cars go? Who lights the street lamps, brushed boots, colors your hats, pounds down the stones in the street? O men, men, poor men! my soul yearns over you, and longs for your deliverance!

1 Lake, M. (1986). Historical reconsiderations IV: The politics of respectability: Identifying the masculinist context. Historical Studies, 22(86), 116–131. https://doi.org/10.1080/10314618608595739

2 Men's Rights Movement: The Longstanding History of the Countermovement to Feminism, available at: https://www.nextgenmen.ca/blog/mens-rights-movement-mra-anti-feminism (Last visited on December 31, 2024)

Another short article titled *"Women's and Men's rights"* appeared in the 1875 volume Historic and literary miscellany, by G.M.D. Bloss. He writes:

"In most of the states, women can hold property in their own name, and while in the position of a fem-covert- their property is exempt from execution, even upon their own contracts."

Whatever improvements and reforms of modern society are demanded, should be in the name of both, and for both, instead of one.[3]

Men's rights activists criticized family courts for awarding women alimony and custody of children at the expense of their ex-husbands, leading to the formation of groups like Divorce Racket Busters and the American society of Divorced Men. These organizations fought against divorce laws, provided emotional support, and connected men with sympathetic attorneys. As the feminist movement gained momentum, activists argued that political attention on violence against women led to false accusations.[4]

The men's rights movement in India started in the 1990s, with prominent organizations forming in cities like Kolkata, Mumbai, and Lucknow. Among the initial organizations championing men's rights were PiritoPurush, Purush Hakka Sanrakshan Samiti, and Patni Atyachaar Virodhi Morcha. These organizations mainly focused on the rights of husbands and advocated against the supposed abuse of Section 498A of the Indian Penal Code (IPC), originally intended to protect against dowry harassment. As time passed, a support line was established to help men who were victims.

The formation of the Save Indian Family Foundation (SIFF) in March 2005 represented a significant milestone in the men's rights movement. SIFF is a coalition of various family rights groups and has

3 A Brief History of The Men's Rights Movement: From 1856 to the present. (2017). United States: Academic Century Press.

4 The Debate About Whether Men Have Been Left Behind Is Decades Old, available at: https://time.com/7199692/mens-rights-feminism-history/ (Last visited on January 1, 2025)

played a key role in highlighting men's issues. On 19 November 2007, SIFF observed International Men's Day for the inaugural time in India.[5]

2. Men's Rights Movements Around the World

2.1. National Coalition for Men (USA):

NCFM is the oldest organization of its type in the United States operating since 1977. It is a volunteer organization funded by private donations and memberships. It raises awareness about the ways sex discrimination affects men and boys.[6]

The state of California was sued by the NCFM in 2005 for providing financing for domestic abuse shelters only for women.[7] Because "men endure high amounts of domestic abuse as victims," the Court of Appeal found in their favour in 2008, holding that the exclusion of male victims "carries with it the baggage of sexual stereotypes" and violates men's rights to equal protection.[8]

2.2. Fathers 4 Justice: Advocacy for shared parenting rights (United Kingdom):

Fathers4Justice (F4J) is the UK's leading fathers' rights and shared parenting campaign group with over 20-years' experience providing expert help, support and advice for thousands of fathers, grandparents and other family members going through the family courts, as well as winning shared and sole residency for countless dads.[9]

2.3. Canadian Association for Equality (CAFE): Focus on men's mental health and education (Canada):

5 Men's Rights in India: Legal Protections and Challenges, available at: https://www.khanglobalstudies.com/blog/men-rights-in-india/?srsltid=AfmBOopZVf-0cd-d-pNdSH_K6nMKSsBlFiR885N9zr2-lur0T4FMqYNt (Last visited on January 1, 2025)

6 https://ncfm.org/ncfm-home/ (Last visited on January 10, 2025)

7 NCFM Vice President responds to criticism about MRA's and the AVfM conference in Detroit, available at: https://ncfm.org/2014/07/action/ncfm-vice-president-responds-to-criticism-about-mras-and-the-avfm-conference-in-detroit/ (Last visited on January 10, 2025)

8WOODS v. HORTON (2008) Court of Appeal, Third District, California.

9 https://www.fathers-4-justice.org/our-campaign/fathers-rights-help-advice-support/#:~:text=Fathers4Justice%20(F4J)%20is%20the%20UK's,shared%20and%20sole%20residency%20for (Last visited on January 10, 2025)

Programs and services for boys, men, dads, and their families are provided by the Canadian Centre for Men and Families, a center for social services and mental health. Three crucial areas are the center of its vision:

1. Lower the number of high-risk male suicides by implementing intervention programs that address the obstacles that men encounter.

2. Strengthen the father-child bond and encourage good societal perceptions of fatherhood by providing legal clinics and fathering groups to fathers going through separation and divorce.

3. Assist males who are victims of domestic violence and collaborate with other organizations to enhance services for men and boys.

To better support all Canadians, the CAFE conducts evidence-based research, organizes public education and awareness campaigns, and strives to enhance public policies in addition to providing crisis-supporting programs and services to families.[10]

2.4. One in Three Campaign: Awareness of male victims of domestic violence (Australia):

The One in Three Campaign is Australia's national campaign raises awareness of the existence and needs of male victims of family violence.[11]

2.5. Save Indian Family Foundation (SIFF) and Men Welfare Trust (MWT) (India):

The Save Indian Family (SIF) Movement is comparable to the Indian Men's Rights Movement. The dowry law misuse victims group was founded in 2003, and since then, SIF has grown to become one of the biggest men's rights organizations in the world. The conglomeration is part of hundreds of men's rights activists, 40+ NGOs, and chapters. In particular, during digestion disputes, the movement leads the Father's

10 https://menandfamilies.org/ (Last visited on January 15, 2025)
11 https://www.oneinthree.com.au/ (Last visited on January 15, 2025)

Rights Movement, the Family Harmony Movement, and the Child Rights Movement.[12]

Men Welfare Trust (MWT) is a Delhi based Non-Governmental Organization (NGO), an integral part of Save Indian Family Movement (SIF) (www.saveindianfamily.in). MWT was registered in Delhi in the Year 2017 with a clear focus on issues related to welfare of Men. It was a need of the hour to have an organization with dedicated team of volunteers to work on issues such as victimization of men & their families due to heavy misuse of gender-based laws such as IPC 498A (Dowry Harassment Law); Dowry Prohibition (DP) Act; Protection of Women from Domestic Violence Act (DV Act); IPC 376 (Rape Law); IPC 354 (Sexual Harassment Law); CrPC 125 & Hindu Adoption and Maintenance Act (Maintenance Laws); The Sexual Harassment of Women at Workplace Act etc., rising incidents of male suicides due to domestic/ family problems, male disposability/ homelessness of men, domestic violence on men, mental health issues, low life expectancy of men, vocational training, rehab, DV shelter homes for men to name a few.[13] SIF ONE Helpline (8882 498 498) has been receiving thousands of calls each month from men across India as well as overseas, men who are battered, abused, depressed by the widespread male-hatred in the Society.[14]

3. Key gender bias laws in India

In the present scenario in India, several key gender laws aim to address various facets of gender-based discrimination and violence. These laws reflect the ongoing efforts to ensure the protection and well-being of women in different spheres of life:

The Dowry Prohibition Act, 1961: Enacted to combat the harmful practice of dowry, this law seeks to prevent the extortion of dowry and the associated harassment and violence against brides. Its objective is to promote gender equality in marital relationships.

12 https://www.saveindianfamily.in/ (Last visited on January 2025)
13 https://www.menwelfare.in/about us/#:~:text=Men%20Welfare%20Trust%20(MWT)%20is,related%20to%20welfare%20of%20Men. (Last visited on January 15, 2025)
14 https://www.menwelfare.in/ (Last visited on January 15, 2025)

The Maternity Benefit Act, 1961: This legislation is designed to support working mothers by providing them with paid maternity leave. The act recognizes the importance of facilitating a healthy work-life balance for women during pregnancy and childbirth.

The Protection of Women from Domestic Violence Act, 2005: Focused on addressing domestic violence against women. This act provides legal protection and remedies for victims. It acknowledges the various forms of violence that can occur within a domestic setting and seeks to empower women with legal avenues for redressal. Moreover, Section 2(a) of this Act, defines "aggrieved person" as any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. It does not include man as an aggrieved person.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013: Aimed at creating a safe and harassment-free work environment for women, this law outlines procedures for filing complaints and ensures redressal mechanisms within workplaces. It emphasizes the importance of promoting a secure workplace for women.

Criminal Laws (Amendment) Act, 2013: Enacted in response to the Nirbhaya rape case, this amendment strengthened laws against sexual offenses, including rape. It reflects the commitment to enhancing the legal framework to better address and deter sexual violence against women.[15]

4. Constitutional rights of men in India[16]

4.1.1. Right to equality*:* Equality before law:

Article 14 mandates equality before the law, states "everyone equal before the law". The phrase 'equality before the law' is often used in relation to the rule of law and means:

15 Bajpai, J. V., Malukani, B., Shrivastava, A., Rai, S., Jain, P., & Choudhury, R. R. (Eds.). (2024). *Changing business paradigms: Trends in innovation, governance, and sustainability* (p. 196). Bharti Publications.

16 Saleem, Q. A. (2024). *Equal justice: Exploring constitutional protections for men in India* (pp. 19–25). BFC Publications.

"The law should apply to all people equally regardless of their status in society – rich or poor, young or old, regardless of their gender, race, culture, religion, or any other attribute."

Therefore, Men are entitled to equal treatment in matters of law, and any law or action that discriminates against them solely on the basis of gender would violate Article 14.

3.1.2. Protection from discrimination (A.15):

Article 15 prohibits discrimination based on gender and other forms of bias. Therefore, Men have recourse to judicial remedies if they feel their rights under Article 15 are violated, ensuring that the principle of non-discrimination applies equitably across genders.

3.1.3. Article 16:

Article 16 of the Indian Constitution ensures equality of opportunity in matters of public employment and explicitly prohibits discrimination on various grounds, including gender. Men are entitled to the same opportunities as women or other genders in public sector jobs, without bias based on their gender.

3.2. Freedom rights (A.19-22):

3.2.1. Article 19:

According to Article 19(1), All citizens shall have the right to freedom of speech and expression; to assemble peaceably and without arms; to form associations or unions or co-operative societies; to move freely throughout the territory of India; to reside and settle in any part of the territory of India; to practise any profession, or to carry on any occupation, trade or business. Therefore, Article 19 ensures that men enjoy fundamental freedoms on par with others, fostering their ability to live, work, and express themselves in a just society. By addressing restrictions and promoting equality, this article strengthens the democratic framework for men and all citizens alike.

3.2.2. *Article 20:*

Article 20 of the Indian Constitution protects individuals from arbitrary and retrospective criminal laws and safeguards their rights in criminal proceedings. It applies equally to all individuals, including men.

3.2.3. *Article 21:*

Article 21 of the Indian Constitution guarantees the Right to Life and Personal Liberty, which is one of the most fundamental rights. It applies equally to men, ensuring their dignity, safety, and freedom in various aspects of life.

3.2.4. *Article 22:*

Article 22 of the Indian Constitution provides protection to individuals in cases of arrest and detention. It applies equally to men, ensuring their rights during legal and preventive detention.

3.3. Cultural and educational rights:

Cultural and Educational Rights are enshrined in Articles 29 and 30 of the Indian Constitution. These rights aim to protect the interests of cultural and educational groups, especially minorities, and apply to all citizens, including men.

3.4. Right to constitutional remedies (Article 32):

Article 32 of the Indian Constitution is often referred to as the "heart and soul" of the Constitution, as described by Dr. B.R. Ambedkar. It provides the Right to Constitutional Remedies, allowing individuals to approach the Supreme Court directly if their fundamental rights are violated. This right applies equally to men, ensuring their access to justice and protection of fundamental rights.

4. Atul Subhash Suicide: A Case Study

Atul Subhash, who was working with an automobile company in Bengaluru, allegedly died by suicide as a demand of Rs 3 crore was made for a divorce settlement. He left behind a 90-minute video and a 40-page death note, explaining how harassment by his wife Nikita Singhania and her family compelled him to take the extreme step. The suicide note, under the headline "Justice is Due", addressed to his 2-year-old child, read:

"Now with me gone, there will not be any money to loot and I hope that they might start to look at the facts of the cases. Someday, you shall know the real face of your mother and her greedy family."

"I pray that they don't devour you and your soul. I often laugh when I remember that I started saving money for a car when you go to college. Silly me. Remember this always that you don't owe anything to anyone. Don't trust the system." Subhash further listed out his last wishes in the note. "All my case hearings should happen live and people of this country should know about my case and learn the terrible state of the legal system and misuse of law these women are doing."

He further wrote: "Give the custody of my child to my parents who can raise him with better values. Don't let my wife or her family come near my dead body. Give maximum punishment to my harassers though I don't trust our legal system too much. If people like my wife are not put behind jail, they would be more emboldened and will put more false cases on other sons of society in the future."

"To wake up the judiciary and urge them to stop harassment of my parents and my brother in false cases. There shall be no negotiations, settlements and mediation with these evil people and the culprits must be punished," the letter read.[17]

The software engineer from the southern city of Bengaluru accused his estranged wife Nikita Singhania, her mother and brother of sustained harassment and torture – accusations they denied. The three were arrested a few days later and a court remanded them for 14 days. News of Subhash's tragic death has also galvanised men's rights activists and started a wider debate around India's tough dowry law which was designed to protect women from harassment and even murder. Nikita Singhania had accused Subhash and his family of harassing her for dowry. Many argue that with cases of divorce steadily rising, the law is now being misused by women to harass their husbands, even forcing them to kill themselves. India's top court has also weighed in, with one

17 "Family Will Die By Suicide If...": Atul Subhash's Father On Grandson's Custody, *available at:* https://www.ndtv.com/india-news/atul-subhash-nikita-singhania-techies-father-on-grandsons-custody-family-will-die-by-suicide-if-7320938 (Last visited on January 3, 2025)

judge describing it as "legal terrorism" that was "intended to be used as a shield and not as an assassin's weapon".[18]

Ms. Nikita questioned the legality of registration of abetment to suicide case against her besides questioning the legality of her arrest. Bharath Kumar V., advocate representing Ms. Nikita, argued that her arrest is illegal as the police had not served the grounds for arresting her. Also, it was contended that she should be granted interim bail as she has to defend her case before the apex court in the petition filed by Atul's mother.[19] Twenty days after their arrest, a city court granted bail to the accused.[20]

Therefore, the tragic case of Atul Subhash highlights the intricate relationship between vulnerable groups' legal rights and the possibility of abuse, which could have unforeseen repercussions. Although legislation like the Dowry Prohibition Act and Section 498A of the Indian Penal Code are essential for protecting women from abuse and harassment, their purported abuse has caused serious concerns. This story demonstrates the terrible toll that unfounded allegations and drawn-out court cases can take on the lives, relationships, and mental health of those who are accused, particularly men.

A sobering reminder of the need for fair and balanced legal processes is provided by Atul's death note, which highlights the emotional toll on his family as well as the alleged shortcomings of the judicial system. The allegations of harassment and rebuttals of dowry demands highlight how marital conflicts can turn into emotional and legal ordeals for both sides.

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18 A man's suicide leads to clamour around India's dowry law, available at: https://www.bbc.com/news/articles/c33d6161z3yo (Last visited on January 3, 2025)

19 Atul Subhash case, available at: https://www.thehindu.com/news/national/karnataka/atul-subhash-case-karnataka-hc-directs-trial-court-to-decide-wifes-bail-plea-on-january-4/article69047446.ece (Last visited on January 3, 2025)

20 Accused in Atul Subhash death case granted bail, available at: https://www.thehindu.com/news/cities/bangalore/accused-in-atul-subhash-death-case-granted-bail/article69062191.ece (Last visited on January 6, 2025)

A larger discussion over gender-neutral changes to family laws, especially those pertaining to offenses involving dowries and claims of domestic abuse, has been sparked by this case. It demands judicial sensitivity, strict protections against abuse of the law, and procedures to stop arbitrary arrests without conducting a thorough investigation. However, it also highlights how crucial it is to guarantee that real victims—regardless of gender—continue to receive justice and protection.

Day by day, false cases and accusations against men in the name of dowry demand, domestic violence etc. are increasing. Another man in Delhi allegedly committed suicide amid ongoing dispute with his wife regarding the bakery business. The man, identified as 40-year-old Puneet Khurana, was found hanging in his home in Model Town's Kalyan Vihar area on Tuesday. As per his family, Khurana was "upset with his wife", who he married in 2016. The couple co-owned For God's Cake bakery and another eatery called Woodbox Cafe. Woodbox Cafe closed a while ago, as per an India Today report.[21] Khurana's family alleged that his wife and in-laws harassed him. "She (Puneet's wife) used to keep torturing him. I want justice for him," his mother told ANI. "He never used to tell us about the things because he thought his parents would be worried."[22]

By looking at these cases, we can see that the way forward is to develop a legislative framework that balances defending women's rights with resolving the complaints of males who feel harmed by the abuse of these laws. Achieving this balance requires societal discourse, awareness-raising initiatives, and judicial responsibility. The terrible

21 Another Atul Subhash? 40-year-old Delhi bakery owner commits suicide amid divorce, business dispute with wife, available at: https://www.businesstoday.in/india/story/another-atul-subhash-40-year-old-delhi-bakery-owner-commits-suicide-amid-divorce-business-dispute-with-wife-459221-2025-01-01 (Last visited on January 6, 2025)

22 Atul Subhash-type case in Delhi: Famous cafe owner dies amid divorce dispute, family alleges 59-minute harassment recording, available at: https://economictimes.indiatimes.com/news/india/atul-subhash-type-case-in-delhi-famous-cafe-owner-dies-amid-divorce-dispute-family-alleges-59-minute-harassment-recording/articleshow/116853209.cms?from=mdr (Last visited on January 6, 2025)

death in these cases ought to encourage a fairer and compassionate method of settling marital conflicts and addressing associated court proceedings going forward.

5. Conclusion and Suggestions

The current debate over men's rights emphasizes how crucial it is to strike a balance between justice and equality in a society that is changing quickly. Even while historical injustices experienced by oppressed groups have been addressed to a great extent, men's particular problems demand fair consideration and thoughtful answers. To guarantee justice and inclusivity, structural solutions are needed for problems including skewed child custody decisions, the stigma associated with male mental health, false charges, and the absence of strong legal protections for males against abuse. The call for acknowledgment is at the core of the men's rights movement, not in conflict with other people's rights but rather in line with the more general ideas of gender equality. Real progress can only be made by working together to break down prejudices, promote understanding amongst people, and create social and legal structures that protect the rights of all people, regardless of gender.

This paper restates that defending men's rights is an essential part of building a decent society and is not a zero-sum game. The principles of equity, empathy, and justice for all are advanced when we recognize and address the particular difficulties that men confront. This opens the door for a more balanced conversation.

By adopting the following measures, societies can move closer to achieving a balanced and inclusive approach to equality that acknowledges and addresses the rights and challenges of all genders:

1. Legal Reforms and Gender-Neutral Laws: Amend existing laws to ensure gender neutrality, particularly in areas such as domestic violence, sexual harassment, and workplace discrimination, to protect the rights of all individuals, including men.

2. Awareness Campaigns: Launch educational campaigns to challenge gender stereotypes and promote awareness of men's issues, including mental health, parental rights, and vulnerability to abuse.

3. Support Systems for Men: Establish dedicated support centers and helplines for men facing emotional, psychological, or legal challenges. These facilities should provide counselling, legal aid, and peer support.

4. Focus on Mental Health: Implement initiatives to address the stigma surrounding male mental health. This includes increasing access to affordable counselling, workplace mental health programs, and community-based support networks.

5. Equal Treatment in Family Courts: Reform family court systems to ensure fair treatment of men in custody and alimony cases. Implement guidelines that prioritize the best interests of children while safeguarding parental rights for both fathers and mothers.

6. False Accusation Safeguards: Strengthen mechanisms to address false allegations without discouraging genuine complaints. This includes provisions for fair investigation processes and penalties for proven false accusations.

7. Research and Data Collection: Encourage academic research and data collection on issues uniquely affecting men, such as workplace fatalities, suicide rates, and underreporting of abuse, to inform evidence-based policymaking.

8. Workplace Inclusivity: Develop workplace policies that recognize men's roles beyond traditional breadwinner stereotypes, including paternity leave, flexible work arrangements, and support for caregiving responsibilities.

9. Inclusive Gender Equality Programs: Design gender equality programs that emphasize the shared benefits of equity and include men as active participants in conversations on societal change.

10. Engagement of Stakeholders: Foster collaboration among policymakers, legal experts, advocacy groups, and civil society to address men's rights comprehensively and inclusively within the larger framework of gender justice.

Doctrine Of Proportionality: Its Relation With Wednesbury Unreasonableness

Vivek Kumar Pathak*

Abstract

In democratic legal systems, judicial review is considered to be the most significant factor for promoting and maintaining constitutionalism to protect and preserve the fundamental rights and freedoms of the people. There are diverse grounds on which the higher judiciary can make the evaluation of legislative and administrative actions for this purpose. In the area of public law and particularly administrative law, the Wednesbury unreasonableness and proportionality have been very popular grounds of judicial review. There has often been the discussion with respect to the relation, distinction and preference in these two grounds of judicial scrutiny and appraisal. It happens because of the fact that some scholars are of the opinion that proportionality is an aspect of Wednesbury Principle and both are the mutable concepts. Therefore, in academic explorations, it certainly becomes significant to find out the relationship between these two so that one may understand whether these grounds of judicial review are similar and entirely distinct from each other. If these two are found to be distinct, it similarly becomes important to see that which one should be the preferable option for an effective, operative and productive judicial review? In this background, the present paper discusses the meaning and evolution of proportionality as the ground of judicial review in the area of public law and its relation with the Wednesbury unreasonableness principle. The paper also deals with the question of preferential option by assuming that the doctrine of proportionality is an established concept and it works more in concrete than in abstract. The author concludes that the proportionality test is distinct from, and provides for a more intense test of, judicial review than Wednesbury unreasonableness principle and

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therefore, it should be the preferable option, particularly, in matters of violation of basic rights and freedoms of individuals.

Key Words: Judicial Review, Proportionality, Wednesbury Unreasonableness, Rights, Freedoms, Public Law, Constitution, Democracy.

I. Introduction:

Judicial review of legislative and executive action has been recognized as one of the most significant developments in the field of public law in the last century. Though it is believed that the law relating to judicial review was developed in 19th century when the Supreme Court of United States recognized the judicial review as a legal concept in the famous case of *Marbury* v. *Madison*[1], it could find wide application only in the later 20th Century. In the aftershock of the Second World War, democracy emerged as the leading political principle of governance throughout the world. Since then, the scope and ambit of judicial review has become the dominant theme of the study and research in the area of constitutional law and administrative law.[2] Judicial review is one of the important factors that make the Constitution of a country as democratic by developing, maintaining and ensuring the constitutionalism in that Constitution. Supremacy of the Constitution with the requirement that ordinary laws conform to the requirement of the law of the land, the concept of limited government, rule of law and the doctrine of separation of powers seem to be the foundational elements in the development of the concept of judicial review. The Supreme Court of India has observed that:

"If there is one principle which runs through the entire fabric of the Constitution, it is the principle of 'rule of law' and it is the judiciary which is entrusted with the task of keeping every organ of the State within the limit of law thereby making rule of law more meaningful and

1 5 US 137 (1803).

2 P.B. Ajoy, "Administrative Action and the Doctrine of Proportionality in India", 1(6) *IOSR Journal of Humanities and Social Science,* Sep-Oct. 2012), pp.6-23. Available at: *www.iosrjournals.org.*

effective".[3] It has also been held that "rule of law is the foundation of a democratic society. The judiciary is the guardian of rule of law. In a democracy like ours where there is a written Constitution which is above all the individuals and institutions and the power of judicial review is vested in the superior courts, the judiciary has a special and additional duty to perform i.e. to see that all the individuals and institutions, including the executive and legislature, act within the framework of not only law but also the fundamental law of the land".[4]

In India, the higher judiciary consisting of High Courts and the Supreme Court of India are vested with the power of judicial review and this power of judicial review of higher courts has been recognized as an essential component of the basic structure of Indian Constitution.[5] The concept of judicial review is placed on very high stand by declaring it as the part of the basic structure of Indian Constitution and therefore, the power of judicial review of the High Courts and the Apex Indian Court cannot be dowsed, rescinded or watered down even by making an amendment in the Constitution.[6] The Indian Supreme Court is of the opinion that the duty of courts to protect and preserve the people's fundamental rights is dependent on the protection of their power of judicial review. Fundamental rights would become non-enforceable and thus worthless if the courts are deprived of their power of judicial review and *"in the absence of judicial review the written Constitution will be reduced to a collection of platitudes without any binding force*."[7] The judicial review of an administrative action can be made by the higher courts on certain grounds and the doctrine of proportionality has been recognized as one of such a ground of judicial review. Proportionality is a principle that is applied to the constitutional and administrative adjudication in determining the conflicts between conflicting rights or between the rights and interests, and also a method for dealing with such

3 *C. Ravichandran Iyer* v. *J. A. M. Bhattacharya,* (1995) 5 SCC 457.
4 *In Re, Vinay Chandra Mishra,* (1996)2 SCC 534.
5 *L. Chandra Kumar* v. *Union of India*, AIR 1997 SC 1125.
6 M.P. Jain, *Indian Constitutional Law*, (New Delhi: Wadhwa and Company, 5th Edn., 2003) Chapter XLI, Section F, pp.1926-1935.
7 *Kesavananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461.

disputes.[8] The idea of proportionality seems to be fundamental to the determination of rights and interests in democratic world.[9] It generally involves four stages.[10] On every occasion of infringement of rights, freedoms and liberties of people by the government, the doctrine of proportionality requires that the government must be capable of showing firstly that the objective of the government is lawful and significant, secondly that the means adopted by the government have a rational connection to the objective sought, thirdly that the least drastic means available were adopted and fourthly that the advantage from appreciating the objective is more in proportion to the damage to the right. The two striking and prominent features of the doctrine of proportionality are that "it is standard-based rather than categorical and it is result oriented rather than being a formal and conceptual doctrine".[11] Proportionality is an idea that has a noble lineage in ancient and classical conceptions of law and justice[12] and presently it marks its presence in all the areas of modern conception of law and justice.[13] The present paper focuses on the

8 Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism", 47 *Columbia Journal of Transnational Law*, 2008, pp.68. Available at: *https://papers.ssrn.com.* (Accessed on 12/11/2024).

9 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations,* (Cambridge University Press, 2012); David Beatty, *The Ultimate Rule of Law, (*Oxford University Press, 2004); Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe,* (Oxford- Hart Publishing, 1999); Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post Communist States of Central and Eastern Europe, (*Dordrecht: Springer, 2005).

10 The number of the stages involved in the application of the doctrine of proportionality is not exhaustive and it may be less than four also depending on the perspective.

11 Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture,* (Cambridge University Press, 2013) at 2. Available at: *https://academic.oup.com/icon/article/13/3/769/2450814.*

12 Thomas Poole, "Proportionality in Perspective", *N.Z. L. Rev.* 2010, at 369. Available at: *https://www.google.com/search?q=Thomas+Poole%2C+%E2%80%9CProportionality+in+Perspective*. (Accessed on 13/12/2024); Mark Antaki, "The Rationalism of Proportionality's Culture", in Grant Huscroft, Bradley W. Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning,* (Cambridge University Press, 2014) at 305.

13 Beverley McLachlin, "Proportionality, Justification, Evidence and Deference: Perspectives from Canada", Speech of Chief Justice of Canada,

doctrine of proportionality in the domain of public law. It discusses the evolution of proportionality as the ground of judicial review and makes an effort to find out the relationship of doctrine of proportionality with the Wednesbury unreasonableness as the ground of judicial review. In making this study, the author assumes that the doctrine of proportionality is an established concept as it works more in concrete than in abstract and it is distinct from, and provides for more intense test of, judicial review than Wednesbury unreasonableness principle.

II. Evolution Of Doctrine Of Proportionality:

The term 'proportional' as defined by dictionaries refers to "properly related in size or degree or other measurable characteristics".[14] The term "proportional" is usually employed as a qualifying adjective and refers to the relationship or balance among the parts of something. As a general principle of law, the concept of proportionality is introduced as a technique of addressing tensions and conflicts between individuals and government, and for harmonizing their contending entitlements and determinations.[15] In the field of criminal law, the doctrine is used to carry the idea that the penalty and the punishment awarded to an offender should be in accordance with the crime. Under international humanitarian law governing the use of force in an armed conflict, proportionality is a dominant factor in evaluating the necessity of military action. In this evaluation it is to be seen that if total anticipated devastation due to the use of force must be outweighed by the good to be achieved. Thus, the principle of proportionality requires that action undertaken must be proportionate to its objectives.[16] It seems

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available at: *https://www.hkcfa.hk/filemanager/speech/en/upload/144/Proportionality.* (Accessed on 13/12/2024)

14 According to the meaning given to the term 'Proportional' as an adjective by Vocabulary.Com, available at: *https://www.vocabulary.com/dictionary/proportional.*

15 Kai Moller, "Proportionality: Challenging the critics", 10(3) *International Journal of Constitutional Law,* July 2012, pp.709-73. Available at: *https://academic.oup.com/icon/article/10/3/709/673485.*

16 "Note On the Legal Doctrine of Proportionality", *Children's Rights Alliance*, 2007, available at:

that the principle of proportionality, in the area of public law, has been developed to restrict the misuse and abuse of power and to prevent the instances of violation of the basic rights of human beings by the public officials to the minimum that is necessary in a given circumstance. In its philosophical conception, the doctrine of proportionality may be traced back to the ancient Indian moral and ethical principle "that which is hateful to you, don't do to your fellow."[17] Proportionality has been described as, "You must not use a steam hammer to crack a nut, if a nutcracker would do."[18] The proportionality principle seems to be incorporated in Babylonian Law *i.e.* the Code of Hammurabi when it states "an eye for an eye, and a tooth for a tooth". The proportionality principle is a reprimand to ensure that the punishment should always be in accordance with the severity of crime and therefore, "the police should not shoot at sparrows with cannons."[19] Essentially, the principle of proportionality apprehends the rational idea that, in every action of the government, the means it adopts should be well adapted to achieve the ends it is pursuing. The courts manifest the idea of proportionality as a ground of judicial review of governmental actions with a prearranged system of gradually strict legal tests for determining whether the measure in fact interferes disproportionately with the rights or interests of an individual.[20] In its modern meaning, proportionality has been defined in terms of procedure and this procedural test of proportionality is comparatively clear. Tom Hickman,[21] while recognizing several

https://www.google.com/search?q=Note+On+the+Legal+Doctrine+of+Proportionality%2C+Children's+Rights+Alliance%2C+2007&oq

17 *Padma Purana*, 1.19.335. (Sristi Khand, Chapter No. 19, Shloka No. 335).

18 As per Lord Diplock in *R* v. *Goldstein*, [1983] 1 WLR 151, 155.

19 The Statement of Renowned Administrative Law Scholar, Fleiner, quoted in George Barrie, "The Application of the Doctrine of Proportionality in South African Courts", 91(11) *Unisa Press Journal,* 1985, available at: *https://unisapressjournals.co.za*

20 Mathews, Jud, "Proportionality Review in Administrative Law", 2017, available at: *http://elibrary.law.psu.edu/book_contributions/*

21 Tom Hickman is a leading public and constitutional law barrister at Blackstone Chambers and Professor of Public Law at University College London (UCL). He is author of Public Law After the Human Rights Act, 2010 (Inner Temple Book Prize 2008-11 (new author)); co-author of Human Rights: Judicial Protection in the United Kingdom (2008). Tom was Awarded the Sutherland Prize for Legal History by the American

models, identified a general formulation to the meaning of proportionality as a three-part procedure. According to him, the court, while reviewing the action, must consider three questions:

i) if the measure adopted by the authority was appropriate to the objective looked-for,

ii) if the adopted measure was obligatory for accomplishing the objective and

iii) if the measure adopted imposed unnecessary burdens on the affected individuals.[22]

It means that the doctrine of proportionality involves 'necessity test'[23] followed by the 'balancing test'[24] in determining the validity of a governmental action dealing with the rights and liberties of an individual. Proportionality is, originally, a moral principle and in it cannot always be incorporated and observed in administration of law and justice but the benchmarks of this global philosophical and moral thought cannot be undervalued in administering law and in dispersing justice to common people.[25]

The roots of the doctrine of proportionality can be found in ancient Hindu law,[26] Roman law[27], Babylonian Law,[28] Magna Carta[29] and the

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Society of Legal History in 2016 for an essay on the law of seditious libel in eighteenth century England.

22 Jaswinder Kaur, "Doctrine of Proportionality: Whether it is Goodbye to Wednesbury Unreasonableness in Present Scenario", 4(9) *Indian Streams Research Journal,* Oct. 2014.

23 The 'necessity test' requires that the least restrictive alternative, that is necessary in a given circumstance, should be used in taking the action affecting the rights of the people.

24 The 'balancing test' mandates that the measures adopted or action taken should not impose excessive onerous burdens on the rights and interests of the individuals and there shall always be a balance between the severity of measures adopted and the objective sought.

25 Jeffrey Jowell, "Proportionality in the United Kingdom, Le Principe de Poportionnalité, Conférence Débat du CDPC", 8 Février 2018, available at: *https://www.revuegeneraledudroit.eu/blog/2018/11/15/proportionality-in-the-united-kingdom/.*

26 Mahamahopadhyaya Kamla Krishna Smrititirtha, "*Dandaviveka of Bardhamana*", (Oriental Institute, Baroda, 1931).

27 Jan Hallebeek, "Some Remarks on Laesio Enormis and Proportionality In Roman-Dutch Law and Calvinistic Commercial Ethics", 21 *Fundamina*, 2015, pp.14-32. Available at: *https://scielo.org.za/pdf/funda/v21n1/02.pdf.*

28 The Code of Hammurabi, a Babylonian code, dates from about 1772 BC.

English Bill of Rights, 1969.[30] It is also believed that the doctrine of proportionality came out when legal philosophers of the late-nineteenth century prescribed the directions and rules for governing and regulating the powers of police in the light of the first principle of political philosophy. According to this first principle of political philosophy, the people submit to the rule of the sovereign so that the sovereign can advance their common welfare.[31] If this bargain and agreement is the source of the authority of the state to act, it certainly specifies certain limitations of state's authority and the most basic limitation is that the state is justified in acting only to the extent that its action promotes public welfare. Applying it to the police law, jurist Günther Heinrich Von Berg states that "the police law may abridge the natural freedom of the subject, but only insofar as its lawful goal requires."[32] The modern

29 Magna Carta, 1215, Chapter 20-22., see *Solem* v. *Helm,* 463 U.S. 277 (1983) "The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements" may not be excessive. And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments . . . . When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional." *See*, *e.g., Hodges* v. *Humkin,* 2 Bulst. 139, 140, 80 Eng.Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence"); *See also,* Craig S. Lerner, "Does the Magna Carta Embody A Proportionality Principle?", 25(3) *George Mason University Civil Rights Law Journal*, 2015.

30 Peter Murrell, "Design and Evolution in Institutional Development: The Insignificance of the ENGLISH Bill of Rights", 45 *Journal of Comparative Economics,* 2017, pp.36-55, available at: *https://www.econ.umd.edu/sites/www.econ.umd.edu/files/users/pmurrell/Design_and_Evolution_JCE_February_2017.pdf.*

31 According to Gottileb Svarez, the leading legal scholar and the architect of General Land Law in Prussia, "The rights of command in a state or a ruler cannot be derived from an unmediated divine blessing, or from the right of the stronger, but they must be derived from a contract, through which the citizens of the state have made themselves subject to the order of the ruler for the advancement of their own common happiness".

32 Quoted in Würtenberger (1999), Moreover, over the course of the nineteenth century, the dominant opinion on what constituted lawful goals for the police contracted, from the general welfare to promoting public safety (Heinsohn 1997, 34), Cited in Jud Mathews, "Proportionality Review in Administrative Law", *School of Advanced Studies, University of*

understanding of the concept was introduced by German post-war legal thinking when it was incorporated in the German Constitution.[33] Later, it was taken up by the European Court of Human Rights when this court was instituted in 1959. Subsequently, it was adopted by the young European Community as a conceptual 'meta principle of judicial governance'.[34] The modern, multistep proportionality framework seems to be the innovation of the approach of Germany's Federal Constitutional Court to adjudicate constitutional rights claims for more than half a century.[35] Proportionality is now well established as a general principle of European Community law in the form of a ground of judicial review in the area of public law. According to this general principle, any law restricting the rights of individuals is to be assessed on the touchstone of proportionality. The doctrine of proportionality in its present form is of European origin. In U.K. the administrative action was traditionally being tested on the ground of illegality, irrationality, procedural impropriety and Wednesbury principle *i.e.* unreasonableness but presently administrative actions affecting the freedom, rights and liberties of people are examined, reviewed and declared invalid on the ground of proportionality. The doctrine of proportionality is so logical that one would expect its origin from common law. But in fact, it is not the derivative of the common law or statutory law of the U.K. Nevertheless, it can be said that proportionality is an ancient concept and its precise origin has always been the matter of debate and discussion because it has its origin in different ancient cultural, religious, moral, and ethical thoughts and finds its presence in early literature and ancient jurisprudence.

London, available at: *https://www.docsity.com/en/docs/1-proportionality-review-in-administrative-law-jud-mathews/8993623/.*

33 Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", 57(3) *University of Toronto Law Journal,* 2007, pp.383-397.

34 Jaswinder Kaur, "Doctrine of Proportionality: Whether it is Goodbye to Wednesburry Unreasonableness in the Present Scenario", 4(9) *Indian Streams Research Journal*, Oct. 2014.

35 Apothekenurteil (Pharmacy Case, 1958) as quoted in Mathews, Jud, "Proportionality Review in Administrative Law", 2017. Available at: *http://elibrary.law.psu.edu/book_contributions/9.*

III. Doctrine Of Proportionality Versus Wednesbury Unreasonableness:

In the English Legal System, for examining the legitimacy of an administrative action or statutory discretion, usually the Wednesbury test is applied. According to this test the court would see whether irrelevant considerations had been taken into account in making the decision or taking the action or whether the action is bonafide? Some scholars are of the view that the proportionality is an aspect of Wednesbury principle and this opinion has gathered the support of some judicial decisions[36] and the commentators like Rivers,[37] Taggart[38] and Elias.[39] This argument has some force in the sense that both the standards of judicial review are variable and give the discretion to the courts to determine the validity of administrative action. The traditional Wednesbury test confers a limited discretion on the adjudicator and if the adjudicator remains within the limits of the conferred discretion, his determination is considered to be legitimate. According to Lord Green M.R., this limit of discretion includes all those determinations which are not "so unreasonable that no reasonable authority could ever have come to them".[40] According to classical formulation of Wednesbury, this limit of discretion seems to be

36 *R.* v. *Chief Constable of Sussex Ex p. International Trader's Ferry Ltd*. (1999) 2 A.C. 418 HL*., Begum* v. *Tower Hamlets,* (2003) 2 A.C. 430 at (47), available at: *https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd981111/chief01.htm.* (Accessed on 15/12/2024)

37 Julian Rivers, "Proportionality and Variable Intensity Review", 65(1) *Cambridge Law Journal,* 2006, pp.174-207, available at: *https://www.jstor.org/stable/4509179.*

38 M. Taggart, "Proportionality, Deference, Wednesbury", *New Zealand Law Review,* 2008, at 423, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528019*

39 Elias, "Righting Administrative Law" in Dyzenhaus (eds), A Simple Common Lawyer Essays in Honour of Michael Taggart (Oxford, Hart Publishing, 2009), available at: *https://www.jstor.org/stable/24311897.*

40 *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corp* (1948) 1 K.B. 223 at 230, available at: *https://judicialacademy.nic.in/sites/default/files/1453025380_Wednusbury%20case.pdf.* As per Lord Diplock: a decision "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" in *Council of Civil Service Unions* v. *Minister for the Civil Service* (1985) A.C. 374 at 410, available at: *https://www.casemine.com/judgement/uk/5a938b3e60d03e5f6b82ba42*

very wide. The principle is not rigid and inflexible[41] but it is a changing standard of judicial review and therefore, it is also termed as 'Variable Wednesbury Reasonableness'. The core of the Wednesbury principle affirms that more considerable justification is required if the action has more severe impact on the individual affected by the action and thus, the justification required on the part of the authority taking the action or making the decision is relative to the severity of the effect of that action on the rights and liberty of individual.[42] It seems that when the decision has more severe impacts on the individual concerned, the limit of discretion of the decision maker decreases and the standard of review by the court becomes more strict. It happens particularly with the cases where the issue of deprivation of rights and liberties of an individual is involved.[43] This feature of variable Wednesbury principle requires more incisive tests in cases of deprivation of basic rights and less insightful tests in economic and policy matters.[44] It means that the intensity of review depends on the nature of the case in hand and the seriousness of the impact of the decision on the individual concerned.[45] It also means that with reference to Wednesbury principle, the grounds of review like 'irrationality' and 'perversity' have now become obsolete and the ground of 'variable reasonableness' has become the benchmark of judicial review. Some academicians opine that proportionality is also notably

41 Christopher Forsyth and Ivan Hare, *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford Clarendon Press, 1st edn., 1998) at 185.

42 *R.* v. *Secretary of State for Education and Employment Ex p. Begbie,* (2000) 1 W.L.R. 1115, available at: *https://www.casemine.com/judgement/uk/5b46f1f62c94e0775e7ef1a0*

43 *R.* v. *Ministry of Defence Ex p. Smith*, (1996] Q.B. 517, available at: *https://www.casemine.com/judgement/uk/*
Bugdaycay v. *Secretary of State for the Home Department,* (1987) A.C. 514 at 531G per Lord Bridge and at 537H per Lord Templeman, available at: *https://www.casemine.com/judgement/uk/5a8ff8c960d03e7f57ecd6e9*

44 *R.* v. *Secretary of State for the Environment Ex p. Hammersmith and Fulham LBC*, (1991) 1 A.C. 521, available at: *https://www.casemine.com/judgement/uk/5a8ff8c960d03e7f57ecd709*.

45 *R. (on the application of Mahmood)* v. *Secretary of State for the Home Department*, (2001) 1 W.L.R. 840, available at: *https://www.casemine.com/judgement/uk/5a8ff8cc60d03e7f57ecd96d*

variable concept[46] and it has been accepted that intensity of review on the ground of proportionality also depends on the nature of the decision and its effect on the individual's rights and interest.[47] Due to this attribute of proportionality test, it is easy to state in abstract form[48] but the exact nature of the test is far easy to define.[49] The courts are also of the view that the test of proportionality might be applied with more or less gravity.[50] But it may be argued that this proposition is disingenuous because the measure adopted would either be proportionate or not. In this regard proportionality tests seem to be more accurate and sophisticated criteria as compared to the traditional Wednesbury ground. Though, at initial stage, there may be the overlapping between criteria of Wednesbury reasonableness and the standard of proportionality and the cases may be decided in the same way by applying either of the tests but it seems that the intensity of review is rather higher under the proportionality test.[51] These two tests remain distinct in both the form and substance.

The proportionality test is diverse from Wednesbury in form because of dissimilarity in its process. While applying the Wednesbury

46 Supperstone and Coppel, "Judicial Review after the Human Rights Act", 3 *E.H.R.L.R.,* 1999, at 315, as cited in Jame Goodwin, "The Last Defence of Wednesbury", *Westlaw India*, 2012, available at: *delivery_westlaw india 2.pdf*

47 *R. (on the application of Daly)* v. *Secretary of State for the Home Department*, (2001) 2 A.C. 532 HL at [28] per Lord Steyn, available at: *https://lawprof.co/public-law/irrationality-review-cases/r-daly-v-home-secretary-2001-ukhl-26-2001-2-ac-532/*

48 That the measure adopted or the action taken or the decision made should not be excessive i.e. more punishing than it is required in a given circumstance.

49 *Haung* v. *Secretary of State for the Home Department,* 2006 Q. B. 1 at 45, available at: *https://publications.parliament.uk/pa/ld200607/ldjudgmt/jd070321/huang%20-1.htm*

50 *R (on the application of British American Tobacco UK Ltd.)* v. *Secretary of State for the Home Department*, available at: *https://www.casemine.com/judgement/uk/5a8ff74f60d03e7f57eab252.*

51 As per opinion of Lord Bingham in the case of *R (Daly) v. Secretary of State for the Home Department*, (2001) 2 WLR 1622 at para 27, cited in Hamaad Mustafa, "Wednesbury, Proportionality and Judicial Review", available at: *https://sahsol.lums.edu.pk/sites/default/files/2022%20Proportionality%20and%20Judicial%20Review.pdf.*

test, the court is to see the range of permissible decisions within its discretionary limits and identify whether the decision falls within this range.[52] But under the process of review on the ground of proportionality, the court is required also to make an assessment on the basis of 'necessity' and 'balance' test in addition to see the range of reasonable decisions.[53] In the proportionality test, the court is to see the justifications for the restrictions on the rights and interests of the person concerned in addition to taking into account all the considerations.[54] This is contrast with the Wednesbury test wherein the decision maker is the focal point in the process of reviewing the decision[55] and the party affected becomes the central point in the test of proportionality.[56] One more point of distinction has been pointed out that "Wednesbury unreasonableness is a residual category to be applied at the end of the court's review[57] and proportionality is the methodology that the reviewing court starts with".[58] In terms of substance also, the proportionality test yields different outcomes from the test of wednesbury unreasonableness[59] despite the acknowledgement that these two methods often produce the similar result. The authenticity of this

52 *Boddington* v. *British Transport Police*, 1999 2 A. C. 143 at 175 H, available at *https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd980402/bodd01.htm.*

53 *R (Daly)* v. *Secretary of State for the Home Department*, (2001) 2 A. C. 532 HL at 27

54 *Wood* v. *Commissioner of Police of Metropolis*, (2009) EWCA civ. 414 at 84, available at: *https://www.casemine.com/judgement/uk/5a8ff7b660d03e7f57eb16d9.*

55 *R* v. *Ministry of Defense Ex. p. Smith,* (1996) Q. B. 517 at 545, as cited in Swati Jhaveri, Michael Ramsden, "Judicial Review of Administrative Action Across the Common Law World", Cambridge University Press, available at: *https://www.marcialpons.es/media/pdf/9781108481571_frontmatter.pdf.*

56 M. Taggart, 'Proportionality, Deference, Wednesbury' (2008) New Zealand Law Review 423 at 439, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528019*

57 Le Sueur, "The Rise and Ruine of Unreasonableness", 2005, available at: *https://adminlaw.org.uk › wp-content › uploads.*

58 M. Taggart, *supra* n, 56, at 438.

59 *R (on the application of Association of British Civilian Interneesfor Eastern Region* v. *Secretary of State for Defence*, (2003) Q. B. 1397, available at: *https://www.casemine.com/judgement/uk/5b46f1ec2c94e0775e7ee2de*

statement lies in the fact that a decision that is considered to be reasonable under the Wednesbury test may be found to be disproportionate.[60] Conversely, it may also be possible that a decision that is considered to be proportionate under proportionality test may be found as unreasonable.[61] In English Law, with respect to the relationship between Wednesbury and proportionality tests, it has been recognized that the proportionality test becomes more intensive than Wednesbury principle for protecting the basic rights and liberties of people.[62] It is evident from the judgement in the cases *R.* v *Ministry of Defence Ex p. Smith,*[63]*, Daly* v. *Secretary of State for the Home Department*[64] and *Begum* v. *Tower Hamlets London Borough Council.*[65]

In *Smith's case*, homosexuals were prevented from serving in armed forces by a policy of the Department of Home. It was contended that the policy violated the right to respect and right to privacy of the applicant and therefore, is illegitimate. The court applied the test of Wednesbury unreasonableness and grudgingly held the policy lawful on the ground that it was not so unreasonable that no reasonable decision maker could reach to such a decision[66] but on appeal, the test of proportionality was applied by the European Court of Human Rights and the decision was held disproportionate and thus illegal.[67] In the Daly case, while discussing the Smith case, Lord Styen observed that "there is material difference between Wednesbury grounds of review and the approach of

60 *R (Daly)* v. *Secretary of State for the Home Department*, (2001) 2 A. C. 532 HL at 27.

61 Wade and Forsyth, *Administrative Law,* (Oxford University Press, 10th edn., 2009), at 314.

62 In '*Daly'* case, the House of Lords repudiated the viewpoint of Lord Phillips M.R. in the case of '*Mahmood'* whereby the case of human rights infringement was reviewed on the standard of Wednesbury reasonableness test. They also criticized the premise in R (on the application of Isiko) v. Secretary of State for the Home Department, (2001) 1 FCR 633 that proportionality and Wednesbury reasonableness require equitable standards of judicial review.

63 (1996] Q.B. 517.

64 (2001) 2 A. C. 532 HL
(2003) 2 A.C. 430, available at:
https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030213/begum-2.htm

66 (1996) Q.B. 517.

67 (1999) 29 E.H.R.R. 493.

proportionality". In the case of *Begum,* it was the opinion of Lord Bingham that "intensity of review under proportionality is greater than was previously appropriate, and greater even than the heightened scrutiny test". It follows that though the proportionality and the Wednesbury unreasonableness both are flexible and inconstant standards of review but at the same time they are two discrete grounds of judicial review of an administrative action in their form as well in the substance. Therefore, valid questions arise whether the test of 'Wednesbury unreasonableness' be replaced with the test of 'proportionality'? and if the Wednesbury test be preserved and continued with respect to the decisions other than the cases of the violation of the human rights and fundamental freedoms and liberties of the people? There are the arguments in favor of affirmative answers to both the questions. Some researchers argue that the proportionality test provides a more structured, transparent and intense ground of judicial review and therefore, it should replace uncertain, opaque and decisionmaker oriented Wednesbury principle.[68] On the contrary, it is also argued that the proportionality test poses the risk for the doctrine of separation of powers and it has its own limitations. The limitations of proportionality test include its non-suitability to review the omissions and inactions on the part of the governments and the decisions which are strange, ridiculous and incongruous but not disproportionate.[69]

IV. Conclusion:

The foregoing discussion confirms that the principle of proportionality is an ancient notion rooted in the ancient Indian knowledge system and other ancient civilizations. It also supports the assumption of the author that doctrine of proportionality is an established concept as the ground of judicial review in modern legal and

68 Hamaad Mustafa, "Wednesbury, Proportionality and Judicial Review", 2 *LUMS Law Journal*, 2018, available at: *https://sahsol.lums.edu.pk/sites/default/files/202209/Wednesbury%2C%20 Proportionalit 20JudicialReview.pdf*

69 Tom Hickman, *Public Law after the Human Rights Act*, (Hart Publishing, 2010), at 285.

judicial systems. It works more in concrete than in abstract and it is distinct in its form and substance both from Wednesbury unreasonableness principle. The proportionality test provides for a more structured, transparent, and intense test of judicial review to examine the reasonableness of administrative actions as it provides a robust logical basis to guide the investigation. With respect to the relationship between Wednesbury and proportionality tests, it seems that the proportionality test becomes more intensive than Wednesbury principle in matters of the infringement of basic rights and liberties of the people. As to the preferable option to challenge the fairness of an administrative action, it may be argued that proportionality test should be preferred particularly in the cases involving the violation of the basic rights, freedoms, and liberties of an individual because it gestures a modification in judicial approach towards a more rigorous inquiry. In the context of the limitations of proportionality test and its non-suitability to review the omissions and inactions of the government and the decisions which are strange, ridiculous, and incongruous but not disproportionate, the Wednesbury unreasonableness is still a workable ground of judicial review and therefore, it may be suggested that in such cases the Wednesbury test may be a preferential option.

Foreign Tourists as Victims and Perpetrators: Examining State Responses to Crime and Safety in the Tourism Sector

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Meenakshi Singh**

"The one land that all men desire to see, and having seen once, by even a glimpse, would not give that glimpse for the shows of all the rest of the world combined."

- Mark Twain[1] on India

Abstract

India is home to some of the world's famous destinations. 43.80 lakh foreign tourists visited India, which has increased since 2022 to 21.24 lakhs. Undoubtedly, India is rich with natural landscapes, historical and cultural diversity, and made its mark in scientific and medical technology. These features attract a lot of foreigners to explore incredible India. The tourism industry has been playing a significant role in the country's economic development but is also building career prospects in hospitality and management. India is the host for the year 2023 of the G20 nations, and four meetings were specifically focused on the tourism sector for its sustainable development. But on the other hand, the fact cannot be denied that the tourism sector has not been untouched by crime. Foreign tourists visit India to explore, but there are some instances of scamming by the locals; such instances tarnish the Indian image. But there is another side of the coin, too, where foreigners visiting India commit crimes. In fact, according to recent NCRB data, the "crime rate against the foreigners" is less than the "crime committed

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1 Samuel Langhorne Clemens, known by the pen name Mark Twain, was an American writer, humorist, essayist, entrepreneur, publisher, and lecturer. He was praised as the "greatest humorist the United States has produced", and William Faulkner called him "the father of American literature".

by the foreigners." This research paper will not only discuss the tourism industry along with its type and role in economic development but also focus on the criminal aspects connected to the industry with brief emphasis on the role and need for tourist police and policy to establish a safe environment and inspire prospective tourists to include India as a preferred destination.

***Key words*:** Tourist, Crime, Victim, Foreigner, G20

Introduction

The diversity of India attracts a large number of tourists from various parts of the globe. It has been one of the major focuses of the government to provide a hospitable environment to the tourists. India has potential in becoming top tourism hub in the world and putting its best efforts on the 17 pillars[2] encompassed by World Economic Forum's (WEF) the Travel and Tourism Competitive Index (TTCI). Handsome amount of money is spent in the maintenance of the tourists' destinations, and it's not just for the sake of international tourists but domestic tourism is promoted too. Various pilgrimage sites are well maintained and properly administered so as to respect the religious sentiments of the population. Various kinds of tourism like, cultural diversity, historical landmarks, adventure, medical, ayurveda and wellness and hospitality attract a huge number of tourists in India every year. Along with recreation, our country offers affordable medical and scientific facilities and quality education. The reservation and

2 Business Environment, Safety and Security, Health and Hygiene, Human Resource and Labour Market, ICT Readiness, Prioritization of Travel and Tourism, International Openness, Price Competiveness, Air Transport Infrastructure, Ground and Port Infrastructure, Tourist Service Infrastructure, Natural Resources, Cultural Resources, Non-Leisure Resources, Environmental Sustainability, Socioeconomic Resilience and Conditions and Travel and Tourism Demand Pressure and Impact. Retrieved from https://travel.economictimes.indiatimes.com/news/tourism/explained-why-indias-ranking-in-the-wefs-travel-tourism-development-index-dropped/91889708 (Visited on 6 October 2023, 12.28 PM)

scholarship policy for foreign students attracts students for educational purposes. The industry holds huge contribution in earning foreign exchange[3].

But everything comes with a backlash. As compared to the citizens, the non-awareness of the non-citizens towards our society and law makes them easy targets for crime. Also sometimes the adrenaline junkie tourists love to take risks and hence put themselves into dangerous situations. Next, the so- called western culture of some tourists is well known to promote the criminal activities such as illegal rave[4] parties with drugs, prostitution etc.

Security of the tourists and from the notorious tourists is one of the major concerns for the industry. The lack of proper administration, coordination, uniformity and control of the law enforcement agencies proves to be a major setback. However recently some states seem to be employing special forces for tackling criminal activities towards the tourists but proper uniform administrative structure throughout the country is yet to be seen.

3 Foreign exchange earnings during the four-month period during January-April 2023 were at Rs.71,235 crore compared with ₹23,584 crore a year ago. India earned a total of Rs.2.1 trillion in foreign exchange from tourism in 2019. Retrieved from https://www.livemint.com/industry/india-2023-foreign-exchange-earnings-from-tourism-could-reach-pre-covid-2019-levels-11689867335718.html (Visited on 6 October 2023, 12.28 PM)

4 The term rave is said to have originated in 1950s London in the UK, where it was used in reference to "wild bohemian parties." It became the word for any wild, over-the-top parties in general in the next decade, before fading away for a while. It then re-emerged in the 1990s with the birth of dance music genre. Retrieved from https://www.dnaindia.com/explainer/report-dna-explainer-what-are-rave-parties-the-notorious-hotspots-for-illegal-drugs-2913964 (Visited on 6 October 2023, 10.58 AM)

Types of tourism

i. Cultural and historical

As one of the most ancient civilizations of the world, our country is glorified with 40 UNESCO world heritage sites.[5] The diversity in culture is one of the major tourists' attractions, The "Incredible India" campaign launched in 2002 during its initial phase proved to be successful to promote and develop in the industry with 2.38 million tourists visiting India, which went up to 7.7 million in later years.[6] The report of WEF (published in May 2022), indicates India stands at 54th position in the index which is lowered by 8 places in 2019.[7]

However, the Central as well as State governments organize various campaigns to promote tourism, such as 'The Heart of Incredible India' in 2006 by Madhya Pradesh government,[8] *'Khusboo Gujarat Ki'* in 2011 by Gujarat government and apart from these various events such as Pushkar Mela in Rajasthan, Taj Mahotsav in U.P, Khajuraho festival in M.P, Suraj Kund Mela in Haryana, Swadesh Darshan Scheme, Dekho Apna Desh Initiative, Ek Bharat Shreshtha Bharat, PRASAD (Pilgrimage Rejuvenation And Spiritual Augmentation Drive) and many more showcase and celebrate our culture with great pride.

ii. Wildlife

With 567 wildlife sanctuaries and 106 National Parks India offers huge variation in Wildlife and Ecological tourism[9]. The geographical

5 https://www.clearias.com/cultural-tourism-in-india/# (visited on 9 September 2023, 10:56 A.M)

6 https://travel.economictimes.indiatimes.com/news/destination/states/20-years-of-incredible-india-a-successful-endeavour/92380545 (visited on 9 Sept 2023, 12:07 P.M)

7 https://www.weforum.org/reports/travel-and-tourism-development-index-2021/in-full (visited on 9 Sept 2023 12:18 P.M)

8 https://journals.sagepub.com/doi/full/10.1177/25166042221147092 (visited on 9 Sept 2023 at 12:35P.M

9 https://r.search.yahoo.com/_ylt=Awr1QHnXIfxkgaQmCAK7HAx.;_ylu=Y29sbwNzZzMEcG9zAzIEdnRpZAMEc2VjA3Ny/RV=2/RE=1694274136/RO=10/RU=https%3a%2f%2f

variation and climate change supports different ecosystems. Recently, the government has been focusing on its development and promotion. World's largest Safari Park will be developed by the Haryana government in the Aravalli Ranges and this year 20 Cheetahs were bought from South Africa for Kuno National Park M.P. Keeping the recreation aspect on one side, the scientific research of the habitat and wildlife attracts a lot of enthusiasts as well. Many creative foreign photographers and movie or documentary directors choose India as their canvas. Channels such as National Geographic, Discovery, Animal Planet, World Documentary etc. have made numerous documentaries focused upon the Indian Wildlife.

iii. Rural

In order to avoid the hustle and bustle of the big cities and to rejuvenate oneself people are drawing their attention towards the calm and slow-paced lifestyle of the villages. Major population of the country resides in the rural areas and nowadays tourists are more attracted to know the culture from near and nothing could offer a better stake than rural tourism. In order to promote the area, the Central Government has launched the campaign *"Atma Nirbhar Bharat"* on 12 July 2021 consisting of strategy and plan for development of rural tourism, which would not only promote the culture but also would open the employment opportunities for the rural population. The strategy consists of 6 pillars: -

a) Benchmarking of state policies and best practices
b) Digital technologies and platforms for rural tourism
c) Developing clusters for rural tourism
d) Marketing support for rural tourism
e) Capacity building of stakeholders
f) Governance and Institutional Framework[10]

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wii.gov.in%2fwildlife_sanctuaries/RK=2/RS=8Lq_1jAPENkXENxwZQdHM4txIkA- (9 Sept 2023 at 1:34P.M)

10 https://r.search.yahoo.com/_ylt=Awr1Tdoviv1kB3o.SZy7HAx.;_ylu=Y29sbwNzZzMEcG9zAzIEdnRp

iv. Medical

The cost efficiency and fast growth in the medical field attracts the tourists for medical facilities. Not just the recent development, but our country has a prideful history in the medical field. Along with allopathy, we provide ayurvedic, unani, cosmetic surgery, yoga, meditation and homeopathic treatments. As per the Times of India report, we have the largest number of medical colleges in the world and provide more than 50,000 doctors per year.[11] The private hospital chains such as Apollo and Fortis are even opening their branches outside India.[12]

Role of tourism industry in the economic development

For the first time since its independence, India has made its place in the top 5 among the world's strongest economies.[13] Tourism industry has been one of the major reasons in order to bag this position. Constant promotion and development in infrastructure of the industry increased the GDP and earned the valuable foreign exchange along with increasing employment opportunities.

Earning foreign exchange

India welcomed 3.13 million tourists' arrivals during the first quarter of this year which resulted in earning of foreign exchange of Rs 71,235 crores.[14]

ZAMEc2 VjA3Ny/RV=2/RE=1694366384/RO=10/RU=https%3a%2f%2ftourism.gov.in%2fsites%2fdefault%2ffiles%2f2021-06%2fDraft%2520Strategy%2520for%2520Rural%2520Tourism%2520June%252012.pdf/ RK=2/RS=GhXanittxWuMspaF4tIp5d7JYDY- (10 Sept. 2023 at 3:19 P.M)

11 https://timesofindia.indiatimes.com/blogs/voices/we-dont-even-know-how-many-doctors-currently-practice-in-india/ (10 Sept. 2023 at 8:53 P.M)

12 Medical Tourism Destination SWOT Analysis: A Case Study of Malaysia, Thailand, Singapore, and India Kee Mun Wong, Peramarajan Velasamy, Tengku Nuraina Tengku Arshad, School of Business and Accountancy, University of Malaya, 50603 Kuala Lumpur, Malaysia, Research and Informatics Department, Malaysia Healthcare Travel Council, 59000 Kuala Lumpur, Malaysia

13 https://www.weforum.org/agenda/2020/02/india-gdp-economy-growth-uk-france/ (Visited on 13 Sept 2023 at 9.30 PM)

14 https://www.livemint.com/news/india/india-2023-foreign-

Employment opportunities

The industry has not only promoted and developed the employment opportunities but also the various campaigns such as Atmanirbhar Bharat has been known for creation of new employment opportunities for the rural sector along with the prideful promotion of India's rural culture.

Multiplier effect on economy

The money generated in this sector spreads and channels through the various other sectors of economy.

Promotion of peace and stability

By generating jobs and employment opportunities, the industry maintains the peace and stability in the country.

Promoting development of infrastructure

The development of the industry also encourages other infrastructures such as transportation, hotels, restaurants, shopping complexes etc.

Contribution in GDP

Until 2021 the industry contributed 178 billion US$ to the country's GDP, which is around 5.8 % of the country's GDP. It has increased 44% since the previous year.[15]

Tourism and crime

Travelling is always seen as one of the greatest methods for recreation and relaxation but the fact cannot be denied that going to unknown places is a risky job. When a person decides to take a holiday and spend it in some unknown place then he takes the risk of victimization. It is obvious that tourists would visit countries with lesser risk of victimization.

For better understanding the relationship between crime and tourism, Prof. Ryan and Kinder have proposed the hotspot theory

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exchange-earnings-from-tourism-could-reach-pre-covid-level-11689870705702.html (Visited on 13 Sept 2023, 6:38P.M)

15 https://www.statista.com/statistics/1250204/india-contribution-of-travel-and-tourism-to-gdp/ (Visited on 13 Sept. 2023, 6:33 P.M)

according to which hotspots are referred to the places where predatory crimes can occur. They refer to such places as 'criminogenic.'[16] Prof. Mcanell developed the concept of alienation where it has been explained tourists being alien to the societies are less acceptable by the natives and hence more prone to criminal activities.[17] The various types of tourism have already been discussed. Apart from those many tourists come to India not just for travel but for the purpose of research studies. The fact cannot be denied that the closeness to the societies make the foreigners more prone to crime. Hence, it has been one of the major concerns of the governments to focus upon the security of their tourists. But it has been mentioned that it is true that tourists always act as victims. They can act as the criminal or the catalysts which could induce the criminal behavior.

Tourists as victims

India has shown improvement in the ranking of Global Peace Index with 126th rank as per the report of April 2023 from 135th rank since last year. But the rank still counts as moderately peaceful. Although significant improvement has been shown and crimes against the tourists have been reduced over the years but not eradicated completely. Petty offences such as getting scammed from local vendors, shopkeepers, cab and auto drivers by telling more than the specified price, pick pocketing, menial theft, eve teasing go unreported. The security of female tourists is one of the major concerns. Recently in March 2023, a 22-year-old Japanese woman was groped by a group of men in Delhi who forcefully smeared colours on her in the name of Holi.[18] This is not the first time when the auspicious festival is scarred by such hooligans. In

16 Crime and it's Impact on Tourism in India: A Theoretical Analysis Hema Nagpal, IJRSS, February 2014

17 Study on risk perceptions of international tourists in India Shu-Pin Chiu 1 and Shih-Yen Lin 2* 1Department of Crime Prevention and Correction, Central Police University, Taiwan. 2Department of Leisure Studies and Tourism Management, National Chi Nan University, Taiwan. Accepted 19 November, 2010

18 https://www.indiatoday.in/india/story/love-indiait-is-a-wonderful-country-japanese-tourist-who-was-harassed-on-holi-2345393-2023-03-11 (visited on 12 Sept. 2023 at 11:07 P.M)

Thiruvananthapuram a female tourist was physically and verbally abused by a group of 5 men, who was later rescued by the tourist Resort owner.[19] Another incident was reported in Amritsar in February 2023 where a female tourist died during a chain snatching attempt.[20] The security of the nation has always been questionable regarding the security of women. The so-called branding of the tourism industry is unable to hide the ground reality where the anti- social elements are very much mingled in the society that the aliens to the Indian society are unable to recognize.

The NCRB data on crime against foreigners for the year 2021 is as under:[21]

Crime head	Crime against foreign tourists	Crime against other foreigners	Crime against total foreigners
Murder	5	4	9
Culpable Homicide not amounting to Murder	0	0	0
Attempt to Commit Murder/Culpable Homicide	2	1	3
Simple Hurt and	5	3	8
Grievous Hurt	0	1	1

19 https://www.indiatoday.in/india/story/kerala-news-female-tourist-uk-abused-thiruvananthapuram-2330046-2023-02-04 (visited on 12 Sept 2023 at 9.30 PM)

20 https://timesofindia.indiatimes.com/city/amritsar/female-tourist-dies-while-preventing-snatching-attempt-in-amritsar/articleshow/97625962.cms (visited on 14 Sept 2023 at 5.45 PM)

21 Crime in India 2021, statistics volume 3, National Crime Records Bureau, Government of India

Assault on Women with Intent to Outrage her Modesty	7	8	15
Kidnapping and Abduction	0	3	3
Human Trafficking	2	6	8
Rape	5	9	14
Theft	19	4	23
Extortion	0		
Robbery	5	2	7
Dacoity	1	1	2
Cheating	3	11	14
Forgery	0		
Insult to the modesty of women	0		
Other IPC crimes	9	5	14
Total IPC	63	58	121
SLL			
Immoral Traffic Prevention Act	3	10	13
Other SLL crimes	5	11	16
Total SLL	8	21	29
Total crimes against foreigners	71	79	150

Tourists as criminals

As mentioned before, the recent NCRB data shows statistics which show a greater number of tourists as criminals than victims. Visiting tourists might induce criminal behavior such as demanding for drugs or prostitutes or may themselves indulge in criminal activities such as drug or human trafficking. Hoshiyar, Punjab is one of the best examples of drugs being trafficked by non- citizens from the neighboring border country. As per the report of Times of India, crimes committed by foreign tourists are more than crimes committed against them. Among

the 284 cases registered since June 2020 to June 2023, 200 are cases of crime committed by foreigners and most of them are related to drugs.[22] In the National Capital such crimes rose by 91.6% in the year 2021. The committed crimes are punishable under Registration of Foreigner's Act, 1939, Foreigners Act, 1946 and Narcotics and Psychotropic Substances Act, 1985. They could commit some grave offences such as the act of terrorism. Lack of proper vigilance and security checking standards makes it easier for the non- citizens to commit crimes without any hurdles. It is not much difficult for them to transport the illicit goods from one place to another as proper vigilant security is only seen at airports and big cities. Also, it is not necessary that criminals would choose these transportations.

Crimes committed by foreigners according to NCRB data is as under:[23]

Sl. No.	Crime Head	Number of crimes
1	Murder	8
2	Attempt to commit murder	8
3	Culpable homicide not amounting to murder	2
4	Hurt	1
5	Grievous hurt	2
6	Kidnapping and abduction	2
7	Human trafficking	5
8	Rape	18
9	Unnatural offences	0
10	Theft	29
11	Extortion	0

22 https://timesofindia.indiatimes.com/city/goa/cases-against-foreigners-in-goa-twice-as-many-as-filed-by-them/articleshow/102264581.cms (13 September 2023, 00: 52A.M)

23 Supra Note. 21

12	Robbery	4
13	Dacoity	1
14	Cheating	75
15	Forgery	54
16	Counterfeiting	4
17	Other IPC crimes	60
18	Foreigner Act, 1946 and Registration of Foreigner Act, 1939	1688
19	NDPS Act, 1985	354
20	The Passport Act, 1967	109
21	The Arms Act, 1959	10
22	POCSO, 2012	4
23	IT Act, 2000	16
24	The Explosives and Explosive Substances Act 1884 and 1938	1
25	The Copyright Act, 1957	0
26	The UAPA,1967	0
27	Other SLL crimes	130
	Total crimes	2585

Legal Regime

Bhartiya Nyay Sanhita, 2023

Section 1(3)[24] refer to punishment to every person who committed offence within India

Section 1(5)[25] Extension of code to Extra- Territorial offense and would apply to any committed offence by: -

a) Any citizen within India or outside India

24 Indian Penal Code, 1860, Section 2, punishes every person who commits an offence within India. The IPC was repealed and new criminal law brought in its place i.e. BNS 2023. With reference to this section no change except "Code" is replaced with "Sanhita". Wherever the word “Code” is used in IPC, the word “Sanhita” is used in BNS

25 Indian Penal Code, 1860 Section 4, Extension of code to Extra- Territorial offense, this Section is included as a subsection in BNS sans heading. In the illustration, "Uganda" has been replaced with "any place outside India."

b) Any person on any aircraft or ship registered in India

c) Any person who is targeting a computer resource within India

Constitution of India

Under the Article 51 A which mentions about the fundamental duties of the citizens related to tourism are: -

(f) To value and preserve rich heritage of our composite cultures

(g) To protect and improve the natural environment including forests, lakes, rivers, wildlife and to have compassion for living creatures

Other acts which govern the crimes committed by the tourists and which are made for the protection and cater the needs of tourism industry and tourists are: -

- Foreign Exchange Regulation Act, 1973
- The Passport Act, 1967
- The Airport Authority of India Act, 1994
- The Prevention of Food Adulteration Act, 1954
- The Railways Act, 1989
- The Sarais Act, 1867
- Bhartiya Nagrik Suraksha Sanhita, 2023
- The Laws of Torts
- Indian Contract Act, 1872
- Bhartiya Nyay Sanhita, 2023
- The Industries (Development and Regulation) Act, 1951
- The Road Transport Corporation Act, 1950
- Consumer Protection Act, 2019

Prosecuting foreigner in India – An outline

The judicial system of India makes one liable for the act committed; being a foreigner or not knowing the local laws is not an excuse[26]. The accused may be initially held without official charges and produce

26 The Latin maxim 'ignorantia juris non-excusat,' or 'ignorance of the law is no excuse,' implies that the Court presumes that every party is aware of the law and hence cannot claim ignorance of the law as a defense to escape liability.

him/her before Magistrate within 24 hours of the arrest[27]. The detention may be extended up to three months or longer depending upon the nature of the criminal act. India being Interpol member country the foreigner who is accused in the act be subject to an Interpol notice[28].

Indian criminal law is applicable to both citizens of India and foreigners who commit crime within the territory of India and such persons may be arrested and detained under various laws mentioned above. For offences committed under the Bhartiya Nyay Sanhita, 2023, investigations will be conducted in accordance with Bhartiya Nagrik Suraksha Sanhita, 2023. This is a comprehensive set of rules that defines the powers of the police and the judiciary and lays down the procedures to be followed in the conduct of an inquiry or trial. For offences committed under other legislation, investigations will be conducted in accordance with procedures outlined in the respective legislation, coupled with Bhartiya Nagarika Suraksha Sanhita, 2023.

The person on whom charges are framed, the presence of such person is necessary for an investigation, and if there is sufficient evidence suggesting that such person may flee, hide or destroy evidence, he/she may be detained. The Indian authorities may confiscate the travel documents, such as passport, while the investigation is ongoing, until charges are withdrawn or till completion of the sentence. The arrested person has certain rights under the law and is entitled to execute such rights and in addition the rights under the Vienna Convention on

27 Article 22 (2) of the constitution lays down that every person who is arrested and detained in custody should be produced before the nearest Magistrate within a period of 24 hours of such arrest exclusive of the time necessary for the journey from the place of arrest to the magistrate's court. However, Sec. 167 of the Cr.P.C. vests the power in the Magistrate to authorize the detention of the arrested person for more than 24 hours if the investigation cannot be completed within that period.

28 The International Criminal Police Organisation (INTERPOL) enables the Police of 194 member countries to work together to fight international crime. The Interpol notices are international requests for cooperation or alerts allowing Police in member countries to share critical crime related information.

Consular Relations[29]. The criminal trial is heard in the Trial Court, and then may proceed to a High Court for Appeal and eventually to the Supreme Court for final Appeal.

Tourist Police - the need and its role

The safety and security of the tourists is the basic and essential prerequisite for the sustainable growth of the industry. No doubt that the tourism industry has the right to have legitimate expectations from the government to ensure the safety and security standards. Special police for tourism is not a new concept. Many countries with developed tourism sectors have such special forces. Such police officials are specially trained to interact with the tourists and maintain the law and order in the tourist places. Egypt has appointed such officers at famous destinations who are well trained to interact with the foreigners in English and cover every tourist hot spot such as library, art gallery, museum, market etc.[30] in order to cope up with most commonly reported crimes of theft, pickpocketing, chain snatching, mugging and many more. The Royal Malaysian Police has established the specialized police and the tourist can recognize them as they are with a special uniform and badge. Initially the force was established in Kuala Lumpur, and in the states of Johor, Penang, and Selangor.[31] In 2017 the Royal Thai Police of

29 The Vienna Convention on Consular Relations ("Vienna Convention") sets forth signatory nations' obligations to detained foreign nationals) The United States adopted the Vienna Convention and Optional Protocol in 1963 and ratified in 1969. Article 36 requires that detained foreign nationals be informed--"without delay" ...

30 Evolving paradigms of tourism and hospitality, A case study of India, Mahmood A. Khan, Apple Academic Press

31 Study on Functioning of Tourist Police in States/UTs & Documentation of Best Practices, Submitted by: Indian Institute of Tourism & Travel Management Bhubaneswar, Odisha (An Autonomous Body under Ministry of Tourism, Govt. of India, by Project Director Prof. Sandeep Kulshreshtha, Director, IITTM Chief Investigator Prof. Sarat Kumar Lenka, Nodal Officer, IITTM Bhubaneswar Investigators Dr. Md. Sabir Hussain, Assistant Professor, IITTM, Bhubaneswar Shri Preji M P, Assistant Professor, IITTM, Bhubaneswar Shri Prasanth Udayakumar, Assistant Professor, IITTM, Bhubaneswar

Thailand established the tourist police which recently drew attention by launching *'I Lert you'* tourist police app in 2021 in order to aid and help the tourists in need along with generating emergency hotline numbers.[32] The attentiveness and strong vigilance of the Singapore police is highly appreciable. They are strictly instructed to answer the phone calls on the emergency number within 10 seconds and reach the crime spot within 15 minutes.[33] However, the police forces of some countries hold some loopholes such as non- fluency in English which becomes the major hurdle on the way of helping tourists. According to one study, Thai police officials are not much trained in English speaking skills.[34] Next, it was observed in Ghana that too much presence of police at several destinations made the tourists uncomfortable.[35]

India

The Bureau of Police Research and Development, Govt. of India published a compendium of study reports on promoting good practices and standards and covered Standard Operating Procedure on Tourist Police Scheme in the year 2021 to promote tourism in the country.

State	Initiatives / Policy
Goa	Bags the honor of being the first state to have a Tourist Police Unit in 1990 which is deployed at important destinations and to monitor and control the crimes. The police have also developed an attractive website in order to help and provide necessary guidance to tourists.

32 https://r.search.yahoo.com/_ylt=Awr1SZgfAQNlubgMJ4e7HAx.;_ylu=Y29sbwNzZzMEcG9zAzEEdnRpZAMEc2VjA3Ny/RV=2/RE=1694724512/RO=10/RU=https%3a%2f%2fwww.thaiforum.org%2fforum%2fforum-wiki%2findividual-topics-from-a-z%2fscam-alerts%2f4684-tourist-police-i-lert-u-app/RK=2/RS=.V4eFKHy9gsIELnSdFiuJ5qZ.i0- (14 Sep. 23, 19:03)

33 Supra Note. 26

34 Problems And Needs Of The Occupational English Language Skills For Thai Tourist Police Officers Working At One Of The International Airports In Thailand By MR. Sanchai Sae-Jeng, International Communication Language Institute Thammasat University, 2018

35 Supra Note. 24

Jammu and Kashmir	**The Superintendent of Police heads the Special Tourist Police Unit deployed at different destinations. In order to maintain the security, the Government has also enacted J and K Registration for Tourist Act.**
Delhi	**The tourists were facing the problems of criminal activities such as pickpocketing, theft, eve-teasing etc. and also the problem of interacting with the locals for help. So in order to cope up with this, Police officials are deployed on duty at certain places such as, Railway Station, IGI Airport, Rajghat, Qutub Minar, Red Fort, Janpath, India Gate, Palika Bazar. CM Kejriwal deployed 400 police officers at 21 different locations for the peaceful success of G20 Summit.[36]**
Himachal Pradesh	**Along with deploying 100 police officials in 2015 at 23 places such as Dalhousie, Dharamshala, Kasauli, Kufri etc., the Government has undertaken the consideration of safety of pilgrimage sites as well. To maintain peace and order officers are appointed at Chamunda Devi, Srinaina Devi, Jwalaji and Deotsidh. Recently the CM has announced that the HPPSC would appoint 12,000 police personnels who along with providing guidance to the tourists and curbing drug crimes, would be trained in disaster management skills as well.[37]**
Uttar Pradesh	**In 2015 funds were sanctioned to the government to employ Ex-Servicemen as tourist police officials at Shravasti and Kushinagar. Now the tourist police have been appointed at Agra and other tourist hotspots as well.**

36 https://www.thehindu.com/news/national/tourist-police-deployed-at-key-locations-in-delhi-to-help-g-20-delegates/article67288803.ece (15 Sep. 23, 16:41 P.M)

37 https://www.tribuneindia.com/news/himachal/1-200-to-be-recruited-for-tourism-police-curbing-drug-menace-cm-541705 (15 Sep. 23, 16:36P.M)

Andhra Pradesh	**A Special Police Force system was started in 2016 which is available 24x7 for helping the tourists. The state government has been focusing upon the safety and security for the tourists and in February 2023 the CM has inaugurated 20 Police outposts through virtual mode. The ASI or SI rank officers would head the outposts with each outpost having 6 police officers including women constables. [38]**

Shortcomings

Observance says that the tourism ministry along with the state governments has been focusing upon the safety of the tourists in order to maintain national integration and pride. But comparing globally certain shortcomings have been observed in administration of tourist policing system: -

a) Even after decades, none of the state could be seen providing special uniforms to the tourist police officials. It creates difficulty for the tourists to recognize them.

b) Although, several states have emergency hotline numbers to contact the officers but they vary from State to State. A uniform emergency contact number would provide better convenience and security to our guests.

c) If we observe at the base level, the corrupted and non- helping attitude of the officers shakes the faith of the help seekers and becomes one of the main reasons that many petty offences go unreported.

d) There is a need for proper training for the officers. The police officers are not provided properly with special training to deal with drastic situations such as terrorist attacks. The 9/11 massacre holds the evidence on this point. Although the police officers were brave enough to tackle and hold the situation until help arrived, the fact cannot be denied that until the NSG commandos arrived many lives were lost including the tourists.

e) One of the major barriers between the help seeker and the helper is the language. There are many tourists who are not good at English.

38 https://www.thehindu.com/news/national/andhra-pradesh/andhra-pradesh-chief-minister-inaugurates-20-tourist-police-outposts/article66508022.ece (Visited on 10 Oct. 2023 at 10.30 PM)

Except Punjab none of the states has been seen to provide special language training. In Fact some of the officers are not good at English as well.

Recent trends and development in the tourism sector

Not only in non-domestic tourism but a steady rise is also seen in domestic tourism as well. According to an article published in Hindustan Times by Akansha Agnihotri, 300 million tourists were predicted to take domestic trips.[39] The easy access to hotel bookings through online methods, affordable hotel accommodations, hustle free online travel ticket bookings, affordable train and flight tickets have made travelling easy and enjoyable. Along with this rise in culinary tourism could also be seen where people want to explore the hidden cuisines of the country. Although social media is always seen as a tool for distraction, it has also encouraged people to step out and explore because the social media influencers are well aware that travel vlogs are highly viewed on the social media platforms.

2023 would be an unforgettable year for Indian history as we bagged the honor to host G20 Summit. 4 of those meetings were specifically focused upon the tourism sector. The meetings were held at Rann of Kutch, Siliguri, Srinagar and Goa.

39 https://www.hindustantimes.com/lifestyle/travel/emerging-trends-in-indian-tourism-the-rise-of-domestic-travel-and-weekend-getaways-101690345092589.html

G20 summit venues	Area of focus
Rann of Kutch, Gujarat **7 - 9 Feb 2023**	● Green Tourism ● Digitalization ● Empowering skills for jobs in tourism sector ● Promoting startups/ private sector to encourage innovation ● Strategic management of tourist destinations[40]
Siliguri, West Bengal **1-3 April 2023**	● Empowerment of youth for jobs in the sector. ● Building potential roadmap for linking the sector with 2030 agenda for SDGs ● Development of adventure tourism[41]
Srinagar, Jammu and Kashmir **22-24 May 2023**	● To achieve goals of 2030 SDG ● Economic development and cultural preservation ● Draft for 'National Strategy on Film Tourism'[42]
Goa **19-22 June 2023**	● Promotion of cruise tourism. ● Prevention of plastic pollution ● Focus on 2030 SDG goals[43]

G20 leaders endorsed the 'Travel for LiFE'[44] program to provide a big boost to the tourism sector. It is a pioneering initiative that provides

40 https://www.g20.org/en/media-resources/press-releases/february-23/twg-concludes/ (15 Sept. 2023, 11: 39 P.M)

41 https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1913442 (15 Sept. 2023 11.42 PM)

42 https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1927544 (15 Sept 2023 at 9.30 PM)

43 https://www.g20.org/en/media-resources/press-releases/june-2023/twgm-goa/ (15 Sept 2023 at 10.30 PM)

44 Travel for LiFE program has been inspired by the Hon'ble Prime Minister's vision of LiFE (Lifestyle for Environment).

a blueprint for transformative potential in promoting responsible and sustainable tourism.

Conclusion

Since Independence, it is the first time that our country has made its place in the top five economies and no doubt that the tourism industry has played a significant role in helping the nation in achieving this benchmark. Many more developments and prideful moments are yet to come. The world is not only getting curious about our culture and history but also the ignited minds are a major source of attraction. But criminal activities are the major hurdle in the pathway of our country to become a global success. Although the data shows that there is improvement from the part of law enforcement agencies to control criminal activities towards the tourists, many petty offences go unreported and with the advancement in technology the videos of eve teasing, menial scams are widely shared upon the social media which obviously creates a negative impact. Next, it is less suspected that tourists could indulge into criminal activities as we have a welcoming attitude towards them. But as per famous Sanskrit quote *अति सर्वत्र वर्जयेत्*[45] *(Ati Sarvatra Varjate)* meaning excess of anything is harmful. Our excess welcoming attitude makes us less vigilant. In developed countries such as the USA, France etc. stepping out without passport and other verification documents creates a major trouble for the foreigners but in India the vigilance is not that strict.

There is a need for proper administrative setup for tourist police with separate uniforms and advanced training. Such police officials must be trained in communication skills, different languages, disaster management, special arms, and ammunition training, proper defence

45 Sanskrit quote nr. 562 (Maha-subhashita-samgraha)
The *Mahāsubhāṣitasaṃgraha* (महासुभाषितसंग्रह) is a compilation of Sanskrit *subhāṣitas* (quotes or aphorisms), collected from various sources. Subhāṣita is a specific genre of Sanskrit literature, exposing the ancient Indian intellectual and creative heritage.

training, technological training, and from time to time they must undergo physical and mental examinations.

The Directive Principles of State Policy and the Fundamental Duty creates the duty upon the state and citizens to maintain the national heritage and culture and protect and preserve the integrity of the nation. Our culture is our root which makes us stand pridefully in front of the world and hence it is the duty of every Indian to respect, preserve and protect it.

Reforming the Juvenile Justice System: A Human Rights Approach to Mental Health and Legal Protection

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Dr Sadaqat Rehman ***

Abstract

This paper examines the critical intersection between youth justice and mental wellness, advocating for a paradigm shift towards integrating mental health support within the juvenile justice system through a human rights framework. Recognizing the disproportionate prevalence of mental health issues among juvenile delinquents, this research underscores the necessity of addressing mental wellness as a fundamental component of the legal process and rehabilitation efforts. Utilizing a qualitative research methodology, the paper reviews existing literature, legal documents, and case studies to analyse the current state of youth justice systems, the mental health challenges faced by young offenders, and the potential human rights violations inherent in the lack of mental health support. The findings reveal a significant gap in the incorporation of mental wellness considerations within juvenile justice procedures and highlight the positive impacts of mental health interventions on legal outcomes and the overall well-being of juvenile delinquents. Furthermore, the paper proposes a set of policy recommendations aimed at integrating mental health services into youth justice systems, guided by international human rights standards. By doing so, it presents a comprehensive approach to reforming juvenile justice practices to ensure they are both just and conducive to the mental and emotional rehabilitation of young offenders. This research

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contributes to the ongoing discourse on juvenile justice reform, offering insights into how a human rights framework can facilitate the convergence of legal safeguards and mental health support, thereby promoting a more humane and effective system.

Key words: Youth Justice, Mental Wellness, Human Rights Framework, Juvenile Delinquents, Legal Safeguards, Mental Health Integration, Juvenile Justice Reform.

Introduction

The landscape of youth justice systems globally presents a complex interplay between legal procedures and the psychosocial development of young offenders. Historically, these systems have oscillated between punitive approaches and rehabilitative ideals, often failing to address the underlying issues that lead to juvenile delinquency. Notably, a significant body of research indicates a high prevalence of mental health issues among juvenile delinquents, with studies suggesting that up to 70% of youth in the justice system meet criteria for at least one mental disorder [1].This stark figure contrasts sharply with the estimated 20% prevalence rate of mental health conditions in the general adolescent population, underscoring a critical gap in addressing the needs of vulnerable youth within the justice system.[2]

The intersection of mental health issues and juvenile delinquency raises profound concerns about the adequacy of current youth justice systems to support the rehabilitation and reintegration of affected youth. The punitive measures often employed fail to address the root causes of delinquent behaviour, neglecting the potential for positive psychosocial development and the restoration of mental wellness. This oversight not

1 Teplin, L.A., Abram, K.M., McClelland, G.M., Dulcan, M.K., &Mericle, A.A. "Psychiatric Disorders in Youth in Juvenile Detention." *Archives of General Psychiatry* 59, no. 12 (2002).

2 Merikangas, K.R., He, J.P., Brody, D., Fisher, P.W., Bourdon, K., &Koretz, D.S. "Prevalence and Treatment of Mental Disorders Among US Children in the 2001–2004 NHANES." *Pediatrics* 125, no. 1 (2010).

only hampers the effectiveness of rehabilitation efforts but also raises significant human rights concerns, particularly regarding the right to health and the right to a fair trial, as articulated in international human rights instruments such as the United Nations Convention on the Rights of the Child (UNCRC).

Given this context, there is a pressing need for a holistic approach that integrates legal safeguards with mental wellness support, ensuring that interventions within the youth justice system are informed by an understanding of the unique psychological and developmental needs of juvenile delinquents. Such an approach not only aligns with contemporary principles of juvenile justice but also embodies a commitment to the fundamental human rights of children and adolescents in conflict with the law.

Human Rights Instruments Relevant to Youth Justice and Mental Health

International human rights instruments provide a legal and ethical framework for the treatment of juveniles within the justice system, emphasizing the importance of rehabilitation, the provision of mental health care, and the upholding of basic human rights. The United Nations Convention on the Rights of the Child (UNCRC), in particular, articulates the right of every child to attain the highest standard of health and access to facilities for the treatment of illness and rehabilitation of health (Article 24). Additionally, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) emphasize the right to access mental health services, highlighting the obligation of states to provide juvenile detainees with the necessary treatment and care (United Nations, 1990).

Despite the established prevalence of mental health issues among juvenile delinquents and the clear mandates of international human rights instruments, there remains a significant gap in the literature concerning the effective integration of mental wellness practices into

youth justice systems. Most research to date has focused either on the epidemiology of mental health disorders within juvenile populations or on the legal frameworks governing juvenile justice, with less attention given to the practical implementation of mental health services within this context. There is a noticeable lack of comprehensive studies that evaluate the outcomes of integrated mental health and justice interventions, and an absence of guidelines or best practices for practitioners seeking to incorporate mental health support into juvenile justice settings.[3]

This gap signifies a critical area for further research, emphasizing the need for empirical studies that explore the efficacy of integrated mental health interventions and the development of evidence-based practices that can be adopted across diverse legal and cultural contexts. Addressing this gap is essential for improving the well-being and legal outcomes of juvenile delinquents, ensuring that youth justice systems are both just and conducive to the mental and emotional rehabilitation of young offenders.

Methodology

Explanation of the Case Studies

The methodology for this research employs a qualitative case study approach, focusing on the examination of specific instances where youth justice systems have attempted to integrate mental wellness practices into their operations. These case studies were selected based on their geographic diversity, the uniqueness of their approaches to integrating mental health services, and their relevance to the themes of juvenile justice and human rights. Each case study involves an in-depth analysis of the jurisdiction's legal framework, the mental health interventions

3 Cohen, R., Green, J., Roper, H., Cunnington, M., &Muhleisen, T., "Systematic review of integrated mental health and substance abuse programs for justice-involved youth", 73 Children and Youth Services Review.

implemented, and the outcomes observed in terms of both legal processes and the well-being of the juvenile delinquents involved.

The case studies include:

1. **A Scandinavian Country's Model**: Known for its progressive approach to juvenile justice, this country emphasizes rehabilitation over punishment and has integrated comprehensive mental health evaluations and treatments into its juvenile justice system.
2. **An Urban Center in the United States**: This case explores a pilot program that partners juvenile courts with local mental health services to provide immediate assessment and treatment for youth showing signs of mental health issues at the time of arrest.
3. **A Developing Country's Community-Based Program**: This example highlights a community-based approach to juvenile justice that incorporates mental wellness programs designed to support both the youth and their families.

These case studies were chosen to provide a broad perspective on the integration of mental health services within different legal and cultural contexts, thereby enabling an exploration of the challenges and successes encountered in various settings.

Case Studies

Case Study 1: A Scandinavian Country's Model

This case study examines the juvenile justice system of a Scandinavian country, noted for its rehabilitative approach and the integration of mental health services. In this model, juvenile offenders undergo comprehensive mental health assessments upon entering the justice system, followed by tailored treatments and support programs. This approach is supported by findings from Johansson and Lindqvist (2022), who report significant improvements in recidivism rates and mental wellness among participants. The country's legislation also mandates the consideration of a child's mental and emotional state in all

judicial proceedings, reflecting a commitment to the principles outlined in the United Nations Convention on the Rights of the Child (UNCRC).[4]

Case Study 2: An Urban Centre in the United States

This case focuses on a pilot program in an urban area within the United States, where the juvenile court system has partnered with local mental health services to provide immediate assessments and interventions for youth identified with potential mental health issues. According to Miller and Davis (2023), this collaboration has led to a more informed judicial process, where decisions regarding sentencing and rehabilitation are made with a comprehensive understanding of the youth's mental health needs. This case demonstrates the potential for systemic change when mental health considerations are integrated into the justice process, aligning with recommendations from the American Psychological Association (APA) on addressing the mental health needs of juvenile offenders.[5]

Case Study 3: A Developing Country's Community-Based Program

The third case study explores a community-based approach to juvenile justice in a developing country, where mental wellness programs are designed to support both the youth and their families. The program focuses on prevention and early intervention, offering community workshops, family counselling, and individual therapy for at-risk youth. Findings from Ngozi and Ahmed (2024) indicate that this approach has not only reduced juvenile delinquency rates but also enhanced the overall mental wellness of participating families. The program's success underscores the importance of community involvement and support in addressing juvenile delinquency and mental

4 Johansson, L. & Lindqvist, K., "Rehabilitation Programs for Juvenile Offenders in Scandinavian Countries: An Evaluation Study", 23(1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 35–51 (2022).

5 Miller, L. & Davis, M., "Integrating Mental Health Care in Juvenile Justice: The Cook County Model", 28(1) *Child and Adolescent Mental Health* 34–42 (2023).

health issues, echoing the principles of participatory justice and community care outlined in the Havana Rules.[6]

The Impact of Mental Health on Legal Outcomes

Mental Wellness and Legal Processing

Mental health conditions can significantly impact the legal processing of juvenile delinquents, affecting their understanding of proceedings, their ability to participate in their defence, and the appropriateness of the legal outcomes they face. Courts that fail to recognize or adequately address these issues risk perpetuating injustices and may impose sentences that do not take into account the juvenile's mental health needs, potentially violating their rights to a fair trial and to health.[7]

Human Rights Violations and Opportunities

Identification of Human Rights Violations

The failure to provide adequate mental health care and support for juvenile delinquents can constitute a violation of their human rights, including the rights to health, to freedom from inhuman treatment, and to a fair trial. Instances of solitary confinement, lack of access to mental health services, and failure to consider the mental and emotional maturity of juveniles in legal decisions are all areas of concern.[8]

6 Ngozi, A. & Ahmed, R., "Community-Based Mental Wellness Programs for Juvenile Offenders in Developing Countries: A Case Study of Nigeria", 68(3) *International Journal of Offender Therapy and Comparative Criminology* 789–805 (2024)

7 Connor, D.F., Ford, J.D., Albert, D.B. &Doerfler, L.A., "Conduct Disorder, Substance Use Disorders, and Coexisting Conduct and Substance Use Disorders in Adolescent Detainees", 68(5) *Psychiatric Services* 452–459 (2017).

8 "Callous and Cruel: Use of Force against Inmates with Mental Disabilities in US Jails and Prisons", Human Rights Watch Report (2015).

Opportunities for Reform Through a Human Rights Lens

The integration of mental health considerations into the youth justice system presents a significant opportunity for reform. By aligning policies and practices with international human rights standards, states can ensure that juvenile delinquents receive the support and care they need for rehabilitation and reintegration into society. This could include developing alternatives to detention that prioritize mental health care, implementing comprehensive mental health assessments as part of the legal process, and training justice system personnel on issues of adolescent mental health (United Nations, 2015).

Integrating Mental Wellness into Youth Justice: A Human Rights Approach

Strategies for Incorporating Mental Health Support Within the Justice System

Integrating mental health support into the youth justice system necessitates a multidimensional approach that addresses both the immediate needs of juvenile delinquents and the systemic changes required to sustain long-term improvements. Strategies include:

1. **Comprehensive Mental Health Assessments**: Implementing standardized mental health screenings and assessments for all juveniles at the point of entry into the justice system can identify needs and guide appropriate interventions.[9]

2. **Integrated Treatment Programs**: Developing treatment programs that are integrated into the justice system but are delivered in

9 Fazel, S., Doll, H. &Långström, N., "Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Meta-Regression Analysis of 25 Surveys", 47(9) *Journal of the American Academy of Child & Adolescent Psychiatry* 1010–1019 (2008).

collaboration with mental health professionals to ensure that treatment is therapeutic and not punitive.[10]

3. **Training for Justice System Personnel**: Providing ongoing training for judges, lawyers, police, and correctional officers on recognizing mental health issues and understanding the developmental needs of adolescents.[11]

4. **Alternatives to Detention**: Promoting non-custodial measures for juveniles with mental health conditions, such as diversion to mental health courts or community-based treatment programs, to avoid the harms associated with detention.[12]

Policy Recommendations for Ensuring the Rights of Juvenile Delinquents are Protected

Policy reforms are essential to facilitate the effective integration of mental wellness into youth justice systems:

1. **Legislation Recognizing the Importance of Mental Health**: Enact laws that recognize the critical importance of mental health in the assessment, treatment, and rehabilitation of juvenile delinquents, in line with international human rights obligations.

2. **Establishment of Mental Health Courts**: Create specialized courts for juveniles that focus on mental health issues, ensuring decisions are made with consideration of the juvenile's mental health and aiming for rehabilitation rather than punishment.[13]

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10 McCoy, M.L., Keen, S.M., Towers, C.V., Gnall, E. &Botash, A.S., "Integrating Mental Health Therapy into the Juvenile Justice System: A Case Study", 5(1) *Journal of Juvenile Justice* 68–79 (2016).

11 Zel, S. & Seewald, K., "Koetzle, D. &Lösel, F., "Working with Juvenile Offenders: The Role of Training in the Enhancement of Efficacy Beliefs in Probation Officers", 11(4) *Journal of Experimental Criminology* 491–509 (2015).

12 Underwood, L.A. & Washington, A., "Mental Illness and Juvenile Offenders", 13(2) *International Journal of Environmental Research and Public Health* 228 (2016).

13 Goldstein, N.E.S., Macaulay, W.A., &Wershler, J.L., "A National Survey of U.S. Juvenile Mental Health Courts".

3. **Guarantee Access to Quality Mental Health Services**: Ensure that juveniles have access to high-quality mental health services, both in detention and in the community, supported by adequate funding and resources.

4. **Oversight and Accountability Mechanisms**: Implement oversight mechanisms to monitor the integration of mental health services into the youth justice system, ensuring that rights are protected, and services are effective and humane.

Several jurisdictions around the world have made significant progress in integrating mental health services within their youth justice systems:

- **New Zealand's Family Group Conferences**: A restorative justice approach that involves the family and the community in the decision-making process, addressing the youth's behaviour while considering their mental health and social needs.[14]
- **Norway's Child Welfare Approach**: Norway integrates its juvenile justice and child welfare systems, focusing on rehabilitation in a family-like environment with a strong emphasis on mental health support, leading to one of the lowest recidivism rates globally.[15]
- **Canada's Integrated Court Programs**: Canada has developed integrated court programs that provide mental health assessments, treatment planning, and follow-up for juvenile offenders, demonstrating success in reducing recidivism and improving mental health outcomes.[16]

14 Maxwell, G. & Morris, A., "Family Group Conferences in New Zealand: Legal and Policy Implications", 54(4) *Family Court Review* 605–618 (2016).

15 Andersson, T., Munk, M.E., Törrönen, J. &Šilova, A., "Norway: Longitudinal Study on Recidivism", 14(5) *European Journal of Criminology* 574–590 (2017).

16 Szymanski, L., "Integrated Mental Health Court Programs in Canada", 37(2) *Canadian Journal of Community Mental Health* 41–54 (2018).

Implications for Policy and Practice

Implications of Research Findings

The integration of mental wellness into youth justice, guided by a human rights approach, has profound implications for policymakers, legal practitioners, and mental health professionals. For policymakers, the research underscores the need for comprehensive legal frameworks that recognize and address the mental health needs of juvenile delinquents as a matter of rights and public health. This includes allocating resources for mental health services, establishing oversight mechanisms to ensure adherence to human rights standards, and promoting alternatives to detention that prioritize rehabilitation.[17]

Legal practitioners, including judges, lawyers, and probation officers, are called upon to adopt a more informed and compassionate approach to handling cases involving juvenile delinquents with mental health issues. This necessitates training on mental health awareness, the development of skills to identify and respond to mental health needs, and the application of legal standards that reflect the principles of justice and rehabilitation for juveniles.[18]

Mental health professionals have a crucial role in shaping the response to juvenile delinquents within the justice system. They are tasked with conducting accurate assessments, providing effective treatment, and advocating for the integration of mental health considerations into judicial processes. This involves working closely with legal and correctional systems to ensure that mental health

17 Underwood, L.A. & Washington, A.,"Mental Illness and Juvenile Offenders", 13(2)

18 Koetzle, D. &Lösel, F., "Working with Juvenile Offenders: The Role of Training in the Enhancement of Efficacy Beliefs in Probation Officers", 11(4) *Journal of Experimental Criminology* 491–509 (2015).

interventions are tailored to the needs of juveniles and contribute to their rehabilitation and reintegration into society.[19]

The Role of International and National Human Rights Bodies

International and national human rights bodies play a pivotal role in facilitating the change required to integrate mental wellness into youth justice systems. At the international level, bodies such as the United Nations Committee on the Rights of the Child can provide guidance and oversight, encouraging states to comply with their obligations under conventions like the UNCRC. These bodies can also serve as forums for sharing best practices and promoting international cooperation in the development of juvenile justice reforms that respect the rights and needs of children (United Nations, 2015).

At the national level, human rights commissions and ombudspersons can monitor the treatment of juveniles in the justice system, investigate allegations of rights violations, and advocate for reforms. They can also play an educational role, raising awareness among stakeholders about the rights of juveniles and the importance of integrating mental health support into justice processes (Human Rights Watch, 2015).

Through their advocacy, oversight, and advisory functions, human rights bodies can support the implementation of the recommendations arising from this research. By promoting a rights-based approach to juvenile justice, they contribute to the creation of systems that not only protect the legal and procedural rights of juveniles but also ensure their mental and emotional well-being.

19 McCoy, M.L., Keen, S.M., Towers, C.V., Gnall, E. &Botash, A.S., "Integrating Mental Health Therapy into the Juvenile Justice System: A Case Study", 5(1) *Journal of Juvenile Justice* 68–79 (2016).

Conclusion

Summary of Findings and Their Significance

This research has illuminated the critical intersection of mental wellness and youth justice within a human rights framework. Findings underscore the high prevalence of mental health issues among juvenile delinquents and the profound impact these issues can have on their experiences within the justice system and their outcomes. The analysis highlighted the substantial gaps in current practices, with many youth justice systems failing to adequately address the mental health needs of juveniles, thereby compromising their rights and opportunities for rehabilitation.

The exploration of international human rights instruments, such as the UNCRC, and their implications for juvenile justice reform, underscores the legal and ethical obligations of states to integrate mental health support into their justice systems. Case studies from around the world provided tangible examples of how such integration can be achieved and the positive impacts it can have on juveniles, the justice system, and society at large.

Call to Action

Based on the findings of this research, there is a clear and urgent call to action for integrating mental wellness into youth justice systems through a human rights lens. Policymakers, legal practitioners, and mental health professionals must work collaboratively to enact reforms that:

1. **Incorporate Comprehensive Mental Health Assessments and Treatments**: Ensure that every juvenile entering the justice system receives a comprehensive mental health assessment and that those with mental health needs have access to appropriate, evidence-based treatments.

2. **Adopt Legal and Policy Reforms**: Enact legal and policy reforms that prioritize mental health and rehabilitation over punitive

measures, informed by the principles enshrined in international human rights standards (United Nations, 2015).

3. **Invest in Training and Resources**: Allocate the necessary resources for the training of justice system personnel and the provision of mental health services, emphasizing the development of specialized programs that address the unique needs of juvenile delinquents (Koetzle&Lösel, 2015).

4. **Promote Alternatives to Detention**: Expand the use of alternatives to detention, such as diversion programs and community-based treatments, which have been shown to offer more humane and effective solutions for juveniles with mental health issues (Underwood & Washington, 2016).

The role of international and national human rights bodies in advocating for and monitoring these reforms is crucial. They must continue to hold states accountable to their obligations under international law, providing guidance, support, and oversight to ensure the rights of juvenile delinquents are protected and upheld.

Prevention Of Money Laundering In India: A Legislative And Judicial Overview

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Dr.Arneet Kaur**

Abstract

Money laundering in the recent past has again gained traction on the world financial and political platform. This is primarily due to the various new avenues through which dirty money is being generated and circulated. Enforcement Directorate (ED) is a multi-disciplinary organisation which is empowered to investigate the offence of money laundering along with violations of foreign exchange laws. This paper focuses on the act of money laundering and analysing the most effective judicial measures to counter the same. Money laundering as an offence is a serious crime as it not only affects an individual, but it also has an impact on the economy of a country. Since money laundering is an economic offence, it is imperative to study how the Government of India tackles this menace. This paper also highlights the various upheavals the implementation process of this act is facing due to inadequate support from governmental authorities.

Key Words: Money Laundering, Economic Offence, Enforcement Directorate, Financial Crime, Constitutionality.

I. Introduction

A large number of crimes find their genesis in matters related to money. 'Money' is any circulating medium of exchange. It is the means through which human beings meet their basic needs. The rampant economic inequalities or the lack of chastity may instigate an individual to choose the path of crime. There are a number of crimes that can stem due to these reasons like greed, some being theft, murder, kidnapping,

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economic offences like money laundering, tax evasion, illicit drug trafficking, credit and frauds etc. A comprehensive definition of 'economic offences' or 'economic crime' could neither be constituted nor accepted universally, but the Eleventh United Nations Congress on Crime Prevention and Criminal Justice (Bangkok, April 2005) attempted to broadly define the phrase, 'economic crime'. It defined 'economic crime' as those activities which involved one or other form of economic gain or financial or material benefit. In its opinion, the Congress included economic fraud and all identity-related crimes, except for those that did not necessarily contain an economic element or motive, within the ambit of an 'economic crime'.[1] By way of this broad definition the United Nations (UN) Congress attempted to identify the key components of 'economic crimes' that were common all over the world. The need to properly assess the threat posed by economic crime within any jurisdiction was emphasised. The member States encapsulated the broad understanding of this concept in their domestic laws.

The European Union (EU) provides a similar definition for 'economic crime' whereby it states that, an economic crime refers to illegal acts that are committed by an individual or a group of individuals to obtain a financial or professional advantage. The main motive behind such a crime is economic gain. It is also known as 'financial crime'.[2] Interestingly, the Eleventh United Nations Congress on Crime Protection and Criminal Justice has defined 'financial crime' separately. The definition states that a 'financial crime' includes all those crimes that are committed by using major financial systems or are committed against those systems.[3]

1 Eleventh United Nations Congress on Crime Prevention and Criminal Justice, *available at* https://www.unodc.org/documents/congress/Documentation/11Congress/ACONF203_18_e_V05844 09.pdf (last visited on January 10, 2024).

2 EUROPOL, "Economic Crime", *available at* https://www.europol.europa.eu/crime-areas/economic-crime#:~:text=Economic%20crime%2C%20also%20known%20as,such%20crimes%20is%20economic%20gain (last visited on April 13, 2024).

3 Eleventh United Nations Congress on Crime Prevention and Criminal Justice, *available at* https://www.unodc.org/documents/congress/Documentation/11Congress/ACONF203_18_e_V0584409.pdf (last visited on January 10, 2024).

Money laundering in particular is understood as the illegal process of generating large amounts of money through criminal activities or means and making it appear as if it has originated from a legal or legitimate source. It is a financial crime, better known as an economic offence. It can be understood as the process of making the proceeds of criminal activity appear legal.[4] In other words, money laundering can be understood as an activity wherein the individual not only conceals his source of income but also indulges in converting black money into white money.

'Black money' refers to the money that has been acquired through illegitimate means or money which is unaccounted for and on which tax has not been paid. There is no formal definition for 'black money'. But it is generally understood as money which is hidden from the government. It is not included in the gross domestic product [GDP] of India, national income etc. "White money" on the other hand is earned through legitimate means and is accounted for. In other words, it is the money for which tax has been paid & which is not hidden from the government. Therefore, the conversion of black money or unaccounted money into white money or accounted money is known as money laundering.

II. The Prevention of Money Laundering Act, 2002: An Overview

In India, The Prevention of Money Laundering Act, 2002 was enacted to fulfil the objectives of the Political Declaration adopted by the Special Session of the United Nations General Assembly which was held in June 1998. The Declaration called upon its member States to adopt a National Money Laundering Legislation and Program, mainly with the objective of meeting with the serious threat that is posed by the act of money laundering to the economies and financial systems of the member States. The Declaration also aimed at protecting the integrity and sovereignty of the countries. In order to fulfil India's global commitment in combating the menace of money laundering, 'The Prevention of Money Laundering Act' was enacted. Along with this Act, the Prevention of Money Laundering (Maintenance of Records) Rules 2005

4 *Supra* note 2.

also play a pivotal role in tackling the issues of money laundering and terrorist financing.

This legislation is a comprehensive act that was formulated to prevent money laundering and the connected activities, to confiscate the proceeds of crime, to set up agencies and a mechanism for coordinating measures for combating money laundering etc.[5] The Act intends to strike at organised crimes and the legitimacy of the ill-gotten money through those crimes[6]. The Act has been amended several times. It is the main enactment that deals with money-laundering. It is a small Act with just 75 sections which are divided into 10 chapters. Section 2 of the Prevention of Money Laundering Act 2002 is the defining section for this Act. It contains several definitions including that of attachment, authorised person, beneficial owner, banking company, chit fund company, cooperative bank, dealer, financial institution, intermediary, investigation, offence of cross border implications, payment system, person, proceeds of crime, property, etc. This section does not expressly define what constitutes the offence of money laundering. *Section 3* of the Act talks about the "Offence of Money Laundering", which has been quoted below:

"Offence of money laundering – Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a part or is actually involved in any process or activity connected [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money laundering.[7]"

Therefore, an offence of money laundering is committed when a person is found to be directly or indirectly indulging or attempting to indulge or knowingly assists or knowingly is a part or is involved in the process or activity connected to money laundering. The activity that consists of the act of money laundering relates to proceeds of crime including its concealment, possession, acquisition or use and projecting

5 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), Statement of Objects & Reasons.

6 Kavitha G. Pillai v. Joint Director, Director of Enforcement, Government of India, 2017 (3) Ker. LT 1143.

7 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), s. 3.

or claiming it as untainted property. In other words, any person who indulges in any of the above-mentioned activities with the aim of showcasing proceeds of crime as untainted, shall be held responsible for committing the offence of money laundering.

Section 4 of the Act prescribes the punishment for the offence of money laundering. It states that, *"Whoever commits the offence of money laundering shall be punishable with a rigorous imprisonment for a term which shall not be less than three years, but which may extend to seven years and shall also be liable to a fine."* If the proceeds of crime involved in money laundering relates to any offence given in the second paragraph of Part A of the Schedule, then the rigorous imprisonment may extend to ten years[8]. The offences listed in Paragraph 2 of Part A of the Schedule relate to offences under The Narcotic Drugs and Psychotropic Substances Act, 1985.

It is interesting to note, that this Act not only punishes the persons who commits an offence of money laundering under this Act, rather it also punishes the authorities or officers who while exercising their powers as bestowed by the Act, undertake a vexatious search operation. Such an authority or officer shall be liable for imprisonment for a term which may extend to two years or fine which may extend to fifty thousand rupees or both[9].

The Prevention of Money Laundering Act gives powers to the Director or any other officer not below the rank of Deputy Director (who is authorised by the Director) to order in writing the attachment of property, which is involved in money laundering, if he has reasons to believe that such property is connected with the offence of money laundering. The property cannot be attached for a period of more than 180 days. *Chapter III* talks about "Attachment, Adjudication and Confiscation", wherein the Act provides for a separate mechanism for attachment of property which is involved in money laundering. While *Section 6* of the Act provides for the constitution of the Adjudicating Authority and lays down the powers conferred upon it for deciding a

8 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), s. 4.
9 *Id., s*. 62.

matter concerning money laundering, *Section 8* deals with the adjudication procedure. The Act also bestows the power of survey, search, seizure and arrest to the concerned authorities or the Director as the case may be. This has been provided in *Chapter V* of the Act.

Further, the Prevention of Money Laundering Act, 2002 provides for an appellate tribunal under *Section 25*. The Appellate Tribunal which was constituted under *Section 12(1)* of the Smugglers and Foreign Exchange Manipulators (Forfeiture of property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the adjudicating authority and other authorities under The Prevention of Money Laundering Act. An appeal to the said tribunal is to be made within a period of forty-five days from the date on which a copy of the order by the Adjudicating authority or Director is received.[10] The Appellate Tribunal shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit.[11] A person who is aggrieved by the order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the impugned order.[12] Interestingly, the Act of 2002 also provides for establishing of 'Special Courts' through a notification, by the Central Government, in consultation with the Chief Justice of High Court, for trial of offence which is punishable under Section 4 of the Act. By way of a notification, one or more Courts of Session are designated as Special Courts[13]. The provisions of Code of Criminal Procedure, 1973 are applicable to the proceedings before a Special Court. The Special Court shall, for the purposes of the said provisions, be deemed to be a Court of Session and the persons conducting the prosecution before such court shall be deemed to be a Public Prosecutor.[14]

There are four classes of authorities that shall be appointed for the purposes of this Act, namely:

1.Director or Additional Director or Joint Director

10 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), S. 25.
11 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), S. 35.
12 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), S. 42.
13 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), S. 43.
14 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), S. 46.

2.Deputy Director

3.Assistant Director, and

4.Such other class of officers (may be appointed for the purposes of this Act.)[15]

The powers of these authorities have also been provided for in Chapter VIII of the Act. Thus, the Act provides for all the necessary information that is required for the establishment and functioning of the various authorities and for punishing not only those who commit a crime, but also those who carry out vexatious searches to harass members of the public.

III. Prevention of Money Laundering (Maintenance of Records) Rules, 2005

'Rule' in general is understood as any standard, principle, or norm that guides conduct.[16] Rules follow the enactment of a parent legislation thereby clarifying any ambiguities that may have been left in the parent legislation and assisting the law enforcers in implementing the law more easily. The Prevention of Money Laundering (Maintenance of Records) Rules, 2005 have proved their worth in dealing with real-life cases of money laundering. The introduction to the Rules state that these rules have been curated by the Central Government in consultation with the Reserve Bank of India in exercise of its powers conferred by Section 73 read with Section 11A and Section 12AA of the Prevention of Money laundering Act, 2002.[17]

The Rules yet again define a number of terms including, Central KYC Records Registry, digital KYC, digital signature, non-profit organization, regulator, suspicious transaction, transaction etc. It further elucidates which transactions are to be recorded[18], what all information is to be recorded and maintained[19], how are they to be recorded and

15 Prevention of Money Laundering Act, 2002 (Act 15 of 2003), S. 48.
16 Cornell Law School, "Rule", *available at* https://www.law.cornell.edu/wex/rule (last visited on March 23, 2024).
17 Prevention of Money Laundering (Maintenance of Records) Rules, 2005.
18 Prevention of Money Laundering (Maintenance of Records) Rules, 2005, Rule 3.
19 *Id.*, Rule 4.

maintained[20] and the procedure and manner of furnishing information[21]. Rule 4 speaks with reference to the transactions that are mentioned in Rule 3 and states that the "records shall contain all necessary information specified by the Regulator to permit reconstruction of individual transaction, including the following information-

a) The nature of the transaction,

b) The amount of the transaction and the currency in which it was denominated

c) The date on which the transaction was conducted

d) The parties to the transaction."[22]

The records so developed shall be maintained in accordance with the procedure and manner as may be specified by the regulator. The reporting entity is bound to evolve an internal mechanism to maintain such information.[23] The reporting entity is also obligated to conduct a *client due diligence* at the beginning of an account- based relationship. The provisions of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 work towards safeguarding the "reporting entity".

III. The Enforcement Directorate

The Directorate of Enforcement is a multi-disciplinary organization which is responsible for investigating the offence of money laundering and any violations of the foreign exchange laws. It is a domestic law enforcement and economic intelligence agency in India. It is mandated to enforce two important fiscal legislations viz., the Foreign Exchange Management Act, 1999 (FEMA) and the Prevention of Money Laundering Act, 2002 (PMLA). The Enforcement Directorate has been given the duty to enforce the provisions of the Prevention of Money Laundering Act 2002 by conducting investigations to trace the assets that are derived from the proceeds of crime, to provisionally attach such property and to ensure prosecution of the offenders and confiscation of the property by the Special Court.[24] It is entrusted with the responsibility

20 *Id.*, Rule 5.
21 *Id.*, Rule 7.
22 *Id.*, Rule 4.
23 *Id.*, Rule 5.
24 Directorate of Enforcement, "What we do", *available at:* https://enforcementdirectorate.gov.in/ (last visited on February 25, 2024).

of enforcing economic laws and combating economic crimes, and is accordingly empowered by the law.

The primary focus of the Enforcement Directorate is on curbing the generation and circulation of black money and ensuring compliance with foreign exchange and money laundering laws. Apart from the aforementioned acts, the Enforcement Directorate can also enforce the provisions of the Fugitive Economic Offenders Act, 2018 and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.[25]The Enforcement Directorate originated on 1st May 1956 as an 'Enforcement Unit' under the Department of Economic Affairs specifically for handling Exchange Control Law violations under the Foreign Exchange Regulation Act, 1947 (FERA), which was later on repealed and replaced by Foreign Exchange Regulation Act, 1973. In 1957, it was renamed as "The Enforcement Directorate". With the opening of the economy through the New Economic Policy of 1991 (LPG- Liberalization, Globalisation and Privatisation) the Foreign Exchange Regulation Act of 1973 was repealed and replaced by the Foreign Exchange Management Act 1999 (FEMA). To meet its international obligations with respect to the International Money Laundering regime, India enacted the Prevention of Money Laundering Act in 2002. The Enforcement Directorate was then entrusted with the enforcement of the Act of 2002 w.e.f. 1st July 2005.

IV. Role of Judiciary in facilitating Prevention of Money Laundering Act, 2002

Recently, the constitutionality of The Prevention of Money Laundering Act, 2002 was questioned in the Hon'ble Supreme Court of India, in the case of *Vijay Madanlal Choudhary & Ors. V. Union of India & Ors.*[26]. The petitioners challenged ECIR and a number of sections of the Prevention of Money Laundering Act, 2002. There were a number of pertinent issues raised in this case like : "Under the

25 Vasudha Mukherjee, "Decoding the ED: Understanding its history, powers, and criticism", *Business Standard, available at: https://www.business-standard.com/india-news/decoding-the-ed-understanding-its-history-powers-and-criticism-123112200730_1.html* (last visited on February 25, 2024).

26 2022 SCC Online SC 929.

Prevention of Money Laundering Act, is it mandatory to obtain a magistrate's permission before making arrests? , Whether 'money laundering' is a standalone offence and whether a complaint about a predicate offence is required to arrest under the act? etc. The Hon'ble Supreme Court upheld the wide investigative powers of the directorate of enforcement and the restrictive bail conditions under the PMLA, 2002. Further, the Hon'ble Court held that the *"Principle of Innocence"* of the accused is regarded as a human right, but the presumption can be prohibited by a law made by the Parliament. It was clarified by the Court that Section 3 of the PMLA, 2002 has a wide reach and it considers the offence of money laundering as an independent offence. Further, it was held that the offence under section 3 is dependent on illegal gain of property because of a criminal activity relating to a scheduled offence. The Authorities under 2002 Act cannot prosecute any person on a notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and pending enquiry including by way of criminal complaint before the competent forum. The court rejected the contention that the Enforcement Directorate authorities are police officers. Thus, a statement recorded by them under section 50 of the Act would be hit by Article 20(3) of the Constitution, which says no person accused of an offence shall be compelled to be a witness against himself.On the question of constitutionality of section 45 of the PMLA, the Court held that the section is constitutional, rejecting the arguments that were proposed by the petitioners, which claimed that the section was arbitrary/unreasonable/violative of article 14 or 21. Thus, the Supreme Court held the Prevention of Money Laundering Act, 2002 as constitutionally valid[27].

Before this landmark judgment, courts in India adopted divergent views, especially on the applicability of Section 45 which pertains to the grant of bail along with twin conditions being attached to it. The judgments of the various High Courts reflect a polarized divergent view of interpretation which was subsequently settled in the judgment of

27 Vijay Madanlal Choudhary & Ors. *V.* Union of India & Ors, 2022 SCC OnLine SC 929.

Vijay Madanlal Choudhary. Few other landmark judgments which have been passed by the Hon'ble Supreme court and High Courts of India:

Nikesh Tarachand Shah *v.* Union of India[28]

It was declared by the Hon'ble Supreme Court of India that section 45(1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before the bench in which bail had been denied, because of the presence of the twin conditions contained in section 45 , were directed to go back to the respective Courts which denied bail. All such orders are set aside, and the cases remanded to the respective Courts to be heard on merits, without application of the twin conditions contained in section 45 of the 2002 Act. The writ petitions and the appeals were disposed of accordingly.

Hasan Ali Khan *v.* Union of India[29]

The Bombay High Court held that where even the projection of the proceeds of crime as 'untainted' had taken place before the commencement of the provisions of the Prevention of Money Laundering Act, then the charge of an offence punishable under this Act cannot be leveled with respect to such transactions. This implied that the date on which the projection of the proceeds of crime as 'untainted' has taken place, must be a date after the commencement of the Act so that the accused can be prosecuted for the offence punishable under Section 4. In the instant case, most of the transactions (making up the subject matter of the case) had taken place before the commencement of the Act therefore, they cannot be the subject matter of the prosecution for the offence punishable under the Prevention of Money Laundering Act 2002. The contention whether the cases where money laundering had already been done before the commencement of the Act would give rise to the prosecution under the provisions of the Act was, rejected. Another aspect of the matter pertained to the essence of "offence" as defined in Section 3 of the Prevention of Money Laundering Act 2002. The

28 (2018) 11 SCC 1.
29 2011 SCC OnLine Bom 1117.

question focused on whether where a person having proceeds of crime in his possession puts them in a bank account and then transfers the same to another bank account, he can be said to have projected that money as "untainted property". It was held that proceeds of crime would remain proceeds of crime, irrespective of whether they are kept in a house, or deposited in a bank account, or kept with someone else. To project a property as "untainted property", would involve offering some explanation regarding the acquisition of the said property and showing it to have a legitimate source.

Directorate of Enforcement *v.* Kamma Srinivasa Rao[30]

It was held that the various provisions of PMLA, specifically Sections 19, 65 and 71, Court held that provisions of PMLA shall prevail and override the provisions of CrPC, to the extent of inconsistency between the provisions of CrPC and PMLA. Referring to the judgment of *Gangula Ashok v. State of A.P.*, it was held that in light of Sections 4 and 5 CrPC, if any special enactment contains any provision contrary to the provision of the Code, such other provisions would then apply in place of the provisions and the procedure laid down under CrPC. However, if there is no inconsistency or the provisions of the special enactment are silent, then by necessary implication provisions of CrPC shall apply. The court in the process thus compared Section 41-A vis-à-vis Section 19 of the PMLA. It was held that Section 19 provides enough protective measures and is a specific provision laying down the manner and procedure for the arrest of the person accused of committing an offence of money laundering. In view thereof, the general power and procedure of arrest provided under Section 41-A shall cease to apply qua the offences under PMLA. The arrest of any person post 2019 Amendment to the PMLA is thus subject only to Sections 19 and 45. Thus, pre-arrest protection under Section 41-A CrPC cannot be extended in the case and context of offences under PMLA, especially in view of its "Statement of Objects and Reasons" of the PMLA Amendment Act of 2019. It relates to the prevention of commission of economic offences on a large scale. On the second issue, it was held that the Sessions Judge

30 (2022) 1 ALD (Crl) 838 (Andhra Pradesh High Court).

(Designated Court) had no power to return the remand application filed under Section 167(2) CrPC and that he exceeded his powers by rejecting the remand application. The court performs the judicial function whilst deciding an application for remand and is bound to pass a judicial order with due application of mind. On the third issue, about the maintainability and consideration of anticipatory bail application under Section 438 CrPC, it was held that since the Designated Court/Sessions Judge had returned the remand application, in light of which the accused was relieved from ED's custody, therefore the accused for all intent and purposes was never in the custody of the ED on the date of filing of the Section 438 application.

V. Conclusion & Suggestions

Humans are not only social animals, they are also very emotional beings. Their lives are fuelled by emotions; both positive and negative. These emotions drive a human to work hard to fulfil his dreams, desires, goals etc. but this drive has the power to not only push a human onto a path of success but also on the dark path of crime. Crime stems from a variety of emotions such as lust, greed, revenge/vengeance, sorrow, helplessness etc. Over the centuries, humans have just added to the already long list of crimes committed by them . Economic offences, which originated after the establishment of trading and banking systems are, relatively, newer categories of offences. The economic offences pose a threat not just to individuals, rather, they have multilateral effects on the society, economy, and the businesses of certain other individuals other than the person who is directly involved in the crime. Money laundering is a type of economic offence and, in India the Prevention of Money Laundering Act along with its Rules, deals with it. The Act establishes authorities and investigative agencies to safeguard the interest of the public, the country, its economy, sovereignty, and integrity. Money laundering as an offence can have its roots in certain other illegal activities like drug trafficking and terrorism or may give a boost to such activities along with other illegal or illicit activities. The act of money-laundering may create a parallel economic system and may result in destabilisation of the existing economy. To tackle this wide range of such dangerous activities, the Prevention of Money Laundering

Act, 2002 (PMLA) was enacted. Several global measures have been taken to combat drug trafficking, terrorism and other organised and serious crimes which have primarily emphasised on the need for financial institutions, including securities market intermediaries, to establish internal procedures that will effectively serve to prevent and impede money laundering and terrorist financing. The Prevention of Money Laundering Act is in line with these measures and mandates.

The Prevention of Money Laundering Act, 2002 is a complete code which overrides the general criminal law to the extent of inconsistency. It is a special act which was enacted for preventing money-laundering and other related activities. PMLA aims to confiscate property derived from, or involved in, money laundering and to punish those who committed the offence of money laundering. The act has established its own enforcement machinery and other authorities with adjudicatory powers and jurisdiction. The Act of 2002 provides for establishment of a special court, which is the proper forum to proceed and adjudicate matters relating to money laundering. Also, the act provides for several remedies to the persons who may be accused in a case relating to the offence of money laundering. The Prevention of Money Laundering Act, was enacted with the intention of combating the growing problem of money laundering so as to uphold the integrity of the financial systems of the Indian Banking sector. The act has for the first time criminalised the act of money laundering in crystal clear words, and at the same time given teeth to authorities to deter, detect & prosecute offenders. It has brought about a major change in the practices of Indian banking systems. They are now required to conduct due diligence on their customers, track & report suspicious transactions and extend full cooperation to authorities in tackling economic offences. Also, it is a known fact that if the fruits of crime are denied to offenders , then it weakens their fangs . Hence, the proposed asset forfeiture scheme is a vital national strategy to ward off financial crimes. The act has very astutely identified not only terrorism & narcotics, but also corruption & unethical trafficking amongst women and children as a stream for generating large sums of iniquitous money in the Indian economy. Despite the tireless amount of

time & energy spent on polishing this act , it still showcases rough edges. Hence, the following should be considered:

1) The effective and efficient operation of PMLA requires certain offences like those under section 13 of Prevention of Corruption Act 1988, section 4 of the Immoral Traffic (Prevention) Act 1956 and section 417-420 of the Indian Penal Code 1860 need to be included in the schedule of Prevention of Money Laundering Act, lest the law remains a skeleton with no flesh.

2) Even new age crimes like piracy of software data, entertainment, intellectual properties etc need to be adequately addressed in the Prevention of Money Laundering Act. With the advent of crypto-currency, additional measures need to be undertaken to address the risk of money laundering through crypto-currency.

3) The governments must work towards sensitising the masses and making them aware about the drawback of money laundering. The tax havens must not be converted into havens where laundered money can be easily stored. Thus, certain policy changes need to be made in order to avoid such practices.

4) The FATF Recommendations must be implemented with great care and due diligence. Great emphasis should be laid on fulfilling the KYC Norms. The RBI's norms regarding KYC are pretty strict, full compliance of the same can do wonders for securing a safe environment for the investors and banking companies.

5) India must enforce Data Protection Laws in order to better regulate online transactions. This will bring the Information Technology laws into the picture .

6) The financial institutions and banks should be prompt in reporting suspicious activities. They are the main links from where black money is converted into white, hence, they act as crucial points in the whole money laundering mechanism. Financial institutions should gather and retain important information about their clients in order to prevent any kind of fraudulent activities, which is also in consonance with the KYC norms.

7) A more holistic approach is required when tackling an economic offence because it has the potential of impacting the economy of the

country as well. The Parliament should bring more clarity in the sphere of applicability of the numerous provisions that deal with money laundering and the related activities.

8) The constitutional validity of certain provisions, particularly the reversal of the burden of proof u/s 24 has been contested. It was brought to limelight due to its violation of principles of natural justice and presumption of innocence.

9) Section 45 is also under the scanner, as it imposes harsh conditions on which bail can be granted, thereby infringing upon the personal liberty of individuals. The granting of power to the court to assess a person's innocence before generating bail is arbitrary and excessive and should be capped.

10) The main challenge of this act is to strike a balance between individual rights and effective enforcement. The power to attach property, arrest and seize assets without offering a safety net to citizens or individuals raises concerns about it being in direct violation of fundamental rights granted under article 21 of the Constitution. This casts a shadow on the democratic fabric of our country. This is further worsened by the allegations of selective enforcement in politically motivated cases, prompting calls for judicial oversight and reform.

Advancement of Kantaka Justice (Criminal Justice) System in Ancient Bharat :- A Historical Analysis

Dr. Sanjeev Kumar Mishra*

Abstract

Similar to other advanced civilizations, India also developed a criminal justice system influenced by its socio-economic and political conditions throughout different historical periods. These conditions shaped the goals of criminal justice and its methods of administration, which adapted over time. To meet evolving needs, rulers introduced new mechanisms and strategies for enforcing laws and delivering justice. This paper explores the progression of the criminal justice system, particularly during ancient India.

Key words: Dharma, criminal, Smritis, Puranas

Introduction

In the early stages of society, individuals seeking justice for offenses relied on personal retaliation due to the absence of a state or formal authority. This process, driven by chance and personal emotions, often involved revenge. Even during the advanced Rig-Vedic period, it is noted that the responsibility of punishing a thief rested with the victim. Over time, personal vengeance transitioned into collective retaliation as humans needed to live in groups for survival. This group living necessitated mutual agreements on behavioral norms and the establishment of rules to govern conduct within the community. These norms and prescribed actions for non-compliance formed a code of conduct known as Dharma, or law.

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Emergence of Criminal Law

As human society progressed, it became more advantageous to live in organized communities rather than smaller kin-based groups. The early Indian civilization placed significant emphasis on Dharma, with individuals naturally adhering to it without requiring external enforcement. In such a society, people lived harmoniously, free from selfishness and exploitation, respecting one another's rights. Instances of rights violations were rare, as illustrated in the following verse:

Subhaasitan no. 17

"There was neither kingdom nor the King; neither punishment nor the guilty to be punished. People were acting according to Dharma, and thereby protecting one another."

However, this ideal society did not endure indefinitely. Despite continued belief in Dharma and reverence for divine authority, societal conditions deteriorated over time. Exploitation and oppression by the stronger members of society became rampant, creating significant inequalities. In response, law-abiding individuals sought remedies, leading to the emergence of a central authority—the King—and the establishment of the State. The primary purpose of this authority was to protect individuals and their property. To achieve this, the King developed a system to enforce laws and penalize violators, forming the foundation of what would later be known as the "criminal justice system."(

Although evidence from the Indus Valley Civilization suggests the existence of an organized society during the pre-Vedic period, a structured criminal justice system is only traceable to the Vedic era, where laws became well-defined. The Vedic literature provides detailed accounts of conduct and governance, laying the groundwork for the evolution of the criminal justice system. This historical journey spans three main periods: Ancient India (1000 B.C. to A.D. 1000), Medieval India (A.D. 1000 to 1757), and Modern India (A.D. 1757 to 1947).

Ancient Bharat

This era is often referred to as the Hindu period due to the prevalence of Hindu law. Elements of state administration, including the King's role as a ruler with the assistance of advisors, can be traced back to the early Vedic period. The Rig Veda refers to the King as *Gopa janasya*, or the protector of the people, emphasizing his responsibility to maintain law and order. According to the Dharma Sutras and the Arthashastra, ensuring the safety and welfare of subjects was a central duty of the King.

States were divided into provinces, which were further subdivided into divisions and districts, each overseen by appointed governors and district officers responsible for judicial and administrative duties. Urban administration was managed by officials like the Nagarka, who handled law enforcement, building regulations, sanitation, and population records. Villages, the fundamental units of governance, were typically led by hereditary headmen and village councils (Panchayats) that represented royal authority locally.

Popular assemblies played a significant role during the early Vedic period. Two notable institutions, the Sabha and Samiti, facilitated communal decision-making. However, by the later Vedic period, the Samiti lost relevance, while the Sabha evolved into a narrower body resembling the King's Privy Council.

A formalized judicial system began taking shape in the pre-Mauryan age. The Mauryan Empire (326–185 B.C.) bridged earlier practices described in the Dharma Sutras and the more systematic codes in Manu's Smriti. References in Megasthenes' *Indica* and Ashoka's Pillar Edict IV [1]highlight the penal system during this time. Despite converting to Buddhism, Ashoka retained

the death penalty, though he softened its severity by granting convicts a three-day respite before execution.

Post-Mauryan dynasties, like the Kushanas and Guptas, introduced significant advancements in governance. The Kushanas (120–220 A.D.)

1 Dr. Mrinmaya Chaudhari : Languishing for Justice

emphasized monarchy and added new judicial and military officials such as Mahadandanayaks and Dandanayaka to enhance justice delivery. The Guptas (320–550 A.D.) revitalized imperial administration with innovations like Municipal Boards composed of representatives such as the Guild-President, Chief Merchant, Chief Artisan, and Chief Scribe, which reflected an effort to incorporate public representation into governance.

Later, during Harshvardhana's reign (606–647 A.D.), a robust administrative system emerged. Chinese traveler Hiuen Tsang praised Harshavardhana for his commitment to justice, industriousness, and popularity. In contrast, penal laws during this time were harsher compared to the more lenient policies of the Guptas. In the Deccan, the Chalukyas of Vatapi (540–753 A.D.) maintained similar administrative characteristics, while the Rajput states in Northern India followed a bureaucratic model of governance.

The criminal justice system in ancient India was characterized by several distinctive features, which are elaborated below.

Concept of Dharma (Nyaya aur Kanoon)

The Hindu legal framework was deeply rooted in the concept of Dharma, as articulated in the Vedas, Puranas, Smritis, and related texts. Dharma served as the blueprint for the holistic development of individuals and various societal groups. Its importance is summarized in the following verse:

"Those who destroy Dharma get destroyed. Dharma protects those who protect it. Therefore, Dharma should not be destroyed."

Dharma was viewed as a powerful tool essential for safeguarding the rights and freedoms of individuals. In instances of rights violations, the aggrieved party could seek the King's intervention, regardless of the offender's status. The King's authority to enforce laws and punish wrongdoers provided the necessary force to ensure compliance.[2]

2 Justice M. Rama Jois : Legal and constitutional history of India (seventh edition, universal law publications co., New Delhi, 2010, 575-76).

Sources of Dharma (Nyaya Shrotra)

The Vedas were the earliest and most authoritative source of Dharma in ancient India. Additional sources included the Dharma Sutras, Smritis, and Puranas. Over time, supplementary sources like the Mimamsa (art of interpretation) and Nibandhas (commentaries and digests) also gained importance. In cases of conflict between the Vedas, Smritis, and Puranas, the Vedas were considered the highest authority, as they were believed to be of divine origin.

The four Vedas—Rig Veda, Yajur Veda, Sama Veda, and Atharva Veda—contain hymns, rituals, and mystical doctrines. Scholars like Wilkins and Max Müller date their composition and evolution between 1200 B.C. and 200 B.C. The Vedas consist of two primary parts: the Samhita, a collection of hymns, and the Brahmana, which provides ritualistic guidelines. Each Brahmana includes an Upanishad, containing esoteric teachings.

The Dharma Sutras outlined rules of conduct, including civil and criminal law, and are considered the earliest works of the Hindu legal system. Notable Dharma Sutras were authored by Gautama, Baudhayana, Apastamba, and others. These early texts influenced the development of the Smritis, which codified legal principles derived from the Vedas, Dharma Sutras, and societal customs.

The Smritis also addressed judicial administration, including court structures, judge appointments, procedural laws, and enforcement of substantive laws. Prominent Smritis include the Manu Smriti, Yajnavalkya Smriti, Narada Smriti, and others. The Manu Smriti, in particular, became a cornerstone of ancient Indian law. However, research indicates that many verses within it were later additions, diverging from the original content.

Puranas, which focused on the glorification of specific deities, were another source of law. The 18 Puranas were categorized into three groups, each dedicated to either Brahma, Vishnu, or Shiva. Variations in their teachings and origins reflect their development at different times and places.

Kautilya's *Arthashastra*, from the Mauryan era, is another significant legal source. Authored by Kautilya (also known as Chanakya), this treatise covered topics such as judicial procedures, evidence in civil and criminal cases, and prison management. It also set guidelines for the conduct of judges and rulers. However, some sections related to punishments are believed to have been later interpolations.

As time progressed, the King's law (Dharmanyaya) gained precedence over traditional laws in cases of conflict. Customary laws, derived from societal practices, also held significant authority. The Smritis themselves acknowledged customs as a valid legal source, provided they did not contradict sacred laws. In unresolved matters, the King could make decisions based on conscience and practical reasoning.

Raja and Courts (Raja aur Nyaya)

Smritis emphasized that the administration of justice was among the most crucial responsibilities of the King. The institution of kingship itself was conceived to enforce Dharma (law) through the King's authority. The King was tasked with punishing those who violated Dharma and protecting those who suffered harm. This impartial administration of justice was considered essential for maintaining peace and prosperity for both the King and his subjects.

The King's Court functioned as the highest appellate body and also handled significant cases of state importance. The King presided over this court with the assistance of the Chief Justice, other judges, ministers, elders, and representatives from the trading community.

The next tier in the judicial hierarchy was the Chief Justice's Court, which included a panel of judges to aid the Chief Justice. In towns and districts, judicial matters were overseen by state-appointed officers acting under the King's authority. Emperor Ashoka further organized the judiciary by assigning Mahamatras to oversee town-level judicial operations through regular inspections and tours.[3]

3 Justice M. Rama jois : Legal and constitutional history of India (seventh edition, universal law publications co., New Delhi, 2010, 110-112)

Judicial System in Villages (Gramin Nyaya Vyavastha)

In ancient India, the judicial system was structured to ensure that villagers had easy access to justice. In Vedic society, village-level assemblies like the Samiti and Sabha played a pivotal role in governance. These evolved into Village Councils, or Panchayats, which acted as judicial bodies. Typically composed of five or more members, the Panchayat adjudicated minor civil and criminal cases.

Village headmen, often hereditary officials, were empowered to impose fines on offenders. Several committees, including justice committees, were elected by the villagers to handle various matters. More complex criminal cases were escalated to central courts or district-level courts, presided over by government-appointed officials under royal authority.

Police (Aarakshi)

The establishment of state police in India dates back to the pre-Mauryan period, with its full development documented in Kautilya's *Arthashastra*. The police force was divided into two distinct categories: regular police and secret police.

The regular police had a hierarchical structure consisting of three levels:

- **Pradesta (rural areas)** or **Nagaraka (urban areas)** at the top.
- **Sthanikas** in the middle tier, managing both rural and urban jurisdictions.
- **Gopas**, who served at the lowest level in rural and urban settings.

The Pradesta's duties included conducting inquests in cases of sudden death, which involved post-mortem examinations and thorough investigations.

The secret police operated in two forms:

- **Peripatetic spies**, who moved from place to place to gather intelligence.
- **Stationary spies**, who remained in specific locations for information collection.

The *Manu Smriti* recommended employing soldiers and spies to detect offenses, while the *Katyayana Smriti* mentioned informants and investigators, suggesting that a system resembling modern police was in place to aid the King in justice administration.

Jails (Kaaragaar)

The concept of state-operated jails also originated during the pre-Mauryan period. It was mandated that jails be built in the capital city, with separate accommodations for men and women, and that they be adequately guarded. Prisoners were often engaged in productive labor during their incarceration.

Ancient Indian law emphasized a humane approach to prisoners, advocating for their protection against mistreatment. The Dharmamahamatras were tasked with overseeing prisoners' welfare and recommending the release of deserving individuals.

Kautilya's *Arthashastra* provides a detailed account of jail administration, describing policies on guarding facilities, managing prisoners, and ensuring their welfare.

Crime and Investigation (Gunaah aur Anveshan)

In ancient India, violations of criminal laws were treated as offenses against the State. Any citizen could report a crime to the King, who was obligated to apprehend and punish the offender. The King also had the authority to act independently in addressing criminal activities, regardless of whether a formal complaint had been filed.[4]

Information or complaints about offenses could be submitted by any individual, not solely by the victim or their relatives. Informants, known as *Stobhakas*, received compensation from the King for providing initial reports about crimes. Investigation officers, called *Suchakas*, were appointed by the King to detect criminal activities and carry out inquiries.

4 .V.D.Kulshreshtha : Landmarks in Indian Legal and Constitutional History (Eastern Book Publication, 4-6).

The *Manu Smriti* outlined specific guidelines for the King to prevent and detect crimes:

1. Criminals were often found in public spaces such as assembly houses, brothels, gambling dens, and hotels.
2. The King should deploy soldiers and spies to patrol these areas and deter unlawful activities.
3. Reformed criminals could be employed as informants to help identify offenders.

Punishments

The concept of *Dandaniti* (policy of punishment) was integral to state administration in ancient India. Manu underscored its significance, stating:

"Punishment alone governs all created beings; it protects them and watches over them while they are asleep."

Manu, Yajnavalkya, and Brihaspati categorized punishments into four types:

1. **Admonition** – A warning to the offender.
2. **Censure** – Public reprimand.
3. **Fine** – Monetary penalties.
4. **Corporal punishment** – Physical penalties, which included execution, amputation, branding, public humiliation, or other severe methods.

These punishments were often harsh and inhumane by modern standards. Additionally, the severity of punishments sometimes depended on the offender's and victim's social class (*Varna*). For instance, the *Manu Smriti* prescribed harsher penalties for individuals of lower *Varna*. A Sudra insulting a Brahmana faced corporal punishment, while a Kshatriya or Vaisya committing the same offense was fined. However, contradictory provisions also existed; the *Katyayana Smriti*

and certain verses of the *Manu Smriti* suggested stricter penalties for higher Varna offenders.[5]

Test of Witnesses and Perjury

Timely examination of witnesses was emphasized to avoid miscarriages of justice caused by delays. Witnesses were legally obligated to testify in court, and failure to appear carried significant penalties. Moreover, failing to testify was equated to giving false evidence, which was considered a serious offense.

Perjury, or providing false testimony, was strictly punished. Offenders faced confiscation of their entire wealth and expulsion from society. Additionally, the accused could present new witnesses to strengthen their case or prove that the earlier witnesses were guilty of perjury. This system ensured fairness and maintained the integrity of the judicial process.

[6]Citizens Involve in Crime Prevention

The failure to fulfill societal duties, particularly in crime prevention, was treated with gravity. Individuals who failed to assist in preventing crimes faced severe penalties, including banishment and the confiscation of their property.

For instance, homeowners who did not aid neighbors during emergencies, such as fires, were fined. Similarly, those who ignored calls for help or fled from the scene after being approached for assistance were subjected to double punishment. These laws highlighted the collective responsibility of citizens in maintaining law and order.

Right of Self-defense

The right to self-defense was firmly established in ancient Indian law. The provision stated:

5 Dr. Surendra Kumar : Manu Smriti. (Published by Arsh Sahitya Prachar Trust, New Delhi, 6-7)

6 . WJ Wilkin: Hindu Mythology (Rupa Publication 2, 90-91.)

"A person can slay without hesitation an assassin who approaches him with murderous intent. By killing an assassin, the slayer commits no offense."

This right extended beyond personal defense to protecting others, such as women and vulnerable individuals, from violent or murderous attacks. Even if the aggressor was a Brahmana, the act of defense was not deemed unlawful. This principle emphasized the importance of safeguarding life and dignity against aggression.

Conclusion

Misconduct and offenses committed by public officials, including police officers, jail superintendents, and judges, were treated with utmost seriousness. Severe punishments were prescribed for such acts to ensure accountability and uphold public trust. For example, judges passing unjust orders, accepting bribes, or betraying their responsibilities were banished.

The foundations of criminal justice in India can be traced back to the Vedic period, where its roots began to form. Over time, the system evolved, and by the Mauryan period, a well-defined and structured criminal justice framework, as outlined in the *Arthashastra*, was firmly established.

CSR Beyond Altruism: Evaluating the Tangible Impact of Corporate Social Responsibility Initiatives

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Abstract

Corporate Social Responsibility (CSR), Section 135 of the Companies Act 2013 has undergone various changes since it has come into action. Few years ago CSR was clarified not to be an act of generosity and magnanimity anymore, while highlighting the penal provision in form of Section 164 of Companies Act, 2013 that now stands amended. As much as CSR looks like a businessman's philanthropic effort it cannot be denied that it also protects the businessman from Government's action that can be taken if corporates don't return some part of their benefit to the society. For example, COVID 19, it has been an eye opener in terms of involvement of corporates in coming out and helping the most affected during the pandemic. However, it did give some corporations a tough time to formulate CSR policies concerning CSR activities because of certain ambiguity in the language of the Section 135 and Schedule VII of the Act. However, all such contributions later made by corporates were taken as CSR but the entire fuss has indeed raised an alarming signal, calling for amendment to do away with the exclusion of Chief Minister's Relief Fund(s), the ambiguous language pertaining to penalty, and the definition of CSR to begin with. Notwithstanding anything that, India, did become the first country to introduce mandatory provision for CSR, it still has a long way in achieving the very fabric of its objective, this paper aims to highlight the journey of CSR while dealing with its background and theories involving social responsibility and intends to find out implementable solutions for ensuring impactful CSR activities by Corporates.

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Introduction

"When you are in doubt ... remember the face of the lowest and worst man you might have seen and ask yourself whether the action you consider will be of any use to him? Is there anything he can learn from it? Will it get him back into control of his own life and destiny? The check alone will give sense to our plans and programs" - Mahatma Gandhi

Business and society cannot be separated as business always affects the society, good or bad, that's arguable. The idea that business should return something positive to the society by uplifting the same, leads to the introduction of a concept like Corporate Social Responsibility (CSR). CSR, a responsibility of the corporate to return to society, and a responsibility on corporate where the needs more particularly economic needs of the society are taken care of. The basic belief is to provide for society; what corporate has taken from it in its quest of profits.

Howard R. Bowen's work, 'Social Responsibilities of the Businessman'[1] remains the first mention of social responsibility and business ethics together. It laid down the foundation of the relationship business and society must share, even though it is a work of decades ago its relevance has been ever increasing.

Defining Corporate Social Responsibility

CSR does not have a one go definition but many have tried to link business, philanthropy and society while defining the same. The World Sustainable Development Business Council (WBCSD) defined Corporate Social Responsibility as the determination of the industry to contribute to sustainable economic growth. CSR's primary aim is to communicate with clients internally and externally,"Corporate Social Responsibility is the continuing commitment by business to behave

1 Howard R Bowen, *Social Responsibilities of the Businessman* (University of Iowa Press 2013) https://doi.org/10.2307/j.ctt20q1w8f (last visited on November 07, 2024).

ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."[2] Another interpretation of CSR where it was argued that "CSR is a case in which the company moves beyond enforcement and participates in activities that tend to promote a greater benefit, above the company's goals and what the legislation demands."[3]

"Creating a strong business and building a better world are not conflicting goals; they are both essential ingredients for long-term success" - William Clay Ford Jr.

Ford emphasises on the need of having both a flourishing business and a better world as a balanced common objective. The idea that business has nothing to do with the society is an irony in itself as there cannot be a sustainable success to the business if the world isn't taken care of. No business can flourish without the resources that the world has to offer. No matter how strong the business has been, it can perish in no time if the world falls apart. The idea of business and society are not conflicting but complementary in nature.

"The emphasis placed by more and more companies on corporate social responsibility symbolises the recognition that prosperity is best achieved in an inclusive society." - Tony Blair

Blair's idea of CSR goes a long way, as it was during his Government that in the very history of the United Kingdom, that a Minister for Corporate Social responsibility was appointed. Minister Howell elaborated that his role as a minister in that government is 'to raise awareness of the business case of Corporate Social Responsibility'.

In a dialogue on 'A decade of CSR: Retrospects & Prospects' Union Minister of State (Independent Charge), Dr. Jitendra Singh,[4]

2 World Sustainable Development Business Council, *Stakeholder Dialogue on CSR* (The Netherlands, 6–8 September 1998).

3 C Newman et al, 'Corporate Social Responsibility in a Competitive Business Environment' (2020) 56(8) *The Journal of Development Studies* https://doi.org/10.1080/00220388.2019.1694144 (last visited on November 07, 2024).

4 Ministry of Personnel, Public Grievances & Pensions, *Press Release* https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1995896#:~:text=The%20rules%20in%20Section%20135,on%20corporate%20

defined CSR as "*Corporate Social Responsibility (CSR) is not a charity, but a duty & responsibility towards society inspired by the highest values of seeking to return to society a part of what we have received in whatever capacity & to whatever extent we can*"

It is pertinent to understand that the idea of giving back to society lies at the very foundation of CSR. Corporates must understand that their CSR activities shall convey a sense of strong ethics and values among their customers and thereby strengthen their businesses further.

A Magnanimous Act by the Corporates or a Corporate Mirage?

While unfolding the definition of CSR it is to be remembered that it is not only an exercise in theory explaining what corporations should be doing, it is also a moral and ethical obligation as to what these giant corporations should be exercising for uplifting the society by fulfilling the needs of society. CSR and Charity are also used interchangeably at times but it is to be highlighted that the corporates are not doing charity but partially returning to the society what they take from it to earn profits. CSR has been considered a magnanimous act or a generous act by the corporates to take care of the needs of the society; however, the intention of the company while performing CSR still remains mere accountability towards the Government. When the veil of Philanthropy is lifted the true intention of corporations sometimes comes out, CSR is not always done because of generosity but accountability and adherence to a mandatory requirement. The notion that business is all about only making money gets subdued with the introduction of a responsibility like CSR, it becomes extremely important to identify the role of business in connecting the economy, uplifting society while staying relevant in the market. Corporates are not pressured to undertake a responsibility if they are not capable of doing so, CSR is not to trouble corporates, but to show a balance to corporates thriving with profits, by ensuring that these corporates do not forget their social and ethical responsibility. As Henry David Thoreau said "Goodness is the only investment that never fails."

social%20responsibility%20activities (last visited on November 08, 2024).

CSR only helps the corporates become better in the eyes of their consumers, for every act of service, the corporates ladder up in the eyes of their customers, with 'times that are a changin', and consumer being aware of the companies' obligation and mandatory responsibility towards the society, dynamic CSR activities by any corporate only aids in creating a better image of that corporate and attract more business. As a layman would understand CSR that it is about improving the performance of a company, it is not to be side-lined that it is also for creating opportunities in the society and reaching out to the needy. CSR enshrines Milton Friedman's 'Business is Profit' while allowing the corporations to undertake social activities ultimately resulting in the profit of the corporation. He states "…there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud."[5]

Selfless Act garbed with a Selfish Intention?

Over the years CSR has put corporates in a deciding position to determine what activity the corporates should undertake while executing their obligation of performing CSR. There is no strict policing to control where and how the CSR fund must be spent. Many times the corporates find difficulty in understanding their exact responsibility and to determine the same they may undertake these below mentioned approaches.

Corporate Social Pyramid approach- Carroll[6] identified responsibilities into 4 types, namely economical, philanthropic, legal and ethical responsibilities.

Businesses were traditionally commercial institutes offering services and goods to the public. The priority has always been gaining profit for any business or entrepreneur individually. Therefore, the idea

5 Milton Friedman, *Capitalism and Freedom* (Fortieth Anniversary Edition, The University of Chicago Press 2002) 133.

6 Mark S Schwartz and Archie B Carroll, 'Corporate Social Responsibility: A Three-Domain Approach' (2003) 13 *Business Ethics Quarterly* 503–30.

of the incentivising profit turning into finest gain has existed for decades and it has become a principle. Archie B Carroll's approach towards CSR enshrines the necessary requirement of the business to be successful which it can only be if it continues to be profitable. Business must among the other responsibilities, first have economic responsibility and determination to keep doing better in business and making it profitable.[7] A competitive, performance oriented, profitable and efficient business is the first step towards this approach.

Irrespective of the fact that the society allows companies to enjoy their financial status, corporations do need to comply with the policies, rules, guidelines and regulations made by the Governments. The corporates cannot deny their legal responsibility of adhering to the applicable regulations on them at any point. Legislations ensure that companies fulfil their responsibility of linking society and industry. Principles codified in nature don't leave corporations with much to wonder about but coexist with laws framed for them along with their other responsibilities. Aligning partially with the idea of social contract, businesses are supposed to thrive for better growth but well within the realm of the Law. In Carroll's approach legal responsibility is seen at par with economic responsibility, as compliance of legal provisions and effective competitiveness in the market, both aids in the growth of the business.[8]

One can find reflection of principles of equity in legal and economic responsibilities mentioned above but there may be some duties that remain uncovered by them, therefore ethical responsibilities and duties concerning values, standards that a consumer can be concerned of, needs to be adhered to by the corporates. Ethics steps in where no law has been made, certain practices that have societal acceptance or rejection sometimes lack a codified law, and that's where the ethical responsibilities stem in. Ethical responsibilities also push legal responsibilities to widen its horizon continuously and even though ethics and values are seen to be exhibited in the larger platform, harmless

7 ibid.
8 Carroll (n 6).

business practices go way too far than any other unethical business practices would.

Carroll's approach transitioned from discretionary in his earlier work to Philanthropic in his work 'The Pyramid of CSR'. The responsibility that ensures that corporate citizens are there for the benefit of the society. Sometimes corporates had even without any mandatory provision, as a moral obligation undertaken various activities for the upliftment of the society. It is not a responsibility that is mandated but a responsibility which corporates themselves volunteer for.

It is important for a corporation to perform all these obligations if they desire best results with respect to CSR done by them. Carroll while emphasising on the importance of the above mentioned three responsibilities said that a voluntary philanthropic responsibility would be like a cherry on the 'Pyramid', as he places the philanthropic responsibility on the top of his pyramid.[9]

The triple bottom line[10] approach-

An approach in which profit is not calculated only with reference to Cost and profit but it is calculated with reference to the ecological balance and society. Sustainability has the heart of this approach and it revolves around economics and ethics for this. For best results, the company has to aim at having all the three sustainability i.e. economic, social and environmental.

Economic Sustainability: One must eye on helping the society while still securing the position of the corporate and not incur loss. Sustainability with regard to the economic condition of a corporation is extremely important as one cannot pour from an empty vessel; similarly, a company in loss will not be able to help the society. Strategies that are sustainable must be adopted by the corporations keeping their finances in mind.

9 Carroll (n 6).

10 Wayne Norman and Chris MacDonald, 'Getting to the Bottom of "Triple Bottom Line"' (2004) 14 *Business Ethics Quarterly* 243–62.

Social Sustainability: It is important to note that while the world is rewarding the richest of the rich, the other side is sliding into poverty and hunger more and more. With this imbalance, the civilisation may revolt questioning the power of the powerful ones. World peace can only be maintained if the wealthy do not turn a blind eye to the needy.

Environmental Sustainability: With the issue of Climate change, the entire world is becoming more aware of the consequences of taking the environment lightly. It is extremely important that environmental sustainability is not side-lined and the corporates must take extra efforts owing to their capabilities to take care and preserve the environment while undertaking CSR activities. Corporates being the biggest beneficiary of resources must take steps to preserve them. Especially corporations who are aiding in the degradation of the environment with their business activities, they should return back much higher to society as they have taken many, many years from the life of this planet.

It is pertinent for the corporations to keep in mind that it's their duty to ensure the sustainability requirement while they make huge profits and get away with the perks.

The Committee for Economic Development in the year 1971 used another approach a 'three concentric circles'[11] where the three circles depicted CSR. The first circle i.e. the inner circle focused on growth, products- economic functions, the second circle that's the intermediate circle highlighted that the growth, jobs etc functions must take an aware approach of ongoing social priorities and values, and the last but not least the third circle, i.e. outer circle emphasises on the active planning and involvement in the upcoming engaging social responsibility.

One of the most important theories that's often described as a mirror image of Corporate Social Responsibility is the Stakeholder theory. The owners, customers, competitors, employees, community, suppliers, social activist groups, public at large, among others have been categorised as stakeholders by Carroll in his Pyramid of CSR.[12]

11 Committee for Economic Development, *Concentric Circles Model of CSR* (1971).
12 Carroll (n 6).

The stakeholder's philosophy doesn't begin with the company, instead it is the community where it ends. It highlights all the persons concerned with the corporate, it emphasises that decision must be made keeping in mind that it shall affect all the interested parties' i.e. all the concerned individuals including the community. It is not necessary for a party to own something in the company for the company to take care of them, all the people who can be impacted by the business activity of the corporation must be kept in mind. It describes that everyone from the staff, to the consumers to people in general i.e. public all are all stakeholders in some way or the other. Especially the managers, the ones who are amoral, meaning the ones who may not have immoral objectives but are unbothered by how their decision is affecting others at large. The boundaries of stakeholder may not be very clear but it is safe to say that the corporations affect the world directly or indirectly, hence everyone can step into the shoes of being a stakeholder and the corporate must aim to achieve the social wellbeing of all the stakeholders. It is easier said than done in a competitive world but ultimately the company's goal is to enhance income on a collective bottom line, that describes benefit as social well not being and not as finance.

Evolution of Corporate Social Responsibility in India

CSR might be the new term used for uplifting the weaker, helping the underprivileged and giving access to the deprived ones but it has roots in the antique history of India. *'Daan'* by Hindus and '*Zakaat'* by Muslims to name a few are practices that have been there since time immemorial. Some help poor people due to kindness but many perform *Zakaat* and *Daan* due to the fear of God or to seek something in return from the almighty. Modern day CSR is also done by the corporates as a selfless act with a selfish motive. During the time of independence, leaders and freedom fighters like Mahatma Gandhi emphasised a lot on keeping a check on one's action and helping the needy and underprivileged. The idea that do good to others and it shall return to

you in various ways was propagated during the colonial period for rich established Indians to help their fellow brothers who were suffering.

With India gaining independence and the introduction of Companies Act, 1956[13] as a result of Bhabha Committee's[14] report, post-independence India still lacked a statutory provision for CSR. However, the spirit of helping the poor didn't fade; some industrialists came forward and helped the society breathe better after colonial suffering by ensuring the establishment of schools and hospitals for the poor. With the advent of Globalisation and Liberalisation, laws related to governing business, regulating taxes came pouring in; this specifically gave rise to the need of provisions related to corporate governance. In the 1990, the country witnessed more companies coming towards the cause of social responsibility due to relaxation of license, the then economic boom, etc. The companies realised that they can no longer be only concerned about their business only and each stakeholder including the society has a role to play with regard to how a corporation will flourish.

As corporations were in the process of realising the need to take every stakeholder into confidence for better performance and ultimate profit, the country and the world at large realised the need to protect the environment for a better future for everyone. With environment protection coming to limelight, the remedy for the same was found to be the need for policy related to the environment, which must be followed by corporates and industries, who are one of the biggest reasons for the degradation of the environment. During the last three decades the world has witnessed its Governments being active to regulate behaviour of the corporates by making them accountable for their actions. India followed the same that led to introduction of provisions relating to corporate

13 *Indian Companies Act 1956* https://www.mca.gov.in/content/dam/mca/pdf/Companies_Act_1956_13jun2011 (last visited on November 08, 2024).

14 *Report of the Law Committee 1952, Bhabha Committee Report* https://www.mca.gov.in/bin/dms/getdocument?mds=YRfwnpXwT9FZ8CFeAf0OHQ%253D%253D&type=open (last visited on November 09, 2024).

governance. In the year 2009, 'Voluntary Guidelines on Corporate Social Responsibility' were released, followed by even more specific 'National Voluntary Guidelines (NVGs) on Social, Environmental and Economic Responsibilities of Business 2011'. Companies Act 2013 witnessed on 01st April 2014 the provision i.e. Section 135[15] That led to the introduction of the term "Corporate Social Responsibility" that made it a mandatory provision for a select few companies to delve into philanthropy and uplift the society. With this, India became the first country to have a mandatory provision for CSR. Up until the amendment made after half a decade of it coming into effect, CSR for companies were governed by the 'Comply or Explain' principle. It gave the companies the liberty to voluntarily choose their compliance in an extremely flexible way, the companies would either include their CSR activities in the annual report or explain the reason of not being able to do any CSR activity. That flexible approach has seen a shift in the second half of a decade of CSR, it's a transitional shift from a flexible one to a rigid one, from voluntary to mandatory structural procedural compliance.

Ever since the introduction of CSR and the formation of related rules, it has seen amendment from time to time, be it criminalising the defaulters or reversing the decision, the laws related to CSR has been evolving. Irrespective of the amendments being undertaken the crux of a legal provision for CSR remains the intention of helping the society by contribution from the corporates.

The legislative actions undertaken ever since the introduction of provision for CSR can be understood as either seeing corporates as partners for the development of society or strengthening the responsibility of business towards society. There have been various guidelines from the Government from time to time to remain relevant with respect to dynamic changes in the global business environment. Another regulatory body in India, Securities and Exchange Board of

15 ICA 2013, s 135.

India (SEBI) has also laid down a framework in the form of Business Responsibility Reporting framework for top 500 listed companies[16]. This is still at an infant stage and companies are getting acquainted with reporting from a perspective of Environmental Social Governance(ESG). Policies and guidelines are formed and released time to time, the year 2019 witnessed revision in the earlier guideline to form National Guideline for Responsible Business Conduct (NGRBC)[17] adhering to Companies Act 2013 ensuring it is in sync with globally adopted and followed Sustainable Development Goals 2030 (SDGs)[18] and United Nations Principles on Business and Human Rights (UNGP).[19]

CORPORATE SOCIAL RESPONSIBILITY IN INDIA *A POSTERIORI*

The concept of social responsibilities as discussed isn't new to India, the involvement of corporates in these social responsibilities may comparatively be new. The ancient history of personal laws, the excellent philanthropic record of Tatas and Birlas has shaped voluntary corporate philanthropy well in our country. But the country with its demographic dividend reaching at the top and the ever growing gap between the rich and poor desired an active role by more than a handful of corporations in reducing such gaps. India became the first country to have a mandatory provision concerning CSR in one of its legislation i.e. Companies Act 2013.[20] The Government has been focused on helping people by taking the help of the corporations for a long time. As per the

16 Securities and Exchange Board of India, *Master Circular for Business Responsibility and Sustainability Report* SEBI/HO/CFD/PoD2/CIR/P/2023/120 (issued 2 July 2018).

17 Ministry of Corporate Affairs, *National Guideline on Responsible Business Conduct* (issued 15 March 2019).

18 *Sustainable Development Goals 2030* https://sdgs.un.org/goals (last visited on November 09, 2024).

19 *The UN Guiding Principles on Business and Human Rights* https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR (last visited on November 10, 2024).

20 *Indian Companies Act 2013(*ICA, 2013*)* https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf (last visited on November 10, 2024).

Section 135, Companies Act 2013[21]. The section directs that the companies mandatorily spend 2% of last three years average net profit as

21 *"Indian Companies Act 2013, s 135. Corporate Social Responsibility—(1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during [the immediately preceding financial year] shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director:*
[Provided that where a company is not required to appoint an independent director under sub-section (4) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.]
(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.
(3) The Corporate Social Responsibility Committee shall,—
(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company [in areas or subject, specified in Schedule VII];
(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and
(c) monitor the Corporate Social Responsibility Policy of the company from time to time.
(4) The Board of every company referred to in sub-section (1) shall,—
(a) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and
(b) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.
(5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, [or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years,] in pursuance of its Corporate Social Responsibility Policy:
Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:
Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount
[and, unless the unspent amount relates to any ongoing project referred to in sub-section (6), transfer such unspent amount to a Fund specified in Schedule VII, within a period of six months of the expiry of the financial years].
[Provided also that if the company spends an amount in excess of the requirements provided under this sub-section, such company may set off such excess amount against the requirement to spend under this sub-

CSR funds, if the company has -(1) turnover of Rs.1000 crore (2) Profit after tax of Rs. 5 crore or (3) Rs. 500 crore net worth. The companies were unable to ponder on fundamental corporate values such as openness, integrity, and responsibility in their attempt to maximise their income. So, the government introduced CSR as an obligation, a mandatory requirement and not a charity. The Schedule VII[22] of the

section for such number of succeeding financial years and in such manner, as may be prescribed.]

[Explanation.—For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198.]

[(6) Any amount remaining unspent under sub-section (5), pursuant to any ongoing project, fulfilling such conditions as may be prescribed, undertaken by a company in pursuance of its Corporate Social Responsibility Policy, shall be transferred by the company within a period of thirty days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent Corporate Social Responsibility Account, and such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

[(7) If a company is in default in complying with the provisions of sub-section (5) or sub-section (6), the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less.]

(8) The Central Government may give such general or special directions to a company or class of companies as it considers necessary to ensure compliance of provisions of this section and such company or class of companies shall comply with such directions.]

[(9) Where the amount to be spent by a company under sub-section (5) does not exceed fifty lakh rupees, the requirement under sub-section (1) for constitution of the Corporate Social Responsibility Committee shall not be applicable and the functions of such Committee provided under this section shall, in such cases, be discharged by the Board of Directors of such company.]"

22 "*Indian Companies Act 2013*, SCHEDULE VII
(See section 135)
Activities which may be included by companies in their Corporate Social Responsibility Policies
Activities relating to:—

(i) eradicating hunger, poverty and malnutrition, [promoting health care including preventive health] and sanitation [Including contribution to the Swatch Bharat Kosh set-up by the Central Government for the promotion of sanitation] and making available safe drinking water;
(ii) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects;
(ii) promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;
(iv) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal
welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water
[including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga];
(v) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;
(vi) measures for the benefit of armed forces veterans, war widows and their dependents;
(vii) training to promote rural sports, nationally recognised sports, paralympic sports and Olympic sports;
(viii) contribution to the Prime Minister's National Relief Fund [or Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund)] or any other fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;
(ix) (a) Contribution to incubators or research and development projects in the field of science, technology, engineering and medicine, funded by the Central Government or State Government or Public Sector Undertaking or any agency of the Central Government or State Government; and
(b) Contributions to public funded Universities; Indian Institute of Technology (IITs); National
Laboratories and autonomous bodies established under Department of Atomic Energy (DAE); Department of Biotechnology (DBT); Department of Science and Technology (DST); Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH); Ministry of Electronics and Information Technology and other bodies, namely Defense Research and Development Organisation (DRDO); Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs)]
(x) rural development projects.]
(xi) slum are development.
Explanation— For the purposes of this item, the term 'slum area' shall mean any area declared as such by the Central Government or any State

Companies Act 2013 laid down the activities which may be included by companies in their Corporate Social Responsibility Policies. The companies are given free hand to cherry pick the activities from the Schedule without any compulsion to undertake any specific or a few of the activities mandatorily. The intention of the Government for helping the society by introducing provision for CSR and including profitable corporates is welcomed by the world.

If one looks at the historical background of how the CSR relating law has shaped up in last one decade of it coming into existence, it would be surprising to note that it has had its own twists and turns, and only recently unfolded as a clearer provision, after couple of amendments in the original provision i.e. Section 135[23] and rule i.e. Companies (Corporate Social Responsibility Policy) Rules, 2014[24].

The Act has further been amended in the year 2017, 2019, 2020. The Companies (Amendment) Act 2017 further refined and elaborated that the financial year should be the preceding final year, for better accountability. The said amendment in Sec 135 (1) stated "*for the words "any financial year", the words "the immediately preceding financial year" shall be substituted"*

One of the amendments by the virtue of Amendment Act 2019 stirred a controversy among the stakeholders, the amendment inserted in Section 135[25], a sub section 7 i.e. "*(7) If a company contravenes the provisions of sub-section (5) or sub-section (6), the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees and every officer of such company who is in default shall be punishable with imprisonment*

Government or any other competent authority under any law for the time being in force.]

(xii) disaster management, including relief, rehabilitation and reconstruction activities.]"

23 ICA 2013, s 135.

24 Companies (Corporate Social Responsibility Policy) Rules 2014 https://www.mca.gov.in/Ministry/pdf/CompaniesActNotification2_2014.pdf (last visited on November 11, 2024).

25 ICA 2013, s 135.

for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both"[26]and ensured that the responsible officers for the default are punished not with just fine but imprisonment. This amendment left the people divided, one school of thought applauded the idea hoping for better activeness and accountability whereas the other school heavily criticised it, highlighting that the very intention of this provision is to uplift society, make socially engaging contributions and not harass persons who may be put behind the bars for a reason as small as inability to find an agency for better execution of the CSR policies even though they had the very intention to uplift and contribute to the society. Therefore after many debates, discourse and a substantial amount of criticism the same was withdrawn in the next amendment of the Act, making fine the only method of punishment for non compliance of these provisions. Another part of the Amendment Act 2017 was the mandatory requirement to open a special account in any scheduled bank called 'Unspent Corporate Social Responsibility Account'[27], where the remaining fund shall be transferred to be used in CSR policies of the company in the next three financial years from the transfer date. This requirement of an Unspent CSR account highlights the inability of companies to identify the activities or strategise their spending of CSR funds despite their being a list of activities under Schedule VII.[28] The amendment has also ensured that the CSR committee formed under Companies Act 2013 to oversee the CSR activities and prepare CSR policies comprises directors of the company, and in case the company has an Independent Director he or she should also be made a part of the CSR Committee. The intention of the legislation is clear that it needs an effective, efficient and transparent mechanism to achieve the objective of

26 *Companies (Amendment) Act 2019 https://www.mca.gov.in/Ministry/pdf/AMENDMENTACT_01082019.pdf* (last visited on November 11, 2024).

27 *Companies (Amendment) Act 2017 https://www.mca.gov.in/Ministry/pdf/CAAct2017_05012018.pdf.* (last visited on November 11, 2024).

28 ICA 2013, Schedule VII.

the CSR provision. Mere adherence to CSR policy without bringing any substantial change or sustainable development defeats the very intention of the concept of CSR.

On analysis of the companies' rules, the rules witnessed amendment three times in a row in the form of Companies (Corporate Social Responsibility Policy) Amendment Rules, 2014, Companies (Corporate Social Responsibility Policy) Amendment Rules, 2015 and Companies (Corporate Social Responsibility Policy) Amendment Rules, 2016. One of the notable amendments in its journey of evolution is the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020 which amended Schedule VII, as *"item (viii), after the words "Prime Minister's National Relief Fund", the words "or Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund)"*[29] shall be inserted." This made the contributions by companies during the COVID-19 period even more significant. Even though the MCA circular dated 10th April 2020[30] specified that contribution relating to COVID-19 in Chief Minister's Relief Fund (CMRF) or State Relief Fund (SRF) was not covered under Schedule VII of the Act, this differential treatment between the governments was criticised as it created confusion for the giant corporates to not be able to contribute and focus in the local area of their business. The very recent amendment is that of Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 which came in after the Companies (Amendment) Act 2020. This rule helped in achieving a refined understanding of the term CSR, mandated elaborate details and disclosure of CSR projects by companies in their Annual reports, gave a way to deal with Unspent CSR funds, making a provision for a specific fund or a specific time period to utilise the carry forwarded fund,

29 *Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020* https://www.mca.gov.in/Ministry/pdf/csr_26082020.pdf (last visited on November 12, 2024).

30 Ministry of Corporate Affairs, General *Circular 15/2020* (10 April 2020) https://www.mca.gov.in/Ministry/pdf/Notification_10042020.pdf (last visited on November 12, 2024).

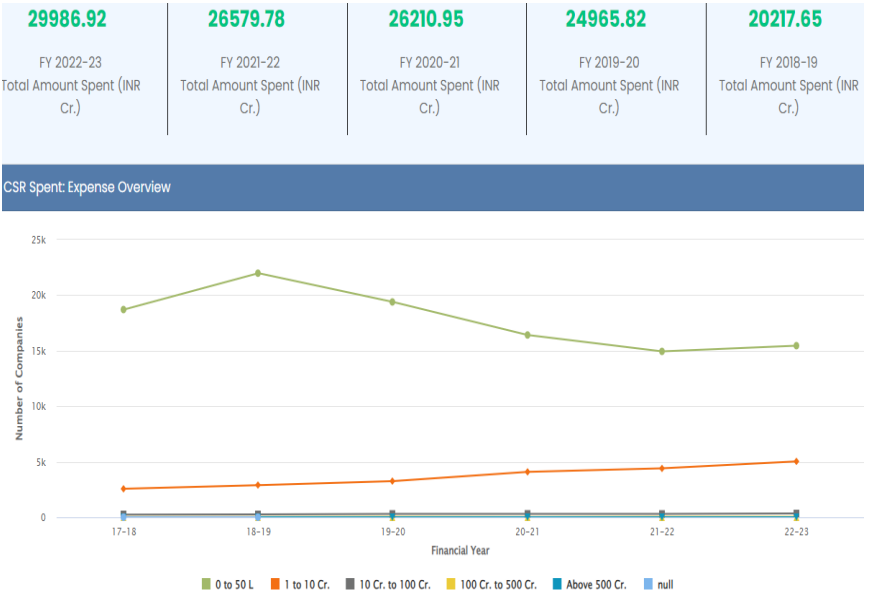
emphasised on the importance of the role of CSR committees and most importantly introduced the concept of Impact Assessment to the idea of CSR. Last amendment in the rule came via Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022 where the structure to provide information about their CSR activities in the report with clarity on mentioning Unspent funds was released. Now all the eligible companies are required to assess the impact of their big projects, merely spending major chunk of the fund in a project or two is no more enough, it's the company's responsibility to show that those projects are also yielding desired results and contributing in the upliftment of the society by achieving the object of that particular project.

Source: csr.gov.in

Analysis of the above graph shall help in determining the unequal and non-uniform distribution, allocation of CSR funds in the states. A quick look at the difference between the 1st and the 10th state of top 10 states under CSR spent can explain the stark differential treatment that companies have for different states. This leads to becoming a barrier in overall development of the society and also maximises selective treatment thereby not yielding the positive sustainable result that the component of CSR activity is expected to. Anything selective rarely goes on to do productive, positive and fruitful work. The efforts of the companies relating to CSR activities needs to be streamlined and conscious spending of CSR funds needs to take the first seat. Non-Strategic and merely compliant spending of CSR funds has done enough damage to what could have been a historic result yielding a responsible business picture. The principle of Comply or Explain may be transformed to 'Comply and Explain' wherein the company wouldn't just be required to comply mandatorily with the requirement of spending funds in CSR activities but also be required to elaborating and explaining why did the company spent that amount in a particular activity and how will it have a benefit for the society and whether or not it is sustainable in nature. The idea of sustainability has to be deeply

embedded in each of the activities that the corporations are doing as their business responsibility practices.

As it can be seen in the below mentioned graph, despite the amount spent being more than Twenty thousand crores rupees in last half a decade, it can be seen that there still is lack of clarity on what amounts to be a CSR activity and whether these companies have helped in relatively reducing the poverty, bettering the climate, empowering the women, facilitating the rural development, etc. None of the activities listed in Schedule VII of the Companies Act 2013 has seen the light of positivity with exponential growth due to these funds being spent as CSR by companies. It is noteworthy to appreciate the segregation of these CSR activities listed in Schedule VII, as most of them align with one or more of the 17 Sustainable Development Goals 2030. However, it is also important to highlight that even though India became the first country to have a legal provision for CSR, its fruitful result yielding implementation still has a long way to go.



Source: csr.gov.in

With the above mentioned amendments in the provision and in the rules, and data on spending CSR, CSR in India has witnessed many unfolding, timely circulars from Ministry of Corporate Affairs also directed the direction of these activities, a circular dated 23rd March 2020 elaborated that the expenses incurred relating to COVID-19 activities would be covered as CSR activity, another circular clarified that the amount spent in activities such as mass production, etc to support campaign by the Government like Har Ghar Tiranga shall also be included in CSR activities, as it covers activity listed in (ii) of Schedule VII of Companies Act 2013[31], relating to promotion of education concerning culture.[32] These circulars aid the companies to spend their funds and contribute to the timely requirement of the nation and its governance, however what it also does sometimes is divert the attention of the companies from their long term commitment to the already existing and lined up CSR goals. Many companies fall short in aligning their activities with sustainability, a one-time activity here and there mostly gets the maximum fund from the CSR expenditure of these companies. A sustainable, thoughtful, aligned with Sustainable Development Goals 2030, strategize plan to bring in real change and aid upliftment of society is missing from the planning of CSR activities.

Conclusion

Section 135 of Companies Act, 2013 has seen many amendments in less than a decade of it coming into existence. From being made mandatory to being a penal provision to criminalisation and then being reversed, it has had its long journey but it still has a long way to go. During the pandemic contributions made by the corporate, that even led to various confusions, has made it clear that it still needs to have more clarity in describing what shall constitute a CSR activity for the purpose

31 ICA 2013, Schedule VII.

32 Ministry of Corporate Affairs, General *Circular 08/2022* (26 July 2022) https://www.mca.gov.in/bin/dms/getdocument?mds=dXH1ziMu%252FmN%252BBSRLHN9evw%253D%253D&type=open (last visited on November 12, 2024).

of the Act. One may praise the intent of the provision but one cannot deny that even now most of the corporates are only undertaking these activities out of compulsion and not philanthropy, thereby leading to just getting done with spending of CSR fund and not actually helping the poor, working towards the environment, encouraging and empowering women, educating people and developing rural areas thereby uplifting the society.

There has been absence of a strong empirical set of data that denotes positively towards the influence CSR spending has had on any one of the activities listed in Schedule VII of the Companies Act 2013, adopted in CSR policies of the companies. CSR's High level committee, 2018 made several valuable recommendations like setting up of CSR portal, alignment of Schedule VII with the SDGs for an even more effective result driven approach.

It is pertinent to understand that the idea of capitalism must not necessarily hinder the compassion that society desires and deserves, and for a country like India, which has had its belief in mixed economy, no stakeholder must be kept away in achieving the feat for society that India has foreseen considering the cons of unchecked capitalism. Profitable Corporates have an extra responsibility as a stakeholder, in ensuring that the needs of this generation are met without compromising the needs of the future.

It is impossible to achieve these goals without the change in mindset of Corporates, they while picking their CSR activities need to shift the approach from less time taking major fund spending activities to carefully strategized impactful activities which are sustainable in nature. Suggested measures by the High level Committee, 2018 must be taken seriously and impact assessment of the CSR activities by corporate giants must be conducted by authorised agencies which are independent, for better transparency and accountability. However, the impact assessment is only to be done where companies which have an obligation of 10 crores or more spend one crore or more in a project. This gives the corporates a choice to not undertake long sustainable projects but just do away with the same by having multiple small

projects of less valuation. As much as the campaigns run by Governments receive their due idolization, it is poignant to note that it is not mandatory for corporates to donate to each and every campaign run by the governments, self-assessment of their projects or assessment via the implementing agency should be done before the corporates enter in the race to donate to these funds. Sometimes impact can be brought in by doing one project repeatedly over the years but with efficiency. The customers, of the corporations who donate their major chunk of CSR funds in funds set up by the Governments receive less appreciation than those corporates who do their research and their CSR committee takes necessary steps, strategise, hires an expert or consultant, to be mindful of their CSR expenditure and opt for inclusive activities that helps in upliftment of the society. CSR may appear to be a time taking activity but it navigates to profit for both the business and the society. A consumer shall always prefer a brand, a company that has potentially shown ethical values in the conduct of their business. The likes of Tatas and Birlas have become brands not just because of the services they provide but the values they imbibe and the causes they stand for. Their customer base increased multifold looking into the socially responsible behaviour they adopted within their functioning. No corporation has sustained a respectable mark unless they have strived and contributed back to the society.

The step of impact assessment introduced recently, is welcoming however the ceiling of the same, as mentioned above, needs to be looked into. The impact of each and every CSR activity or project should be made mandatory, as discussed above the principle of Comply and Explain rather than Comply or Explain, must be implemented. The corporates in their report must also mention the reason, durability, and the long term benefit of choosing a particular activity.

Another suggestion would be to ensure that the companies are contributing actively to mandatory primary activities in the Schedule VII of Companies Act 2013 and for that few primary activities have to be marked or highlighted, considering the situation the country and the

world is in. One of the major challenges that we as a world are facing is the climate crisis and in a situation like that Corporates, especially environment polluting companies must come forward and contribute in activities concerning environmental protection. Another primary activity would be gender equality given the fact that no sustainable and inclusive development is possible by keeping almost half of the population deprived of equal opportunities. Also the eradication of poverty is possible when all the citizens are provided with quality education, access to better healthcare and employment opportunities, so these are to be definitely seen as primary activities among the other activities mentioned in the list of CSR activities under Schedule VII of the Act. These primary activities may be intertwined but they definitely need separate as well as collective attention to bring in the change that the very provision of CSR i.e. Section 135 of the Companies Act 2013 was brought in for. Therefore, CSR, a provision, that was introduced to ensure the responsibility of Corporates in uplifting the society must continue to work towards its goal with proper checks and balances, and must not die a slow death with the namesake CSR activities of the Corporates that doesn't effectively enhances and strengthens the society.

Intellectual Property Rights, Green Taxes, and Scrappage Policy in the Indian Automobile Industry: A Comprehensive Analysis

Naresh*
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Abstract

As part of green economics, taxes are imposed on pollution that adversely impacts the environment and public health, as well as incentives for innovative, low-carbon, and environmentally sustainable resource use. Many nation-states are still experimenting with green taxation. A number of environmental performance indices indicate that pollution is the worst in India. Among the major pollutants are vehicle exhausts. Older motor vehicles will be subject to Green Tax under guidelines released by the Indian government in 2021. Environmental pollution caused by automobiles is discussed in this article. In addition to a motor vehicle's size and structure, the technical conditions of the engine also contribute to the amount of pollution emitted into the environment. In addition to adversely impacting human health, automobiles burn enormous amounts of petrol, causing significant environmental damage. This comprehensive analysis examines how Intellectual Property Rights (IPR), Green Taxes, and Scrappage Policies interact in the Indian automobile industry to adversely affect plants. Car exhaust fumes directly affect plants and disturb their natural breathing processes. In addition to promoting environmentally friendly practices through IPR, it explores how Green Taxes and Scrappage Policies incentivize the development of green technologies. This study examines how these elements combine to foster sustainability in the industry by analyzing their relationship. It highlights the importance of government

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support and collaborative innovation in overcoming challenges such as high R&D costs and enforcement issues. In terms of policy effectiveness and future directions, this integrated approach for the Indian automobile sector aims to balance economic growth with environmental sustainability.

Key words: Green tax, Scrap policy and Automobile industry.

Introduction

There is a serious environmental concern about air pollution in urban areas due to poor air quality. Due to rapid urbanization, the number of motor vehicles in India has increased tremendously. Urban India is becoming increasingly polluted due to the increasing number of vehicles and increased congestion caused by the growing number of vehicles. The country has taken several measures to improve air quality in cities. In addition to improving fuel quality, drafting necessary legislation and enforcing emission levels for vehicles, improving traffic planning and management, enforcing green taxes[1], and improving intellectual property laws and scrap policies, these actions can be taken. Because it contributes to greenhouse gas emissions and air pollution, the Indian automobile industry faces significant environmental challenges. Indian government policies have mitigated these impacts through the implementation of green taxes and scrappage policies. The development of new, environmentally friendly technologies is also encouraged by Intellectual Property Rights (IPR)[2]. As the industry transitions towards sustainability, IPR, Green Taxes, and Scrappage Policies influence each other in varying amounts. As well as providing a comprehensive understanding of the mechanisms promoting eco-friendly advancements in the Indian automobile sector, this study examines how IPR fosters

1 Sun, Lishan, et al. "Reducing energy consumption and pollution in the urban transportation sector: A review of policies and regulations in Beijing." 285 *Journal of cleaner production*: 125339 (2021).

2 Khan, Z. A., and Shireen Singh. "Intellectual Property Rights Regime in Green Technology: Way Forward to Sustainability." 22.4 *Nature Environment & Pollution Technology* (2023).

innovation, how Green Taxes drive demand for green technologies, and how Scrappage Policies promote the removal of older, polluting vehicles.

Objectives

- To study the impact of green taxes and new scrap policy on the automobile industry.
- To know the role of intellectual property rights in the development of the automobile industry.
- To study the interrelation between Intellectual property rights and green taxes in the development of the automobile industry.

Literature Review

A holistic framework for promoting sustainable innovation in the automobile industry is created by the synergy between Intellectual Property Rights, Green Taxes, and Scrappage Policies. According to Aghion et. al. (2016)[3]Environmental policies are a powerful tool for driving technological innovation, particularly when they are combined with strong intellectual property protections. In their view, green taxes incentivize companies to invest in eco-friendly technologies, and IPR ensures that firms profit from their innovations, thus encouraging them to develop new ones.

The combined effect of these policies on the Indian automotive sector is explored by Balakrishnan, A. S., & Suresh, J. (2018)[4]. The authors find that the interplay between intellectual property rights and green taxes significantly increases the adoption and development of green technologies. Additionally, scrappage policies accelerate vehicle

3 Aghion, Philippe, et al. "124.1 Carbon taxes, path dependency, and directed technical change: Evidence from the auto industry." *Journal of Political Economy*: 1-51 (2016).

4 Balakrishnan, A. S., and Jayshree Suresh. "Green supply chain management in the Indian automotive sector." 29.4 *International Journal of Logistics Systems and Management*: 502-523 (2018).

turnover, ensuring newer, cleaner vehicles are replaced with older, polluting vehicles.

Automobile industry role in environmental pollution

Depending on the quality of the fuel used in automotive vehicles and the efficiency of their engines, vehicles emit a wide range of pollutants. Additionally, vehicles release fugitive emissions of fuel, whose sources and levels vary according to their types, maintenance, etc. As a result of vehicles/fuels, carbon monoxide (CO), nitrogen oxide (NOx), aldehydes, butadiene (C4H6), lead (Pb), particulates (PM), hydrocarbons (HC), sulfur oxides (SO2), and polycyclic aromatic hydrocarbons (PAHs) are released into the atmosphere[5]. Particulates and oxides of nitrogen are the main pollutants emitted by diesel engines, while hydrocarbons and carbon monoxide are emitted by petrol/gasoline engines. Emissions from vehicles negatively affect human health as well as the environment. Pollutants released from vehicles can have an adverse effect on human health and the environment. Direct and indirect effects associated with acute exposure to pollutants, such as reduced visibility and cancer, include both direct and indirect effects. Respiratory and cardiovascular systems may be affected directly by these pollutants[6]. There is an association between Sulphur Dioxide and suspended particulate matter levels and increased mortality, morbidity, and impairment of lung function. The green tax and scrap policies were therefore implemented to reduce the emissions from automobiles.

5 Sathasivam, Kavitha, Rosmawani Che Hashim, and Raida Abu Bakar. "Automobile industry managers' views on their roles in environmental sustainability: a qualitative study." 32.5 *Management of Environmental Quality: An International Journal*: 844-862 (2021).

6 Poulikidou, Sofia. "Identification of the main environmental challenges in a sustainability perspective for the automobile industry." (2010).

Green Taxes in automobile industry

The degree and origins of environmental contamination differ significantly among Indian states. As per the Supreme Court of India in ***M.C. Mehta v. Union of India***[7], the right to live in a pollution-free environment is a fundamental entitlement under Article 21 of the Indian Constitution[8]. Levying taxes on fossil fuels could serve as an effective and sustainable approach to mitigate carbon emissions and their environmental impacts. Driving a motor vehicle or the act itself is not inherently perilous. However, vehicle owners, alongside other sources of pollution, bear responsibility for the enduring harm caused by their vehicles. A hybrid policy integrates multiple strategies to regulate ecosystems. Implementing various environmental taxes, tradable emission permits, and obligatory environmental standards can incentivize the advancement of renewable technologies within the manufacturing sector. Section 59 of the Motor Vehicle Act of 1988 empowers the Central Government to establish regulations for the disposal of obsolete motor vehicles[9]. The pursuit of community safety, environmental preservation, and legislative objectives remains paramount. Both federal and state governments possess the authority to promulgate policies aimed at safeguarding and enhancing the environment, reducing energy consumption, and elevating living standards. The Indian Ministry of Road Transport and Highways has released draft guidelines outlining the implementation of a Green Tax on older vehicles[10].

7 M.C. Mehta v. Union of India, 1987 SCR (1) 819

8 Kumar, A. Article 21 of Indian constitution: Provide protections of life and liberty.

9 Singh, Jai Shankar, and Kartikeya Kumar Singh. "The Motor Vehicle Act 1988: A Critical Evaluation." 5 *Int. J. Innov. Res. Adv. Stud*: 308-312 (2018).

10 Singh, Kanwal DP, and Sheetal Gahlot. "Policy framework of green taxation on motor vehicles: A comparative perspective."12.3 *European Journal of Sustainable Development*: 49-49 (2023).

Pollution taxes or environmental taxes are excise duties imposed on goods that produce environmental pollutants. Emission taxes can reduce pollution efficiently for households and businesses that need to reduce pollution. Green tax reforms are popular not only because they reduce pollution directly, but also because they reduce other more distortionary taxes. Green tax reforms are not straightforward to implement despite their potential benefits[11]. Commercial vehicles entering Delhi have been fitted with RFID tags and CCTV cameras at border entry points to monitor their emissions. Green taxes are a relatively new trend in India. According to the size of the pollutant, environmental compensation charges will be applied. In the beginning, the government charged two-wheeled trucks a fine of Rs.700 to Rs.1300, and three-wheeled trucks a fine of Rs.600. Since then, however, the fines have been doubled, with light vehicles and two-wheeled trucks being required to pay Rs.1400 for every passing through the city, and three-wheeled trucks being required to pay Rs.2600. In Maharashtra, a green tax will be imposed on vehicles over 15 years old, and over eight years old on commercial vehicles[12].

New scrap policy in automobile industry

This policy provides government funding for scrapping old and inefficient vehicles on Indian roads and replacing them with newer and more efficient vehicles. Policy's primary purpose is to reduce the carbon footprint of the country by phasing out unfit and polluting vehicles. ATSs will be required to conduct fitness testing for Heavy Commercial Vehicles (HCVs) as of April 1, 2023. On June 1, 2024, the ATS will begin conducting fitness tests for other types of Commercial Vehicles (CVs) and Private Vehicles (PVs)[13]. A vehicle that fails the fitness test

11 Albrecht, Johan. "The use of consumption taxes to re-launch green tax reforms." 26.1 *International Review of Law and Economics*: 88-103 (2006).

12 Das, Pabitra Kumar, and Mohammad Younus Bhat. "Global electric vehicle adoption: implementation and policy implications for India."29.27 *Environmental Science and Pollution Research*: 40612-40622 (2022).

13 Fan, Qiaochu, J. Theresia van Essen, and Gonçalo HA Correia. "A bi-level framework for heterogeneous fleet sizing of ride-hailing services considering an approximated mixed equilibrium between automated and

and is over 15 and 20 years old shall be scrapped. An ELV (End-of-Life Vehicle) is a vehicle that fails the fitness test[14]. Identifying old, defective, and polluting vehicles and scrapping them is the main objective of Vehicle Scrappage Policy 2021. The vehicle scrappage scheme has some key takeaways[15].

- Scrapping non-registered and unfit vehicles reduces pollution.
- Ensure the safety of passengers, drivers, and vehicles.
- Develop the automobile industry as a source of employment.
- Scrapping informal vehicles should be formalized.
- Vehicle owners can save money on fuel and maintenance by improving fuel efficiency.
- The automotive, steel, and electronics industries will have easier access to low-cost raw materials.

Intellectual property rights in automobile industry

Sustainability and environmental consciousness have gained increasing attention in recent years. Automobiles contribute significantly to greenhouse gas emissions and environmental degradation, so greener technologies have become increasingly important in this sector. A green intellectual property (IP) concept has emerged as a response to this demand in the automotive sector[16]. Technology, products, and processes that are environmentally friendly are protected and utilized through green IP.

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non-automated traffic." *European Journal of Operational Research* (2024).

14 Konz, Raymod J. "The end-of-life vehicle (ELV) directive: the road to responsible disposal." 18 *Minn. J. Int'l L.*: 431 (2009).

15 James, Ajith Tom, et al. "Analyzing barriers for implementing new vehicle scrap policy in India." 114 *Transportation Research Part D: Transport and Environment*: 103568 (2023).

16 Ockwell, David G., et al. "Intellectual property rights and low carbon technology transfer: Conflicting discourses of diffusion and development."20.4 *Global Environmental Change*: 729-738 (2010).

Role of Green Mobility in the Automobile Sector

Hydrogen, biofuels, hybrid vehicles, and electric vehicles are some of the technologies used in green mobility[17]. In addition to reducing its dependence on fossil fuels, improving air quality, and reducing greenhouse gas emissions, India can reduce its dependence on these technologies. A number of factors have contributed to the rise of green mobility in the country. One of the world's largest and fastest-growing automobile markets, India has witnessed a significant increase in vehicle traffic, resulting in adverse air quality due to increased vehicular traffic. A plethora of health problems are caused by adverse air quality in urban areas due to excessive air pollution.

Energy needs in various sectors, including transportation, are met by imported fossil fuels. As a result of this dependence, fluctuations in worldwide oil prices may adversely affect the Indian economy. A second reason is that India has agreed to reduce its greenhouse gas emissions in accordance with the Paris Climate Change Agreement. Around 15% of India's greenhouse gas emissions come from the transportation sector[18], which is among the highest in the world. In light of the challenges the country faces, green mobility has become a pressing concern.

Various government initiatives have been taken recently to promote green mobility in India. A recent initiative to promote the adoption and manufacturing of electric vehicles is the Faster Adoption and Manufacturing of Electric Vehicles (FAME) program. In this scheme, electric vehicles are encouraged as a part of an effort to promote their adoption in the country. The demand for green mobility is further motivated by a general awareness of sustainable transportation's value. Innovation related to environmentally friendly technologies is protected

17 Li, Yanfei, and Farhad Taghizadeh-Hesary. "The economic feasibility of green hydrogen and fuel cell electric vehicles for road transport in China." 160 *Energy Policy*: 112703 (2022).

18 Bose, Ranjan, et al. "Transportation in developing countries: greenhouse gas scenarios for Delhi, India." (2001).

by green intellectual property (IP)[19]. A pollution-free nation can be achieved with the help of green IP, which is crucial for establishing a safe auto sector in India.

Green Patents

Under the International Patent Cooperation Treaty [PCT], patent applications for renewable energy and energy-saving technologies have increased by approximately 120% worldwide[20]. Some IP agencies are laying out special clauses and forums for connecting like-minded inventors in order to encourage inventions addressing climate change. WIPO, for instance, has created the WIPO Green platform to facilitate exchange and match-making for eco-friendly technology solutions.

In addition to providing a platform for searching for patent information regarding environmentally friendly technologies, the IPC Green Inventory also serves as the World Intellectual Property Organization's environmental initiative. "Green Channel", launched in 2009 in the UK, aims to accelerate patent assessments for green technologies[21]. Australian, Israeli, Japanese, South Korean, and US fast-track programs were all introduced in the same year. Additionally, in 2011, China, Brazil, Taiwan, and Canada launched related programs.

Significance of Green IP in the Automobile Sector

Sustainable development is undergoing a global transition today. Human activities contribute to climate change and have to be managed to minimize their carbon footprint. The automobile industry can promote sustainable development by promoting green mobility. Green mobility

19 Reichman, Jerome H., et al. "Intellectual property and alternatives: Strategies for green innovation." *Intellectual property rights: Legal and economic challenges for development*: 356-391 (2014).

20 Li, Xiangning. "Green Technology and Patents: in the European Context." (2020).

21 Hsu, Mu-Yen. "Green Patent 3.0: How to Promote Innovation for the Environment beyond Green Channel." *2016 Portland International Conference on Management of Engineering and Technology (PICMET)*. IEEE, 2016.

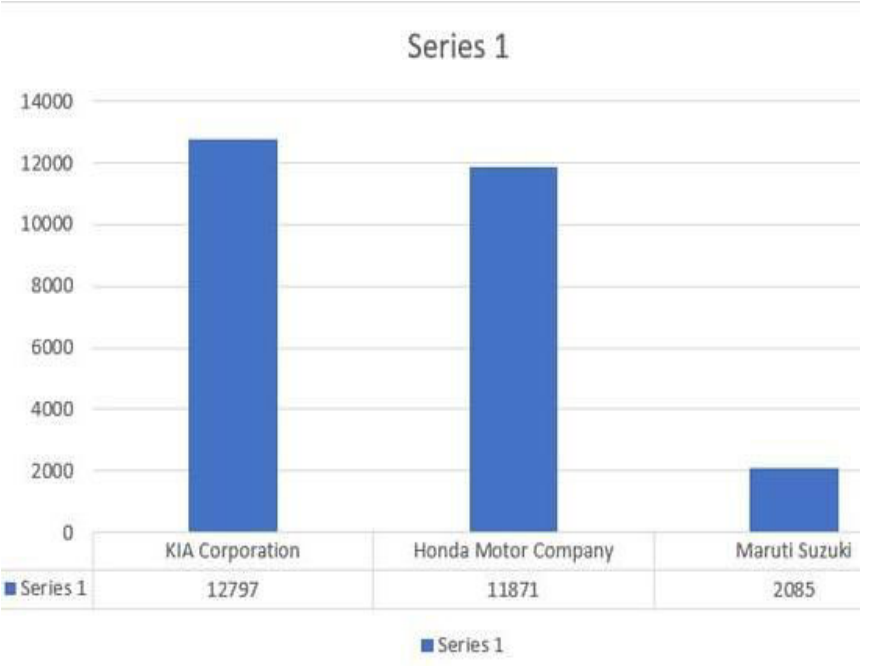
provides products that contribute to a sustainable future, such as electric vehicles. Solar and wind energy can be used to charge electric vehicles[22]. As well, it is possible to recycle and reuse the batteries of electric vehicles. In addition to these benefits, electric vehicles offer several others:

- A conventional combustion engine uses energy to generate heat and other kinds of energy loss to power its wheels, whereas an electric vehicle converts the energy stored in its battery to generate power for the wheels.
- With electric vehicles, noise pollution is reduced, making people more comfortable.
- The maintenance required for electric vehicles is less than for gasoline-powered cars, and electric vehicles use less electricity than gasoline-powered cars.
- Compared to conventional cars, electric vehicles offer a lower center of gravity, instant torque, consistent power delivery, and the ability to scale power.

It has also been found that hybrid cards can contribute to sustainable development in the automobile industry. Unlike conventional automobiles, hybrids combine the best features of gasoline and diesel engines. Due to higher fuel efficiency and lower emissions, hybrid cars are more affordable and environmentally friendly than conventional gasoline-only cars. Hybrid cards also provide energy savings, regenerative braking, a smaller engine, an automobile starting/stopping feature, and less dependence on fossil fuels[23]. In the chart below, we show the patent applications that the leading automobile manufacturers have filed.

22 Ahmad, Tasneem, and Vinita Krishna. "Technological Innovation in the Automobile Sector: A Case Study of Electric Vehicles Using Patent Analytics Approach." *Proceedings of the Global Conference on Innovations in Management and Business (GCIMB 2021)*. 2022.

23 Abdelsattar Mohamed Saeed, Montaser, Mohamed M Aly, and Salah Saber Abu-Elwfa. "A Review on Hybrid Electrical Vehicles: Architectures, Classification and Energy Management." 5.2 *SVU-International Journal of Engineering Sciences and Applications*: 93-99 (2024).



Source: Swaraj Raghuwanshi, Aastha Suri, Swaraj Raghuwanshi, & Aastha Suri. (2023, August 9[24]).

Figure 1: Patent applications for Hybrid Vehicles filed by Automotive Manufacturing companies

A total of 12797 patent applications have been filed by KIA Corporation related to hybrid vehicles, followed by 11871 patent applications by Honda Motor Company, and Approximately 2085 patent applications have been filed by Maruti Suzuki with the aim of promoting green technology that reduces greenhouse gas emissions and improves air quality. As another highly efficient, renewable, and readily accessible technology, hydrogen fuel cell technology ensures no emissions. During the 1980s, for the first time, the automobile industry reported a rise in hydrogen fuel demand with the rise in petroleum prices. Hydrogen-based fuel cell technology has been developed by several companies since

24 Swaraj Raghuwanshi, & Aastha Suri.. *Green Intellectual Property and Automobile Sector*. Bar and Bench - Indian Legal news (2023, August 9). https://www.barandbench.com/law-firms/view-point/green-intellectual-property-and-automobile-sector

then, especially for transportation. Over the past 40 years, approximately 1800 patent families have been filed and published in India relating to hydrogen fuel cells in automobiles. It is evident that the number of patent applications related to hydrogen cells has increased dramatically over time, with 68.92% granted and 15.96% still pending. In addition, Toyota and Honda appear to be among the top 20 companies in India filing the most patents. These two companies have pioneered research related to hydrogen fuel cell technology, particularly for automobiles. A hydrogen-powered car model has been tested by Honda since the 1990s.

Interrelation between IPR and green taxes

Developing innovation and promoting sustainability in the Indian automobile industry requires a close relationship between Intellectual Property Rights (IPRs) and Green Taxes. Investing in research and development (R&D) is incentivised by IPR, such as patents and trademarks[25], which grants companies a period of exclusive market access that allows them to recoup their investments. Electric vehicles (EVs) and advanced emission control systems are two technologies that benefit from this protection by reducing emissions and improving fuel efficiency. Green taxes, on the other hand, encourage manufacturers to adopt cleaner technologies by levying taxes on environmentally harmful products[26]. Pollution-producing vehicles become less affordable to own and operate as a result of these taxes, which drives a demand for eco-friendly substitutes. Consequently, manufacturers invest in research and development in order to develop environmentally friendly technologies, often securing patent rights. Using IPR to protect technological advancements and to avoid higher taxes creates a virtuous cycle where innovation is driven by the need to avoid higher taxes. While these benefits can be maximized, challenges such as high R&D costs and the

25 Atun, Rifat A., Ian Harvey, and Joff Wild. "Innovation, patents and economic growth." 11.02 *International Journal of Innovation Management*: 279-297 (2007).

26 Norouzi, Nima, Maryam Fani, and Saeed Talebi. "Green tax as a path to a greener economy: A game theory approach on energy and final goods in Iran." 156 *Renewable and Sustainable Energy Reviews*: 111968 (2022).

enforcement of IPR must be addressed. The Indian automobile industry can achieve sustainable growth through collaborative innovation and government support.

Conclusion

In response to climate change, green technology is rapidly gaining popularity around the world. As India develops green technology, especially in the automobile industry, it is rapidly moving towards ensuring a sustainable future. Patents for eco-friendly technologies, such as electric vehicles, hybrids, and hydrogen fuel cells, further strengthen this progress. While we have a long way to go on the road to achieving a sustainable future, there is still a long way to go. Innovation and sustainability in the Indian automobile industry depend on the interaction of IP rights, green taxes, and scrappage policies. Green technologies are encouraged by IPR, which ensures competitiveness and market exclusivity for companies. Incentives for cleaner alternatives and innovation are created by green taxes, which disincentivize polluting vehicles. As a result of scrappage policies, obsolete, high-emission vehicles can be removed from the road, which further complements these efforts. These policies can significantly contribute to the industry's sustainable growth even though they have challenges such as high R&D costs and enforcement issues. This interrelation can be maximized with government support and collaborative efforts. The Indian automobile industry will have a cleaner and more sustainable future if a balanced approach integrates economic and environmental objectives.

Future Scope of this study

In the automobile industry, IPR, green taxes, and scrappage policies play a critical role in driving sustainable innovation. Green taxes and scrappage policies encourage the adoption of green technologies, and IPR protection encourages investment in green technologies. The Indian automobile industry can achieve environmental sustainability through the combination of these mechanisms. A balanced approach to economic

growth and environmental protection must be explored in future research to maximize the effectiveness of these policies.

Judicial Interpretation of Personal Laws in India: An Appraisal of Changing Dynamics

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Abstract

Personal laws are those set of rules which are community specific rooted inherently in religious faith and customs. The personal laws belonging to different communities in India are mostly codified and reformed by legislations. The Hindu Marriage Act 1955, The Hindu Adoptions and Maintenance Act, 1956, The Hindu Succession Act 1956, The Hindu Minority and Guardianship Act 1956 are codified Hindu personal laws. The Indian Divorce Act 1869, The Indian Christian Marriage Act 1872, The Marriage Validation Act 1892 are codified Christian family laws. The Muslim Personal Law (Shariat) Application Act, 1937, The Dissolution of Muslim Marriages Act 1939, The Muslim Women (Protection of Rights on Divorce) Act, 1986, The Muslim Women Protection of Rights on Marriage) Act, 2019 are some examples of Muslim personal laws. The Parsi Marriage and Divorce Act, 1936 deals with Parsi Family Law, whereas, the Jewish Matrimonial Law has not been codified and Jews are still governed by different un-codified laws. In the matters of inheritance Christians,[1] Parsis[2] and Jews[3] are governed by the Indian Succession Act 1925. However, the interpretation of such laws have undergone a considerable shift from tradition to modernity. Given the sensitivity attached to community specific matters, the interpretation of such laws has always drawn attention within and outside the legal minds. This paper is an attempt to draw an appraisal of changing dynamics of judicial interpretation of personal laws in India.

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1 Sections 31 to 49.
2 Chapter III- Special Rules for Parsi Intestates: Section 50-56.
3 Sections 31-49.

Key Words: Constitution, Fundamental Rights, Social Transformation, Triple Talaq, Hindu Succession, Interpretation.

Introduction

Personal laws are recognized by State through constitutional guarantees.[4] Yet the approach of Courts with respect to interpretation of personal laws has not remained consistent and cohesive. The general norm of the secular courts is to protect these laws by deciding matters according to the personal law of the parties. In India, Article 44 of Constitution in the form of a directive principle requires the State to secure for the citizens a Uniform civil Code throughout the territory of India. It is pertinent to mention that freedom of religion is guaranteed as a fundamental right under Article 25 of the Constitution of India.[5] Those who are in favor of retaining personal laws without any intervention by the State rely on this provision.[6] However it is to be noted that under the Constitution freedom of religion is not absolute but subject to public order, health, morality and other provisions relating to Fundamental Rights. The role of the judiciary in this area has been described by the Supreme Court of India as:

"the court, therefore, while interpreting Article 25 and 26 strikes a careful balance between the freedom of the individual or the group in regard to religion, matters of religion, religious belief, faith or worship, religious practice or custom which are essential and integral part and

4 Article 25 of the Constitution of India.

5 ibid

6 Article 25 in The Constitution Of India guarantees Freedom of conscience and free profession, practice and propagation of religion : (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

those which are not essential and integral and the need for the State to regulate or control in the interest of the community."[7]

The Supreme Court has observed in the *H.H. Ramanuja Jeeyar Swami v State of Tamil Nadu*:[8]

"what constitutes an essential part of a religions or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and includes practices which are regarded by the community as a part of its religion".

In *Shayara Bano v. Union of India*[9] the Supreme Court of India stated that:

'Personal law' has constitutional protection. This protection is extended to 'personal law' through Article 25 of the Constitution. It needs to be kept in mind that the stature of 'personal law' is that of fundamental right. The elevation of 'personal law' to this stature came about when the Constitution came into force. This was because Article 25 was included in Part III of the Constitution. Stated differently, 'personal law' of every religious denomination, is protected from invasion and breach, except as provided by and under Article 25.'

Traditional Judicial Approach

Traditionally, the courts in India have shown reluctance in interfering with personal laws. The cautious approach of courts towards personal laws owes much to the literal approach of courts to interpret these laws. Over the years, the Supreme Court has taken a different and inconsistent approach while dealing with personal laws. In some cases it has held that personal laws of the parties are not susceptible to Part III of the Constitution dealing with fundamental rights. Therefore they cannot be challenged as violative of fundamental rights especially article 14, 15 and 21 of the Constitution of India as they do not fall within the ambit of word 'Law' under Article 13(3) of the Constitution.[10] On the contrary, in many other cases the Apex Court tested personal laws on the

7 A. S. Narayanan v State of Andhra Pradesh, AIR 1996 SC 1765,1792
8 AIR 1972 SC 1586 at 1593
9 AIR 2017 SC 4609 at p.4740 (parah 146)
10 "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

touchstone of Part III of the Constitution of India. After the commencement of the Constitution, the Courts in India continued to adopt a cautious approach while considering the constitutional validity of personal laws and the interpretation thereof. The courts generally followed the approach of non-intervention with respect to interpretations of personal laws.

In *State of Bombay v Narasu Appa Mali*[11] the court held that the framers of the Constitution wanted to leave the personal laws outside the ambit of part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in-fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of fundamental rights.

In *Shri Krishna Singh v Mathur Ahi & Ors*[12] Supreme Court ruled that part III of the Constitution does not touch upon the personal laws of parties. The Court stated that:

"*in applying the personal law of the parties, a Judge cannot introduce his own concepts of modern times but should enforce the law as derived from recognized and authoritative sources of Hindu Law i.e. Smritis and Commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or is modified or abrogated by statute*."

In *Ahmedabad Women Action Group v. Union of India*[13] A Public Interest Litigation was filed to declare Muslim Personal Law which allows polygamy as void as offending Art. 14 and 15. However, the Supreme Court refused to take cognizance of the matter.

In *P.E Mathew v. Union of India*[14] Section 17 of Indian Divorce Act was challenged as arbitrary and discriminatory. The Court held personal laws are outside the scope of Fundamental Rights.

In *Maharishi Avadhesh v Union of India* [15] the court held that personal laws could not be challenged for being in contravention of the provisions of Fundamental Rights. The writ petition under article 32 was

11 AIR 1952 Bom 84
12 AIR 1980 SC 707
13 AIR 1997 SC3614
14 AIR 1999 Ker 345
15 1994(1)SCC713

moved in this case seeking respondents to consider the question of enactment of common civil code for all the citizens; to declare Muslim Women Protection of Rights on Divorce Act, 1986 as void being arbitrary and discriminatory and in violation of article 14, 15, 44, 38, 39 & 39A of the Constitution. The court while dismissing the writ petition held that these are all matters for the legislature. The court cannot legislate in these matters.

Emerging Judicial Approach

With the increase in social integration and social transformation, economic independence and reform movements, wider interpretation of constitutional provisions, the call for the improvement of woman's position in the society also increased calling attention towards the varied rights of women including her matrimonial and property rights. More importantly the increasing advocacy for uniform civil code also pushed for liberal interpretations of matters pertaining to personal laws.

In *Shah Bano* case[16] Supreme Court held that Muslim women are entitled to maintenance beyond the period of *Iddat*. Section 125 of Cr.pc was given preference and wide interpretation over law of maintenance given in Shairah. In this case the Supreme Court directed Shah Bano's former Husband to pay her maintenance as per law of maintenance enshrined in Section 125 of Cr.pc. The court rejected the argument of Shah Bano's former husband that since she was paid maintenance during the period of iddat and was not so entitled to any further maintenance under the Muslim Personal Law.

The Supreme Court while dealing with a case relating to Christian Personal Law [17] ruled that Syrian Christian women were entitled to an equal share in their father's property. Before the Supreme Court order, the Syrian Christian community settled property inheritance issue as per the Travancore Succession Act, 1916 and Cochin Succession Act, 1921 while other Christians followed the Indian Succession Act of 1925 for the same. As per the Travancore and Cochin Acts, women received only a quarter of their male siblings or Rs. 5000 whichever was less. In this

16 Muhammad Ahmad Khan v. Shah Bano Begum AIR 1985 SC 945
17 Mrs Mary Roy and others v State of Kerala and others AIR 1986 SC1011

case the court preferred the law which gives more share to the women as compared to the law which gives less share.

In *Sarla Mudgal v Union of India*[18] the Supreme Court directed the government to indicate steps taken and efforts made by the Government towards securing a uniform civil code for the citizens of India. In this case, the question for consideration before the court was whether a Hindu husband married under Hindu law, after conversion to Islam, without dissolving the first marriage, could solemnize a second marriage. The Court held that such a marriage would be illegal and the husband could be prosecuted for bigamy under section 494 of IPC.

In *Danial Latifi v Union of India*[19] , the validity of Muslim Women (Protection of Rights on Divorce) Act, 1986 was challenged as being violative of Arts. 14, 15 and 21 of the Constitution. It is to be noted that this Act was passed in order to undo the effect of Shah Bano judgment. Muslims in India had raised the voice against the shah bano judgment calling it interference in the sharia. The Supreme Court in this case held that the provisions of the Act do not offend the provisions of the Constitution. However the Court interpreted the provisions of the act widely and held that Muslim divorced women have right to maintenance even after the iddat period under the 1986 Act. The court said that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which clearly extend beyond iddat period in terms of section 3(1)(a) of the Act.

In *Noor Saba Khatoon v Mohd. Quasim*[20] the Supreme Court held that a Muslim woman is entitled to claim maintenance for her children till they become major. Both under the MPL and under section 125 of Criminal Procedure Code, 1973 the obligation of the father is absolute when the children are living with the divorced wife.

In *Seema v. Ashwani Kumar*[21] the court while dealing with the issue of registration of marriages held that all marriages irrespective of their religions, be compulsorily registered. The Court felt that this ruling was necessitated by the need of time as certain unscrupulous husbands

18 (1995) 3 SCC 635
19 (2001) 7 SCC 740
20 AIR 1997 SC 3280
21 AIR 2006 SC1158

abandon their wives thereby causing problems for the wives while seeking maintenance, custody of children or inheritance of property.

In *Shayara Bano v Union of India and others*[22] Supreme Court of India by 3:2 majority set aside the practice of 'talaq-e-biddat' – 'Triple Talaq' being 'unconstitutional', 'arbitrary'[23] and 'not part of Islam. The S. C said:

"Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot take place. Also, as understood by the Privy Council in Rashid Ahmad (AIR 1932 PC25) such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after Shamim Ara (AIR 2002 SC3551). This being the case, it is clear that this form of Talaq (instant Triple Talaq) is manifestly arbitrary in the sense that the martial tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India."[24]

The Court further said: "Triple talaq was against the basic tenets of the Quran.[25] Kurian Joseph J. who was part of majority stated:[26]

"*The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt for reconciliation and if it succeeds, then revocation are the Quranic essential steps before talaq attains finality. In triple talaq, this door is closed, hence triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat*."

In *C. Masilamani Mudaliar & ors. V. The Idol of Sri Swaminathan* famously known as Mudliar Case[27] The Court held that personal laws are void to the extent of Fundamental Rights. In this case the sale of property by a Hindu widow was challenged by a Hindu

22 AIR 2017 SC 4609
23 *Id* at 4832.
24 *Id* at 4832, parah 285.
25 AIR 2017 SC 4609
26 *Id* at 4784-85 (Parah 211).
27 1996 SCALE (2)664

religious organization as being invalid under section 14(2) of Hindu Succession Act of 1956. Section 14(1) of the Act states that any property possessed by a Hindu woman, whether acquired before or after the bill's passage, is owned fully by her. She does not hold limited ownership. However, Section 14(2) forbids Section 14(1) from applying to "any property acquired by way of gift or under a will." Therefore, Hindu women only have limited property rights if they received property as a gift or from a will. The Court noted that as the legislature´s intention in Section 14(1) was trying to stop gender discrimination, Section 14(2) must be read to comply with this goal. The Court also noted that Section 14(2) can only apply where there is a gift or will, but not where there is any existing right or duty. The Court ruled that since maintenance is a right, property gifted to provide maintenance falls under the protection of Section 14(1) instead of Section 14(2). The Court noted that the Constitution and its Preamble was intended to remove discrimination. Because personal laws are derived from religious tradition rather than the Constitution, they are void under Article 13 of the Constitution if they violate the fundamental rights described by the Preamble.

The issue of constitutional validity of Section 15 and Section 16 of Hindu Succession Act is another important development which reflects gender bias in the Hindu Inheritance law. Both the sections were challenged in *Kamal Anant Khopkar v. Union of India & Ors*[28] before the Supreme Court terming the sections 'highly discriminatory'. It is alleged in the petition that 'deep rooted patriarchal ideology' is inherent in section 15 of the Act. It is relevant to mention that according to section 15 of the Act if a Hindu woman dies without making a will i.e. dying intestate, then her self-acquired property by way of inheritance shall go to husband and the heirs of husband and not to her parents. On the other hand when a Hindu man (husband) dies, the property is inherited by his wife, children, mother and then father. In this case the parents of the wife get nothing. They are not even in the list. Similarly if the woman dies intestate without leaving any children then the property is devolved upon the heirs of the husband irrespective of this fact that

28 Writ petition (Civil) No. 1517 of 2018.

deceased woman had inherited the property from her father or mother. The provisions are retained largely to maintain male lineage. In Short her own property is not inherited by her original heirs. It is quite strange that a woman who becomes a widow is sent back to her parent's home by her in-laws. However, when she herself dies, the same in-laws surface and claim property of such a widow as against her mother or father. The Supreme Court has sought Centre's response in this case.

The amendment made in 2005 in Hindu Succession Act 1956 (applicable to Hindus, Sikhs, Jains and Buddhists for the non-testamentary or intestate succession) granting equal rights to daughters in their father's ancestral property made the law of succession a bit balanced in nature. This amendment enables daughters to become coparceners and accrue share by birth itself. Before this amendment Hindu Succession Act considered daughters only as members of the HUF and not as coparceners.

In *Danamma @ Suman Surpur vs Amar*[29] The Supreme Court held that a daughter, living or dead on the date of amendment will be entitled to share in the father's property.

In *Mangammal v. T.B. Raju*[30] the Supreme Court held that the living daughters of living coparceners would be entitled to claim a share in the ancestral property.

In *Indian Young Lawyers Association & Ors. v. State of Kerala & Ors*[31] the Supreme Court struck down the age-old tradition that disallowed girls and women of menstruating age i.e between ten to fifty years of age from entering the Sabarimala temple in Kerala. Chief Justice Dipak Misra headed Constitution bench in a 4-1 verdict said the rule 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry)Act, 1965 violated their right to equality and right to worship. The court held that the provision in the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965, which authorized the restriction, violated the right of Hindu women to practice religion.

29 (2018) 3 SCC 343
30 Civil Appeal No. 1933 of 2009, Judgment date 19th April, 2018
31 (2019)11 SCC 1

In *Gulam Magdum v Niyamatibi & Ors*[32] the Court held that in all the suit properties inherited from the original owner by his wife, one daughter and three sons, the wife in the capacity of sharer would take 1/8th share in all suit properties. After deducting such 1/8th share, daughter and three sons being residuary, daughter would get one share and sons would take double her share respectively.

Conclusion

It can be concluded that the courts no longer remain silent on personal law matters. The emerging judicial approach largely remains revolving the effects on the rights of women through the wider interpretation of personal laws. The courts are keener to adopt sociological jurisprudence. However, one can easily observe that while there are stronger voices emerging for reforms in the personal laws, however, Muslim Personal Law in particular has been a subject of many debates and controversies around the question of reform. This had led to substantial interventions by the judiciary as well as the legislature, including the criminalization of practices like 'triple talaq' in the name of reform and modernization. Notably, the personal laws which have a constitutionally recognized status also exist within the same legal system and have been shaped in their current form under the influence of the colonial legal order. So in order to look for reform and modernization, all the aspects pertaining to personal laws and the involved communities need to be taken into consideration.

32 AIR 2022 Bom 185

Third Gender and Child Adoption in India: Tracing the Legal Trajectory

Dr Kasturi Gakul*

Abstract

Prospective adoptive parents subject to fulfilment of certain eligibility criteria can adopt children under the Juvenile Justice (Care and Protection of Children) Act, 2015 in India which is supplemented by Adoption Regulations, 2022. Analysis of these legal provisions though reveals categorisation of single, married and unmarried couples willing to adopt children, yet it is more concentrated towards the aspect of favouring couples in marital relationship. Unmarried couples of the third gender may be in live-in relationships and wish to become parents by adopting children. However, non-heterosexual couples are not eligible to adopt as the law in India does not recognize their right to marry. Consequently, third gender persons in relationships remain childless. The constraints on adoption of children by third gender couples have resulted in the upsurge of legal dialogue and examination of the same by the judiciary in India. Thus, transgenders' right to adopt children in furtherance of their right to found a family forms the central theme of the present paper and the author has endeavoured to address this discourse through analysis of existing Indian laws and relevant judicial cases.

Key words: *adoption, children, couple, right to marry, third gender.*

Introduction

Human rights discourse on rights of third gender persons triggers the debate on the multifarious vulnerabilities which they are susceptible to, despite the call for humanization based on the core value of freedom at birth and equality in respect of rights and dignity inherent in every human being[1]. Transgenders are legally recognised as 'third gender' in

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1 Universal Declaration of Human Rights, 1948, art. 1.

India.[2] The right to found a family irrespective of sexual orientation or gender identity entails the access to adopting children without discrimination by persons of third gender who wish to experience parenthood.

Child adoption in India is governed under the Hindu Adoption and Maintenance Act, 1956 [hereinafter HAMA, 1956] and the Juvenile Justice (Care and Protection of Children) Act, 2015 [hereinafter JJ Act, 2015] read with Adoption Regulations, 2022 [hereinafter AR, 2022]. The ambit of Hindu Adoption and Maintenance Act, 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2015 while aiming at the welfare and best interest of child, delineates different adoption criteria applicable to persons eligible to adopt under the said laws. A vital question to address in this regard is whether transgenders in India can adopt children and experience the joy of parenthood. Hence, the present study is confined to the exploration of the legal journey pervading the rights of third gender vis-à-vis adoption of children in India in the context of juvenile justice law.

Before divulging into the intricacies of this discourse, it is imperative to analyse the provisions relating to eligibility of prospective adoptive parents (hereinafter PAP) to adopt children under the juvenile justice law in India.

Child Adoption and Juvenile Justice Law in India

People irrespective of their religion can adopt children under the Juvenile Justice (Care and Protection of Children) Act, 2015 read with Adoption Regulations, 2022 subject to satisfaction of prescribed criteria. The JJ Act, 2015 under section 2(14) identifies 'children in need of care and protection' which include large categories of vulnerable children. Among them children who are orphan[3], abandoned[4] and surrendered[5]

2 *National Legal Services Authority* v. *Union of India and Others*, (2014) 5 SCC 438.

3 The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s. 2(42).

4 *Id,* s.2(1).

(hereinafter OAS) are accorded an opportunity to socially reintegrate and rehabilitate in the society through the non-institutional process of adoption. The Juvenile Justice (Care and Protection of Children) Act, 2015 provides for adoption to ensure the right to family for children.[6] The process of adoption as per the Juvenile Justice (Care and Protection of Children) Act, 2015 results in the permanent severance of relationship by the adopted child from the biological parents. The adopted child acquires the status of a lawful child of the adoptive family with all rights and responsibilities. The JJ Act, 2015 has laid down eligibility criteria of the prospective adoptive parents. Any person or persons who under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 are eligible to adopt children are termed as prospective adoptive parents (PAPs).[7] To have a clear idea on the eligibility of the PAPs the provisions of section 57 of the Juvenile Justice (Care and Protection of Children) Act, 2015 must be read with regulation 5 of the Adoption Regulations, 2022. Persons who wish to adopt a child must have mental alertness, physical stability and should have sound financial condition.[8] Although financial stability has been specified as an eligibility criteria no minimum income levels has been prescribed for PAPs by the Adoption Regulations, 2022 and whether the PAPs are motivated and capable of providing the child with reasonable living standard has to be assessed by the social worker.[9] They should be highly motivated to adopt a child and should not have any medical condition which is life threatening. A child can also be adopted by people who are divorced or single. If adoption is done by a married couple, then consent of both the

5 *Id,* s. 2(60).

6 The Juvenile Justice (Care and Protection of Children) Act, 2015, (Act 2 of 2016), s. 56(1).

7 The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s.2(49).

8 *Id*, s. 57 (1).

9 Central Adoption Resource Authority, *available at*: http://www.cara.nic/PDF/faqs.pdf. (last visited on Feb 24, 2025).

spouses is necessary[10] and they must have two years of stable marital relationship[11]. This does not apply in cases relating to relative or step-parent adoption of children.[12] Persons irrespective of marital status and natural son or daughter can adopt.[13] However, where a couple have two or more children, they can only adopt children with special needs or hard-to-place children.[14]While single female can adopt child of any gender[15], a single male cannot adopt a girl child[16]. Analysis of the provisions of JJ Act, 2015 read with AR, 2022 reveal that people who are not married cannot adopt children with their partners except only in their individual capacity. This would preclude any unmarried couple including transgender persons in relationship from adopting a child with their partner. Denial of the right to adopt by couples who are not in marital relationship amplifies discrimination towards transgenders in India as they cannot marry to make themselves eligible for fulfilling the criteria specified under the AR, 2022. Further, use of the terms 'single male' and 'single female' in the Adoption Regulations, 2022 explicitly propagates binary constructs resulting in exclusion of third gender from adopting a child.

Legal Discourse in India

Emphasizing upon the constitutional rights of transgenders, Justice K.S Radhakrishnan and Justice A.K Sikri on 15th April 2014 in *National Legal Services Authority* v. *Union of India and Others*[17] stated that transgender means "across or beyond gender".[18] The Supreme Court of

10 The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s. 57 (2) read with Adoption Regulations, 2022, reg. 5 (2)(a).
11 Adoption Regulations, 2022, reg. 5 (3).
12 *Id*, reg. 5 (3).
13 *Id*, reg. 5(2).
14 *Id*, reg. 5(8).
15 *Id*, reg. 5(2)(b).
16 *Id*, reg. 5(2)(c).
17 (2014) 5 SCC 438.
18 Piyasree Dasgupta, "Trans People Would Love To Adopt As Shown In The Powerful Vicks Ad, But They Legally Can't", *Huffpost,* April 1, 2017,

India clarified that though transgender (hereinafter TG) is an umbrella term including within its fold gay men, lesbian, bisexuals and cross dressers, in the context of the instant case the Court was not concerned with its wider meaning.[19] The Court made it clear that it was discussing the conferment of distinct identity upon the transgender community which included the Hijras, Aravanis, Kothis, jogtas/Jogappas, and Shiv-Shakthis. According to the Court, transgender are those whose gender identity or behaviour is not in conformity with their biological sex and also includes persons who are not able to identify themselves with the sex that was assigned to them at birth. The Court while viewing that transgender people have been subjected to multiple forms of oppression and discrimination, took note of the December 2010 Report of United Nations Development Programme (UNDP-India) on 'Hijras/transgenders in India: HIV Human Rights and Social Exclusion' wherein it had been recommended that action steps in consultation with transgender and stakeholder were to be developed for taking a stand on the legal recognition of the gender identity of transgender. The Court observed that only binary genders of female and male were recognised under the Indian law resulting in a gender system of law relating to marriage, adoption, inheritance, taxation and welfare legislations.[20] It was held that though Hijras/TGs had not been excluded from the ambit of articles 14, 15, 16, 19 and 21 of the Constitution of India (hereinafter COI), the binary notions of gender prevalent in the India laws have resulted in the non-recognition of the identity of TGs in different legislations thus denying the TGs equal protection of law and as such they face discrimination. The Court said that the term 'person' under article 14 of the Constitution of India was not restricted in its application and

available at <https://www.huffingtonpost.in/.../transgender-women-would-love-to-adopt-like-show> (last visited on Feb 25, 2025).

19 Dhananjay Mahapatra, "Supreme Court recognizes Transgender as Third Gender", *The Times of India,* April 15, 2014, *available at* <https://timesofindia.indiatimes.com> (last visited on Feb 25, 2025).

20 *National Legal Services Authority* v. *Union of India and Others* (2014) 5 SCC 438.

included TG persons who were entitled to protection of laws and equal civil rights as those enjoyed by other Indian citizens. The Court stressed that "recognition of one gender lies at the heart of the fundamental right to dignity" and that for the enjoyment of civil rights by the TG community their gender identification as 'third gender' was essential and COI has already discharged its duty by conferring rights upon the TG persons and that such rights were to be recognised and interpreted for ensuring dignified life of the TG people. The non-recognition of third gender in civil statutes relating to marriage, adoption, inheritance etc amounts to discrimination.[21] Thus, although the third gender persons in India have the civil right relating to adoption of children, yet the binary notion of gender ingrained in the laws on adoption had denied transgenders from adopting children.

On 24th August 2017, Justice Chandrachud in the historic case of *Justice K S Puttaswamy (Retd.), and Anr.* v. *Union of India and Ors*[22] commenting upon the decision of Supreme Court in *Suresh Kumar Koushal* v. *Naz Foundation*[23] in upholding the constitutional validity of Section 377 of the Indian Penal Code, 1860 (hereinafter IPC) thereby criminalising homosexuality maintained that dignity of privacy with respect to sexual orientation could not denied by reason that the lesbian, gay, bisexual, transgender, queer and intersex (hereinafter LGBTQI) comprised only of a minuscule fraction of the population in India and stated that the fundamental rights of sexual minorities were not 'so-called rights' but real rights which were enmeshed in social constitutional doctrine by virtue of the right to life and it constituted the essence of liberty and freedom.[24] It was also asserted that at the core of

21 Manoj K. Jha*, "*Transgender rights in India"*, available at* <https://iasscore.in/national-issues/transgender-rights-in-india> (last visited on Jan. 18, 2025) .

22 Writ Petition (Civil) No 494 of 2012, MANU/SCOR/11040/2018.

23 (2014) 1 SCC 1.

24 Agnidipto Tarafder and Arindrajit Basu, "For the Many and the Few: What a Fundamental Right to Privacy Means for India*"*, *The Wire*, Aug. 25, 2017, *available at* <https://thewire.in/government/right-to-privacy-supreme-court-2> (last visited on Feb. 25, 2025).

the fundamental rights envisaged under articles 14, 15 and 21, lies the right to privacy and protection of sexual orientation, and discrimination on the ground of sexual orientation offends the dignity of individuals.[25]

The five-judge Constitution bench of the Supreme Court of India comprising of Chief Justice of India (CJI) Dipak Misra and Justices R F Nariman, A M Khanwilkar, D Y Chandrachud and Indu Malhotra[26] on 6th September 2018 *in Navtej Singh Johar and Ors* v. *Union of India Thru Secretary Ministry of Law and Justice*[27] stated that LGBT are Indian citizens though they comprise a sexual minority and have the equal right to enforce their fundamental rights under articles 14, 15, 19 and 21 of the Constitution of India. The Apex Court declared that criminalization of consensual sex between the same-sex LGBT persons in private by Section 377 of the IPC, 1860 effectuates discrimination thus violating articles 14, 19 and 21 of the Constitution of India. The Court viewed that "Sexual orientation is immutable, since it is an innate feature of one's identity, and cannot be changed at will".[28]

On 10th December 2020, the Transgender Persons (Protection of Rights) Act, 2019 [hereinafter TPPR Act] came into force with the aim of providing protection to the rights of transgender people (TG) and their welfare. This law prohibits discrimination against TG persons and grants recognition to their identity. TG person has been defined to be those whose gender does not match with the gender that has been assigned to that person at birth.[29] The definition is inclusive and covers trans-men,

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25 Satvik Varma, "*The Rainbow of Hope That the Right to Privacy Judgment Has Brought"*, *The Wire,* Sep. 2, 2017, *available at* <https://thewire.in/173273/right-to-privacy-judgment-section-377/?fromNewsdog=1/> (last visited on Feb. 25, 2025).

26 Gay sex is not a crime, says Supreme Court in historic judgment, *The Times of India,* Sep. 6, 2018, *available at* <https://timesofindia.indiatimes> (last visited on Feb. 22, 2025).

27 (2018) 10 SCC 1 .

28 *Navtej Singh Johar and Ors* v. *Union of India Thru Secretary Ministry of Law and Justice,* (2018) 10 SCC 1.

29 The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 2(k).

trans-women, intersex variation persons, gender queers, *kinnar, hijra, aravani and jogta*.[30] The the Transgender Persons (Protection of Rights) Act, 2019 does not specifically deal with right of the TG persons to adopt children however in the context of the TPPR Act, family has been defined to be a group of persons who are related either by way of marriage, consanguinity or by lawful adoption.[31]

A Consultation Paper on Reform of Family law was prepared by the Law Commission of India (hereinafter LCI) on 31st August 2018 under the Chairpersonship of Former Supreme Court of India Judge Justice Dr. B S Chauhan.[32] To this effect submissions from civil society were sought and on 10th July 2018 submission on issues of family law were made to the Law Commission of India by some of queer feminist LBT activists and organisations where they had projected some concerns of transgender people under the existing law in India. In their submission they highlighted Principle 24 of the Yogyakarta Principles according to which everyone irrespective of sexual orientation or gender identity has the right to found a family and there can be no discrimination upon families based on sexual orientation or gender identity of its members. In this respect as per Principle 24 of the Yogyakarta Principles, States to ensure the right to find family and access to adoption without discrimination on the ground of sexual orientation or gender identity are required to take up legislative and administrative measures.[33] On the issue of child adoption, it was submitted that since laws on adoption and guardianship were gender dependent, rights of persons having children prior to their transition and those who want to adopt children are affected. Rights to adoption and guardianship must be taken into

30 *Ibid.*

31 The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019), s. 2(c).

32 Krishnadas Rajagopal, "Uniform Civil Code neither necessary nor desirable at this stage, says Law Commission*"*, *The Hindu*, Aug. 31, 2018, *available at* <https://www.thehindu.com> (last visited on Feb 23, 2025).

33 Orinam, "Response to Law Commission of India on Uniform Civil Code*"*, *ORINAM*, 2018, *available at* <https://orinam.net/lci-response-lbt-2018> (last visited on Feb 23, 2025).

consideration for recognition of the civil rights of TG persons. The clause under Central Adoption Resource Authority (hereinafter CARA) guidelines and the Juvenile Justice (Care and Protection of Children) Act, 2015 stated that while a girl child cannot be adopted by a man, a male child can be adopted by a woman. Questions were put as to the applicability of this clause to trans-men, trans-women and to persons who identifies oneself as a third gender or transgender. It was also questioned whether children of any gender could be adopted by TG persons. It was urged the guidelines pertaining to adoption be made gender neutral. It was suggested that laws be altered so that all citizens of female, male and other genders have access to rights and that laws on adoption regardless of religion be made available to all citizens.[34]

The Law Commission of India in the Consultation Paper on Reform in Family Law has elaborately discussed about the law on child adoption under Hindu Adoption and Maintenance Act 1956, Personal Law Amendment (hereinafter PLA) Act 2010, Law relating Muslims, Parsi, Christians, Juvenile Justice (Care and Protection of Children) Act, 2015, Adoption Regulations, International Conventions and Indian judicial pronouncements. Having regard to the area of the present discussion the author has incorporated only those inputs and recommendations of the LCI which are relevant to the topic of adoption and transgender persons. The LCI had strongly suggested that in the provisions relating to adoption under the JJ Act, 2015, the term 'parents' be substituted for the words 'mother and father' which would facilitate individuals of any gender identity to take recourse to the Act. Further it also recommended by the LCI that in place of words 'son and daughter' the term 'child' should be applied which would provide scope for the adoption of inter-sex children.[35] The LCI had stated that there is neither any necessity nor desirability for Uniform Civil Code (hereinafter UCC) in India and that

34 Orinam, "Response to Law Commission of India on Uniform Civil Code", *ORINAM*, 2018, *available at* <https://orinam.net/lci-response-lbt-2018> (last visited on Feb 23, 2025).

35 Law Commission of India, "Consultation Paper on Reform of Family Law" (August, 2018).

reform in family law requires harmonization of religion and constitutionalism.[36]

With the adoption of a girl child by a trans-woman Gauri Sawant, trans-parenthood has been acknowledged in India to a certain extent after the same was brought out in the public domain through the Vicks advertisement as a part of #TouchOfCare campaign. However, the perplexing reality is the denial of the legal right to adopt by transgender persons in India.[37] Children are being informally adopted by trans-women outside the purview of law.[38] Uncared poor children are looked after by trans-women and in certain cases indigent parents had consented to the informal adoption of their children by trans-women. Legally no trans-men and trans-women have been able to adopt a child as per the adoption laws in India.[39] Adoption can be done by trans people under Hindu Law through the conscious act of giving and taking by the parents and trans person respectively without documentation in the presence of witnesses.[40] However, adoption without documentation raises serious concerns where the adoptive trans parent cannot prove legal claims over the child and in cases of disputes when biological parents may claim back their child thus rendering the transgender person issueless.

On 2nd December, 2015 an affidavit was filed by the Central Adoption Resource Authority in High Court of Bombay refuting the allegations that lesbians, gays and transgenders (LGTs) cannot adopt under the adoption guidelines by stating that the prospective adoptive parents (PAPs) need to be stable-physically, mentally and emotionally; be capable financially; motivated to adopt a child and have no medical

36 Raghav Ohri, "Uniform civil code neither necessary nor desirable: Law panel", *The Economic Times*, Aug. 31, 2018, *available at* <https://economictimes.indiatimes.com> (last visited on Feb 17, 2025).

37 Piyasree Dasgupta, "Trans People Would Love To Adopt As Shown In The Powerful Vicks Ad, But They Legally Can't", *Huffpost,* April 1, 2017, *available at* <https://www.huffingtonpost.in/.../transgender-women-would-love-to-adopt-like-show> (last visited on Feb 25, 2025).

38 *Ibid.*

39 *Supra* note 18.

40 *Supra* note 37.

condition which is life threatening.[41] Provisions have been made by the CARA for online registration of PAPs in the Child Adoption Resource Information and Guidance System (hereinafter CARINGS) under the option of male, female and couple. It is to be noted that even after the Apex Court's recognition of TGs as third gender this option is conspicuously absent in the CARINGS.[42]

The Apex Judiciary's decision in *Navtej Singh Johar case*[43] Decriminalising homosexuality would have real meaning only when the right to marriage, inheritance, adoption etc has been secured to the LGBT community. Equality for LGBT community is not possible without laws on marriage and adoption. LGBT people too aspire to have a family and as such the right to adopt children is imperative.[44] After this judgment the LGBT couples wanted the legal right to adopt children which was not permissible under the prevailing law on adoption.[45] Children have been adopted by LGBT persons in India as single parents and no legal right has been conferred upon their LGBT partners regarding the adopted child.[46]

The contention on the same-sex marriage before the Supreme Court of India in *Supriyo @ Supriya Chakraborty & Anr* v. *Union of India*[47] has eloquently addressed the issue pertaining to adoption of children by

41 Expertily, "Can Transgender Women Adopt in India*"*, *Expertily*, April 24, 2017, *available at* <https://www.expertily.com> (last visited on Feb 20, 2025).

42 S*upra* note 18.

43 *Navtej Singh Johar and Ors* v. *Union of India Thru Secretary Ministry of Law and Justice,* (2018) 10 SCC 1.

44 Ambika Pandit and Abhinav Garg, "Now, time to give LGBTs marriage & parenting rights", *The Times Of India,* Sep 7, 2018, *available at* <http://timesofindia.indiatimes.com> (last visited on Feb 20, 2025).

45 Vinod, "LGBT community wants the next fight to be for the adoption right", *OneIndia,* Sep 6, 2018, *available at* <https://www.oneindia.com> (last visited on Feb 20, 2025).

46 Dhamini Ratnam, "Adoption by same-sex couples may be barred", *Livemint*, Aug 8, 2014, *available at* <https://www.livemint.com/ Politics/.../Adoption-by-samesex-couples-may-be-barred.ht.> (last visited on Feb 22, 2025).

47 Writ Petition (Civil) No. 1011 of 2022.

queer persons including TGs in India. Examining the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015 and Adoption Regulations, 2022, the Apex Judiciary viewed that CARA which had notified the Adoption Regulations, 2022 has exceeded its jurisdiction by prescribing a criterion under regulation 5(3)[48] which is beyond the ambit of section 57[49] of the Juvenile Justice (Care and Protection of Children) Act, 2015. The effect of such transgression from the parent law has precluded the couples who are not married from adopting a child jointly with their partners. The Court stated that the term 'stable' under regulation 5(3) was vague and that there was no clarity whether it can be automatically assumed that a marriage which has lasted for two years can be a measure of determining stability in a relationship. Adoption Regulations, 2022 has classified couples into categories of married and unmarried and assumes without any supporting data that a child will be able get a stable home only when couples are married. The Court said that people who are living together cannot be deprived of the right to found a family based on the societal construct of a family unit. CARA's advocacy of marital status for classification of couples has brought forth a differentia which has no link to the object of serving the child's best interest as contemplated to be achieved by the Adoption Regulations.

The Court in the instant case opined that stability in relationships cannot be presumed only on marriage but factors such as safety, freedom from violence etc are also required to provide a stable home for children and that there is no concrete evidence shown by Union of India that only people in heterosexual marital relationship or single persons can provide a child with stable home as compared to a couple who are not married. Hence, the Apex Court declared that regulation 5(2) and 5(3) of Adoption Regulations, 2022 is in contravention of articles 14 and 15 of the Constitution of India.

48 *Supra* note 11.
49 *Supra* note 8.

Referring to the home study report (hereinafter HSR) of the prospective adoptive parents to be prepared by Specialised Adoption Agency, the Court stated that whether prospective adoptive parents can take care of the child to be adopted would have to be discerned from the home study report which will assess the ability of the prospective adoptive parents irrespective of their sexual orientation. The Court held that queer community is discriminated against by regulation 5(3) of Adoption Regulations, 2022 because marriages between persons who are not heterosexuals have not been legally recognized by the State. The existence of such provision triggers adoption of children by transgenders individually even though they are in a relationship, further fuelling their disadvantageous position.

The Supreme Court of India stressed that the Constitution of India does not permit discrimination among individuals because of sexuality and legal assumption under the AR, 2022 in judging the parenting ability of persons based on sexuality is ultra-vires the JJ Act, 2015 and violates the constitutional mandate under articles 14 and 15. It is note-worthy that Supreme Court of India has unequivocally affirmed that 'sex'[50] includes sexual orientation.

The Court also took note of the Central Adoption Resource Authority memorandum dated 18th April, 2022 which made persons in live-in relationships non-eligible for adopting children. This circular issued by virtue of regulation 5(3) of AR, 2022, though perpetuated discrimination upon all who were in live-in relationships, aggravated the suffering of the non-heterosexuals. Neither the JJ Act, 2015 nor AR, 2022[51] stipulates such discriminatory principles and hence, the Apex Court found the said Central Adoption Resource Authority circular to be in violation of article 15 of the Constitution of India.

To ensure protection of all including queer community against discrimination in adopting children, the Supreme Court of India ordered the removal of the term 'marital' from regulation 5(3) of Adoption

50 The Constitution of India, art. 15(1).

51 Adoption Regulations, 2022, regs. 5 (1) and 5(2)(c).

Regulations, 2022 and elucidated that the term 'couple' will refer to all couples irrespective of marital status and will include queer couple. The principle of 'consent of the spouses' specified under regulation 5(2)(c) has been extended by the Court to even couples who are not married or are queer. In cases where couples are applying for adoption, the Court has viewed that the phrases 'male and female applicants' used in different schedules of AR, 2022 are to be substituted by term 'prospective adoptive parents'. CARA in complying with the said judgment, has been given the liberty to set conditions for welfare of the adopted child without discriminating on the ground of sexual orientation. The Apex Judiciary in its judgment under Part G, paragraph 340 (p) has declared that couples who are not married including queer couples can adopt a child jointly.

Conclusion

Conferment of legal recognition and circumventing of ambiguities in procedures relating to issuance of documents to transgenders is necessary as the same is connected to their basic civil rights like right to education, access to public health, inheritance rights, marriage and adoption of children etc.[52] The right to adopt by third gender persons in India has been constricted by the literal constructs of Juvenile Justice (Care and Protection of Children) Act, 2015 read with Adoption Regulations, 2022. This legal interpretation has marooned the right to found a family within the fetters of heterosexual marriages, thus disregarding the right to form a family through adoption by couples irrespective of their sexuality. Human rights standards emphasize that the State should ensure assistance and protection to families.[53] Children deprived of family environment are accorded the opportunity to be loved and cared for through a non-institutional process of adoption.[54] Though

52 *National Legal Services Authority* v. *Union of India and Others,* (2014) 5 SCC 438.

53 International Covenant on Economic, Social and Cultural Rights, 1966, art. 10.

54 Convention on the Rights of Child, 1989, art. 20.

marriage is a union, it also encapsulates companionship. Third gender persons in a relationship have the right to the union of companionship under article 21 of the Constitution of India.[55] Law in India does not recognise the fundamental right to marry of transgenders who are in same-sex relationship but they have a right to enter a union and the State is responsible for ensuring such persons with legal benefits. The right to union by queer couples entails them an environment to co-habit together and any prohibition of such union on the ground of sexual orientation is discriminatory[56]. India has not signed Yogyakarta Principles[57] but in NALSA[58] and Navtej[59] judgment, Supreme Court of India while dealing with matters concerning sexual minorities have acknowledged the significance of the said principles. Combating stigmatization of children adopted by queer couples, necessitates State recognition of queer relationships and to actively mobilise awareness generation programmes to sensitize communities about such couples. The judicial approach in Supriyo's case[60] prohibits discrimination based on sexual orientation and explicitly grants the queer couples including transgenders the right to adopt children under juvenile justice law. It is pertinent to reiterate that the purpose of adoption according to section 56(1) of the Juvenile Justice (Care and Protection of Children) Act, 2015 is to ensure child the right to family and therefore, in pursuance of the Supriyo's case[61], it is evident that the right of transgender couples to legally adopt a child jointly, is intrinsically linked with the realisation of the object embodied in the Juvenile Justice (Care and Protection of Children) Act, 2015. Enabling

55 *National Legal Services Authority* v. *Union of India and Others,* (2014) 5 SCC 438.

56 *Supra* note 50, art.15.

57 Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2006.

58 *Supra* note 2.

59 *Navtej Singh Johar and Ors* v. *Union of India Thru Secretary Ministry of Law and Justice,* (2018) 10 SCC 1.

60 *Supriyo @ Supriya Chakraborty & Anr* v. *Union of India* Writ Petition (Civil) No. 1011 of 2022.

61 *Supra* note 47.

third gender couples to legally adopt children will provide the vulnerable child with a nurturing stable family and the childless non-heterosexual couples will experience parenthood.

Impact of Artificial Intelligence and Rights of Children - A Critical analysis

Dr. Madhuri D. Kharat*

Abstract

The rapid emergence and growth of artificial intelligence has marked a meaningful as well as severe impression in the global market and ordinary human societies. The hidden surveillance of artificial intelligence has not only interfered into the lives of individuals but contributed to different sectors such as education, health, information technology and other industries. However, as human beings, an individual may or may not be aware about its use or misuse. Especially children as future assets of society, are the biggest tool for the growth of artificial intelligence. It is pertinent to note that, United Nations with its different organisations have initiated in-depth research work towards protection of children from negative aspects of new & advanced technologies. Children and their rights need to be recognised and protected in this emerging cyber space. This paper made an attempt to understand different nuances of relevance of artificial intelligence and other technology based on it in contemporary scenarios and also especially focuses on its impact & influence on augmentation of rights of children with existing legal developments at global level. This paper focuses on the certain viable observations on the use of artificial intelligence that can benefit the growth of children in the nation-building process.

Key words - artificial intelligence, child rights, society, cyber space

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Introduction

In the contemporary socio-legal technological era, the global world has revolved around the changing lifestyles of the populace. Human life has been transformed due to advancement in technology including the internet and artificial intelligence. Artificial intelligence and the cyber world has influenced and impacted human life & brings new hopes and issues. Advancement in technology has given the life of human beings in such a multiple and revolutionary manner. In this article the author has focused on how the life of children has been influenced due to the insulation of artificial intelligence. The potential of artificial intelligence for the growth and nourishment of children is important as well as challenging. The threats and benefits of artificial intelligence on the life of children have been noticed around the globe. This paper will also synergize the link between existing law, the protection of children and their importance during the artificial intelligence progress.

In the history of protection of children's rights, the international and national legal systems have taken various initiatives in a serious and effective manner. The childhood of a human being has always been the most innocent and irreplaceable phase of life. If the basic and fundamental environment gets to the children at the outside of their life then that would be a great contribution in nation building. However, the issues associated with the children have not yet been dissolved completely. The present context with children is still suffering from different challenges of life such as malnutrition, various health issues, illiteracy, rampant poverty and the exploitation in the nature of sexual, physical and verbal. It is evident that a number of childrens are roaming on the streets without a home in the major cities of the country that itself shows that their basic rights have not yet been enforced in true spirit. The famous convention on the rights of children, which is a binding document which has ratified the same, has Committed to recognise, protect and enforce the rights of children. The 54 articles of convention have been devoted to understand and implement the various ideas that will make the healthy life of children. Apart from this convention, the

United Nations have adopted various other legal instruments which are helping legal systems around the globe. The advancement in technology is special in the form of artificial intelligence, has led to analysis and understanding the interplay between Digital contents, digital environment, virtual services provided in the form of robotics, complex algorithms, and difficulty in data privacy.

Legal Initiatives

The United nations have always aimed to protect basic for principles of rights of child including non-discrimination, best interest of child, right to life survival and development, respect the views of the child. These four principles are very basic and fundamental that need to be protected at any cost. This also gives a base to various nation states to implement laws in tune with it. It is equally important for developed and developing nations to navigate and understand the different nuances in the digital world and bring a healthy and protective environment for them.

In the year 2021, UNICEF Has published a report on policy guidance for AI and children. If one looks at this report it has proposed very important guidelines and recommendations associated for growth and enhancement of rights of children in the world of artificial intelligence. The first guideline is to ensure the development of children with full support from guardians as well as the legal system to achieve their well being. The subsequent guideline ensures the child should have inclusive attention in the society. Another guideline promotes just fair and reasonable opportunities and priorities without any discrimination for the children. These guidelines also ensure the safety of children and urge the government to maintain transparency, accountability, and explainability for the betterment of children. UNICEF in their document of guidelines also made an effort to empower the government and business enterprises to educate and infuse the knowledge of artificial intelligence rights of children. These guidelines also focussed on empowering children to stand and fight in the era of artificial

intelligence in a right manner without any fear and hindrance. It is also pertinent to know that UNESCO has recognised the tool of artificial intelligence as the most influential as well as challenging to human strengths. In this regard in the year 2019, UNESCO has brought and published various recommendations on the ethical standards of artificial intelligence so that this tool shall not lead to inhumanity and enhance the life of human beings, society at large and strengthen ecosystems. In the year 2021, these recommendations were appreciated by all 193 members of UNESCO. These recommendations provide a comprehensive view of public policy on artificial intelligence for its sustainable and protective development. It also focuses in the education sector to enhance the quality of teachers with the help of artificial intelligence such as teaching, research administration as well as overall growth of the educational institution. The tool of artificial intelligence will also facilitate the policy makers of the legal system, so that they can provide a better solution on various issues exhausted in society.

Apart from such steps taken by the United Nation at the international level, now it is also very pertinent to see how artificial intelligence could simplify and make the life of children much more relaxed and easy. The tools of artificial intelligence have been useful for children in various sectors such as education, health, security as well as sociability. With the help of these tools parents, guardians as well as doctors could understand the mindset of a child in a proportionality appropriate manner. For example, the disease and the symptom of disease if we club together and allow the artificial intelligence tool to diagnose the same, that may provide a small assistance to respective doctors to understand the health issues of children. If the symptom of disease and the age of the child-patient is common in most of the cases then that could give a quick and rational opinion to the doctors for early preparation to save the life of a number of children.

Pragmatic perspectives

Children are assets of any nation building. But the new environment of artificial intelligence has affected their life in multiple ways. In the year 2022-2023 Children's Parliament and Alan Turing institute from Scotland has done extensive research on the interaction of children with artificial intelligence. They have focussed primarily on four schools to understand challenges and issues pertaining to possibilities of human rights violations due to the rapid presence of artificial intelligence. The investigation was done with the help of several questionnaires in an elaborate manner. The questions were prepared in a focussed manner to understand relevance of AI and life of children including its use, misuse, adaptation, strengths, acceptability, decision-making, education, safety and security. This research also intensively came to the conclusion that, most of the children had confidence over using artificial intelligence for positive benefits. With the same hope, children are anticipating that the presence of artificial intelligence will definitely assist them if it is used in the right spirit. Through the cultivation of human resources and the enhancement of productivity, an efficient educational system possesses the capacity to revolutionize a nation. Progress and the general shift to a developed economy are heavily dependent on the literacy and education levels of the populace, especially in the case of developing nations.[1]

India has a huge youth population, which highlights the importance of a well-developed education sector. Statistics show that there are more than 50% of the population under the age of 25 right now. It is critical that the growing number of digital data collection tools be properly utilized to enhance educational practices and curricula. There has been a huge rise from 2011 to 2015 (upto 32%) in the educational sector in the field of insertion of Technology through private enterprises which is inclusive of maximum use of computers and Technology beneficial to the child in the schools.The new batch of kids have quickly adopted the

1 Children's Parliament Exploring Children's Rights and AI, Summary Stage 1 Report https://www.childrensparliament.org.uk/wp-content/uploads/A.I_Stage_1_Report_Final.pdf

new technology from the urban areas, however the kids in the rural background are still struggling to understand the technology it's advantages, and it has also be noted that the school teachers and their lack of willingness also violating basic rights of child.[2]

The central and state government has taken extensive steps for the meaningful growth in the gross enrollment ratio at the elementary level and as well as at the secondary level such as 97% and 80% respectively. These figures definitely show that both governments are cooperating with each other with the same goal of welfare of all the children. However on the other side there are certain problems that are still persisting or remain present such as low retention rates between children's are not interested to retain in the school to complete their education. The Drop rate of a child is also a serious concern for the state as well as for the central government. As per the national achievement survey which was done in the year 2017, it was also noted that the poor learning outcomes is also a serious concern among the children from elementary as well as secondary level. This has raised very serious consequences and posed a blot on the improvisation of the quality of education.[3]

A large number of schools, particularly those in smaller or more distant towns, do not have the resources to maintain grade-specific classrooms and faculty. As a result, the instructor must contend with a diverse student body that spans generations and exhibits vast disparities in terms of class, age, aptitude, and proficiency. A common source of poor teaching-learning and, by extension, poor learning outcomes, this enormous variation presents a formidable challenge to the educator. The majority of classrooms use teaching and learning strategies that are

2 Charisi, V., Chaudron, S., Di Gioia, R., Vuorikari, R., Escobar-Planas, M., Sanchez, I., Gomez, E.Artificial Intelligence and the Rights of the Child Towards an Integrated Agenda for Research and Policy, 2022, https://joint-research-centre.ec.europa.eu/index_en

3 National Strategy for Artificial Intelligence (2018) by NITI Aayog https://www.niti.gov.in/sites/default/files/2023-03/National-Strategy-for-Artificial-Intelligence.pdf

based on memorization and lack interaction. Customization to the child's learning level, abilities, and pace is usually missing from remedial instruction when it is provided. There are a number of factors that put some students at risk of dropping out of school. These include things like unsuitable classroom environments, unqualified instructors, students' lack of preparedness for school, language obstacles, significant grade-level achievement gaps, family situations (such as migrant families), children's eating habits or health, and so on.[4]

The lack of qualified educators in some parts of a state is seldom the cause of a large number of open teaching positions; rather, it is the result of regional disparities. For example, in Uttar Pradesh, there are 1.74 lakh openings for elementary school teachers, but there is also a surplus of 0.66 lakh teachers in the entire state, according to recent statistics. Most current methods of teacher education use a very broad and generalized set of activities. It has nothing to do with a teacher's unique strengths and areas for improvement; for example, a teacher who struggles with mathematics would benefit from additional training to help their students better grasp the subject. Despite the availability of information and communication technology (ICT) infrastructure, a recent survey indicated that school technology adoption is low. This is mostly due to insufficient teacher training. Computers are used mainly for audiovisual display or student practice by 83% of the teachers who participated in the survey. Educators with advanced degrees also tend to make greater use of technological tools in the classroom. While just 53% of instructors lacked proper training, 88% of those who did report using classroom computers. Educators with formal training are almost twice as

4 Paulo D., Implementing the Rights of the Child Six Reasons Why the Human Rights of Children Remain a Constant Challenge, International Review of Education / Internationale Zeitschrift für Erziehungswissenschaft / Revue Internationale de l'Education, Vol. 48, No. 3/4, Education and Human Rights (Jul., 2002), pp. 259-263

likely to say they use technology for communication and to participate in online forums.[5]

Conclusion and Future perspectives

The extraordinary impact of the digital world has paved the way for child growth through innovative learning environments. The advancement of technology and the developed ecosystem has brought new techniques to study, research and data analysis of collected data. The possible outcome achievable by artificial intelligence tools is far less than human capabilities. The interactions with children, teachers, educational systems from different cultures, nationalities also became possible due to new learning techniques and technologies. The risk factors pertaining to lack of information and lack of access to knowledge have been severely reduced and that lead to empowerment of children to fight to world in upcoming challenges.[6]

There are many AI based softwares, programmes have been developed and introduced in cyber space including ChatGPT. It has been recognised and made an attempt in every sphere of life of individuals, including children. It is a basically large language model that has been made in such a manner which brings the most accurate prediction. The children in the present generation, have been utilizing this feature and taking advantage in their completion of their assignments and education. One cannot deny the significance of it, however, if a child get habit of receiving results from such programme softwares and gets results without application of mind then that would lead to disaster to long term growth of a respective child. The Convention of rights of child when

5 Cynthia P.C., United Nations : Convention on the Rights of the Child, International Legal Materials, Vol. 28, No. 6 (NOVEMBER 1989), pp. 1448-1476

6 Richard J. Wolff, Children's Rights in Education: A Philosophical and Historical Approach,The Journal of Educational Thought (JET) / Revue de la Pensée Éducative, Vol. 17, No. 1 (April 1983), pp. 43-49

emphasis upon overall growth of child then such tools appears to be useful as well as dangerous too. [7]

Another big challenging software which has been developed is robotics. This automated and self-empowered machine have interfered with human capabilities and replacing with the role of teachers at various stages.There are two main schools of thought when it comes to robots in the context of children's perspective : (i) those that are primarily used as a physical interface to help children learn and understand programming and computational thinking, which has a long history in STEAM education (e.g., Pappert, 1970), and (ii) those that are specifically made to have meaningful social interactions with children from different streams. Robotic applications present new and exciting possibilities for children's growth and development, but there are also risks associated with their creation, testing, and use. Such risks may include :

a. Impact on right to privacy
b. Threat to data protection
c. Freedom of child's speech and expression
d. Impact on child's mental and physical growth
e. Many health related issues

Apart From this, there are specialized areas of study for children's use of artificial intelligence because this academic region of education and its direct impact on child rights is one of the many that AI is already impacting and will continue to impact.

First, children are among the most vulnerable populations because their cognitive and social-emotional abilities are still developing and show signs of fast growth.

Secondly, children are seldom included in the decision-making process for the creation and release of AI-based applications, even though these apps are having an ever-increasing impact on children's daily lives, such as in personalized learning apps or entertainment face recognition apps.

7 Laura M. M., Mariusz Z., Rubén M. G., Aleksandra P.,Artificial intelligence and human rights, https://doi.org/10.2307/j.ctv282jgff

Third, children should be effectively and appropriately prepared for a variety of roles, including those of present and future users of AI-enabled systems as well as those of potential designers and developers of such systems. Because of this, it's crucial to provide kids and teens with opportunities to learn about human-centered ethical design and acquire the skills necessary to critically evaluate the creation, application, and impact of robotic technology in all spheres of society.

Harnessing Artificial Intelligence for Enhanced Legal Aid Delivery in India: Challenging Unequal Justice

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Abstract

Legal aid heralded the notion to ensure everyone has equal access to justice, that is critical for upholding the constitutional principle of equality and social justice in India. It became a key element centered on "justice for all", specifically Article 39A of our Constitution, it obligates the States to ameliorate access to justice that is demonstrated by enacting The Legal Service Authorities Act 1987, mandating legal aid clinics to be established that marked a significant step towards a pervasive access to justice to the marginalised, however, the legal aid clinics despite its promising nature are constrained by various persistent challenges that substantially disrupt its impact and effectiveness. This paper examines integrating artificial intelligence (AI) technologies into legal aid clinics in India to enhance service delivery and access to justice, mitigating its deficiencies and fulfilling the objective of inclusivity in the legal system confronting unequal justice. Additionally, the paper attempts to address the advantages, challenges, and ethical considerations in deploying AI in legal aid settings.

Key words: Legal Aid, Client Outreach, AI Technologies, Equal Justice.

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Jayanth K. Krishnan et al. Grappling at the Grassroots: Access to Justice in India's Lower Tier, Harvard Human Rights Journal / Vol. 2714-MAY-14 13:39.

I. Introduction

Legal aid has been an integral design in the Constitution of India. It is fundamentally based on the point that "without institutional and resource support, it was difficult for weaker interests to stave off wealthier opposing parties in court."[1] The Constitution of India, art. 39A, mandates the State to provide equal justice and free legal aid. Additionally, legal aid is guaranteed under Art. 14, 21, 22 (1). The 14th Law Commission back in 1958 recommended for the establishment of legal aid authorities in India. It is pertinent to point, "that the earliest Legal Aid movement appears to be of the year 1851 when some enactment was introduced in France for providing legal assistance to the indigent."[2] The response of the Indian judiciary to the legal aid movement also reflects its earnestness as Justice Bhagwati articulated, "we would strongly recommend that…it is high time that a comprehensive legal service programme is introduced in the country. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them." [3] Subsequently, these efforts fostered to the enactment of the Legal Services Authorities Act, 1987 (ACT NO. 39 OF 1987) (*hereinafter* referred to as the Act) that mandates the provision of free legal aid, which the National Legal Services Authority manages. Fundamentals of the Act includes institutional framework of legal aid, at the centre, state and in the district level and upto the sub-division. Individuals such as prisoners, undertrials, weaker sections of society unable to engage legal representation can access free legal aid services through the designated institutions. The conception of the legal aid ushered into a new era for equitable access for "justice to all". The concept of legal aid involves

2 See, National Legal Services Authority, available at https://nalsa.gov.in/about-us. (last visited on July 14, 2024).

3 *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar, Patna* 1980 (1) SCC 98.

providing free legal assistance to indigent persons involved in legal proceedings who do not have the means to pay to represent them legally in courts, tribunals, or other legal proceedings.

It is perhaps also worth noting that the Act in section 4 (K) provides for establishing legal aid clinics in universities, law colleges and other institutions such as in villages, community centres, jails, courts, juvenile justice board etc. in consultation with the Bar Council of India. These legal aid clinics illuminate the privileges and benefits of the marginalized in society. Certainly, though the legal services authorities have significantly aided people in gaining access to justice, their efforts and outcomes are contradictory to the mark and limited. This inefficiency is for a variety of reasons, including a sparsity of legal aid workers, inadequate infrastructure, poor promotion of their legal aid initiatives. To provide an example of truthful information the legal aid clinic in law schools even with the adequate infrastructure and resources because of improper implementation of the scheme in matters relating to curriculum, legal representation by the faculty and students, method of conducting legal aid awareness etc. has considerably lowered the enthusiasm for doing legal aid activities and its desired result[4]. These significantly undermined the objective of legal aid clinic. Effective implementation of legal aid requires harnessing AI technologies to enhance accessibility, efficiency, and efficacy in providing legal assistance to those in need.

This paper highlights the current state of legal aid clinics and explores the potential of incorporating Artificial Intelligence (AI) to improve their efficiency in Legal Aid Clinics and challenge unequal justice. It aims to reveal issues like:

- Staffing shortages leading to limited legal expertise available to handle complex cases.

4 "A Study of Law School Based Legal Services Clinics," *UNDP* available at: https://www.undp.org/india/publications/study-law-school-based-legal-services-clinics-0 (last visited March 11, 2024).

- Lack of resources for tasks like legal research and case management.

In addition, explores how AI can potentially address these inefficiencies and explore some possibilities such as: Automating repetitive tasks like document review and legal research which frees up lawyers' time for more complex issues.

- Providing clients with initial legal advice and guidance through AI chatbots or decision trees.
- Identifying legal issues based on client descriptions and recommending relevant resources.
- Helping with data management and case analysis to improve overall efficiency.

Furthermore, this paper also endeavour to delve broader insights into

- Cost of implementing and maintaining AI systems.
- Bias in AI algorithms that could disadvantage certain groups.
- Limited ability of AI to handle complex legal issues requiring human judgment.
- Accessibility concerns - ensuring AI tools are user-friendly for clients with limited technological literacy.

In conclusion, the paper provides significant guidance on how to navigate and integrate AI into legal aid clinics, while addressing the identified challenges. This might involve:

- Developing ethical guidelines for AI use in legal services.
- Investing in training and education to ensure lawyers can effectively work alongside AI tools.
- Focusing on AI applications that offer the most significant benefits for both clients and legal aid staff.

II. Legal Aid And Legal Clinics: Overview And Challenges

The landmark U.S Supreme Court's judgment in *Gideon v. Wainwright,* [5] granted indigent defendants the right to counsel provided by the government,[6]this case provided the right to counsel and recognized that lawyers in criminal courts "are necessities, not luxuries." [7] The judgment demonstrated the right to legal aid as essential for fairer trials. The court further reiterated in the judgment that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. The noble ideal of fair trials before impartial tribunals in whichever defendant stands equal before the law…cannot be realized if the poor man charged with crime must face his accusers without a lawyer to assist him."[8]

In India in the case of *Hussainara Khatoon v. State of Bihar* (1979)[9] Justice P.N. Bhagawati, Justice R.S. Pathak, and Justice A.D. Koshal ruled the right to legal aid as a legal right to every citizen in need. The judgment proves as an influential impetus that significantly reinforced the necessity for enactment of Legal Service Authority Act,1987 a legislation with its objective stated in the introduction which is self-explanatory , " An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice

5 Gideon v. Wainwright,372 U.S.335(1963) available at, *https://supreme.justia.com/cases/federal/us/372/335* (last visited May 2, 2024)

6 Neal Devins & Louis Fischer, The Democratic Constitution, Oxford University Press 2015, p-64

7 See, John Gross: *Reframing the Indigent Defense Crisis https://harvardlawreview.org/author/johngross* (last visited May 12, 2024)

8 *Supra* Note 6.

9 1980 (1) SCC 98.

on a basis of equal opportunity. "[10] It has the objective "to establish a nationwide uniform network for providing free and competent legal services to the weaker sections of the society based on equal opportunity. The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to monitor and evaluate implementation of legal aid programmes."[11] It is critical to understand that "Legal aid" is defined as "legal advice assistance and/or representation at little or no cost to the person designated as entitled to it," The definition of "legal aid" also "encompasses services provided by lawyers and paralegals in criminal as well as in civil and administrative matters to individuals who are poor, marginalized, or otherwise in need of special legal protection, to enable them to exercise their rights."[12]

III. **Legal Aid Clinic And Legal Pedagogy**

Legal aid clinic is a subset of legal aid. Legal aid clinic primarily evolved as a means for the law students to see legal operations and a response to reform in legal pedagogy as the then prevailing system of legal education were producing mere book-teachers as it was assumed many law schools are so staffed with mere book-teachers that on hindsight, reform in legal pedagogy becomes necessary. The existing system of legal education only produced mere book-teachers. As observed "many of our law schools are so staffed with mere book-teachers that were best equipped not to train lawyers but to graduate men able to become book-law teachers who can educate till other students to become book-law teachers- and so on ad infinitum"[13].

10 The Legal Services Authorities Act, 1987, available at https://drive.google.com/file/d/1WJ21cJ-zxkxLLq_-5pFRs3qROh16x7Tv/preview

11 Department of Justice, National Legal Services Authority (NALSA)https://doj.gov.in/access-to-justice-for-the-marginalized/

12 UNODC: *Global Study on Legal Aid Global Report*, available at https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf

13 "Frank - 1933 - Why Not a Clinical Lawyer-School.pdf,."

The legal clinics eventually was "incorporated into the legal curriculum with objective to incorporate field observation in the late 19th and early 20th centuries in America"[14]. In India, the 14th Law Commission as far back in 1958 reviewed the working of legal aid in many other countries and recommended for the establishment of legal aid authorities that can permeate to the grassroots which was witnessed in the enactment of the Act. The legislation then provided for the establishment of legal aid clinic that can permeate to the grassroots. The word 'clinic' was obviously borrowed from the medical terminology, an advice or management of especially of a specialist nature or requiring a subject matter specialist. The legal aid clinics in universities and law schools are of dualistic nature, educational as well as a social mission. However, there are increasing concerns that legal aid clinics are becoming redundant with their effectiveness challenged mostly by funding struggle, staffing deficiencies. One of the causes of the ineffectiveness of legal aid clinic in law schools is that there are restrictions within India's legal aid system that hinder its effectiveness. Such as:

- *Policy Barrier:* Law professors are currently barred from guiding students in court (trial and appellate) under Advocates Act 1961, even for legal aid cases. This is an error in public policy decisions.
- *Impact on Law Clinics:* Due to this restriction, legal aid clinics staffed by law students lack proper courtroom experience and mentorship.
- *Consequence for Clients:* This, in turn, limits the legal skills and experience these clinics can offer to underprivileged clients who depend on legal aid.
- *Overall Effect:* The legal aid system becomes less effective in achieving its goal of providing competent legal representation to those who cannot afford it.

14 "What is a Law Clinic? – Tech Law Clinics," 2020*available at*: https://techlawclinics.uni.lodz.pl/en/what-is-a-legal-clinic/ (last visited March 11, 2024).

In short, law students who assist with legal aid cases cannot get courtroom experience under the guidance of professors. This limits the quality of legal representation these clinics provide to clients who need it most.

Another hindrance to effectiveness of the legal aid clinic in India is funding. The clinics are majorly understaffed, funding of legal aid clinic is one of the major reason that prevents from it being effective[15]. This lack of staff required for legal aid clinics is primarily due to a lack of funding. With fewer staff lawyers, the workload on each lawyer becomes much higher. This can lead to less time dedicated to each case, potentially compromising the quality of representation for clients. They increased stress and burnout for lawyers, leading to higher turnover and further staffing issues. The clinic also will not be able to offer the full range of legal services it could with more staff. This means some clients may not be able to get the help they need for their specific legal problems. Limited staff may also mean fewer clinic hours or less consultation availability. This can make it harder for people seeking legal aid to access the needed services, especially those with limited mobility or time constraints. Therefore, understaffing due to funding problems creates a vicious cycle. Clinics can only serve so many clients effectively, which weakens the public's perception of their value, potentially leading to even less funding in the future.

IV. Introduction To Artificial Intelligence

Artificial intelligence (AI) is "a branch of computer science"[16]. It entails using computer programs to conduct operations requiring human intelligence generally. AI algorithms can perform self-learning,

15 "India Legal Aid Clinics: Creating Service Learning Research Projects to Study Social Justice,"*available at*:https://www.researchgate.net/publication/281480455_India_Legal_Aid_Clinics_Creating_Service_Learning_Research_Projects_to_Study_Social_Justice (last visited March 11, 2024).

16 "Artificial Intelligence Definition, Ethics and Standards," *available at*: https://www.researchgate.net/publication/332548325_ (last visited March 11, 2024).

perception, problem-solving, and logical reasoning. AI is a field that is developing rapidly, continues to evolve and quickly integrating into society as it makes our lives easier. AI boils down to how well a computer can imitate or go beyond human capabilities[17].Often concerns are also expressed, that AI will surpass human capabilities. However, AI cannot just stop at reaching the human level of intelligence[18]. The usefulness of AI lies in the fact that, AI can go beyond human capabilities and without it AI cannot reach its maximal capabilities and with it the very purpose of AI.

Legal aid clinic often provides legal advice and prognosis of a certain legal predicament to the disadvantaged members of the society. Coupled by human vices and snob such advice, when carefully reasoned, are often biased. AI has the potential to provide more objective predictions. In addition to being less susceptible to various kind of biases, AI do not tire, and it does not need to take time off[19]. Since the ineffectiveness of legal aid clinic is attributed to a shortfall of workforce and funding as it can be expensive to maintain a huge workforce, AI has the potential that can effectively aid to legal aid.

V. Ai Applications In Legal Aid Clinic

The traditional legal aid clinic usually performs functions such as, client intake and assessment; whereby the clients legal needs are assessed and determine if it is within the reach of the clinic to provide services such as legal advice, legal research, drafting of documents and also often conduct outreach programs like workshop to serve the community by providing legal aid education.

17 Chethan Kumar GN, "Artificial Intelligence: Definition, Types, Examples, Technologies" *Medium*, 2019*available at*: https://chethankumargn.medium.com/artificial-intelligence-definition-types-examples-technologies-962ea75c7b9b (last visited March 11, 2024).

18 Ibid

19 Benjamin Alarie, Anthony Niblett and Albert Yoon, "How Artificial Intelligence Will Affect the Practice of Law" *SSRN Electronic Journal* (2017).

The traditional role of lawyers can be replaced to an extend by AI in review of legal document, "search for legal precedent, document generation, brief and memorandum generation and prediction of the case outcome"[20]. It is not to say that the role of the lawyers will completely be replaced by the AI, for that to happen it might take a couple of innovative generations of the AI presently available. And even with that, human interventions will always be required. The role of AI in legal profession can be better understood as machine intelligence as an input to facilitate the lawyer. This non-lawyer assistance is relied upon by the lawyer in rendering legal service to clients, e-discovery consultations, document management etc. provided the lawyer is fully responsible for supervising the non lawyer assistant[21]. etc.

The identified problem in hand with regards to legal aid clinic is the limited financial resources and because of which limited personnel resources arise. By AI replacing most of the basic legal tasks of the overwork lawyer in the legal aid clinic, the financial limitations can also be addressed. However, there is also other concerns that to create AI tools to support the tasks of legal aid clinics, such institutions typically must work within tight software development and maintenance budgets. Although government funding may cover initial development expenses, ongoing maintenance costs for adapting to legal changes or technical challenges are often not included. Hiring external consultants for specialised software issues or as domain-specific 'knowledge engineers' in legal areas is also expensive[22].

Powerful and wealthy individuals have historically enjoyed greater access to legal services than others. These advantages include investing

20 Northwestern University School of Law et al., "The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services," 13 *Actual Problems of Economics and Law* (2019).

21 Ibid.

22 Andrew Mowbray, Philip Chung, and Graham Greenleaf, "Utilising AI in the legal assistance sector" (2019).

in experienced lawyers, strategically choosing which cases to appeal, and engaging in lobbying efforts. From this perspective, technology represents just another advantage the privileged can afford. However, technology often catalyzes exponential changes that can exacerbate existing inequalities that are not devoid of AI dominion, as more affluent individuals can utilize tools capable of analysing contracts in a manner beyond human capacity. Thus, it is not merely about hiring superior legal expertise but about deploying technology that can comprehensively analyse vast amounts of relevant data, further amplifying disparities[23].

VI. Benefits And Opportunities: Ai In Legal Domain

In recent years, AI chatbots have become more common on websites aimed at consumers, frequently serving as customer support's initial point of contact. While the legal industry has been somewhat cautious in embracing chatbot technology, certain firms and legal teams have decided to embrace it[24].

Chatbots are advanced search tools that enable humans to interact with computer databases seamlessly[25]. They are crafted to emulate interactive dialogue, often posing inquiries or engaging in a form of 'conversation' with users, all aimed at furnishing them with pertinent information among other functions. Legal aid clinics could be further effective by integrating free chatbots, which operate around the clock and offer preliminary legal advice and assistance at any hour, including beyond typical office hours. Chatbots represent a notably cost-effective means of obtaining fundamental legal information and initiating initial steps compared to traditional legal consultations. They play a vital role

23 Jeff Neal, "Harvard Law expert explains how AI may transform the legal profession in 2024" *Harvard Law School available at*: https://hls.harvard.edu/today/harvard-law-expert-explains-how-ai-may-transform-the-legal-profession-in-2024/ (last visited March 13, 2024).

24 *"Chatbots are legal - what are the key benefits?* | LexisNexis Blogs,"available at: https://www.lexisnexis.co.uk/blog/in-house/chatbots-in-legal-what-are-the-key-benefits .

25 *"What Is a Chatbot*? | IBM," available at: https://www.ibm.com/topics/chatbots.

in heightening public awareness regarding legal rights and available options, empowering individuals by furnishing initial guidance, Chatbots can encourage individuals to address legal matters promptly, potentially resulting in more favourable outcomes.

Serving as a triage system, Chatbots aid users in determining whether their situation necessitates legal representation or can be addressed through self-help resources. The emergence of legal Chatbots signifies a promising advancement within the legal domain. As technology progresses, we anticipate the development of even more sophisticated Chatbots with enhanced capabilities to aid individuals in navigating legal challenges, fostering a more accessible and equitable legal framework. Although legal chatbots within legal aid clinics offer significant promise, ensuring free access is essential for their efficacy. These clinics predominantly cater to low-income individuals unable to afford conventional legal services. Introducing a paywall for the chatbot would directly undermine this core mission. Collaboration with tech firms, alongside public funding, could aid in developing and maintaining the chatbot at a reduced expense. The free availability of legal chatbots within legal aid clinics serves as a potent mechanism for advancing access to justice and legal knowledge. By guaranteeing free access, these chatbots can empower individuals, bridge gaps in legal services, and ultimately foster a more equitable legal framework.

As legal aid clinics cannot transfer resource costs to their clients, so their lawyers continually operate within resource constraints. Nevertheless, AI-driven legal research tools offer a solution by swiftly analysing extensive legal precedents and case law, aiding lawyers in identifying pertinent legal arguments and case outcomes. These AI models can be trained on historical case data to forecast the likelihood of success across various case types, enabling lawyers to allocate resources judiciously and devise more effective case strategies. Accelerated case processing and access to pertinent information can enhance client service and expedite resolutions. Moreover, data-driven insights can inform the

clinic's overarching strategic direction and advocacy endeavours. Through responsible and ethical implementation of AI, legal aid clinics can harness its potential to enhance efficiency, better cater to their clientele, and ultimately advance access to justice.

VII. Challenges And Ethical Considerations

AI has the potential to enhance fairness. With the judiciary overburdened with caseloads, machines can leverage their speed and capacity for processing vast amounts of data. They can effectively assess and consider pertinent factors more accurately than humans. Consequently, AI-driven decision-making could be free from bias and subjectivity, resulting in more informed and impartial judgments.

However, to begin with, AI is not completely neutral, the bias in AI stems from ingrained societal stereotypes. Search engine algorithms are also biased, driven by big data, prioritising popular results based on user clicks and location. Consequently, search engines can perpetuate existing biases and stereotypes, creating echo chambers that reinforce societal prejudices and stereotypes online[26]. Where users are primarily exposed to information confirming their prior beliefs, limiting their exposure to diverse perspectives. Search engine algorithms rely on massive datasets to rank search results. If this data inherently reflects societal biases, the algorithms will learn and perpetuate those biases. The algorithms are also based on user search history and online behaviour.

In addition, the accuracy of AI systems is a subject of ongoing debate and scrutiny. To illustrate a high profile incident, a lawyer named Steven Schwartz, in 2023, in a suit against Colombia-based Avianca Airlines, submitted a legal brief drafted with assistance from the generative AI platform ChatGPT. The draft referenced legal cases that appeared to provide precedents favourable to his client's argument. However, upon investigation by the judge overseeing the case, it was

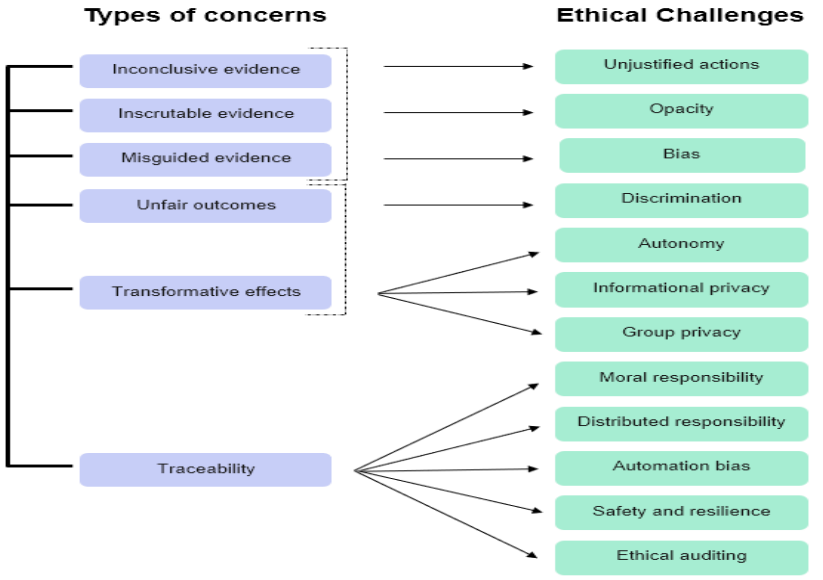
26 "Artificial Intelligence: examples of ethical dilemmas | UNESCO,"*available at*: https://www.unesco.org/en/artificial-intelligence/recommendation-ethics/cases (last visited March 13, 2024).

revealed that six of these cited cases were nonexistent[27]. They had been fabricated by the online tool. This incident was one of many notable cases where emerging technology has presented challenges. Many AI systems, especially deep learning models, are intricate "black boxes." Understanding exactly how they arrive at their decisions can be challenging, making identifying and addressing potential errors challenging.

Finally, as AI becomes ubiquitous across various sectors, it brings forth a myriad of privacy challenges, disrupting conventional norms of safeguarding personal data. AI fundamentally utilises machine learning algorithms to process information, enable independent decision-making, and adjust to changes without direct human intervention. The privacy dilemma surrounding AI revolves around several critical issues. Its voracious appetite for extensive personal data to fuel its machine-learning models raises significant concerns regarding data storage, utilisation, and accessibility. Questions also arise regarding the origins of this data, its storage locations, who has access to it, and under what conditions. These queries often surpass the capabilities of conventional data protection regulations[28]. A myriad of data protection laws presently applicable find it challenging to tackle the intricate data-gathering methods prevalent on the internet nowadays. Individuals frequently lack substantial control over the utilisation of their data, post-collection. Regulatory measures are also not sufficient to grant adequate authority to users to oversee their data privacy. This disparity between apprehensions regarding privacy and the efficacy of data protection regulations is increasingly troubling in the current scenario. Figure below shows the ethical considerations in AI.

27 Molly Bohannon, "Lawyer Used ChatGPT In Court—And Cited Fake Cases. A Judge Is Considering Sanctions" *Forbes available at*: https://www.forbes.com/sites/mollybohannon/2023/06/08/lawyer-used-chatgpt-in-court-and-cited-fake-cases-a-judge-is-considering-sanctions/ (last visited March 13, 2024).

28 Gai Sher et al., "The privacy paradox with AI" *Reuters*, 31 October 2023, section Legal Industry.



29

Fig 1. Ethical Considerations in AI

29 Common ethical challenges in AI, available at https://www.coe.int/en/web/bioethics/common-ethical-challenges-in-ai (last visited April 12, 2024

VIII. Implementation Strategies

There are few identified challenges to the implementation of AI in any given setting. To begin with, (*transparency)*; Wortham highlights that achieving significant levels of transparency and interpretability poses a significant challenge in developing intelligent systems[30]. The formidable task of ensuring extensive transparency and interpretability presents a challenge in constructing intelligent systems. Inaccurate or insufficiently developed models have the potential to cause harm to corporate operations[31]. Additionally, (*Lack of trust in AI)*; "both leaders and employees lack confidence in and understand their organisation's intentions regarding deploying AI in the workplace. Research indicates that merely 62% of business leaders express a favourable attitude towards AI, with an even lower acceptance rate among employees, standing at 52%"[32]. Furthermore, (*Analog processes)*; large qualitative data sets are required to obtain data and establishing a robust data infrastructure are essential for ensuring the sustainability of AI operations. Finally, (m*isunderstandings of AI)*; understanding how an AI system reaches its conclusions or predictions is also challenging.

Therefore, an all-encompassing policy framework is crucial for effectively integrating AI across diverse sectors, including its use in legal aid. This policy must tackle concerns regarding data privacy, transparency, accountability, ethical implications, and accessibility to guarantee the responsible and fair deployment of AI advancements. High-quality datasets are a prerequisite for achieving success with AI initiatives., while ensuring that humans have oversight and are involved in developing, deploying, and monitoring AI systems to identify and

30 Robert H Wortham, Andreas Theodorou and Joanna J Bryson, "What Does the Robot Think? Transparency as a Fundamental Design Requirement for Intelligent Systems."

31 Wiebke Reim, Josef Åström and Oliver Eriksson, "Implementation of Artificial Intelligence (AI): A Roadmap for Business Model Innovation," 1 *AI* 180–91 (2020).

32 "Workday Global Survey Reveals AI Trust Gap in the Workplace," *Investor Relations Work day available at*: https://investor.workday.com/2024-01-10-Workday-Global-Survey-Reveals-AI-Trust-Gap-in-the-Workplace (last visited March 13, 2024).

address errors or biases will go far toward AI acceptance. By working towards algorithmic transparency, user awareness, and diverse data, we can create a more equitable and informative AI experience.

IX. Conclusion

In a lecture delivered in Karnataka, former Supreme Court Justice Uday U Lalit emphasised the importance of providing high-quality legal aid to the economically disadvantaged, stating, "Legal aid to the poor does not mean poor legal aid. There has been better standard, better quality, and better level." The major concern facing legal aid clinics is the lack of financial resources to keep up with the demands of successfully running the clinic. In litigation the "haves", will always have the capacity to allocate resources towards seasoned legal professionals who with greater financial means capable to employ expensive man power to bring the situation in favour of the client, while the "have not" have to deal with the lawyers who cannot trickle down the cost of employing expensive resources to the client and therefore have to make do with fewer resources and thereby perpetuating inequality. Even with the provision of legal aid for social equity, disparities continue to persist between the 'haves' and the 'have not' due to large gaps in financial resources demonstrating unequal justice.

The legal aid clinic are also significantly underfunded and as of 2022 India had 44,472 panel lawyers, which means India had one legal aid lawyer per 31,930 population. The implementation of AI in legal aid clinics can positively address disparities arising due to the large wealth gap by effectively sealing the want of manpower of the lawyer handling the indigent case.

There are also concerns to data protection in employing AI, however we can ensure responsible utilisation of AI technology by fostering collaboration with AI developers and technology companies, maintaining transparency, and upholding accountability. The way forward for harnessing AI for enhanced legal aid delivery is to transition from general AI to AI skilled to analyse complex legal problems.

Although it is uncommon to find entirely cost-free, fully operational AI solutions, investigating these possibilities can enhance the accessibility of AI technology for legal aid clinics. Through public funding and establishing partnerships, these clinics can harness AI's potential to enhance their effectiveness and provide better assistance to the disadvantaged and marginalized sections for an inclusive equality in legal system promoting social justice.

Information and Communication Technology and Dispute Resolution in India: An Appraisal of Emerging Legal Trends with special reference to Alternate Dispute Resolution

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Abstract

Information and communication technology (ICT) has revolutionised every field of life. Only a hermit would be unaware of the degree to which technology has permeated every aspect of our lives. It has transformed society to such an extent that it is very hard to imagine modern life without technology. The integration of ICT with the justice delivery system has a potential to go a long way in overhauling the entire justice delivery system. This paper is an endeavour to highlight different policy perspectives underlying various legislations in India which mandate use of modern technology to achieve the objectives of speedier resolution of a wide variety of disputes. It gives a detailed account of various enactments supporting an integration of ICT in the resolution of disputes through Alternative Dispute Resolution.

Key words: ADR, Information and Communication Technology, Justice, Mediation, ODR

Introduction

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Information and communication technology has encompassed all the sectors of our lives. It has been embraced by all the branches of Government in daily functioning. Above all it has been integrated with the justice delivery system all over the globe. Some of the problems associated with the adversarial justice delivery system and its procedural intricacies which traditionally account for delay in justice and denial of access to the marginalised people, have largely been overshadowed through the use of new technology. Host of technological advancements have made justice delivery processes and access to courts easier. A century ago, lawyers were held in high esteem like medieval priests. People used to visit them because they were considered as storehouses of legal information to which the public lacked access. Today with the democratisation of information, legal knowledge is not confined to a selected few but is widely available on the internet. Other information centric professions have already felt the pulse of change because of information democratisation. For example, the market value for newspapers has plummeted and the labour engaged therein has substantially reduced. The new wave of information and communication revolution has made considerable impact in all branches of the Governments across the globe. Above all, the judiciary has embraced it and has been willingly accepting the new challenges of opening judicial gateways to make the judicial governance more transparent, accessible and speedier with the use of new technology. For instance, the e-Court project initiated by the Government of India, and its implementation in phases being closely monitored by the Supreme Court of India, has the potential to revolutionise the processes involved in access to justice and the justice delivery system. The addition of novel features of technology to the justice delivery machinery from top echelons to the grass-root level has the potential to dethrone the traditional processes that have become the root cause of otherwise diminishing faith in the justice system. The integration of ICT with justice delivery system envisages adoption of new regulations, overhauling some of the existing procedural regulations and putting in place huge ICT related

infrastructure and manpower in the courts and the tribunals to fully usher an automated justice delivery system.

Legislative Framework in India and use of ICT in Dispute Resolution

With rapid advancements in information and communication technology (ICT), the legal landscape in India has undergone significant transformations. In particular, ICT has played a crucial role in the development of Online Dispute Resolution (ODR) and Alternative Dispute Resolution (ADR) mechanism. In India a host of legislations provide for utilisation of ICT in ADR mechanisms for resolution of disputes both within and outside courts and tribunals and thereby strengthening the integration of ICT in resolution of disputes.

The Mediation Act, 2023

The Supreme Court[1] as well as NITI Aayog[2] had recommended full recognition to the mediation processes and legislative support to online dispute resolution by means of a separate legislation on mediation. The Supreme Court constituted a Mediation and Conciliation Planning Committee (MCPC). The committee prepared a draft on mediation legislation. This draft after rigorous overhauls has finally been enacted in the shape of the Mediation Act, 2023 which gives full legal sanctity to dispute resolution with the use of ICT.[3]

The Act defines mediation in an inclusive manner while recognising online mediation as well. Under section 2(h) mediation is defined as under: -

"Mediation" includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation,

1 *M.R. Krishna Murthi v. The New India Assurance Co. Ltd.* AIR 2019 SC 5625.

2 'Designing the Future of Dispute Resolution-The ODR Policy Plan for India', NITI Aayog Expert Committee on ODR, October ,2021, p.51.

3 The Economic Times, 'Supreme Court forms committee to draft mediation law, will send to Government' (19 January 2020) available at *https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to government/articleshow/73394043.cms?from=mdr* (Last visited on 23/12/2024)

community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute".

Chapter VII of the Act provides that online mediation may be undertaken at any stage of mediation under the Act. However, consent of the parties concerned need to be sought before conducting online mediation. The online mediation may include use of electronic form, computer networks, encrypted electronic mail service, secure chat rooms or conferencing by video or audio mode or both.[4] The procedure for online mediation shall be such as is specified under the Act.[5] The conduct of online mediation is to ensure that essential elements of integrity of proceedings and confidentiality are maintained at all times. The mediator concerned is required to take appropriate steps in respect of confidentiality and integrity of proceedings.[6] Further mediation communication in online mediation has to be undertaken strictly as per the Mediation Act, 2023 which ensures full confidentiality in the conduct of mediation.[7]

The scope of undertaking online mediation has been facilitated by the Mediation Act, 2023 by making suitable amendments in the following enactments: -

The Arbitration and Conciliation Act,1996

The Act provides the framework for undertaking arbitration in India. The 2019 amendments to the Act provide for the establishment of a regulatory authority, viz. the Arbitration Council of India.[8] The 2020 Amendment removed barriers of qualification for the arbitrators.[9]

The Mediation Act, 2023 through its Section 61 and Schedule Sixth has further amended the Arbitration Act, 1996. The new amendments

4 The Mediation Act, 2023, Section 30(1).
5 Id., Section 30(2).
6 Id., Section 30(3).
7 Id., Section 30(4).
8 Arbitration and Conciliation Act, 1996, Sections 43 (D) and 43 (I).
9 Arbitration and Conciliation (Amendment)Act, 2020.

omit words 'mediation and conciliation' occurring in Section 43D (1) and (2) of the Arbitration Act. Sections 61-80 of the Arbitration Act have altogether been substituted by the new single section 61 which provides that "any provisions in any other enactment for the time being in force, providing for resolution of disputes through conciliation in accordance with the provisions of this Act, shall be construed as reference to mediation as provided under the Mediation Act, 2023.[10] It further provides that reference to the conciliation under the Arbitration Act, 1996 as well as the Code of Civil Procedure,1908 shall also be construed as reference to mediation referred to in clause (h) of section 3 of the Mediation Act, 2023.[11] However, conciliation proceedings already pending prior to the commencement of Mediation Act, 2023 are saved to continue to be processed under the repealed provisions relating to conciliation under the earlier provisions of Arbitration Act, 1996.[12]

Amendment to Section 89 of Civil Procedure Code

By virtue of Section 59 read with the IVth Schedule of the Mediation Act, 2023, Part V of the CPC has been renamed as special proceedings by omitting the word Arbitration therefrom. Section 89 of the CPC has been recast as follows:

Settlement of disputes outside the Court: -

Where it appears to the Court that the dispute between the parties may be settled and there exists elements of settlement which may be acceptable to the parties, the Court may—

(a) refer the dispute to arbitration, and thereafter, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration were referred for settlement under the provisions of that Act; or

(b) refer the parties to mediation, to the court-annexed mediation centre or any other mediation service provider or any mediator, as per the option of the parties, and thereafter the provisions of the Mediation

10 The Mediation Act, 2023, Sixth Schedule, Section 61.
11 Ibid.
12 Id., Section 62.

Act, 2023 shall apply as if the proceedings for mediation were referred for settlement under the provisions of that Act; or

(c) refer the dispute to Lok Adalat, in accordance with the provisions of sub-section (1) of section 20 of Legal Services Authorities Act, 1987 (39 of 1987) and thereafter, all other provisions of that Act shall apply in respect of the dispute;

(d) effect compromise between the parties and shall follow such procedure as deemed fit for judicial settlement.

In the Legal Services Authorities Act, 1987 (39 of 1987), in section 4, for clause (f), the following clause shall be substituted, namely: -

"(f) encourage the settlement of disputes, including online, by way of negotiations, arbitration, mediation and conciliation."[13]

Clearly, therefore, reference to any kind of mediation, arbitration, Lok Adalat and even judicial settlement by a civil court under Section 89 CPC would include reference of disputes through online dispute resolution mechanism.

Legal Services Authorities Act, 1987

The Act is meant to empower the weaker sections of the society and those with low income to seek justice and redressal of their grievances, from the courts, tribunal and other administrative fora by providing them legal services. The Act also facilitates resolution of disputes through ADR techniques including Lok Adalat. The Mediation Act, 2023 has introduced the provisions relating to online resolution of disputes by amending clause (6) of Section 4 of the Legal Services Authorities Act, 1987.[14] After this amendment the legal service authorities/committees have been empowered to "encourage the settlement of disputes, including online, by way of negotiations, arbitration, mediation and conciliation."[15]

13 The Mediation Act, 2023, Fourth Schedule.

14 The Mediation Act, 2023, Section 60 which provides that the Legal Services Authorities Act,1987 shall be amended in the manner specified in the Fifth Schedule to the Mediation Act, 2023.

15 Ibid.

Indian Contract Act, 1872

Under Section 58 of the Mediation Act, 2023 exceptions 1 and 2 of Section 28 of the Contract Act, 1872 have been substituted with new exceptions.[16] Exception 1 provides that section 28 of the Contract Act shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to resolution through arbitration or mediation.[17] Under exception 2 again no contract which is in writing shall be rendered illegal, by which two or more persons agree to refer to arbitration or mediation any question between them which has already arisen, or effect any provision of any law in force for the time being as to references to arbitration or mediation.[18]

Micro, Small and Medium Enterprises Development Act, 2006

The facility of online mediation/arbitration under the Mediation Act/Arbitration and Conciliation Act,1996 as amended by Mediation Act, 2023 can be availed by any party to a dispute without regard to any amount due under section 17 of the Micro, Small and Medium Enterprises Development Act, 2006[19]. On receipt of a reference by any such person, MSME Development Council shall conduct such mediation either by itself or through any mediation service provider as provided under the Mediation Act, 2023.[20] Even on failure of such mediation, the MSME Development Council can take up the disputes for arbitration either by itself or through institution or centre providing ADR Services whether offline or online basis.[21]

Companies Act, 2013

The Meditation Act has also amended Section 442 of the Companies Act, 2013 in order to facilitate reference to mediation under

16 The Mediation Act, 2023, Third Schedule.
17 Ibid.
18 Ibid.
19 The Mediation Act, 2023, Section 62 read with Seventh Schedule to the Mediation Act, 2023.
20 The Micro Small and Medium Enterprises Development Act, 2006, Section 18.
21 Ibid.

the Mediation Act, 2023.[22] The newly substituted section 442 allows any of the parties to a proceeding before the Central Government, Tribunal or the Appellate Tribunal to apply for referring the matter for mediation under the Mediation Act.[23] The Central Government, Tribunal or the Appellate Tribunal, as the case may be, can suo moto make reference for mediation. The mediator or the mediation service provider is to file the mediated settlement agreement arrived at between the party with the Central Government/Tribunal/Appellate Tribunal as the case may be where after the concerned authority can pass an order or judgement making the mediated settlement agreement as part of such order/judgement.[24] Thus, support for any mediation including especially online mediation is available.

Commercial Courts Act, 2015

The amendment in Commercial Courts Act, 2015 provides for pre-litigation mediation before institution of suits before the commercial courts where there is no urgent interim relief sought.[25] Such pre-litigation mediation can be conducted either through the authority constituted under the Legal Service Authority Act, 1987 or through a mediation service provider.[26] Such pre-litigation meditation is to be accomplished within a period of 120 days which may be extended by another spell of 60 days.[27] This period of pre-litigation mediation has to be excluded from the computation of limitation.[28] Where pre-litigation mediation results in a settlement, the same has to be processed as per sections 27 and 28 of the Mediation Act.[29] Thus, a huge number of commercial disputes can be resolved at pre-litigation stage through the process of online mediation as well.

22 The Mediation Act, 2023, Section 63 and the Eight Schedule.
23 The Companies Act, 2013, Section 442.
24 Ibid.
25 The Commercial Courts Act, 2015, Section 12A. Also See Section 64 the Mediation Act,2023.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.

Consumer Protection Act, 2019

The most significant development in respect of consumer disputes is the introduction of new mediation policy in the Consumer Protection Act, 2019.[30] Under this policy the District, State and National Consumer Disputes Redressal Commissions have been empowered at any stage of the proceeding to refer consumer disputes for mediation under the Mediation Act, 2023.[31] Settlement of such disputes if arrived at in respect of some or all the issues involved in the disputes can be filed before the concerned Commissioner after it is reduced into writing and signed by the parties and the mediator.[32] Thus, a tremendous potential is noticeable for resolution of consumer disputes through the use of ICT like online mediation. Such courses have been successful in various countries, especially Italy where it has resulted in significant reduction in civil litigation.[33]

Consumer Protection (E-Commerce) Rules, 2020 envisage that e-commerce entities need to develop their internal grievance redressal mechanisms. These mechanisms can set up the foundation for online disputes resolution and reduce the litigation burden of the Consumer Commissions.[34]

The Family Courts Act, 1984

The Act empowers Family Courts to resolve disputes through Conciliation.[35] The Supreme Court of India also has mandated family courts to utilise mediation as a technique to resolve matrimonial disputes.[36] The Mediation Act also empowered such courts to use the

30 The Consumer Protection Act, 2019, Section 65. Also see the Tenth Schedule of the Mediation Act, 2023.
31 Id., Section 37.
32 Id., Sections 37A and 37B.
33 Leonardo D'usro 'Bridging the Gap between Mandatory and Voluntary Mediation' (ADR Centre for Development, 4 April 2018) available at https://adrcentefordevelopment.com/wp-content/uploads/2020-04/Italys-Required-Initial-Mediation-Session-by- Leonardo -Dusro-5pdf (Last visited on 23/12/2024)
34 Consumer Protection (E-Commerce) Rules, 2020.
35 The Family Courts Act ,1984, Section 9.
36 *K. Srinivas Rao v D.A. Deepa* (2013) 5 SCC 226.

mediation processes including online mediation within the bounds of the Family Courts Act ,1984.[37]

Securities and Exchange Board of India (Ombudsman) Regulations, 2003.

In respect of disputes relating to allotment of securities, receipt of shares certificate, dividends, interest on debentures and other related matters, the regulations envisage appointment of ombudsman who can attempt settlement of related complaints through a process of mediation between a complainant and the listed companies or their intermediary.[38]

Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016

The model bye-laws provide for the establishment of Grievance Redressal Committee by the Insolvency Professional Agencies which can receive complaints against the professional members of the Agency or any other person who has engaged the services of the concerned professional members of the agency. The Grievance Redressal Committee can attempt redressal of grievances through mediation, in person as well as online.

The Industrial Relations Code, 2020

Through the mechanism of conciliation officers, the code envisages amicable settlement of industrial disputes.[39] The Industrial Disputes Act also provides for voluntary arbitration of industrial disputes with an adequate margin of protection for Labour Rights.[40] Section 55 read with the Schedule II of the Mediation Act, 2023 provides for adoption of mediation norms envisaged under the Act to deal with the disputes arising under the Industrial Disputes Act and the Industrial Relations Code, 2020.

37 The Mediation Act, 2023, Section 55(1) and the Second Schedule.
38 Securities and Exchange Board of India (Ombudsman) Regulations 2003, reg 16(1).
39 Industrial Relations Code 2020, Section 53.
40 Id., Section 42.

Bharatiya Sakshya Adhiniyam, 2023

The Indian Evidence Act, 1872 as repealed by the Bharatiya Sakshya Adhiniyam, 2023 (Act No. 47 of 2023) also recognised electronic evidence and prescribed conditions relating to its admissibility. The provisions like sections 65-A and 65-B provided guidance to the courts to regulate sharing of virtual documents and conducting virtual Court hearings. This mechanism has now been incorporated in the new code wherein sections 61-63 have further strengthened the scope for admissibility of electronic evidence.

Section 2(d) of the BSA defines a document as any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter and includes electronic and digital records. By an illustration this definition is further explained in the following words:

'An electronic record on emails, server logs, documents on computers, laptops or smartphones, messages, websites, locational evidence and voice mail messages stored on digital devices are documents.'

Similarly, the word evidence in section 2(e) has been defined as meaning and including:

I. all statements including statements given electronically which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence.

II. all documents including electronic or digital records produced for the inspection of the court and such documents are called documentary evidence."

Under Section 29 of the new code, 'an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant face, and made by a public servant in the discharge of his official duty or by any other person in performance of a duty

especially enjoined by the law of the country in which such book, register or record or an electronic record, is kept, is itself a relevant fact.

Under sections 31 and 32, whenever a court has to form an opinion as to the existence of any fact of the public nature, or as to a law of any country, any statement of such fact or of such law contained in Acts or notification or in a book purporting to be a printed or published including in electronic or digital form under the authority of the Government is a relevant fact. Likewise, electronic records have been given legal recognition in Section 35 of the Adhiniyam.

Under Section 57, primary evidence is defined as a document itself produced for the inspection of the court. Where an electronic or digital record is created or stored, and such storage occurs simultaneously in multiple files, each such file is primary evidence. Further where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed. It is worth mentioning that where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence. Similarly, where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence.

Sections 61 to 63 of the BSA exclusively deal with electronic or digital records. Section 61 expressly provides that nothing in the Act shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall, subject to section 63, have the same legal effect, validity and enforceability as other documents. Under section 62, the contents of electronic record may be proved in accordance with the provisions of section 63 which means that any information contained in an electronic record is to be deemed as a document provided the conditions mentioned in section 63 are satisfied.

Under section 66 except in the cases of a secure electronic signature if the electronic signature of any subscriber is alleged to have applied to

electronic record the fact that such electronic signature is the signature of subscriber must be proved.

Under section 90 the court may presume that an electronic message forwarded by the register through an electronic mail server to the addresses to whom the message purports to be addressed corresponds with the message as said into his computer for transmission but the court shall not make any presumption as to the person by whom such message was sent.

Under the BNS, destruction of a document or electronic record or obliteration or rendering illegible the whole or part of such document or electronic record to prevent its production as evidence in a court or in any proceedings lawfully held before a public servant is punishable with imprisonment up to 3 years or fine up to Rs 5000 under section 244.

Where a person threatens another person by sending a message through electronic device with an intention to commit extortion, he shall be liable for the offence of extortion under section 308 as explained in illustration (e).

Under section 335, making or altering a document or an electronic record or causing any person to put his signature including electronic signature on a document or electronic record with this dishonest or fraudulent intention constitutes the offence relating to false documents or false electronic record. Similarly, a person who makes a false document or electronic record or part of a document or electronic record with intent to cause damage or injury to the public or to any person or to support any claim or title or to cause any person to part with property, or to enter into any express or implied contract or with an intent to commit any fraud or that fraud may be committed, commits the offence of forgery under section 336. Under sections 337, 338, 339, and 340, making a false document or electronic record, using it dishonestly or fraudulently or being knowingly in possession of such forged document or electronic record is made severely punishable.

Similarly making, publishing or circulating any statement false information, rumour or report including through electronic means with intention to cause harm or fear to the public or which incites any class or

community of persons to commit any offence is regarded as a Public Mischief and punishable under section 353.

Digital Personal Data Protection Act, 2023

The Digital Personal Data Protection Act, 2023[41] aims to provide for the processing of digital personal data in a manner that recognises both the right of individuals to protect their privacy and the need to process such personal data for lawful purposes and for matters connected therewith or incidental thereto.[42] The Act allows processing of personal data of a Data Principle for lawful purpose(not expressly forbidden by law) for which she has given her consent or for certain legitimate uses.[43] To ensure compliance with requirements of the Act relating to the rights and duties of the Data Principle, the obligations of the Data Fiduciary, Significant Data Fiduciary as well as the Consent Manager, the Act provides for the establishment of a Data Protection Board of India.[44] Data Principle has a right to have a readily available means of grievance redressal which must be provided by a Data Fiduciary or a Consent Manager in respect of any act or omission on their part in the performance of their obligations in relation of the personal data of a Data Principal or the exercise of her rights under the act and the rules framed there under.[45] This grievance redressal mechanism also needs to be facilitated online.[46] Besides the Data Protection Board of India has been invested with powers to investigate personal data breach and breaches in observance of the act.[47] The Board is to function as an independent body and shall, as far as practicable function as a digital office, receive complaints, hear and pronounce decisions.[48] In performance of its functions, the Board is mandated to be

41 The Digital Personal Data Protection Act, 2023 (No. 22 of 2023), *Gazette of India,* August 11, 2023, https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf. (Last visited on 03/07/2024).
42 See the Preamble to the Digital Personal Data Protection Act, 2023.
43 Digital Personal Data Protection Act, 2023, Section 4.
44 Id., Section 18.
45 Id., Section 13.
46 Ibid
47 Id., Section 27.
48 Id., Section 28.

digital in design and adopt such techno-legal measures as may be prescribed clearly, therefore, the Board is to facilitate grievance redressal mechanism on an online basis.[49] Persons aggrieved by an order or direction of the Board can prefer an appeal before the Telecom Disputes Settlement and Appellate Tribunal.[50] The Tribunal is also mandated to function, as far as possible, as a digital office, with the receipt of appeals, hearing and pronouncement of decisions being Digital in design.[51] Chapter VII of the Act dealing with appeals has been marginally named as "Appeals and Alternate Dispute Resolution" which is a clear indication that ADR techniques can be resorted to in the disposal of disputes arising from the Digital Personal Data Protection Act, 2023.

It can be safely concluded that the DPDP Act which is an offshoot of ICT itself provides for the full-fledged use of technology in addressing as well as redressing the grievances and disputes arising under the Act.

Bharatiya Nagarik Suraksha Sanhita, 2023

The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 defines "electronic communication" in section 1 as the communication of any written, verbal, pictorial information or video content transmitted or transferred (whether from one person to another or from one device to another or from a person to a device or from a device to a person) by means of an electronic device including a telephone, mobile phone or other wireless telecommunication device or a computer or audio video player and camera or any other electronic device or electronic form as may be specified by notification by the central government.

Section 105 provides that the process of conducting search of a place or taking possession of any property, article or all things including preparation of the list of all things seized in the course of such search and seizure and signing of such list by witnesses shall be recorded through any audio video electronic means preferably mobile phones and

49 Ibid
50 Id., Section 29.
51 Id., Section 19(10).

the police officers shall without any delay forward such recordings to the District Magistrate, Sub-divisional Magistrate or Judicial Magistrate of the first class.

Under section 173, every information relating to the commission of a cognizable offence irrespective of the area where the offences committed, may be given orally or by an electronic communication to an officer in charge of a police station. However, such electronic communication shall be taken on record by the in- charge police station and shall be signed within 3 days by the person giving it.

Where the information is given by a woman and the person against whom the offence is alleged to have been committed is temporary or permanently mentally or physically disabled, then such information must be recorded by a police officer at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be, and the recording of such information shall be video-graphed . Witnesses in an investigation may also be examined by a police officer by audio-video electronic means under provision to section 180(3).

Section 202 deals with the offences committed by means of electronic communication or letters or messages sent or received whereby a person is induced to deliver the property. Such offences can be tried by a court within the local limits of whose jurisdiction the property was delivered or received.

Under section 209, in respect of offences committed outside India, evidence duly deposed in foreign countries may be received in electronic form as well. A magistrate while taking cognizance of an offence may issue summons or warrants, provide copies of police reports, statements through electronic means to the accused and the victims. Where a charge is framed by a judge, the charge can be read and explained to the accused present either physically or through audio-video electronic means and the accused can be asked whether he pleads guilty or claims to be tried.[52]

52 The Bharatiya Nagarik Suraksha Sanhita, 2023, Section 251(2).

The Information Technology Act, 2000

The Information Technology Act 2000 is based on the UN General Assembly's Model Law on Electronic Commerce (UNCITRAL Model Law) which was framed by the United Nations Commission on International Trade law. The Act provides legal recognition to electronic commerce. Electronic commerce is defined as trade which takes place through the internet. It encompasses all the facets of the business transaction such as online advertising, online ordering, online payment and online delivery. The Act facilitates electronic filing of documents with the government agencies and provides an elaborate in-house dispute resolution with a further facility to challenge various orders in decisions by way of appeal before the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).

The Act accords legal recognition to electronic records and electronic signatures and their use in government and its agencies. It provides for delivery of a wide variety of public services through electronic licence service providers who may also be authorised to collect service charges for providing such services.

Section 10A as introduced by the IT (Amendment) Act, 2008, validates electronic contracts though without specifying as to whether such contracts are exclusively dealt under the IT Act. However, on reading sections 10A and 81 of the Act together, it can be safely concluded that the electronic contracts are not exclusively dealt with under the IT Act. All those principles that are provided in the Contract Act are still applicable provided they are not inconsistent with the rules governing electronic contracts under the IT Act.

Chapter IX (sections 43 to 47) of the Act provide an adjudicatory mechanism to resolve cases relating to compensation, penalties and contraventions arising under the act. The Adjudicating Officer is conferred with the power to hold enquiries and adjudicate claims for injury or damage not exceeding rupees 5 crores. Persons aggrieved by an order made by Controller or an Adjudicating Officer under the act may prefer an appeal to the TDSAT. The Appellate Tribunal is to dispose of such appeal as expeditiously as possible within 6 months from the date

of receipt of such appeal. The Appellate Tribunal is not bound to follow the procedure laid down in the CPC, however, it shall be guided by the principles of natural justice. Appeals against the decisions of the Appellate Tribunal can be filed before the High Court.

The Act lists various types of computer related offences and specifically provides that it is to apply to offences or contraventions committed outside India as well.

The adjudicatory mechanism provided under the Act dealing with the wide variety of ICT disputes can serve as an example for resolution of disputes through ICT tools. Besides, the authorities created under the Act are to serve as experts for the purpose of providing expert opinion on electronic evidence before any court or other authority as an examiner of electronic evidence.

Conclusion

The detailed account of legal provisions available in different enactments, rules and regulations demonstrate that legislative support towards the integration of ICT in the resolution of different types of disputes is expanding rapidly in India. Through such expansion, courts, administrative tribunals, commissions and other agencies are geared up to use latest technologies for speedier resolution of disputes of the common man which in turn will result in reducing the costs and expenses traditionally associated with the resolution of such disputes in the physical world. The integration of ICT and ADR and ODR presents a significant opportunity to enhance access to justice, reduce pendency of cases, and improve the efficiency of dispute resolution in India. While challenges such as digital literacy, cyber security and regulatory inconsistencies remain, the emergence of ICT driven ODR platforms, governmental support and increased awareness are paving the way for a more technology-driven legal ecosystem. Strengthening the legal system for dispute resolution and ensuring uniformity in law will be crucial in making India a global leader in ICT enabled dispute resolution mechanisms.

Dead Letters or Living Laws? A Critical Study of Select Provisions of the Transfer of Property Act in the Modern Era

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Abstract

In our ancient Indian Civilization, the wise sages advised us that property of all kinds is necessary for a quality life. But the property should be treated with some aloofness, otherwise it becomes as harmful as poison. This unique gem of advice is very relevant today, and it will remain so in future too. Properties are various types, like tangible, intangible, Movable, Immovable, chosen in action, chosen in possession, intellectual property rights etc. The Transfer of Property Act[1] was an old salutary colonial legislation of merit, but it has lost some relevance in the present age, as it happens for everything with passage of time. The transfer of property, in the nature of movable and immovable, corporeal or incorporeal are coming under the purview of the Act[2]. It explains various types of transfer, such as sale, lease, exchange, gift, mortgage of different types etc. Some transfers are related to creating/ extinguishing interest, as for example, transfer of ownership, possession, benefits arising out of land etc. Some unreasonable classification of movable/ immovable property still exists, based on its situation. For example, money as a property, in the bank account of a person, may be termed as immovable. Now, almost hundred and fifty years after the Transfer of Property Act's enactment, some provisions of the said Act are now unconstitutional, irrelevant, and inconsistent with existing laws. We

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1 Transfer of Property Act, 1882
2 Ibid.

shall delve into the scheme of the Act[3], and point out the various provisions, which are suffering from various types of inconsistency with the present legal, Constitutional and other social practices.

Key Words: - Transfer of Property Act, Property, Indian Constitution and Proprietary Scheme, Unconstitutional, Dead-letter.

Introduction:

Salmond on Jurisprudence, described property as a bundle of rights. Say in case, an owner of an estate, can make various types of transfer of her property, she can let out a portion of a building on rent, another part of the building for mortgage, the adjacent mango garden on lease, giving license to a person to catch fish in a pond etc. Thus, the estate is a bundle of proprietary rights; it can be wholly or partly transferred. Transfer is generally an inter-vivos;[4] It is different from succession or testamentary transfer.

Sometimes, we have a pre- determined notion that a derivative title is inferior. To counter this notion, we can provide an example that, under section 14 of the Hindu Succession Act, a woman becomes owner of property through possession.[5] After the amendment of the Hindu Succession Act, now daughter is also a coparcener as son(and subject to rights and liabilities),also, can initiate partition. This situation is in consonance with Article 14, 15, and 300A of the Constitution of India. Thus, the Hindu Female can now transfer property under the Property Act after she becomes owner of the property through Section 14 of the Hindu Succession Act.

Let us discuss about the Act which amend the Hindu Law governing Property rights of Hindu Women, i.e. The Hindu Women's Rights to Property Act, 1937.

Subsection (3) of Section 3 of the Act states that, any interest devolving on a Hindu widow under Section 3 shall have limited interest

3 Ibid.
4 Transfer of Property Act 1882, s. 13.
5 Hindu Succession Act 2005, s.14.

which is known as Hindu Woman's Estate And at the same time as a male owner have right of claiming partition, she shall also have the same right of claiming partition.[6]

Hence, section 14 of the Hindu Succession Act is drawing from the Hindu Women's Rights to Property Act, in the respect of initiating partition, but the concept of limited interest recognised as "Hindu Woman's Estate", as a legal provision is surely unconstitutional. Because owner of a property can gives anybody a restricted right over an estate, but the legal provision, (which should be in general term), section 3 of the Hindu Women's Rights to Property Act, 1937, is woman specific, thus violating Article 14, 15(1), 300A of the Indian Constitution.

There is repeal of The Hindu Women's Right to Property Act, 1937 by section 31 of the Hindu Succession Act, 1956 provides mode of succession for female Hindu, widow.

Thus, it is nothing but an academic discussion, where we identify the evolution of the Hindu Woman's limited interest in an estate, and its reflection in the Transfer of Property Act.

Now, we delve into the provisions of the Transfer of Property Act, and analyse it in the existing social, legal and Constitutional context.

Section 3 of the Act is known as "Interpretation clause". It explains some technical legal words, which are the intention of the legislature and their intended use. We all know, interpretations are done by judges, advocates, legal academicians, and other legal experts. In our legal system, apart from the interpretation of judges, advocates, the interpretation of the academicians, legal experts are secondary data. Still, we must identify the gap(s) in the provisions that have become outdated.

The "immovable property" is defined as"immovable property does not include standing timber, growing crop and grass".[7]

This definition does not clearly explain/identify the immovable property. We need to take help from the General Clause Act[8], that

6 Hindu Succession Act 2005.
7 Transfer of Property Act 1882, s.3.
8 General Clauses Act 1897.

is,"immovable property shall include land, benefits to arise out of land, and things attached to earth or permanently fastened to anything attached to the earth;"[9]

Immovable property has been stated in section 2 (6) of the Registration Act. Let us discuss the said provision of Registration Act[10]:

According to section 2 (6) of the Act, standing timber, growing crops nor grassare not included in "Immovable Property", whereas, it includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth.

Salmond the famous jurist tells us, there is no clear logic behind the classification of movable and immovable property.

In the case of *State of Maharashtra v. Tapas D. Neogy*[11]wherein it was held that within the meaning of Section 102 of Criminal Procedure Code the money in the bank account may be regarded as a property and the seizure of such property on suspicion that it is connected with commission of offence held as property and the police officer also has power to prohibit the operation of such account, if such assets have linkages with the commission of offence.

Thus, money in a bank account may be termed as immovable, depending upon the situation of the property. Some essential transactions can be carried out in the account holder's branch only. Though the bank account is not attached to earth, as per General Clause Act, it is a benefit arising out of land, as the building of the bank is attached to earth.

But in the era of core banking,the money in account may be called movable property. Also, after introduction of the Information Technology Act[12] We can presume instruments and documents are digitized and within the ambit of the Transfer of Property Act.

9 General Clause Act1897, s.3(26).
10 The Registration Act 1908.
11 (1999) 7 SCC 685
12 Information Technology Act 2000

Sometimes, if a person does not enquire about a property, or visit the registrar's office, he/she cannot have any actionable claim for any defect in the title, as a purchaser, because he is deemed to have actual and constructive 'Notice". But the thing is, a lay man never understands the intricacies of law. Thus, an appointed advocate may search the status of the property and give a report. If this professional report is given negligently/ fraudulently, the concerned person must provide compensation to the client, who sought such report.

"Actionable claim" refers to a claim for a debt or a beneficial interest in property that is not secured by a mortgage or a guarantee, and is recognized by civil courts as a valid reason for taking legal action. This includes:

- Unsecured debts
- Beneficial interests in movable property (such as shares, stocks, or other intangible assets) that are not in the possession of the claimant

It covers debts or interests that exist now, or may exist in the future, and may be conditional or dependent on certain events happening.[13]

It doesn't make sense that a debt secured by a mortgage isn't considered an actionable claim. According to Section 60 of the Transfer of Property Act, a mortgagor has the right to redeem their property and can take legal action to enforce this right. This means that a lawsuit to redeem the property is essentially an actionable claim. There doesn't seem to be a logical reason or justification for excluding this type of claim from protection. Although, one can't challenge the authority of the colonial-era law that established this rule.

"Actionable claim" is transferable under section 130 of the Transfer of Property Act.

Actionable claim is different from mere right to sue, under section 6 (e) of the Transfer of Property Act and section 6 (b) – a mere right of re-entry for breach of a condition subsequently. All of these rights are

13 Transfer of Property Act 1882, s.3.

related to possession, not related to other rights of ownership. These are right of licence (personal in nature) and not transferable.

Section 111(g) explains when a lease can be forfeited in three situations:

1. When the lessee breaks a specific condition that allows the lessor to retake possession.
2. When the lessee disputes the lessor's ownership.
3. When the lessee becomes insolvent and the lease agreement allows the lessor to retake possession in such cases.[14]

As it stands now, under the law, in all these situations, the lessor must give the lessee a written notice stating their intention to end the lease.

Now, we can comment that, the right of re-entry under section 111 (g) (ii) of the Transfer of Property Act is transferable, if it is not a mere right of re-entry for possession.

Transfer of Property Act, provides about oral transfer, where writing is not expressly required by any law.[15] Here the statutory law is silent about the necessity of witness and the procedure to prove such oral transfer,there is no specific reference to the erstwhile Evidence Act,1872.

Section 17 of the Registration Act 1908 states that:

Certain documents that don't directly create, change, or end rights to immovable property (like land or buildings) worth ₹100 or more, but instead give the right to obtain another document that will create, change, or end such rights, must be registered.

Hence, if a document transferring property worth over ₹100 isn't registered, it can't be enforced in court.[16]

The amount of rupees 100 in those times had huge value. Now, we can amend /change it up to rupees 50000 at least.

14 Transfer of Property Act 1882, s. 111(g).
15 Transfer of Property Act 1882, s.9.
16 The Registration Act 1908, s.17(2) (v)

We now have consumer Courts to deal with such issues.[17]Though the jurisdiction of the principal Civil Court is never ousted, if the proper remedy is not given in another forum.

The Courts shall have jurisdiction to try all suits of a civil nature accepting suits of which their cognizance is either expressly or impliedly barred.[18]

In the case of *The Secretary of State v Mask and Co*[19], Lord Thankerton explained that:

- The courts should not easily assume that they have no jurisdiction over a matter.
- Any limits on court jurisdiction must be clearly stated or implied.
- Even if jurisdiction is limited, courts can still review cases where:
  - The relevant laws haven't been followed.
  - The decision-making body hasn't acted fairly and impartially.

Later, in the case of *Dhulabhai v. State of Madhya Pradesh*[20]The Supreme Court established seven principles to determine if a court has jurisdiction over a case. The main points are:

- Does the law give the decision-making body's ruling final authority?
- Can the decision-making body do what the court would do, making it a suitable alternative to the court?

Thus, section 9 of the Transfer of Property Act, should operate up to rupees fifty thousand, subject to changes, that is requirement of witness and suitable application of erstwhile Evidence Act, 1872,[21] to prove such oral transfer.

Section 10 of the Transfer of Property Act, provides the result of condition restraining alienation. Thus, restraining a transfer absolutely is

17 Consumer Protection Act2019.
18 Civil Procedure Code 1908, s.9
19 AIR 1940 PC 105, 110.
20 A.I.R. 1969 S.C. 78.
21 BharatiyaSakshyaAdhiniyam,2023.

void. For example, if A transfers a house to B, putting a condition that if B sells the house, it has to be sold to C, wife of A, or to their legal heirs. Thus, this condition/ restraint is void.

However, this restraint is valid, in case of a transfer like lease, that it is related to possession, and for the benefit of lessor or persons claiming under him.

"Again, if a married woman is not Hindu, Mohammedan, or Buddhist, a transfer can be made to her, or for her benefit. She will have a limited interest during her marriage and is not entitled to transfer of any type, not even for her beneficial interest."[22]

We can assume, this proviso is unconstitutional, infringing Article 14,(Unreasonable classification), Article 15(1)(Discrimination based on sex), 300A of the Indian Constitution(Owner of a property must have full control subject to limited legally recognized limitations).Whether, Article 21 is infringed or not, is subject matter of debate. Because, property is expressly dealt by Article 300A of the Indian Constitution.

Section 13 of the Transfer of Property Act allows for the transfer of property to benefit someone who is not yet born. There are mainly three ingredients:

A. No direct transfer to the unborn person.

B. Creating a prior interest, that is a mechanism of trust or if not trust then proprietary right must vest on someone.

C. Absolute transfer of the property to the unborn person.

The illustration is given that:

A transfers his property to B to hold in trust for:

- A and his future wife, one after the other, for their lifetimes

- Then, after both have passed away, for their eldest son for his lifetime

- Finally, after the eldest son's death, for A's second son

However, the plan for the eldest son doesn't work because it doesn't include the entire property that A still owns

22 Transfer of Property Act 1882, s.10.

The section 13 of the Transfer of Property Act seems to be alright from all aspects. But if we examine it with the changed socio-economic-legal context and the Indian Constitution, we find some anomalies.

Prior interest seems to be restricted interest as trust as given in the illustration, but we may say, it is a vested interest, even also as ownership, where only limitations will be that the previous owner takes any decision only for the benefit of the unborn person. No person shall be deprived of his property save by the authority of law.[23]

Thus, life interest created for an intended wife seems to be an unreasonable classification and unfair, unjust, unreasonable procedure as per the touch stones of the Article 14 and 21 of the Indian Constitution.

One can argue that illustration is not a part of statute and only in illustration "Wife" word has been used. But illustrations are used to explain the real intention behind the statute and if we take into consideration the then socio-economic situation and other prevalent statutes, we have no doubt that, prior interest specially referred to married women's life interest only. (Not referring to the role of trustee, as a prior interest).

(As for example, The Hindu Widow Remarriage Act, 1856.) Some important provisions of the Act can be summarised as

- If a widow remarries, she will lose all rights to her late husband's property, including:
  - Maintenance
  - Inheritance
  - Property inherited from her husband's family
  - Property given to her through a will
- This is because the property was only meant for her to use, not to own or sell, unless explicitly stated otherwise

23 Constitution of India 1950, art.300A.

- When she remarries, the property will pass to the next heirs of her late husband or to those entitled to it after her death, as if she had passed away.[24]

The Hindu Women's Right to Property Act, 1937

This law updates the Hindu laws regarding women's property rights. Section 3 states that:

- A Hindu widow's inheritance is limited to a 'Hindu woman's estate'

- However, she has the same rights as a male owner to claim partition (division of property)"

The Caste Disabilities Removal Act, 1850

This law extending the principle of section 9, Regulation VII, 1832 of Bengal code (throughout) India ensures that people are not deprived of property rights due to changes in their religion or caste. The main points are:

- Laws or customs that take away property rights due to a change in religion or loss of caste are no longer valid

- Courts will not enforce such laws or customs, which previously led to:

- Forfeiture of rights or property

- Impaired inheritance rights due to renouncing or being excluded from a religion or losing caste status.

As we go through the old statutes of British India, we understand that, Hindu women under the then various statutes, always had a restricted interest (Read, Life interest) in a property. However, we can safely comment that, even these old statutes are not expressly repealed; it stands nullified for infringing Part III[25] and other parts of the Indian Constitution.

Now, let us examine the ingredients of section 14 of the Transfer of Property Act.

24 The Hindu Widow Remarriage Act 1856, s.2
25 Constitution of India 1950, art.13.

A. The unborn child must be in existence, when prior interest gets extinct.

B. The property transferred may be tied up to the majority of the minor child.

Now, the question is if the "Child" includes an "Adopted" child?

If, we examine contemporary Indian Penal Code (1860), under section 477,[26] There is a punishment for destroying an authority to take in adoption of a son, or fraudulently cancelling an "Adoption Deed".

Thus, we can say that under section 14 of the Transfer of Property Act, the minor, unborn child included the concept of adopted male child only. Because, section 477 of the Indian Penal Code mentions "Son" only. The term "Man" explains "Male Human being of any age" "Woman" included "Female Human being of any age"[27]. "He" [28]The pronoun includes the concept of "Male and Female" both. Similar interpretation still holds, if we go through, 2(10), (19), (35) of the BharatiyaNyayaSanhita, 2023.

Given such interpretation, section 14 of the Transfer of Property Act, stands"Unconstitutional", infringing Articles 14, 15 (1), 21 (From the Substantive and Procedural angles) of the Indian Constitution.

If we examine the statutory scheme of the Transfer of Property Act, as per the Transfer of Property Act, (Code),as per section 16, if prior interest created for the benefit of person or class of persons fail, because of the failure of any (If the sections 13 and 14 of the Transfer of Property Act, stand Unconstitutional) of the rules under section 13 and 14 of the said Act, then any subsequent interest in a same transaction will also fail. Thus, section 14 of the Transfer of Property Act will fail, if interest in section 13 of the Transfer of Property Act fails. (As per the provision section 16 of the Transfer of Property Act).[29]

Section 35 of the Transfer of Property Act provides, about the "Doctrine of Election", "Election when necessary".

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26 BharatiyaNyaya Sanhita2023, s 343.
27 Indian Penal Code1860, s. 10
28 Indian Penal Code 1860, s.8.
29 *GirjeshDutt v Datadin*(1934) 9 Luck329.

This section says that:

- Someone can try to transfer a property they don't own to someone else

- The person receiving the property must decide to accept or reject the transfer

- If the transfer is:

  - A gift (gratuitous): and the person trying to transfer dies or becomes unable to make the transfer again

  - Paid for (for consideration): the person trying to transfer must pay the value of the property to the person who was supposed to receive it, if they can't actually transfer the property.[30]

Mostly, we find that the section 35 of the Transfer of Property Act, in the Civil Courts are unused or unheard. A probable way of implementing it may be devised.

Article 13(3)(a) of the Constitution of India provides that, "law" includes custom or usages having in the territory of India the force of law. Thus, if section 35 of the Transfer of Property Act, is codification of any custom / usage in an area it can be proved in the Court of law.[31] After, Enactment of the Registration Act, (1908), the contract grant must be reduced to written form. The document itself must be the sole source of evidence, no other form of evidence is required. As per the section 49 of the Registration Act(1908), an unregistered document(Read a document prepared according to section 35 of the Transfer of Property Act) a document can be used as evidence in court for a purpose related to, but not directly about, the main issue. This is called using the document for a:

-Collateral fact: a fact that is connected to, but not the main point

- Collateral purpose: a purpose that is related to, but not the main reason.

The Evidentiary value of Affidavit: The Section 3(3) of the General Clause Act provides that, "affidavit" shall include affirmation and

30 Transfer of Property Act 1882, s.35

31 The Evidence Act 1872, s.91 or Bharatiya Saksha Adhiniyam 2023, s.94.

declaration in the case of persons by law allowed to affirm or declare instead of swearing;"

Section 1 of the BharatiyaSakshaAdhiniyam 2023, provides, that,"It applies to all judicial proceedings in or before any Court, including Court-martial, but not to affidavits presented to any Court or officer, nor to proceedings nor to proceedings before an arbitrator;"

Thus, "Affidavit" does not have evidentiary value. But we shall make a mistake, if we reach a hasty decision, without examining other important statutes like Erstwhile Criminal Procedure Code, Civil Procedure Code.

Section 331 of the Bharatiya Nagarik Surakha Sanhita, 2023 provides that, an applicant may provide evidence through an Affidavit, regarding the alleged conduct of a public servant with the Court's permission.

Someone who has a formal role or expertise can give evidence in writing (by affidavit) in any investigation, trial, or legal proceeding under this Sanhita. The Court can also:

- Call the person to testify in person

- Ask them questions about what they wrote in the affidavit if requested by the accused person or the prosecutor.[32]

"Affidavits" may be sworn or affirmed before any Judge or Judicial or Executive Magistrate,(b) any commissioners of oaths appointed by a High Court or Court of Session,(c) any notary appointed under the Notaries Act,1952.[33]

The deponent shall state the true facts and facts he believes to be true or from his own knowledge, grounds of belief.

The Court may order to struck out or amend any unnecessary and offensive information from the affidavit.

We now examine the application of the word "Affidavit" appearing in the Civil Procedure Code. (That is roughly 124 times). We shall examine some illustrations.

32 Bharatiya Nagarik Surakha Sanhita 2023, s.332
33 Bharatiya Nagarik Surakha Sanhita 2023, s.333.

Under section 139 of the Civil Procedure Code, Oath on "Affidavit" may be administered by Court, Magistrate, any Notary appointed by the Notary Act, any officer or other person may be appointed by the High Court for this purpose, any officer authorised by any Court, which is empowered by a State Government.

The deponent may be administered an oath by any above-mentioned officials.

Order XI, rule, 8, 9, 13, 15 of the Civil Procedure Code, provides the importance of the "Affidavit."

Affidavit in answer, filing: When asked questions (interrogatories), respond with an affidavit within 10 days or by a deadline set by the Court.[34]

Form of affidavit in answer- An affidavit in answer is to be made in Form No. 3 in Appendix C as a template, adjusting it as needed.[35]

Affidavit of documents: If ordered to produce documents, submit an affidavit (Form No. 5 in Appendix C) stating which documents you object to producing.[36]

Inspection of documents referred to in pleadings or affidavits:

- Any party can request to see documents mentioned in pleadings or affidavits.

- The requested party must allow inspection and copying of these documents.

- If a party fails to comply, they can't use those documents as evidence unless:

- They prove it's related to their own title (as a defendant).

- They show a valid reason for not complying, and the Court allows it with conditions.[37]

The Code provides about, Affidavit of signature—An affidavit of the pleader or his clerk, of the due signature of any admissions made in

34 Civil Procedure Code 1908, o. XI, r. 8
35 Civil Procedure Code 1908, o. XI, r. 9
36 Civil Procedure Code 1908, o. XI, r. 13
37 Civil Procedure Code 1908, o. XI, r.15.

pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.[38]

Transferring Cases:

- Section 25 of the Civil Procedure Code allows cases to be transferred.

- To request a transfer, make a motion with a supporting affidavit (Section 25(2)).

Starting a Lawsuit:

- Section 26 of the Civil Procedure Code explains how to start a lawsuit.

- A lawsuit begins with filing a complaint (a written complaint) or in another prescribed way (Section 26(1)).

- Facts in the plaint must be supported by an affidavit (Section 26(2)).

- The affidavit must follow the format and guidelines outlined in Order VI, Rule 15A.

Under section 30 of the Civil Procedure Code, Power to order discovery and the like—

(a) …….

(b) …….

(c) order any fact to be proved by affidavit.

Section 38 (Transfer by person authorized only under certain circumstances to transfer) of the Transfer of Property Act, under the heading "TRANSFER OF IMMOVABLE PROPERTY"provides that, where any person authorized only under circumstances, transfer the property, alleging such circumstances, the circumstances will be deemed to have existed, if the transferee after exercising reasonable care and acting in good faith participate in the transfer.

Though, the above-mentioned section starts with "Where any person", the illustration typically, like other provisions, talks about widow Hindu Woman and collateral heirs, after the death of her

38 Civil Procedure Code 1908, o. XII, r.7.

husband. The Hindu widow's right to the property left by her husband is limited to the life interest. Thus, without much effort, we can say that the section 38 of the Transfer of Property Act, is infringing Articles 300A, 13, 14, 15(1), 21 of the Indian Constitution and void.

Section 39 of the Transfer of Property Act, provides about transfer, where a third person is entitled to maintenance. This section will not be applicable against a transferee for consideration, without notice of the right, nor against such property in his hand.

Now, we can say that presently, there is a "Registration office", in every district of the Country. Thus, the chance of being without "Notice" is almost nil. The provision is a device of "Trust" and the beneficiary is the third person entitled to maintenance, provision of advancement or marriage.

Even, there is no arrangement of the device "Trustee",(the manager of the immovable property), if the concerned immovable property is transferred, violating the rights of the beneficiary, (the third parties rights), it should attract the provision of the section 405, the "Criminal breach of Trust", under the Indian Penal Code.(Now, section 316 of the Bharatiya Nyaya Sanhita.).

As per the section 4 of the Transfer of Property Act, this whole Act is related to the Indian Contract Act and Registration Act. Thus, a beneficiary under a Contract can enforce it, if he/ she is deprived of her benefit under the contract.[39]

Section 100 of the Transfer of Property Act, provides about the device of charge, kind of a simple "Mortgage". But the protection given to the transferee of an encumbered immovable property(Charge), without "Notice" and "Consideration" should be omitted. The same logic applies, that such property under section 100 of the Transfer of Property Act must be compulsorily registered, and thus always noticeable. These documents should be gradually digitized.

The Transfer of Property Act provides that, transfer of a property by an ostensible owner (Not the real owner), with the consent from persons

39 *Narayani Devi v Tagore Commercial Corporation Ltd*. AIR 1973 CAL 401.

interested in the immovable property, shall not be declared voidable, if the transferee has acted in good faith and has notice of the real fact.[40]

This section is now impliedly repealed by the Benami Prohibition Act. One can understand that property held in "Benami" will always result in grave "Socio-Economic" challenges to the Nation.

Section 52 of the Transfer of Property Act, provides for the concept of doctrine called **"***LisPendens".* The section provides: - If any proceeding or suit is pending related to immovable property, which is not collusive in nature, and any right to immovable property is directly and specifically in question, the property cannot be transferred by any party involved in the suit and proceeding, which will affect the other party involved in the suit / proceedings, or a party under a decree and order.[41]

Now the question is, if the transfer of the property takes place in violation of the section 52 of the Transfer of Property Act, what will be the remedy. Though the section does not provide any remedy expressly, the remedy void ab- initio seems to be the most appropriate solution. But this remedy will be applicable until a valid reasonable time/ period only.

Section 2(15) of the Bharatiya Nyay Sanhita provides: "Illegal", "Legally bound to do"- The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit."

Apart from a civil suit, a penal proceeding under the section 403 of the Indian Penal Code (314 of the BharatiyaNyayaSanhita) may be initiated; if a transfer of an immovable property takes place violating section 52 of the Transfer of Property Act, directly or specifically.

Real Estate Development and Regulation Act, 2016: This Act is a new development in the modern "Real Estate" business. Section 2(d) of the Act provides "allottee" means to whom a plot, apartment or building has been sold or allotted either through leasehold or freehold. This Act

40 Transfer of Property Act 1882, s.41
41 Transfer of Property Act 1882, s.52

like “Transfer of Property Act” does mention the word immovable property as land, building, rights of ways, lights or other benefits attached to the earth,but does not include standing timber, growing crops and grass. Any dispute under this Act is settled through the forum established under the Act. As per the Transfer of Property Act, for settlement of proprietary disputes or its offshoots, the principal Civil Court or other Civil Courts are always the proper forums, also relevant depending upon the pecuniary value of the suit.[42] Section 2 (x) of the Act provides, family includes, husband, wife, minor son and minor unmarried daughter who are wholly dependent upon a person. The concept promoter[43] is very important in this Act.

For the purposes of The Real Estate (Regulation and Development) Act 2016, when two different people are involved in a real estate project:

- One person builds or converts a building into apartments or develops a plot for sale.

- Another person sells the apartments or plots.

Both individuals will be considered "promoters" and will share responsibility for:

- Fulfilling the requirements of this Act

- Following the rules and regulations that apply

They will be held jointly accountable for their actions.[44]

This concept of promoter is not available in the Transfer of Property Act. Section 2(f) of the Act provides about the “Occupancy Certificate”, that is nothing but a possessory right of the “allottee”, obtained from the local authority.[45] Section 2(zg) of the Act provides the definition of a “Person”. The term "Person" refers to:

1. An individual
2. A Hindu undivided family
3. A company

42 Civil Procedure Code, 1908.
43 The Real Estate (Regulation and Development) Act 2016, s.2(zk)
44 ibid
45 The Real Estate (Regulation and Development) Act 2016, s.2(zc)

4. A partnership firm (registered under the Indian Partnership Act or Limited Liability Partnership Act)

5. A government authority

6. A group of people or an organization (incorporated or not)

7. A co-operative society (registered under co-operative society laws)

8. Any other entity that the government specifies as a "person" through a notification.[46]

Thus, the term "Person" includes various types of individuals, organizations, and entities, and can be expanded by the government to include others.

Section 16, 17, 18 of the Act provides provisions for Responsibilities of the Promoter, “the promoter is responsible for ensuring the project is insured, transferring ownership to the buyer”, “Return of amount and compensation”. Section 4 of the Act provides procedure for registration of the Application for registration of real estate projects by the competent Authority. Section 9 provides for the registration of the real estate agent.

This Act is more suitable for urban areas in India and may gradually replace the Transfer of Property Act.

46 The Real Estate (Regulation and Development) Act 2016, s.2(zg)

Conclusion: -

As civilization progresses, culture, custom, usages, life habits, technologies change. To cope up with these changes, law must change and develop itself. Thus, apart from legislators, judges, Advocates, the researchers, law students, professors of law must engage in continuous research and develop the law for the modern age. The Civil legal system provided equal importance to the opinion of the jurists with the other legal professionals: - the Advocates, Judges, legislators, draftsmen etc. Thus, gradually, in India, law must be revised as per the opinion of the qualified jurists.

REVITALIZING MEDIATION THROUGH THE 'MANDATORY' APPROACH: AN ANALYSIS OF PRE-LITIGATION MEDIATION PROVISIONS IN INDIA

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Abstract

Mediation techniques have been used as a means of justice delivery since ancient times and have evolved ever since to take the current form that they have today. But with the continuous development of the structured court systems, mediation became a rare practice restricted to small-scale disputes. Over time, due to the sheer number and complexity of disputes, the court system became overburdened, and delivery of justice became delayed. To counteract this, judiciaries across the world started promoting Alternative Dispute Resolution ('ADR') mechanisms. However, in recent years it has been observed that to reduce the burden of courts and to effectively direct litigants into mediation for cases that can be effectively resolved there, multiple countries have given mediation a compulsory nature where there is a compulsion to go into mediation process but not to reach mediation settlement. This study will analyze the provisions from India, Australia and Italy to understand the benefits of mandatory mediation and to identify the factors that resulted in successful implementation and the challenges faced in the implementation of such provisions.

Key words: Mandatory Mediation, Pre-litigation Mediation, ADR, Justice delivery, Settlement

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I. Introduction

With over 1.08 crore civil cases pending in Indian courts, including around 40,000 commercial suits[1]The legal system of India is under substantial pressure. This surge in cases reflects a positivist societal shift where individuals are more informed[2] and proactive about asserting their rights. However, the rising number of litigants also raises concerns about efficiency and accessibility of the legal landscape. As more people turn to litigation as a means of resolving disputes, it highlights the need for reforms and incorporation of Alternative Dispute Resolution (ADR) measures, improved court infrastructure and greater legal awareness to help manage the caseload and ensure justice is delivered in a timely manner[3]. Addressing these challenges will be crucial in balancing citizens' rights with the practicalities of an overburdened legal system[4].

The concept of safeguarding citizen's rights is robustly supported by both the legislature and the judiciary in India. The several notable advantages of the Indian legal system encapsulate the accessibility of the judiciary to all individuals, regardless of their socio-economic status coupled with availability of the opportunity to every party to present their case and ensuring justice by meticulously reasoned court judgements. These attributes encourage citizens to seek resolution of their disputes through the legal system. However, while access to courts is a vital aspect of justice, it does not inherently guarantee its delivery. The growing number of filed suits has significantly strained the judiciary, impeding the effectiveness of the justice delivery system. Although the overarching objectives of judicial systems are clear and

1 Data provided by NJDG on 14th Oct, 2024.

2 J. Narain, "LEGAL AID—LITIGATIONAL OR EDUCATIONAL: AN INDIAN EXPERIMENT" 28(1) *Journal of the Indian Law Institute* 72 (1986).

3 P. K. Bharadwaj, et.al, "Alternative Dispute Resolution in Criminal Justice System: Need of the Hour?" 12(7) *Turkish Journal of Computer and Mathematics Education (TURCOMAT)* 1289–1294 (2021).

4 Sardar, Huma, "Mediation as a Pre-Trial Dispute Resolution Mechanism: Evaluating Its Efficacy in Reducing Court Backlogs and Enhancing Access to Justice" 4 *International Journal of Research Publication and Reviews* 2799-2810 (2023).

comprehensive, many nations, including India, struggle with inadequate infrastructure[5] to effectively achieve these aims.

The inherent structure of any formalized or court-based legal system conjecturally allows parties to exploit delays in an attempt to exhaust the resources of their opponents[6] and evade a formal judgement. In the context of India, several common sources of delay within the legal system include:

a. Delays at the service stage of summons.
b. Deliberate absences during the framing of issues.
c. Availing unnecessary adjournments in the name of justice.
d. Undue absence of witnesses.
e. Protracted timelines for appeals.

These represent just a few ways in which delays can be introduced into the system, compounded by the fact that there is a significant shortage of judges[7] to manage the increasing volume of cases. Additionally, the considerable complexity and costs associated with litigation deter a substantial portion of the population from accessing the courts, rendering them either unable or unwilling[8] to pursue legal recourse.

Hence, while there is an ongoing effort to address the backlog of pending cases by strengthening the judiciary, it is evident that the current infrastructure is inadequate to meet the rising demands of litigants. Furthermore, enhancements to the judicial system have begun to plateau.

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5 Mayur Suresh & Siddharth Narrain, *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India 20* (Orient BlackSwan, 2019); The World Bank, "Ease of Doing Business in India" *available at:* http://www.doingbusiness.org/data/exploreeconomies/india/enforcing-contracts (Visited on September 25 2024).

6 Ghosh, P., "Civil Justice System : Its Delays And Solutions" 41(2) *Journal of the Indian Law Institute* 264–271 (1999); Gaurav Pandey, "The Unsettling Consequences of Justice Delay in India: A Grave Situation with Alarming Data" *available at:* https://timesofindia.indiatimes.com/readersblog/the-legal-perspective/the-unsettling-consequences-of-justice-delay-in-india-a-grave-situation-with-alarming-data-55042/ (Visited on September 30, 2024).

7 Singhvi, "Reforms In The Administration Of Justice: Beating The Backlog" 58(1) *Journal of the Indian Law Institute* 115–126 (2016).

8 C. Raj Kumar, "Legal Education, Globalization, and Institutional Excellence: Challenges for the Rule of Law and Access to Justice in India" 20 *Indiana Journal Of Global Legal Studies* 221, 252 (2013).

To effect meaningful change, solutions must be implemented outside the traditional courtroom framework. One promising avenue is the adoption of Alternative Dispute Resolution (ADR) mechanisms, which have been successfully utilized through various "soft approaches" worldwide.

II. Mediation In India

ADR has gained significant traction as a preferred method for resolving disputes within the legal systems of numerous countries. Its appeal lies in being more accessible, less adversarial, and more cost effective compared to traditional court proceedings. This trend is particularly evident in international business contexts, where globalization and cross-border commerce render conventional legal systems impractical for dispute resolution. While ADR mechanisms have been adopted in various forms across different legal systems, they are predominantly viewed as alternatives to the judicial system. This has led to discussions[9] on how these "alternative" mechanisms can be effectively harnessed as viable solutions to the existing challenges within the Indian legal landscape.

One particularly effective and versatile alternative mechanism for preserving relationship of contesting parties during dispute resolution is 'Mediation'[10]. Mediation is an informal process that involves a neutral third party, known as the mediator, who facilitates dialogue between the disputing parties. The outcome of the mediation is typically documented in writing to provide it with legal validity. Unlike formal legal proceedings, mediation is characterized by its informality, allowing the parties to establish the parameters of the process. The mediator's role is to serve as a conduit, helping to convey each party's needs and interests to the other, rather than acting as a adjudicator[11]. This approach fosters

9 Deepika Kinhal, Apoorva, "Mandatory Mediation in India- resolving to resolve" 2(2) *Indian Public Policy Review* 49-69 (2020).

10 Vidhi Centre for Legal Policy, "Strengthening Mediation in India: Interim Report on Court Annexed Mediations, (2020) 42 *available at:* https://vidhilegalpolicy.in/wp-content/uploads/2020/07/InterimReport_StrengtheningMediationinIndia.pdf (Last visited September 13, 2024).

11 James J. Alfini & Catherine G. McCabe, "Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law" 54 *ARK. L. REV.* 182 (2002).

open communication in a collaborative environment, helping parties reach a mutually satisfactory resolution while maintaining their relationship.

In practical terms, mediation has emerged not only as a time-saving option but also as a cost-effective alternative to traditional litigation. While the primary objective remains dispute resolution, the collaborative nature of mediation often allows parties to reach settlements on their own terms, thereby fostering more amicable relationships post-resolution compared to adversarial processes[12]. Although adversarial systems have their advantages, especially in handling complex disputes, they typically do not provide parties with the opportunity to effectively communicate their needs[13]. Instead, they focus on competing demands within a formal courtroom setting. The informal nature of mediation helps to mitigate both the financial and emotional burdens associated with litigation, enabling parties to reintegrate into their respective communities with a sense of satisfaction regarding the settlement.

While the theoretical benefits of mediation are clear, they are often challenging to realize in practice, as parties frequently approach disputes as battles to be won rather than issues to be resolved[14]. This mindset can negatively impact litigants. Despite understanding this, many still prefer litigation for the certainty it provides regarding dispute resolution and the hope of a favourable outcome[15]. This reliance reflects the hard-earned trust in the judicial system, but it is now backfiring, leading to increased litigation and overwhelming pressure on an already burdened judicial system.

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12 Mary F. Radford, "Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters" 1 *PEPP. DISP. RESOL. L.J.* 241 (2000).

13 Narain, Rashika and Abhinav Sankaranarayanan, "Formulating a Model Legislative Framework for Mediation in India" (2018) 11(1) NUJS Law Review 75.

14 Approva Mandhani, "Mediation Report Should Preferably Contain Only One Sentence, Nothing More, to Maintain Confidentiality: Delhi HC [Read Order]" *available at"* https://www.livelaw.in/mediation-report-preferably-contain-one-sentence-nothing-maintain-confidentiality-delhi-hc-read-order/ (Visited on September 6, 2024).

15 Supra Note 12.

III. Mediation And The Indian Experience

In ancient times, India had its own system of dispute resolution in the form of panchayats. The chief idea was to resolve any and all disputes in the presence of respectable members of the society. The decisions of panchayats were not based on pre-written rules and regulations, rather they were governed by the prevalent norms of expected behaviour. In such a practice the end goal of justice was to reach a compromise and punishment was the exception. Even after the incorporation of a formal Court system by the Britishers, panchayats continued to operate as the recognized institutes of administration of justice. However, these institutions had their limitations as they were restricted by the territory in which the disputants resided and could no longer deal with the complex claims of trade and property matters. As such, over time the institutions got relegated to just dealing with small civil disputes and the rest of the matters were overseen by the formal Courts.

CJI NV Ramana correctly noticed "Mahabharata an early attempt at mediation, mediation embedded in Indian ethos:"[16] It is not that ADR has been removed from the Indian legal system, it just took a more formal shape through Arbitration and Conciliation Act, 1996. Coupled with the enabling provisions of CPC, the Arbitration and Conciliation Act has been the parent legislation of ADR activities in India, but its shortcomings soon became known as arbitration proceedings became more complex and closely resembled the adversarial system which it was supposed to supplement with an informal procedure. To further reduce the burden on Courts and now on arbitral tribunals, Lok Adalats were introduced but they are only effective in small suits.

Because there was no umbrella legislation that could deal with mediation in India, Courts have evoked the Section 89 of Code of Civil Procedure (1908) to implement mediation as a practical ADR

16 "Mahabharata an early attempt at mediation, mediation embedded in Indian ethos: CJI NV Ramana at India-Singapore Mediation Summit" *available at:* https://www.barandbench.com/news/litigation/mahabharata-mediation-indian-ethos-cji-nv-ramana-india-singapore-mediation-summit (Last Visited on September 28,2024).

mechanism. The Supreme Court has on multiple occasions mentioned the need to bring substitutes to the existing complex judicial process.[17] In 2005[18]The Supreme Court of India constituted a committee that brought forward suggestions to better implement Section 89 so as to provide justice that is accessible to all. The Model Rules brought forward by the committee allowed various High Courts to draft their own rules with regards to implementation of mediation. Mediation, thus, became preferred in disputes that do not dwell on complex questions of law which can be resolved amicably by the parties thus getting rid of the complex and expensive legal process while offering the parties a sustainable solution to their disputes.[19] The main feature of mediation for parties lies not in its informal nature but rather in its confidentiality.[20]

Again in 2010[21], Supreme Court reviewed the application of Section 89 and concluded that wherever possible, Courts shall refer the cases to ADR and give guidelines for the same. To further expand the scope of mediation, Supreme Court[22] also provided that certain types of criminal cases can also be referred to mediation if the conditions are appropriate.

While the series of cases such as *Salem Advocate Bar Association v. Union of India*[23]; *Afcons Infrastructure Ltd. and Ors. v. Cherian Varkey Construction Co. (P) Ltd*[24].; *K. Srinivas Rao v. D.A. Deepa*[25]*; M.R. Krishna Murthi v. The New India Assurance Co. Ltd and Ors*[26]. will continue to emphasize the need of mediation to be implemented properly the same needs a legislative backing to properly function. The powers of

17 *Guru Nanak Foundation v. Rattan Singh & Sons* AIR 1981 SC 2073; *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya* (2003) 5 SCC 531; *Shyamalika Das v. Gen. Manager, Gridco* (2010) INSC 802.
18 *Salem Advocate Bar Association v. Union of India* AIR 2005 SC 3353.
19 Narain, Rashika and Abhinav Sankaranarayanan, "Formulating a Model Legislative Framework for
Mediation in India" (2018) 11(1) NUJS Law Review 75.
20 Supra Note 16.
21 *Afcons Infrastructure Ltd. and Ors. v. Cherian Varkey Construction Co. (P) Ltd.* MANU/SC/0525/2010.
22 *K. Srinivas Rao v. D.A. Deepa* 2013 5 SCC 226.
23 AIR 2005 SC 3353.
24 MANU/SC/0525/2010.
25 2013 5 SCC 226.
26 (Civil Appeal No. 2476-2477 Of 2019).

mediation were given out in a segmented way with Consumer Protection Act, and Companies Act, 2013 becoming torchbearers of the same.

IV. Bringing Mandatory Mediation To India

The success of the mediation provisions prompted the legislation to take the bold step of implementing Mandatory Mediation in a controlled manner. While the lawmakers observed that parties belonging to Commercial suits are most amiable with mediation proceedings, an amendment was introduced in the Commercial Courts Act, 2015 which inserted Section 12A to the act that created the first instance of "Mandatory Pre-litigation Mediation" in Indian legislation. The Supreme Court and other High Courts have asserted the mandatory aspect of this provision time and again[27].

While studies[28] suggest that Mandatory Mediation provides the mediation process the much-needed boost to its popularity, but this new legislation has brought with it its own problems that make it difficult to assess whether the benefits proposed by Mediation as an ADR mechanism can be rightfully claimed or not. A lot of instances have been brought to light that showcase how such mandatory mediation is not able to deliver what was proposed by the legislators.[29] Apart from the limited implementation, the provision also faced challenges when it came to appointment of mediators, unfamiliarity of mediators with commercial disputes and issues of clients with the "failure to reach settlement" report that accompanied the provision. Another major drawback was the lack of clarity regarding the status of settlements reached through the provision and their implementation. While the same has been remedied through

27 *M/s Patil Automation Pvt Ltd & Ors v Rakheja Engineers Pvt Ltd* (2022) 10 SCC 1; *Yamini Manohar v T.K.D. Keerthi* 2023 SCC OnLine SC 1382; *M/S Sabsons Agencies Private Limited Versus Ws Harihar Polymers & Anr*, 2024 (3) TMI 584.

28 De Palo, Giuseppe, "A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More Directive." *available at:* https://www.europarl.europa.eu/RegData/etudes/BRIE/2018 /608847/IPOL_BRI(2018)608847_EN.pdf (Last Visited on September 20, 2024).

29 Devendra Damle, Jitender Madaan, et.al., "Characterising cheque dishonour cases in India: Causes for delays and policy implications" *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4082939 (Last Visited on September 5, 2024).

recent judgments[30]The remaining time-period is not enough to assess the impact of the same on the overall legal system.

Even after all this there remained a confusion regarding Cross-border settlements, while India is a signatory to 'United Nations Convention on International Settlement Agreements resulting from Mediation' commonly known as 'Singapore Convention on Mediation' the same ideas were not reflected in Section 12A or its accompanying rules.

Another reason for the weak impact of the provision was lack of awareness and unfamiliarity with process among the general public coupled with the misconception that willingness to go into mediation or propose a settlement is a display of weakness.[31] While Mandatory Mediation addresses the same to most extent and makes the parties experience the mediation process firsthand before making any decision about it, the same has not been able to become an effective alternative for the parties.[32]

The impact of these issues can be seen in recent legislation. In India, a bill was proposed with the title "The Mediation Bill, 2021" that contained a provision under its Section 6 for Mandatory Mediation for civil disputes whereby no civil dispute could be raised in the court of law before first referring to mediation for the same. This provision was brought to question by the Rajya Sabha who sent it to the Standing Committee on Personnel, Public Grievances, Law & Justice for their comments. The committee observed that India was not ready for mandatory mediation or 'Pre-litigation Mediation' in the words:

The Committee further notes that making pre-litigation mediation mandatory may actually result in delaying of cases and may prove to be an additional tool in hands of litigants to delay the disposal of cases. The Committee also notes the views of few experts that not only pre litigation mediation should be made optional but also be introduced in a

30 *Id.* at 29.
31 Gupta, Juhi, "Bridge over Troubled Water: The Case for Private Commercial Mediation in India" 11 *American Journal of Mediation* 59-88 (2018).
32 Campbell C. Hutchinson, "The Case For Mandatory Mediation" 42 *Loyola Law Review* 85 (1996).

phased manner instead of introducing it with immediate effect for all civil and commercial disputes and the challenges faced in implementing Pre-Litigation Mediation under the Commercial Courts Act, 2015 should be studied before mandating it across other categories of cases.[33]

Giving due regards to the committee findings, the final enactment Under Section 5 of The Mediation Act, 2023 made the 'Pre-litigation Mediation' process completely voluntary for civil disputes. This led to the current status quo of 'Pre-litigation Mediation' having a voluntary nature in civil disputes and a compulsory nature in commercial disputes in India with criminal disputes kept out of the way.

V. Mandatory Mediation In Italy

When it comes to mandatory mediation, Italy reserves its due share of recognition around the world for its early experiments with mediation processes and its successful integration of Mandatory mediation in its legal system through the current 'opt-out' model introduced by enactment of Law No. 60/2009.[34] While the law was later repudiated on the grounds that it hindered the access to justice of individuals and placed unnecessary restraints on them before approaching court of law, this resulted in significant drop in the rate of cases being presented for mediation.[35] To address this issue, the law was reintroduced with some sought-after amendments in 2013 and which is being enforced till date and has been successful in bringing back the number of mediations attempted to an appreciation worthy number. To ensure public trust in the process and to remove confusions, the latest amendments have limited the mandatory mediation process to fewer types of disputes such

33 Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, "One Hundred Seventeenth Report on The Mediation Bill, 2021".

34 Elsaman, Mahmoud, "Introducing Mandatory Mediation to Egypt"s Administrative Courts: Two Feasible Approaches" 2(1) *Courts & Justice Law Journal* 55-75 (2020).

35 De Palo, Giuseppe, Leonardo D"Urso, et. al., "'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the EU." *available at:* https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOLJURI_ET(2014)493042_EN.pdf (Last Visited on September 17, 2024).

as property disputes, lease, loan rent disputes, defamation and any financial contract, while ensuring enforcement of the agreement achieved by the parties. While the mere existence of the provision cannot ensure the participation of parties, the law places an obligation on the lawyers to inform their clients of the option to mediate and benefits thereof.

The Italian law enforces this mandatory mediation process in a very creative and inexpensive manner. The Law requires parties to have a preliminary meeting with the mediator who will explain the possibilities of mediation in their dispute and encourage them to undergo mediation instead of a suit. The provision is further strengthened by giving penalties for non-appearance in the mediation proceedings and giving tax benefits for undergoing mediation. The ingenuity of the Italian model lies in the fact that after the first meeting there is no further obligation on parties to participate in mediation, they can choose to 'opt-out' of the mediation process by paying a nominal fee for the already attended session and go forward with the suit.

This not only creates a trust in mediation process for both the existing dispute as well as future disputes, but this also reduces the aversion felt by parties towards mediation to an almost negligible level.[36] The Italian model has experienced an increase in settlements arrived through mediation both through mandatory and voluntary modes which represents the trust that has been built in the mediation process among the common populace in Italy.

VI. Mandatory Mediation In Australia

Australian experience with Mandatory Mediation brought forward a new dimension to the implementation of the process as Australia has federal and state laws clearly demarcated. Mediation process in Australia did not go through the commonly seen phase of rejection from existing legal machinery; rather it was the legal professionals as well as the

36 Leonardo D'Urso, "Italy's 'Required Initial Mediation Session': Bridging the Gap Between Mandatory and Voluntary Mediation" *available at:* https://www.mediationhub.ae/publications/italys-required-initial-mediation-session-bridging-the-gap-between-mandatory-and-voluntary-mediation# (Last Visited on October 3, 2024).

judiciary readily accepted mandatory mediation practices and implemented them to their fullest extent possible.[37]

The history of mediation in Australia does not start from an overworked judiciary needing a reform, rather mediation was introduced as a preventive measure to avoid overburdening the judiciary in future. The provisions for mandatory ADR processes were introduced in Australia as early as 1995 with disputes such as retail and small business disputes, construction, rent and farm disputes. On lines with the patterns observed Australia also started introducing mandatory mediation with small and simpler disputes but rather than the common trend of legal system being incompatible with the change, the Australian legal system embraced the changed[38] and today Mandatory Mediation is a common practice in Australian courts with multiple statutes supporting the same.[39] While it was also observed by the Supreme Court of New South Wales that people avoid entering into mediation as it might showcase weakness but once they enter into it they try to actively participate in the same.[40]

The current legal framework regarding mandatory mediation in Australia calls for all suits to be initiated along with a report of "genuine steps" taken to resolve the dispute or in absence of such steps the reasoning why no such steps were taken before initiation of the suit. The beauty of this framework is that for the filing of civil suits, the Civil Dispute Resolution Act, 2011 (Cth) requires a report with aforementioned points but in the definition of "genuine steps" nowhere

37 Greg Rooney, "The Australian Experience of Legislated Pre-Action ADR Requirements: Specificities, Acceptation, and Keys to Success" *available at*: https://mediate.com/the-australian-experience-of-pre-litigation-adr-requirements/ (Last Visited on September 11, 2024).

38 Melissa Hanks, "Perspectives On Mandatory Mediation" 35(3) UNSW Law Journal 929 (2012).

39 E.g. Native Title Act, 1993 (Cth), the Administrative Appeals Tribunal Act, 1975 (Cth), and the Civil Procedure Act, 2005 (NSW), Civil Dispute Resolution Act, 2011 (Cth).

40 *Idoport Pty Ltd v National Australia Bank Ltd* (No 21) [2001] NSWSC 427, [29]–[30].

has the law limited the parties to mediation, it has naturally became a preference among litigants due to its informal and inexpensive nature.[41]

Further because of the federal structure of Australia, the civil justice framework is not uniform across the nation which makes it difficult to make single laws for the states but still the studies have shown that mediation is a preferred mode of dispute settlement with a settlement rate of more than 80% in Australia.[42]

VII. Lessons For India

While we have limited ourselves to Australia and Italy in the present discussion, jurisdictions such as the US, UK, Turkey, France etc. are already exploring their own ways to implement mandatory mediation within their territories.[43] The common point observed is that all jurisdictions are feeling a need to give their citizens the much-needed push towards Mandatory Mediation processes but there is no uniform mode of implementation that can be observed. Countries like Italy and Turkey take support of legislation and countries like Australia and United States with federal laws take support of their decentralized system to achieve a similar result. Thus, each jurisdiction tackles the implementation problem with their own localized experiments and solutions.

In the case of India, mediation is not the first ADR mechanism that India has tried to codify, The Arbitration and Conciliation Act, 1996 and the establishments of Lok Adalats are good examples of attempts made by Indian legislature in bringing ADR mechanisms to mainstream but both of them have proven to eventually go counter to the beliefs of law framers by becoming complex or inefficient. Presently, the Arbitration

41 Bergin, P. A., "The Right Balance Between Trial and Mediation: Visions, Experiences and Proposals - A Look Beyond the EU - Australia." *available at:* http://www.austlii.edu.au/au/journals/NSWJSchol/2012/38.pdf (Last Visited on September 18, 2024).

42 Alan Limbury. "Compulsory Mediation – The Australian Experience" *available at:* http://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australianexperience/ (Last Visited on September 11, 2024).

43 Leonardo D'Urso, "A New European Parliament Mediation Resolution Calls on Member States and the EC to Promote More Use" 36 Alternatives 19 (2018).

regime resembles the adversarial system and the Lok Adalat system is restricted to small scale cases; while they are contributing in reducing burden on courts, the contribution is miniscule.

While there is a lot of work to be done, the key points that need to be addressed still draw our attention back to the acceptance of mandatory mediation provisions on two levels: Firstly, by the legal professionals and judges; Secondly by parties. In furtherance to these points, while addressing the acceptance of mandatory mediation at any stage, the presence of skilled mediators cannot be ignored. Such individuals are not only responsible for resolving disputes but are also responsible for building rapport with the parties so that even in an unfortunate situation where parties do not opt for mediation, they should stay open to the option in future disputes.

What India proposed in the Mediation Bill, 2021 was a daring step to introduce 'Pre-litigation Mediation' as a mandatory provision for almost every civil dispute wherein lies the problem. Most of the opposition the provision faced was with respect to its universal and wide coverage over matters which were relatively new to be put in mediation for our country.

While India has completely backed out from the mandatory provision another alternative would have been to roll out mandatory mediation provisions in a phased manner as suggested by the Standing Committee[44] in its report. This helps in reducing the rejection of the provisions by the professionals and judges as this gives the feeling of it being a temporary measure rather than a permanent change in the legal framework to which they are already attuned.

While giving due regards to the Italian 'opt-out' model we can try to prepare a localized law for India as well with its own 'opt-out' features but keeping in mind that we are creating a mandatory mediation provision we should not forget the 'opt-in' features for mandatory mediation that were experimented by Romania.[45] The Romanian

44 Supra Note 35.

45 Rühl, Giesela, Jan von Hein, et al., "Cross-border activities in the EU - Making life easier for citizens." *available at:* https://www.adrcenterfordevelopment.com/wpcontent/uploads/2018/06/IP

Constitutional Court held that such mandatory 'opt-in' provision does not sit well with the legal framework of the country and creates barriers to access of justice.

Studies conducted before the implementation of The Mediation Act, 2023 suggest that such opt-out mediation models can be introduced for disputes primarily in the domains of commercial laws, labour laws, family disputes, consumer and tenancy disputes.[46] Along with a clear warning that such mandatory mediation shall not end up as a token gesture.[47]

The next point to address for India is to consider the availability of skilled mediators. While the current framework of mediators is working hard according to the training that they receive, there is a need to review the whole framework from start to finish. While the current mediators are trained with the view that individuals are coming to them out of their own violation, to prepare them for Mandatory Mediation provisions, it is important that we retrain the mediators such that they are able to address the needs and quell the dissatisfaction of parties that are brought before them against their wishes. The next step will be to ensure that along with trust building exercises mediators are also trained in dealing with specialized disputes, the role of mediator shall not remain as a neutral spectator only when the parties are of the belief that the mediator understands the intricacies of their dispute will they willingly bind themselves to such a procedure.

VIII. Conclusion

While there are a number of successful examples of jurisdictions where mandatory mediation provisions became part of the legal framework, we have an example of an equal number of jurisdictions that failed in their attempt at such integration. What needs to be observed is that it is more of an issue of societal acceptance rather than legal

OL_STU2015510003_EN_short-version.pdf (Last Visited on September 13, 2024).

46 Supra Note 11.

47 Ibid. at page 65; Rashika Narain & Abhinav Sankaranarayanan, "Formulating A Model Legislative Framework For Mediation In India" 11 *NUJS L. Rev.* 1 (2018).

acceptance of the concept. As long as the parties are not happy with the mandatory mediation process or at the bare minimum unless they have trust in the process, they will not be willing to enter into such processes. The nature of mandatory mediation process is such that we will be putting opposite parties in front of each other but in case of India we often overlook that most of the individuals come from under-privileged or low education backgrounds, the sophistications involved in mediation proceeding might feel cumbersome for them so before actually implementing the provisions there is a need to thoroughly assess the common litigant in India and their psychology to better understand their expectations of a legal remedial mechanism. Another factor to be addressed from the litigant side is to convince them of the certainty of process and the settlement. Parties should not be put under an impression that they have lower negotiation power than their opposition neither should they be under any confusion regarding the status of settlement achieved.

While the law is already established with the enforcement of the Mediation Act, 2023 the possibility of making 'Pre-litigation Mediation' a mandatory practice can still be introduced as a pilot practice with respect to select disputes and with a sunset clause as utilized by Italy. Apart from this, giving due appreciation to *Samadhan* portal of Delhi High Court, we can introduce multiple such portals and mediation centres for such disputes where cases falling under certain categories will be compulsorily directed to mediation. Taking it a step further we can also incorporate a "genuine steps report" kind of mechanism in India as well.

Through this paper we have tried to address the need of re-introducing Mandatory Mediation provisions in India, not through an "as is" condition, but in a phased manner while addressing the issues or complications as and when they come before implementing the next stage. We have seen that parliament accepted the Standing Committee's suggestion that India was not ready for Mandatory Mediation as of now, but they overlooked the possibility of introducing the same in a phased manner.

Ground Water Laws In India: Challenges And Achievements

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Yashita Gupta**

Abstract

The objective of the present research is to analyse the legal status of ground water within the regulatory framework of water law. It further argues the need for groundwater, like surface water, to be given the status of a public trust in order to ensure that no individual can appropriate it. For instance, there is wide acknowledgement of the fact that rules that link access to ground water and control over land fail to meet the test of social equity and environmental sustainability. The paper primarily focuses on legislation, case laws, common law principles and the doctrine of public trust concerning ground water regulation encompassing the jurisprudence involved in the allocation of natural resources.

Key words: Environmental Laws, Ground Water, Ownership, Public Trust

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I. Introduction

Water-our most important but neglected natural resource-is essential to development, agriculture, human communities and to our survival itself. The population explosion and industries requiring large quantities of fresh water indicates increasing pressure on water resources in future. With the continuing loss of fresh water through the disruption of hydrological cycles, resulting deforestation and desertification and

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through the pollution of rivers, lakes and underground waters, there are growing shortages of fresh water in many parts of the world.[1]

Water is such a precious thing that rights to it have always been zealously safeguarded. The Buddha is said to have intervened to settle a water dispute while still a Prince of Kapilavastu in Nepal. In earlier times, populations were smaller, allowing individuals or communities to resolve disputes by relocating and tapping into new resources. Water resource development was relatively limited compared to the ample availability of water in most regions. Even consumptive uses, such as irrigation, rarely led to shortages for others. Customary practices typically governed these interactions, ensuring that most transactions were regulated by long-established norms.

Since ancient times, the regulation of water has been a key concern for rulers. Issues such as water pollution and its impact on public health were addressed in the laws of Manu.[2] The *Arthashastra*, an ancient Indian treatise on statecraft from the Kautilyan period, specifically stipulated that users had to pay a water tax for the use of water in cultivation, regardless of whether it was sourced from rivers, lakes, or springs. The ownership of water storage systems like reservoirs, embankments, and tanks was allowed to be private. During the period of Muslim rule, water was considered a common resource, with the recognition that all individuals had the right to free access and use. Despite these developments, it seems that formal water law did not gain much emphasis until the colonial period, largely because water was not widely perceived as a scarce resource.[3]

In the nineteenth century, the colonial government began to take a more active role in water law, introducing a range of interventions.

1 Bharat Desai, *Water Pollution in India: Law and Enforcement*, 5(New Delhi,Lancers Books,) 1990.

2 W.Doniger (Trans.), 1991, The Laws of Manu, (Harmondsworth: Penguin Books

3 A. Siddiqui, 'History of Water Law in India', in C.Singh (ed), 1992, Water Law in India, (New Delhi: Indian Law Institute), p.289. See also Irfan Habib, The Agrarian System of Mughal India, (Asia Publishing House, New York, 1993).

These included laws for the protection and maintenance of embankments, the regulation of ferries, and the management of fisheries. Special attention was also given to irrigation, with the colonial administration focusing on harnessing water for this purpose. This led to the adoption of various legislative measures, such as the Northern India Canal and Drainage Act of 1873, which facilitated large-scale irrigation projects, and the United Provinces Minor Irrigation Works Act of 1920, which addressed smaller irrigation works. The primary focus of these laws was economic, concentrating on the productive use of water, with little regard for environmental concerns or the social implications of water usage.[4]

II. Ground Water and Relevant Provision

Groundwater is arguably India's most vulnerable water resource. Reports suggest that groundwater irrigation already contributes to 75-80% of the value of irrigated production in the country. Approximately 35 million hectares (Mha) of land can be irrigated using groundwater, which surpasses the 33 Mha of irrigation potential created through all major and medium irrigation projects. Beyond its role in agriculture, groundwater is a crucial source of drinking water for many cities and rural communities and serves as the primary source of clean water for industrial use as well. Despite mounting concerns, little action has been taken to address the emerging challenges surrounding groundwater, and there are frequent calls for more effective management.[5] A model bill to regulate groundwater use was first introduced in 1971, with a revised version circulated in 1992. All proposed groundwater legislation to date has adopted a predominantly regulatory approach, focusing on controlling and overseeing the use of this critical resource.[6]

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4 Phillipe Cullet and Sujith Koonan(eds.) Water Law in India: An Introduction to Legal Instruments 1 (Oxford University Press,New Delhi, 2011)

5 B.P.C.Sinha and S.K.Sharma, "Need for Legal Control of Ground Water Development-Analysis of Existing Legal Provisions" *Bhu Jal News,* Apr.10,1987.

6 Marcus Moench, "Approaches to Ground Water Management: To Control or Enable?"29 *Economic and Political Weekly*,135(1994).

III. The Model Bill

In September 1992, the Ministry of Water Resources of the Government of India issued a "Model Bill to Regulate and Control the Development of Ground Water" to the states. Like earlier versions, this bill lacks real regulatory power. Water is a state matter according to the Indian Constitution, limiting the central government's direct control. However, the Model Bill is important because it represents the central government's viewpoint, as well as that of many leading water experts in the country, on the best approach to addressing emerging groundwater challenges. Its significance lies in its potential to shape policy and the central government's influence over funding decisions.[7]

The main provisions of the bill are outlined in Section 3, which allows state governments to create a groundwater "authority" and appoint its chairman and members. While the chairman's qualifications are not specified, the members must represent departments related to groundwater survey, exploration, development, or protection, and may also include individuals with specialized knowledge or practical experience in groundwater issues, as determined by the government (GOI 1992, Section 3). The bill also permits states to appoint technical and other staff as "public servants" under Central Act 40 of 1860, if necessary (Sections 4 and 16). Together, these provisions give states the authority to establish administrative bodies for managing groundwater use and extraction, all under state control.[8]

Once a Ground Water Authority is established, the Model Bill allows for the designation of specific areas where the authority believes regulating or controlling groundwater use is necessary for the public good. In these designated areas, individuals wishing to drill wells (except small and marginal farmers) must obtain a permit from the authority. The Model Bill states that the authority may issue a permit if it deems it in the public interest, subject to specific conditions. Existing groundwater users in these areas must also apply for registration within

7 S. Visvanath"Centre Plans Model Law on Groundwater," *The Hindu,* Apr. 3, 2016.

8 *Supra* note 4.

90 days of the notification. This registration must include details such as the water source, extraction method, volumes extracted, intended use, extraction duration, area served (if for irrigation), and supply details for drinking or municipal use. Like new wells, the authority may issue a certificate of registration for continued water use, subject to conditions.[9]

When making decisions about new wells and existing water use, the Ground Water Authority must consider several factors: (a) the intended purpose(s) of the water use, (b) the presence of other competing users, (c) the availability of water, and (d) any other relevant considerations. Until a decision is made on a permit, existing users are allowed to continue extracting water as they did before the area was designated.

Once a permit or registration certificate is granted, the authority has the power to modify the terms, either temporarily or permanently, for technical reasons, with the goal of reducing water usage. The authority can also cancel permits and certificates for reasons including: (a) fraud or misrepresentation in obtaining them, (b) failure to comply with conditions or violations of other provisions of the act, or (c) the emergence of circumstances that warrant restricting groundwater extraction or use.[10]

IV. Ground Water and Fundamental Right

The exploitation of groundwater directly impacts an individual's fundamental right to life[11], meaning that their right to dig bore wells cannot be restricted by executive order alone. Such restrictions can only be imposed through a legislative act.[12] For example, a groundwater extraction scheme on the Lakshadweep Islands, which posed a threat of saline intrusion into the freshwater table, was suspended until the Central Government reviewed and modified the plan. It is important to note that deep underground water is considered a state resource.[13]

9 Sec.5.
10 Sec 6(3).
11 Constitution of India Art. 21.
12 Puttapa Honnappa Talvar v Deputy Commissioner, Dharwar AIR 1998 Kant 10 .
13 Attakoya Thangal v Union of India (1990) 1 Ker LT 580.

Until recently, groundwater was largely unregulated, primarily due to limited extraction driven by technological constraints, the availability of surface water, and a lack of knowledge regarding its characteristics. The common law right of landowners to exclusively extract groundwater for their use was acknowledged in the Indian Easements Act of 1882. However, this applied only to percolating water (or the upper water table), excluding "water under the land which does not pass in a defined channel," or in other words, underground flows, which are governed by riparian laws.[14]

V. Central Ground Water Authority

The Central Ground Water Authority (CGWA) was established under Section 3(3) of the Environment (Protection) Act, 1986, to regulate and manage India's groundwater resources. The CGWA specifically oversees the extraction of groundwater by industries and projects in 802 over-exploited and 169 critical assessment units. The list of these critical areas has been shared with the State Pollution Control Boards and the Ministry of Environment & Forests, which refer new industries and projects to the CGWA for approval.[15]

The CGWA has identified 162 critical and over-exploited areas in regions such as NCT Delhi, Haryana, Punjab, Andhra Pradesh, Rajasthan, Madhya Pradesh, Gujarat, West Bengal, Uttar Pradesh, Karnataka, Tamil Nadu, Puducherry, and Diu, where groundwater regulation and management are enforced. To ensure compliance, Deputy Commissioners and District Magistrates in these areas have been instructed, under Section 5 of the Environment (Protection) Act, 1986, to oversee the development and management of groundwater resources within the notified zones.[16]

14 S.N.Jain ,"Legal Aspects of Ground Water Management" 23 *Journal of Indian Law Institute* 182(1981).

15 *Available at* http://cgwb.gov.in/aboutcgwa.html (last visited on November 5, 2016).

16 *Ibid*

5.1. Powers & Functions: The CGWA has been granted several powers:

1. To exercise powers under Section 5 of the Environment (Protection) Act, 1986, including issuing directions and taking measures related to matters outlined in Section 3(2) of the Act.

2. To apply penal provisions from Sections 15 to 21 of the same Act.

3. To regulate, control, manage, and develop groundwater resources in the country, issuing necessary regulatory directions.

4. To appoint officers under Section 4 of the Environment (Protection) Act, 1986.

VI. Ownership Rights over Water:

Who owns the water? The question of water ownership was addressed by Weil in the Harvard Law Journal in 1909, stating that running water in natural streams is not the property of anyone, similar to wild animals or air. This principle, rooted in English common law, was reflected in the Indian context during the discussions leading to the Government of India Act of 1935. The Act recognized that the Indian government had the common law right to use and control water in the public interest. For instance, Punjab's claim to exclusive ownership of the Ravi and Beas waters was rejected by the Eradi Tribunal in 1987.[17]

Groundwater was largely unregulated until recently due to limited extraction, technological constraints, the availability of surface water, and a lack of understanding of groundwater's characteristics. The Indian Easements Act of 1882 recognized landowners' common law right to extract groundwater for personal use[18], but this applied only to percolating water (the upper water table), excluding underground flows covered by riparian law.[19]

17 B.G.Verghese, *Water of Hope: Integrated Water Resource Development and Regional Cooperation within the Himalayan-Ganga-Brahmaputra-Bank Basin* 308 (Oxford and IBH, New Delhi, 1990).

18 *Supra* note 14.

19 Mihir Shah, " Should we privatise water?" *The Hindu*, Apr. 21, 2017.

Under English Common Law, landowners had the right to extract percolating waters without specified limits. However, this right is theoretically constrained by the Easement Act and irrigation laws, which affirm the government's absolute rights over all natural water resources.[20]

VII. Common Law Principles

In India, access to water has primarily been governed by common law principles, particularly since the late 19th century. These principles generally link access to water with control over land.With regard to flowing surface water, the prohibition on water ownership led to the development of riparian rights, granting landowners the right to appropriate water flowing through a river for private use. Riparian rights, which originated in England and North America, are considered an integral part of land ownership, granting landowners usufructuary rights to utilize a portion of a watercourse's flow. [21]While riparian rights are indirectly reflected in the Indian Easements Act of 1882, their full evolution in India has been shaped through extensive litigation spanning over a century.[22]

In relation to groundwater, the absence of knowledge about its direct connection to surface water when the legal framework was established led to the misconception that the prohibition on ownership did not apply. As a result, groundwater was viewed as an intrinsic part of the land, akin to other natural resources. This perspective is reflected in the Easement Act, which treated groundwater as a chattel of the landowner, granting them rights over it as a component of their landholding.[23]

20 Chhatrapati Singh*, Water Right in India* 34 (Indian Law Institute, New Delhi, 1990).

21 S.Hodgson, 2004, *Land and Water: The Rights Interface*, FAO Legislative Study 84, (Rome: FAO), p.49 as cited in Phillipe Cullet and Sujith Koonan(eds.) *Water Law in India: An Introduction to Legal Instruments* 27(Oxford University Press, New Delhi, 2011).

22 T.G. Puthucherril, "Riparianism in Indian Water Jurisprudence", in R.Iyer(ed.),*Water and the Laws in India* 99(Sage ,New Delhi,2009).

23

VIII. Indian Easement Act, 1882

(a) Any right of the government to regulate the collection, retention, and distribution of water from rivers and streams flowing through natural channels, as well as from natural lakes and ponds, or water that flows, is collected, retained, or distributed through any channels or infrastructure developed at public expense for irrigation purposes.

(b) Easements Restrictive of Certain Rights

Easements are restrictions of one or other of the following rights (namely):

(a) Exclusive Right to Enjoy: Every owner of immovable property has the exclusive right to enjoy and dispose of it, along with any products or additions to it, subject to applicable laws.

(b) Rights to Advantages from Location: The owner of immovable property has the right to enjoy, without interference from others, the natural benefits that come from the property's location, subject to prevailing laws.

(c) Examples of the Above Rights:

(d) The right of every landowner to ensure that water naturally passing or percolating through their land is not polluted by others before it flows or percolates.

(e) The right of every landowner to collect and manage water within their land’s boundaries, including all groundwater that does not flow in a defined channel and all surface water that does not follow a defined path.

(f) The right of every landowner to ensure that water in any natural stream flowing through or over their land in a defined natural channel does so without interruption or significant change in quantity, direction, force, or temperature. Additionally, landowners whose property borders a natural lake or pond receiving water from a stream have the right to keep the water in such lakes or ponds within their property without significant changes in quantity or temperature.

(g) The right of landowners on higher land to allow water naturally arising on or falling onto their land to flow naturally to the adjacent lower land, as long as the lower landowner does not prevent this flow.

(h) The right of every landowner whose property borders a natural stream, lake, or pond to use its water for drinking, household needs, and watering livestock. They also have the right to use the water for irrigation or manufacturing purposes on their property, provided this does not materially harm the rights of other landowners with similar entitlements.

Explanation: A "natural stream" refers to a watercourse—whether permanent, intermittent, tidal, or tideless—that flows naturally, either above or below ground, solely due to natural forces, and follows a known, natural path.

8.1. Rights Which Cannot Be Acquired by Prescription

Easements acquired under Section 15 of the Indian Easements Act are acquired through prescription, and are referred to as prescriptive rights. However, the following rights cannot be acquired by prescription:

(a) A right to surface water that does not flow in a stream and is not permanently collected in a pool, tank, or otherwise.

(b) A right to underground water that does not pass through a defined channel.

In *Secretary of State v. S. Subbarayudu*[24], the Privy Council held that:

1. A riparian owner is defined as a person who owns land bordering a stream and, by virtue of this, has certain rights to take water from the stream. Generally, the fact that the land abuts the stream means that the riparian owner is considered the proprietor of the streambed up to the midpoint (*usque ad medium filum*).[25]

24 AIR 1932 Privy Council 46.
25 *Id* at 48.

2. The right of a riparian owner to take water is primarily for domestic use, followed by other purposes related to the land, such as irrigation of the land that constitutes their property.[26]

3. Furthermore, this right is a natural right, not strictly an easement, even though it is often referred to as one. In particular, it cannot be lost due to non-use (*non utendo*), and the maxim *tantum prescription quantum possessum* (which means prescription is based on possession) does not apply in this case.[27]

In *Karathidundi Kehsava Bhatta v. Sunnanguli Krishna Bhatta*, [28] the Madras High Court held that:

The general rule is that the owner of land has a natural right to all water that percolates or flows through undefined channels within their land. Even if the intention behind digging a well or pond is to cause damage to a neighboring property by extracting water from their field or land, this does not alter the situation. It is the act itself, not the motive, that is considered. Therefore, no legal action can be taken for the obstruction or diversion of percolating water, even if such abstraction results in diminishing or depleting the water supply of a neighboring well or land.[29]

IX. Doctrine of Public Trust

Environmental laws in India have evolved significantly over the past three decades. Since the 1970s, several statutes have been enacted to address various environmental concerns, including pollution prevention and control, forest conservation, and wildlife protection.[30] A key feature

26 *Ibid*
27 *Id* at 49.
28 AIR (33) 1946 Madras 334.
29 *Id* at 335.
30 Some of the major environmental legislations are: Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Wild Life (Protection) Act, 1986; Forest (Conservation) Act, 1980; Wild Life (Protection) Act, 1972; National Environment Tribunal Act, 1995 and National Environment Tribunal Act, 1995 and National Environment Appellate Authority Act, 1997. For an analysis of environmental legislation in India, see, Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* (Oxford: Oxford University Press, 2001).

of this development is the increasing emphasis on environmental protection and preservation. Prior to this phase, Indian environmental law primarily relied on tortious claims, such as nuisance and negligence. The Indian judiciary, especially the higher judiciary, has also played a pivotal role in shaping and advancing environmental laws in the country. Therefore, it can be said that environmental law in India has been shaped through both legislative enactments and judicial contributions.[31]

In *State of West Bengal v. Kesoram Industries*[32], the Supreme Court held that :

Certain rights can be granted by individuals holding equivalent or superior rights, while others are within the purview of the state. However, the state's authority may be limited by the doctrine of "public trust," which restricts its ability to grant rights over specific resources, such as deep underground water. The court has affirmed that deep underground water belongs to the state, as the public trust doctrine extends to these resources. A landowner possesses only the right of use, and cannot take any actions that infringe upon the rights of others. Additionally, the right of use is confined to the purpose for which the land is held and cannot be extended to other uses.

Regarding easementary rights, under Section 25 of the Limitation Act, 1963, no prescriptive right can be acquired unless the easement is exercised continuously for a period of 30 years. The exercise of rights—whether related to air, way, watercourse, or the use of water—must be done without interruption, in a peaceful, overt manner, and as a recognized right. Only after such continuous and uninterrupted use does the right become absolute, indefeasible, and legally binding.[33]

While the Meteorological Department's prediction of a monsoon rain deficit has raised concerns about the country's economic outlook, the critical stress on groundwater resources due to this deficit remains

31 Major principles and doctrines of environmental law have been incorporated as part of the Indian law by the Indian judiciary through case laws.

32 (2004) 10 SCC 201

33 *Supra* note 4 at 25.

underemphasized. On average, 61% of the net annual available groundwater is consumed for various purposes, and states such as Delhi, Haryana, Punjab, and Rajasthan are facing severe groundwater overdraft. Satellite data from NASA (2009) highlights a grim scenario, revealing that in northern India, groundwater levels are declining by approximately one foot per year. With the additional extraction of groundwater prompted by the monsoon deficit, the stress on these vital resources is expected to escalate to critical levels.[34]

The rapid depletion of groundwater in recent years can be attributed to several interconnected factors: escalating demand for agricultural, domestic, and industrial use; shifts in cropping patterns, particularly the cultivation of water-intensive crops like paddy and cash crops in non-traditional areas; large-scale groundwater extraction due to recurring droughts; subsidized electricity for groundwater extraction in certain states; and the rapid pace of urbanization, which disrupts the natural recharge of aquifers. Together, these pressures are significantly accelerating the depletion of groundwater, making it an urgent issue for sustainable water management.

The sources of the water and sanitation crisis differ between countries, but there are several common themes. First, many countries do not prioritize water and sanitation politically, as reflected in the limited budgets allocated to these sectors. Second, some of the poorest populations are paying disproportionately high prices for water, which highlights the lack of proper water utility services in slums and informal settlements where many impoverished people reside. Third, the international community has largely overlooked water and sanitation in development efforts aimed at meeting the Millennium Development Goals. A central issue behind these challenges is that the individuals most affected by the water and sanitation crisis—especially the poor and

34 S K Sarkar, "Groundwater Management is Critical for Survival," *The Statesmen* ,Sept. 17, 2015.

women—often lack the political influence and voice needed to claim their rights to these essential services.[35]

X. Prohibition of Ownership and Public Trust

The survival of humankind has always been linked to the sufficient availability of water. This has led various societies over time to posit, directly or indirectly, that the link between water and survival imposes a prohibition on the ownership of water *per se*. Indian history seems to indicate that private ownership of flowing water was generally not allowed, even though various forms of private appropriation, such as ownership of tanks, seem to have been allowed from ancient times. This basic proposition was challenged neither by Islamic law nor by colonial laws, since English law also reflected the old Roman law principle that running water could not be owned.[36]

The need for regulation and control within systems that prohibit ownership of water has been recognized early on in legal history. In some ancient governance models, like the *Arthashastra*, it was declared that all water belonged to the king. Meanwhile, Roman Law introduced the idea that even the government should not claim ownership of water. This concept evolved into what is now known as the "public trust" doctrine, as seen in *M.C. Mehta v. Kamal Nath*[37], where the government is entrusted with a fiduciary duty to ensure that water resources are preserved and used judiciously. The public trust doctrine extends the prohibition of ownership to water, giving the government substantial authority over water management.[38]

In practice, however, this grants the government considerable discretion in how it manages water resources. Case law has treated surface water and groundwater separately. In *M.C.Mehta v. Kamal Nath* [39] The court ruled that the public trust principle applies to all 'running

35 Human Development Report 2006, UNDP, Beyond *Scarcity*: *Power, Poverty and the Global Water Crisis*, Preface v (Palgrave Macmillan, New York, 2006).
36 *Supra* note 4 at 23.
37 (1997) 1SCC 388
38 *Ibid*
39 (1997) 1SCC 388

water.' In the *Kesoram* case[40]The principle was extended to groundwater, though this interpretation has yet to be fully confirmed in a case specifically addressing water rights. This judgment discussed the application of the public trust doctrine in the context of legislative power to impose taxes on land, rather than in a direct water-related case.[41]

In *M.C.Mehta v. Kamal Nath*[42] the Supreme Court held that:

The public trust doctrine is fundamentally based on the principle that certain natural resources—such as air, sea, water, and forests are of such critical importance to the public welfare that it would be unjust to allow them to be privately owned. These resources are gifts from nature, and as such, they should be freely accessible to everyone, irrespective of social or economic status. The doctrine imposes a duty on the government to protect these resources for the benefit and enjoyment of the general public, rather than permitting their privatization or commercial exploitation.

Historically, the public trust doctrine under English common law applied only to certain traditional uses of natural resources, such as navigation, commerce, and fishing. However, in recent cases, American courts have broadened the scope of the doctrine, extending its protection to a wider range of natural resources. There is no reason why the public trust doctrine should not be similarly expanded to encompass all ecosystems within our natural resources, ensuring their protection for future generations.

The Hon'ble Court further stated that India's legal system, rooted in English common law, includes the public trust doctrine as a fundamental part of its jurisprudence. According to the doctrine, the state is the trustee of all natural resources that are meant for public use and enjoyment. The general public benefits from resources such as the seashore, running waters, air, forests, and ecologically sensitive lands.

40 2004) 10 SCC 201
41 *Supra* note 4 at 28
42 (1997) 1SCC 388

As the trustee, the state is legally obligated to protect these resources and prevent their conversion into private ownership.[43]

In the absence of specific legislation, the executive, acting under the public trust doctrine, cannot transfer ownership or control of natural resources to private individuals or commercial entities. The inherent value and pristine beauty of natural resources, along with the environment and ecosystems, must be preserved for the public good. The erosion of these resources for private, commercial, or any other use is not permissible, unless the courts, in good faith, determine that such encroachment is necessary for the greater public interest.[44]

The court further affirmed that the public trust doctrine, as outlined in the above judgment, is an integral part of the law of the land. This principle ensures that natural resources are safeguarded for public use, preventing their privatization and ensuring their protection for future generations.

In *State of West Bengal v.Kesoram Industries*,[45] The Hon'ble Supreme Court held that:

Some rights can be granted by individuals holding the same or higher rights, while others can only be granted by the state. However, even the state, in light of the doctrine of 'public trust,' may lack the authority to grant rights over certain matters, such as deep underground water. In the case at hand, the court ruled that deep underground water is owned by the state, as the doctrine of public trust applies to it. A landholder may only have the right to use the land and cannot take any actions that would infringe upon the rights of others. Moreover, the right of use is restricted to the specific purpose for which the land is held, and cannot be used for other purposes. In such matters, no prescriptive right can be acquired under Section 25 of the Limitation Act, 1963. A person must exercise an easementary right—such as the right to air, way, or watercourse—without interruption for 30 years, peacefully and openly,

43 *Id* at para 34.
44 (2004) 10 SCC 201
45 39*Ibid*.

as an easement and as of right. Only then does such a right become absolute and indefeasible.

In *Secretary of State v. P.S.Nageswara*[46], the Madras High Court held that:

A customary right may provide plaintiffs with the benefits they seek, but it does not grant them an exclusive entitlement to all the water in the channel. It does not prevent the government from utilizing the water for other purposes, as long as the plaintiff's customary use is not adversely affected. A prescriptive right can be asserted against another's proprietary rights, but not against the sovereign rights of the state. Under Indian law, the state holds the prerogative to regulate the distribution of water in public streams to ensure its optimal use. The government asserts an absolute right to alter the sources or methods of irrigation that supply water to ryots, and to regulate the use of water from all public or natural streams, with the goal of serving the broader public interest.

In *Tekava Ao v. Sakumeren Ao*[47]held that disputes within village communities, particularly those related to access to land with a water source, do not fall under the category of traditional civil litigation handled by ordinary civil courts in accordance with the Code of Civil Procedure. These disputes are meant to be addressed based on the customs of the village communities, following an informal procedure outlined in the relevant rules. When it comes to natural resources such as land and water, the issue of ownership is often less significant, as the state is unequivocally the sovereign and dominant owner.

XI. Concluding Remarks

In the Indian context, water law has undergone significant changes over the past four decades. Firstly, in the 1970s, the issue of water pollution was seriously addressed. Secondly, water law began prioritizing the social and human dimensions of water, evident in policies ensuring access to drinking water for every individual and the recognition of water as a fundamental right. Thirdly, in managing

46 41Para 386
47 AIR 1936 Mad.923.

groundwater, the limitations of a legal system that left groundwater management solely to landowners have been acknowledged, though regulatory action remains minimal. Fourthly, substantial reforms in both the water sector and water law have been introduced over the last decade as part of broader economic and financial reforms initiated since 1991.

However, much more remains to be done, especially in light of the threats posed to human development by climate change. This is not a distant concern—global warming is already underway, and it has the potential to reverse decades of development progress in many countries. Reduced water supplies in already water-stressed areas, more extreme weather patterns, and melting glaciers present significant challenges. While global efforts to reduce carbon emissions are essential, there is also a critical need for stronger focus on supporting adaptation strategies. Water for livelihoods presents a distinct set of challenges. While the world isn't running out of water, millions of vulnerable people live in regions experiencing growing water stress. Approximately 1.4 billion people live in river basins where water consumption exceeds the rate of natural replenishment. The consequences of overuse are already apparent: rivers are drying up, groundwater levels are declining, and water-dependent ecosystems are quickly deteriorating. The world is depleting one of its most vital natural resources, accumulating an unsustainable ecological debt that future generations will have to bear.

Upholding Justice through the Cab Rank Rule: Safeguarding the Right to Fair Representation

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Abstract

A lawyer is meant to abide by the rules governing the ethics in the practice of the legal profession. The rules connote some duties. Amongst such duties is the duty to accept briefs otherwise known as the Cab Rank rule.[1] Cab Rank Rule is the soul of Professional integrity of Advocate. An advocate must accept every case that falls in the area of his/ her expertise; don't think about the client and allegation. This unshakable principle safeguards the basic structure of justice. It ensures that those accused of even the most heinous crimes can receive competent and impartial legal representation. But in today's times, when public opinion has come to influence the judicial process, especially in sensitive and high-profile cases, the role of advocates is being viewed with intense suspicion, criticism and resentment. This paper takes a deep look at the advocate's role in protecting justice, breaking down the many problems lawyers face, especially women who have their own set of problems in these troubled waters. We talk a lot about how important the cab rank rule is and how it makes it hard for lawyers to do their jobs when they have to deal with public backlash, moral outrage, and a society that is becoming more judgemental. This paper looks closely at the recent, horrifying murder of a 31-year-old trainee doctor in Kolkata to talk about the ethical issues surrounding the cab rank rule, the threats that advocates face in their personal and

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1 Legborsi Tony-Francis, "The Cab Rank Rule: A Legal Practitioner's Role in its Observance With Respect to Cases of Murder or Manslaughter" Achievers University Law Journal Volume 3 Issue 1 (2023)

professional lives, and the urgent need for stronger protections to keep the legal system honest.

Key words: Cab Rank Rule, Gender and Law, Legal Ethics, Legal System Integrity, Public Backlash.

Introduction:

Justice and fairness are not just nice things to have in a working legal system; they are the most important, non-negotiable principles that must be upheld through an unrelenting, impartial administration of the law. Advocates, who are often seen as the steadfast guardians of these principles, have a huge professional responsibility to make sure that everyone, no matter their social status, perceived guilt, or the severity of the charges against them, gets fair and competent legal representation. The cab rank rule is one of the most important but often misunderstood rules in the legal field that makes this professional duty even stronger. This rule makes it mandatory for advocates to take on any case that falls within their professional capacity, no matter how serious the crime or how bad the public perception of the case is. The cab rank rule is what keeps the legal system true to the idea that everyone is "innocent until proven guilty." It makes sure that no matter how much people hate someone, they can still get justice.

However, in recent years, especially with the rapid growth of social media, where the public can dissect and condemn every case long before it goes to court, the moral and ethical role of advocates has come under more and more scrutiny. The public's desire for quick judgement often clashes with the advocate's duty to uphold due process. This creates a situation where defending a controversial client can lead to public shame and even being shunned. The dangerous mix of legal duty and public opinion was very clear in the horrible case of the 31-year-old trainee doctor's brutal rape and murder at RG Kar Medical College in Kolkata. This case caused outrage and protests across the country, drowning the legal process in a flood of public anger.[2] In this high-profile case, female

2 Nandini Manhas, "An Analysis Of Kolkata Rape And Mrder Case At R.G. Kar Medical College And Hospital" *International Journal of Engineering,*

lawyers who represented the state had to deal with more than just legal problems. They also had to deal with harassment, threats, and a hostile public. This serves as a reminder of how vulnerable women in the legal profession are, especially when they are defending people in cases where the public has already made up its mind about the moral issue.

This paper tries to peel back the layers of the advocate's role in the legal system to show the moral and professional issues that make their work so complicated, especially in high-profile, contentious cases. It looks at how important the cab rank rule is for keeping the legal process fair and making sure that lawyers can do their jobs without worrying about being judged morally or facing public backlash. The paper goes into great detail about the moral problems that come up when lawyers represent clients who are controversial or morally wrong. It also talks about the extra burden that female lawyers face, as they often have to deal with both professional and gender-based harassment.

The Role of Advocates in the Legal System

Advocates are fierce, unyielding sentinels of justice who stand right in the middle of the storm, where the law meets public anger. They are in the middle of the constant roar of society's demand for fairness and the cold, clinical accuracy of the courts. It's like walking a tightrope, making sure the scales of justice don't tip over into chaos. The Latin phrase "*Ei incumbit probatio qui dicit, non qui negat*" means the burden of proof lies on the one who asserts, not on the one who denies; as explained by Supreme Court of India that every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of

criminal jurisprudence in India [3] This is where the idea of "innocent until proven guilty" comes from. This saying means "presumption of innocence until proven guilty." This idea is found in many legal systems around the world, including India's. The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023[4], stresses the importance of a fair trial and legal proceedings. Similarly, under Section 104 (Burden of Proof) of the Bharatiya Sakshya Bill (BSB) 2023[5]The prosecution has the burden of proof, which upholds the principle of innocence until proven guilty. Section 105 (Presumption of Innocence) is directly related to this principle because it says that the accused does not have to prove his innocence unless the law requires it. In the same way, in ***Subedar v. State of Uttar Pradesh***[6], the Supreme Court of India made it clear that legal representation is a key part of justice under Article 21 of the Indian Constitution. This article protects the right to life and personal freedom.

But this is where the strange idea of "professional detachment" comes in: an advocate's armour of impartiality protects them from their own biases and prejudices as they navigate the rough waters of justice. They don't sit on the bench, and they aren't the ones who are judging their clients' morals. They only have to follow the law. When people hear about high-profile cases that are full of terrorism, brutal sexual violence, and cold-blooded murder, they often get confused about this idea. The recent rape case in Kolkata, where lawyers defending the state of West Bengal were bullied and criticised in public, shows how difficult it is to follow the Cab Rank Rule in India. Some people in the public and media criticised the lawyers who worked for the state for defending what was seen as an unpopular client in this case. The lawyers were under a lot of pressure, threats, and harassment, which showed how hard it is to follow the Cab Rank Rule in a tense and divided situation. In a famous case, The appellant in *Josiah v. The State*[7] was charged with armed

3 State of U.P. v. Naresh and Ors 2011 AIR SCW 1877
4 Bharatiya Nagarik Suraksha Sanhita, No. 1 of 2023, Acts of Parliament, 2023 (India).
5 Bharatiya Sakshya Bill, No. 2 of 2023, Acts of Parliament, 2023 (India).
6 *Criminal Appeal No.886 of 2020.*
7 (1985) 1 NSCC 132.

robbery and murder along with two other people. Both of the crimes were punishable by death. The other two, who were represented by lawyers, were let go because their lawyers said there was no case against them. The person who appealed did not have a lawyer. The appellant testified in his own defence and was properly cross-examined. That was after the judge had written down that the accused's rights were explained to him. He was found guilty of the crime and given a death sentence by hanging. The Court of Appeal turned down his appeal. In another appeal to the Supreme Court, his lawyers said that the trial broke sections 287(1), 288 of the criminal procedure laws of Bendel State and section 33(6) of the 1979 Constitution. The Court said that the person who was accused of a capital crime had the right to have a lawyer assigned by the court if he couldn't afford one. So, according to section 33(6)(c) of the 1979 Constitution, the appellant did not get a fair trial, as Per Oputa JSC said that "justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only two-way traffic. It is really a three-way traffic. Justice for the appellant accused of a heinous crime of murder, justice for the victim, the murdered man, the deceased whose blood is crying to Heaven for vengeance and finally justice for the society at large."

As shown in *Nandini Sundar v. State of Chhattisgarh,*[8] the world of legal battles can be a stage for moral complexity. Sundar, a human rights activist and academic, accused the Chhattisgarh government of giving weapons to vigilantes to abuse indigenous tribes. The backlash was quick and harsh, and her lawyers were called supporters of the Naxalite rebels. Still, Sundar's supporters, who weren't bothered by the public's anger, stayed focused on the human rights violations at the heart of the case and kept pushing the state's unconstitutional actions. A show of professional distance in full swing, with the cab rank rule acting as an "invisible hand" that pushes lawyers to do their jobs even when society and the state are putting a lot of pressure on them.

8 *Nandini Sundar v. State of Chhattisgarh*, (2011) 7 SCC 547.

Advocates in this big theatre don't just follow the law; they also protect the very idea of democracy. In democratic societies, where the rule of law and individual rights are very important, advocates use a powerful sword to make sure that even the most hated or vile people can get their day in court without being punished by the mob or the state. They are the checks and balances on state power, making sure that prosecutions don't go wrong just because of public opinion or bias in the courts.

The Cab Rank Rule: Ensuring Fair Representation

This seemingly harmless professional duty is very important. It forces lawyers to take on cases they are qualified for, as long as they are available and the client can pay their fees. It can be thought of as the legal profession's own taxi service, where you get in the cab first and get represented no matter how bad or controversial your case is. It's the cabbie's code of ethics brought into the court system, and its effects are huge in making sure that everyone is treated fairly, especially those clients that society would rather see go away.[9]

This rule isn't just a suggestion in common law countries like India; it's the very basis of legal ethics. The cab rank rule says that lawyers can't turn their backs on clients because of personal biases, the nature of the charges, or the unclear waters of social standing. The cab rank rule is most useful when things are really bad. When the news is full of "terrorists," "murderers," or any other terrible crime and people are ready to fight, the advocate steps in. The rule works best when people are so angry that the air crackles with it. The advocate stands firm against the tide, making sure that the accused gets all of their legal rights by making sure that the principle of "innocent until proven guilty" isn't trampled, crushed, or destroyed by the rush of judgement.[10]

9 Andrew Higgins, *Rebooting the Cab Rank Rule as a Limited Universal Service Obligation,* (2017) 20 Legal Ethics 201.

10 John Flood and Morton Hviid, The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market, *SSRN* (2013).

But, and there's always a but, things are never that clean and simple. There are even cracks in the cab rank rule, which is supposed to be unbreakable. An advocate doesn't have to take a case if they don't know what to do, don't understand it, or are facing a conflict of interest. And if the client can't pay, the rule goes away. And in cases where legal aid is needed, the state steps in and ignores the rule. The Advocates Act of 1961 and the Bar Council of India Rules make this rule real in India. They make sure that everyone has the right to legal representation, which is further protected by Article 22(1) of the Indian Constitution, which says that everyone has the right to legal counsel if they are arrested.

The recent infamous case in Kolkata, where Sanjay Roy was the main suspect in the brutal rape and murder of a trainee doctor at RG Kar Medical College, is a real-life example of this kind of thing. The country's anger was clear; it was so strong that many lawyers refused to represent Roy. But then, in the middle of the storm, advocate Kabita Sarkar stepped up and took the case to the Sealdah court. She did it not because she knew the accused well, but because the cab rank rule said she had to. This was the rule in action, in all its raw truth. In this chaos, female advocates for the State of West Bengal were attacked with hate speech, threats, and harassment. This is a dark reminder that being an advocate is not for the weak. This story, however, isn't just about India. Advocates around the world face the same i.e. threats, harassment, and sometimes even violence. Advocate Abbas Kazmi, who first acted as Kasab's lawyer, encountered substantial pressure from both the public and his colleagues. In the end, Kasab was assigned a legal aid lawyer.[11] Dinah Rose QC published a statement that she would not withdraw from appearing before the Privy Council on behalf of the government of the Cayman Islands to argue that the Bill of

11 Vivek V. Yadav, The Cab Rank Rule: A Critical Examination of Its Role in Legal Ethics and the Indian Judiciary, Lawful Legal, September 22, 2024.

Rights in the Caymanian Constitution does not guarantee same-sex couples the right to marry. Ms Rose has received 'pressure in the form of abuse and threats', while former justice of the South African Constitutional Court Edwin Cameron accused her of 'prosecuting a homophobic case to deny LGBTIQ persons in the Cayman Islands equal rights'.[12] An advocate's job is more than just a job; it's a moral and legal compass that guides them through the stormy seas of public backlash and state scrutiny. They aren't good or bad people, and they don't make moral decisions for others. In the most basic yet most important way, they are the embodiment of due process.

Ethical and Moral Considerations in Controversial Cases

The cab rank rule is like a moral battlefield where duty and morality often clash. The question that comes up a lot is whether advocates should be completely protected from the moral storm that surrounds the cases they take. The principle of professional detachment says, "Yes, absolutely don't let personal beliefs seep in," because that's the only way to keep the system's integrity, right? The problem is that critics always have a "but." They don't usually believe this principle. They say that this "cab rank principle" makes it too easy for lawyers to avoid moral responsibility, letting them off the hook for the consequences of defending the indefensible. Critics ask how lawyers who are supposed to protect the law can represent a terrorist, a murderer, a rapist, and still sleep at night. When your morals are screaming "No," shouldn't you be able to say it?

The 2008 Ajmal Kasab case,[13] After the refusal of Advocate Abbas Kazmi due to social pressure, he has been allotted a lawyer due to legal aid to the accused. The question was how could anyone stand up in court and defend a man like that? But there was an advocate there, standing firm and saying that the accused still deserves a fair trial, even in the worst and most horrible cases. Not a puppet show, but a real defence.

12 Matthew Happold, "The cab rank rule: English barristers in foreign courts" Ethics PROFESSION 12 Feb, 2021, P.19.

13 *State of Maharashtra v. Ajmal Kasab*, (2012) 9 SCC 1

That's the heart of the justice system. Without it, the system is just a machine: cold, random, and breaking down under the weight of public anger. The Kasab case didn't just push the cab rank rule to its limits; it also made people think about what it means to defend the indefensible.

The case of *MJ Akbar v. Priya Ramani*[14] was very public, but the battlefield was very different and just as dangerous. Akbar was accused of sexual harassment at the height of the #MeToo movement, and it felt like walking through a minefield. This wasn't just a legal matter. This was the movement against years of unchecked power and men who thought they could do anything. The public wasn't just watching; they were calling for justice. People who defend the accused in *MeToo* cases are facing the full force of society's anger. An advocate needs to make a balance between defending their client and thinking about how the case will affect society as a whole and the general public. In the famous heinous rape case of Delhi, known as Nirbhaya Rape case (2012), despite the horrific nature of the crime and intense societal outrage, the accused were given legal representation. Advocates know, even though they were being watched and criticised, they did their job to make sure due process was followed with establishment of Balance between their duty and pre-made opinion of the society. Asaram Bapu, a powerful religious leader accused of sexual assault, was a difficult case because the challenge was to separate religious influence from legal obligation. The Advocate in this case was regularly threatened. He didn't talk about feelings or respect; they talked about the facts and the law. In the same way, the case against Arnab Goswami involved media freedom and political issues. Instead of using media stories or public opinion, the advocates based their arguments on constitutional rights. In high-profile, controversial cases, female advocates have to deal with both the case itself and the harassment, threats, and even violence that come with it. Examples for these threatens to female advocates are many

14 CNR No. DLCT 120000252019.

more like as Kathua Rape case; Gujrat Riot Case, Delhi riots cases, where the political and communal sensitivities were high, and public opinion was heavily polarised. Their insistence on due process and the rule of law in such hostile environments has earned them respect, but it has also made them targets of trolling and personal attacks, especially on social media. These examples show that advocates need to be able to rise above their feelings and balance the pressure of society with their duty. Even when they are representing clients who aren't very popular, they must use evidence, uphold constitutional values, and not abuse the legal system. The idea is simple but strong: not only must justice be done, but it must also be seen to be done. As officers of the court, advocates are very important for keeping democracy alive. They do this not by making the public happy, but by protecting the legal rights of everyone, whether they are guilty or innocent. Fair trial and fair defence are the most important things to keep democracy alive in the country. Justice must not only be done, but also seen to the general public of a democratic country.

The Cab Rank Rule doesn't work as well in practice because it takes so long for Indian courts to reach a decision. This rule says that lawyers must take any case they are qualified to handle, no matter who the client is or what the crime is. This rule is often hard to follow in a court system that is already too busy. For example, the Asaram Bapu sexual assault case lasted for several years. The long trial not only tried the public's patience, but it also put a lot of stress on both the prosecution and defence lawyers. People in society often criticise lawyers who take on such controversial cases for "defending the guilty," and that criticism gets worse when justice is delayed. People think that the delay is a sign of guilt, which makes lawyers less likely to take on these kinds of cases in the future, even though the Cab Rank Rule says they have to. So, delays in the courts not only deny people timely justice, but they also put advocates' professional integrity and safety at risk, especially those who fight for the right to a fair trial.

Legal Aid and Access to Justice:

One of the most important parts of the justice delivery system of India, is legal aid. It could be called a lifeline for the system. When money is involved and people who don't have it are accused, it keeps the scales of justice from tipping into chaos. The system is more like a maze than a machine. The Legal Services Authorities Act of 1987 set up a legal system in India that gives free legal help to people who can't afford it. The point of this is that no one should have to face the harsh machinery of the legal system alone just because they couldn't afford to pay. The Indian Constitution says that "*The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities*"[15] It means the government must also step in to make sure that no one is denied justice because they don't have enough money.

The problem starts when the mob goes after the accused. Many times Private lawyers start to disappear because they are afraid of backlash, damage to their reputation, or being linked, even in a small way, to an unpopular defence. Legal aid is there to help in this situation. The Advocates Act of 1961 set rules for how lawyers should behave, and the Bar Council of India Rules 1961 set rules for how lawyers should behave. Under Chapter II, Part VI, Rule 11, "except for some special circumstances, an advocate shall not refuse to take any case in any court or tribunal." This makes it clear that the cab rank rule is not optional; it is fundamental. Lawyers do not get to choose their clients. This right is not an exception; it belongs to everyone. The same problem is causing problems for legal systems all over the world. Legal aid all over the world is fighting the same fight, getting worn down by the number of cases, and justice is hanging by a thread.

15 Article 39A, The Constitution of India.

But some countries are fighting back by making changes, giving more money, and giving more training. Without that, the promise of legal help is just a promise. And promises don't mean much when things are unfair.

Conclusion:

People often don't understand the cab rank rule or the work ethics of lawyers, especially when they defend the most hated and controversial people. That's why it's so important to have the right trail, so that justice can be done in the most fair way possible, with no room for injustice in any part of it. The cab rank rule is very important for this reason. These rules and moral lines are what keep the legal system running. They make sure that justice is not used as a weapon by the majority, but as a shield for everyone, even in the worst cases. The threats and harassment that women in the profession face are a clear sign that the system needs to do a lot more. Not just with words, but also with actions, legal bodies like the Bar Council of India need to do more. Better protections for advocates, more public education about what they do, and a promise to keep these professionals safe from the storms they will inevitably face. There are problems with the cab rank rule. Not one system is. But it stands as a beacon to make sure that the courtroom isn't just a place where the rich or famous get justice. The next thing to do is make sure it stays that way. We protect the fair legal process by protecting the advocates. And most importantly, make sure the system is fair, even if the world outside the courtroom isn't. That's all that makes the difference between justice and revenge in the end.

Law Commission Reports And Reform In Lower Judiciary- A Critical Analysis

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Abstract

This article explores the significant role of the Law Commission of India in recommending changes for the lower court, despite obstacles such as insufficient infrastructure, backlog of cases, and corruption that impede the dispensation of justice. By examining more than two hundred papers, particularly those impacting the lower court, the analysis evaluates the suggestions for judge recruitment, infrastructure, case administration, and alternative conflict resolution, among other topics. Although there have been detailed plans to improve the judiciary's effectiveness and transparency, the execution has been irregular and unreliable, mostly because of political inaction, opposition from stakeholders, and changing legal and socio-economic conditions. The study suggests that the Law Commission's work is crucial for imagining judicial change, but true advancement requires revised suggestions that consider present circumstances, as well as sincere political determination and cooperation from stakeholders. The plan recommends a methodical strategy to carry out pending suggestions, regularly assess and revise reform ideas, and guarantee thorough monitoring and assessment to revitalize the lower court, enhancing its responsiveness to current issues and public expectations. The critical analysis tries to emphasize the discrepancy between proposal and implementation and provide strategies to bridge it in order to create a more efficient, transparent, and accessible judicial system at the grassroots level.

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Key words: Law Commission Of India, Judicial Reform, Lower Judiciary Challenges, Implementation Gaps, Alternative Dispute Resolution, Stakeholder Engagement

Introduction

The lower court plays a crucial role in the judicial system of any nation, serving as the primary interface for most litigants and the general public. In several nations, like India, the lower courts encounters various obstacles, such as insufficient infrastructure, lack of judges and personnel, backlog of cases, absence of openness and accountability, and corruption. The problems impact the quality, efficiency, and accessibility of justice delivery at the grassroots level. Constant reform and development in the lower courts are necessary to satisfy the hopes and ambitions of the people.

The Law Commission of India is a statutory organization responsible for researching and providing recommendations on many elements of law and justice. It has been helpful in identifying issues and proposing remedies for the lower courts. The Law Commission has presented many studies on different elements of the lower judiciary, including judge nominations, transfers, promotions, service conditions, wages, pensions, infrastructure, case administration, court costs, legal aid, and alternative dispute resolution. The papers demonstrate the Law Commission's vision and actions to improve and enhance the lower courts in India.

The Law Commission's proposals have been implemented slowly and inconsistently due to the need for political will and collaboration from federal and state governments, the higher courts, and other stakeholders. Furthermore, several suggestions may have become obsolete or useless as a result of the evolving socio-economic and legal landscape. Hence, it is necessary to evaluate and revise the Law Commission's findings to determine their influence and efficiency on the subordinate courts. This paper intends to critically analyze significant

findings from the Law Commission about the lower court and provide methods for reform and improvement.

Law Commission Reports on Lower Judiciary

Since its establishment in 1955, the Law Commission has presented over 200 reports on different facets of law and justice. Among them, a minimum of 20 reports focus on the lower courts, either directly or indirectly. Below are short discussions of several noteworthy reports.

- 14th Report on Reform of Judicial Administration (1958)[1]: This was the first comprehensive study on the lower judiciary, including elements like judicial officials, court workers, court buildings, court costs, legal assistance, and more. The study suggested establishing an All India Judicial Service (AIJS) to hire and educate judicial officials for the subordinate courts. The proposal also recommended creating a National Judicial Service Commission (NJSC) to supervise the selection, reassignments, advancements, and conduct of judicial officials. The study recommended separating the administrative and judicial powers at the district level, eliminating the position of District Magistrate, and establishing a Chief Judicial Magistrate. The research suggested implementing a standard civil code, streamlining procedural regulations, and encouraging alternative dispute resolution techniques.
- 58th Report on Structure and Jurisdiction of the Higher Judiciary (1974)[2]: The paper discussed the organization and authority of the Supreme Court and the High Courts, with consequences for the subordinate courts. The study suggested establishing intermediate courts of appeal to alleviate the workload of the High Courts and accelerate case resolution. The research proposed streamlining the geographical

1 Law Commission of India, 14th Report on Reform of Judicial Administration, 1958, available at http://lawcommissionofindia.nic.in/1-50/report14.pdf (last accessed on 10/12/2023).

2 Law Commission of India, 58th Report on Structure and Jurisdiction of the Higher Judiciary, 1974, available at http://lawcommissionofindia.nic.in/51-100/report58.pdf (last accessed on 15/01/2024).

and financial jurisdiction of the subordinate courts, as well as increasing their authority and responsibilities.

- 77th Report on Delay and Arrears in Trial Courts (1979)[3]: The study focused on the issue of delay and arrears in the lower courts, seen as a primary factor contributing to public discontent with the judicial system. The analysis examined reasons causing delays and arrears, including insufficient judges and personnel, poor infrastructure, complicated and antiquated rules and processes, and frivolous and vexatious lawsuits. The research proposed many strategies to address the issue, including augmenting the quantity of judges and personnel, enhancing the infrastructure, streamlining the rules and processes, and implementing fines and punishments for frivolous and vexatious litigants.

- 116th Report on Formation of an All India Judicial Service (1986)[4]: The report restated the suggestion from the 14th report to establish an AIJS for the recruitment and training of judicial officers for the lower courts. The paper contended that the All India Judicial Service (AIJS) would guarantee consistency, excellence, and effectiveness in the lower courts, as well as provide a reservoir of skilled individuals for the upper judiciary. The study outlined the criteria, procedures, and service conditions for selecting, training, and managing AIJS members.

- 120th Report on Manpower Planning in Judiciary: A Blueprint (1987)[5]: The research focused on personnel planning in the judiciary, namely determining the ideal quantity and caliber of judges and staff

3 Law Commission of India, 77th Report on Delay and Arrears in Trial Courts, 1979, available at http://lawcommissionofindia.nic.in/51-100/report77.pdf (last accessed on 13/01/2024).

4 Law Commission of India, 116th Report on Formation of an All India Judicial Service, 1986, available at http://lawcommissionofindia.nic.in/101-169/report116.pdf (last accessed on 10/06/2023).

5 Law Commission of India, 120th Report on Manpower Planning in Judiciary: A Blueprint, 1987, available at http://lawcommissionofindia.nic.in/101-169/report120.pdf (last accessed on 10/11/2023).

needed for the courts to operate effectively. The research suggested a methodical and logical approach to personnel planning, using factors like as workload, disposal rate, and judge strength in the courts. The study suggested establishing a permanent organization, the National Court Management System (NCMS), to oversee and evaluate the staffing and efficiency of the courts.

- 221st Report on Need for Justice-dispensation through ADR etc. (2009)[6]: The paper highlighted the need of encouraging alternative dispute resolution (ADR) procedures including arbitration, conciliation, mediation, lok adalats, etc., to decrease the backlog and delays in the courts and to provide prompt and cost-effective justice to the parties involved. The report assessed the current legal framework and institutional mechanism for Alternative Dispute Resolution (ADR) in India. It recommended various reforms and enhancements, including the implementation of a comprehensive ADR law, the creation of a National ADR Authority, the incorporation of ADR into the court system, and the training and certification of ADR professionals.
- 230th Report on Reforms in the Judiciary - Some Suggestions (2009)[7]: The study proposed improvements in the judiciary based on feedback from stakeholders including judges, attorneys, and academics. The study addressed many areas including judge nominations, transfers, promotions, accountability, infrastructure, case administration, court costs, and legal assistance. The research emphasized the need of establishing a National Judicial Commission (NJC) to supervise the selection and relocation of judges in the higher judiciary, as well as a

6 Law Commission of India, 221st Report on Need for Justice-dispensation through ADR etc., 2009, available at http://lawcommissionofindia.nic.in/reports/report221.pdf (last accessed on 10/03/2024).

7 Law Commission of India, 230th Report on Reforms in the Judiciary - Some Suggestions, 2009, available at http://lawcommissionofindia.nic.in/reports/report230.pdf (last accessed on 10/02/2024).

National Arrears Grid (NAG) to track and diminish the backlog and delays in the courts.

- 245th Report on Arrears and Backlog[8]: Increasing the number of judges or magistrates in the judiciary (2014): This research examined the problem of arrears and backlog in the courts, which had become concerning, impacting the integrity and legitimacy of the judicial system. The analysis assessed the present and future need for judges in subordinate courts by analyzing the backlog, resolution, and filing of cases. The study suggested promptly appointing more judges to reduce the backlog in a timely manner and establishing a permanent framework, known as the Indian Courts and Tribunals Service (ICTS), to evaluate and reassess the need for judicial personnel regularly.Law Commission reports provide comprehensive analyses of existing laws and propose amendments or new legislation aimed at addressing gaps, inefficiencies, and injustices within the judicial system. By conducting in-depth studies, the Commission identifies systemic issues that hinder the functioning of lower courts, such as case backlog, procedural delays, and inadequate infrastructure.

- One notable report is the **114th Report**[9] **on the "Reform of Judicial Administration"**, which emphasized the need for judicial accountability and suggested measures to enhance the efficiency of the lower judiciary. The report advocated for the establishment of fast-track courts, the simplification of procedures, and the introduction of alternative dispute resolution mechanisms. These recommendations have influenced legislative changes and practices in various states, leading to improved access to justice.

8 Law Commission of India, 245th Report on Arrears and Backlog: Creating Additional Judicial (wo)manpower, 2014, available at http://lawcommissionofindia.nic.in/reports/Report245.pdf (last accessed on 12/01/2024).

9 Law Commission of India. (1986). *114th Report on the Reform of Judicial Administration*. Retrieved from Law Commission of India Website

Relevant Case Laws

Several landmark judgments reflect the impact of Law Commission recommendations on the functioning of the lower judiciary. For instance, in **K.S. Puttaswamy v. Union of India (2017)**[10], the Supreme Court underscored the importance of timely justice and highlighted the need for reforms in the judicial process, which echoed the sentiments of the Law Commission's reports. The Court emphasized that delays in the judicial system could infringe upon the right to life and personal liberty, thereby reinforcing the urgency for reform.

Additionally, in **Madhav Rao Scindia v. Union of India (1971)**[11], the Supreme Court acknowledged the necessity for judicial independence and the importance of an efficient lower judiciary in upholding constitutional rights. The recommendations made by the Law Commission regarding judicial appointments and accountability mechanisms have been instrumental in shaping the discourse around these issues.

Judicial Appointments and Accountability: The Supreme Court's judgment in **Supreme Court Advocates-on-Record Association v. Union of India (2016)**[12], which upheld the National Judicial Appointments Commission Act's constitutionality, reflects the ongoing discourse around judicial accountability that has been championed by the Law Commission.

Impact and Effectiveness of Law Commission Reports

The Law Commission studies on the lower judiciary have played a crucial role in bringing attention to the problems and obstacles encountered by the lower courts, as well as proposing potential answers and improvements. The studies have impacted the policy and legislation-making process, as well as the court judgments and instructions

10 https://main.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_26-Sep-2018.pdf

11 https://main.sci.gov.in/jonew/judis/1271.pdf

12 https://main.sci.gov.in/jonew/judis/43070.pdf

regarding many parts of the lower judiciary. The studies' influence and efficacy have been constrained by causes including inadequate execution, stakeholder opposition, changing circumstances, and deficiencies in the reports. Below, some of these variables are explored.

- The primary obstacle that has hindered the influence and efficiency of the Law Commission findings is the failure to execute the recommendations by the relevant authorities. The execution of the suggestions relies on the political determination and collaboration of the national and state governments, the higher courts, and other stakeholders, which is often deficient or insufficient. The suggestion to establish an AIJS in 1958 has not been put into effect yet, despite warnings and instructions from the Law Commission, the Supreme Court, and the Parliament. The proposal to create a National Judicial Commission (NJC) in 2009 has been delayed due to the disputes and legal battles surrounding the National Judicial Appointments Commission (NJAC) Act of 2014, which was deemed unconstitutional by the Supreme Court. The lack of resources, including cash, infrastructure, and staff, hinders the execution of the suggestions aimed at reforming and improving the lower court.
- Stakeholder resistance, including judges, lawyers, litigants, and the public, with vested interests or concerns about proposed reforms, has impeded the impact and effectiveness of Law Commission reports. In 1958, a suggestion was made to divide the administrative and judicial roles at the district level. However, state governments have opposed this idea since they are hesitant to relinquish their authority and impact on district administration and magistracy. In 2009, the suggestion to encourage ADR procedures has been received with opposition from attorneys who are concerned about potential financial losses and a decrease in clients as cases are redirected away from the courts. The suggestion to apply fees and sanctions to frivolous and vexatious litigants, proposed in 1979, has been met with opposition from litigants and the public who saw it as impeding their access to justice and discouraging their valid complaints.

- The significance and usefulness of Law Commission findings have been constrained by changing socio-economic and legal situations, which may have made certain suggestions outmoded or irrelevant. The recommendation to establish intermediate courts of appeal in 1974 may no longer be relevant because specialized tribunals like the National Green Tribunal, the National Company Law Tribunal, and the National Consumer Disputes Redressal Commission have assumed some of the appellate responsibilities of the High Courts. The suggestion to implement a standard civil code proposed in 1958 may no longer be relevant owing to new concerns like gender justice, personal laws, minority rights, etc., which need a more detailed and inclusive strategy.
- The influence and efficacy of the Law Commission reports have been hampered by gaps and deficiencies within the reports, thereby diminishing their credibility and acceptance. Some studies may have been inaccurate or invalid due to the use of insufficient or obsolete data and information, impacting the precision of the analysis and recommendations. The 245th report, which used 2012 data, could have overestimated the need for judges in subordinate courts due to the substantial growth in case backlog and new case filings since that time. Some reports may have been biased by the personal or ideological perspectives of Law Commission members, thereby compromising the objectivity and impartiality of the findings. The 221st report, written by the former Chairman of the Law Commission, Justice A.R. Lakshmanan, may have shown his personal bias towards ADR procedures, which may not have been supported by other Law Commission members or stakeholders.
- Use of Technology: The COVID-19 pandemic accelerated the adoption of technology in the judiciary. The Law Commission's earlier recommendations regarding e-filing and virtual hearings gained momentum, leading to significant reforms in how lower courts operate. This shift not only improved access to justice but also enhanced the efficiency of court proceedings.

Challenges and Future Directions

While the Law Commission has made significant contributions to the reformation of the lower judiciary, challenges remain. Implementation of its recommendations often faces bureaucratic hurdles and resistance from entrenched interests. Additionally, there is a need for continuous monitoring and evaluation of the reforms to ensure their effectiveness.Moving forward, it is crucial for the Law Commission to engage with stakeholders, including legal practitioners, civil society organizations, and the public, to gather feedback on the reforms. This collaborative approach can lead to more effective solutions tailored to the needs of the justice system.

Conclusions and Suggestions

The Law Commission of India has significantly contributed to the enhancement and improvement of the lower judiciary in India by study and suggestions on several elements of the lower courts. The Law Commission reports provide vital information, insight, and assistance to policy makers, lawmakers, judges, attorneys, academics, and the public about difficulties and challenges encountered by the lower court, along with potential remedies and changes. The influence and efficacy of the Law Commission findings have been constrained by causes including inadequate execution, stakeholder opposition, changing circumstances, and deficiencies in the reports. Hence, it is necessary to evaluate and revise the Law Commission findings to determine their influence and efficiency on the subordinate courts. Following the research provided, here are some recommendations for further reforming and enhancing the lower courts.

- Implementing the recommendations of the Law Commission reports that have been neglected for a significant period is crucial and should be prioritized by the relevant authorities. Implementing the proposals need the political determination and collaboration of the national and state governments, the higher court, and other stakeholders. This may be accomplished by fostering consensus and conversation

among them, and by addressing their fears and apprehensions. Implementing the recommendations necessitates allocating sufficient resources, including funds, infrastructure, and manpower. This can be accomplished by increasing the budget and judicial infrastructure for the lower judiciary, as well as by filling vacancies and creating new positions for judges and staff in the lower courts.

- Recommendation: It is advised to evaluate and update the Law Commission reports that have become obsolete or irrelevant owing to changes in the socio-economic and legal landscape, either by the Law Commission or another competent institution. Reviewing and updating reports involves collecting and analyzing current and trustworthy data through surveys, studies, consultations with stakeholders, and utilizing technology and tools like artificial intelligence and big data. Reviewing and updating reports involves considering and integrating new issues and challenges, such as the effects of the COVID-19 pandemic, the digitalization of the courts, and the protection of human rights. This can be accomplished by taking a comprehensive and interdisciplinary approach.
- Monitoring and evaluating Law Commission reports that have been fully or partly implemented by the Law Commission or another responsible entity is recommended. Monitoring and evaluating reports involves measuring and assessing the results and implications of recommendations using indicators, benchmarks, and feedback mechanisms including disposal rate, clearance rate, and satisfaction rate. Monitoring and evaluating reports involves identifying and correcting any gaps or deficiencies by using best practices, standards, and innovative methods including peer review, comparative analysis, and pilot initiatives.

In conclusion, the Law Commission of India has significantly contributed to the reform and enhancement of the lower judiciary in India by presenting many studies on different elements of the lower courts. The influence and efficacy of the Law Commission findings have

been constrained by many circumstances that must be acknowledged and resolved. Hence, it is necessary to execute, assess, revise, oversee, and analyze the Law Commission recommendations, and propose actions for enhancing and refining the lower courts in India.

Right to Health of Tribal Women in Paniya tribe Wayanad District: A Socio-Legal Study

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Abstract

This paper explores the right to health of tribal women in Kerala, focusing on Wayanad district. By examining the accessibility of healthcare, reproductive health, nutrition and food security, cultural and social factors, legal awareness and access to justice, environmental factors, and community support, this research aims to identify the current health status of tribal women. The findings are based on a pilot study involving 70 tribal women. The study reveals significant disparities in health outcomes and highlights the need for comprehensive socio-legal interventions to improve the health and well-being of tribal women in Wayanad.

***Key words*:** Right to Health, Tribal women, Paniyatribe,Healthcare Accessibility, Socio-Legal Framework

Introduction

An individual's state of health is characterized by his or her physical, mental, and social wellbeing, not just by the absence of disease or infirmity. It is widely recognized that the right to health is an essential component of living a life of dignity and ensuring overall good health. In India, the health status of tribal communities remains a critical concern, with tribal populations experiencing disproportionately higher levels of morbidity and mortality compared to non-tribal populations. In

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particular, tribal women face compounded health challenges due to their gender and socioeconomic status.

Kerala, often celebrated for its commendable health indicators and progressive health policies, is home to a significant tribal population, especially in the Wayanad district. Despite the state's overall achievements in healthcare, tribal communities in regions like Wayanad lag behind in healthoutcomes. Various socioeconomic, cultural, and environmental factors impact the health of tribal women in this district, which demands a nuanced and focused study[1].

The paniya tribe primarly located in Kerala's Wayanad district, is one such marginalised group .Kerala often applauded for its impressive health indicators, revels an irony when it comes to the tribal communities. Tribal women specially from paniya tribe encounter various challenges in accessing healthcare,maintain nutritional security and ensuring reproductive health. These challenges has been compounded by a lack of legal awareness and systemastic socio-legal barriers in realizing of their health rights[2] .

Tribal women in Wayanad encounter numerous obstacles in accessing healthcare services, ranging from geographical isolation to socio-cultural barriers. Their reproductive health, nutritional status, and overall well-being are adversely affected by limited healthcare accessibility, traditional health practices, and socio-economic deprivation[3]. Further, legal and environmental factors contribute to their health challenges, exacerbating their vulnerability.

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1 Haseena, K., Joy, S., George, K., & Joy, T "Reproductive health problems and its determinants among the tribal women in Wayanad, Kerala; a cross-sectional study " 49 *Indian Journal of Community Medicine: Official Publication of Indian Association of Preventive & Social Medicine*, S21 - S22. (2024). https://doi.org/10.4103/ijcm.ijcm_abstract74.

2 Sumant Badami," Between medicine and manthavady: agency and identity in Paniya health" 1(2) *South Asian History and Culture* 301-314 (2010) doi: 10.1080/19472491003593043

3 S. Mohandas et al. "Nutritional Assessment of Tribal Women in Kainatty, Wayanad: A Cross-Sectional Study." 44 *Indian Journal of Community Medicine : Official Publication of Indian Association of Preventive & Social Medicine* S50 - S53 (2019): https://doi.org/10.4103/ijcm.IJCM_39_19.

This study aims to provide a comprehensive assessment of the health status of paniya women in Wayanad district, focusing on multiple dimensions such as accessibility to healthcare, reproductive health, nutrition and food security, cultural and social factors, legal awareness and access to justice, environmental factors, and community sources and support. By identifying the barriers these women face in accessing healthcare and achieving optimal health, this research seeks to inform policy interventions that align with constitutional mandates including Directive principles of state policy and international commitments like the United Nations Declaration on the Rights of Indigenous Peoples and also to promote health equity for tribal communities in Kerala.

II. Objectives of the study

1. To assess the accessibility of healthcare services for tribal women in Wayanad.
2. To evaluate the reproductive health status of these women.
3. To examine the nutrition and food security situation among tribal women.
4. To understand the impact of cultural and social factors on their health.
5. To scale the level of legal awareness and access to justice.
6. To identify environmental factors affecting their health.
7. To explore community sources and support systems.

III. Legal Materials and Methods

Study Design: The study is a pilot study aimed at assessing the right to health of tribal women in Wayanad through a socio-legal framework. The research focuses on various health-related factors, including accessibility to healthcare, reproductive health, nutrition, cultural and social factors, legal awareness, and environmental conditions.

Study Participants: The study encompassed 70 tribal women from the Paniya community in Wayanad district. The participants were selected using purposive sampling to ensure diversity in age groups and socio-economic backgrounds.

Study Place: The study was conducted in the Wayanad district of Kerala, specifically targeting the Paniya tribe, which is a major tribal community in this region.

Data Collection Procedure: Data were collected through structured interviews and questionnaires, covering topics such as healthcare access, reproductive health, nutrition, legal awareness, and environmental factors. The data collection aimed to capture both qualitative and quantitative information regarding the health status of the participants.

Data Analysis: The collected data were analysed using descriptive statistics to evaluate the percentages of respondents facing issues in different categories (e.g., healthcare accessibility, reproductive health, food security, etc.). The results were presented in tabular form, reflecting the key findings of the study.

Legal Framework Integration: Data collection tools incorporated questions on awareness and implementation of legal rights,including constitutional protections,national health policies and schemes targeting tribal health.Participants were queried on their familiarity with:Article 21 (Right to life)-health as a fundamental right,Article 46(Directive principles)-states the obligation to promote the economic and educational interests of Scheduled Tribes[4]. The fifth schedule of the constitution[5] and regardingDraft National Tribal Policy[6]

IV. Results

1. Accessibility to Healthcare: **Table one**

a. Distance to healthcare facilities: 65% of women reported travelling more than five kilometres to reach the nearest healthcare facility.

b. Quality of services: 58% expressed dissatisfaction with the quality of services provided.

c. Affordability: 90% indicated that healthcare services were not affordable

4 Bandhua Mukti Morcha v. Union of India AIR 1984 SC 812

5 Constitution of India . fifth schedule.

6 Government of India, *National Tribal Policy, 2006*, Ministry of Tribal Affairs.

Table 1: Accessibility to Healthcare service.

Aspect	Percentage
Distance to facility(>5km)	65%
Dissatisfaction with quality	58%
Services not affordable	70%

2. Reproductive Health: **Table 2**

a. Antenatal care: 60% of pregnant women did not receive regular antenatal checkups.

b. Institutional deliveries: Only 40% had access to institutional delivery services.

c. Family Planning: 75% lacked adequate information on family planning methods

Table 2: Reproductive Health Status

Aspect	Percentage
Lack of Regular Antenatal Check-ups	60%
Access to Institutional Delivery	40%
Lack of Family Planning information	75%

3. Nutrition and Food Security:**Table 3**

a. Nutritional Status: 50% of women were found to be undernourished.

b. Food Security : 68% faced food insecurity, particularly during lean agricultural seasons.

Table 3: Nutritional and food security Status

Aspect	Percentage
Undernourished women	50%
Facing food insecurity	68%

4. Cultral and Social Factors: **Table 4**

a. Traditional Beliefs: 55% of women relied on traditional healer's over modern medicine.

b. Gender Roles : 80% reported that gender roles limited their access to healthcare and nutrition.

Table 4: Cultural and Social factors

Aspect	Percentage
Rely on Traditional Healer	55%
Gender Roles Limiting Access	80%

5. Legal Awareness and Access to Justice: **Table 5**

a. Legal Awareness: only 10% were aware of their legal rights related to health

b. Access to Justice: None had sought legal recourse for health-relatedissues, with limited success.

Table 5: Legal Awareness and Access to Justice

Aspect	Percentage
Awareness of Legal rights	30%
Sought Legal Recourse	10%

6. Environmental Factors: **Table 6**

a. Water and sanitation: 45%lacked access to clean drinking water and sanitation facilities.

b. Housing : 50% lived in substandard housing conditions affecting their health.

Table 6 : Environmental Factor

Aspect	Percentage
Lack of Clean Drinking water	45%
Substandard Housing	50%

7. Community Sources and Support: **Table 7**

a. Community Health Workers: 60% had access to community health workers,but their services were irregular

b. Support Networks: 55% relied on informal support networks for health-related assistance.

Table 7: Community Sources and Support

Aspect	Percentage
Access to community Health workers	60%
Reliance on informal Support	55%

Legal Framework for the Tribal Health Rights

India's legal and policy framework recognises the unique challenges faced by tribal communities and emphasises their protection and development. These are some of the key constitutional statutory and policy mechanisms relevant to the health rights of Paniya tribal women.

1. Constitutional Protections

- Article 21: The right to life was interpreted by courts[7] to include access to affordable healthcare[8]

- Article 15(4) &16(4): Art.15(4) allows the state to make advancement for schedule tribes. These are relevant to tribal women as it empowers the government to implement policies and programs which aims at improving their social and educational status, which indirectly impacts their right to health [9]. By tackling social and educational backwardness the state can improve the accessibility to health care services as well as expand the health outcomes on tribal women. Under Art.16(4) the state can reserve jobs and positions in public services for tribes, which can lead to improved economic conditions and, better access to healthcare resources[10].Economic empowerment through employment can enable tribal women to afford better healthcare and improve their overall health status.

- Article 46: Article 46 of the Indian Constitution aims to protect and promote the interests of Scheduled Tribes, including tribal women. This indirectly supports their right to health by aiming to reduce disparities and improve access to health services. The right to health is recognised in international human right treaties, which India is a part of. These treaties obligate the state to provide healthcare without discrimination, aligning with the principles of Article 46 to ensure tribal women receive equitable health services[11]

- 5th and 6th Schedules: The Fifth Schedule of the Indian Constitution explains how scheduled areas and tribes should be

7 *Francis Coralie Mullin vs The Administrator, Union Territory of Delhi*, AIR 1981 746.

8 *Paschim Banga Khet Mazoor Samity v. State of West Bengal (1996) 4 SCC 37*

9 N. Sunitha et al. "HUMAN RIGHTS AND SOCIAL STATUS OF TRIBAL WOMEN 4 " *International Journal of Approximate Reasoning*, 2311-2314 (2016):. https://doi.org/10.21474/IJAR01/1723.

10 E. Prema et al. "Health of Tribal Women in India- Need for a Progressive Vision." Proceedings of the 1st International Conference on Law and Human Rights 2020 (ICLHR 2020) (2021). https://doi.org/10.2991/ASSEHR.K.210506.013.

11 Ibid.

managed. It allows the president to identify these areas and gives Governors the power to make rules for them. The goal is to protect tribal rights, preserve their culture, and support their growth and development. The 6th schedule of the Indian Constitution protects the interests of tribals in the north eastern regions, fostering grassroots democracy and empowering marginalized communities, while also highlighting its limitations and areas for reform.[12]

2. National Laws and Policies

- The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act,2006: The Act aims at granting legal entitlement, empowerment and improvement of livelihood by way of various provisions of the act, for example in a study conducted with 150 households of four tribal communities viz., Paniya,Kuruma,Kattunaika and Urali which are predominant communities found in the study area. Study revealed that kuruma community found to have 'very good' socio-economic status and livelihood progress of other communities as well but the difficulties in realizing rights and utilizing it leads to poor impact of FRA,2006 on them[13].

- The Panchayat (Extension to Scheduled Areas)Act,1996(PESA): This Act is designed to empower tribal communities in India by promoting self-governance and enabling them to make decisions regarding their development, including healthcare. That is why the panchayati raj extends system to tribal areasallowing local governance bodies like gram sabhas to have a say in decision-making process,which includes healthcare decisions[14]. The Act also helps them to manage their

12 Samipya Mahanta et al. "Understanding the Dynamics of the 6th Schedule of the Indian Constitution: A Comprehensive Analysis." Educational Administration Theory and Practices (2024). https://doi.org/10.53555/kuey.v30i3.1503

13 Merlin Mathew et al. "Tracking the Status of Forest Rights Act, 2006 and its Impact on the Livelihood of Tribal Communities in Wayanad District of Kerala, India." Economic Affairs (2019). https://doi.org/10.30954/0424-2513.3.2019.19.

14 Sachchidanand Prasad et al. "Decentralisation at the Grassroots: Status of Panchayats Extension to Scheduled Areas of Jharkhand." *Academic*

resources and make decisions that directly affect their lives, thus fostering a sense of ownership and responsibility[15].

- The National Rural Health mission (NHRM): The National Rural Health Mission launched in 2005,is a significant initiative by the Indian Government which aimed at improving healthcare infrastructure in rural and tribal areas. This mission was designed to address the blunt disparities between urban and rural health services in India, with a particular focus on enhancing the health infrastructure and human resources in these underserved Regions[1617]

The mission has led to a substantial increase in the number of health facilities and the availability of healthcare professionals in these regions[18]. This missions efforts include the operationalization of primary Health Centres (PHCs) to offer 24/7 delivery and emergency obstetric services, which are vital for maternal and child health [19]

- The Prevention of Atrocities Act, 1989: The Act Protects schedule caste and schedule tribes from discrimination, but its impact and purpose remain questionable due to concerns over misuse

Journal of Interdisciplinary Studies (2023). https://doi.org/10.36941/ajis-2023-0023.

15 R. Prasad et al. "Capacity Building and Empowerment of Tribals in Scheduled Areas of India for Self-Governance" 11 The Oriental Anthropologist 385 - 399 (2011). https://doi.org/10.1177/0976343020110215.

16 G. Mudur et al. "India launches national rural health mission.330 BMJ : British Medical Journal, 920 (2005) https://doi.org/10.1136/BMJ.330.7497.920-A.

17 A. Prasad et al. "Addressing the social determinants of health through health system strengthening and inter-sectoral convergence: the case of the Indian National Rural Health Mission"6 1 Global health action, (2013) 20135. https://doi.org/10.3402/gha.v6i0.20135.

18 S. Nagarajan et al. "The National Rural Health Mission in India: its impact on maternal, neonatal, and infant mortality." 20 5 Seminars in fetal& neonatal medicine,315-20(2015) https://doi.org/10.1016/j.siny.2015.06.003.

19 Itisha Vasisht et al. "Assessment of Quality Health Services Rendered by the Health Facilities to Improve the Reproductive and Child Health Under National Rural Health Mission in Uttarakhand." (2012).

and potential vengeance[20].But over time many has understood that they must address fundamental questions about social transformation and institutional barriers to effectively address historiacal oppression against Dalits and Adivasis[21].

3. International Commitments

- United Nations Declaration on the Rights of Indigenous People (UNDRIP): acknowledged the right to health for indigenous women and communities. Articles 20(1),21,22,24 and 44 of UNDRIP[22] focus on the economic, social and cultural rights of Indigenous Peoples with a particular focus on the right to health[23].
- Convention on Elimination of all forms of discrimination against women(CEDAW): CEDAW is a powerful tool for achieving global health goals, such as Sustainable Development goals,by facilitating constructive dialogues between states and human rights experts.it also promotes gender equality in health access.

4. State Level Mechanisms

- Kerala's Tribal Health Policy includes various measures like mobile medical units and ASHA[24] workers in tribal areas.
- Comprehensive Tribal Development Project targets in improving health education and livelihood.

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20 Pranabindu Acharya et al. "An Analysis of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989." *SSRN Electronic Journal* (2020). https://doi.org/10.2139/ssrn.3732709.

21 S. Fuchs et al. "South Asia Multidisciplinary Academic Journal, 28 | 2022." (2022).

22 United Nations Declaration on the Rights of Indigenous People. 2007 art.20,21,22,24,44

23 Camilo A. Pérez-Bustillo et al. "Indigenous Rights to Development, Socio-Economic Rights, and Rights for Groups with Vulnerabilities: Articles 20 – 22, 24 and 44." *AARN: Social Justice & Human Rights (Sub-Topic)* (2017).

24 Julee Joseph et al. "Maternal Health Services Received by Tribal Women from ASHAs (Accredited Social Health Activists) in Wayanad District, Kerala."7 Paripex Indian Journal Of Research, (2018).

V. Discussion

1. The findings reveal critical challenges faced by Paniya tribal women in Wayanad regarding their right to health. Despite constitutional and policy provisions aimed at addressing health inequities, significant gaps persist in, accessibility, awareness, and service delivery. **Healthcare Accessibility** The study indicates that 65%of participants travel over 5 Km to access healthcare, often to poorly equipped facilities. This highlights the ineffective implementation of the National Rural Health Mission (NRHM) and the lack of primary healthcare centres in tribal areas, despite constitutional mandates under Article 46 of the Indian Constitution to promote the welfare of Scheduled Tribes. Financial barriers, with 70% finding healthcare unaffordable, further underscore the need to strengthen schemes like Ayushman Bharat to ensure free or subsidized healthcare for marginalized people. **Reproductive Health** Poor access to antenatal care and institutional deliveries reflects systematic weakness in maternal health programs such as the Janani Suraksha Yojana (JSY). The lack of family planning awareness among 75% of respondents points to a gap in reproductive health education. These issues become more severe by socio-cultural norms that limit women's decision-making power, further marginalising them in a system that is already impoverished for tribal communities. **Nutrition and Food Security** The study found that 50% of women were undernourished, and 68% faced food insecurity. This raises concerns about the effectiveness of programs like the Integrated Child Development Services (ICDS) and Public Distribution System (PDS) in reaching tribal households. **Cultural and Social Barriers** Traditional practices remain influential, with 55% of women relying on traditional healers over modern medicine. While culturally significant, this reliance often delays necessary medical treatment. Gender roles limit 80% of participants from seeking timely healthcare, reflecting deep-rooted patriarchy and social hierarchies. Bridging the gap between modern healthcare and cultural practices is critical to improving health outcomes in tribal communities.

Legal Awareness and Access to Justice The findings show that only 30% of participants are aware of their legal rights, and none had sought legal recourse for health-related grievances. This indicates a lack of outreach efforts to educate tribal populations about health-related laws under the Scheduled Castes and Scheduled and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and the absence of accessible legal aid. This emphasises the need of capacity-building measures to empower tribal women and to ensure their role in decision-making processes. **Environmental Challenges** Nearly half of the participants lack access to clean drinking water and live in substandard housing, exposing them to preventable health risks. These findings point to inadequate implementation of schemes like Swachh Bharat Abhiyan and Pradhan Mantri Awas Yojana (PMAY-Gramin) in tribal areas .Such conditions disproportionately affect women, who are primarily responsible for household water and sanitation management. **Community Support** While 60% of participants had access to ASHA workers, irregular services hinder their effectiveness. This suggests the need for stronger community health networks and incentives for health workers to serve remote areas areas consistently. Informal support networks, while helpful, cannot replace structured and well-funded healthcareinterventions.

VI..**Recommendations**

1.Improve healthcare Accessibility: Establish more healthcare facilities within tribal regions and ensure they are adequately staffed and equipped

2.Enhance Reproductive Health Services: Provide comprehensive reproductive health education and Services, including family planning and expand awareness campaigns under JSY and Janani shishu Suraksha karyakram to ensure antenatal and postnatal care.
3.Address Nutritional Needs: Implement targeted nutrition programs and ensure food security through community-based initiatives.
4.Cultural Sensitivity Training: Train healthcare providers to understand

and respect cultural practices while promoting modern healthcare methods. And also should engage tribal leaders to build trust in healthcare programs.
5.Legal Education: Increase legal awareness among tribal women regarding their health rights and provide accessible legal aid by establishing Legal Aid Clinics.
6.Environmental Improvements: Improve water and sanitation facilities through Swatch Bharat Abhiyan and Stat-led initiatives and address housing conditions through government programs under PMAY-Gramin.
7.Strengthen Community Support: Formalise community health workers and devolep formal support networks to assist tribal women.

Vii Conclusion

The paper highlights the urgent need for an integrated approach to improve the health and wellbeing of tribal women in Wayanad. The findings reveal significant barriers in healthcare accessibility, reproductive health, nutrition, legal awareness and environmental conditions. These issues are compounded by socio cultural norms and systemic neglect, leaving tribal women vulnerable and marginalised. By addressing these social legal barriers and enhancing community support, significant progress can be made towards ensuring their right to health. It is crucial to involve tribal women in the planning and implementation of health programmes to ensure that they are culturally appropriate and effective. Moreover, increasing legal awareness and access to justice can empower these women to claim their rights and seek remedies for health-related issues. Collaborative efforts from government agencies, non-governmental organisations, and local communities are essential to create a sustainable and inclusive health system for tribal women in Wayanad.Tribal women in the region can improve their quality of life and achieve health equity with comprehensive and targeted interventions.