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Editorial

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

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

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

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

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cElected Women Representatives in Local Self-governance: Participation and Challenges

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Abstract

Gender equality and empowerment of women is an indispensable feature for the progress of any society. The literature on the subject reflects various challenges in achieving the constitutional goal of gender equality in reference to the participation of women representatives in local self-governance. The present study examines the participation and challenges to elected women representatives in local self-governance. It is based on a document review of the secondary data. The legislative initiatives by Indian Parliament ensured the presence of women in local self-governance. But in a male-dominated society, women representatives face numerous challenges at all levels of governance. Despite the increasing number of women in local self-governance, there are certain barriers that hinder their real and true participation in decision-making. The presence of individual and institutional factors creates different hurdles for the women's participation. Such challenges are required to be addressed to ensure women's full, actual, and active participation in local self-governance.

Key words: Gender Equality, Women, Elected Representative, Local Self Governance, Women Empowerment

Introduction

Women's position in society is one of the primary aspects in ascertaining the success rate of civilization. In Ancient India, women occupied dignified positions and enjoyed prominent roles in political affairs in ancient and medieval periods.[1] Women served as provincial and local administrators[2]

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and played important political roles since ancient times.[3] The post-independence period has been marked as the era of social reforms, political recognition, and economic upliftment of women.[4] The focus of women's empowerment is equipping women to be self-reliant, economically independent, and have positive self-esteem to enable them to face any difficult situation and they should be able to participate in the process of decision-making.[5] The global average of women in parliament stands 26.1%.[6] India is at 142 in terms of women representatives in Parliament.[7] The proportion of women empowerment in parliament is insufficient, as the ideal number should be at least 33%.[8] For a long, the demand to reserve one–third of the total number of seats for women in the Lok Sabha and in state legislative assemblies could not materialize.[9] The political space belongs to all citizens; politics is everyone's interest and affect the lives of each person.[10] Women have the right to vote without any discrimination.[11] The state is responsible for ensuring women's political participation on equal terms with men.[12] They have the right

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1 Preeti Prabhat, "Prabhavati Gupta -The Regent Queen of Vakataka Dynasty, Vol (2) Issue 3 International Journal of Innovative Social Science & Humanities Research p. 124-128 (July-Sept, 2015). *available at:* https://www.csirs.org.in/uploads/paper_pdf/prabhavati-gupta-the-regent-queen-of-vakataka-dynasty.pdf ((last visited on July 29, 2003).

2 Neelam, "Socio-economic, Religious, Educational, Domestic and Political Rights to Women in Ancient India" Vol (2) International Journal of Humanities & Social Science Studies 115 (2015). *available at:* https://www.ijhsss.com/files/Neelam_6s2k52ex.pdf (last visited on 28 April, 2022).

3 Gayatri Gupta, *Status of Women in Ancient India*, 357-359 (Shri Niwas Publication, Jaipur, 2012); Chander S. Halli, Shridhar.M. Millal. "Status of Women in India Status of Ancient, Mediaeval and Modern" 2 Imperial Journal of Interdisciplinary Research 298(2016). *available at:* http://www.onlinejournal.in/IJIRV2I2/040.pdf (last visited on 27 May,2022).

4 Siddhartha Dash, "Role of Women in India's Struggle for Freedom" Orissa Review, 74-76 (August - 2010). *available at:* https://magazines.odisha.gov.in/Orissareview/2010/August/engpdf/74-76.pdf (last visited on 19 January 2023).

5 Kuldeep Fadia, "Women's Empowerment through Political Participation in India", 3 Indian *Journal of Public Administration* 538 (2014). *available at:* https://journals.sagepub.com/doi/10.1177/0019556120140313 (last visited on 19 February, 2023).

6 Women in Parliament, 2020, Inter Parliamentary Union Report, *available at:* https://www.ipu.org/women-in-parliament-2020 (last visited on 19 September, 2022).

7 Women in Politics, 2020, *available at:* https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Women-in-politics-map-2020-en.pdf (last visited on 15 September, 2022).

8 The Indian Express, August 25, 2021.

9 Aman kumar, *Panchayati Raj and Women Empowerment* 63 (Addi Publication, Jaipur, 2011).

10 The Inter-Parliamentary Conference toward the Participation of Females in the Political and Parliamentary Decision-making Process held in Geneva (1989).

11 Article-1 of the Convention on the Political Rights of women, 1952.

12 Article 7 of the Convention on the Elimination of all Forms of Discrimination against Women (1979)

to vote and elect for all public bodies[13] to hold public office, become part of the government formulation and implementation, and participate in institutions related to the public and political life of the country.[14] After realizing the need for greater democratization and progressive inclusion, many nations pursued political reforms that ensured decentralization to enhance the empowerment and inclusion of women.[15] The United Nations have recognized the concept of gender equality through its Sustainable Development Goal-5. Women must be part of the decision-making process.[16] The women empowerment process is when women can find freedom and action to solve their problems and examine these issues critically.[17] Women face external and internal barrios in the way of their political participation.[18] Empowerment of women in the main political sphere is challenging and crucial for their advancement and the foundation of gender equality. Empowerment is central to gender equality.[19] A large mass of women is kept out of the political arena still. Thus no role in the decision-making process in governance.[20]

1. Local Self-governance and Women Representation:

Local Self-governance includes Municipalities in urban areas and Panchayats in rural areas. Panchayat is the center of administration and the custodian of social harmony. A village is a self-contained social microcosm. Mahatma Gandhi laid emphasis on the decentralization of power at the village level and wanted that every community should become a republic having full powers. Constitution also mandated that government shall organize the village Panchayat and endow them with such authority and powers as may be necessary to enable them to function as a unit of self-government.[21] There can

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13 Article 7 Clause (a) of the Convention on the Elimination of all forms of Discrimination against Women (1979).

14 P. Surender, Role of Women Representatives in Panchayati Raj Institutions, *available at:* http://hdl.handle.net/10603/42908 (last visited on 1 November, 2022).

15 P. Patnaik, Does Political Representation ensure Empowerment? Scheduled tribes in decentralised local governments of India. *8* (1) *Journal of South Asian Development* (2013) 27-60. https://journals.sagepub.com/doi/10.1177/0973174113476998 (last visited on 15 September, 2022).

16 R.K. Bakshi, *Challenges of Women Empowerment* 224-225 (Altar Publishing House, Delhi, 2012).

17 Mc Verghees, *Women Empowerment through Kudumshree: A study in Ernakulum* District (2012) (Unpublished Ph.D Thesis, Mahatma Gandhi University). available at: http://shodhgangotri.inflibnet.ac.in/bitstream/123456789/777/1/synopsis.pdf (last visited on 20 November, 2022).

18 MD Aminur Rahman, "Women's Empowerment: Concept and Beyond"*11 Globel Journal of Human Social Science Sociology and Culture 79* (2013). available at: https://globaljournals.org/GJHSS_Volume13/2-Womens-Empowerment-Concept.pdf (last visited on 22 Novemnber, 2022).

19 T. K. Pandey, "Women Empowerment: Participation in Panchayati Raj Instituion," 22 *The Challenge*, (2013). *available at:* http://thechallenge.org.in/documents/ WOMEN_ EMPOWE RMENT.pdf (last visited on 1 November, 2022).

20 *Ibid*

21 Vikash Nandel, "Participation of Women in Panchayati Raj Institution: A Sociological Study of Haryana, India," 2 *International Research Journal of Social Science* 47

be no genuine people's participation and no real democracy without equal participation of men and women in decision-making.[22] Various factors are responsible for women's low participation and empowerment in Panchayats. The most important ones are literacy, traditionalism, prejudices, dependency and the unfavorable political structure, with its high rate of male superiority and slow turnover. Today's great need is to remove these barriers between women's formal political equality and their significant power of political exercise.[23] Thus, reservation is necessary to bring women into the mainstream of society and make part of decision-making in governance. Without reservation, women will be reluctant to the political participation and empowerment remains only in the hands of male members of society.[24] Article 15(3) empowers the state to make any special provision for women and children. Article 243D (2) There shall be reserved seats for women belonging to scheduled castes or, as the case may be, the Scheduled Tribes, at least one-third of the total number of seats reserved for that category. Clause 3 one-third of seats to be filled by direct election in every Panchayat shall be reserved for women, including women belonging to scheduled castes and scheduled tribes. Clause (4) of Article 243D-offices of Chairpersons in the Panchayats at the village level or any other level shall be reserved for women.[25] Apart from the constitutional requirement of 33% of women's reservation in local self-governance, some states increase this up to 50%. The States of Bihar, Odisha, Rajasthan, Himachal Pradesh, Andhra Pradesh, Himachal Pradesh, Jharkhand, Kerala, Madhya Pradesh, Maharashtra, Tripura, and Uttarakhand have provided 50% reservation for women in Panchayat bodies. Though decentralization is recognized as a positive means to gender equality and political empowerment, obstacles still exist in the social system to achieve them.[26] This article aims to comprehend and assess how elected women representatives participate in various activities of local self-governance and identify challenges they have when carrying out their responsibilities using the opportunity that reservation affords. The present study attempts to extrapolate from all possible empirical investigations that have already been completed to

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(2013). a*vailable at*: http://www.isca.in/IJSS/Archive/v2/i12/8.ISCA-IRJSS-2013-184.pdf (last visited on 30 September 2022).

22 Pandey, *Supra* note 19.

23 Simi Agnihotri, Vijay Singh, "Women Empowerment through Reservation in Panchayat Raj Institution in Himachal" 3 *Indian Journal of Public Administration 4*18 (2014). a*vailable at:* http://www.iipa.org.in/New%20Folder/4--Simmi.pdf (last visited on 1 November, 2022).

24 Ashok Tanwar, Anil Meena, *Panchayat Raj Me Mahilao ki Sathiti* 1 (*Institute of Social Sciences*, *Panchayti Raj Update*, 2015*).* a*vailable at: http://hdl.handle.net/10603/285076* (last visited on 30 January 2023).

25 Narender Kumar, *Constitutional Law of India*, 771-772 (Allahabad Law House, Faridabad, 7th edn.2011).

26 M. Singha, Women Empowerment through Panchayati Raj Institutions: A Case Study. Journal of Studies in Social Sciences and Humanities. 2(3), (2016) 115-120. a*vailable at:* http://www.jssshonline.com/wp-ontent/up loads/2020/06/JSSSH _Vol.2_No.3_2016-September_115_120_Sr-No.-4.pdf (last visited on 1 November, 2022).

discover general patterns using data. The first part of the study covered the participation of elected women representatives in different activities of local self-governance, including political, social, economic, development, decision-making, policy-making, and legal activities. The second part discussed the challenges which elected women representatives face when running for office and carrying out their assigned responsibilities in local self-governance, including financial, administrative, legal, sociopolitical, knowledge gaps, inadequate training, domestic, socio-cultural, economic, personal, social, mobility, and technological issues. Based on the evaluated studies, the final section assesses and draws conclusions on how women participate and face obstacles in local self-governance.

2. Participation of Elected Women Representatives in LSG

3.1 Political Activities

The reservation of women under the Panchayati Raj in India's populist politics generally restricts the practice of political empowerment of women into manageable zones. However, a number of literature have been examined and analyzed in light of elected women representatives' involvement in and difficulties with PRIs. Elected Women Representatives involved in various political activities of local self-governance. Political activities such as door-to-door convincing or advertising, nomination filling, attending political party meetings, attending PRIs meetings, addressing public meetings, participation in election meetings, pamphlet distribution, election fund collection, vote casting, exposing corrupt officials, encouraging rural women to participate in panchayat or development affairs, awakening community members regarding voting rights, encouraging community participation for rural development and making the panchayat system transparent were enlisted in reviewed studies.

In Maharashtra, most women representatives were occasionally participating in convincing door-to-door activities.[27] A similar study conducted in Bihar also found that a significant proportion of officiating women members of Gram Panchayat and women members of Panchayat Samiti were participating in door-to-door advertisement activities.[28] The study conducted in Maharashtra further found that 44 percent of studied women participated in addressing public meetings most of the time, 38 percent of women attended meetings rarely in convincing outside the village, 36 percent of respondents attended political party meetings the majority of the time, 31 percent of women members accompanied most of the time by a family member while coming to a

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[27] S. B. Satpute, *Participation of Women Members in Panchayati Raj Institutions* (2012). (Unpublished doctoral dissertation, Dr. Panjabrao Deshmukh Krishi Vidyapeeth, Akola, Maharashtra). a*vailable at:* http://krishikosh.egranth.ac.in/ handle/ 1/ 5810126872 (last visited on 1 February, 2023)

[28] K. P. Maneela, (2014). *Women Empowerment through Panchayati Raj Institutions: Impact study of patna District* (Doctoral dissertation, Rajendra Agricultural University, Pusa (Samastipur) *available at:* http://krishikosh.egranth.ac.in/handle/1/5810034599 (last visited on 1 January, 2023).

meeting.[29] The study in Haryana found that a higher proportion of general and scheduled caste women representatives were absent from meetings than backward caste representatives. Further analysis found that all Elected women representatives who held a technical degree or diploma attended meetings more frequently than those who were illiterate.[30]

The study conducted in Maharashtra further found that nearly half of elected women representatives expressed their opinion and ideas during meetings.[31] Similarly, in Haryana, the majority of backward caste women representatives frequently discussed concerns in Gram Sabha and Gram Panchayat meetings. On the other hand, the majority of scheduled caste women representatives and general category women representatives rarely expressed issues in meetings.[32] Elected women representatives in Haryana rarely raised issues in meetings of Panchayati raj institutions.[33] According to a study in Assam, most women representatives enjoyed total freedom of expression at meetings, were able to voice their opinions during Panchayat meetings, actively participated in discussions and debates about future plans of action, and were able to choose the regions that needed improvement.[34] Female panchayat members have higher political participation in activities such as exposing corrupt officials, encouraging rural women to participate in panchayat or development affairs, awakening community members regarding voting rights, encouraging community participation for rural development and making the panchayat system transparent, among others.[35] In Bihar, a majority of officiating women members of Panchayat Samiti participated in the filling of nomination and vote-casting activities. On the contrary, they showed little interest in raising funds for the election.[36]

3.2 Social Activities

Elected women representatives participate and express their views on various vital issues and attempt to satisfy the needs and demands of people from the linked region by attending meetings of Panchayati Raj Institutions.[37] Elected women representatives with a graduate or postgraduate degree and a

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29 Satpute, *Supra* note 27

30 R. Nagpal, Women's empowerment in Haryana: Role of female representatives of Panchayati Raj Institutions. *Asian Journal of Multidimensional Research*, *2*(6), (2013) 135-150.

31 Satpute, *Supra* note 27.

32 Nagpal, *Supra* note 30.

33 *Ibid.*

34 Singla, *Supra* note 26.

35 S Singh, & V. Kumari, & S. Chander, Knowledge and involvement of elected women in various activities of Gram Panchayat 3 (1) International Journal of Innovations in Engineering and Technology, (2013) 296-305 *available at: http://ijiet.com/wp-content/uploads/2013/11/45.pdf* (last visited on 10 January, 2023); Sunita Singh, (2013). *Study on Socio-Economic factors affecting Women Participation in Gram PPanchayat Activities in Haryana* (Doctoral dissertation, CCSHAU) available at: http://krishikosh.egranth.ac.in/handle/1/5810014341 (last visited on 10 January, 2023)

36 Maneela, *Supra* note 28.

37 Nagpal, *Supra* note 30

technical degree or certification felt that participating in PRIs allowed them to work for the welfare of the people.[38] EWRs who had gained self-sufficiency emphasized issues like gender equality, health and education of children, sanitation, women empowerment, and social development, which has shifted male leaders' perceptions of elected women representatives' performance in Panchayati Raj Institutions.[39] When elected women representatives presided over Gram Sabha and Gram Panchayat meetings, women were seen actively participating.[40]

In Maharastra, the participation of elected women representatives is more in social activities such as maintaining drinking water facilities, and village sanitation activities and supervision of distribution of nutrition for children and women.[41] In Haryana, the majority of women representatives participated in social activities such as celebrating festivals, eradicating female feticide, reduction of violence such as beating/abusing women, eradicating discrimination against the girl child, eliminating the parda system and social welfare programs for the handicapped, mentally retarded, old age, and widows, eradication of dowry system, eradication of female illiteracy, etc.[42] Women's higher participation in social activities was due to the social challenges they experienced in their daily lives, as well as the fact that they were familiar with these types of activities and were more socially able.[43] Female panchayat members were more likely to participate in social activities such as enrollment drives, pre-school education, education of children from low-income families, managing night school and noon formal education, literacy program, village library and reading rooms and organizing sports/cultural shows.[44] Improvements in activities such as education of children from low-income families, pre-school and primary school education, and women's educational growth were found to be the essential factors for family and village development from the study reviewed.[45] Apart from that, construction of houses, rural electric fixation, construction of panchayat ghar/bhawan, construction of road and drainage facility/park/playgrounds etc, proceeding/extending drinking water facility, sanitation of public places and installation biogas/smokeless challah were among the activities in which female panchayat members participated.[46] In the health and sanitation role, female panchayat members were more involved in activities such as monitoring the smooth operation of hospitals, assisting in the achievement of immunization targets, making arrangements for safe drinking water,

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38 *Ibid.*

39 G. Palanithurai, Role of Support Agency for Elected Women Representatives: A Narration of Two Decades Experience in Women Empowerment. *60* (3) *Indian Journal of Public Administration*, (2014). 489-502.

40 Ibid.

41 Ibid.

42 Singh, et. al., *Supra* note 35.

43 Singh, *Supra* note 35.

44 *Ibid.*

45 *Id.*

46 *Id.*

preventing epidemic spread, maintaining adequate sanitation, and organizing sanitation and medical relief camps and cleaning of public roads and provision of the drainage system.[47]

In Maharashtra, elected women representatives occasionally participated in social activities such as organizing beneficiaries for construction, supervising housing projects, and fuel and fodder distribution.[48] It was quite depressing to discover that in Bihar, a significant portion of respondents had never performed any obligations or functions, including cultural activities, rural housing and electrification activities, public distribution activities and construction, repair, and maintenance activities, respectively.[49]

3.3 Economic Activities

Economic activities in which EWRs participated and enlisted in reviewed studies were the execution of rural unemployment schemes, poverty alleviation schemes, irrigation schemes, agriculture extension schemes and family income schemes. In Maharashtra, a study found that women members were participating in the execution of rural unemployment schemes occasionally; on the contrary, they were participating most of the time in the execution of poverty alleviation schemes and irrigation schemes.[50] Women's participation in various administrative and economic activities in Haryana began with the right of women to parental property, followed by assistance in obtaining economic assistance such as loans, credit, and other forms of credit for villagers and assistance in seeking employment in government development programs such as NAREGA.[51] On the contrary, it was rather depressing to discover that in Bihar, many women representatives were discovered to have never engaged in tasks and responsibilities such as income-generating activities and agricultural and associated activities, respectively.[52]

3.4 Development Activities

Development activities include promoting agriculture, horticulture, dairy farming, poultry, piggery, plantation and rural cottage industry, employment creation, asset production, disease control, women, child and weaker section welfare, etc. In Maharashtra, women members were participating more in activities of leprosy, polio eradication and malaria control in comparison to the plantation, farm forestry, and social forestry etc. Other activities where participation is less include of welfare weaker section, promotion of rural cottage industry, promotion of dairy farming, poultry, and

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47 *Id.*

48 Satpute, *Supra* note 27.

49 Anuradha Ranjan Kumari, Laxmikant and Maya Kumari."Participation of Elected Women in Panchayati Raj System in Bihar" paper presented in *National Conference entitled"* 10, Book of Abstracts, *National Conference On Improving Income of Farmers through Agriculture and Aquaculture through Development Interventions* (2018).

50 Satpute, *Supra* note 27.

51 Singh, et. al., *Supra* note 35.

52 Kumari, et. al., *Supra note* 49.

piggery; sometimes in activities of creation of employment and productive assets, implementation of women and child welfare activities; and rarely in activities of agricultural and horticultural promotion.[53]

In Haryana, female panchayat members' higher to lower participation in trade and commerce roles began with activities such as assisting in the procurement of remunerative; organizing cooperative consumer societies; providing cheap credit to the villagers; checking malpractices; organizing cooperative marketing of agri- products and other products; and maintaining crop godowns.[54] Conclusively, a significant female proportion was involved in trade and commerce activities.[55] Women panchayat members were more involved in agriculture and village industry activities, such as irrigation agreements, serving as a liaison between villagers and agriculture extension officers, resolving land disputes, providing extension training on agriculture practices, providing bank credit to farmers, and securing seeds, fertilizers, agri, implementations, pesticides, etc. and promotion of rural and cottage industry.[56]

In Telangana, women representatives worked on development projects such as school buildings, water tanks, dams, and community halls, as well as other jobs such as telephone, telephone, power, and hospital facilities.[57]

3.5 Decision-Making Activities

Reservation led to an increase in women's representation at the lower levels of politics, but representation does not imply proper participation of women in decision-making processes, as family members attend meetings, make decisions, and the meeting's proceedings are completed at home by officials and family members.[58]

In Maharashtra, women members were participating, most of the time, in activities of identification of landless families for land distribution, selection of village artisans, the youth of training and *anganwadi* worker deployment within the gram panchayat, preparation of scheme from gram panchayat share; sometimes in activities of distribution of seed, fertilizers and pesticides, group formation, beneficiary's selection, mini-kit distribution, identification of families without house site for housing under rural housing scheme; rarely in activities of workers list preparation.[59] In Maharashtra, women members

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53 Satpute, S*upra* note 27.
54 Singh, S*upra* note 35.
55 *Ibid*
56 Singh, et. al., S*upra* note 35.
57 G. Vijaya, Political participation of women in Indian political scenario. *10* (8) *International Journal of Multidisciplinary Educational Research*, (2021). 1-5. *available at:* http://ijmer.in/pdf/e-Certificate percent20of percent20Publication-IJMER.pdf (last visited on 12 January, 2023).
58 M. Bag, & M. Jagadala, "Women Empowerment: Issues and Challenges through the Lens of Reservation in Panchayati Raj System" *13* (13) *Acme intellects International Journal of Research in Management* (2016). 1-12.
59 Satpute, *Supra* note 27.

accepted that their family members always interfered in decision making and merely 34 percent had an interest in panchayat work.[60]

On the contrary, in Sikkim study found that despite intervention from MLAs/MPs and other state leaders, elected women representatives participated well in decision-making and assumed duties in Panchayats.[61] In Haryana, the majority of women members participated in discussions on the expenditure of schools, anganwadis, etc. and accountability of panchayat income and expenditure activities.[62]

3.6 Policy Making and Legal Activities

Policy-making activities include preparing annual plans and budgets, removing encroachment on public properties, providing relief in natural calamities, organizing voluntary labour and contributing to community work. Legal or judicial activities include such as imposing fines for damaging public property, checking corruption, settling disputes amicably, providing cheap and speedy justice to villagers through panchayat, and arranging for legal advice.

In Maharashtra, most women representatives participate in different activities of local self-governance, including preparing an annual plan and annual budget, providing relief during natural disasters and organizing volunteer labor and contribution for community works and removing encroachment on public property.[63] However, their participation in budget preparation is not satisfactory.

The study indicated a higher number of elected women representatives participated in providing views about the activities of the panchayat, but their views ignored being women members were also in a higher proportion. Despite their participation in the budget, fund allocation and justice activities, their proposal acceptance was not significant.[64] In Haryana, the Panchayat budget activities were drafted by the women members, but yearly, they hardly prepared the plan for village development.[65] According to a study conducted in Bihar, none of the respondents ever engaged in general village work-related activities, such as creating annual plans and budgets, clearing encroachments and maintaining vital village statistics, which may not be of interest to women because they believe it to be a male-dominated field of work.[66]

In Haryana, female panchayat members were involved in judicial activities such as imposing fines for damaging public property, checking corruption, settling disputes amicably, providing cheap and speedy justice to villagers through panchayat, and arranging for legal advice. Though their participation is satisfactory in judicial activities, when it came to activity-setting

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60 *Ibid.*

61 U. P. Thapa, "Analysis of Women Representatives in Panchayati Raj Institution in Sikkim" *5*(1) *International journal of Social Science and Economic Invention (IJSSEI)* (2019) 8-12.

62 Singh, et. al., *Supra* note 34.

63 Satpute, *Supra* note 27.

64 Singh, *Supra* note 35.

65 Singh, et. al., *Supra* note 35.

66 Kumari, et. al., *Supra* note 49.

disputes, the majority of them were dissatisfied with their performance due to male and political party interference.[67]

3. Challenges to Elected Women Representatives:

4.1 Socio-cultural and Economic Challenges

EWRs faced many gender stereotypes while participating in local self-governance, such as gender discrimination[68] by male panchayat members and government officials of local self-governance. Due to the conservative outlook of families and society, elected women representatives found it difficult to get involved in carrying out their responsibilities.[69]

Women members hesitate to freely express their opinions owing to gender inequality. In most cases, they are unwilling to offer their viewpoints in front of the male members of Panchayati Raj Institutions.[70] They lacked interest in attending meetings due to their inability to motivate colleagues, the frustration of not getting an opportunity to speak in the meeting, and the lack of cooperation from male members.[71] Generally, male family members of elected women representatives were asked to the gathering and meetings instead of Elected women representatives.[72]

Due to the existence of patriarchy, women had less access to higher positions in party meetings and decision-making and the fact that lack of cooperation of male colleagues' prevented women leaders from implementing different development methods.[73] It was also found that the majority of ministers were from upper-class society and they did not encourage and cooperate to elected women representatives particularly lower cast women sarpanch and members, in administration matters.[74] Moreover, in rural India, women from lower caste communities could not work independently as khap panchayats function parallel to pressurize elected women representatives in local self-governance.[75]

Women and dalit representatives had difficulties getting money from the bureaucracy because it is staffed primarily by people from high castes and is rife with patriarchal values, which hindered the implementation of welfare programs and development plans for women and Dalits.[76]

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67 Singh, *Supra note* 35.

68 Satpute, *Supra note* 27

69 A. Dubey, N. Gupta & S. Sharma, "Role and Developmental Activities of Women in Panchayati Raj Institution of Kathua District" *7*(2) *Studies on Home and Community Science* (2013) 131-138.

70 *Ibid.*

71 Satpute, *Supra note* 27.

72 Bag, et. al., *Supra* note 58.

73 T. Varghese, "Women's Political Participation and Leadership in India: Examining the Challenges" 19 (1) *Public Policy and Administration* (2020). 111-125.

74 Vijaya, *Supra* note 57; Singh, *Supra* note 35.

75 Rajesh. K. Sinha, "Women in Panchayat" *Kurukshetra*, 34. (July 2018). *available at:* https://pria.org/uploaded_files/panchayatexternal/1548842032_Women%20In%20Panchayat.pdf (last visited on 10 January, 2023).

76 N. Sukumar, L. D. Lal, & V. K. Mishra, "Inclusiveness in the Panchayati Raj Institution" *5*(1), *Journal of Social Inclusion Studies* (2019) 72-88, available at:

Apart from that, female Sarpanches could not perform effective roles owing to a lower profile, poor orientation, lack of enthusiasm, lack of political background, socially conservative attitude[77], domestic responsibility and lack of cooperation at all levels.[78]

Moreover, elected women representatives from backward communities depended on land owners and the dominant caste for their livelihood, owing to their own poor economic condition that affected the working efficiency of women Sarpanch.[79] Conclusively, the higher class's close relationship with officials made it difficult for them to work in local self-governance.[80] Elected women representatives faced problems in performing their duties owing to personal motives of panchayat members, interference by male counterparts in all works, lack of support from male members, and abusive language by male members.[81]

Economic status was shown to be more significant for women than for men since women were deprived of it, owing to patriarchy that coexisted in the family and panchayati raj institutions at the same time.[82] Moreover, entry into politics was significantly more difficult for women who did not come from wealthy families, mainly if they intended to run for office or take part in an election.[83]

According to research conducted in Assam, relatively few women Panchayat members received remuneration for their duties, but they nevertheless worked tirelessly for the welfare and advancement of their community.[84] Lack of financial certainty was one of the biggest obstacles to starting a political career and drove them to look for other employment.[85] Apart from that, EWRs got insufficient pay and benefits from the government and incurred travel expenses to attend meetings.[86]

4.2 Administrative Challenges

Regarding administrative challenges, lack of cooperation from government employees, political bias in fund allocation and pressure from political parties are the major obstacles that elected women representatives to face while performing assigned duties.[87]

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https://journals.sagepub.com/doi/full/10.1177/239448111 9859675 (last visited on 12 January, 2023).

77 Sinha, *Supra* note 75.

78 Vijaya, *Supra* note 57.

79 *Ibid.*

80 *Id.*

81 Dubey, et. al., *Supra note* 69.

82 Sukumar, *Supra note* 76.

83 Varghese, *Supra note* 73.

84 Singla, *Supra note* 26

85 Varghese, *Supra note supra* note 73.

86 Thapa, *Supra note* 61; Varghese, *Supra note* 73.

87 Sangita Rangnath Gawali, *Role Performance of Women Panchayat Members in Konkan and North Maharashtra* (2012). (Doctoral dissertation), Department of Extension Education, Dr. BSKKV, Dapoli). *available at:* http://krishikosh.egranth.ac.in/handle/1/86351 (last visited on 12 January, 2023).

In Gujarat, tribal women Sarpanches faced a challenge like delays in sanctions and permission for development work from the upper level, lack of administrative and financial power in the hands of sarpanches, lack of communication, lack of special protection for women sarpanches, lack of freedom in decision making due to the interference of male family members, lack of discipline of male members at panchayat office, groupism in Gram Sabha and lack of staff in village and panchayat office.[88]

Administrative obstacles faced by Elected women representatives in Haryana are a lack of employees, commission in percentage, and too much bureaucratic supervision.[89] Apart from that, other administrative constraints faced by women representatives were a lack of cooperation from officials,[90] as well as widespread corruption, which resulted in frustration and demotivation among elected women representatives.[91]

The major challenge to elected women representatives in Gram Panchayats was inadequate, irregular fund supply and complex procedure for sanctioning loans,[92] uncounted delays in approval from the state and center and non-cooperation from the state government on financial matters are the most serious financial constraints.[93] Such challenges are more serious where panchayat does not have a resource for revenue generation.[94]

4.3 Socio-Political Challenges

Though women's participation in the political process has been significantly crucial from equity and development consideration and reservation has increased women's participation in the local self-governance dramatically, women's leadership faced enormous pressure as a result of the criminalization of Panchayat elections.[95] Female panchayat members found political interference as one of the significant socio-political constraints.[96] In Haryana, female Gram Panchayat members also realized interference by anti-social elements and politicians as the most serious socio-political constraint.[97]

In PRIs political party interest, dominant castes and land-owner's involvement in panchayat decision-making result in quarrels, and conflict and

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88 S.M. Bhabhor, K.D. Kunchala and J.K. Patel, *Determinants of role performance of tribal women Sarpanches under Panchayati Raj system*. 4 (1) Advance Research Journal of Social Science (2013) 12-16 *available at:* http://researchjournal.co.in/upload/assignments/4_12-16.pdf (last visited on 06 January, 2023).

89 Singh, *Supra note* 35.

90 Satpute, *Supra note* 27; Gawali, *Supra note* 87

91 Sinha, *Supra note* 75.

92 Gawali, *Supra note* 87;

93 Singh, *Supra note* 35.

94 Vijaya, *Supra note* 57.

95 Gadadhara Mohapatra, Empowerment of Women through Panchayati Raj Institutions (PRIs) in Odisha: A Review of Issues and Evidence. *62*(2) *Indian Journal of Public Administration* (2016). 294-308. *available at:* https://doi.org/10.1177/0019556120160207 (last visited on 06 January, 2023).

96 Gawali, *Supra note* 87.

97 Singh, *Supra note* 35.

raise an issue regarding the security of women Sarpanch and her family.[98] In Punjab, lower participation of women in decision-making was owing to psychological, social-cultural and political hindrances such as gender stereotypes, low education level, poor resources, proxy candidates and gender disparities by political parties.[99] Apart from that, EWRs acknowledged that political support and strong leadership are the key enabling factors for them.[100] Joining a political party was one of the most critical channels for women to advance in leadership and serve as a bridge for a variety of oppressed groups.[101] In West Bengal, a study found that a majority of female Gram Panchayat members were politically affiliated, but contrary, Zila Parishad and Panchayat Samiti members had a lower proportion of political affiliation.[102]

4.4 **Challenges regarding Awareness and inadequate training**

Inadequate knowledge is recognized as one of the major constraints that have affected the performance of elected women representatives in local self-governance. Female panchayat members lacked the timely and inadequate guidance required to perform their role as a member of local self-governance.[103] In Maharashtra, the study found women representatives lack knowledge about different schemes of local self-governance[104] (Satpute, 2012). In Gujarat, a majority of tribal women Sarpanches had lack awareness about the working of Panchayati Raj Institutions, development programmes, and various rural development initiatives by the government.[105] In Haryana, female respondents felt a lack of proper awareness about their power and responsibility as serious constraints confronted by women in performing gram panchayat duties[106] (Singh, 2013). Further studies revealed that lack of experience, lack of political information, inadequate knowledge about the Panchayat Act, rules, and regulations, lack of orientation in rural development issues and panchayat administration, and lack of technical inputs knowledge related to rural service delivery system were among the factors that women participants believe that these factors contribute to ineffective participation.[107]

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98 Vijaya, *Supra note* 57.

99 Kaur, H., & Singh, M. "Barriers to Political Participation of Women: A Case Study of Punjab, India" 12 (8) *Turkish Online Journal of Qualitative Inquiry* (TOJQI) (2021) 2808-2816. *available at:* https://tojqi.net/index.php/journal/article/view/4730 (last visited on 12 January, 2023).

100 Sukumar, *Supra note* 76.

101 P. V. Krishna, *Participation and Awareness of Elected Women Representatives in PRIs* (Working papers 2014-03-14, Voice of Research.) *available at:* https://ideas.repec.org/p/vor/issues/2014-03-14.html (last visited on 12 January, 2023); Varghese, *Supra note* 73.

102 H. Adhikari, "Leadership at the Grassroots: Positioning Women in Patriarchal Society" *2* (3/4) *Review of Management*, (2012). 13.

103 Gawali, *Supra note* 87;

104 Satpute, *Supra note* 27.

105 Patel, *Supra note* 88.

106 Singh, *Supra note* 35.

107 Sinha, *Supra note* 75; Vijaya, *Supra note* 57.

Lack of training was ranked first among the technical restrictions faced by tribal women Sarpanches in Gujarat.[108] To aid such problems, few government institutions in Kerala, Karnataka, Rajasthan, Maharashtra, and West Bengal fared well in standard evaluations, giving the impression that elected representatives can acquire relevant advice from them to carry out their roles and obligations.[109] Furthermore, elected women representatives believed that a five-day training program was insufficient to learn the full system.[110] In Kerala, the majority of elected women representatives viewed that they needed both technical and administrative abilities to serve the public and that since they had no prior experience with these jobs, they must have received specialized training.[111] Government-level training recognized necessary for women leaders to ensure that their duty was to serve the public fairly and openly while abiding by the constraints of these different parties.[112]

4.5 Other Challenges

Domestic responsibilities were recognized as a barrier for women representatives to perform their roles effectively.[113] Therefore, cooperation is required from husbands and husband's parents for women's political career establishment.[114] Studies found that the majority of female representatives did not attend meetings as they were busy with family work.[115] The study further found that the majority of female representatives who did not attend meetings had a higher proportion in the age group 31-50 years, followed by the age group 51 years to above and by the age group 21-30 years.[116]

Personal constraints identified by female Sarpanches in Guajrat were lack of experience as a leader, low-level education, lack of people's interest in development work, difficulties in expressing village problems to upper-level authorities, lack of cooperation and unity among elected members and difficulties in going alone in the meeting outside the village.[117]

Apart from that, a lack of risk-carrying ability was identified as one of the psychological problems in Konkan and North Maharashtra.[118] In Haryana, the majority of rural female respondents had faced the problems such as a lack of self-confidence, hesitation, anxiety, stress, and laziness.[119] Illiteracy was also identified as one of the primary barriers to the efficient participation and

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108 Patel, *Supra note* 88.
109 Palanithurai, *Supra note* 39.
110 Thapa, *Supra note* 61.
111 Varghese, *Supra note* 73.
112 *Ibid.*
113 Vijaya, *Supra note* 57; Gawali, *Supra note* 87; Kaur, et. al., *Supra note* 99.
114 T. Varghese, "Women's Political Participation and Leadership in India: Examining the Challenges" *19* (1) *Public Policy and Administration*, (2020). 111-125.
115 Nagpal, *Supra note* 30; Satpute, *Supra note* 27.
116 Nagpal, *Supra note* 30.
117 Patel, *Supra note* 88.
118 Gawali, *Supra note* 87.
119 S. Kumar, S. Chander, & S. Kumar, "Awareness among Rural Women about Reservation for Women in Panchayati Raj of Haryana" 8 (2) *International Journal of latest trends in Engineering and Technology*, (2015). 376-381.

functioning of PRIs.[120] Economic independence, commitment to service, transparency in PRIs and administration, support from government officials, family encouragement, and communication skills were the motivating elements that motivated the women respondents to participate in PRI.[121]

Lack of social organizations was identified as a primary restriction faced by female members of panchayats in Maharashtra, followed by villagers' lack of collaboration.[122] In Bihar, women's inferiority to males and the pardha tradition were identified as two main barriers to effective women's participation in PRIs by female office bearers.[123]

Women from higher castes and with higher education who had family members involved in politics wanted to participate in Panchayat elections in Orissa, but strict religious belief systems, elders, and male folk did not allow them to participate in public meetings and the village panchayat's decision-making process.[124]

A study was done in five blocks of East Sikkim's Pakyong, Ranka, Martam, Duga, and Gangtok found that the older group did not want to contest future elections due to health difficulties and wanted to give other women an opportunity to contest.[125] Doubting women's potential was one of the greatest barriers to their successful participation in PRI affairs.[126] Being objected to speak out elected female representative opinion was also considered as one of the major constraints.[127] Biased male representatives' attitude is also one of the factors of low attendance of elected women representatives in various meetings of Panchayati Raj Institutions.[128] All women elected representatives raised this concern irrespective of caste.[129]

Other challenges are gender-based violence, including sexual harassment, assault, and the needless sharing of their photographs on social media. If there was a delay in the execution of policies, women legislators or their families have occasionally been the target of public abuse or criticism. These events caused even the most prominent women in the leadership to make the decision to give up their political careers and lose interest in running in the subsequent election.[130] Elected women representatives were not allowed by family members to travel and stay alone during the residential training, resulting in a lower proportion of women representatives who had completed

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120 Gawali, *Supra note* 87; Maneela, *Supra note* 28.
121 Dubey, et. al., *Supra note* 69.
122 Gawali, *Supra note* 87.
123 Maneela, *Supra note* 28
124 Bag, et. al., *Supra note* 58.
125 Narender Paul, A Case Study on Women Leadership in Panchayat Raj Institutions (PRI) at the Gram Panchayat Level, CORD, *available at:* https://docslib.org/doc/1109730/a-case-study-of-women-leadership-in-pris-at-gram-panchayat (last visited on 20 February, 2023); Thapa, *supra* note. 61.
126 Maneela, *Supra note* 28
127 *Ibid.*
128 Nagpal, *Supra note* 30
129 Maneela, *Supra note* 28.
130 Varghese, *Supra note* 73.

training.[131] Female members were not permitted to travel alone by their family members.[132]

Woman sarpanch also claimed that because of the patriarchal mindset of wearing a sari, she was unable to wear a salwar suit and, consequently, could not ride a two-wheeler, placing her in need of the assistance of other male members to travel to different locations to attend meetings or carry out other activities of local self-governance.[133] Domestic duties prevented the elected women representatives from participating in social development activities, particularly at night when their presence was essential.[134] Costly and complex technologies are considered major technological constraints confronted by female panchayat members in performing the given role.[135]

4. Conclusion

India has been gradually emerging as a powerful nation since women are playing notable roles in the development of the country. Women are now considered to be capable of making a stride between their household and professional lives. The concept of gender equality has been recognized by the United Nations through its Sustainable Development Goal-5. Almost all the sectors are dominated by male public representatives and executives in both developed and developing nations and hence women face numerous difficulties in participating in the decision-making process at all levels of governance. With the legislative intervention, women are placed as part of local self-governance as some state reserve fifty percent of seats for women in local self-governance. Despite all these efforts towards gender equality and women empowerment, participation in the decision-making process and fulfilling statutory responsibilities, women elected as people's representatives face several challenges.

Elected women representatives participated in different activities of the Panchayati Raj Institution, including political, social, economic, development, decision-making, policy-making, and legal activities. They face several challenges when running for office and carrying out their assigned responsibilities in Panchayat Raj Institutions, including financial, administrative, legal, sociopolitical, knowledge gaps, inadequate training, domestic, socio-cultural, economic, personal, social, mobility and technological issues. These issues need to be addressed with the efforts of all stakeholders of local self-governance. A society's progress cannot be achieved without the empowerment of women. It ensures India's commitment to strengthening Sustainable Development Goal 5, which is a crucial prerequisite for a prosperous, peaceful, and sustainable society.

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131 Sinha, *Supra note* 75.
132 Maneela, *Supra note* 28.
133 Sukumar, *Supra note* 76.
134 Varghese, *Supra note* 73.
135 Gawali, *Supra note* 87.

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Interpreting Indian Constitutional Morality through the Lens of *Dharma*

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Abstract

The principle of constitutional morality emphasizes the significance of upholding the ideas and values that are codified within a constitution. In the Bharatiya context, the Constitution functions as grundnorm, offering direction for the functioning of the state and safeguarding the rights and liberties of its citizens. The interpretation and application of constitutional principles raise complex questions about morality, justice, and societal good. One way to analyze these questions is through Dharma, which is a concept deeply embedded in Bharatiya tradition and has been grundnorm of Bharat. It consists of moral, ethical, and cosmological concepts that form a framework for personal conduct and social orderliness. This study thus seeks to investigate how constitutional morality intersects with Dharma, looking at whether or not the ideas embedded in Dharma can be introduced into constitutional morality. It will draw on constitutional law, jurisprudence, and ancient Bharatiya scriptures for insights on these issues. This study aims to contribute to the current legal discourse about the judiciary's interpretation and implementation of constitutional values within the framework of Dharma.

Keywords: Constitutional Morality, Popular Morality, Social Morality, Dharma, Morality

Introduction

"The survival of our democracy and the unity and integrity of the nation depend upon the realization that constitutional morality is no less essential than constitutional legality. Dharma (righteousness; sense of public duty or virtue) lives in the hearts of public men; when it dies there, no Constitution, no law, no amendment, can save it."

~ *Nani Palkhivala*

In the case of *Madhav Rao Jivaji Rao Scindia vs. Union of India,*[1] Nani Palkhivala articulated the aforementioned quotation, wherein he construed the constitution as a societal imperative accompanied with a moral aspect. He

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[1] 1971 SCC (1) 85

placed significant emphasis on the notion that constitutional morality holds equal importance to constitutional law. Along with it, he mentioned the term Dharma to emphasize that Dharma is supreme and is the Grundnorm in the Bharatiya context. He established the intersection between constitutional morality and Dharma in order to ensure the sustainability of our democratic system and the unity and the integrity of our nation.

Taittiriya Samhita states:

Dharmo vishwasya jagatah pratishtha
Loke dharmishtham praja upasarapanti
Dharmena papamapanudati
Dharme sarvam pratishthanam
Tasmad dharmam paramam vadanti

(Taittiriyopanishat-Jnanasadhana Nirupanam-vide Sasvara Vedamantra p. 128.)

Dharma serves as the fundamental basis for all matters and activities within the world. Individuals hold a high regard for those who demonstrate adherence to the principles of Dharma. The concept of Dharma serves as a protective barrier for individuals, shielding them from engaging in ideas and behaviors that are considered sinful. The foundation of everything in this universe is based on the concept of dharma. Dharma is widely regarded as the ultimate authority.[2]

The term "Dharma" holds significant meaning in the Sanskrit language, including a broad range of concepts and principles. There is no equivalent term in any other linguistic system. Attempting to provide a definition for the aforementioned term would prove to be fruitless. The phenomenon can only be elucidated. The term encompasses a diverse range of interpretations. Several of them might facilitate our comprehension of the breadth of that phenomenon. The term "Dharma" encompasses various meanings, including justice (Nyaya), what is morally right in a specific situation, religious principles, righteous conduct, acts of kindness towards living beings, acts of charity or almsgiving, inherent qualities or attributes of living beings and objects, obligations or duties, legal norms and customary practices with legal validity, as well as a legitimate royal decree (Rajashasana).[3] Dharma is the contextual term and here it implies the 'Morality'. In simple terms, Morality is the subjective assessment of an individual or a society about what is right and wrong i.e righteous conduct, as Dharma suggests.

Dhāraṇāddharmamityāhuḥ dharmo dhārayata prajāḥ
Yasyāddhāraṇasaṃyuktaṃ sa dharma iti niśchayaḥ (Karna Parva Ch. 49.50)

Dharma can be understood as the moral and ethical principles that serve to maintain and sustain societal order. The Dharma is closely linked to the preservation and safeguarding of human life. The scriptures explicitly state this understanding.[4]

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2 Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient, Judicial and Constitutional System* (Universal Law Publishing Co.).

3 *Ibid.*

4 *Ibid.*

With the advancement of legal discourse, we come across two terms, i.e., social/popular morality and constitutional morality. In recent years, the idea of social and constitutional morality has grown in significance. It is evident from a variety of Indian judiciary rulings that societal morality has occasionally superseded constitutional morality and vice versa in India.

Understanding the concept of Constitutional Morality and Social/Popular Morality

In the contemporary legal discourse, The Constitution of India is widely acknowledged as the fundamental legal framework (Grundnorm) of the nation. It is regarded as a living instrument that provides guidance to the Indian Judiciary in the resolution of diverse matters. It is continuously evolving, indicating that the constituent assembly, during its preparation, allowed for some flexibility to ensure it remains relevant and up-to-date with the changing needs and conditions of Bharatiya society. In addition, the numerous ideals, including liberty, equality, fraternity, and justice, function as a moral criterion for the distinct branches of the government. The executive branch provides guidance to the legislature on the types of laws to enact and how to execute them. The judiciary, specifically the courts, adhere to the Constitution in order to render decisions on the matters presented to them. They analyze the Constitution and render diverse judgments depending on the principles established by the analysis. The judiciary is occasionally required to develop novel doctrines in order to address diverse concerns and uphold justice throughout society. This can be attributed to the fact that, although being the longest written text worldwide, the Constitution is unable to explicitly describe all the notions that adapt to the changing demands of society. In the past twelve years, Indian courts have come up with the idea that the Indian Constitution contains a morality known as constitutional morality (CM). CM is an instrument that helps judges figure out what the Constitution's text means in cases where there is disagreement. Courts have used CM in many situations, including those involving individual rights, group rights, minority rights, federalism, the duties of constitutional players, and the right constitutional processes that govern how institutions interact with each other. The Indian Constitution does not explicitly mention or employ the the term 'Constitutional Morality' in any of its articles. However, the phrase "morality" is addressed four times in the Indian Constitution i.e. Article 19(2), Article 19(4) (Right to Freedom), Article 25(1), and Article 26 (Right to Freedom of Religion). The Supreme Court utilized the Constitutional Morality in order to gain insight into the several fundamental rights that are safeguarded by the constitution, as well as to ascertain the constitutional validity of statutes. Consequently, the judges have given it many meanings. The Constitution implicitly includes the notion through its inclusion in Part III-Fundamental Rights (Article 12-35), Part IV-Directive Principles of State Policy (Article 36-51), the Preamble, and Fundamental Duties.

Social morality can be defined as the shared responsibilities that individuals within a society have towards the overall welfare of the society.

These are moral rules or ways of acting that most people agree with and understand. Social morality is important because it sets the rules that keep a group peaceful. It lets people live together without fighting or arguing with each other. It has to do with how people in the neighborhood treat each other. It can be done with plans for politics, society, the economy, and the environment. One of the essential features of social morality is to have righteousness among the individuals to determine what is right and wrong. It's also good to deal with ethical problems that come up a lot in society. Social morality tells us how to treat each other, our groups, and society as a whole. To study social morals, people use a mix of psychology, anthropology, sociology, and ethics. When someone has social morality, it comes from their culture, society, family history, and personal situations.

Social morality is basically the dharma that people in a society should follow toward each other, the environment, the state, and the country. It is the collective conscience of the individuals living in the society. However, the definition of social/popular morality has not been defined by the court.

Grote's views on Constitutional Morality

An English historian named George Grote, who lived in the 1800s and wrote a complete 12-volume history of Greece, was the first person to use the phrase "constitutional morality" in his work.[5] He said it was a form of popular authority based on freedom and self-control.[6] Grote defined "constitutional morality" as follows:

> "[A] paramount reverence for the forms of the constitution, enforcing obedience to the authorities acting under and within those forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts—combined too with a perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be not less sacred in the eyes of his opponents than in his own."[7]

Grote said that constitutional morality has been around in the U.S. and England since the Glorious Revolution in 1688. He warned that it wasn't a "natural sentiment"[8] and that "judging by the experience of history," it was very hard to "establish and diffuse [it] among a community."[9] He also said that constitutional morality was "a necessary part of a government that is both free and peaceful."[10] Organizations like the courts in Cleisthenes's Athens didn't intend to use the concept of "constitutional morality" to subvert the democratic majority's will. Grote asserted that the establishment and diffusion of a community's "sentiment" was essential for the establishment of a "free and

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5 George Grote, *History of Greece* (Nabu Press, United States of America, 2011).
6 *Ibid.*
7 *Ibid.*
8 *Ibid.*
9 *Ibid*.
10 *Ibid.*

peaceable"[11] government. When Grote put it this way, constitutional morality implied certain obligations for both the citizens as well as the authorities, which have been enlisted below:[12]

1. The Constitution would be respected by all citizens.
2. According to the Constitution, all citizens would submit to authorities.
3. All individuals would have the liberty to openly express their disapproval of public officials who are performing their constitutionally required responsibilities.
4. Public servants would be required to behave in accordance with the Constitution.
5. Politicians would uphold the Constitution and assume that those challenging them would do the same.

Constitutional morality suggests that these are presumably defined obligations/duties that both citizens and the government must uphold. Similarly, *Dharma* outlines duties that both the government and its people have to fulfill.

Grote's theory of constitutional morality fundamentally posited the necessity of "coexistence of freedom and self-imposed restraint; of obedience to authority with unmeasured censure of those exercising it."[13] Individuals would demonstrate reverence for the Constitution and adhere to the regulations established by constitutional authorities, while simultaneously possessing the freedom to challenge these authorities. The constitutional authority must operate within the legal boundaries.

Dr. Ambedkar's views on Constitutional Morality.

Dr. B.R. Ambedkar, widely regarded as the progenitor of the Indian Constitution, was the first person in India to use the phrase 'Constitutional Morality'. During the Constituent Assembly debate, he used this phrase to explain why it was important and necessary for the assembly to have administrative powers and duties.[14] Dr. Ambedkar mentioned the views of Grote on constitutional morality:

> "The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceable, since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer ascendency for themselves."[15]

In simple words, constitutional morality diffusion is crucial for a free and peaceable government, as even powerful minority forces can hinder its functioning without conquering ascendency. During the debates of the Constituent Assembly, Dr. Ambedkar again quotes Grote's view of

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11 *Ibid.*
12 *Ibid.*
13 *Ibid.*
14 Constituent Assembly Debates of India, Vol. 7, p.31
15 *Ibid.*

understanding constitutional morality: "a paramount reverence for the forms of the Constitution.".[16] According to Dr. Ambedkar, The consensus among scholars is that the dissemination of constitutional morality plays a crucial role in ensuring the effective functioning of a democratic constitution, there are two things that are linked to this that most people don't see. One reason is the close relationship between the Constitution's phrasing and how things operate. The way the government works must match the way the Constitution is written and make sense. Conversely, it is possible to manipulate the Constitution without modifying its structure. The only necessary action is to alter its administration, ensuring it aligns with and contradicts the core principles of the Constitution. So, people can only take the chance of leaving details of governance out of the Constitution and letting the Legislature decide them in situations where they are deeply committed to its morals, like the one described by historian Grote. The question is whether or not we can assume that constitutional morals will diffuse in this way. Constitutional virtue is not something that comes naturally. It needs to be grown. We must acknowledge that our population is currently undergoing the process of acquiring knowledge. India's democracy is merely a superficial facade on Indian soil, as it lacks true democratic principles.[17]

Accordingly, Dr. Ambedkar advocated the idea that constitutional morality implies respecting procedures and constitutional forms. He emphasized that constitutional morality must uphold the foundational ideals of democracy, i.e., liberty, equality, and fraternity.[18] Therefore, it is imperative for the constitution to sustain the goals outlined in the preamble, as they are considered the morality or *dharma* of the constitution.

Judicial Interpretation of Constitutional Morality

In contemporary legal discourse, constitutional morality can be generally classified into two distinct subcategories: the essence or efficacy of the Constitution and the antithesis of popular morality or social morality. Since the country's adoption of a constitution, the courts in India have rarely applied the constitutional morality. The case of *Kesavananda Bharati v. State of Kerala*[19] marked the inaugural instance in which the Supreme Court made a reference to constitutional morality. The concept that has been formulated in this context is commonly known as the "basic structure doctrine" of the Indian Constitution. In this instance, Justice AN. Ray determined that constitutional morality is in fact required for the majority as well as the entire population, based on Grote's construction. He accorded it equal standing for the duration of the social contract[20]. Although he did not address it extensively, Justice P. Jaganmohan Reddy used the phrase and mentioned Ambedkar in his ruling.[21]

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16 *Ibid.*
17 *Ibid.*
18 Ajay Kumar, "Two Different but Same Perspectives on Constitutional Morality" *ILI Law Review* (2022).
19 (1973) 4 SCC 225.
20 *Id*., at para 747.
21 *Id*., at para. 1112.

One other well-known case in which a "breach of constitutional morality" was mentioned was 'First Judges case', also known as *S.P. Gupta v. Union of India.*[22] Justice ES. Venkataramiah stated in the said case: "A convention is a rule of constitutional practice which is neither enacted by Parliament as a formal legislation nor enforced by courts, yet its violation is considered to be a serious breach of constitutional morality leading to grave political consequences to those who have indulged in such violations."[23] Justice SB. Sinha ruled in *Islamic Academy of Education v. State of Karnataka*[24] that:

> *"[An] affirmative action may, therefore, be constitutionally valid by reason of articles 15(4) and 16(4) and various directive principles of state policy, but the court cannot ignore the constitutional morality which embraces in itself the doctrine of equality. It would be constitutionally immoral to perpetuate inequality among the majority people of the country in the guise of protecting the constitutional rights of minorities and constitutional rights of backward and downtrodden."*[25]

The case of *Advocates on Record Association v. Union of India,*[26] also referred to as the NJAC case, addressed the constitutionality of the 99th amendment, which established the National Judicial Appointment Commission as a substitute for the judges' collegium process. An intriguing point was made by Justice J. Chelameswar, a member of the minority that disapproved of the amendment, regarding the importance of constitutional morality for the Indian court. He said that "we the members of the judiciary exult and frolic in our emancipation from the other two organs of the state. But have we developed an alternate constitutional morality to emancipate us from the theory of checks and balances, robust enough to keep us in control from abusing such independence?"[27]

The Delhi High Court ruled in *Naz Foundation v. Government of NCT of Delhi*,[28] also referred to as the Naz Foundation case, that an individual's fundamental rights to privacy and dignity cannot be violated merely because one has strong moral objections to them. Despite popular acceptance, the notion of constitutional morality must not take precedence over popular morality.[29] This is how our constitution has things organized. While popular morality is entirely predicated on "shifting and subjecting notions of right and wrong,"[30] constitutional morality derives from constitutional values. A precedent was established whereby the courts evaluated State activities without reference to social norms, stigmas, or restrictions. Therefore, constitutional morality alone—rather than public morality—should serve as the

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22 1981 Supp (1) SCC 87.
23 *Id.*, at para. 1077.
24 (2003) 6 SCC 697.
25 *Id.*, at para. 98.
26 (2016) 5 SCC 1.
27 *Id.*, at para. 1113.
28 (2009) 111 DRJ 1.
29 *Id.*, at para. 86.
30 *Id.*, at para. 79.

yardstick for upholding legislation.[31] For example, in this case, the Court considered the ideal of upholding the constitutional principles rather than society's perception regarding the legitimacy of same-sex relationships when deliberating upon the matter pertaining to the decriminalization of homosexuality, which was then a criminal offense under Section 377 of the Indian Penal Code.

Although the Supreme Court acknowledged that popular morality could not be a valid justification for violating an individual's right, it overturned the High Court's decriminalization of homosexuality in the *SK. Koushal case*.[32] The United Kingdom's Wolfenden Committee Report on the subject of homosexuality between consenting adults makes the same observation. Consequently, in the case of *Navtej Singh Johar v. Union of India,*[33] a panel of five judges endorsed the perspective of the *Naz Foundation*. Chief Justice Deepak Misra, who was also addressing on behalf of Justice Khanwilkar, stated that the courts in this case should follow the constitutional morality theory rather than popular morality. He emphasized that constitutional morality should take precedence over the opinions of the majority or the general public. Although there are many additional virtues that fall under the umbrella of constitutional morality, the adoption of a multicultural and inclusive society is the primary goal of constitutional morality. Constitutional morality, he noted, is the only element that can be permitted to enter the rule of law and cannot be "sacrificed for the sake of social morality."[34] Social morality cannot be used as a cover for the violation of an individual's fundamental rights.[35] According to Justice RF. Nariman, the "Preamble" of the Indian Constitution contains the fundamental idea of constitutional morality. The "ideals and aspirations" of the constitution are stated in the preamble. He went on to say that the Indian Constitution's guarantees of individual dignity and fundamental rights in general are also sources of constitutional morality.[36] Justice DY. Chandrachud observed that the state's institutions must be obedient to the constitutional morality principle in order to fulfill the goals of "Justice, Liberty, Equality, and Fraternity" as stated in the Preamble. Social morality shouldn't have an impact on such loyalty and dedication to constitutional morality.[37]

In the case of *Joseph Shine v. Union of India,*[38] the Supreme Court deliberated over the key matter concerning the constitutional legitimacy of section 497 of the Indian Penal Code (IPC). This clause penalized a man (not a spouse) for engaging in sexual activity with a married woman, even if she gave her consent. While invalidating section 497, Justice RF. Nariman emphasized

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31 *Ibid*.
32 *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.
33 (2018) 10 SCC 1.
34 *Id*., at para. 268.
35 *Ibid*.
36 *Id.*, at para. 349.
37 *Id*., at para. 352.
38 (2019) 3 SCC 39.

the superiority of modern constitutional morality above local social mores. He discovered that:[39]

> "Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It envisages the creation of a society where the "ideals of equality, dignity and freedom" triumph over entrenched prejudices and injustices. The creation of a just, egalitarian society is a process. It often involves the questioning and obliteration of parochial social mores which are antithetical to constitutional morality".

Common morality and constitutional morality were reviewed by Justice DY Chandrachud. He observed that in order to ensure the provision of essential and fundamental rights for individuals to live an equitable and liberated life as a part of society, the state must uphold the principles outlined in the constitution. Rather than any common or popular morality, constitutional morality must always serve as the foundation for the law. Because section 497 of the IPC disturbs the operation of articles 14 and 15, which deal with equality and non-discrimination, respectively, we must uphold them out of loyalty and commitment to constitutional morality.[40] The court further stated in this instance that the fundamental components of constitutional morality are equality, liberty, and dignity. Justice Dipak Misra in the case of *Manoj Narula v. Union of India* [41] effectively replaced the principle of the rule of law with constitutional morality. As per his statement, constitutional morality essentially entails adhering to the principles outlined in the Constitution and refraining from engaging in actions that would contravene the rule of law.[42]

In *State (NCT of Delhi) v. Union of India,*[43] It was observed that "Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse."[44] The court made the observation that the courts have an obligation to interpret laws and preserve the values derived from the constitution. It is also the judges' responsibility to be impartial toward the majoritarian viewpoint. Constitutional morality should not be subordinated to social morality or popular opinion that lacks legal support when a criminal provision, such as Section 377 in this instance, is contested.[45] This approach allows the courts to render just decisions even in cases where the group whose fundamental rights are infringed upon is relatively small. Conversely, the court in the *Suresh Kumar Koushal* case determined that Section 377 is constitutionally valid, notwithstanding the fact that only a small portion

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39 *Id*., at para. 87.
40 *Id*., at para. 143.
41 (2014) 9 SCC 1.
42 *Supra* note 43 at para. 75.
43 (2018) 8 SCC 501.
44 *Id.*
45 *Id.*

of the country's population consists of lesbians, gays, bisexuals, or transgender individuals.[46]

The *Indian Young Lawyers Association v. State of Kerala*[47] case (also known as the Sabrimala Temple case) explicitly examined the harmony between equality and religious rights. In this instance, the primary concern was the ban on women entering temples on the grounds that it violated public or popular morals. The unconstitutionality of this restriction was determined by Chief Justice Misra, who asserted that the term 'morality' as delineated in sections 25 and 26 of the Indian Constitution should pertain to constitutional morality rather than social morality.[48] In reference to the aforementioned subject, Justice DY Chandrachud articulated that the core principles of constitutional morality encompass the four tenets enumerated in the Preamble of the Indian Constitution. He lists these four precepts as follows: everyone should feel a sense of brotherhood, everyone should have the right to liberty, and everyone should be treated equally. He went on to say that only in a system that values liberty can an individual be treated with dignity. It is the equality of citizens required by the notion of dignity. Legal protection is granted based on equality in the same manner as it is for others. Additionally, it upholds the inalienable right to be free from discrimination. These serve as the compass points for governing the idea of constitutional morality.[49]

Consequently, it is incumbent upon the court to maintain the provisions enshrined in the constitution, provided that they align with the fundamental principles and constitutional morals. The Indian Constitution's guiding principles are outlined in the trinity of equality, liberty, and dignity. This trinity's priorities are of the highest order, and any tradition, viewpoint, or way of life that goes against them is wrong.[50] He claimed that the objectives of our constitution's framers can be achieved by incorporating "liberty, equality, and fraternity" as essential foundations of constitutional morality. These are the sole steps that can be implemented to guarantee equitable dispensation of justice to our citizens. Thus, the essential principles of equality, liberty, and dignity must take precedence.[51] In this case, the court determined that the noble objectives of liberty, equality, and fraternity must have served as the fundamental principles of constitutional ethics once more. In summary, the Supreme Court's rulings above suggest that constitutional morality, as opposed to public morality, is a morality based on the core tenets of equality, fraternity, and human liberty.

Constitutional Morality from a critical standpoint

Liberals and progressives have praised the apex court for adopting a reforming position on various issues by prioritizing constitutional morality

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46 *Supra* note 34.
47 (2018) SCC OnLine SC 1690.
48 *Id.*, at para. 110-111.
49 *Id.*, at para. 189.
50 *Id*., at para. 226.
51 *Supra* note 52.

over popular morality. On the other hand, the opposing viewpoint has expressed doubts about the Apex Court's interpretation and application of the word "constitutional morality" and contends that the implementation of this theory amounts to judicial overreach.[52] In this regard, the Attorney General of India (AGI) K.K. Venugopal has also voiced his concerns.[53] The AGI stated in reference to the *Sabarimala Temple*[54] case:

> "What is this Constitutional morality? If a bench of the Supreme Court speaks in two different voices, one saying Constitutional morality will permit the entry of women and the other one which says no, it's prohibited because of constitutional morality, that is a very dangerous weapon. You cannot use it. It can result in grave injury without anyone knowing where it's going to end. Therefore I'm hoping Constitutional morality will die with its birth."[55] K.K. Venugopal asserted that Grote and Ambedkar never meant for courts to apply constitutional morality to determine whether government activity is lawful or not. They saw it as a goal, hoping that citizens would instill a passion for the Constitution that would make it difficult for the ruling political class to destroy it.[56]

In addition, K.K. Venugopal articulated his critique by asserting that Constitutional morality does significant harm to the nation. When employing this notion, the ultimate destination remains uncertain. He prays that constitutional morality ceases to exist. The potential realization of Prime Minister Pandit Nehru's initial concern regarding the transformation of the Supreme Court into a third chamber is a possibility.[57]

Taking a critical stance on the same matter, the then Union Law Minister Mr. Ravi Shankar Prasad requested the courts to define constitutional morality if it was going to be used as a "touchstone" to determine whether legislation was acceptable.[58] As per the Minister's assertion, it is imperative to establish a consensus and delineate the intricacies of constitutional morality with precision, ensuring uniformity across all judges.[59] Senior Advocate Abhishek Manu Singhvi has addressed the application of constitutional morality in his most recent book. He claimed that the phrase is rife with subjectivity and that different judges would have different approaches to the

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52 Md Zeeshan Ahmad, "The challenge of Constitutional Morality before the Supreme Court" *The Leaflet*, March 26, 2020, *available at*: https://www.theleaflet.in/the-challenge-of-constitutional-morality-before-the-supreme-court/

53 "Constitutional morality must die or SC could become Parliament's third chamber, as Nehru feared: A-G Venugopal" *Times Now News*, December 09, 2018, *available at*: https://www.timesnownews.com/india/article/kk-venugopal-attorney-general-sabarimala-news-address-constitutional-morality-supreme-court-jawaharlal-nehru-bharatiya-janata-party-chief-justice-of/328266

54 *Supra* note 50.

55 *Supra* note 56.

56 *Ibid.*

57 *Ibid.*

58 *Supra* note 55.

59 *Ibid.*

law.[60] Mr. Gopal Subramaniam noted that if laws and doctrines are applied without considering their righteousness and potential effects on society, they could prove to be harmful.

"Righteousness; sense of public duty or this image is in the heart of every citizen and once this dies then no Constitution, no law, no amendment, can save it,"[61]Mr. Nani Palkhivala stated once, during his argument in the *privy persecution case*.[62] If this idea is applied in the courtroom in an unethical and irrational manner without visibility and unity, it will be in danger.

The primary critique directed at constitutional morality is its imprecise nature. Judges have not sufficiently addressed this issue, and there is now no clear consensus among the court regarding the nature and scope of this principle. Most judges don't even define the phrase; they just apply it.[63] According to Justice Chandrachud, constitutional morality has an infinite scope. Perhaps sensibly, he declines to provide a comprehensive list of moral principles that make up this one.[64] Justice Chandrachud stated in the *Sabarimala Temple case*[65] that the preamble contains the "matters on which the Constitution has willed that its values must reign supreme."[66]

In *State (NCT of Delhi) v. Union of India*,[67] In his analysis, Justice Chandrachud examined the constitutional morality within the framework of the Constitution's spirit,[68] speaking for both himself and his fellow judges. In order "to enhance and complete the spirit of the Constitution,"[69] He stated, constitutional morality necessitates that constitutional silences be filled. Constitutional morality, he continued, lays out principles for institutions to survive as well as "expectations of behavior that will meet not just the text but the soul of the Constitution."[70]

Constitutional morality, which Justice Nariman referred to as "the soul of the Constitution," in *Navtej Singh Johar*,[71] was found in the Preamble of the document, which states its ideals and aspirations. In addition, he asserted that constitutional morality is present in Part III of the document, specifically in relation to the provisions that uphold an individual's dignity.[72] In a subsequent

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60 Nishant Mishra, "The Making of Constitutional Morality by Indian Judiciary: History, Significance and Concerns" *Lawctopus*, June 10, 2021, *available at:* https://www.lawctopus.com/academike/constitutional-morality-india/

61 *Supra* note 3.

62 *Ibid.*

63 Nakul Nayak, "Constitutional Morality: An Indian Framework" *SSRN 24* (2021), *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885432

64 *Ibid.*

65 *Supra* note 50.

66 *Id.*, at para. 12.

67 (2018) 8 SCC 501.

68 *Supra* note 44.

69 *Supra* note 70 at para. 301.

70 *Id.*, at para. 302.

71 *Supra* note 35.

72 *Id.*, at para. 79.

Sabarimala Review,[73] He stated that the fundamental concepts of constitutional morality are encompassed inside the Preamble, together with other sections such as Part III and Part IV.[74] Justice Nariman has expanded upon his previous interpretation by mentioning Part IV and "various other parts" of the constitution.[75] Justice Dipak Misra in the case of *Manoj Narula v. Union of India,*[76] effectively replaced the principle of the 'rule of law' with constitutional morality.[77] He asserts that constitutional morality is abiding by the rules of the Constitution and abstaining from engaging in actions that would contravene the law.[78] According to Justice Misra's statement in the *State (NCT of Delhi) case*,[79] constitutional morality encompasses the rigorous and comprehensive observance of the constitutional principles as outlined in different sections of the constitution. It refers to the morality that is inherent in the constitutional norms and the conscience of the Constitution.[80] In the *Navtej Singh Johar case,*[81] He referenced the words of the constitution, the concept of plurality, the ideal of inclusion, and other fundamental concepts of constitutionalism.

The lack of specificity in these conceptions of constitutional morality is inadequate in mitigating any potential unpredictability within the legal system. How should a judge in a lower court ascertain the moral permissibility of a contested State action under the constitution, taking into consideration the concept of stare decisis? The main issue that arises from this ambiguity is that judges' rules for determining what constitutes constitutional morality are inconsistent—even contradictory—both within and across their own rulings[82]. The concern is that because of its ambiguity, the judges' prejudices and personal beliefs may be taken into account.[83] Professor Oliver Wendell Holmes asserts that it is foolish and harmful for judges to downplay the human factor. Judges cannot escape it. Merely holding their position does not absolve judges of their humanity. Every person has preconceived notions and biases. However, when individuals of a particular kind and class start congregating in government buildings, the result is an unstable combination. Consequently, these preconceptions and biases permeate the entire system and are evident in the work that people produce.[84] In a case like this, the judiciary's interpretation of constitutional morality may amplify some voices while silencing others.[85]

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73 *Kantaru Rajeevaru v.Indian Young Lawyers Association*, 2020SCC OnLine SC 158.
74 *Id.*, at para. 121.
75 *Supra* note 66.
76 *Supra* note 43.
77 *Supra* note 44.
78 *Supra* note 43 at para. 75.
79 *Supra* note 46
80 *Id.*, at para. 79.
81 *Supra* note 35.
82 *Supra* note 66.
83 *Supra* note 63.
84 "Constitutional Morality: Not Only Domain of Judiciary" *CPRG India Blog*, December 13, 2018, *available at*: http://www.cprgindia.org/blog/opinion/ constitutional-morality-not-the-domain-of-judiciary/
85 *Supra* note 66.

Conclusion

With regards to the Indian Constitution, constitutional morality implies that the Constitution also has its own dharma. What is the Constitution's dharma? It lies in the Preamble, which is acknowledged as the soul of the Constitution. Constitutional morality, which Pandit Thakur Das Bhargava Justice Nariman, referred to as "The soul of the Constitution," was found in the Preamble of the document, which states its ideals and aspirations. The principles enshrined in the preamble, including justice, liberty, equality, fraternity, unity, and integrity, represent the *dharma* of the constitution, which have to be upheld collectively by the state and its individuals. The very first line of the Preamble says that WE, THE PEOPLE, implies that the citizens of this nation have come together and resolved that they themselves are the ultimate source of authority and giving themselves this constitution. If it goes well, then how can social morality be substituted with constitutional morality? The so-called constitutional morality should not be in contradiction with social morality. Furthermore, it is worth considering how the constitutional morality established by the supreme court of India can potentially conflict with the prevailing common morality. The interpretation of constitutional morality by the Supreme Court is contingent upon its adherence to its motto., i.e., "*yato dharmastato jayaha*," that occurs in the Mahabharata fifteen times, and it implies that "Where there is adherence to right action, there [alone] lies victory!"

While the Constitution provides the legal basis for a democratic society, *Dharma* supplements it by offering a moral and ethical framework that directs how constitutional morality should be interpreted and put into practice. *Dharma* ensures that judicial decisions are both legally and morally sound by upholding the fundamental principles of justice, fairness, and equality found in the Constitution. Judges can resolve moral conundrums and advance values like empathy, compassion, and social responsibility—all of which are essential to a just and equitable society—by incorporating *Dharma* into legal thinking. *Dharma* provides interpretive flexibility that enables it to be modified to meet the needs of modern society and legal difficulties. Judges can negotiate complicated issues with sensitivity to moral considerations by incorporating *Dharma* into legal language, which improves the judicial process' legitimacy and effectiveness. While interpreting both, the application of *Dharma* may offer a medium ground between popular morality and constitutional morality and maintain the judiciary's checks and balances. The imposition of Western morality on Indian society, which exhibits significant differences from the Western world, should be avoided in the pursuit of Constitutional morality. It is high time for the Supreme Court to define the contours of Constitutional morality and to inform about the parameters while defining Constitutional morality with their perspective.

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Authorship V. Ownership Battle in Copyright for AI Generated Content

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Abstract

With the development of AI technologies, copyright and the function of copyright societies are likely to undergo dynamic evolution. Copyright societies will be essential in establishing legal frameworks, promoting moral AI procedures, and encouraging cooperation between interested parties. Copyright societies will use cutting-edge technical solutions to manage copyright more transparently, like blockchain, and more effectively using AI-powered content detection tools and enforcement. In order to solve the issues faced by AI-generated content, standardisation efforts, enhanced cross-industry collaboration, and educational programmes will be crucial. Copyright societies will traverse a challenging terrain as cultural and societal views change, guaranteeing just recompense for artists while juggling public worries about AI's potential to stifle creativity. In the dynamic field of AI copyright, the future looks to be one of harmonisation and adaptation, with copyright societies taking the lead in defending intellectual property rights.

Keywords: Artificial Intelligence, Copyright, Copyright Societies.

Introduction

The concepts of authorship and ownership in copyright law are fundamental to understanding how intellectual property rights are established and protected. They are of paramount importance in copyright law, serving as the bedrock upon which the entire framework of intellectual property protection is built. The concepts of 'Authorship' and 'Ownership' lie at the heart of copyright law, shaping the rights and responsibilities of creators, rights holders, and users of creative works. By recognizing and protecting these fundamental rights, copyright law promotes creativity, fosters cultural development, and contributes to the advancement of society as a whole.

Concept of Authorship

The author of a copyrighted work is generally considered to be the person or group of people who created the work[1]. The term "author" can

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encompass a wide range of creators, including writers, artists, musicians, filmmakers, and programmers. Whenever a copyrightable work is created, the author puts in his intellectual ability in order to create the work. Hence, the Copyright Act, 1957, recognizing the efforts put by the authors, grants authorship rights to the author of the creation. Since copyright is a universal right, it doesn't matter what the nationality of the author is in order to acquire authorship rights.

Section 2(d) in The Copyright Act, 1957 states[2]:

"author" means, —

i. in relation to a literary or dramatic work, the author of the work;
ii. in relation to a musical work, the composer;
iii. in relation to an artistic work other than a photograph, the artist;
iv. in relation to a photograph, the person taking the photograph;
v. in relation to a cinematograph film or sound recording, the producer; and
vi. in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;

(a) (dd)"broadcast" means communication to the public and includes a re-broadcast;

Authorship is the identification of the individual or individuals who contributed to the creation of a copyrighted work. To qualify as an author under copyright law, the individual must have made a significant and original contribution to the creation of the work. This contribution can be in the form of creative expression, such as writing, composing, or designing as mere ideas, facts, or concepts typically do not qualify for copyright protection. The other kind of Authorships include:

Joint Authorship[3]: When two or more individuals contribute to the creation of a single work with the intention that their contributions be merged into inseparable or interdependent parts of a unified whole, they may be considered joint authors.

Anonymous and Pseudonymous Works[4]: Copyright law also recognizes works published without identifying the author or under a pseudonym. In such cases, the copyright protection lasts for a specified duration, typically based on the date of publication or the death of the author, depending on the jurisdiction.

Concept of Ownership

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1 Columbia Law School – Scholarship Archive, available at https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1695&context=faculty_scholarship (last visited on April 16, 2024)

2 India Code, available at https://www.indiacode.nic.in/handle/123456789/1367?sam_handle=123456789/1362 (last visited on April 16, 2024)

3 Indian Journal of Law and Legal Research, available at https://www.ijllr.com/post/joint-author-under-the-copyright-act (last visited on April 16, 2024)

4 ,Copyright India, available at https://copyright.gov.in/ Copyright_Act_1957/chapter_v.html (last visited on April 17, 2024)

Copyright ownership refers to the legal rights held by the author or other entities (such as employers or companies) in relation to a copyrighted work. Generally, the author of a work is the initial owner of the copyright. However, there are exceptions. These include:

Works made for hire[5]: In some jurisdictions, if a work is created by an employee within the scope of their employment, the employer is considered the legal author and owner of the copyright, unless there is an agreement stating otherwise. Similarly, works created under a contract specifying that they are "works made for hire" may also result in the commissioning party being considered the owner of the copyright.

Assignment and licensing: Copyright ownership can also be transferred or licensed to other parties through agreements such as assignments or licenses[6]. An assignment involves the permanent transfer of ownership rights, while a license grants permission to use the work under certain conditions, without transferring ownership

Authorship v. Ownership

When individuals contribute to the creation of a copyrighted work, they are considered authors, and they automatically become owners of the copyright. This is the default rule in copyright law. However, in cases where works are created as "works made for hire" or under contractual agreements, the copyright ownership may belong to entities other than the individual creators. For example, if an employee creates a work within the scope of their employment, the employer is considered the legal author and owner of the copyright. Similarly, if a freelance creator agrees to transfer the copyright to a client as part of a contract, the client becomes the owner of the copyright, even though they may not have contributed to the creative process directly.

Hence, it can be rightly said that all authors can be owners but not all owners can be authors.

The Role of Indian judiciary in establishing Authorship v. Ownership

The Indian Judiciary has played a key role in the development of the concept of Authorship v. Ownership under Copyright. This can be well understood from some of the significant case laws on this subject:

1. Eastern Book Company & Ors. v. D.B. Modak & Anr. (2008)

In the case of Eastern Book Company & Ors. v. D.B. Modak & Anr. (2008)[7], the Supreme Court of India addressed the issue of copyright in legal judgments and the distinction between authorship and ownership in this context.

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5 Kent Library Research Guides, available at https://semo.libguides.com/copyright/ownership#:~:text=Author%20is%20the%20copyright%20owner,you%20are%20the%20copyright%20owner. (last visited on April 18, 2024)

6 Stanford Libraries, available at https://fairuse.stanford.edu/overview/faqs/ copyright-ownership/ (last visited on April 18, 2024)

7 Casemine, available at https://www.casemine.com/judgement/in/ 5609 ae60e4b0149711413a68 (last visited on April 18, 2024)

The facts of the case are as follows:

Background:

Eastern Book Company (EBC) published Supreme Court cases along with headnotes and footnotes containing summaries and analysis. D.B. Modak, a practicing advocate, subscribed to EBC's journal and used the headnotes and footnotes in his legal practice[8].

Issues raised:

EBC contended that the headnotes and footnotes in its journal were original literary works eligible for copyright protection, and D.B. Modak's use of these headnotes and footnotes without authorization constituted copyright infringement.

Legal Proceedings:

EBC filed a lawsuit against D.B. Modak, alleging copyright infringement and seeking an injunction to restrain him from using its headnotes and footnotes. The case eventually reached the Supreme Court of India for adjudication

Supreme Court's decision:

The Supreme Court examined the nature of legal judgments and the elements of originality and creativity required for copyright protection. The court held that judgments rendered by judges in their judicial capacity do not qualify as literary works eligible for copyright protection under Indian copyright law[9]

Reasoning:

The court reasoned that judicial decisions are pronouncements of law and are considered part of the public domain. Judges who render judgments perform a judicial function rather than a creative or artistic function, and their judgments are intended to be accessible to the public for legal reasoning and analysis

Outcome:

Based on its interpretation of copyright law and the nature of legal judgments, the Supreme Court ruled in favor of D.B. Modak, holding that the headnotes and footnotes containing summaries and analysis of judicial decisions were not eligible for copyright protection. Therefore, D.B. Modak's use of EBC's headnotes and footnotes did not constitute copyright infringement[10].

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8 Indian Case Law, available at https://indiancaselaw.in/eastern-book-company-and-ors-vs-d-b-modak-and-anr/ (last visited on April 18, 2024)

9 NISPR – Journal of Intellectual Property Rights, available at https://nopr.niscpr.res.in/bitstream/123456789/60454/1/JIPR%2027%284%29%20266-276.pdf (last visited on April 18, 2024)

10 NISPR – Journal of Intellectual Property Rights, available at https://nopr.niscpr.res.in/bitstream/123456789/1386/1/JIPR%2013%283%29%20%282008%29%20245-252.pdf (last visited on April 18, 2024)

This case is significant as it clarified the scope of copyright protection in legal judgments and emphasized the public interest in access to judicial decisions. It underscored the distinction between authorship and ownership in the context of legal materials and affirmed the principle that judicial pronouncements are part of the public domain rather than subject to copyright restrictions.

2. R.G. Anand v. Deluxe Films & Ors. (1978)

In the case of R.G. Anand v. Deluxe Films & Ors. (1978), the Supreme Court of India addressed the issue of joint authorship and copyright ownership in the context of collaborative works. The case involved a dispute over the ownership of the script for a film titled "New Delhi," which was written by R.G. Anand[11].

The facts of the case are as follows:

Background

R.G. Anand, a playwright and scriptwriter, authored the script for a film titled "New Delhi." The script was subsequently purchased by Deluxe Films, a film production company, for the purpose of producing the film[12].

Collaboration with Other Writers

During the production process, certain modifications and adaptations were made to the original script by other writers and contributors. These modifications included changes to the dialogues, scenes, and characterizations.

Ownership Dispute

Following the success of the film, a dispute arose regarding the ownership of the copyright in the script. R.G. Anand claimed sole authorship and ownership of the script, while Deluxe Films asserted that the contributions of other writers and collaborators made them joint authors and co-owners of the copyright.

Legal Proceedings:

The case eventually reached the Supreme Court of India for adjudication. The primary issue before the court was whether R.G. Anand was the sole author and owner of the copyright in the script or whether the contributions of other writers conferred joint authorship and ownership rights[13].

Supreme Court's decision:

The Supreme Court examined the nature of collaborative works and the principles of joint authorship under copyright law. The court held that when two or more individuals collaborate to create a work, they may be

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11 Supreme Court of India, available at https://main.sci.gov.in/jonew/judis/5032.pdf (last visited on April 17, 2024)

12 Indian Journal of Law and Legal Research, available at https://www.ijllr.com/post/r-g-anand-vs-m-s-delux-films-ors-1978-air-1613-applicability-in-the-present-time (last visited on April 17, 2024)

13 Indian Case Law, available at https://indiancaselaw.in/r-g-anand-v-delux-films-and-ors/ (last visited on April 17, 2024)

considered joint authors if each contributor's contribution is independently copyrightable and there is mutual intention to create a joint work.

Criteria for Joint Authorship:

The court outlined the criteria for determining joint authorship, including the extent of each contributor's creative input, the intention of the parties, and the nature of the collaboration. The court emphasized that joint authorship does not require equal contribution but rather significant and original contributions from each collaborator.

Outcome:

Based on its analysis of the evidence, the Supreme Court ruled in favor of R.G. Anand, holding that he was the sole author and owner of the copyright in the script for "New Delhi." The court found that the contributions of other writers were not independently copyrightable and did not confer joint authorship or ownership rights[14].

This case is significant as it established principles for determining joint authorship and copyright ownership in collaborative works. It clarified the criteria for joint authorship and emphasized the importance of assessing the nature and extent of each contributor's creative input in determining copyright ownership.

Should AI be given Authorship for its self-generated content?

Considering the legal precedents and the importance attached to the authorship of work under different circumstances, the question whether AI can be given authorship under copyright laws for AI-generated work is still an evolving and debated topic in legal jurisdictions globally. The issue revolves around the notion of authorship and the criteria used to determine it.

Copyright laws typically grant protection to works created by human authors. These laws often require that the work be the result of human creativity or intellectual effort. However, there's often no explicit mention of whether non-human entities, such as AI systems, can qualify as authors. Many countries' copyright laws do not specifically address the issue of AI-generated works. As a result, courts and policymakers are left to interpret existing laws in light of technological advancements.

There are ongoing debates among legal scholars, policymakers, and practitioners regarding whether AI systems can be considered authors. Some argue that since AI systems lack human creativity and consciousness, they should not be eligible for authorship. Others argue that if the output of an AI system meets the criteria for originality and creativity, it should be eligible for copyright protection.

Let us take a look at some of the arguments, both, in favour and against the issue of granting Authorship to AI under Copyright.

Arguments in favour

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[14] Law Times Journal, available at https://lawtimesjournal.in/r-g-anand-vs-m-s-delux-flims-and-others/ (last visited on April 16, 2024)

i. Recognition of creative output
AI systems are capable of producing original and creative works across various domains, including art, music, literature, and design. Assigning authorship to AI acknowledges the creative contributions of these systems and recognizes the value of their outputs as cultural and artistic expressions[15].

ii. Incentivising Innovation
Granting copyright protection to AI-generated works can incentivize investment in AI research and development by providing creators and developers with legal recognition and protection for their creative endeavors. Copyright protection may encourage the creation of new AI algorithms and applications capable of generating innovative and valuable content. Knowing that their creations are eligible for copyright protection may motivate developers to invest resources into improving AI algorithms and capabilities, leading to innovation in the field[16].

iii. Protection of AI Creator's Rights
Assigning authorship to AI ensures that the rights associated with creative works are properly attributed and protected. This recognition allows AI developers and creators to assert their rights over the works they generate, including the right to control how their works are used, reproduced, and distributed.

Arguments against

i. Creativity and Originality
Copyright law typically protects works that are the result of human creativity and originality. Determining whether AI-generated works meet these criteria is complex.

ii. Human Involvement and Control
AI-generated works often involve some degree of human involvement, such as the selection of input data, the configuration of algorithms, or the interpretation and refinement of output. Determining the extent of human intervention and control in the creation process is essential for determining authorship and ownership rights. However, establishing clear criteria for distinguishing between human and AI contributions can be difficult.

iii. Legal Personhood and Agency
Copyright law typically attributes authorship to natural persons or legal entities capable of possessing legal rights and obligations. However, AI systems are not recognized as legal persons and lack the legal capacity to hold copyrights or other intellectual property rights. Assigning authorship to AI raises questions about whether AI systems

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15 Springer, available at https://link.springer.com/article/10.1007/s10462-021-10039-7 (last visited on April 16, 2024)

16 WIPO Magazine, available at https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html (last visited on April 16, 2024)

should be granted legal personhood or agency and what rights and responsibilities they should have under the law.

Challenges in assigning Authorship to AI

i. Evolution of AI Technology

AI technology is rapidly evolving, leading to increasingly sophisticated capabilities in generating creative works. As AI systems become more advanced, determining the extent of their autonomy and creative input becomes more complex. The dynamic nature of AI technology complicates efforts to establish clear criteria for authorship and ownership in copyright law[17].

ii. Global Legal Diversity

Copyright law varies significantly across jurisdictions, with different legal traditions, standards, and interpretations. The challenges of assigning authorship to AI under copyright law may be compounded by the lack of international consensus or harmonization on these issues. Divergent legal frameworks and approaches to AI-generated works can create uncertainty and inconsistency in the treatment of such works on a global scale.

iii. Lack of Precedent

The relatively nascent nature of AI-generated works means that there is limited precedent or established legal doctrine to guide courts and policymakers in resolving disputes or interpreting copyright law in this context. As a result, legal uncertainty and ambiguity may persist, hindering the development of clear and consistent legal standards for authorship and ownership of AI-generated works[18].

Conclusion

India has been taking steps to address the implications of AI in various areas, including intellectual property law. While there haven't been specific legislative or regulatory measures targeting AI as a stakeholder under copyright laws, there are broader efforts and initiatives aimed at understanding and harnessing the potential of AI in the Indian legal framework. These include:

i. Policy Formulation and Consultation:

The Government of India has been actively engaging in policy formulation and consultation processes to address the legal and regulatory implications of emerging technologies, including AI. Various ministries and regulatory bodies, such as the Ministry of Electronics and Information Technology (MeitY) and the Ministry of Commerce and Industry, are involved in discussions on AI governance, ethics, and regulation.

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[17] WIPO Magazine, available at https://www.wipo.int/wipo_magazine/en/ 2017/05/article_0003.html (last visited on April 16, 2024)

[18] Live Law, available at https://www.livelaw.in/law-firms/law-firm-articles-/ artificial-intelligence-intellectual-property-indian-copyright-act-singhania-co-llp-238401 (last visited on April 16, 2024)

ii. AI Task Forces and Committees

India has established task forces, committees, and expert groups to study and provide recommendations on AI-related issues. For example, the NITI Aayog (National Institution for Transforming India) has formed a National Strategy for Artificial Intelligence, which includes recommendations for AI governance, research, and development. These bodies are exploring the implications of AI for intellectual property rights, including copyright laws Overall, assigning authorship to AI under copyright law can have far-reaching implications for technological innovation, creative expression, legal accountability, and societal values. While challenges remain in navigating the complexities of AI-generated content, recognizing the role of AI as a creator under copyright law can help ensure that the rights and interests of all stakeholders are appropriately addressed in the evolving digital landscape.

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Algorithmic Hub-and-Spoke Agreements: An Indian Perspective

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Abstract

Advancement in technology has made it possible for businesses to collude through algorithms, especially pricing algorithms. The use of algorithms to monitor and adjust prices has brought the issue of algorithmic collusion to the forefront globally, including India. This has sparked a debate on whether existing legal framework is adequate to capture legal threats posed by the use of new technology. In the light of the ongoing debate, the paper intends to answer the question of whether traditional antitrust tools be used to examine and assess algorithmic hub-and-spoke agreements in India. This paper argues that the existing competition law framework in India is robust and flexible enough to capture hub-and-spoke collusion in digital environment. However, enforcing laws can be time-consuming but technology changes at a rapid pace. In this regard, it suggests that measures to prevent collusion by algorithms should happen ex-ante at the time when algorithm is developed by the programmer.

Keywords: cartel, hub-and-spoke agreement, algorithm, algorithmic hub-and-spoke agreement, CCI

Introduction

Technology has changed the way humans trade and do business today. Increased reliance on the internet and technology has led to the rise of data-driven businesses that use algorithms to analyse big data, make predictions and automate processes. Algorithms are helping business operate more efficiently, make better decisions and improve performance. In other words, algorithms have become a crucial part of world economy. Advancement in technology has made it possible for businesses to collude through algorithms (especially pricing algorithms). The use of algorithms for monitoring and adjusting prices has brought the issue of algorithmic hub-and-spoke collusion to the forefront globally, including in India. Antitrust experts and scholars are focusing increased attention on the use of algorithm in facilitating collusion among competitors. Contributing to this line of research, the paper aims at answering the following research questions: can traditional antitrust tools be used to examine and assess it in India? This paper argues that, from competition law standpoint, existing legal framework in India is robust and

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flexible to capture collusion in the digital. However, enforcing laws can be time-consuming but technology changes at a rapid pace. In this regard, the paper embraces a regulatory perspective referred to as 'algorithms-by-design', which relies on assessing whether an algorithm is designed to facilitate collusion or not.

With this background, the paper is structured as follows: section 2 discusses the meaning of hub-and-spoke arrangement along with the regulatory approach towards its assessment in different jurisdictions. Section 3 introduces the concept of algorithmic hub-and-spoke arrangement along, proposes the regulatory approach to it in India and analyses Indian cases on algorithmic hub-and-spoke agreements. Finally, section 4 concludes.

1. Legal framework of horizontal agreement in India

Cartels undermine the principles of fair competition, harm consumer welfare, impede innovation and distort market dynamics. They are prohibited globally under anti-trust laws.

In India, the Competition Act, 2002 (CA 2002) prohibits cartels. Section 3(1) of the act contains a prohibition on entering into agreements that harm competition and declares such agreements as void. Section 3(1) reads:

> No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect production, supply…….. which causes or is likely to cause an appreciable adverse effect on competition within India.

Section 3(3) of the act pertains to situations where parties involved in an identical or similar business of goods or supply of services enter into an agreement including cartels.[1] The section reads:

> Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise …..…… shall be presumed to have an appreciable adverse effect on competition

The section deals with horizontal agreements. These are agreement between firms at the same stage of supply chain in the same market or competitors in simple words. The Competition Commission of India (CCI) has held that presence of an agreement or an understanding restraining competition is *sine qua non* for evoking section 3(3).[2] In other words, the provision does not cover the presence of a practice or decision among enterprises in the absence of a clear agreement or understanding between the parties involved.[3]

Agreements under the CA 2002

Generally, profit maximising agreements between competitors are detrimental for the consumers. Such agreements are not found in formal or

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1 Abir Roy and Jayant Kumar, *Competition Law in India* (Eastern Law House, Kolkata, 2nd edn., 2019).

2 Neeraj Malhotra v. Deutsche Post Bank Finance, CCI, Case 5 of 2009.

3 Steven Van Uytsel, *The Digital Economy and Competition Law in Asia* 127-192 (Springer, Singapore, 2021).

written form but are made in smoke-filled rooms.[4] Parties involved do not put anything in writing and may communicate with a nod or a wink.[5] Therefore, "agreement" has been given a wide scope under the act. According to section 2(b)[6], agreement includes:

> any arrangements, understandings or action in concert – (i) whether or not such agreement is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

Under the CA 2002, the term 'agreement' meeting of mind and acceptance of restrictions.[7] An agreement can be inferred from the actions or gestures of the parties, even if it is not explicitly stated.[8] Consequently, an 'agreement' can be oral or written or unenforceable by law. It includes arrangements, understandings and concerted action (informal cooperation without formal agreement). The section also applies to any practice carried on or any decision taken by an association of firms or persons or cartel engaged identical business and having anti-competitive effect on the market.

Standard of proof under the CA 2002

In order to establish the existence of a horizontal agreement, it is important to prove the existence of an agreement or meeting of minds between market participants.[9] It can be observed from the decisional practice of the CCI that direct evidence of action in concert between parties is rarely present. In the absence of direct evidence, the CCI has to rely on circumstantial evidence to determine whether market participants have some form of understanding under which they are acting in coordination with each other.[10] The CCI has relied on two forms of circumstantial evidence: (1) communication evidence and (2) economic evidence.[11] Communication evidence shows that cartel members met. Such type of evidence may include meeting at a trade association, commonality of key business personnel etc. Economic evidence, on the other hand, includes evidence of parallel conduct. However, it is imperative to differentiate the parallel behaviour of competitors from conscious parallelism. In an oligopolistic market, a natural reaction to market factors may result in occurrence of parallel behaviour.[12] Firms operating in an oligopolistic market are generally aware of and greatly influenced by the actions of their competitors.[13] There is a web of interconnected decision-making, where the

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4 In Re: Alleged Anti-competitive conduct by Maruti Suzuki India Limited in implementing discount control policy, CCI, Case 01 of 2019.

5 Rajasthan cylinders and containers limited v Union of India and another, AIROnline 2018 SC 736.

6 The Competition Act (Act 12 of 2003).

7 S M Dugar, *Guide to Competition Law* (Lexis Nexis, Gurgaon, 7th edn., 2019).

8 Supra note 3.

9 In Re: Chief, Materials Manager, CCI, Case 7 of 2013.

10 *Supra* note 1 at 87.

11 *Supra* note 1 at 84.

12 Express Industry Council of India v Jet Airways (India) Ltd., CCI, Case 30 of 2013.

13 Parveer Singh Ghuman, "In Re:Express Industry Council of India & Jet Airways" *CUTS International*, 2017.

price and output of one competitor are linked to those of the others.[14] Though oligopolistic markets can lead to competitive outcomes, but at times the parallel behaviour can be a result of anti-competitive agreement.[15] The key analysis is whether there is an agreement between market participants or not and the CCI looks for plus factors like communication, links or information exchanges which proves consensus ad idem.[16] Information exchange between competitors can take place directly which typically involves trade associations where competitors come into direct contact with each other and exchange business sensitive information or indirectly through hub-and-spoke.[17]

Per-se presumption under the CA 2002

According to the section[18], any agreement including cartel which:

(a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) .....be presumed to have an appreciable adverse effect on competition in India.

Once the existence of a horizontal agreement is established, they presumed to adversely affect the competition. However, this presumption can be rebutted. In case of rebuttal, the burden of proof will shift on the parties to such an agreement who will be required to prove that the agreement will not cause a negative impact on competition in India.[19]

Traditional hub-and-spoke arrangement

Meaning

Hub-and-spoke arrangements are cartels whereby there is no direct horizontal information exchange between competitors (spokes), rather information is exchanged indirectly through a common agency or a common contractual partner (hub).[20] For example, retailer A discloses his future pricing intention to distributor B who passes the information to retailer C and C uses the said information in determining his future pricing.[21] Such a setup results in a hub-and-spoke arrangement. A hub-and-spoke arrangement exists when (1) there was sharing of business sensitive information between competitors; (2) there was no direct communication between the competitors i.e. all communication took place bilaterally between the hub and the spokes; and (3) sharing of information lead to collusive behaviour. Hub-and-spoke arrangements are horizontal agreements implemented through vertical

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14 Ibid.
15 *Supra* note 1 at 110.
16 Ibid
17 Ibid
18 The Competition Act, 2002 (Act 12 of 2003), s. 3(3).
19 *Supra* note 1 at 44.
20 Ibid.
21 Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition – the Promise and Perils of the Algorithm-driven Economy* (Harvard University Press, London, 1st edn., 2016).

arrangements. (Spokes are in a vertical relation with the hub and the hub facilitates a horizontal collusion among spokes).[22]

Legal Assessment

In business world, firms are often required to exchange information with their suppliers etc. in order to operate effectively or efficiently and vertical information exchanges are a common and legal practice.[23] Therefore, the main hurdle in the legal analysis of hub-and-spoke conspiracy is proving the existence of an agreement between competing firms on the basis of vertical exchange between them and a common trade-partner.[24] Authorities have to overcome the obstacle of linking exchanges between vertical trade partners, which might be perfectly legal, in a way that establishes indirect horizontal collusion?[25] Since the line between horizontal and vertical agreements gets blurred in hub-and-spoke agreements, the rules and principles of enforcement against horizontal and vertical agreements are not applicable in a straightforward way. The US and the EU have witnessed significant cases involving hub-and-spoke conspiracy. A study of case-laws on hub-and-spoke jurisdiction shows that the authorities have to prove that parties were aware of sharing competitively sensitive information for the purpose of market co-ordination.[26]

According to the case laws in the US, in order to hold firms liable for an infringement under a hub-and-spoke conspiracy, a "rim" or a conspiracy has to be established around "spokes" or competitors. The "rim" joining the spokes (who are parties to vertical agreements) distinguishes legal vertical agreements from illegal horizontal agreements. Once a conspiracy is established, the conduct of the competing firms is per se illegal.[27]

Courts in the have followed an inference standard to establish conspiracy. In simple words, a conspiracy can be inferred from circumstantial evidence in the absence of direct communication between spokes. Authorities have used indirect evidences such as vertical information exchange in the absence of legitimate business justification or radical departure from past business practices or actions conditional on identical conduct to infer a conspiracy and to distinguished legal vertical agreements from illegal horizontal agreements, .[28]

In Interstate Circuit, Inc. v. United States[29], Interstate Circuit, a movie theatre owner, approached eight film distributors individually. Distributors were asked to add a restriction on minimum admission price to its exhibition

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22 Organisation for Economic Co-operation and Development, *Roundtable on Hub-and-Spoke Arrangements – Background Note* (OECD, 2019).

23 Organisation for Economic Co-operation and Development, *Hub-and-Spoke Arrangement - Note by the European Union* (OECD, 2019).

24 Supra note 22.

25 Organisation for Economic Co-operation and Development, *Executive Summary of the Roundtable on Hub-and-Spoke Arrangements* (OECD, 2020).

26 *Ibid.*

27 Supra note 22.

28 Ibid.

29 306 U.S. 208 (1939).

agreement. Distributors was informed by Interstate Circuit that each distributor had been invited to join the conspiracy and that their cooperation was essential. Since each distributor knew that the other seven distributors had been approached with the same demand and each distributor had complied with the demand, the courts were satisfied that this established conspiracy among distributors. Moreover, the restriction was a departure from set business practices and led to increase in admission prices which further helped the court in inferring a conspiracy. The court held that the unanimity of action and lack of benign motive established a hub-and-spoke arrangement.

The concept was again applied in The Toys 'R' Us (TRU) v. FTC.[30] TRU was the largest toy retailer in the US. TRU asked toy manufacturers to limit the quantity of some of the popular items distributed to warehouse club retailers such as Costco. It also gave them an assurance that their competitors would do the same. TRU, further, ensured that each manufacturer complied with the commitment and adhered to the vertical agreement by fielding complaint about non-compliance. Communication between TRU and individual manufacturer wherein TRU gave them assurance regarding the intention of other manufacturers helped the court in inferring intention. The inference was further supported by individual manufacturers' decision to stop dealing with warehouse club retailers which was contrary to their economic individual. The courts held that the vertical agreements between TRU and manufacturers resulted in horizontal conspiracy and hence, were illegal on account of the hub-and-spoke agreement.

In 2013, held Apple and five publishers liable for infringement of the Sherman Act for engaging in a hub-and-spoke conspiracy.[31] Apple, in 2010, wanted to enter the e-book market. Amazon was already active in the market and was selling e-books on wholesale model i.e. Amazon purchased the e-books on wholesale price, set low retail price and sold e-books on its online bookstore. Publishers were unhappy with Amazon's pricing policy. Apple recommended an agency model to the publishers wherein publishers may set the retail price and sell on Apple's online store. Apple also included MFN clause in the publisher's agreement which necessitated them to not sell e-books on Apple's online store at a price higher than on any other platform including Amazon. Due to this, publishers moved to an agency model with Amazon. Apple actively communicated with each publisher and informed of its independent negotiation with other publishers which provided an assurance to the publishers in negotiating agency contract with Amazon. This helped the court in inferring conspiracy among publishers.

In the EU, specifically in the UK, authorities have established the A-B-C Test to establish hub-and-spoke conspiracy. According to this test, if supplier 'A' disclose market sensitive information to retailer 'B' who passes on the same to supplier 'C' and 'C' uses the shared information for determining the future

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30 126 F.TC. 415 (1998).

31 United States v. Apple Inc, case 1:12-CV-2826

market policy then there is an infringement of law.[32] Additionally, an element regarding the 'state of mind' of A and C has been stipulated i.e. A must communicate the relevant information to B with the intention that it will be passed on to C and C must know why and under what circumstances B obtained the information from A.[33] The UK authorities have clarified the 'state of mind' can be inferred from analysing the circumstances in which the exchanges took place.[34] The UK authorities have used the A-B-C test including the element of 'state of mind' in the Dairy Case.[35] In this case, retailer A passed information regarding future pricing to B - a supplier of cheese, B passed the information to retailer C. A, in the information shared with B, mentioned his willingness to increase his retail prices on the assurance that other retailers will not uncut prices. Absence of legitimate reason with A to transmit such information to B helped the authorities to infer that A foresaw that the information would be passed on to other retailers by B to influence market conditions. C, in possession of his competitor's future pricing policy, was presumed to have considered the information as relevant since he knew that the information was not part of any legitimate business conversation between A and B and did not publically distanced himself from such information. Further, the European Court of Justice (ECJ) has held a supplier may be held liable on account of the act of a retailer if the supplier "could reasonably have foreseen the anti-competitive acts of its competitors and the retailer and was prepared to accept the risk which they entailed."[36]

For establishing a horizontal conspiracy, courts in the US, have followed the 'inference standard' principle while the UK authorities have developed the 'A-B-C' test with emphasis on intention. However, intent is seldom established by documentary evidence and needs to be inferred from circumstantial evidence or statements given by witness and required substantial evidence beyond just information exchanges to support a claim.[37] This can make investigating and proving a hub-and-spoke case a herculean task for the enforcement agencies.

Hub-and-spoke agreements in India

The concept of hub-and-spoke agreements is at a nascent stage to India. Hub-and-spoke conspiracy has been alleged twice and has seen judicial review by the CCI in only one case. The allegation was investigated by the CCI, for the first time in 2018, in Sameer Aggarwal v ANI Technologies[38] (Uber-India case) and the CCI dismissed the allegation at the prima facie level with no discussion on under what circumstances a horizontal conspiracy can be established based on exchanges in a vertical trade relation.

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32 *Ibid.*
33 Ibid.
34 *Supra* note 23.
35 Case no CA98/03/2011.
36 Case C-542/14.
37 Supra note 22.
38 CCI, case 37 of 2018.

In India, horizontal agreement is per-se void. Once established, such an agreement is presumed to harm competition. Additionally, in India, cartel cannot exist without a horizontal conspiracy which may be established with the help of direct or circumstantial evidence. Hub-and-spoke agreements may be subjected to the same principles making them per-se liable and the CCI may rely on circumstantial evidence to infer awareness of sharing competitively sensitive information for the purpose of market co-ordination among competitors. The requirement of intention (as required in the UK) should be avoided because of the harmful effects of cartels on competition.

Another hurdle in the legal analysis of a hub-and-spoke cartel is the question of liability of parties in a hub-and-spoke agreement. The Competition Law Review Committee (CLRC), established by the Indian government to re-valuate the current competition law framework in response to the evolving business landscape, was of the view that that the spokes could be held accountable under section 3(3) of the CA 2002 but the hub might not be liable under the specific terms outlined in the section. [39] The CLRC recommended including an explanation to section 3(3) of the CA 2002 expressly covering the hub and imputing liability based on a rebuttable presumption.[40] The CLRC also deliberated on whether intention should be taken into consideration while assessing hub-and-spoke cartels in India and concluded that the requirement of intention may not be necessary and the hubs may be presumed to have a significant adverse effects on competition precisely because of the detrimental and harmful impact of cartels.

The recommendation made by the CLRC was incorporated into the Competition (Amendment) Act 2023. The amendment act has inserted the following proviso to section 3(3):[41]

> Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement.

The proviso makes "hub" per se liable in hub-and-spoke cases. However, a third party playing more than a passive role in facilitating collusion will be covered by the proviso. In other words, a third party that facilitates, organizes or supports a cartel may become per se liable. Authorities in the US require an awareness of the planned objective or willingness to take risk for per se hub liability and the CCI may focus on the same.[42]

Hub-and-spoke Agreements and RPM

It is common for one party to impose conditions on the other that restrict competition. For example, manufacturer may impose restriction on its

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39 Government of India, Report of the Competition Law Review Committee (Ministry of Corporate Affairs, 2019).

40 *Ibid.*

41 The Competition (Amendment) Act 2023, (Act 9 of 2023), S 4.

42 Supra note 22.

distributor to not sell the products below a certain price. This is known as resale price maintenance (RPM). Under section 3 of the CA 2002, RMP is void if it has a negative effect on competition in India. Explanation (e) to section 3(4)[43] defines resale price maintenance (RPM) as:

> to include, in case of any agreement to sell goods, any direct or indirect restrictions that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged

RMP is a common tool used by firms to implement hub-and-spoke arrangements. If pricing-related intervention is driven by the competitors (for example, retailers), the more likely it is for a hub-and-spoke scenario to exist.[44] For instance, If retailers agree to set retail prices at monopoly level, use the RPM policy (implemented by the manufacturer at retailers' request) as cover for their own price-fixing arrangements and delegate the implementation and enforcement of the cartel to the manufacturer, then this is the case of a hub-and-spoke cartel among retailers.[45] The competition agency in Estonia took action against a hub-and-spoke cartel involving four major retailers in the country.[46] These retailers had agreed via one major supplier to increase the retail price of vodkas and communicated exclusively through the supplier and not directly among themselves.[47] In contrast, if the pricing-related intervention is driven by the supplier, the more likely it is to be found a RPM policy.[48]

Due to the difficulties in the legal assessment of hub-and-spoke agreement, the authorities may prefer to prosecute resale price maintenance (RPM) rather than prosecuting a hub-and-spoke agreement.[49] By putting an end to the RPM, agencies also ends the underlying hub-and-spoke agreement.[50] For instance, an allegation related to hub-and-spoke agreement was made before the CCI in the Fx Enterprise Solution pvt ltd v. Hyundai Motor India pvt ltd[51] (Hyundai-India case). HMIL had included discount controlling mechanism in the dealership agreement which required the dealers to discount the cars sold at a rate not higher than that mentioned in the agreement, thereby fixing the maximum discounts which the dealers were authorized to give. HMIL closely monitored the policy and enforced it by conducting unannounced visits to a dealer's showroom. High Penalties were imposed by HMIL on dealers if caught violating the policy. Hyundai had admitted to administering a discount control scheme and to imposing penalties to ensure

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43 The Competition Act 2002 (Act 12 of 2003).
44 *Supra* note 23.
45 *Supra* note 1 at 141.
46 The Organization for Economic Cooperation and Development, *Annual Report on Competition Policy Developments in Estonia - 2017* (OECD, 2018).
47 *Ibid*.
48 *Supra* note 23.
49 *Supra* note 25.
50 *Supra* note 22.
51 CCI, case 36 of 2014.

adherence to the scheme. It was claimed that Hyundai Motor India Pvt Ltd (HMIL) was responsible for the price-fixing hub-and-spoke cartel between Hyundai car dealers. However, the CCI was of the opinion that such agreements were in the nature of vertical restraints. According, the CCI held that strict enforcement of the discount policy amounted to setting a minimum resale price in violation of the act without pursuing the case of horizontal agreement among retailers.

2. Algorithmic hub-and-spoke agreements

Algorithms collect information (data) and use complex calculations and data analysis to make decisions and suggest actions. Algorithms can create a market that is dynamically competitive. In recent times, the adoption of pricing algorithms has grown considerably.[52] However, the increased use of pricing algorithms has also increased the risk of algorithmic collision. Ariel Ezrachi and Maurice E. Stucke have identified four different scenarios for algorithmic collusion namely, (1) messenger scenario (algorithm plays the role of implementing, monitoring and policing an agreement to collude that was entered into by humans); (2) hub-and-spoke (algorithm acts as a hub and facilitates collusion among competitors); (3) predictable agent (algorithms monitor market conditions and activities of competitors and thereafter predicts a similar price); and lastly (4) digital eye (algorithm, on its own, determines the best course of action in order to achieve a pre-determined business goal, such as maximizing profit.[53] Of the four scenarios mentioned above, India has witnessed cases involving algorithmic hub-and-spoke price-fixing conspiracies. In the online context, there are two hub-and-spoke scenarios that might occur, namely (a) the online platform operator acts as a facilitator of horizontal collusion, and (b) horizontal coordination through third-party algorithms.[54]

The particularity of the former situation is that the platform creates a digital environment where firms connect with each other without direct communication and the coordination is organised and enforced by the platform with the help of an algorithm.[55] For instance, in the Eturas case,[56] an online travel-booking platform messaged travel agencies, who sold their products via the platform, about a new policy on capping maximum retail discounts and implemented this policy through technical restrictions using an algorithm.[57] The issue before the national court was to determine whether agencies were engaged in a concerted practice.

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52 The Organization for Economic Cooperation and Development, *Algorithmic Competition – OECD Competition Policy Roundtable Background Note* (OECD, 2023).

53 Ariel Ezrachi and Maurice E. Stucke, "Artificial Intelligence & Collusion: When Computers Inhibit Competition," 5 *University of Illinois Law Review* (2017).

54 *Supra* note 23.

55 *Ibid.*

56 UAB Eturas & Ors. v. Lietuvos Respublikos onkurencijos taryba, Case no C-74/14

57 Alexandra Caminade, L'entreprise et l'intelligence artificielle – Les reponses du droit 499-516 (Presses de l'Université Toulouse Capitole, 2022).

In the latter situation, competitors opt to delegate pricing decisions to a third-party (for example, external programmer) instead of using their own algorithm due to cost-effectiveness.[58] For instance, in 2023, a class action suit was filed against a group of hoteliers (the group) on the Las Vegas strip in the US, alleging that the use of a third-party pricing software led to supra-competitive prices for their hotel rooms.[59] Similarly, in India, in the matter of In Re: Alleged Cartelization in the Airlines Industry (Airline-India case)[60], airlines were alleged to use third-party algorithms to facilitate price coordination among them.

In both the situations, the use of third party providing similar services to the multiple competitors results in the alignment of decision making. Such alignment can be at code-level or data-level.[61] At code-level, competitors shares their strategy for a common purpose with the third party, who incorporates it into the algorithm.[62] As a result, the third-party has access to confidential pricing strategies of multiple competitors and can program the algorithm to increase prices across the market resulting in horizontal collusion.[63] At data-level, the third party having access to confidential data, may utilize the information to attune its algorithm.[64] Although the third-party does not share data with competitors but patterns in that data can be picked by an algorithm which can further align the decisions of competitors amounting to horizontal collusion.

Regulatory Approach to algorithmic hub-and-spoke in India

The CCI had an opportunity to review an algorithmic hub-and-spoke agreement, for the first time, in the Uber-India case[65]. In this case, the informant claimed that the drivers were 'independent third-party service' providers and that cab aggregators acted as a hub the colluded on prices. The informant further claimed that the pricing algorithm used by the aggregators artificially manipulated supply and demand, guaranteeing higher fares to drivers who would otherwise compete against each other on price. According to the informant, the collusion between spokes orchestrated by aggregators resulted in 'concerted actions' under section 3(3) of the act. The CCI observed that:

> for a cartel to operate as a hub-and-spoke, there needs to be a conspiracy to fix prices, which requires the existence of collusion in the first place. A hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform

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58 Supra note 52.
59 Richard Gibson & Anr. v. MGM Resort International & ors., Case 2:23-CV-00140).
60 CCI, case 3 of 2015
61 *Ibid.*
62 Speech by Maureen K. Ohlhausen, Acting Chairman, *Should We Fear the Things that go Beep in the Night? Some Initial thoughts on the intersection of Antitrust Law and Algorithmic Pricing*, May 23, 2017.
63 Ibid.
64 Autorite' de la Concurrence and Bundeskartellamt, *Algorithms and Competition* (2019).
65 CCI, Case no 37 of 2018

or an agreement for the platform to coordinate prices between them.

The CCI found that the drivers could not share information regarding the commuters and the earnings they make with each other and held that there was no exchange of information between the drivers and the platform. The CCI held that in the absence of an agreement to fix prices between the drivers there was contravention of the provisions of the section. The matter was closed accordingly. The Hon'ble Supreme Court of India (SC), in the appeal preferred before it, upheld the decision given by the CCI and found that Ola and Uber did not facilitate cartelization between drivers who acted independently of each other.[66]

The CCI and the hon'ble SC have failed to understand that in an algorithm-driven environment, though there is no direct contact between the competing firms, they could be still engaging in anticompetitive practices.[67] The key question in algorithmic hub-and-spoke agreement is whether the competitors were aware of the third party's anti-competitive actions or could have reasonably foreseen them.[68] The Etarus case illustrates the same. The ECJ had to determine whether receiving a message was sufficient to presume that the agencies knew about the policy and agreed to cap discounts amounting to hub-and-spoke conspiracy between agencies? The ECJ held that mere receipt is not sufficient to constitute knowledge of the actions. The court stated that it is necessary to show that the agencies were aware of the content of the message, that they had acted accordingly and that there was a link between the message and subsequent conduct to establish a violation of EU law.[69] Accordingly, agencies which were aware of the content of the system notification were presumed to have tacitly consented and thus were liable under the EU law.

In Uber-India case, a hub-and spoke agreement, with the ability and incentive to increase prices, could be established if (1) a sufficiently large proportion of the relevant market uses Uber's pricing algorithm to set prices; (2) only Uber can set price which all the drivers agree to; (3) the algorithm is designed to maximise the total earning of all the drivers since Uber's commission is calculated as a proportion of the drivers' earning; (4) the algorithm uses 'common pool of training data' for determining prices.[70] In this scenario, every driver who agrees to Uber's fare setting mechanism could be presumed to also agree not to compete with other drivers which harms the interest of consumers. [71]

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66 Samir Agrawal v. CCI & Ors., 2021 3 SCC 136.
67 Supra note 64.
68 Supra note 64.
69 *Ibid.*
70 Government of the UK, Pricing Algorithms – Economic Working Paper on the Use of Algorithms to Facilitate Collusion and Personalised Pricing, (Competition & Market Authority, 2018).
71 Supra note 67.

Similar observations were made by a US court in Meyer v. Kalanick & Ors[72] (Uber-US) case. The court observed that the drivers were signing up because the algorithm was providing the same pricing for all the drivers.[73] If the drivers were working independently, it would be against their interest to not compete and accept the same pricing.[74] The court found no merit in the argument that the drivers registered with Uber for the benefit of services rather than price-fixing. The court deemed it highly probable that Uber and its drivers conspired.[75] In the Uber-Spain case[76] (although the main issue was to ascertain where Uber stands in terms of EU law), AG Szpunar pointed out in his opinion that the use of algorithms by competitors is not unlawful in itself but may raise anti-trust concerns regarding hub-and-spoke conspiracy.[77] The Luxemburg competition authority (LCA) in the webtaxi case,[78] had to decide on whether the use of an algorithm to fix fares could be considered as an agreement between rival taxi companies. The companies in question used the Webtaxi reservation system, which helped manage supply and demand, and utilized an algorithm to determine the price that customers had to pay for their rides.[79] The LCA qualified Webtaxi as a two-sided market and held that the participating taxi operators agreed to jointly determine the fares via Webtaxi which was a horizontal price-setting agreement infringing a ban on cartels.

Conclusion

The previous sections have demonstrated that in situations involving algorithmic hub-and-spoke agreements, the contemporary legal framework in India allows authorities. It should be remembered that algorithms like digital markets are evolving rapidly while conducting a legal assessment is a time-consuming process. To this end, this paper calls for adopting a new regulatory approach called 'algorithms by design'.[80] This concept suggests that measures to prevent collusion by algorithms should be implemented ex-ante at the time when algorithm is developed by the programmer.[81] They should create pricing algorithms that follow antitrust laws and comply with the idea of not fixing collusive prices.[82]

The CCI may introduce a specific rule to compel companies to integrate algorithmic design standards. The commission may require programmer, when

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72 Case 16-2750
73 *Supra* note 3.
74 Jorn Kloostra, "Algorithmic pricing: A concern for platform workers?" 13 *European Labour Law Journal* 108 (2022).
75 *Ibid.*
76 Asociación Profesional Elite Taxi v Uber Systems Spain SL, case no C-434/15
77 Opinion of Advocate General Szpunar, Case C 74/14,
78 Decision no 2018-FO-01.
79 Devika Agarwal, "Indian Competition Authority Rules that Uber Does not Facilitate Hub and Spoke Arrangements," 11 *Journal of European Competition Law & Practice* 56 (2020).
80 Valeria Caforio, "Algorithmic tacit collusion: a regulatory approach" 15 *The Competition Law Review* 9 (2023).
81 Supra note 52
82 *Ibid.*

designing a pricing formula, to include constraints that affect how pricing software responds to certain external market conditions. For instance, software should be restrained, during the designing phase, from using confidential data to align decisions or increase prices across the market. Regarding the imposition of design obligation, the programmer must take responsibility of designing algorithm that prevents collusion and the competing firms must verify that the obligation has been met. In terms of legal consequences, if a firm has fulfilled its design obligation but fails to prevent market co-ordination, the CCI may formally request the firms involved to restore prices at the competitive level. In conclusion, the world is experiencing a significant shift towards data-based service optimization with algorithms being used to monitor and set prices. Therefore, the question arises whether firms should be banned for using algorithms while operating in the market? the answer is no, but authorities may impose requirement for accountability in algorithmic decision-making. The approach discussed in this paper allows firms to take necessary measures and makes them liable in case of non-compliance. However, as with any new idea, there are still some questions that remain unanswered such as how firms will prove that their algorithms have been programmed to prevent collusion or how the CCI will verify their due diligence. This paper does not provide conclusive answer to these concerns and further research is required to address these issues.

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The Role of Precautionary Principle in Global Biodiversity Governance

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Abstract

Biodiversity conservation faces unprecedented challenges in the wake of anthropogenic activities and global environmental changes. This research article delves into the critical nexus between risk management and conservation efforts, emphasizing the role of the precautionary principle in shaping global biodiversity governance strategies. The Precautionary Principle, rooted in the idea of anticipating and addressing potential harm even in the absence of scientific certainty, emerges as a pivotal tool for navigating uncertainties in the complex realm of biodiversity conservation. The article begins by providing a comprehensive overview of the current state of biodiversity loss and the intricate web of interconnected threats, ranging from habitat destruction to climate change. Against this backdrop, the article scrutinizes the historical evolution and conceptual foundations of the Precautionary Principle, emphasizing its ethical underpinnings and its application in various international agreements and protocols related to biodiversity. A critical analysis follows, examining case studies where the Precautionary Principle has been successfully integrated into global biodiversity governance. The paper investigates the effectiveness of these implementations, shedding light on the challenges and opportunities associated with its practical application. Special attention is given to instances where the principle has fostered adaptive management strategies, enabling conservation efforts to evolve dynamically in response to emerging threats. Furthermore, the research explores the ethical considerations inherent in the Precautionary Principle, assessing its compatibility with diverse cultural, social, and economic contexts. The examination extends to the potential conflicts between precautionary measures and economic development, aiming to strike a balance between conservation imperatives and human well-being. In conclusion, the paper synthesizes key findings and proposes recommendations for enhancing the integration of the Precautionary Principle into

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global biodiversity governance frameworks. It underscores the necessity of collaborative efforts among policymakers, scientists, and local communities to fortify risk management strategies and ensure the enduring vitality of the world's diverse ecosystems. The research article aims to contribute valuable insights to the ongoing discourse surrounding biodiversity conservation and offers a roadmap for leveraging the Precautionary Principle as a cornerstone in global efforts to sustain and protect Earth's rich biological heritage.

Key Words: Precautionary Principle, Global Biodiversity Governance, Conservation, Environmental Policy, Risk Management

Introduction:

Biodiversity, the intricate tapestry of life on Earth, is undergoing unprecedented challenges in the 21st century. The increasing impact of human activities, from habitat destruction to climate change, has propelled a rapid decline in species and ecosystems, posing a significant threat to global stability and well-being. The global context against which biodiversity conservation operates is one of urgency and complexity. The Living Planet Report by the World Wildlife Fund reveals a disconcerting reality: a 68% decline in global vertebrate populations since 1970[1]. This alarming trend emphasizes the urgent need for comprehensive strategies to address the root causes of biodiversity loss. Habitat destruction, pollution, over-exploitation of resources, and climate change are interconnected threats that demand immediate attention. Understanding the intricacies of biodiversity conservation becomes imperative in this backdrop. It is not merely an ecological concern but a multidimensional challenge that intertwines with economic, social, and ethical dimensions. The fate of ecosystems is intricately linked to human well-being, providing essential services such as clean water, pollination, and climate regulation[2]. Thus, the study of biodiversity conservation transcends scientific inquiry, necessitating an interdisciplinary approach that considers the broader implications for sustainable development. The rationale for delving into biodiversity conservation and risk management is grounded in the need for a proactive and informed response to the escalating threats faced by the planet's biodiversity. Scientific advancements have significantly contributed to our understanding of ecological systems, yet the inherent uncertainties and complexities of these systems pose challenges for effective conservation strategies. Risk management emerges as a key paradigm for identifying, assessing, and mitigating potential threats to biodiversity. The consequences of biodiversity loss are far-reaching, affecting ecosystems, economies, and societies. The degradation of natural habitats disrupts ecological balance, leading to the loss of species and the collapse of ecosystems. This, in turn, jeopardizes the services these ecosystems provide, from regulating climate patterns to supporting agriculture[3].

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1 Almond, Rosamund EA, Monique Grooten, and T. Peterson. *Living Planet Report 2020 - Bending the Curve of Biodiversity Loss*. World Wildlife Fund, 2020.

2 Millennium Ecosystem Assessment. *Ecosystems and Human Well-Being*. Vol 5. Island Press, Washington, DC, 2005.

3 Sala, Osvaldo E., et al. "Global Biodiversity Scenarios for the Year 2100." *Science* 287.5459 (2000): 1770-1774.

Recognizing the intricate linkages between biodiversity, ecosystem services, and human well-being underscores the urgency of developing robust risk management strategies that can navigate the uncertainties inherent in conservation efforts.

At the heart of this discourse lies the Precautionary Principle, a guiding ethical framework that advocates for preventive action in the face of uncertain risks, even when scientific evidence may be incomplete. The Precautionary Principle is particularly relevant in the context of biodiversity conservation, where the consequences of inaction can be irreversible. Its significance lies in its ability to inform decision-making processes, encouraging a forward-looking and proactive stance. The Precautionary Principle recognizes that waiting for absolute scientific certainty before taking action may result in irreversible damage to biodiversity. As such, it becomes a moral imperative in the conservationist's toolkit, urging policymakers and stakeholders to prioritize precautionary measures to avert potential harm[4]. This principle resonates not only with ecological considerations but also aligns with broader ethical values, emphasizing the responsibility to safeguard the natural world for current and future generations.

I. Biodiversity in Peril: A Global Overview

The 21st century has witnessed an alarming acceleration in the loss of biodiversity, with species extinction rates exceeding natural background levels[5]. Anthropogenic factors such as habitat destruction, pollution, climate change, and overexploitation of natural resources have emerged as primary drivers of this crisis. The World Wildlife Fund's Living Planet Index reveals a staggering 68% decline in global vertebrate populations between 1970 and 2016[6], underscoring the urgency of addressing biodiversity loss. Biodiversity loss is not a singular issue but a complex web of interconnected threats. Habitat destruction, driven by urbanization, agriculture, and infrastructure development, remains a significant contributor[7]. Climate change exacerbates these challenges, altering ecosystems and pushing species beyond their adaptive capacities[8]. Overexploitation of species for food, medicine, and trade further intensifies the crisis, leading to population declines and disrupting ecological balance[9]. Pollution, whether from agricultural runoff, industrial

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4 Sandin, P., & Peterson, M. “The Role of Ethics in Environmental Policy”. *Environmental Science & Policy*, 11.3 (2008), 195-203.

5 Ceballos, Gerardo, Paul R. Ehrlich, and Rodolfo Dirzo. "Biological Annihilation via the Ongoing Sixth Mass Extinction Signaled By Vertebrate Population Losses and Declines." *Proceedings of the National Academy of Sciences* 114.30 (2017): E6089-E6096.

6 Almond, Rosamund EA, Monique Grooten, and T. Peterson. *Living Planet Report 2020-Bending the Curve of Biodiversity Loss*. World Wildlife Fund, 2020.

7 Foley, Jonathan A., et al. "Global Consequences of Land Use." *Science* 309.5734 (2005): 570-574.

8 Parmesan, Camille, and Gary Yohe. "A Globally Coherent Fingerprint of Climate Change Impacts Across Natural Systems." *Nature* 421.6918 (2003): 37-42.

9 Worm, Boris, et al. "Impacts of Biodiversity Loss on Ocean Ecosystem Services." *Science* 314.5800 (2006): 787-790.

discharges, or plastic waste, permeates ecosystems, causing widespread harm to aquatic and terrestrial life. Moreover, the introduction of invasive species disrupts native ecosystems, outcompeting or predating on local species and leading to biodiversity decline[10]. The cumulative impact of these threats poses a formidable challenge, making it imperative to adopt a holistic approach to address the root causes of biodiversity loss. Biodiversity loss has far-reaching implications for the provision of ecosystem services essential for human well-being. Ecosystem services encompass the benefits humans derive from nature, including clean water, pollination of crops, climate regulation, and cultural and recreational values. As biodiversity dwindles, the resilience and functionality of ecosystems decline, compromising their ability to provide these essential services. The loss of pollinators, such as bees and butterflies, threatens global food security by impacting crop yields[11]. Deforestation and degradation of forests reduce their capacity to sequester carbon, exacerbating climate change[12]. Wetland destruction compromises water purification capabilities, escalating the risk of waterborne diseases. Moreover, the loss of biodiversity undermines cultural and recreational values tied to natural landscapes, impacting the mental and physical well-being of communities. Human health is intricately linked to biodiversity, with the potential for zoonotic disease outbreaks escalating as ecosystems become destabilized[13]. Preserving biodiversity is not only crucial for ecological integrity but is also a fundamental component of safeguarding human health.

II. The Evolution of the Precautionary Principle

The Precautionary Principle, a fundamental concept in environmental policy and risk management, has evolved over time as a response to growing concerns about the potential impacts of human activities on the environment. While the origins of precautionary approaches can be traced back to the mid-20th century, the formalization of the principle gained prominence in the late 20th and early 21st centuries. The roots of precaution can be found in initiatives to protect public health and the environment. In the 1950s and 1960s, concerns about the widespread use of synthetic chemicals, such as pesticides and industrial pollutants, prompted discussions on the need for caution in the face of scientific uncertainty[14]. Rachel Carson's seminal work, "Silent Spring" (1962), played a pivotal role in raising awareness about the potential ecological harm caused by these chemicals and laid the groundwork for precautionary

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10 Clavero, Miguel, and Emili García-Berthou. "Invasive Species are a Leading Cause of Animal Extinctions." *Trends in Ecology & Evolution* 20.3 (2005): 110.

11 Klein, Alexandra-Maria, et al. "Importance of Pollinators in Changing Landscapes for World Crops." *Proceedings of the Royal Society B: Biological Sciences* 274.1608 (2007): 303-313.

12 Bonan, Gordon B. "Forests and Climate Change: Forcings, Feedbacks, and the Climate Benefits of Forests." *Science* 320.5882 (2008): 1444-1449.

13 Keesing, Felicia, et al. "Impacts of Biodiversity on the Emergence and Transmission of Infectious Diseases." *Nature* 468.7324 (2010): 647-652.

14 Goklany, I. M. “The Precautionary Principle: A Critical Appraisal”. *Risk Analysis*, 29.11 (2009), 1561-1572.

thinking[15]. The concept continued to evolve through the 1970s and 1980s as environmental movements gained momentum. The United Nations World Charter for Nature (1982) was an early international document that hinted at the precautionary approach, emphasizing the need to protect ecosystems and prevent environmental harm[16]. However, it was in the 1990s that the Precautionary Principle gained explicit recognition in global environmental governance.

At its core, the Precautionary Principle reflects a moral and ethical commitment to avoiding harm when the potential consequences are uncertain or poorly understood. This ethical foundation is rooted in the acknowledgment of the limits of scientific knowledge and the recognition that irreversible environmental damage can occur if action is not taken in the face of uncertainty[17]. The principle is guided by a sense of responsibility to future generations, emphasizing the need for intergenerational equity in decision-making[18]. By prioritizing prevention over remediation, the Precautionary Principle reflects a commitment to passing on a sustainable and healthy environment to future inhabitants of the planet.

The Precautionary Principle found explicit recognition in various international agreements, signaling a global commitment to incorporating precautionary approaches into environmental decision-making. The principle gained prominence in the field of biodiversity conservation, climate change, and public health. In the realm of biodiversity, the Convention on Biological Diversity (CBD), established in 1992, explicitly refers to the Precautionary Principle in its preamble and principles[19]. The CBD recognizes the potential irreversible loss of biodiversity and emphasizes the need for precautionary measures to ensure its conservation and sustainable use. The Convention, in its preamble, recognizes the intrinsic value of biological diversity and the urgency of conserving it for present and future generations[20]. Article 8 of the CBD explicitly underlines the importance of adopting a precautionary approach to ensure the conservation and sustainable use of biodiversity, particularly in situations where scientific certainty is lacking[21]. This emphasis on precaution aligns with the broader global recognition of the principle as a guiding tool for environmental protection. The operationalization of the precautionary principle within the CBD is evident in its various provisions and protocols. Article 15 of the CBD, for instance, addresses the access to genetic resources and emphasizes the need for prior informed consent and mutually agreed terms, reflecting a

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15 Carson, Rachel. "Silent Spring Houghton." *Mifflin, Boston* (1962).

16 Wood, Harold W. "The United Nations World Charter for Nature: The Developing Nations' Initiative to Establish Protections for the Environment." *Ecology Law Quarterly* 12.4 (1985): 977-996.

17 Sunstein, Cass R. "Beyond the Precautionary Principle." *U. Pa. L. Rev.* 151 (2002): 1003.

18 Martens, P., et al. Human Ecology, Health and Well-Being: An Interdisciplinary Approach. *Earthscan* (2001).

19 Convention on Biological Diversity (CBD), 1992.

20 *See* Preamble, The Convention on Biological Diversity (CBD), 1992.

21 *See* Convention on Biological Diversity (CBD), 1992, Article 8.

precautionary approach to genetic resource utilization[22]. The Nagoya Protocol, adopted in 2010 as a supplementary agreement to the CBD, further strengthens the precautionary measures by providing a framework for access and benefit-sharing in the utilization of genetic resources[23]. Similarly, in the context of climate change, the United Nations Framework Convention on Climate Change (UNFCCC) incorporates the Precautionary Principle in its preamble, highlighting the need for caution in the face of potential adverse effects of climate change[24]. The principle is particularly relevant in the formulation of adaptation and mitigation strategies where scientific uncertainty prevails. In the realm of public health, the World Health Organization (WHO) embraces the Precautionary Principle as a guiding framework in addressing emerging infectious diseases and potential health risks associated with new technologies[25]. The COVID-19 pandemic is a recent example where precautionary measures played a crucial role in controlling the spread of the virus.

Despite its integration into international agreements, the practical application of the Precautionary Principle has faced challenges. Debates persist around defining the threshold for triggering precautionary action, the balance between precaution and innovation, and the potential for misuse as a barrier to trade[26]. Striking the right balance between precaution and innovation remains a complex and ongoing challenge in the implementation of the principle.

III. The Precautionary Principle: Conceptual Framework

The Precautionary Principle, as a conceptual framework guiding environmental decision-making, is anchored in several core principles and tenets. At its essence, the principle acknowledges the existence of scientific uncertainty and the potential for irreversible harm to the environment, human health, or biodiversity. The following core principles define the conceptual framework of the Precautionary Principle:

- **Anticipation of Harm:** The principle emphasizes the need to anticipate and prevent potential harm before it occurs, even in the absence of conclusive scientific evidence[27]. This proactive approach contrasts with traditional risk assessment paradigms that often require irrefutable evidence of harm before regulatory action.

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22 *See* Convention on Biological Diversity (CBD), 1992, Article 15.

23 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010.

24 United Nations Framework Convention on Climate Change (UNFCCC), 1992.

25 World Health Organization (WHO). Public Health, Innovation and Intellectual Property Rights: Report of the Commission on Intellectual Property Rights, Innovation and Public Health (2013).

26 Raffensperger, Carolyn, and Joel A. Tickner, eds. *Protecting Public Health and the Environment: Implementing the Precautionary Principle*. Island Press, 1999.

27 O'Riordan, T., and J. Cameron. "Interpreting the Precautionary Principle". *Earthscan* (1994).

- **Responsibility for Action:** The Precautionary Principle places a responsibility on decision-makers to take timely and effective measures to prevent or minimize harm[28]. This sense of responsibility extends to current and future generations, fostering an intergenerational equity perspective in decision-making.
- **Burden of Proof and Cost-Sharing:** In cases of scientific uncertainty, the burden of proof is shifted from those advocating precautionary measures to those resisting them[29]. Additionally, the principle often includes a concept of cost-sharing, wherein the costs of preventive measures are borne by those posing potential risks.
- **Public Participation:** The principle promotes inclusive decision-making processes, involving public participation and access to information[30]. This inclusivity enhances the legitimacy of decisions and ensures that diverse perspectives are considered in the face of uncertainty.
- **Consideration of Alternatives:** Decision-makers are encouraged to explore and consider alternative courses of action that pose lesser risks[31]. This involves a comprehensive exploration of available options and a commitment to choosing the least harmful alternative.

The Precautionary Principle's application to biodiversity conservation is particularly pertinent given the irreversible nature of biodiversity loss and the interconnectedness of ecosystems. The conceptual framework finds expression in various international agreements and initiatives focused on preserving the rich tapestry of life on Earth.

- **Conservation of Genetic Diversity:** The Precautionary Principle is integral to the conservation of genetic diversity within species. In the face of emerging technologies like gene editing, the principle underscores the need to exercise caution and thoroughly assess potential impacts on natural genetic diversity before implementing such interventions[32].

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28 Sunstein, C. R. “The anatomy of the Precautionary Principle”. Harvard Law Review, 117.4 (2002), 1174-1236.

29 Sandin, P., & Peterson, M. “The Illusion of the Principle of No Proof of Harm in the Context of the Precautionary Principle”. *Journal of Risk Research*, 12.4 (2009), 477-484.

30 Leach, Melissa, and Ian Scoones. "The Social and Political Lives of Zoonotic Disease Models: Narratives, Science and Policy." *Social Science & Medicine* 88 (2013): 10-17.

31 Gee, David, et al. *Late Lessons from Early Warnings: The Precautionary Principle 1896-2000*. Ed. Poul Harremoës. Luxembourg: Office for Official Publications of the European Communities, 2001.

32 Bragdon, Susan, Kathryn Garforth, and John E. Haapala. "Safeguarding Biodiversity: The Convention on Biological Diversity (CBD)." *The Future Control of Food*. Routledge, 2012. 82-114.

- **Introduction of Non-Native Species:** The principle is invoked in decisions related to the introduction of non-native species, recognizing the potential risks of invasive species to native ecosystems[33]. Decision-makers are called upon to assess the potential harm and explore alternative approaches to prevent unintended consequences.
- **Habitat Protection and Restoration:** The Precautionary Principle guides decisions on habitat protection and restoration, urging a proactive approach to prevent irreversible loss[34]. Conservation strategies must consider potential harm from habitat destruction and prioritize measures to sustain and restore vital ecosystems.
- **Climate Change Adaptation:** In the context of biodiversity conservation, climate change presents a formidable challenge. The Precautionary Principle underscores the importance of anticipatory measures to protect vulnerable species and ecosystems from the impacts of climate change[35]. Conservation strategies need to be adaptive and forward-looking, considering potential shifts in ecosystems.
- **Synthetic Biology and Conservation:** With the emergence of synthetic biology, including gene drives and synthetic organisms, the Precautionary Principle becomes crucial[36]. Decision-makers are called upon to assess the potential risks to biodiversity and ecosystems posed by synthetic biology applications and to exercise caution in their deployment.

In practice, the application of the Precautionary Principle to biodiversity conservation involves a nuanced consideration of the specific context, the level of scientific uncertainty, and the potential consequences of inaction. The framework encourages a holistic and interdisciplinary approach that integrates ecological, social, and ethical considerations into decision-making processes.

IV. Successful Integration of the Precautionary Principle

The Precautionary Principle, a concept rooted in environmental ethics, underscores the need for proactive measures to prevent harm in the face of uncertainty. This principle emphasizes the importance of anticipating and addressing potential risks even when scientific evidence is inconclusive or

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33 Secretariat of the Convention on Biological Diversity. "Cartagena Protocol on Biosafety to the Convention on Biological Diversity: Text and Annexes." Secretariat of the Convention of Biological Diversity, 2000.

34 CBD, UNEP. "Strategic Plan for Biodiversity 2011–2020 and the Aichi Targets." *Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity*. 2010.

35 Millennium Ecosystem Assessment. *Ecosystems and Human Well-Being*. Vol 5. Island Press, Washington, DC, 2005.

36 Presidential Commission for the Study of Bioethical Issues. "New Directions: The Ethics of Synthetic Biology and Emerging Technologies." *DC: Presidential Commission for the Study of Bioethical Issues* (2010).

incomplete. There are lots of examples evidencing the successful integration of the Precautionary Principle in real-world applications, coupled with adaptive management strategies demonstrating its efficacy to address complex environmental challenges.

Real-world Applications:

- **European Union's Ban on Neonicotinoid Pesticides (2018):** The European Union's decision to ban neonicotinoid pesticides serves as a prominent example of the Precautionary Principle in action. Despite inconclusive evidence regarding the direct link between neonicotinoids and declining bee populations, the EU took a proactive stance to protect ecosystems and food security. The ban was enacted based on the potential risk posed to pollinators, opting for caution over waiting for irrefutable evidence of harm[37].
- **Montreal Protocol on Substances that Deplete the Ozone Layer (1987):** The Montreal Protocol exemplifies international cooperation guided by the Precautionary Principle. Faced with growing concerns about the depletion of the ozone layer and its potential impacts on human health and the environment, nations adopted a proactive approach. The protocol called for the phased reduction and elimination of ozone-depleting substances, showcasing a global commitment to averting potential catastrophic consequences[38].
- **Banning Endosulfan in Kerala (2005):** The state of Kerala in India faced a severe public health crisis due to the widespread use of the pesticide endosulfan. Despite inconclusive scientific evidence linking endosulfan to health issues, the Kerala government, guided by the Precautionary Principle, imposed a ban on the pesticide. This decision was based on the potential risk to human health and the environment, especially after reports of adverse health effects on local communities[39].
- **Genetically Modified (GM) Mustard Evaluation (2017):** India's cautious approach to genetically modified crops, particularly GM mustard, demonstrates the Precautionary Principle in action. Before approving commercial cultivation, the government engaged in rigorous testing and evaluation to assess potential risks to biodiversity, human health, and traditional farming practices. The decision-making

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37 Abati, Raiza, et al. "Bees and Pesticides: The Research Impact and Scientometrics Relations." *Environmental Science and Pollution Research* 28.25 (2021): 32282-32298.

38 Montreal Protocol. "Montreal Protocol on Substances That Deplete the Ozone Layer." *Washington, DC: US Government Printing Office* 26 (1987): 128-136.

39 Chakraborty, J. "Endosulfan in Kerala: An Environmental Disaster." *Journal of Environment and Sociobiology* 7.2 (2010): 113-116.

process reflected a commitment to precautionary measures to avoid unintended consequences[40].

Adaptive Management Strategies:

- **Great Barrier Reef Marine Park Authority's Coral Bleaching Response Plan:** The Great Barrier Reef Marine Park Authority (GBRMPA) has implemented an adaptive management strategy to address coral bleaching, a consequence of climate change. Recognizing the complexity and uncertainty of the issue, the GBRMPA employs a dynamic approach. This involves continuous monitoring, experimentation with different coral restoration techniques, and adjusting conservation strategies based on real-time data[41].
- **Dutch Delta Program for Flood Risk Management:** The Netherlands, a country highly vulnerable to rising sea levels, has embraced adaptive management in its Delta Program. Rather than relying on static infrastructure, the Dutch have implemented an evolving system that integrates natural processes, such as restoring marshlands and promoting sustainable urban planning. This adaptive approach acknowledges uncertainties in climate change projections and allows for the modification of strategies as new information emerges[42].
- **Ganga River Basin Management Plan:** The Ganga River, a lifeline for millions in India, faces numerous threats, including pollution and over-extraction. The Ganga River Basin Management Plan incorporates the Precautionary Principle by adopting an adaptive management strategy. Continuous monitoring, stakeholder involvement, and the incorporation of new scientific findings enable authorities to adjust pollution control measures and resource management strategies dynamically[43].
- **Western Ghats Ecologically Sensitive Area (ESA) Notification (2011):** Recognizing the ecological significance of the Western Ghats, the Ministry of Environment, Forest and Climate Change issued the Western Ghats ESA Notification. This move exemplifies an adaptive management approach by designating ecologically sensitive areas. The precautionary measure restricts certain developmental activities to

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40 Singh, Pushpa. "Genetically Modified Crops in India: Politics, Policies, and Political Economy." *Policy Issues in Genetically Modified Crops*. Academic Press, (2021), 75-96.

41 Great Barrier Reef Marine Park Authority. "Coral Bleaching Response Plan." Retrieved from: https://www.gbrmpa.gov.au/our-work/threats-to-the-reef/climate-change/what-were-doing-to-protect-the-reef/coral-bleaching-response-plan

42 Delta Programme. "Delta Programme 2021. Retrieved from: https://english. deltaprogramma.nl/

43 Basu Roy, Sharanya. "Ganga Action Plan (GAP): The Challenge of 'Regulatory Quality'." (2017).

protect biodiversity, allowing for ongoing adjustments based on scientific assessments and changing environmental conditions[44].

V. Challenges and Opportunities

While the Precautionary Principle serves as a crucial framework for environmental decision-making, its implementation faces several limitations and challenges. A central tenet of the Precautionary Principle is its application in the face of scientific uncertainty. However, determining when and how much uncertainty justifies precautionary action remains subjective and challenging[45]. Striking the right balance between waiting for conclusive evidence and taking timely preventive measures is a persistent challenge. Critics argue that the Precautionary Principle, if applied too rigorously, can impede innovation and economic development. Overly precautionary measures may lead to a "paralysis by analysis" scenario, hindering progress in areas where risks are inherent, such as emerging technologies.

Implementing the Precautionary Principle places a significant burden on decision-makers to assess complex scientific information and make judgments about potential risks and benefits[46]. This can be challenging, particularly when considering the multifaceted nature of environmental issues. The principle calls for preventive action, but determining the costs of such actions and weighing them against potential benefits is often intricate. Economic considerations and the potential trade-offs between conservation and development goals add complexity to decision-making.

The application of the Precautionary Principle is not devoid of ethical considerations, and its interpretation may vary across cultures and societies. Different cultures may have varying perspectives on risk, precaution, and the value of environmental resources[47]. The principle's application may encounter resistance in societies that prioritize economic development over environmental concerns or have distinct cultural values regarding nature. Ethical considerations play a crucial role in the implementation of the Precautionary Principle. Questions of equity and justice arise, especially concerning the distribution of costs and benefits associated with precautionary measures[48]. Ensuring that vulnerable communities are not disproportionately affected is a challenge. The Precautionary Principle intersects with other ethical

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44 Gadgil, Madhav. "Western Ghats Ecology Expert Panel: A Play in Five Acts." *Economic and Political Weekly* (2014): 38-50.

45 Sandin, P., & Peterson, M. “The Illusion of the Principle of No Proof of Harm in the Context of the Precautionary Principle”. *Journal of Risk Research*, 12.4 (2009), 477-484.

46 O’Riordan, T., and J. Cameron. "Interpreting the Precautionary Principle”. *Earthscan* (1994).

47 Leach, Melissa, and Ian Scoones. "The Social and Political Lives of Zoonotic Disease Models: Narratives, Science and Policy." *Social Science & Medicine* 88 (2013): 10-17.

48 Gee, David, et al. *Late Lessons from Early Warnings: The Precautionary Principle*, 1896-2000. Ed. Poul Harremoës. Luxembourg: Office for Official Publications of the European Communities, 2001.

principles, such as intergenerational equity and environmental justice[49]. Striking a balance between the immediate needs of the present generation and the responsibility to safeguard resources for future generations requires ethical deliberation.

One of the significant challenges in implementing the Precautionary Principle lies in finding a balance between conservation goals and the imperatives of economic development. The principle's emphasis on preventive action sometimes conflicts with economic interests, especially in industries where potential harm is uncertain[50]. This conflict can lead to resistance from stakeholders who argue that precautionary measures stifle economic growth. Successfully integrating the Precautionary Principle into policy and planning requires a comprehensive approach that considers both conservation and economic development objectives. Achieving this balance necessitates adaptive governance structures that accommodate changing circumstances. To balance conservation and economic development, there is a need to create incentives for sustainable practices[51]. Policies that reward businesses and communities for adopting environmentally friendly practices can facilitate the integration of the Precautionary Principle into economic development strategies.

While challenges exist, there are opportunities to enhance the implementation of the Precautionary Principle and address the aforementioned limitations. Advancements in scientific understanding and monitoring technologies can help reduce uncertainty, making it easier to justify precautionary measures. Continuous research and technological innovation provide tools to assess and manage environmental risks more effectively. Strengthening the capacity of decision-makers, scientists, and communities to understand and apply the Precautionary Principle is essential[52]. Educational programs and training initiatives can enhance the ability of individuals and institutions to navigate complexities in environmental decision-making. Increasing public awareness about the importance of the Precautionary Principle fosters a culture of environmental responsibility. Engaging communities in decision-making processes ensures that diverse perspectives are considered and contributes to the legitimacy of precautionary actions. Integrating the Precautionary Principle into broader policy frameworks, such as sustainable development strategies, enhances its effectiveness[53]. Aligning

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[49] O'riordan, Timothy, and Andrew Jordan. "The Precautionary Principle in Contemporary Environmental Politics." *Environmental Values* 4.3 (1995): 191-212.

[50] Jones, C. "The Precautionary Principle and International Relations". *Global Environmental Politics*, 3.2 (2003), 1-11.

[51] De Felice, T. P., & Rimac Valerio, A. "Sustainable Development and the Precautionary Principle: A Cross-Disciplinary Perspective". *Frontiers in Environmental Science*, 7 (2019), 200.

[52] Fisher, E., & Jones, K. "Implementing the Precautionary Principle in Environmental Decision-Making: A Case Study from the English Regions". *Environmental Science & Policy*, 84 (2018), 131-138.

[53] Ruhl, J. B. "The Precautionary Principle as a Screening Device". *William & Mary Environmental Law and Policy Review*, 28.1 (2003), 1-110.

environmental goals with broader socio-economic objectives facilitates a more cohesive approach to decision-making.

VI. Integrating Global Efforts: Enriching Biodiversity Governance through Precautionary Strategies

The analysis of the Precautionary Principle within the context of global biodiversity governance reveals several key findings. These findings provide insights into the challenges, opportunities, and ethical dimensions associated with the application of the principle in the conservation of Earth's biological diversity. Building on the key findings, the following strategies are proposed to strengthen the Precautionary Principle in the context of global biodiversity governance:

- **Enhanced Scientific Research and Monitoring:** Investing in scientific research and monitoring technologies is crucial for reducing uncertainty and facilitating evidence-based decision-making[54]. Continuous advancements in these areas provide decision-makers with the tools needed to assess and manage environmental risks more effectively.
- **Capacity Building and Education:** Strengthening the capacity of decision-makers, scientists, and communities to understand and apply the Precautionary Principle is essential[55]. Educational programs and training initiatives should be developed to enhance the ability of individuals and institutions to navigate complexities in environmental decision-making.
- **Inclusive Decision-Making Processes:** The ethical dimensions of the Precautionary Principle demand inclusive decision-making processes[56]. Engaging diverse stakeholders, including local communities and indigenous groups, ensures that decisions reflect a broad range of perspectives and contributes to the legitimacy of precautionary actions.
- **Transparency and Accountability:** Ethical decision-making requires transparency and accountability[57]. Open communication about the uncertainties, risks, and potential consequences of actions fosters trust and aligns with the ethical principles of the Precautionary Principle.
- **Integration into Broader Ethical Frameworks:** Integrating the Precautionary Principle into broader ethical frameworks, such as sustainability and environmental justice, provides a more

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54 Goklany, I. M. “The Precautionary Principle: A Critical Appraisal”. *Risk Analysis*, 29.11 (2009), 1561-1572.

55 Elliott, D., & Stern, R. (Eds.). Research Ethics in the Real World: Euro-Western and Indigenous Perspectives. ANU Press (2012).

56 Reed, Mark S. "Stakeholder Participation for Environmental Management: A Literature Review." *Biological Conservation* 14.10 (2008): 2417-2431.

57 Beder, S. “The Role of Experts in Environmental Decision-Making: Exploring Knowledge, Power, and Participation in the Discourse of Risk and Innovation”. *Environmental Science & Policy*, 9.2 (2006), 103-113.

comprehensive approach to decision-making[58]. Aligning precautionary measures with overarching ethical principles contributes to coherent and ethical outcomes.

Collaboration is essential for the effective implementation of the Precautionary Principle in global biodiversity governance. The following collaborative approaches are recommended:

- **International Cooperation and Agreements:** Strengthening international cooperation and agreements is crucial for addressing biodiversity challenges that transcend national boundaries[59]. Multilateral agreements, such as the Convention on Biological Diversity (CBD), provide a framework for collaborative action and the integration of the Precautionary Principle into global strategies for biodiversity conservation.
- **Public-Private Partnerships:** Collaboration between public and private sectors is instrumental in driving sustainable practices and innovation[60]. Public-private partnerships can leverage resources, expertise, and innovation to implement precautionary measures while considering economic interests.
- **Civil Society Engagement:** Civil society plays a vital role in holding governments and corporations accountable and advocating for sustainable practices[61]. Collaborative initiatives involving NGOs, community-based organizations, and grassroots movements contribute to the effective application of the Precautionary Principle.
- **Scientific Collaboration:** Facilitating collaboration among scientists, researchers, and institutions globally enhances the understanding of environmental risks and uncertainties[62]. Shared data, methodologies, and expertise contribute to more robust scientific foundations for the application of the Precautionary Principle.
- **Interdisciplinary Approaches:** Addressing biodiversity challenges requires interdisciplinary approaches that consider ecological, social, and economic dimensions[63]. Collaboration across disciplines fosters holistic decision-making that integrates diverse perspectives and expertise.

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58 Leopold, A. A Sand County Almanac and Sketches Here and There. Oxford University Press (1949).

59 Rands, Michael RW, et al. "Biodiversity Conservation: Challenges Beyond 2010." *Science* 329.5997 (2010): 1298-1303.

60 Andersen, M. S., & Søderberg, A. M. Public-Private Partnerships in Global Health. In Routledge Handbook of Global Public Health, Routledge (2015), (pp. 378-390).

61 Keck, M. E., & Sikkink, K. Activists Beyond Borders: Advocacy Networks in International Politics. Cornell University Press, (1998).

62 Griggs, D. J., et al. *A Guide to SDG Interactions: From Science to Implementation*. International Council for Science, Paris, 2017.

63 Millennium Ecosystem Assessment. *Ecosystems and Human Well-Being*. Vol. 5. Island Press, Washington, DC, 2005.

VII. Conclusion

The Precautionary Principle stands as a vital guidepost in global biodiversity governance, demanding a proactive and ethical approach to environmental decision-making. In examining the Precautionary Principle within the context of global biodiversity governance, several key points have emerged, shedding light on the intricate relationship between environmental decision-making, ethical considerations, and collaborative approaches. The implementation of the Precautionary Principle involves navigating the complexities of decision-making amidst scientific uncertainty. The challenge lies in striking a delicate balance between waiting for conclusive evidence and taking timely preventive measures to address biodiversity loss. Ethical dimensions, including cultural perspectives, equity, and social justice, are integral to the application of the Precautionary Principle. The principle demands a nuanced and culturally sensitive approach, recognizing the diverse attitudes toward risk and conservation across different cultures. A persistent challenge is finding equilibrium between conservation goals and economic development imperatives. The tension between these objectives requires careful consideration to avoid conflicts and foster sustainability. Future efforts should focus on strengthening international agreements, such as the Convention on Biological Diversity, to enhance global collaboration in biodiversity conservation. Collaborative initiatives should extend across borders, involving governments, private sectors, and civil society in transboundary efforts to address biodiversity challenges. Policies should prioritize inclusive decision-making processes that actively engage local communities, indigenous groups, and the broader public. Public participation contributes to the legitimacy of decisions and fosters a sense of environmental stewardship. Conservation policies should incorporate strategies to raise public awareness about the importance of biodiversity and the role of the Precautionary Principle in safeguarding natural resources. The Policies should embrace adaptive management principles, emphasizing continuous monitoring and evaluation to assess the effectiveness of precautionary measures and adjust strategies as needed. Harnessing technological advancements in monitoring tools enhances the capacity to assess environmental risks and responses, contributing to evidence-based decision-making.

Feedback:

The authors except this line *"Risk management emerges as a key paradigm for identifying, assessing, and mitigating potential threats to biodiversity"* has not deliberated upon the concept of risk management. The authors have nicely deliberated upon the different dimensions of PP, however it needs to be apprised that what authors mean by 'Risk Management for conservation' which is reflected as the part of the title of the paper. The paper is worth to publish subject to suggested improvement.

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Covid-19 Pandemic and Access to Healthcare Services of Persons with Disabilities: An Empirical Study of District Srinagar, J&K

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Abstract

Due to an increase in the prevalence of chronic health issues and population ageing, the number of persons who experience impairment on a global scale has recently been rising. According to 2011 census, the number of Persons with Disabilities in India is roughly 2.2% of total population which is approximately 26.8 million. Out of the world's population that is estimated to experience disability, 3.8% require healthcare services. Although people with disabilities are a diverse group with a range of needs and concerns, they frequently require more healthcare than people without disabilities. Despite this, people with disabilities are frequently unable to obtain healthcare services because they have not been acknowledged as a population segment that requires special attention from public healthcare services. Even though India has legislation on the rights of people with disabilities, the Rights of People with Disabilities Act of 2016, which encompasses barrier-free access to healthcare and services, such challenges still exist. Further, the pre-existing challenges to accessible healthcare have been augmented due to Covid-19 as well as by the measures adopted to control it.

Keywords: *Disability; Accessibility; Rights, health; Covid-19 pandemic.*

Introduction

Since the first Covid-19 case was reported in late January 2020, India has had one of the greatest Covid-19 outbreaks worldwide. According to the 2011 Census, there are around 26.8 million Persons with Disabilities (PwD) in India, or 2.2% of the country's total population[1]. PwDs are the most vulnerable and marginalized group in developing nations like India. Due to their

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1 Persons with Disabilities in India- a statistical profile, *available at:* https://ruralindiaonline.org/en/library/resource/persons-with-disabilities-divyangjan-in-india---a-statistical-profile-2021/.

impairment and the lack of accessibility to safeguard them, they are more susceptible to contracting Covid-19[2]. Being a population that is particularly vulnerable to Covid-19, people with disabilities faced greater disparities in accessing healthcare during the pandemic because of inaccessible environments and health information, as well as selective medical guidelines and protocols. These also amplified the discrimination which people with disabilities already experience in the delivery of healthcare. These protocols occasionally demonstrate medical prejudice towards the social and quality of life of people with impairments[3].The pandemic has negatively affected people with disabilities on many levels, including their capacity to carry out activities of daily living like maintaining personal hygiene, dressing, and eating; their level of social alienation; their ability to recognize and communicate Covid-19 symptoms; and their access to critical healthcare and public health information.[4] Some of these challenges were further compounded for persons who had the complications of existing co morbidities due to their disabilities.

It has been widely observed that the carrying out of Covid-19 containment measures did not effectively consider the needs of people with disabilities. The lockdown is the most significant of these, which itself reduced the accessibility of people with disabilities to healthcare services. For instance, lack of accessibility to testing facilities as home-collection was stopped; access to necessary medical aids and medications such as diapers, catheters, disposable sheets, antibiotics, etc. were limited due to either discontinued home delivery services or the unavailability of these items and lack of public transportation facilities[5]. Due to healthcare personnel's inadequate training and lack of cultural sensitivity, people with disabilities have also had to deal with prejudices and discrimination in healthcare settings. Due to this ignorance and the burden it has placed on the healthcare system, there is discrimination against them, as well as a lack of prioritization for their medical requirements and medical rationing. It was also frequently difficult for people with disabilities to find information on Covid-19, its risks, treatments, etc. in an accessible format.[6]

The right to health to persons with disabilities is operationalized through the RPwD Act[7], which is based on certain international obligations. The RPwD Act has been enacted to give effect to the United Nations

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2 WHO, "Disability considerations during covid-19 pandemic" 2 (2020).

3 Avinash Gawande, Abhijit V. Raut, Sanjay Pusam, Trupti Prabhune, "Accessibility of persons with Disabilities due to Covid-19 pandemic in Nagpur region"8 *International journal of Community Medicine and Public Health* 2378 (2021).

4 VIDHI Centre for Legal Policy, "COVID-19, Persons with Disabilities and an (Un) Inclusive Healthcare System" 8 (2022).

5 *Ibid.*

6 Gloria L Krahn, Deborah Klein Walker and Rosaly Correa De Araujo, "Persons with Disabilities as an Unrecognized Health Disparity Population" 2 *American Journal of Public Health* 105 (2015).

7 Rights of Persons with Disabilities Act, 2016.

Convention on the Rights of Persons with Disabilities. The UNCRPD is an international human rights treaty by the United Nations for persons with disabilities. It is the first international human rights instrument for persons with disabilities and imposes obligations on national governments to ensure the fulfillment of the rights of persons with disabilities. These obligations are applicable to the Government of India, as India is a signatory to the UNCRPD. The RPwD Act is the primary disability rights legislation in India and was enacted in 2016 to fulfil India's obligation under the UNCRPD. It establishes a legislative framework to guarantee accessibility for people with disabilities and to make appropriate accommodations for them when required, all while basing itself on the principles of equality, non-discrimination, and respect for people with disabilities.[8] In terms of healthcare, the RPwD Act requires the Central and State Governments, as well as local authorities, to take the necessary steps to guarantee that people with disabilities have access to all areas of public and private hospitals, as well as other healthcare institutions and centres, without encountering any barriers[9]. These authorities must also act to provide disabled people preference in both attendance and care[10]. As well as guaranteeing them "equal protection and safety"[11], it further requires such authorities to offer healthcare to people with disabilities during natural disasters and other "situations of risk".[12]

The judiciary gave directives to several governmental organizations to address the problems that people with disabilities were experiencing throughout the pandemic. In Suo moto proceedings, the Supreme Court raised issues such as the CoWIN platform's accessibility for people with visual impairments in order to monitor the government's response to the pandemic.[13] It identified specific problems with the CoWIN platform, including the inability to use an audio or text captcha, the lack of keyboard support for navigating the website, the lack of enough time to schedule appointments before a user is automatically logged off, and the inability of people with disabilities to learn as to which days have vaccine slots available. The government was directed by the court to address all issues that it highlighted. Various High Courts have also given state governments guidelines about the needs of people with impairments. For instance, the Madras High Court stressed the significance of giving people with disabilities priority in vaccination delivery in *Meenakshi Balasubramanian* v. *Union of India and Others.*[14]

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8 *ibid*, s. 25.
9 *ibid*, s. 25(1) (b).
10 *ibid*, s. 25(1) (c).
11 *ibid*, s. 8.
12 *ibid*, s. 25(2)(i).
13 *In Re: Distribution of Essential Supplies and Services During Pandemic*, Suo Moto Writ Petition (Civil) No. 3 of 2021.
14 Writ Petition Civil No. 2951/2021.

II. Objectives of the study

The research paper is intended to capture the varied experiences of persons with different types of disabilities in their access to healthcare services and information related to the COVID-19 pandemic. The paper intends to demonstrate how current laws and guidelines that demand inclusive practices for providing access to healthcare and healthcare information for people with disabilities (and notably in times of crises), were not put into practice during the epidemic.

III. Legal materials and methods

Study design: The research followed a cross sectional, mixed-methods approach using a purposive sampling technique, where a combination of quantitative and qualitative data was collected and analyzed to understand the experiences of persons with disabilities.

Study participants: Survey data was collected from a sample of 186 persons with disabilities. The sample consisted predominantly of persons with disabilities residing in urban and rural regions in Srinagar. Respondents included persons with disabilities across types of disability - including Locomotor disability, visual impairment, hearing impairment, speech and language disability, intellectual disability, multiple sclerosis, and multiple disabilities.

Study place: A sample of 186 persons, with disabilities was selected through convenience sampling, from the composite Regional centre for Skill Development, Rehabilitation and Empowerment of Persons with Disabilities, Bemina, Srinagar. The centre was selected to facilitate sampling and data collection for this research due to their vast network of beneficiaries across Union territory, which includes persons with disabilities across types of disabilities, socioeconomic statuses and geographies. The sample of 186 was chosen by applying the **Krejcie and Morgan's table of sampling.** The centre, on average, received 36 patients per day with multiple disabilities. Since the study was conducted for a period of 10 days. The average population was 360, for which 186 is the representative sample.

Data collection and procedure*:* The survey included a combination of closed and open-ended questions to capture respondents' experiences in greater depth on key variables. Quantitative data collected on closed ended questions are presented as descriptive statistics, while open-ended questions were analyzed thematically, and used to supplement quantitative results.

Data analysis: All collected data was collected in excel sheet format. Data was analyzed by simple statistical tools like percentage. Observations were drawn and presented with column, pie charts and tables. Based on these observations, conclusions and recommendations are formed.

IV. Result and Discussion

A. Profile of the Respondents

i. Participants Gender Distribution

Table 1. Gender Distribution

Gender	N=186	Percentage
Male	93	50
Female	93	50
Other	0	0
Total	186	100

Source: Primary data, 2023.

Discussion: The sample group had a wide range of demographic characteristics, including equal number of men and women who lived in urban and rural settings and came from different areas of Srinagar or its outskirts.

ii. Age Distribution of Sample

Table 2. Age Distribution

Age Group	N=186	Percentage
18-25	74	39.7
26-35	55	29.5
36-45	37	19.8
46-55	10	5.3
56-65	10	5.3

Source: Primary data, 2023.

Discussion: The Respondents belonged to the age bracket of 18 to 65 years. A majority of the sample, i.e., 39.7%, fell in the 18-25 age group; 29.5% of the sample fell in the 26-35 age group; 19.8% of the sample fell in the 36-45 age group; 5.3% of the sample fell in the 46-55 age group; 5.3% of the sample fell in the 55-65 age group. It is essential to highlight that the choice to sample only adults with disabilities over the age of 18 was prompted by the fact that, at the time the study was being done, only adults were eligible for vaccination.

iii. Educational qualification

Table 3. Education

Level of Qualification	N=186	Percentage
No Formal Schooling	18	9.6
Grade 5 & below	20	10.7
Grade 6-8	26	13.9
Grade 9-12	48	25.8
Above Grade 12	74	39.7

Source: Primary data, 2023.

Discussion: A majority of respondents i.e. 39.7% had received education beyond grade 12 (undergraduate and postgraduate education); followed by 25.8% who had received schooling till grade 12; followed by 13.9% who had received schooling till grade 8; followed by 10.7% who had received schooling till Grade 5 and below and 9.6% who had received no formal schooling.

iv. Employment Status

Table 4. Employment

Employment status	N=186	Percentage
Unemployed	130	69.8
Employed	56	30.1

Source: Primary data, 2023.

Discussion: The Employment status was captured as a binary variable with 69.8% of respondents reporting they were unemployed at the time of the survey.

v. Nature of Disability

Table 5. Nature of Disability

Disability	N=186	Percentage
Locomotor	56	30.1
Visual	52	27.9
Cerebral Palsy	12	6.4
Intellectual	9	4.8
Hearing	12	6.4
Mental illness	4	2.1
Down's Syndrome	1	0.5
Autism	1	0.5
Multiple Sclerosis	2	1.07
Multiple Disabilities	28	15.03
Not Specified	9	4.8

Source: Primary data, 2023.

Discussion: In the study, a majority of the sample, i.e., 30.1% had Locomotor impairment; 27.9% had visual impairment; 15% had multiple disabilities; 4.8% had not specified the nature of their disability; 6.4% had cerebral palsy; 4.8% had intellectual disability; 6.4% had hearing impairment; 2.1% had mental illness; 0.5% had Down syndrome; 1% had multiple sclerosis; and 0.5% had autism.

vi. Nature of support

Table 6. Nature of support

Need of the Sample	N=186	Percentage
High Support	74	39.7
Low Support	112	60.2

Source: Primary data, 2023.

Discussion: The respondents were asked about the nature of their support needs, which refers to the manner and intensity of the assistance required by persons with disabilities to be able to carry out activities in their daily lives. This affects how easily people with disabilities can obtain healthcare services,

especially how much independence they can exercise in daily life. Support needs would be higher for those persons with severe disabilities who would require higher levels of care and assistance. In this sample, 60.2% reported having low support needs and 39.7% reported having high support needs.

B. General Interpretation and Analysis of Data

i. Access to Health Care Services

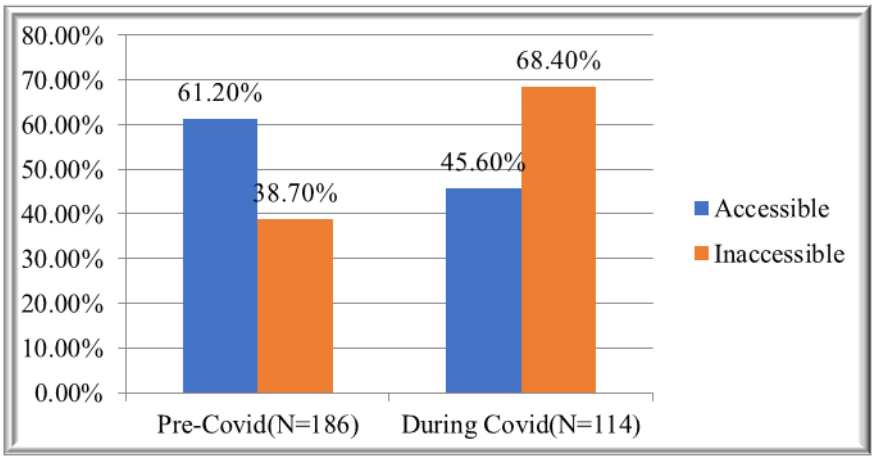

Figure1. Access to Healthcare Services

Discussion: The respondents were asked whether they faced difficulty in accessing healthcare services before the outbreak of COVID-19, for example, in visiting hospitals for routine check-ups, getting priority treatment in hospitals, accessing medications, accessing emergency care, etc. Out of the 186 respondents who responded to this question, 38.7% stated that they had found healthcare facilities inaccessible even before the COVID-19 outbreak. Some reasons reported for this were - long waiting times at medical centres due to the lack of priority of services for persons with disabilities, financial difficulties, lack of access to medicines, and lack of adequate transportation services for persons with disabilities. To enable a comparison between the accessibility of healthcare before and after the outbreak of the pandemic, respondents were asked if they faced difficulty in accessing the same healthcare services they required earlier, during the pandemic. Out of 114 respondents who responded to this question, 68.4% stated that they found healthcare services inaccessible due to the pandemic. Some of the reasons cited for the lack of accessibility during and after the pandemic were the lack of adequate transportation services, closed hospitals, unavailability of medical staff, waiting times, and financial constraints. It should be noted that the reasons that have been cited for lack of accessibility before and after the pandemic are systemic and similar- for example, financial constraints, waiting times and lack of priority treatment, etc. Accordingly, it is likely that the reasons for inaccessibility before the pandemic remained operational, and might have been further exacerbated due to the pandemic.

ii. Covid Vaccination

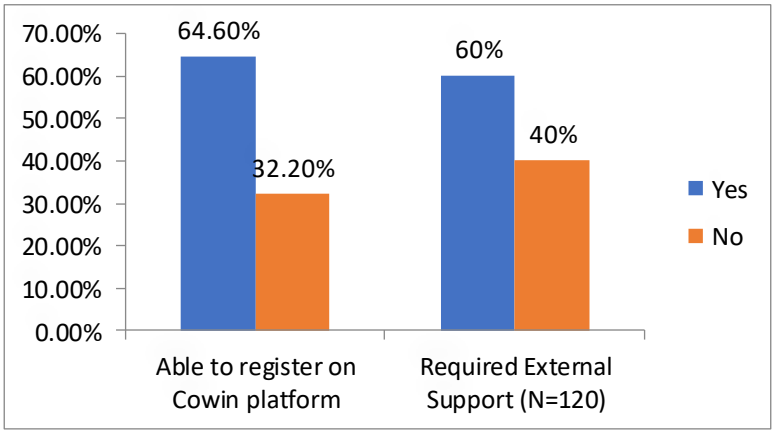

Figure 2. Covid Vaccination

Discussion: To examine accessibility to vaccines for persons with disabilities, the respondents were asked questions both in relation to the CoWIN platform and in relation to the vaccination centers. 64.6% of the total respondents stated that they were able to register themselves on the CoWIN platform. Those who could not register themselves reported that the platform was inaccessible for persons with visual impairment, the platform would reload automatically and not provide sufficient time to successfully register, the requirement of submitting an OTP, among others. Even among those who could register themselves, 60% reported needing external support to register on the platform, such as with assistance from family members.

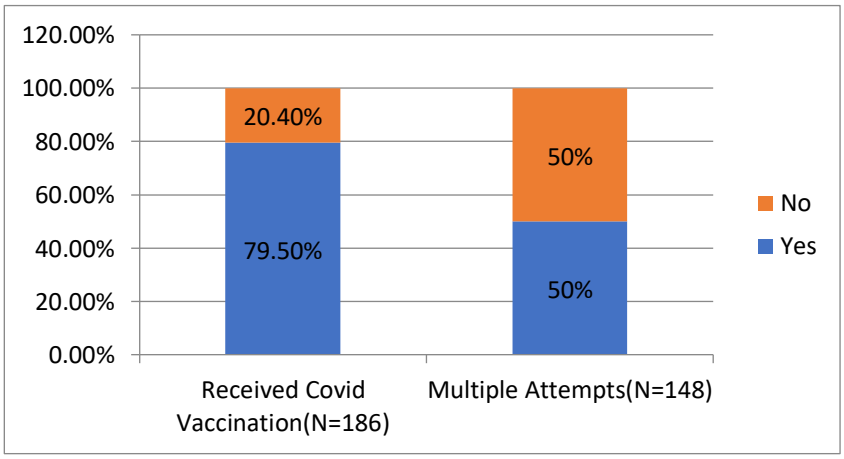

Figure 3. Vaccination Received

Discussion: Of the total 186 respondents, 79.5% had received the vaccination, and of those who received the vaccination, 80% had received both doses. Further, 50% of the respondents who received the vaccination stated that they had to make multiple attempts to get the vaccination.

iii. Measures for Persons with Disabilities: Priority in vaccination and door to door vaccination

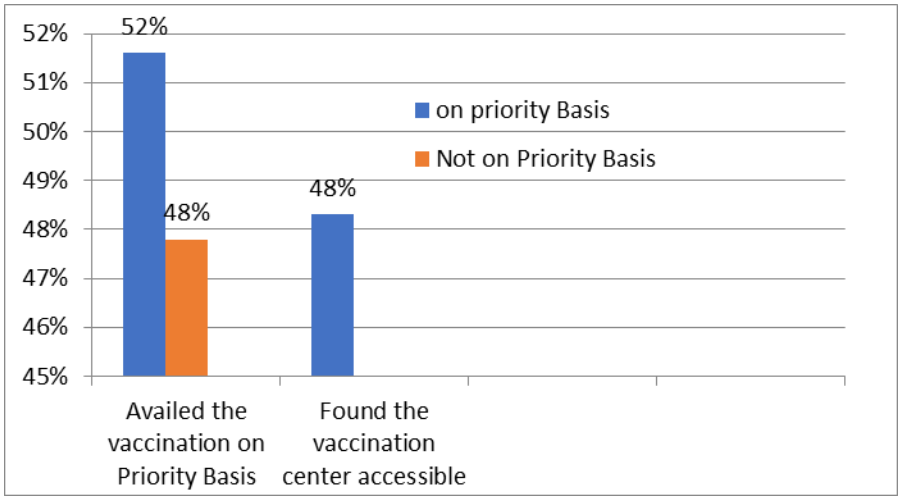

Figure 4. Measures for persons with disabilities.

Discussion: Out of the total number of respondents who could get vaccinations, only 52% were able to avail of the vaccination on a priority basis. Furthermore, 48% of the respondents who could avail of priority vaccination reported that the facilities they visited were not accessible, given inaccessibility to wheelchairs, overcrowding and long queues at the centres, and long distance from home.

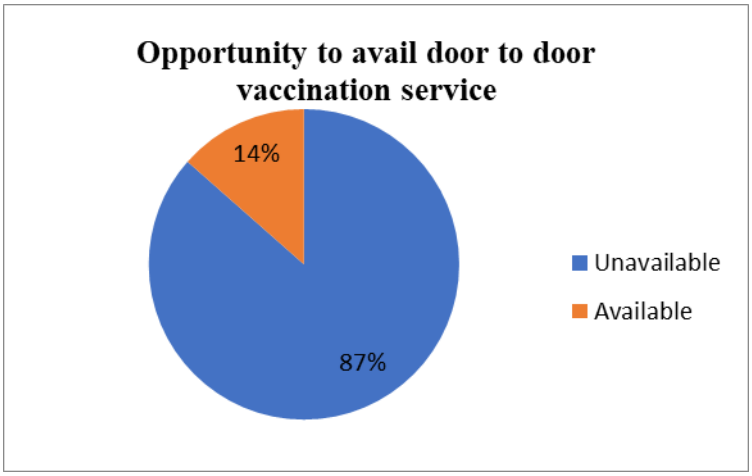

Figure 5. Opportunity to avail door to door vaccination services.

Discussion: The 87% of the respondents stated that they did not have the opportunity to access door-to-door vaccination.

iv. Access to Information on Covid-19

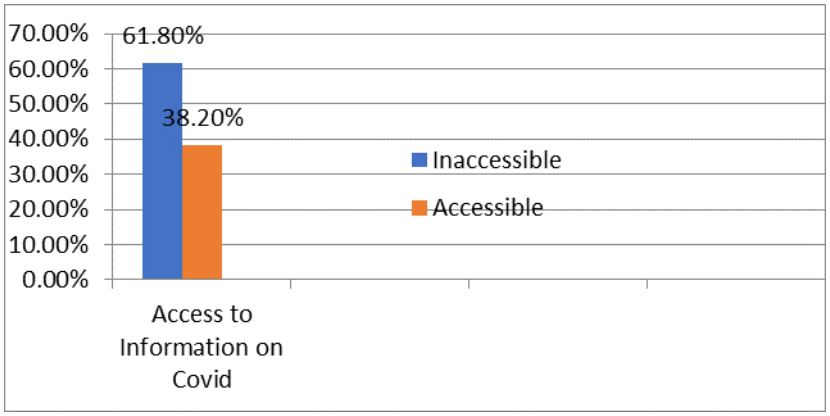

Figure 6. Access to Information on covid-19

Discussion: A majority of the respondents stated that information on COVID-19 was not available in an accessible format. In relation to general information, such as on safety precautions, 61.1% stated that they could not find such information in an accessible format.

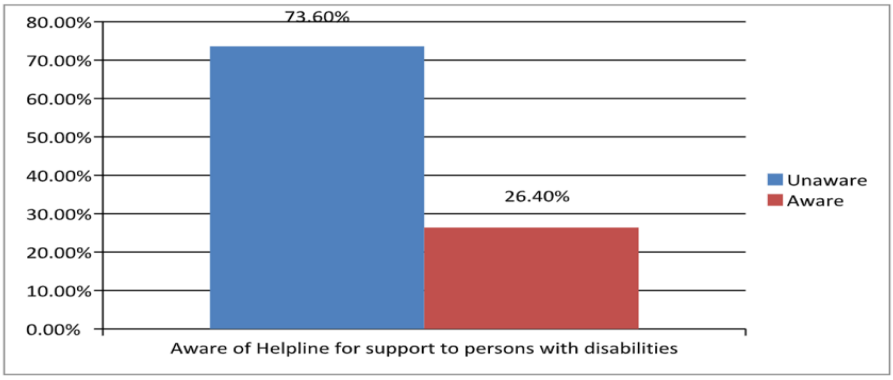

Figure 7. Awareness regarding helpline for support

Discussion: The Respondents were also asked if they were aware of any helpline set up to support persons with disabilities, and 73.6% stated that they were not aware of such a helpline.

v. Financial and Employment Status

Table 8. Financial Crises response

Financial Crises Response	N=186	Percentage
No Crises	26	13.9
Affected but manageable	65	34.9
Little but manageable	63	33.8
Grossly and not all manageable	32	17.2

Discussion: The 86% of the participant faced financial crises due to loss of employment and businesses. Around 17.2% amongst them faced severe crises which was not possible to manage.

vi. Details of Lost Employment

Table 9. Lost Employment

Responses	N=130	Percentage
Yes	78	60
No	52	40

Discussion: The 60% of the respondents who were employed before covid-19 pandemic lost their employment or livelihood since the onset of COVID-19 pandemic.

vii. Access to Education

Table 10. Access to Education

Responses	N=168	Percentage
Yes	80	47.6
No	88	52.3

Discussion: The 47.6% of the respondents have no access to education since the onset of Covid-19 pandemic. The respondents (parents only) felt that on being confined to home the children felt distressed. Majority of the respondents said that the schools are not providing online teaching to children. Among the ones who received online teaching a very less percentage said that the teaching was in accessible formats.

V. Conclusion

The detailed analysis of the research shows that the sample of this study is considerably more advantaged on the basis of education levels and rurality, compared to the national average for persons with disabilities in India. Specifically, both education levels and the region of residence - urban or rural - are likely to have a direct and indirect impact on access to healthcare services and information. As such, the difficulties faced by this sample in accessing healthcare during the pandemic, are very likely an underestimation of the difficulties faced by their more socio-economically vulnerable counterparts across the country. On the other hand, we see that almost 69% of our samples were unemployed at the time of the survey, while 40% reported having high support needs. This might potentially have an adverse effect on their ability to access healthcare services and information. Access to health care services for people with disabilities is already challenging in India due to inadequate infrastructure, facilities, and information. The restriction or sometimes, shutting down of essential health services has made the access even more challenging, due to restricted transport services. The reciprocal relationship between disability and Non-communicable diseases (NCDs) is well-established. NCD patients can develop impairments, and impairments themselves might be a risk factor for NCDs. Persons with disabilities are particularly susceptible to several health issues, including NCDs, due to

underlying health conditions and exclusion from health care services during lockdowns.

The study analyzed the extent of disruption to the living situations of people with disabilities caused by Covid-19 and related restrictions in order to provide guidance on future pandemic or emergency preparedness measures. This study's findings have emphasized the concerns of persons with disabilities, their caretakers, and the health and development systems in relation to Covid-19. These observations should be used to develop protocols and guiding principles for addressing similar catastrophes in the future. It is essential to advocate with governments so that the reaction to a future health or non-health emergency may be rapidly organized and implemented. Rather than wasting a great deal of time in the response cycle, an extensive strategy to reduce the negative impact should be enacted efficiently and immediately.

VI. Suggestions

The suggestions provided depend primarily on the study's findings and do not include anything outside the scope of the study.

1. It is important to make sure that people with disabilities have easy access to all the information they need about Covid-19 screening, treatment and general healthcare.
2. The important information must be made available in accessible formats (e.g. Large prints, Alt text in web pages, Sign Language interpretation in any media broadcasts, etc.) to ensure that everyone can stay informed and make informed decisions about their health.
3. Persons with disabilities, particularly those who are unemployed and depend on monthly disability allowances, require assistance to access healthcare. Regular checkups for conditions like hypertension, diabetes and other co-morbidities are essential for their overall well-being.
4. It is crucial to ensure that individuals with disabilities have access to necessary supplies such as medicines, disinfectants, masks etc. These supplies not only protect them but also help in preventing the spread of Covid-19 infection to others.
5. Information related to rehabilitation, therapy support, and other specialized services ought to be provided in formats that are easily accessible to individuals with disabilities.
6. Facilitate secure service delivery by utilizing innovative methods like tele-rehabilitation or partnering with established private service providers to fulfill the therapy and support requirements of individuals with disabilities.
7. Amid the lockdown, it is essential to enhance the accessibility and availability of mental health services for individuals with disabilities. Offering online counseling services can aid in stress management and help individuals with disabilities address their fears and anxieties effectively.

8. State governments should offer relief measures, special financial assistance, subsidies, and access to interest-free loans to either improve or at least maintain existing livelihoods.
9. Establishing and implementing standards for special education is essential to ensure access to education for individuals with disabilities, especially those with special educational needs and those who were previously enrolled in specialized educational settings.
10. Strengthen the current system of District Rehabilitation Centres to effectively meet the rehabilitation requirements, alongside healthcare needs, of individuals with disabilities.

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Sexual Miniority, Crimes & Victimization: A Literature Based Impact Assessment Study

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Abstract

Criminal justice in today's world falls far short of addressing victim needs even in the best of systems. The victims do feel more deserted when they are belonged to sexual minority (Gay, lesbian, bisexual and transgender-LGBT). Gender-related and sexual orientation, related victimization can be particularly traumatic because potential victims are at risk by virtue of sex and gender. LGBT individuals and their partners have traditionally been excluded from the class of victims entitled to reparations for human rights violations. Discrimination has resulted in systematic exclusion of LGBT individuals and has kept them from being able to exercise their rights in equal conditions as other victims and social groups. The victimization of LGBT individual continues to be denied till today. Indian criminal justice system is not exception of it. It is not victim oriented but accused oriented. This study is discussing causes and impact of LGBT victimization by law and society on the account of existing literature.

Key Words: - Sexual Minority, Victim, Victimization, Sexual Orientation, Gender Identity, LGBT

I Introduction

Every crime, which committed, there are at least two victims: society, which suffers a violation of its laws, and the actual victim who suffers an injury to body or property or reputations or mixed of two/all. A modern welfare state in order to ensure that innocent persons may not be victimized, the accused, has been granted certain rights and privileges and by product of crimes. The victim[1], in modern criminal law, has emerged as an irrefutable attendance in all

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1 "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. Declaration Of Basic Principles Of Justice For

stages of a criminal case. The victim becomes more neglected when they belong to sexual minority (Gay, lesbian, bisexual and transgender-LGBT)[2]. Gender-related and sexual orientation–related victimization can be particularly traumatic because failure in fitting of binary system of sex and gender. LGBT individuals are victimized because they are not meeting people's expectations about how females and males should act sexually or in other ways within intimate relationships. Sexual orientation victimization is an attack based on a person's sexual orientation. Indian criminal justice system is not exception of it. It is not victim oriented but accused oriented. More so, LGBT individuals and their partners have traditionally been excluded from the class of victims entitled to reparations for human rights violations. This history of discrimination has resulted in systematic exclusion of LGBT individuals and has kept them from being able to exercise their rights in equal conditions as other victims and social groups. The victimization of LGBT individual continues to be denied till today. This paper examines sexual orientation and gender identity victimization and its impact on sexual minority through existing literature.

Victim and Victimology:

Victimology is the scientific study of victimization, including the relationships between victims and offenders, the interactions between victims and the criminal justice system — that is, the police and courts, and corrections officials — and the connections between victims and other social groups and institutions, such as the media, businesses, and social movements.[3]

The word 'victimology' was coined in 1947 by a French lawyer, Benjamin Mendelsohn, later a citizen of Israel, by deriving from the Latin word 'victima' meaning one who is harmed and a Greek word 'logos' meaning reason or account. There are references in classical law codes like Manusmriti, the Book of Exodus, and Homer's Illiad to compensation being paid to victims of criminal offences.[4] The term victimology was also coined in 1949 by an American psychiatrist, Frederick Wertham, he wrote: The murder victim is the forgotten man. With sensational discussions on the abnormal psychology of the

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Victims Of Crimes And Abuse Of Power, Guide For Policy Makers, United Nations Office For Drug Control And Crime Prevention, New York 1999

2 Lesbians and gay men are individuals that develop intimate and/or sexual connections with members of the same sex. Bisexual people can experience sexual, emotional, and affectional attraction to their own sex and the opposite sex. Transgender individuals are broadly defined as people whose biosocial assigned sex is not congruent with the sex or the gender with which they identify. Queer has historically been used as a derogatory term against lesbian, gay, bisexual, and transgender people or those suspected of being L, G, B, and/or T. Currently, some people have reclaimed the term and self-identify as "queer."

3 Andrew Karmen, 2003, Crime Victims: An Introduction to Victimology, Wadsworth Publishing ,ISBN 9780534616328.

4 Who Used It For The First Time In His Book 'The Show Of Violence'. p.259, Ezzat A. Fattah, "The Vital Role Of Victimology In The Rehabilitation Of Offenders And Their Reintegration Into Society, 112th International Training Course Visiting Experts' Papers

murderer, we have failed to emphasize the unprotectedness of the victim and the complacency of the authorities. One cannot understand the psychology of the murderer if one does not understand the sociology of the victim. What we need is a science victimology.[5] References to victim compensation are also found in the code of Hammurabi. However, Macaulay's penal jurisprudence and the 'law and order' jurisprudence that followed did not pay too much attention to this aspect.[6]

Sexual Minority As Victim In India

On 15 April 2014, in a judgment concerning the rights of the transgender community, the Supreme Court of India held that: "Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as the third gender. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of transposing equality by the law or the equal protection of the law guaranteed under our Constitution."[7]

Later, on 5 December 2019, the Transgender Persons (Protection of Rights) Act, 2019 was passed. The Act creates obligations for welfare, education, social protection and health measures, as well as prevention against employment-based discrimination. The legislation has been widely criticized by various LGBT groups and the wider Transgender community, who have argued that self-declared identity alone should form the basis to the rights, benefits and entitlements outlined in the Act

On 6 September 2018, the Supreme Court of India ruled that consensual same-sex sexual acts between adults, conducted in private, are no longer an offence under Section 377 IPC.[8] The Supreme Court judgment of September 2018 requested that '… all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such [LGBT] persons in the light of the observations contained in this judgment.'[9] Even though constitutional provisions for non-discrimination, apex court judgment and positive laws LGBT+ members have been continued to be victim of homophobic and transphobic crimes and facing victimization. Several incidents have been reported related to 'facing regular threats of sexual and other violence, including from police;'[10] the ongoing negative attitudes and

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5 Id

6 Akshaya Suresh, "Batting for the Victim", http://www.indlaw.com/legalfocus/focusdetails.aspx?ID=83 (last visited on 15/7/2010)

7 Supreme Court India, Writ Petition (Civil) no 400 of 2012, (paragraph 76, 77), 15 April 2014

8 The Times of India, 'What is Section 377 of IPC?' 31 December 2018. ILGA, State-sponsored Homophobia, Global overview update 2020 December 2020 (page 101),

9 Supreme Court India, 'Writ Petition (Criminal) No. 76 of 2016' paragraph 74(c), September 2018

10 The Guardian, '"There are few gay people in India": stigma lingers…' 13 March 2019

behaviours of the police towards LGBTI individuals;[11] in September 2020, two instances of negative police attitudes were reported in Kolkata, though it is noted that senior police officers intervened, and a complaint was received.[12]

In an article on Section 377 of the IPC, the Indian Army Chief General, Bipin Rawat, stated:'…that while the Army Act, which governs the force, was not above the law of the land, the Indian Army was not "westernised and modernised" and was "conservative" when it came to matters like adultery or homosexuality. He declared that gay sex offenders would be dealt with under relevant sections of the Army Act.'[13] Reportedly same-sex relations continue to be punishable with up to seven years imprisonment for those serving in the army (see State attitudes and treatment of gay men and The Indian Army. The 2020 USSD report, found that despite the September 2018 ruling 'Lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons faced physical attacks, rape, and blackmail. LGBTI groups reported they faced widespread societal discrimination and violence, particularly in rural areas.'[14]

As per BBC News reports of March 2019 , the decriminalization of Section 377, has changed societal attitudes but some still feels fearful of homophobic attacks, six months on.[15] In July 2019, India today reported suicide over homophobia of 19 years old.[16] An article published by Reuters in June 2018 on the suicides of a lesbian couple highlighted the experience lesbians face in India.[17] In a study undertaken in 2018 by The Centre for Regional Political Economy (CRPE), a research centre at Azim Premji University, resulted that almost half of all male and female respondents strongly reject the notion of accepting same sex couples and only 20 percent of men and 17 percent of women agree that same-sex couples should be

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11 BBC News, 'We know what LGBT means but here's what LGBTQQIAAP stands for', 25 June 2015

12 Times of India, 'Police to sensitise personnel to deal with LGBTQ people' 16 September 2020

13 Section 46 of The Army Act, 1950 outlines that: '46. Certain forms of disgraceful conduct. Any person subject to this Act who commits any of the following offences, that is to say,-
'(a) is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind; or
'(b) malingers, or feigns, or produces disease or infirmity in himself, or intentionally delays his cure or aggravates his disease or infirmity; or
'(c) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or that person; shall, on conviction by court- martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.' The Print, 'Here's how homosexuals in Indian military can be punished' 11 January 2019

14 USSD, India Human Rights Report 2019 (page 56), 11 March 2020, https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/india/

15 BBC News, 'LGBT in India: What it's like six months after gay sex was decriminalised', March 2019, https://www.bbc.com/news/newsbeat-47454768

16 https://www.indiatoday.in/india/story/gay-man-suicide-homophobia-lgbt-helplines-1565041-2019-07-09

17 Reuters, 'Lesbian couple's suicide notes reveal stigma they face in India' 12 June 2018. https://www.reuters.com/article/india-women-lesbian-idUSL1N1TE1G4

accepted.'[18] The Guardian reported, in March 2019, noted that: 'Social acceptance is lagging far behind legal sanction.[19] With regard to general societal treatment of LGBTI individuals since the Section 377 ruling, The Department of Foreign Affairs and Trade (DFAT) Country Information Report reported that: 'Attitudes towards and experiences of LGBTI individuals can vary based on a range of factors (such as disparities between urban and rural India, language, caste, class and gender)... The removal of section 377 of the IPC, while a victory for same-sex men in particular, does not prevent or reduce widely held anti-gay and anti-LGBTI sentiment. Equally, the TPPRA, while providing a range of measures, has been widely criticized on a number of grounds and does not prevent or reduce anti-transgender public sentiment and treatment.'[20]

The Department of Foreign Affairs and Trade (DFAT) reported a similar situation for lesbians in 2019 and said that, 'Local sources told DFAT the situation for lesbians is difficult in that they lack safe spaces and, particularly in rural areas, often cannot talk about their sexual orientation. Reports suggest lesbians seeking to end sexual or physical abuse in such relationships would either need to leave the situation (and sever family ties) or deny their sexuality.'[21] The Joint NGO submission by Srishti Madurai and the NNID Foundation to the UN Committee on the Rights of Persons with Disabilities reported that 'Intersex people in the Republic of India are often faced with discrimination, stigmatisation and bullying and through this may struggle with access to education, employment, identity documents and marriage.'[22] In an article on intersex people in India, it was reported: 'Bullied at school, gang raped as a prostitute and asked about his genitals in job interviews, Daniel Mendonca - like many intersex people in India – has been mistreated all his life.[23]

According to a survey of almost 400 LGBT+ youth in Tamil Nadu by the United Nations' cultural agency, UNESCO, more than half skipped classes to avoid bullying, while a third dropped out of school altogether. 'Abuse

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18 CRPE, 'Politics and society between elections' 2019, page 90, https://archive.azimpremjiuniversity.edu.in/SitePages/pdf/politics-and-society-between-elections-2019-report.pdf

19 The Guardian, '"There are few gay people in India": stigma lingers…' 13 March 2019, https://www.theguardian.com/global-development/2019/mar/13/gay-people-india-stigma-lingers-despite-legal-victory

20 DFAT, Country Information Report: India, (paragraph 3.155, page 46), 10 December 2020, https://www.ecoi.net/en/file/local/2043026/country-information-report-india.pdf

21 DFAT, Country Information Report: India paragraph 3.161, page 47, 10 December 2020. https://www.ecoi.net/en/file/local/2043026/country-information-report-india.pdf

22 Srishti Madurai/NNID Foundation, '…Intersex People in India…' 26 July 2019, https://www.ecoi.net/en/document/2015239.html

23 Reuters, 'Job snubs to forced surgery: India's 'invisible' intersex people', 16 August 2019, https://www.reuters.com/article/us-india-lgbt-intersex-idUSKCN1V52M0

included threats of rape, groping, hitting and kicking, being locked in a room, having their belongings stolen and having nasty rumors spread about them.[24]

Victimology And Sexually Minor People

Due to historical and current patterns of individual and societal oppression directed at members of LGBT communities, members of these groups are often reluctant to self-identify to others. Sexual Minority community continues to experience significant degrees of discrimination and violence, ranging from government-sanctioned discrimination to a wide range of crime victimization, including assault, harassment, stalking, sexual violence, and homicide.[25] Victimization is a highly complex process encompassing a number of possible elements. The first element (often referred to as 'primary victimization') comprises whatever interaction may have taken place between offender and 'victim' during the commission of the offence, plus any after effects arising from this interaction or from the offence itself. The second element encompasses 'the victim's' reaction to the offence, including any change in self-perception that may result from it, plus any formal response that s/he may choose to make to it. The third element consists of any further interactions that may take place between 'the victim' and others, including the various criminal justice agencies with whom s/he may come into contact as a result of this response. Where this interaction has a further negative impact on the victim, it is often referred to as 'secondary victimization'.[26] They face victimization on both front, first when they accuse; second when they victim. Both the time they debar from victim status due to their different sexual orientation.

LGBT faces many types of abuse like Physical abuse[27], Sexual abuse,[28] Psychological/Emotional abuse,[29] Physical/Emotional abuse can lead to further problems that are often more serious and destructive abuse includes the purposeful destruction of property or pets..

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24 Reuters, 'Bullied by peers, India's LGBT+ children drop out of schools' 18 July 2019, https://www.reuters.com/article/us-india-lgbt-school-feature-idUSKCN1UC2UI

25 Amnesty International, "Stonewalled: Police Abuse and Misconduct against Lesbian, Gay, Bisexual, and Transgender People in the U.S." (New York): 2005; D. Saucier, J. Hockett, and A. S. Wallenberg, "The Impact of Racial Slurs and Racism on the Perceptions and Punishment of Violent Crime," Journal of Interpersonal Violence 23 (2008): 685 - 701; and D. G. Moon and T. K. Nakayama, "Strategic Social Identities and Judgments: A Murder in Appalachia," Howard Journal of Communications 16, no. 2 (2005): 87-107.

26 Dignan, James, Understanding Victims And Restorative Justice,

27 Physical abuse includes pushing, shoving, slapping, hitting with fist, kicking, choking, grabbing, pinching, pulling hair or threatening the victim with a weapon.

28 Sexual abuse includes forced sex with the threat of violence, sex after violence has occurred, or the use of objects or damaging acts without the woman's consent.

29 Psychological/Emotional abuse occurs the most and includes brainwashing, control of the woman's freedom to come and go when she chooses, isolation, humiliation or degradation, jealousy or possession, economic deprivation, emotional withholding. and a sense of male privilege. This abuse is facilitated by male privilege and forced feelings of minimization or denial.

LGBTQ victimization is under-reported due to many risk factors like fear of ***Isolation, Revictimization, Shame, Discrimination and rejection*** are risks for victims "outing" themselves by seeking help.[30]

There is a rich body of research and theoretical paradigms that support the notion that Western culture and law mistakenly conflates sexual conduct, sexual identity, and sexual orientation.[31] The Studies[32] suggest that police often fail to recognize that the incident has occurred in the context of an intimate partnership, or, because of a misconception among law enforcement that a determination of domestic violence is based primarily on the sex of the victim, many simply assign the label of "mutual abuse" and arrest both parties in incidents of violence in an LGBT relationship. In a culture tending toward homophobia, gay individuals may fear the negative reactions of family, friends, and society in general, if they "come out," thus perpetuating secrecy and isolation, and further undermining the potential for external support to assist when they are victimized by their intimate partners.[33] Another reason to downplay sexual orientation is that same-sex individuals face greater harm from outside sources in the form of societal discrimination and hate crime victimization.[34] Even when their sexual orientation is made public, same-sex victims find that those limited social services available to heterosexual victims of intimate abuse are often not offered to homosexuals.[35] In sum, even when

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30 Why It Matters: Rethinking Victim Assistance for LGBTQ Victims of Hate Violence & Intimate Partner Violence, Joint Policy Report by the National Center for Victims of Crime and the National Coalition of Anti-Violence Programs, www.ncvc.org

31 Katyal, S. (2002). Exporting identity. Yale Journal of Law and Feminism, 14, 97-176. Keaney, C. C. (2007). Expanding the protectional scope of Title VII "because of sex" to include discrimination based on sexuality and sexual orientation. St. Louis Law Journal, 51, 581- 605.

32 Amnesty International, "Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the U.S." (New York): 2005.

33 Balsam, K .F. & Szymanski, D. M. (2005). Relationship quality and domestic violence in women's same-sex relationships: The role of minority stress. Psychology of Women Quarterly, 29, 258-269. Bornstein, D. R., Fawcett, J., Sullivan, M., Senturia, K. D., & Shiu-Thornton, S. (2006). Understanding the experiences of lesbian, bisexual and trans survivors of domestic violence: A qualitative study. Journal of Homosexuality, 51, 159-181. Cook-Daniels, L. (1997). Lesbian, gay male, bisexual and transgendered elders: Elder abuse and neglect issues. Journal of Elder Abuse & Neglect, 9, 35-49. Elliott, P. (1996). Shattering illusions: Same-sex domestic violence. In C.M. Renzetti & C.H. Miley (Eds.) Violence in gay and lesbian domestic partnerships (pp. 1-8). New York: Haworth Press. Miller, A. J., Bobner, R. F., & Zarski, J. J. (2000). Sexual identity development: A base for work with same-sex couple partner abuse. Contemporary Family Therapy, 22, 189-200. National Coalition of Anti-Violence Programs (2002). Lesbian, gay, bisexual, and transgender domestic violence in 2002. New York. Rohrbaugh, J. B. (2006). "Domestic" violence in same-gender relationships. Family Court Review, 44, 287-299.

34 Balsam & Szymanski, 2005; Bornstein, Fawcett, Sullivan, Senturia, & Shui-Thornton, 2006).

35 Burke, T.W., Jordan, M. L., & Owen, S. S. (2002). A cross-national comparison of gay and lesbian domestic violence. Journal of Contemporary Criminal Justice, 18, 231-256. Peterman, L. J., & Dixon, C. G. (2003). Domestic violence between same-

homosexual victims are "out of the closet" and report the abuse, fewer avenues of external support may be available to help them and, indeed, they face further risk of violence by homophobic third parties. Police were biased against homosexuals (including LGBT) and they had little confidence that the courts would protect them because of their sexual orientation may well prevent them from reporting abuse.[36]

Theorists and activists have named and called attention to an increasing number of different forms of gender-related and sexual orientation–related crime and harassment. Fear of crime influences quality of life and reproduces social inequalities, creating and reinforcing exclusion from particular places and from some social interactions[37] and restricting a person's actions. Individuals' beliefs that they need to adjust their lives to avoid gender-related victimization are a manifestation of their oppression.

Universal Concern For The Rights Of The Victim:

Lgbt Individuals Who Are Victims of Grave Violations Must Be Recognized As Such, And Special Consideration Must Be Given To Their Social Condition, Which May In Some Cases Be The Motivation of the victimization. Three sets of international legal principles support such a concept of victim. The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[38] and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[39] promotes a broad definition of victim, declaring that the term includes "the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization." The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by consensus in the General Assembly in 1985, and thus reflects the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders, and the rights and interests of victims.

The *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*[40] also refers to the obligation to guarantee reparations for the victim, the victim's beneficiaries and family.

Law, Victimology And Sexual Minority:

A look at the Indian criminal justice system reveals the same bleak picture. It is not victim oriented but accused oriented. Under our procedural

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sex partners: Implications for counseling. Journal of Counseling & Development, 81, 40-47. Turell, S. C. (2000). A descriptive analysis of same-sex relationship violence for a diverse sample. Journal of Family Violence, 15, 281-293.

36 I d. Burke, Jordan, & Owen, 2002

37 Pain, 2001, p. 902

38 General Assembly resolution 40/34, annex, of 29 November 1985

39 Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. http://www2.ohchr.org/english/law/remedy.htm (last visited on 12/7/2010)

40 Distr. GENERAL E/CN.4/2005/102/Add.18 February 2005. http://www.derechos.org/nizkor/impu/principles.html (last visited on 12/7/2010)

criminal law, the accused is treated as privileged person and is provided with all possible help including a defense counsel at the cost of the State. Legal Discrimination against the sexuality minorities takes many forms, the most notorious being Section 377[41] of the Indian Penal Code (IPC), a British colonial legislation criminalizing homosexual behavior, that continues to be in the Indian statute book although it has long since been removed from the British statute book. Reports of PUCL in 2001[42] and 2003[43] respectively cite the several incidents of the victimization of LGBT community in India.

A Indian Legal Provision for Compensation to Victims

Justice requires that a person who has suffered must be compensated. Basically, the accused is responsible for the reparation of any harm caused to the victim. We have five statutes, under which compensation may be awarded to the victims of crime.

1. The Fatal Accidents Act, 1855
2. The Motor vehicles Act, 1988
3. The Criminal Procedure Code, 1973
4. The Constitutional Remedies for Human Rights Violation
5. The Probation of Offenders Act, 1958

i. The Criminal Procedure Code, 1973

If we focus on the provisions of Criminal Procedure Code, 1973

a) Section 250 authorizes Magistrate to direct complaints or informants to pay compensation to people accused by them without reasonable cause.
b) Section 358 empowers the court to order a person to pay compensation to another person for causing police officer to such other person wrongfully.
c) Section 357[44] Code of Criminal Procedure, 1973 empowers a Court imposing a sentence of fine or a sentence (including a sentence of death) of which fine

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41 Section 377 of IPC reads: Of unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to 10 years and also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.

42 Read report at www.sangama.org/files/sexual-minorities.pdf (last visited on 12/7/2010)

43 Id.

44 Sub-section (1) of Section 357 reads as : When a Court imposes a sentence or fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgement, order the whole or any part of the fine recovered to be applied-
(a) in defraying the expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court; (c) when any person is convicted of any offence for having caused death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act,1855 entitled to recover damages from the person sentenced for the loss resulting to them from such death; (d) when any person is convicted of any offence

forms a part, in its discretion, *inter alia*, to order payment of compensation, out of the fine recovered, to a person for any loss or injury caused to him by the offence.

However the principles underlying section 357 of the Cr. P. C. is very much the same sought to be achieved by the UN basic principles of Justice for Victims of Crime, its scope is extremely limited.[45] Legislation conferred jurisdiction on the criminal courts under section 357(3) of the code of criminal procedure for awarding unlimited amount of compensation to the victims at the time of passing judgment of conviction. This provision is not ancillary to other provisions of criminal procedure code, but in addition thereto. The government has passed the Criminal Procedure Amendment Act 2009. The best part about the recent amendments is that they have strengthened and reinforced the Victimology Jurisprudence in India. An important amendment has been incorporated in a new Section 357A making it mandatory for state governments to prepare a scheme for providing funds for compensating the victim of a crime or her dependents.

Apart from invoking section 357 of the Cr. P.C., the victim may approach a higher court under section 482, Cr. P. C. to claim compensation, which empowers a higher court to exercise its inherent power in the interest of justice. The higher judiciary has applied this principle in the cases of *Bodhisattwa Gautam*[46], *Delhi Domestic Working Women's Case*[47], *Chandrima Das*[48]

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which includes theft, criminal misappropriation, criminal breach of trust, or cheating or of having dishonestly assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensation any bonafide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.
(2) If the fine is imposed in a case, which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal his elapsed, or if an, appeal be presented, before the decision of the appeal.
(3) When a court imposes a sentence, of which fine does not form a part, the court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury reason of the act for which the accused person his been so sentenced.
(4) An order under this section may also be made by all Appellate Court or by the High Court or Court of Session when exercising its powers of revision.
(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section.
See also, Probation of Offenders Act, 1958 and Fatal Accidents Act,

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46 Shri Bodhisattwa Gautam vs Miss Subhra Chakraborty 1995 INDLAW SC 1920. The accused was ordered to pay an interim compensation of Rs.1000 pr month during the pendency of the case. The legal mandate appears quite clear and well established that compensation as well as interim compensation are payable by the accused to the victims of rape in the interest of justice.

47 Delhi Domestic Working Women's Forum vs Union of India 1994 INDLAW SC 1120

48 Chairman, Railway Board vs Chandrima Das 2000 INDLAW SC 600. a Bangladeshi woman was raped by some railway officials in the railway yatri niwas. The apex

and *Nilabati Behera*.[49] Apart from the Criminal procedure Code, Section 5 of the Probation of Offenders Act, 1958 gives limited discretionary power to the court to order reasonable compensation for loss or injury in cases where the accused is let off with admonition or released on probation.[50]

A number of constitutional protections are also available to an accused under Articles 20, 21 and 22 of the Indian Constitution. The Indian Constitution, the supreme law of the land, enunciates no specific provision for victims including LGBT, but right to compensation has been interpreted as an integral part of right to life and liberty under Art. 21 of the Constitution. There is plethora of decisions,[51] where Supreme Court awarded compensation to the victims, whose plight was brought to the notice of the apex court either by themselves or by way of public interest litigation. As early as in 1983, the Supreme Court recognized the petitioner's right to claim compensation for illegal detention and awarded a total sum of Rs. 35000 by way of compensation. In delivering the judgment, Chandrachud C.J. observed: "*Art 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of relief from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Art 21 secured is to mullet its violators in the payment of monetary compensation.*[52]

The Supreme Court of India while discussing the scope and object of Section 357 Cr.P.C., 1973 in *Hari Krishnan and State of Haryana* v. *Sukhbir Singh*[53] observed:

"It is an important provision but the courts have seldom invoked it, perhaps due to the ignorance of the object of it. It empowered the courts to award compensation to victims …It may be noted that this power of the Court to award compensation is not ancillary to other sentences but is in addition thereto. This power was intended to do something to reassure the victim that he/she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offender. It is indeed a step forward in our criminal justice system."

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court asked the railways to pay Rs. 1000000 as compensation for the infringement of her right to life under Art. 21 of the Constitution.

49 Nilabati Behera vs State of Orissa 1993 INDLAW SC 999

50 Sec 5 of the Probation of Offenders Act, 1958: Power of the court to require released offenders to pay compensation and cost.

51 Sebastian Hongray v. Union of India AIR 1984 SC 1026. See also, Bhim Singh vs. State of Jammu& Kashmir (1985) 4 SCC 577 ; People's Union for Democratic Rights vs. State of Bihar, 1987 (1) SCR 631; People's Union for Democratic Rights Thru. Its Secy. vs. Police Commissioner, Delhi Police Headquarters, (1989) 4 SCC 730 ; Arvinder Singh Bagga vs. State of U.P. (1994) 6 SCC 565 ; Dr. Jacob George vs. State of Kerala (1994) 3 SCC 430 ; Paschim Bangal Khet Mazdoor Samity vs. State of West Bengal & Ors.(1996) 4 SCC 37 and Mrs. Manju Bhatia vs. N.D.M.C. AIR 1998 SC 223 . Gudalure M.J. Cherian v. Union of India1995 SCC (Cr) 925. Brijesh v. State of Haryana MANU/PH/0482/2003

52 Rudul Sah v. State of Bihar AIR 1983 SC 1086.

53 AIR 1988 SC 2127

Apart from the above legislative mandate, no other statutory provision exists for the purpose of adequately compensating or otherwise, assisting the victims of crime.

In *Chandradevi, Kamalanantha & others* v. *State of Tamil Nadu*[54] a sensational news item appeared in the Indian Express which captured the attention of its readers. It spoke of the rape of 13 minor girls by the Swami of an ashram. Subsequently on investigation, the case came up before the court and it was revealed that Swami Premananda committed rape on 13 girls in his ashram. It opined, *"While imposing the fine amount on A-1, the learned Sessions Judge has taken into consideration the age of the victim girls, the trauma which they have undergone and the damage which they have suffered and hence ordered a fine of Rs.5,00,000/- on A-1 to be paid as compensation to each of the victim girl. We find that the fine imposed is commensurate with the crime and the capacity of A-1 to compensate. It is not in dispute that A-1 is holding a Joint Account … to a tune of Rs.89, 00,000/- and the operation of this account had been freezed under the orders of the court. Though an attempt had been made by a third party to represent that this amount represents the amount of a Trust and that it cannot be utilized by A-1 for paying the fine ordered to be paid by him, we have no hesitation in rejecting such a representation made without any pleading and records. It only fortifies our apprehension that the appellants are trying to see that the fine amount is not recovered and thereby deprive the victim girls of their due compensation.*

While the above case laws depict a bright picture drawn in favor of victims but mostly all these cases are related to male and female not to sexually minor. The High Court of Madras, reported as *Jayalakshmi v. The State of Tamil Nadu*[55] in which a eunuch had committed suicide due to the harassment and torture at the hands of the police officers after he had been picked up on the allegation of involvement in a case of theft. There was evidence indicating that during police custody he was subjected to torture by a wooden stick being inserted into his anus and some police personnel forcing him to have oral sex. The person in question immolated himself inside the police station on 12.6.2006 and later succumbed to burn injuries on 29.6.2006. The compensation of Rs.5,00,000/- was awarded to the family of the victim.

The reality remains that LGBT victims in India are still a poor lot. They have as yet not received the sympathetic treatment they deserve; rather they have time and again been discarded and sidelined for a wrong committed against them.

However the Law Commission of India, expressing its concern for crime victims, has suggested few proposals for reforms. The Fourteenth Law Commission in 1996 in its 154th Report on the Code of Criminal Procedure suggested a comprehensive victim compensation scheme to be administered, on recommendations of a trial Court, by the Legal Services Authorities constituted at the District and State levels under the Legal Services Authorities Act, 1987. The Law Commission desired the District and State Legal Services

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54 MANU/TN/2335/2002
55 (2007) 4 MLJ 849,

Authorities to have special considerations while compensating victims of custodial crimes, and of child abuse; rape victims, and physically and mentally disabled victims of crimes.[56]

Victimological Theories

According to the social-structural victimization theory, victimization reflects the economic and the power structures of a society. Marginalized, powerless minorities that have been pushed toward the edge of society are often forced into becoming victims. Structural violence[57], social discrimination, turns into personal violence[58] Cultural victimization, which is based on customs, tradition, religion, and the ideology of a society, is the subjective form of social-structural victimization, as the structure of the economy and the system of power eminently influence views, value concepts, and the stereotypes of a society. Hate crimes that are characterized by the symbolic status of the crime victim constitute an example. The victim belongs to an outsider group symbolizing that which the insider group, to which the offender belongs, does not want to be. The offenses serve to affirm the solidarity and identity of the insider group and at the same time to strengthen the feeling of self-assurance of the group members. This is illustrated by the physical attacks on homosexual men and lesbian women. Homosexuals are beaten and even killed because of their sexual inclinations ("gay bashing")[59]

Institutional victimization not only encompasses victimization within an institution but also victimization by the institution itself. Here, the term institution designates a facility that fulfills certain tasks according to certain

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56 The Fourteenth Law Commission in 1996 in its 154th Report on the Code of Criminal Procedure Chapter XV : Victimology, para 17. It is further pertinent to note that the Supreme Court of India also urged the National Commission for Women to prepare a Compensation Scheme for compensating rape victims. It, against the backdrop of art. 38(1) of the Constitution, also pleaded for setting up of Criminal Injuries Compensation Board for the purpose. See Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14 and Bodhisattwa Guatam v. Subhra Chakraborty, AIR 1996 SC 922. For comments, see infra. K. I. Vibhute, Victims of Rape and their Right to Live with Human Dignity and to be Compensated : Legislative and Judicial Responses in India.

57 Hans Joachim Schneider, "Victimological Developments in the World During the Past Three Decades (I): A Study of Comparative Victimology". International Journal of Offender Therapy and Comparative Criminology, 45(4), 2001 449-468, 2001 Sage Publications. Galtung, J. (1975). Strukturelle gewalt [Structural violence]. Reinbek bei. Hamburg, Germany: Rowohit.

58 Sessar, K. (1993). Auslaender als opfer [Foreigners as victims]. In P. -A. Albrecht, A.P.F. Ehlers, F. Lamott, C. Pfeiffer, H. -D. Schwind, & M. Walter (Eds.), Festschrift fuer Horst Schueler- Springorum, pp. 114. Cologne, Germany: Heymanns. Hans Joachim Schneider, supra 53

59 Berrill, K. T. (1992). Anti-gay violence and victimization in the United States. In G. M. Herek&K. T. Berrill (Eds.), Hate crimes (pp. 19-45). Newbury Park, CA: Sage. Hunter, J. (1992).Violence against lesbian and gay male youths. In G. M. Herek&K. T. Berrill (Eds.), Hate crimes (pp. 76-82). Newbury Park, CA: Sage. von Schulthess, B. (1992). Violence in the streets: Anti-lesbian assault and harassment in San Francisco. In G. M. Herek&K.T. Berrill (Eds.), Hate crimes (pp. 65-75). Newbury Park, CA: Sage. Hans Joachim Schneider, supra 53

rules that govern work procedures and the distribution of tasks among staff members who are working together. A subcategory of institutional victimization is victimization by an enterprise (corporate victimization). Examples of institutional victimization include violence in nursing homes, in schools, and in prisons. The cause of violence can be found in the staff members of the institution and the inmates of the institution, but it can also lie in the structure of the institution.[60]

Impact Of Ignorence Of Victimology On Sexual Minority:

The impact of hate violence harms members of the victim's community as well, and can leave them feeling isolated, vulnerable, and unprotected by the law. Abusers often capitalize on widespread bias directed at sexual orientation and/or gender identity by threatening to "out" (reveal the sexual orientation and/or gender identity of) the victim to family members, employers, landlords, or others in positions of power.[61] This threat is an effective tool of manipulation and control because once outed, people may lose jobs and homes, as well as custody of their children.[62]

Transgender people may experience a higher level of both intimate partner violence and sexual assault.[63] An LGBTQ victim may hesitate to disclose partner violence for fear that the abuse will be considered evidence that the victim's sexual orientation and/or gender identity is unhealthy. Seeking support from family members is especially difficult if the family disapproves of the relationship,[64] although studies reveal that even LGBTQ friends and community members are largely unprepared to support victims of intimate partner violence.[65] Additionally, criminal justice personnel and victim assistance providers often underestimate the physical danger involved in same-

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60 Schneider, H. J. (1996b). Violence in the institution. International Journal of Offender Therapy and Comparative Criminology, 40, 5-18.

61 National Coalition of Anti-Violence Programs, "Lesbian, Gay, Bisexual, and Transgender Domestic Violence in the United States in 2007: A Report of the National Coalition of Anti-Violence Programs," (New York: NCAVP, 2008), 5-7, http://www.ncavp.org/common/document_files/Reports/2007%20NCAVP%20DV%20REPORT.pdf. (last visited on 12/7/2010)

62 Stalking Resource Center, "Leaving No Victim Behind," The Source 3, no. 2 (Washington, DC: National Center for Victims of Crime, 2003),http://www.ncvc.org/src/main.aspx?dbName=DocumentViewer&DocumentID=37138. (last visited on 12/7/2010)

63 S. Gentlewarrior, "Culturally Competent Service Provision to Lesbian, Gay, Bisexual, and Transgender Survivors of Sexual Violence," Applied Research Forum (Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence/Pennsylvania Coalition Against Domestic Violence, 2009), http://www.vawnet.org; and R. L. Stotzer, "Violence Against Transgender People: A Review of United States Data," Aggression and Violent Behavior 14, no. 3, (2009): 171-72.

64 M. Aulivola, "Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims," Family Court Review 42, no. 1, (2004): 162.

65 S. Turell and M. Herrman, "Family Support for Family Violence: Exploring Community Support Systems for Lesbian and Bisexual Women Who Have Experienced Abuse," Journal of Lesbian Studies 12, nos. 2-3, (2008):211.

sex relationship abuse, or fail to recognize that a physically smaller partner may be the perpetrator.

Many victim-serving agencies are not well trained to work with LGBTQ victims and survivors of crime.[66] Perhaps the most significant barrier to services for LGBTQ victims is the existence of bias attitudes: homophobia,[67] biphobia[68], transphobia[69], and predominant heterosexism.[70] Without training, providers often fail to consider and address the relevance of anti-LGBTQ bias in the victim's experience. An LGBTQ crime victim may experience bias repeatedly, from being targeted because they are LGBTQ to problems reporting the crime to lack of inclusive victim services. Failure to understand the significance of the victim's sexual identity and/or gender expression therefore presents a great barrier to LGBTQ victims of crime seeking services.

The criminal justice system discriminates against the LGBT community and fails to protect LGBT persons in the country. The deaths of LGBT individuals often go uninvestigated and usually remain unsolved. The perpetrators of such crimes go unpunished. Studies also support the claim that greater psychological injury is prominent among LGBT victims of crimes. Victims may experience the following psychological reactions:

a) Increase in the belief of personal vulnerability.

b) The perception of the world as meaningless and incomprehensible.

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66 G. M. Herek et al., "Hate Crime Victimization among Lesbian, Gay, and Bisexual Adults," Journal of Interpersonal Violence 12, nos. 2, 4, (1997): 195-215; T. A. Savage et al., "Applying Social Empowerment Strategies as Tools for Self-Advocacy in Counseling Lesbian and Gay Male Clients," Journal of Counseling & Development 83, no. 2, (2005): 131-37; M. D. Otis, "Perceptions of Victimization Risk and Fear of Crime Among Lesbians and Gay Men," Journal of Interpersonal Violence 22, no. 2, (2007): 198-217; K. B. Wolff and C. L. Cokely, "To Protect and to Serve? An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual, and Transgender Community," Sexuality & Culture 11, no. 2, (2007): 1-23; C. Fox, "Texts of Our Institutional Lives: From Transaction to Transformation: (En)Countering White Heteronormativity in Safe Spaces," College English 69, no. 5, (2007): 496-511; and R. Klitzman "Patterns of Communication between Gay and Lesbian Patients and Their Health Care Providers," Journal of Homosexuality 42, (2002): 65-75.

67 Homophobia is any attitude or behavior predicated in the assumption that heterosexuality is both normative and desirable, resulting in the marginalization of lesbians, gay men, and queer people at personal, familial, and/or societal levels.

68 Biphobia is any attitude or behavior predicated in the assumption that engaging in intimate/sexual behavior solely with those of the opposite sex is both normative and desirable, resulting in the marginalization of bisexuals at personal, familial, and/or societal levels.

69 Transphobia is any attitude or behavior predicated in the assumption that biological sex and gender are binary and synonymous, resulting in the marginalization of transgender individuals at personal, familial, and/or societal levels.

70 Heterosexism denotes negative attitudes, biases, and discrimination in favor of opposite sex sexuality and relationships. It can include the presumption that everyone is heterosexual or that only opposite-sex attractions and relationships are valid and therefore superior.

c) The view of themselves in a negative light.[71]

The experience of victimization may result in an increasing fear of the victim of the crime, and the spread of fear in the community. For instance, one study compared the psychological trauma suffered by gays and lesbians after being victims of hate crimes with the distress that other gays and lesbians suffered after being victimized by non-bias crimes with comparable violence.[72] The study concluded that after 5 years, gays and lesbians who had experienced a hate crime assault reported significantly greater levels of depression, anger, anxiety, and posttraumatic stress than did subjects who experienced non-bias motivated assaults.[73] Consequently, hate crimes can cause a person's sexual orientation to "be experienced as a source of pain and punishment rather than intimacy, love, and community. Internalized homophobia may reappear or be intensified. . . Such characterological self blame can lead to feelings of depression and helplessness, even in individuals who are comfortable with their sexual orientation".[74] Studies also confirm that gay men who are subjected to violence based on their sexual orientation are two times as likely to report suicidal ideation as those who aren't.[75] These findings support the claim that "experiencing a hate crime links the victim's post-crime feelings of vulnerability and powerlessness with his or her sexual orientation and personal identity".[76] Although the current research on the psychological effects that hate crimes have on transgender victims is sparse, researchers posit that transgender individuals also experience greater psychological trauma when they are victimized based on their gender identity or expression.[77]

Comparing the emotional and behavioral responses of victims of hate violence with those of victims of personal crimes such as assault and rape, several similarities were identified. Investigators have reported intense rage or anger; fear of injury, death, and future victimization; and depression as

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71 Sebba, L., (1996). Third Parties, Victims and the Criminal Justice System. Ohio State University Press, Columbus.

72 Herek, G., Gillis, R., & Cogan, J. (1999). Psychological sequelae of hate crime victimization among lesbian, gay, and bisexual adults. Journal of Consulting and Clinical Psychology, 67(6), 945-951.

73 Herek & Cogan; D'Augelli, A., & Grossman, A. (2001). Disclosure of sexual orientation, victimization, and mental health among lesbian, gay, and bisexual older adults. Journal of Interpersonal Violence, 16(10), 1008-1027.

74 Garnets, L., Herek, G., & Levy, B. (1990). Violence and victimization of lesbians and gay men: Mental health consequences. Journal of Interpersonal Violence, 5(3), 366-383.p. 370)

75 Huebner, David M., Rebchook, Gregory M., & Kegeles, Susan M. (2004). Experiences of harassment, discrimination, and physical violence among gay and bisexual men. American Journal of Public Health, 94(7), 1200-1203.

76 Supra note 52, Herek, Gilles, & Cogan, 1999, p. 950. Melissa Hamilton, "The Intersection Of Gender And Sexuality On Arrest Outcomes For Intimate Partner Violence", University of Toledo College of Law. Electronic copy available at: http://ssrn.com/abstract=997943

77 Lombardi, Emilia, Wilchins, Riki Anne, Priesing, Dana, & Malouf, Diana. (2001). Gender violence: Transgender experiences with violence and discrimination. Journal of Homosexuality, 42(1), 89-101.

elements of victims' potential reactions to crime.[78] Judith Butler explains that the constant fear of victimization shapes individual subjectivities of LGBT people and communities: We are, as a community, subjected to violence, even if some of us individually have not been. And this means that we are constituted politically in part by virtue of the social vulnerabilities of our bodies; we are constituted as fields of desire and physical vulnerability, at once publicly assertive and vulnerable.[79] Few legal scholars and researchers have connected hate crime consequences with the expression and association of LGBT victims and communities. However, two research findings support the concept that hate crimes against LGBT people directly target expression and association on the basis of sexual orientation and gender identity. It is important to preface these findings by noting that hate crimes are severely underreported[80] and that many LGBT victims decide not to report hate crimes in fear of secondary victimization by law enforcement.[81] LGBT people may refrain from certain behaviors or gestures, or avoid certain clothing styles, in fear of being victimized and labeled as LGBT.[82] Fearing violence, LGBT individuals may never reveal their sexual orientations or gender identities at all. The invisible aspect of sexual orientation makes these findings especially troublesome because the visible presence of nonconforming sexual orientations and gender identities is contingent upon the open association and expression of LGBT individuals and communities.[83]

Conclusion:

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78 Barnes, Arnold, & Ephross, Paul H. (1994). The impact of hate violence on victims: Emotional and behavioral responses to attacks. Social Work, 39(3), p. 250, 247-251.

79 Butler, Judith. (2004). Undoing gender. New York: Routledge.p. 18

80 Rubenstein, William B. (2004). The real story of U.S. hate crime statistics: An empirical analysis. Tulane Law Review, 78(4), 1213-1246.

81 Nolan, James J., & Akiyama, Yoshio. (1999). An analysis of factors that affect law enforcement participation in hate crime reporting. Journal of Contemporary Justice, 15(1), 111-127.

82 Herek, 1989; Von Schulthess, Beatrice. (1992). Violence in the streets: Anti-lesbian assault and harassment in San Francisco. In Gregory M. Herek & Kevin T. Berrill (Eds.), Hate crimes: Confronting violence against lesbians and gay men (pp. 65-75). Newbury Park, CA: Sage. Jordan Blair Woods, "Reconceptualizing Anti-LGBT Hate Crimes as Burdening Expression and Association: A Case for Expanding Federal Hate Crime Legislation to Include Gender Identity and Sexual Orientation", Journal Of Hate Studies, Vol. 6:81, pp 81-115. Electronic copy available at: http://ssrn.com/abstract=1092363

83 The complete ghettoization of non-heterosexual orientations into the private sphere was especially extreme during the 1950s, when modern gay bathhouses appeared within the United States. Underground gay bathhouses became queer cultural centers of art, literature and music. See Chisholm, Dianne. (2005). Queer constellations: Subcultural space in the wake of the city, 72 ("Gay bathhouses opened their doors to the culture industry and the culture industry entered gay bathhouses, reproducing gay society for mainstream consumption. . .. some bathhouses exhibited local art to encourage sexual community"). Bathhouses also served as spaces for gay males to be open about their sexual orientation without risking violence. See p. 66.

The most significant barrier for LGBTQ victims is the existence of bias attitudes: homophobia, biphobia, transphobia, and predominant heterosexism versus Homophobia resulting in the marginalization of lesbians, gay men, and queer people at personal, familial, and/or societal levels. Violence against LGBT people are crimes motivated by the offender's bias against the actual or perceived sexual orientation and/or gender identity of the victim. It is important that the victim of the crime be taken care of and respected. This can go a long way in toward helping the victim recover from the incident. Providing these programs to local agencies and letting victims know about them is important as well.The needs of victims of crimes may not be adequately addressed if the victim assistance providers do not know the sexual orientation and/or gender identity of the victim and if LGBT-sensitive services are not available. LGBT people need relief from stigma, discrimination, and the threat of violence to help end their historic invisibility. To sum up in the words of Justice V.R.Krishna Iyer, "The *old penal blinkers and judicial limitations no longer operate now that human rights have achieved a fair amount of attention. The road is long, and not everyone looks upon human rights with the same positivity. It is recognized, however, that the true manifestation of a country's civilization is measured by the completeness of the relief and the comprehensiveness of the habilitation that criminal justice affords to all affected sections- those who are the victims of crimes and offences and those who have been punished, are serving their sentences and then are realized to return to society as law abiding citizens.*" So LGBT victims also required completeness of the relief and the comprehensiveness of the habilitation from law and society.

Laws must include sexual orientation and gender identity as protected classes to assure equal access to justice for LGBT victims of violence. LGBT communities and society at large must be made aware of the scope and effect of violent crimes against LGBT persons, as well as of victims' rights and services. Until this happens, LGBT victims will not receive adequate priority. Efforts must also increase quantitative and qualitative research among LGBT persons and increase opportunities for publication and dissemination of scientific research of studies that illuminate the specific experiences and consequences of LGBT victimization.

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Admissibility of Digital Evidences in Judicial Proceedings: An Analysis

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Abstract

In the contemporary society, neither a natural nor an artificial person can visualise its operations without the assistance of digital tech. The advent of computers has not merely provided the ease of accessibility and storage but also heterogeneity of content. Consequently, the legal domain is also greatly influenced by this technological shift. These digital devices provide relevant information which can be adduced as evidences in court, often termed as digital evidences. Section 65B of the Indian Evidence Act 1872 encompasses the provisions relating to admissibility of electronic evidence in judicial proceedings. Though it is convenient to use electronic records yet it has its own shortcomings and infirmities. Due to proliferation of cyber arena, there is a colossal increase in its misuses. Keeping in view the cyber manipulations and distortions, this paper seeks to analyse the kinds of electronic evidences, their admissibility and reliability in the proceedings of court.

Keywords: Electronic Evidences, Information Technology, Admissibility, Reliability, Computer Output, Data, Certificate, Electronic Record

Introduction

It was in the late 19th century when a digital computer came into its being, owing its origin to the mind of Sir Charles Babbage. Lesser did he know that computer technology will take a lead in almost all aspects of the contemporary society. Can there be any such profession or area of work where a computer or allied device can be completely neglected? The answer stands in negation. The rapid escalation of digitalisation in offices, private or public, has made computers indispensable for the documentation, communication and repository of information. Consequently, the judicial organ of the government also depends on the computers and digital devices for not merely the efficient performance of its operations but also for the employment of computer output as evidences wherever necessary.

Prior to the year 2000, only oral and documentary evidences were admissible in the court of law but the enactment of the information and

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technology law brought a significant change in the prevalent trends. It cannot be disputed that there are innumerable advantages associated with computer resources however it is also pertinent to note that these digital devices are susceptible to misuses. Due to the proliferation of cyber arena as well as cyber misapplications, the need was felt by the government to regulate the same. Subsequently, in the year 2000 the Information and Technology Act was enacted with the purpose of regulating the cyber space recognising the electronic records and electronic information.[1]In consonance to the same, section 92[2] along with the second schedule[3] of the IT Act 2000 sought to amend the Indian Evidence Act 1872. The significant changes made to the evidence law in India are: the term documentary evidence encompassed in section 3[4] was amended to include electronic records which can be produced before the court of law; the term admissions in section 17[5] of the act is amended to include the statements presented before the court in the electronic form along with oral or written statements; and the section 39[6] states the production of the part of the statement available in an electronic form.

The most significant provision dealing with electronic evidences is section 65(A) and section 65(B) which lays the procedure for admissibility of electronic evidences in the court of law.[7] This amendment brought a significant change in expanding the horizons of evidence law in India. Presently, the court can not only acknowledge the computer output as evidence but also seek to ascertain its value and truthfulness before placing reliance on the same.[8]Apart from computer output, e-evidences also include the other digitised devices like mobile phone, messages, cybernated photographs, ATM transaction receipts, word documents, reports, documentaries, spreadsheets, data stored in tabular form, repository memory of computer, printouts, audio and video recording, and others. Almost all fields are predominantly influenced by the computer technology making it an indispensable part of the contemporary India. Thereby, Computer output or digital output proves to be a substantial piece of evidence. However, such e-evidences are always shadowed by a persistent menace of manipulations and fabrications.[9] So it is the obligation of the court to

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1 Tejas Karia, Akhil Anand and Bahaar Dhawan, "The Supreme Court of India re-defines admissibility of electronic evidence in India",12 *Digital Evidence and Electronic Signature Law Review* 34 (2015).

2 Information and Technology Act, 2000 (Act 21 of 2000), s.92.

3 Information and Technology Act, 2000 (Act 21 of 2000), Second Schedule.

4 Indian Evidence Act,1872 (Act 1 of 1872), s.3.

5 Indian Evidence Act, 1872 (Act 1 of 1872), s.17.

6 Indian Evidence Act 1872 (Act 1 of 1872), s.39.

7 Tejas Karia, Akhil Anand and Bahaar Dhawan, "The Supreme Court of India re- defines admissibility of electronic evidence in India",12 *Digital Evidence and Electronic Signature Law Review* 34 (2015).

8 Soni Lavin Valecha and Sonika Bhardwaj, "Admissibility of Electronic Evidence under the Indian Evidence Act, 1872", 4 *IJMH* (2020).

9 Electronic Evidence/ Digital Evidence & Cyber Law in India, *available at*: https://www.linkedin.com/pulse/electronic-evidence-digital-cyber-lawindia-adv-prashant-mali- (last visited on 20 March 2023)

find out the truthfulness of such evidences before admitting them in any proceedings. For this purpose, the court may also seek assistance from certain experts who can guide the court adequately.

Defining E-Evidences

Indian evidence law acknowledges two classes of evidences i.e., primary and secondary evidences. Primary evidence is defined as the one where the original document is produced before the court for inspection.[10] In contrast to it, secondary evidence is defined as to constitute all those certified copies of documents presented before the court of law as enumerated in the concerned provision of the act.[11]There are five types of permitted secondary evidences: certified copies of documents, copies of copied documents, copies made from original documents, counterparts of documents not executed by parties and the testimony of someone who has personally seen a document.[12]Secondary evidences are considered to be inferior to the primary evidence. These are to be produced only when there is no primary evidence available and the reliability of such evidence is unquestionable once approved by the court of law.[13] Electronic evidences fall under the category of secondary evidences. Electronic evidences are a special category of evidences, also termed as advanced evidences.[14] Electronic evidence has been differently defined by different entities. These include 'information of probative value that is stored or transmitted in binary form'[15] and 'information stored or transmitted in binary form that may be relied on in court'.[16]In layman's language, electronic evidence will include all those evidences produced before the court which have their origin in the computer and other digital devices. Certain set of data stored in computers and digital devices cannot be directly produced before the court of law; hence it is either produced in the form of printouts or photographic format or compact disk or other magnetic or optical devices used for storage. Thereby, electronic evidences satisfy the criteria for secondary evidence and, hence are admissible in the court of law.

Substantially, electronic evidence can be defined as a set of data created, stored and directed on a human made machine, computer or any other

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10 Indian Evidence Act, 1872 (Act 1 of 1872), s.62.

11 Indian Evidence Act, 1872 (Act 1 of 1872), s.63.

12 *Ibid.*

13 Exploring the elements of primary and secondary evidence under Indian Evidence Act, *available at:* https://www.lexology.com/library/detail.aspx?g=ea6bba74-3506-4083-9849-756bc506082d(last visited on 20 March 2023)

14 Soni Lavin Valecha and Sonika Bhardwaj, "Admissibility of Electronic Evidence under the Indian Evidence Act, 1872", 4 *IJMH* (2020).

15 "Model Quality Assurance Manual for Digital Evidence Laboratories", 3 *Scientific Working Groups on Digital Evidence and Imaging Technology* (2012)

16 G8 proposed principles for the procedures relating to digital evidence, *available at* http://web.archive.org/web/20030207173420/http://ioce.org/G8_proposed_principles_for_forensic_evidence.html (last visited on 20 March 2023)

digital device preferred for communication or repository of information.[17] This definition has three aspects. Firstly, it implies that all the data stored or communicated to a digital device can be a potential evidence. Secondly, it is implicit that digital devices include all those devices on which data can be stored and transmitted like mobile phones, compact disks, and other devices using the facility of internet. And lastly, it implies that only data relevant to the facts of the case can be produced before the court of law and accordingly the question of its admissibility and reliability is adjudged by the court.[18] Furthermore, section 79(A) of the Information and Technology act endeavours to define electronic records and electronic evidences as information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, and digital fax machines.[19] Thereby, any information thus extracted from or supplied to computer constitutes electronic evidences. Therefore, certain important features of electronic evidence can be enlisted as follows:

1. Any data stored, communicated or transmitted to or from computer and similar human made devices constitute e-evidences.
2. These evidences are secondary in character.
3. The production of these evidences is guided by certain general principles.

Indian Evidence Act and Electronic Evidences

Due To The Ever-Evolving Character Of Technology And Proliferation Of Digitalisation In Every Sphere Of Operations, There Was A Need To Amend The Prevailing Law Concerning The Admissibility Of Newer Sets Of Evidences i.e., e-evidences. Likewise, section 92 of the Information and Technology act amended the Indian evidence law. Various provisions of the act were amended to incorporate electronic records and documents as major piece of evidence such as section 3, section 17, and section 39 and so on. However, the most significant provision is enunciated in section 65(B) dealing with the admissibility of such evidences.

The term electronic evidence is not used in the evidence act as such; instead the term computer output has been used. Section 65(B) (1) elucidates the term computer output as any electronic record which is printed on paper, stored, recorded or copied on any magnetic or digital device which shall be deemed to be an electronic document admissible before the court of law.[20] However such electronic documents are only admissible when the conditions specified in the section 65(B) (2) are fulfilled. After the satisfaction of the

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17 Electronic evidence and its challenges, *available at:* http://mja.gov.in/Site/Upload/GR/Title%20NO.129(As%20Per%20Workshop%20List%20title%20no129%20pdf).pdf (last visited on 21 March 2023)

18 *Ibid.*

19 Admissibility Of Electronic Evidence, *available at:* https://districts.ecourts.gov.in/sites/default/files/Webinar%20on%20Admissibility%20of%20Electronic%20Evidence%20By%20Sri%20A%20Venkateshwara%20Rao.pdf(last visited on 21 March 2023)

20 Indian Evidence Act, 1872 (Act 1 of 1872), s.65(B).

conditions enumerated, the document shall be admitted without any further proof or without the production of original document as such.[21] As per the rule laid down in section 65(B) (4), a certificate is to be produced identifying the electronic record, the manner in which it is produced and the particulars of the device used for such electronic record.[22] This certificate is a requisite which is to be satisfied by the parties to a proceeding. It is pertinent to note that this certificate is produced by the person in official position responsible for the management or operations of the device.[23]

Essential requisites of section 65(b)(2): Four important conditions to be satisfied for the production of electronic evidence are enumerated as under[24]:

1. The computer output to be produced must be derived from a computer which is in regular use and it is to be produced by a person having lawful authority over the use of such computer.
2. The information produced must be regularly fed to the computer in the ordinary course of its activities. It implies that the device shall not be such which has been installed for the specific purpose of evidence collection. The computer must have been in regular use.
3. The computer must have been operating properly during the time period for which the evidence is to be produced and even when it was not operating properly the defect shall not be such which can affect the accuracy of the data stored and produced.
4. The information or electronic record produced must be fed to the computer in the ordinary course of its activities.

Only after the satisfaction of the abovementioned conditions, an electronic record can be admitted as a document before the court of law. It is pertinent to note that scope of application of section 65(B) extends to criminal as well as civil proceedings.

Requirement as to certificate in section 65(b) (4): This is one of the most significant provisions which relates to the production of a certificate of acknowledgment along with electronic record produced. After a plain reading of the aforementioned provision, it can be deduced that whenever an electronic record is produced, it must be accompanied with a certificate issued by the

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21 Section 65B of the Indian Evidence Act, 1872: Requirements for admissibility of electronic evidence revisited by the Supreme Court, *available at:* https://corporate.cyrilamarchandblogs.com/2020/07/section-65b-of-the-indian-evidence-act-1872-requirements-for-admissibility-of-electronic-evidence-revisited-by-the-supreme-court/ (last visited on 22 March 2023)

22 Indian Evidence Act, 1872 (Act 1 of 1872), s. 65(B) (4).

23 Indian Evidence Act, 1872 (Act 1 of 1872), s.65(B).

24 Electronic Evidence under Indian Evidence Act, 1872, *available at:* https://www.latestlaws.com/articles/electronic-evidence-under-indian-evidence-act-1872-by-roopali-lamba(last visited on 22 March 2023)

person in official position responsible for the management and operation of the computer device. This certificate must contain 3 essentials:

1. Identify the electronic record containing the information to be produced.
2. Identify the manner in which it is produced.
3. The particulars of the device through which it is produced.

Under suitable circumstances, the question that arises is if this certificate is mandatory in character or is it the discretion of the court to expound on the character of this certificate. No doubt this is the most debated provision relating to the admissibility of electronic evidence; thereby the apex court has endeavoured to clear the dilemma at several instances.

Admissibility And Reliability Of E-Evidences: Judicial Interpretation

Electronic records are susceptible to manipulations, fabrications and distortions. Thereby, it is imperative to keep a close eye on the process of admissibility of these evidences otherwise it may lead to ignorance of justice and the same can be achieved by regulating such evidences with the help of concrete procedures laid down. The electronic evidences are mainly secondary form of evidences however they can be sometimes produced as primary evidences as well. There are seven instances in which secondary evidences can be produced before the court.[25]The procedure has to be such that which can ensure the integrity of computer output, non-manipulation of electronic devices and the security of the system.[26] The Hon'ble Supreme court of India has interpreted the provisions of the section 65(B) at several instances to ensure the transparency and to maintain the accountability of electronic evidences. The apex court has rightly observed in one of its judgements that admissibility of a document is one thing and its corroborative value is another thing and these two dimensions cannot be intertwined.[27]

The earliest traces of question as to the compliance of conditions enlisted in section 65(B) which came forth the court can be observed in the case of ***State (NCT of Delhi) v. Navjot Sandhu***.[28] In this particular judgement, the apex court had opined that it is not mandatory to comply with the conditions as to admissibility of electronic evidences in section 65(B). Furthermore, it was opined that the conditions specified are discretionary in nature and hence it cannot hamper the adducing of electronic record as secondary evidence under the provisions of section 63 or section 65 of the Indian evidence act.

However, this decision in ***Navjot Sandhu's*** case was short lived and subsequently overruled in the landmark judgement of ***Anvar P.V. v. P.K.***

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25 Indian Evidence Act, 1872 (Act 1 of 1872), s. 65.

26 Admissibility Of Electronic Evidence, *available at:* https://districts.ecourts.gov.in/sites/default/files/Webinar%20on%20Admissibility%20of%20Electronic%20Evidence%20By%20Sri%20A%20Venkateshwara%20Rao.pdf (last visited on 21 March 2023)

27 State of Bihar v. Sri Radha Krishna AIR (1983) 2 SCR 808

28 AIR (2005) 11 SCC 600

Basheer.[29] This judgement proved to be a turning point in the admissibility of electronic evidences. The supreme court of India strongly and clearly observed that the provisions of the section 63[30] and section 65[31] do not apply to the electronic records when produced as secondary evidence. The court premised the judgement on the reason that electronic records are specifically governed by the provisions of section 65(B). It is to be adduced that every word used or omitted by the legislature in any law has a cause backing it and the same cause cannot be neglected. Special provision for the admissibility of the digital evidences has been enacted by the legislature with a specific purpose of guiding the admissibility of such advanced evidences. Thereby, while producing the electronic record as secondary evidence, the provisions of the section 65(B) are to be strictly complied with. Yet, while the production of electronic evidence as primary evidence, the conditions specified in section 65(B) need not be complied with.

This decision was followed by another contradicting decision of a three judge bench of the Supreme Court in ***Tomaso Bruno & Anr. v. State of UP***[32] wherein the court opined a contradicting view in contrast to ***Anvar's***.[33] Herein, the decision of the court in ***Navjot Sandhu's***[34] case was reiterated. In this, the court held that secondary evidence of electronic documents may be adduced under the scope of section 65 as the provisions of the section 65(B) are not compulsory in nature.

Subsequently, in the case of ***Vikram Singh and Anr. v. State of Punjab and Anr***[35] it was again recapitulated by the apex court that whenever electronic record is produced as a primary evidence there is no need to comply with the provisions of section 65(B) rather it can simply be adduced under the provisions of section 65 as such. Thereby till the year 2018, trend was clear that provisions of section 65(B) are to be compulsorily complied with when the electronic document is to be produced as a secondary evidence and however the same conditions can be done away with in case of primary evidence of electronic documents.

There was a major switch in the trends after the judgement of the apex court in ***Shafhi Mohammad v. The State of Himachal Pradesh***.[36] In this very case the Supreme Court distinctly observed that the provision as to the production of certificate encompassed in section 65(B) (4) is not always mandatory. This decision led to a controversy as to the character of the conditions given in section 65(B). This decision was clearly in contradiction to the judgement of the court in ***Anvar P.V. v. P.K. Basheer***[37] and it led to a

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29 AIR (2014) 10 SCC 473
30 Indian Evidence Act, 1872 (Act 1 of 1872), s.63.
31 Indian Evidence Act, 1872 (Act 1 of 1872), s.63.
32 AIR (2015) 7 SCC 178
33 AIR (2014) 10 SCC 473
34 AIR (2005) 11 SCC 600
35 AIR (2017) 8 SCC 518
36 AIR (2018) 2 SCC 801
37 AIR (2014) 10 SCC 473

conflict of opinions. The court came up with another decision holding paramount importance wherein it was observed the non- production of certificate in section 65 (B) (4) is a curable defect.[38]At the stage of trial the necessity to produce certificate will arise. The certificate is to be mandatorily presented at the stage of trial and the compliance with the same cannot be done away with.[39]

The dichotomy on the issue was finally decided recently by the Supreme Court of India in the case of ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Ors***.[40] In this very judgement the rule laid down in ***Anvar P.V. v. P.K. Basheer***[41] was reiterated. The court observed that the decisions pronounced in the case of ***State (NCT of Delhi) v. Navjot Sandhu***[42] and ***Tomaso Bruno & Anr. v. State of UP***[43] are faulty observations as they do not satisfy the purpose of the legislation. The decision of the court in ***Anvar's*** case was premised on the ground it is not always possible for the parties to produce computer output in the form of primary evidence, thereby, it is produced in the form of secondary evidence and the same is guided by the provisions of section 65(B). While deciding the present case, the apex court has rightly relied on the decision of Anvar ***P.V. v. P.K. Basheer's*** case. It cannot be disputed that when the electronic document is produced as secondary evidence, it becomes imperative for the parties to proceeding to strictly comply with the provisions stated in section 65(B) or otherwise the evidence to be adduced can be rejected by the concerned court.

The decision of the Supreme Court in the case of ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Ors***[44] has cleared the current status of provisions of the section 65(B). Conclusively, it can be deduced from the above discussion that the satisfaction of requisites in section 65(B) becomes mandatory in case of secondary evidence of electronic records. It is to be appreciated that the apex court has endeavoured to maintain the spirit of the provision by granting it a mandatory character. The provisions of section 65(B) were particularly designed by the legislature to regulate the admissibility of electronic documents before the court of law. Had the requisites been done away with, the fundamental premise of the provision would have been disturbed.

Challenbges with the Electronic Evidences

1) ***Dichotomy of primary and secondary evidence***: It is very troublesome to determine when the electronic document falls within the category of primary evidence or within the scope of secondary evidence. There can

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38 State of Karnataka v. M.R. Hiremath (2019) 7 SCC 515
39 *Ibid.*
40 Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Ors 2020 SCC Online SC 571
41 AIR (2014) 10 SCC 473
42 AIR (2005) 11 SCC 600
43 AIR (2015) 7 SCC 178
44 Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Ors 2020 SCC Online SC 571

be instances where electronic evidence may seem to be both primary and secondary in character. At such instances, it will become difficult to decide as to the compliance of rules laid down in section 65(B).

2) ***Risk of fabrications and manipulations***: The computer devices are one of the most vulnerable to risk of being hacked and the data being destroyed. There may be instances where the intruder can disturb the accuracy of the electronic document leading to falsification of decision of court. Such evidences are to be looked into carefully and with outmost precision so as to not rely on any manipulated or distorted data. Thereby, making the condition of production of certificate under section 65(B) (4) of paramount importance.
3) ***Large amount of data to be analysed***: Almost all organisations use computers and other digital devices. Most of the operation of various entities is undergone on these devices. These devices are the main source of communication, documentation and storage. Thereby, making it difficult for the court to analyse such large amount of data single handed.
4) ***Need for expert opinion***: The authenticity of electronic records cannot be determined by an amateur. The court itself is incapable of examining the electronic evidence. So, it often requires the assistance of certain experts who will guide it on the questions of authenticity of concerned electronic document. These experts are called as the examiners of electronic evidence appointed by the central government in that behalf.[45]This further enhances the processing time and the prolonging of proceedings.
5) ***Police personnel training***: In handling electronic evidences, police personnel training is a must viewing the contemporary age cybercrimes and attacks. The investigating officers need to be well equipped with the infrastructure as well as the knowledge to safeguard electronic evidence at all price. It is mandatory to impart required expertise to police personnel and investigating agencies in this arena. Likewise, the Karnataka High Court has endeavoured to issue detailed guidelines governing the manner of seizure of electronic records at the time of investigation in ***Virender Khanna V. State of Karnataka and others.***[46]

Conclusions

It is an indisputable fact that India has come a long way in terms of technology and allied services. And it is also a known fact that the growth and development of technology is ever evolving. Proliferation of cyber space and the increasing rate of cybercrimes had urged the parliament to enact laws for the regulation of the same. It also cannot be disputed that a prospective need will also arise as to the amendment of the already existing laws governing cyber space. However, the present statutory provisions lack inherently in

[45] Information and Technology Act, 2000 (Act 21 of 2000), s. 79(A)
[46]Virendra Khanna v. State of Karnataka WP 11759/2020

serving the true purpose of their enactment. The provisions are, to some extent unclear and hence, leads to ambiguity when applied to practical problems. As far as the judicial organ of the government is concerned, it is to be strongly deduced from its functioning that there lays long road ahead on the path of admissibility of electronic evidences. The decision of the hon'ble apex court in the case of ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Ors***[47] has to be appreciated on the lines that it has endeavoured to uphold the spirit of the provision envisaged in section 65(B). The apex court while doing purposive interpretation of the provision has further deepened the scope of section 65(B). The provision was specifically incorporated to serve a specific purpose of admissibility of electronic evidence and thereby, it must be allowed to carry out its operations. Electronic evidences are a very sensitive and advanced form of evidences, which cannot be treated at par with other forms of evidences. Though, the legislators have thoughtfully designed the provisions of the Information and Technology Act, 2000 and the Indian Evidence Act, 1872, yet there is scope for further amendments so as to make the law more comprehensible and practically feasible. It cannot be disputed that judiciary is merely an organ of interpretation and the legislature holds the inherent powers to enact laws for the societal needs. Therefore, Parliament of India must make such changes which render the existing law on electronic evidences more wholesome and flawless. The infirmities and the shortcomings in the existing law need to be addressed by the legislature so as to impart better and quicker justice.

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47 Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Ors 2020 SCC Online SC 571

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Emergence of Space Law as a New Frontier in Criminal Justice System: An Analysis

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Abstract

This abstract takes a deep dive into the abyss of space law, its evolution, basic principles and various challenges that it poses to human beings who have moved beyond their home planet. The paper also involves an examination into complex jurisdictional issues, how space weapons are classified and regulated, ethical considerations as well as environmental concerns such as space debris. In addition, it reviews existing legal frameworks including treaties and agreements such as the Outer Space Treaty and the Moon Agreement. Furthermore, the abstract critically discusses issues on exploitation, exploration of space and fair distribution of resources hence necessitating international cooperation. It also looks at the intersection between competition and law in outer space markets using a fascinating case study involving Intelsat versus Alpha Lyracom which brings out how antitrust laws operate within celestial territories. In conclusion, it offers recommendations that call for developing a comprehensive legal structure, institutional mechanisms and educational programs that would help to wisely handle cases of space jurisprudence thus guaranteeing responsible and peaceful and equitable tapping into cosmic resources for the good of the current and future generations.

Keywords: Space Law, Jurisdiction, Space Weapons, Exploration, Environmental Protection, Ethics in Space

Introduction

Space law concerns itself with outer space activities; and these include, among other things, the exploration of space resources, conflict prevention as well as resolution, environmental protection and international cooperation that leads to peace. The sources from which space law is derived include treaties and agreements between nations, national laws enacted by States concerned with space exploration and settlement, customary international law governing

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outer space activities and judicial decisions in cases involving matters relating to outer space.[1] Furthermore, it borrows significantly from some other legal disciplines such as public international law, human rights law, transnational environmental law and penal jurisdiction of states. When the Soviet Union launched Sputnik 1 in 1957 its first artificial satellite[2], this marked the beginning of a race between US AND USSR towards conquering the Space.[3] These legal challenges together with its advancements have forced an action on international community therefore establishing COPUOS in 1959.[4] Here is where you will find major negotiation forums for adopting international space legislation instruments[5] like the present day five core treaty based global aerospace regime:

i. The 1967 Outer Space Treaty, also known as the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, entered into force and has been ratified by a hundred and ten countries by 2021. Space law is basically derived from broad principles and standards enshrined in the Outer Space Treaty such as liberty of exploration and exploitation of space by all nations, no entitlement to seize celestial bodies, due to its being a peaceful nature must be employed for only peaceful purposes, responsibility and liability of states for their activities in outer space; further obligation to cooperate concerning exploration and use of outer space; however, jurisdiction or control over those involved with such acts.

ii. The Rescue Agreement came into being in 1968. As at 2021, it has been ratified by 98 countries. Under this agreement, states must provide assistance in case their astronauts are at risk, share information on the discovery of space objects inside their territories or high seas with the country from which they were launched and return them to their launching state at the request of such a state.

iii. The Liability Convention, which was adopted in 1972 and will be effective from 2021 when it reaches a number of 98 parties. The Liability Convention sets down procedures and norms for resolving claims relating to satellite, rocket and debris accidents on

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1 Frans von der Dunk (ed.), *Handbook of Space Law* (Edward Elgar Publishing Ltd, Cheltenham; Northampton, 2017).

2 "Sputnik launched | October 4, 1957," *HISTORYavailable at*: https://www.history.com/this-day-in-history/sputnik-launched (last visited November 24, 2023).

3 "The Space Race: Timeline, Cold War & Facts," *HISTORY*, 2020*available at*: https://www.history.com/topics/cold-war/space-race (last visited November 24, 2023).

4 "COPUOS History,"*available at*: https://www.unoosa.org/oosa/en/ourwork/copuos/history.html (last visited November 24, 2023).

5 "COPUOS,"*available at*: https://www.unoosa.org/oosa/en/ourwork/copuos/index.html (last visited November 24, 2023).

earth's surface or its atmosphere or against another space object or its personnel while in outer space. It prescribes strict liability of launching state for damage caused by it within the Earth's boundaries or to an aircraft, as well as a fault-based one for any injury that may arise in outer space. In addition, the term 'launching state' according to this convention refers to a state that launches a space object either itself or through its territory.

iv. The Registration Convention was enacted in 1976 and has been ratified by sixty-nine countries by 2021. According to the Registration Convention, a launching state is obliged to notify the United Nations about its space objects and provide details regarding their fundamental characteristics, orbital parameters, and functions. Additionally, it creates an international registry of all space objects called UN Register on Objects launched into Outer Space (UNROOS). Maintenance of the register is done by the same.

v. The Moon Agreement, known as the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, came into effect in 1984 and currently has 18 signatories. It is based on the provisions of international space law. This treaty asserts that resources located within or on a celestial body belong to all peoples of earth equally and hence an international regime should be developed once they become exploitable. Also in this context, military bases are not allowed to be installed nor weapons tested or radioactive materials disposed on earth's natural satellite or any other cosmic object.[6]

The aforementioned key agreements are supplemented by other global instruments that deal with separate facets of space law.[7] Moreover, there are also regional and bilateral frameworks that support and supplement the international space law system.[8] Generally speaking, national legislation is mainly about authorization,surveillance and licensing of space activities;establishment of national aerospace organizations;allocation and utilization of space resources;national security considerations including but not limited to public interests;and fulfillment of international obligations.

The evolution of outer space jurisprudence is a reflection of the transformation in character and scale of space activities which has seen them become more diverse, complex and commercialized over the years. In addition, new actors such as developing countries, non-governmental organizations

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6 "Space Law Treaties and Principles,"*available at*: https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html (last visited November 24, 2023).

7 MA Xinmin, "The Development of Space Law: Framework, Objectives and Orientations."

8 Michael G. Faure and Karine Fiore, "The civil liability of European nuclear operators: which coverage for the new 2004 Protocols? Evidence from France," 8 *International Environmental Agreements: Politics, Law and Economics* 227–48 (2008).

(NGOs), and private entities have augmented the difficulties and openings for space law development and application. Space law's evolution mirrors the broadening of scope and privatization of space activities, as well as appearance of new players. This includes issues like legal fallouts from acts committed in outer space; jurisdiction problems; types or classes given to space weapons; principles governing use of these resources from space; definition for debris in relation to it being a hazard or not while others are concerned with ethical considerations all that require closer attention by legal authorities as regards their regulation. Respect for human dignity & interests & rights, social responsibility & improving public awareness & education on said matters emerge as key aspects capable of addressing these issues. Such recommendations would also include but not limited to state policy makers, international institutions, private organizations like companies or corporations other than governmental ones (also called NGOs), academics who teach subjects pertaining to this field such universities where it is taught at various levels depending upon country, civil society among others mentioned above. This article aims to comprehensively analyze these issues and provide a critical analysis of the same. It also seeks to outline some appropriate remedies that can be adopted as well as suggestions on how space laws for criminal justice can be improved and updated.

Space Crimes and Jurisdiction

State or entity jurisdiction refers to the legal power of a state or an entity to control, judge, and enforce law over a certain geographic location, person or object. Applied law is the collection of laws that governs any specific case or dispute, which can come from different origins like international agreements, internal statutes, customary practices or past rulings of courts. One of the aspects in relation to space law emerging issues includes determination of jurisdiction.[9] and the regulation of personal ciminal acts in outer space,[10] which may cause the administration of justice to face significant challenges,[11] the safeguarding of human rights[12], and the upholding of peace and stability.[13] Space crimes are acts or omissions in the nature of hacking, sabotage, espionage, theft, assault and murder that contravene the relevant law causing harm to persons or property in space. Alternatively stated; space crimes include any acts or omissions which infringe upon the proper law and result in

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9 P. J. Blount, "Jurisdiction in Outer Space: Challenges of Private Individuals in Space" (Rochester, NY, 2007).

10 "Exploring the problems of criminal justice in space - Room: The Space Journal," *Room The Space Journal of Asgardiaavailable at*: https://room.eu.com/article/exploring-the-problems-of-criminal-justice-in-space (last visited Nov. 24, 2023).

11 Danielle Ireland-Piper and Steven Freeland, "Star Laws: Criminal Jurisdiction in Outer Space," 44 *Journal of Space Law* 44–75 (2020).

12 Annette Froehlich and Claudiu Mihai Tăiatu, "Human Rights and Space Law," in A. Froehlich, C. M. Tăiatu (eds.), *Space in Support of Human Rights* 1–47 (Springer International Publishing, Cham, 2020).

13 Steven Freeland and Elise Gruttner, "Outer Space Security," in R. Geiß, N. Melzer (eds.), *The Oxford Handbook of the International Law of Global Security* 0 (Oxford University Press, 2021).

injury to people's lives and/or property all over outer space. These may be committed by astronauts, cosmonauts, taikonauts space tourists, space miners, space pirates, or space terrorists. Space mining is a common occurrence where theft can occur thus this might be considered a crime. Moreover while cyber attack cases are not frequent within the world of space exploration one would rather stay safe than regret what happened.Space crime means any act or omission which violates applicable law and causes harm to persons or property in outer space. Motives behind such acts may vary such as personal reasons such as mental illness; political; economic motives like greed for example: resource exploitation; ideological reasons like terrorism where groups use force against those they perceive as enemies thereby causing death destruction due religious beliefs.In addition some each different actions have different effects on human life because it harms them through destroying their food resources and ecosystems that support it: examples endangering safety health staff on board spacecraft object disrupting work objects placing country under risk.These crimes can be classified depending on their impact like jeopardizing personnel safety within spaceships affecting operations functions of these components threatening security stability activities breaching rights interests nations others involved into this process.[14]

Many legal issues will determine the reception of space crimes. Different factors like the kind and seriousness of the offence, where and under whose control it occurred, identity of the offender and the offended ones and their citizenships, any role played by launching state as well as flag state, availability of witness or evidence; law enforcement and judiciary cooperation within countries involved; enforceable procedures and substantive norms. The contemporary outer space law system has laid down general principles that could be employed to deal with crimes committed in outer space, such as the following:

a) The Outer Space Treaty of 1967[15], which is the main source of the international space law, under which there are several provisions that prevent appropriation of outer space and celestial bodies, require the use of outer space for purposes other than war, within a state's national jurisdiction it provides responsibility and liability of states over their national space activities, territoriality rights of states on their spacecrafts with the crewmembers as well as satellite disease on foreign objects and the cooperation in exchange to further explore more about outer space.[16]

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14 Jonathan Lim, "The Future Of The Outer Space Treaty – Peace And Security In The 21St Century" (2018).

15 Jill Stuart, "The Outer Space Treaty has been remarkably successful – but is it fit for the modern age?" *The Conversation*, 2017 *available at*: http://theconversation.com /the-outer-space-treaty-has-been-remarkably-successful-but-is-it-fit-for-the-modern-age-71381 (last visited November 24, 2023).

16 *United Nations Treaties and Principles on Outer Space*, (United Nations, New York, 2002).

b) The Rescue Agreement of 1968[17], which complements the Outer Space Treaty, obligates the countries to help astronauts in trouble; to notify and converge with launch site country on any space objects found within their territories or on international waters; and upon request, sending them back.[18]

c) The Liability Convention of 1972 serves as a supplementary agreement to the Outer Space Treaty that outlines the mechanisms and protocols for resolving claims arising from damage caused by space vehicles such as satellites, rockets and scrap debris on Earth's surface; or to aircraft in motion, or out of persistence in outer space with another spacecraft or its crew.[19] The Liability Convention imposes on the launching state an absolute liability in case of damage caused to aircraft or to the earth and liability of the launching state based on fault for damage caused in outer space.[20]

d) The Registration Convention of 1976, to supplement the Outer Space Treaty stipulates that any nation launching a satellite is obliged to register it with the UN and give details about its basic features, orbital elements and purpose.[21] The Registration Agreement also creates the United Nations Register of Space Objects managed by the UN Office for Outer Space Affairs (UNOOSA).[22]

e) The Moon Agreement of 1984, uses the principles and rules of the Outer Space Treaty for celestial bodies including the moon. The agreement also provides more details on how to go about exploring, investigating and using other planets within this galaxy. According to the Moon Agreement, moon resources along with the moon itself are a common heritage of mankind. Further, it proposes that an international arrangement be set up to govern when such resources can be exploited on lunar surface (if possible

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17 "RES 2345 (XXII),."

18 "Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched Into Outer Space," *Institute of Air & Space Lawavailable at*: https://www.mcgill.ca/iasl/research/space-law/rescue-agreement (last visited November 24, 2023).

19 Prasidha Marakani, "An Analysis to Determine Fault under the Liability Convention 1972," 9 *International Journal Of Legal Developments And Allied Issues* 82–9 (2023).

20 Agnessa O. Inshakova, Ruslan A. Konygin and Alexandr I. Travnikov, "Reshaping the Institution of Liability in International Space Law," in E. G. Popkova (ed.), *Sustainable Development Risks and Risk Management: A Systemic View from the Positions of Economics and Law* 141–4 (Springer International Publishing, Cham, 2023).

21 Frans von der Dunk, "The Registration Convention: Background and Historical Context" *Space, Cyber, and Telecommunications Law Program Faculty Publications* (2003).

22 "RES 3235 (XXIX),."

in future).[23] The Agreement also prohibits creating military bases, testing weapons and dumping radioactive waste on lunar surface. It also extends to other celestial bodies.[24]

f) The International Space Station (ISS) Intergovernmental Agreement of 1998, which is a multilateral pact that governs the operation and utilization of the ISS by the participating countries, which is an intricate as well as unique space entity made up of numerous modules as well as elements provided by multiple states.[25] The The ISS Intergovernmental Agreement covers ownership, registration, jurisdiction and control of ISS, its elements; rights and obligations of crew members and users; compensation for damage caused to third parties, intellectual property protection, dispute resolution mechanisms.[26]

However, space law cannot ignore various problems related to crime committed in outer space which include issues like defining such crimes and putting them into categories, dealing with jurisdiction as well as applicable law regarding them investigation procedures followed while prosecuting the offenders. These principles ought to be within a framework that includes punishment measures for rehabilitation after punishment has been meted out. The above issues must be reconciled in respect to equity, defense, assistance of humans as worthy beings and ability to reintegrate one into a wider society on space which has special peculiarities.

Warfare in Space And Weaponry

One of the most complicated issues in space law is the control of space weapons. This could potentially endanger world peace and security.[27] Any devices or systems, which can cause any harm to space objects or their signals, are considered as space weapons. These include any in-service or under development technologies that may be used for purposes of damaging, destroying, interfering with the functioning of these objects or otherwise affecting them. Any hostile or aggressive action involving the use or threat of use of space arms from outer space to space objects is called space warfare.[28] As a result, some general principles and rules can be found in the existing legal

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23 Ram S. Jakhu, "Twenty Years of the Moon Agreement: Space Law Challenges for Returning to the Moon" (Rochester, NY, 2005).

24 Eleni-Anna Mavroeidi, "The Effectiveness and Applicability of the Moon Agreement in the Twenty-First Century: Will There Be a Future?," in G. D. Kyriakopoulos, M. Manoli (eds.), *The Space Treaties at Crossroads* 35–48 (Springer International Publishing, Cham, 2019).

25 Alexandros Eleftherios Farsaris, "The International Space Station (ISS) Inter-governmental Agreement as a Precedent for Regulating the First Human Settlements on Mars," in A. Froehlich (ed.), *Assessing a Mars Agreement Including Human Settlements* 63–74 (Springer International Publishing, Cham, 2021).

26 "Peaceful Purposes in International Space Law,."

27 Sa'id Mosteshar, "Space Law and Weapons in Space" *Oxford Research Encyclopedia of Planetary Science*, 2019.

28 Bill Boothby, "Space Weapons and the Law," 93 (2017).

order surrounding space that might also apply to these weapons. These include:

i. The 1967 Outer Space Treaty forbids placing nukes or other means of mass destruction into orbit. It prohibits the same around earth or any other celestial body, on the moon, or in outer space. It only promotes peace. It bars setting up military bases, installations or fortifications. It also prohibits testing of weapons and carrying out of military exercises on such bodies.[29]

ii. The Multi-lateral Partial Test Ban Treaty of 1963 restricts nuclear explosions above ground, under water or in outer space. The only exception is the underground ones. It was enacted to avoid the radioactive fallout. It further strives towards nuclear disarmament.[30]

iii. The ABM Treaty is a 1972 bilateral agreement between the USA and USSR which greatly put limits on the development and deployment of anti-ballistic missile (ABM) systems aimed at shooting down or exploding ballistic missiles/their warheads while in flight.[31] Based on a principle of mutual deterrence and strategic stability, the ABM Treaty was designed to avoid a race in nuclear arms and potential nuclear war. In 2002, US terminated the ABM Treaty to create room for missile defense against rogue states.[32]

iv. Environmental Modification Convention is yet another multilateral treaty formulated in 1977 to outlaw military uses of environmental modification techniques having widespread, long-lasting or severe effects such as weather modification, climate manipulation, ocean current changes, and seismic activity inducement.[33] It also provides for consultation among its parties on peaceful use of such technologies; sharing data and information on their research and development activities.[34]

v. The Moon Agreement of 1984 also forbids setting up bases, carrying out weapon tests, and dumping radioactive materials on

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29 "Outer Space Treaty of 1967,"*available at*: https://history.nasa.gov/1967treaty.html (last visited November 24, 2023).

30 "Test Ban Treaty (1963)," *National Archives*, 2021*available at*: https://www.archives.gov/milestone-documents/test-ban-treaty (last visited November 24, 2023).

31 "Antiballistic missile (ABM) | Missile Defense, Nuclear Deterrence & Arms Control | Britannica,"*available at*: https://www.britannica.com/event/Anti-Ballistic-Missile-Treaty (last visited November 24, 2023).

32 "Anti-Ballistic Missile Treaty," *Wikipedia*, 2023.

33 "Environmental Modification Convention," *Wikipedia*, 2023.

34 "Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) – UNODA,"*available at*: https://disarmament.unoda.org/enmod/ (last visited November 24, 2023).

the moon and other celestial bodies[35] as discussed in the previous section.

So, the existing space law may be insufficient to solve problems related to space weapons and warfare like classification of space-based weapons, prevention of military activities in outerspace and enforcement of international humanitarian and security law in outer space. Furthermore, there is a possibility that it will not guarantee accountability in respect to any acts committed during such kind of wars or the liability for damage arising from them.

Exploitation of Space

Space exploration is the study of celestial bodies and outer space. It involves the use different techniques that include satellites, probes, rovers, landers, orbiters or manned missions.[36] Space exploitation refers to employing space resources like minerals, water energy or data for various objectives such scientific, commercial[37], industrial or social[38]. This present space law regime has certain general principles and regulations that may apply regarding the exploration and exploitation of outer space as outlined below:

i. The Outer Space Treaty of 1967 in section 1 states that all countries no matter what their level of economic or scientific development is shall follow a policy of exploration and use of outer space for the benefit and in the interest of all mankind.[39] This treaty is also encouraging international cooperation and consultation in the conduct of states' space activities, and requires publicizing information on it to members of the scientific community across the globe.[40]

ii. The Moon Agreement of 1984 obligated states to take steps to ensure that no interference occurs with the equilibrium of the environment of celestial bodies such as the moon and also safeguard their scientific and cultural worth.[41]

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35 "Moon Treaty," *Wikipedia*, 2023.

36 "Space exploration | History, Definition, & Facts | Britannica," 2023*available at*: https://www.britannica.com/science/space-exploration (last visited November 24, 2023).

37 "As private satellites increase in number, what are the risks of the commercialization of space?," *World Economic Forum*, 2022*available at*: https://www.weforum.org/agenda/2022/01/what-are-risks-commercial-exploitation-space/ (last visited November 24, 2023).

38 Mahulena Hofmann and Federico Bergamasco, "Space resources activities from the perspective of sustainability: legal aspects," 3 *Global Sustainability* e4 (2020).

39 *United Nations Treaties and Principles on Outer Space*, (United Nations, New York, 2002).

40 Tanjirul Islam, "Outer space treaty of 1967: Having loopholes?"

41 Eleni-Anna Mavroeidi, "The Effectiveness and Applicability of the Moon Agreement in the Twenty-First Century: Will There Be a Future?," in G. D. Kyriakopoulos, M. Manoli (eds.), *The Space Treaties at Crossroads* 35–48 (Springer International Publishing, Cham, 2019).

iii. The 1986 Principles on Remote Sensing of the Earth from Outer Space, which is a non-binding framework for regulating remote sensing operations as well as their application, refers to sensing of earth's surface and atmosphere from space for any purpose,[42] which includes enhancing environmental protection, improving land use and management of natural resources.[43] The Principles uphold all states' entitlement to remote sensing data and, those which carry out the sensor's activities must respect other states sovereignty and interest, particularly the state sensed. The Principles also foster internationalism in such studying processes and encourage exchange of information between countries or scientists.[44]

iv. In 1992, the UN General Assembly adopted additional regulations named The Principles Relevant to the Use of Nuclear Power Sources in Outer Space, which are some other guidelines not legally binding that are meant to govern the safety and environmental aspects relating to the use of nuclear power sources, for example reactors or radioisotope generators during outer space activity whenever accidents occur or there is a breakdown.[45] States using nuclear power sources in outer space must carry out a comprehensive safety assessment and do everything possible to avoid or reduce the chances of causing any harm to the earth, its surroundings or its people.[46] For the purpose of a given document, states must also notify other states and the United Nations Secretary General about their intentions and outcomes with regard to employing atomic energy in space so that they can team up or give emergency aid in situations of imminent calamity.[47]

v. The Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries of 1996, is a non-binding resolution adopted by the UN General Assembly which is intended to confirm and advance international cooperation as well as solidarity principles and objectives when it concerns outer space activities especially for the

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42 "Remote Sensing,"*available at*: https://www.unoosa.org/oosa/en/ourwork/topics/remote-sensing.html (last visited November 24, 2023).

43 "Remote Sensing Principles,"*available at*: https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/remote-sensing-principles.html (last visited November 24, 2023).

44 Joanne Irene Gabrynowicz, "Law of Remote Sensing," in E. G. Njoku (ed.), *Encyclopedia of Remote Sensing* 332–4 (Springer, New York, NY, 2014).

45 "NPS Principles,"*available at*: https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/nps-principles.html (last visited November 24, 2023).

46 "Principles on Nuclear Power Sources in Space,."

47 UN Committee on the Peaceful Uses of Outer Space Legal Subcommittee (31st sess : 1992 : Geneva) Chair, "Principles relevant to the use of nuclear power sources in outer space :: Chairman's text." (1992).

interest and advantage of those countries which are still developing.[48] The Declaration acknowledges the growing importance of space science and technology to the economic, social and cultural development of all nations, as well as the need to increase developing countries' access and involvement in these activities. The Declaration also urges states and international organizations to broaden their cooperation and support in education, training, research, development and application of space science and technology; as well as assisting in information and data sharing between all states and scientists.[49]

Therefore, the classification of space resources, their fair allocation and the conservation of cultural and scientific values associated with heavenly bodies are important. It is also important to ensure that all countries including underdeveloped ones participate in space study. These aspects must be given attention to avoid conflicts, protect interests and encourage cooperation.

Space Debris and Crime against Environment

Space law is highly concerned with issues concerning space debris and environment, which are among the most crucial that may pose immense risks to outer space or earth security as well as sustainability. This term 'space debris' means all human-made non-functional objects. It includes their fragments in Earth's orbit or reentering the atmosphere.[50] Environmental crime encompasses activities that are against regulations and laws that damage or pose risks to the environment such as pollution, waste disposal, smuggling of wildlife and logging.[51] Space debris and environmental crime may be governed by the general principles and rules in the extant space law regime, such as the following:

a) Concerning the space activities of one state, other states are to be taken into account in terms of the treaty on outer space of 1967, and they should prevent pollution of outer space or celestial bodies and any alteration that impacts adversely on the earth's environment due to foreign materials from other planets.[52]
b) The 1972 Liability Convention extends the possibility of joint and several liability between two or more launching states as well as recourse claims among them and advisees discussions or

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48 "Space Benefits Declaration,"*available at*: https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/space-benefits-declaration.html (last visited November 24, 2023).

49 "A/RES 51/122,."

50 Rada Popova and Volker Schaus, "The Legal Framework for Space Debris Remediation as a Tool for Sustainability in Outer Space," 5 *Aerospace* 55 (2018).

51 Matt R. Nobles, "Environmental Crime and Contemporary Criminology: Making a Difference," 44 *American Journal of Criminal Justice* 656–69 (2019).

52 *United Nations Treaties and Principles on Outer Space*, (United Nations, New York, 2002).

negotiations for a quick and fair settlement of compensation claims.[53]

c) The Registration Convention of 1976 mandates the launching authority to notify the UN Secretary General about any adjustments in position or purpose of their space objects, for example when they are non-operational, de-orbited or re-entered into the atmosphere.[54]

d) The Environmental Modification Convention of 1977[55] stipulated that States Parties must take measures to prohibit the interference in natural balance of earth's environment and secure the scientific and cultural worth of the earth's environment.[56]

e) The Space Debris Mitigation Guidelines of 2007, were endorsed by the United States Committee on the Peaceful Uses of Outer Space (COPUOS)[57] which are not compulsory and give direction on how to develop, plan, put into practice or decommission space objects aimed at minimizing the production and accumulation of debris in space thus ensuring that this environment remains intact for future generations to come.[58] It further advises states and international organizations to examine, adopt and assess their national or regional policies and regulation on mitigation of space debris while cooperating with one another to share information about their activities in mitigating it.[59]

Nonetheless, complete legal definitions, proactive preventive measures, robust detection systems and effective reparation strategies should be employed to address space debris and environmental crime. These challenges are compounded by the intricacies of international law, technological constraints, as well as varied global actors interests. It is therefore critical that these issues have to undergo rigorous academic scrutiny that is legally and practically grounded.

Ethics in Space

Ethics in space is a field of applied ethics that includes the moral and social questions related to human activities in external space as exploration, exploitation, colonization, militarization, and preservation. Ethics in space focuses on the values, beliefs, and standards that should determine how individual states or organizations or people should behave toward outer space

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53 "RES 2777 (XXVI),."

54 "RES 3235 (XXIX),."

55 "Environmental Modification Convention," *Wikipedia*, 2023.

56 Pekka Haavisto, "Environmental Post-Conflict Assessments: A New UN Tool Developed by UNEP," in H. G. Brauch, P. H. Liotta, *et al.* (eds.), *Security and Environment in the Mediterranean: Conceptualising Security and Environmental Conflicts* 535–62 (Springer, Berlin, Heidelberg, 2003).

57 "A/AC.105/C.1/L.260,."

58 Nicholas L Johnson, "Space Debris Mitigation Guidelines."

59 Diego Zannoni, "Out of sight, out of mind?The proliferation of space debris and international law," 35 *Leiden Journal of International Law* 295–314 (2022).

creatures as well as the implication of such behaviors for the Earth and its population.[60] Ethics in space is one of the emergent and relatively new branches of study, whose significance has been steadily increasing and gaining relevance with the growth and widening reach of space activities.[61] Justification and motivation of space activities are important especially in respect to the common good, human dignity, rights and interests of all stakeholders. This includes present and potential life forms on other planets. Exploration and use of outer space should be driven by ethical reasons and goals with a delicate balance between the benefits and risks for the humankind as well as the earth. The intrinsic value is respected while taking into account that life can manifest itself in different ways in outer space.[62]

Space actors have very big duties and responsibilities, especially in relation to the legal system, international relations, and public and transparent space events. It is important that countries, organizations and individuals be able to conduct business in space ethically with no ambiguity regarding what should or must be done. There should be a commitment to established and new rules of space law as well as dialogue between all actors involved in the sector. The participation of the public as well as civil society in space activities should also be promoted.[63]

The importance of sustaining and taking care of outer space cannot be overemphasized, particularly in terms of the environmental conservation, resource control, and cultural upkeep about outer space and celestial bodies. Standards that offer a moral basis for avoidance or reduction of harmful consequences resulting from space operations on the external space environment should be established. It is important to look into equal sharing and usefully managing resources from outer universe besides protecting its scientific and traditional property.[64] It's prudent that the innovation and advancement of space technologies, concerning safety and security, social and economic impact, as well as ethical and legal implications of new and emerging space technologies be guided by ethical standards and criteria. This calls for anticipation and addressing of the social-economic impact from space technologies on vulnerable or marginalized groups.[65] We must identify and

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60 James S.J. Schwartz and Tony Milligan (eds.), *The Ethics of Space Exploration* (Springer International Publishing, Cham, 2016).

61 Daniel Munro, "If Humanity Is to Succeed in Space, Our Ethics Must Evolve" *Centre for International Governance Innovationavailable at*: https://www.cigionline.org/articles/if-humanity-is-to-succeed-in-space-our-ethics-must-evolve/ (last visited November 24, 2023).

62 Adam Greenstone, "Government Ethics and Sustainable Space Exploration," 42 *Northern Illinois University Law Review* 313–29 (2022).

63 Larry F. Martinez, "Legal regime sustainability in outer space: theory and practice," 2 *Global Sustainability* e26 (2019).

64 Johannes Wallacher, Stefan Einsiedel and Andreas Gösele, "Sustainable development: in space as on Earth?," 2 *Global Sustainability* e15 (2019).

65 " Technology Innovations for Space Exploration,."

solve ethical and legal dilemmas and conflicts that may occur as a result of applying using space technologies such as privacy, liability, or property.[66]

Case Study: The Intelsat Antitrust Litigation

Alpha Lyracom Space Communications, a privately-owned satellite operator sued Intelsat in the United States courts. It was a series of antitrust lawsuits filed by Alpha Lyracom Space Communications, a private satellite operator, against Intelsat, an intergovernmental organization that provides satellite communication services, in the United States courts during the early 1990s. The main issue was whether Intelsat had abused its dominant position in the global satellite market by engaging in anti-competitive practices such as price discrimination, cross-subsidization and exclusionary contracts among others against Alpha Lyracom and other private competitors.[67] This case study shows how difficult it is to control market access and competition for space actors, particularly in cases of inequality, exclusion, or discrimination. It also indicates the challenges faced when attempting to apply and enforce antitrust norms and rules in outer space, especially those pertaining to ambiguity, uncertainty or dual-use. This case study is also an insight into why there should be international coordination and cooperation among countries; it will help promote dialogue and collaboration between different space stakeholders such as industry players and governments.[68]

The case study can be summarized as follows:

i. PanAmSat, a satellite system by the private firm Alpha Lyracom, offered transoceanic video and data transmission services to clients in North and South America, Europe and Asia. It insisted to be the only independent competitor of Intelsat, a global satellite system run by an intergovernmental organization for its members. The company asserted that Intelsat was monopolizing or occupying a dominant position in the world satellite market and had misused its monopoly power by engaging in various forms of anti-competitive practices that were detrimental to Alpha Lyracom including: varying charges between customers dependent on their geographical area or links with Intelsat; using government revenue to fund commercial operations; exclusive agreements with clients which prevented them from opting for other providers.

ii. Alpha Lyracom sued Intelsat in US courts, several times, for violations of the Sherman Act, Clayton Act and Foreign Sovereign Immunities Act which are key federal laws on antitrust in the

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66 Kai-Leung Yung et al., "A Systematic Review of Product Design for Space Instrument Innovation, Reliability, and Manufacturing," 9 *Machines* 244 (2021).

67" Alpha Lyracom Space Com. v. Comm. Satellite, 946 F.2d 168 | Casetext Search + Citator,"*available at*: https://casetext.com/case/alpha-lyracom-space-com-v-comm-satellite (last visited November 26, 2023).

68" Alpha Lyracom Space Communications v. Comsat Corp., 968 F. Supp. 876 (S.D.N.Y. 1996)," *JustiaLawavailable at*: https://law.justia.com/cases/federal/district-courts/FSupp/968/876/1947246/ (last visited November 26, 2023).

United States. Alpha Lyracom prayed for injunctive relief, declaratory relief, and damages against Intelsat. It also requested the court to enjoin Intelsat from its anti-competitive behaviour and open up its satellite system to private competitors.

iii. Intelsat sought to defend itself by arguing that it was not under the jurisdiction of the United States court system, because it was an intergovernmental organization which had immunity against any state laws, unless it waived such immunity explicitly. Intelsat also argued that it could not be bound by antitrust laws in the United States since its activities were not commercial or trade-oriented within the country. Instead, they involved providing public utilities to member countries and other clients as dictated by its international obligations and commitments. Further, Intelsat argued out that all what is meant when accused of being anti competitive practices are just lawful and reasonable exercises of its rights and obligations as an intergovernmental organization stipulated under its founding treaty and regulations.

iv. The case experienced a lot of inconsistency in rulings by American courts on different aspects such as jurisdiction, immunity, applicability of antitrust laws and the merits of charges. The case went through many levels of appeal and review before being settled out of court in 1993 after Intelsat agreed to pay Alpha Lyracom $10 million and modify some procedures to enable other businesses to compete with it in satellite-related activities.[69]

The case study presents several regulatory challenges in space activities:

a) Defining and classifying the activities of space actors like Intelsat and Alpha Lyracom, particularly in ambiguous or dual-use scenarios.

b) Ensuring fair market access for all space actors, including developing countries and private competitors, and protecting them from potential abuses by dominant providers like Intelsat.

c) Applying and enforcing antitrust and competition laws in outer space, especially in complex or uncertain situations.

d) Promoting dialogue among all space actors and stakeholders, enhancing public and civil society involvement in space activities governance, particularly concerning antitrust and competition issues. This includes encouraging international cooperation among states and intergovernmental organizations involved in space activities.

Conclusion and Recommendations

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69 United States Court of Appeals and Second Circuit, "113 F3d 372 Alpha Lyracom Space Communications IncLp v. Comsat Corporation," F3d 372 (1997).

This research paper examines space law as a new frontier in criminal justice system. It also highlights some challenges that emanate from increasing and diversifying human activities in outer space. Additionally, it has explored some existing as well as emerging legal frameworks and mechanisms for regulating and governing such activities, with proposals for how they could be improved. Some of the possible solutions towards enhancing space law as a new frontier in criminal justice include:

i. To establish a legal framework that regulates market entry and competitiveness of space participants, in particular as regards antitrust matters. It could bring about new arrangements or norms that articulate what constitutes the field of space, guarantee equitable admission to all space actors, apply rules against monopolies and engender dialogue among interested parties.

ii. Creating the policy framework for governing space activities, with a particular focus on antitrust matters. This could entail establishing new or leveraging existing institutions that can control and arbitrate anti-competitive practices in outer space like COPUOS, ITU, WTO, or ICJ.

iii. A more stringent research and analysis of space activities, especially on matters related to antitrust. This can encompass research or reports that shed light on the character, governing mechanisms and effects of space activities.

iv. Space activities can be made more understandable to the society and public generally through education so that they can comprehend the antitrust issues concerning them. This may involve holding meetings or running programs that enlighten people about how space activities are regulated.

In conclusion, this research's objective is to offer a glimpse of space law and criminal justice in relation to human activities in outer space. Additionally, it is expected that this article has ignited the reader's curiosity on this mind boggling topic and stimulated further inquiry and study. Criminal justice believes that there are great opportunities for improving and progressing the legal system and humanity as a whole in space law, which is seen as anew frontier. In addition to being a common heritage, space law is also considered a shared responsibility of all mankind, meaning that it requires cooperation from all states or other actors with public participation to ensure its peaceful use by future generations.

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Crimes against Women in Cyberspace: Navigating Legal Challenges in the Digital Age

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Abstract

In the digital age, cyberspace offers unmatched opportunities for connectivity and empowerment. However, alongside its promise lies a disconcerting reality – an alarming surge in cyber crimes targeting women. This paper sheds light on this distressing trend, meticulously exploring its implications and challenges in the digital sphere. The paper delves into this surge, particularly its prevalence in India, where women fall victim to cyber crimes every second. These crimes include cyberstalking, non-consensual distribution of intimate content, cyber pornography, defamation, morphing, online bullying, infringing upon women's privacy and security, etc. The consequences of these cybercrimes go beyond the digital sphere, manifesting in substantial mental distress for the victims. This study underscores the immediate need for an all-encompassing strategy that includes legal amendments, policy revisions, and technological innovations to effectively combat cyber crimes against women.

Keywords: Cyberspace, digital age, cyber-crimes, technology, privacy

Introduction

Technological progress in communication has fostered a sense of interconnectedness among individuals separated by geographical distance. Notably, the internet stands as a paramount innovation in the field of communication, transforming the world into a closely-knit global community effectively. The advent of the internet has given rise to a limitless virtual domain, offering numerous opportunities for enhancing interpersonal and professional connections across international borders[1]. In the digital age, cyberspace has become an integral part of our lives, providing unprecedented opportunities for education, economic growth, and connectivity. The internet is used by millions of devices and everyone enjoys using the internet. India's

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1 Saha, Tanaya, et.al., "Indian women at risk in the cyber space: A conceptual model of reasons of victimization." 8 *International Journal of Cyber Criminology* 1 (2014).

digital population has been growing rapidly crossing over 600 million active users on the internet. The average time spent by an Indian national on social media websites is two and a half hours a day.[2] Since people are so much exposed to the internet and in turn to the virtual world there are high chances of it being misused and used against each other and thereby giving rise to a crime known as cyber crime. And one cannot blame the internet for such happenings. However,it gives potential hackers a chance and space to use technologies to promote their illegal goals.[3]And these crimes in today's times have become increasingly prevalent.[4] However, it is noteworthy that there is currently no well-defined legal statute or comprehensive definition that precisely encapsulates the full scope of these offenses. The Council of Europe Convention on Cybercrime defines cybercrime as "any criminal activity committed using a computer system or network, against a computer system or network, or against data stored therein.".Since cybercrime lacks a singular, universally accepted definition, it is more informative to conceptualize it as a collection of behaviors stemming from actual criminal activities that affect computer systems or data.[5] The unique characteristic of cybercrime is that it can occur without direct contact between the victim and the perpetrator. Women usually are the vulnerable victims of such crimes Cybercrimes against women include a variety of malicious actions intended to take advantage of their weaknesses, both online and offline. Certain individuals utilize technology as a means to smear the reputation of women. Their tactics include sending lewd emails, sharing offensive messages via platforms like WhatsApp, cyberstalking women in online spaces and chat rooms, and, most egregiously, generating pornographic videos without the consent of the individuals involved. Furthermore, these wrongdoers resort to using deceptive emails and online software to manipulate images for explicit content. The most common and frequently reported crimes committed against women in cyberspace are cyberstalking, email spoofing, impersonation, online trolling, and morphing.[6] Cyber harassment, which uses technology to stalk, threaten, or intimidate women, is one of these crimes. Violence against women in cyberspace can take many forms like revenge porn, threats of rape, and can go up to the extent of murder and sexual assault. The other forms of crime that can happen against women in cyberspace are extortion-related intimidation by the threat of releasing private images of the victims, sexual assault via the perpetrator's

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2 Statistica, “Social Media Usage in India – Stastica and facts”,(Last assessed on 25th Jan 2024).

3 S. Rajat Balabantaray,M. Mishra, et.al., “A Sociological Study of Cybercrimes Against Women In India :Deciphering the Causes and Evaluating the Impact on the victims” 19 *IJAPS* 27 (2023).

4 Saini, H., Rao, et al.,2 Cyber-crimes and their impacts: A review. *International Journal of Engineering Research and Applications*, *2*202-209 (2012).

5 Sarmah, Animesh, et.al., "A brief study on cyber crime and cyber laws of India." 4 *International Research Journal of Engineering and Technology (IRJET)* 1633-1640 (2017).

6 Supra 5

comments in cyberspace, and influencing the victim's sexuality.[7] Certain women are more vulnerable than others, including public figures, politicians, journalists, bloggers, video game players, and women's rights advocates[8]. Another common type is online stalking, in which the attackers infringe on the victim's privacy and personal boundaries. Additional ways through which women's privacy and dignity are abused include revenge porn, the nonconsensual sharing of intimate photographs, morphing (which means changing or altering the pictures of the women with the help of morphing tools) these obscene images are being displayed, and thereby defaming women and violating their privacy. Usually, those young girls and women fall prey to this type of crime who post their pictures on various social media websites. Furthermore, the creation of fake profiles on platforms such as Facebook and the practice of doxing exacerbate the violation by enabling the unauthorized disclosure of personal information, including names, addresses, employment details, contact numbers and financial information.

Another worrying problem that can result in monetary loss and emotional pain is financial fraud that targets women. A very recent case of online harassment against women was the case of Bulli Bai app case. It is a distressing incident of online harassment. A fictitious auction of Muslim women was held on the Bulli Bai app, an internet platform. Without their consent, this app posted pictures of well-known Muslim journalists and activists. The photos were then practically auctioned out, seriously violating their privacy and causing harassment. The Indian authorities in response to this case swiftly apprehended several individuals, including the alleged creator of the app, a 21-year-old engineering student named Neeraj Bishnoi, who was arrested in Assam. This case sparked a great deal of public outrage and highlighted the urgent concern of online harassment, particularly targeting weaker groups such as Muslim women.[9]

Justice Ravindra Bhat a Supreme Court judge at a book launch stated that the cyber crimes against women tend to effect women the most as it lead to a decrease of self-worth in them. This is not the first time something like this has happened. In May 2021 a YouTube channel called "Liberal Doge" mock-auctioned Muslim women from Pakistan and India to its 87,000 subscribers. Subsequently, in July 2021, an application named "Sulli Deals," which was also available on GitHub, created profiles of over eighty Muslim women by using photographs from their social media accounts and labeling them as "deals of the day."[10] The major aim of citing these incidences is to brought it to the notice of people at large that these crimes are rising like fire and strict actions needs to

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7 A.D Prameswari, “Online abuse against women in the cyber space as an important issue to discuss” ,Asean Symposium of criminology: conference proceeding (27)2017 .

8 Cyber Violence against Women, Cyber Violence. Council of Europe.

9 “Bulli Bai app: Fourth man held over auction of Muslim women”, *BBC News*, Jan.06 ,2022.

10 The Leaflet,”Bulli Bai and cyber violence: a symptom of power imbalance”,Gauri Anand and Hinduja verma

be done. In bulli bai app case the the accused were released on bail and what it depicts is normalising the cyber violence against women which is an issue of concern.

Literature Review

- Cyber crimes against women in India, By Debarati Halder and K. Jaishankar[11]: This paper focussed on the issue of cyber crimes against women in India. In this paper, it was highlighted that sufficient research needs to be done in this particular field. The legal framework in India related to cyber crimes against women and the gaps in the current system were also discussed. Overall it tries to explain the challenges faced by women in the digital world and contributed by way of giving valuable suggestions to address the issue.
- An empirical study on the cyber crimes Against women and children in India, by Navitha P and Dr. M. Jagadeeshwaran[12]: The paper targets to understand the prevalence of crimes against women and children in cyber space after analysing the five years data from the official website of National Crime Records Bureau. It also draws attention to the rising prevalence of cyber pornography, hosting sexual content, and morphing against women in India .
- Strategies to Prevent and Control of Cybercrime against Women and Girls, By S. Poulpunitha, K.Manimekalai, P.Veeramani[13]**:** The purpose of this study was to explore the challenges and concerns related to cybercrime targeting women and girls in order to present preventative measures and ways to respond with the help of unified forces.
- Mapping Cyber Crimes Against Women in India by Dr. Shalini Kashmiria[14]; In this paper along with the discussion of the victimisation of women by using the internet a comparative analysis of the cyber laws in India, USA, and UK is discussed as well.
- Cybercrimes: Another Dimension of Women Victimisation, By Paridhi Saxena & Anisha Malke[15]: The research paper discusses various cyber crimes, including cyber pornography, cyberstalking, and cyberbullying against women. This paper also discusses various gaps in the IT Act of 2000 and makes some recommendations concerning these crimes.
- Cyber Crime and Cyber Laws in India by Vinayak Pujari, R B Patil, et al.[16]; This paper discussed cybercrime and the laws related to cyber-crime and mainly emphasized on the information one must have to be vigilant about the commission of cyber-crimes.

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11 Asain Journal of Women Studies,24 Routledge Taylor Francis Group 2018.

12 International Journal of Advanced Research in Science, Communication and Technology(IJARSCT)3 (2023).

13 International Journal of Innovative Technology and Exploring Engineering (IJITEE), 9 (2020).

14 International Research Journal of Commerce and Law 1, (2014).

15 International Journal of Research and Analysis 5, (2018).

16 International Journal of Advance and Innovative Research 7, (2020).

Methodology

The paper adopts a qualitative research methodology for evaluating and analyzing crimes against women in cyberspace. In this secondary data from various official websites was analysed. To fully understand the complex nature of cyber crimes against women qualitative research approach is preferred.

Research Objectives

1. To determine the extent and prevalence of various forms of cyber crimes against women in different online spaces.
2. To add to the academic knowledge based on this topic and raise public awareness about the prevalence and impact of cyber crimes against women.
3. To review existing initiatives, educational programs, and awareness campaigns aimed at preventing cyber crimes against women.

Legal Framework and Challenges

The extensive utilization of technology has bestowed unforeseen prospects for economic expansion, communication, and education. India is the world's third most susceptible country to Internet crimes as per the Federal Investigative Offices (FIO)US Internet Crime Complaint Centre (IC3) Internet Crime Report 2019. [17]Nonetheless, this progression in India has engendered an escalation in cyber crimes specifically aimed at women. Consequently, to effectively address these emergent concerns, the establishment of a rigorous legislative framework has become imperative. Cybercrime against women is a growing issue in India, with more and more women becoming victims of online harassment, stalking, publishing of illicit content, cyber defamation, and cyber abuse. The various laws contain in one way or another certain provisions that not completely but try to address this problem, including the Indian Penal Code (IPC), the Information Technology Act of 2000 (IT Act), the Protection of Children from Sexual Offences Act of 2012 (POCSO Act) and Indecent Representation of Women (Prohibition)Act, 1986.

The IPC includes provisions for offenses like voyeurism, sexual harassment, and criminal intimidation etc. Section 354 of the IPC make the offences of voyeurism, stalking and sexual harassment punishable. Mostly sexual harassment, stalking, and voyeurism that involve the use of a computer are registered under IPC. The Indian Evidence Act 1872 provides the standards for evidence which is electronic evidence in the form of section 65A and section 65B of this particular Act. So far as cyber crimes are concerned electronic evidence is very important and in order to make this evidence more compatible and reliable the Indian Evidence Act needs to be more updated and stronger to deal with this issue.[18]

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17 N.Salim Khudhair, "Competence in Cybercrime : A Review of Existing Laws" 4 Geintec (2021).

18 "Introspecting the Gaps between Cyber Crimes against Women and Laws: A Study of West Bengal", National Dialogue on Gender–based Cyber Violence, 2018.

Similarly, the IT Act specifically targets only certain cybercrimes and covers offenses such as publishing or transmitting obscene material, identity theft, and hacking. Some of the various provisions that deal with cyber crimes are as follows:

- Section 66C provides punishment for identity theft.[19]
- Section 66D of the IT Act penalises cheating by personation by using computer resource.
- Section 66 E provides punishment for violation of privacy.
- Section 67 provides punishment for publishing or transmitting obscene material in electronic form.[20]
- Section 67A deals with punishment for publishing or transmitting material containing sexually explicit in electronic form.[21]
- Section 67B penalises publishing or transmitting of material depicting children in the sexually explicit act, etc in electronic form.[22]

India got its first codified Act in the field of technology in the form of Information Technology Act,2000 which was falling short of the requirements to meet the global standards. The focus of the IT Act was however the recognition of electronic records and the facilitation of e-commerce. So far, the It Act is considered as the mother legislation of cyber crimes however this legislation is not enough to deal with these emerging crimes. Barely ten sections were incorporated in the IT Act to deal with cyber crimes. [23]One of its advantages is that it regulates cyber crimes, however does it actually regulates cyber crimes by not providing a single definition of cybercrime. This act only penalizes a handful of cybercrimes and lacks defining even those that are mentioned in the Act. There are other new types of crimes especially committed against women daily in cyberspace and this particular Act still has not been amended to include those acts. In today's digital times when everything is done on the internet is it logical that legislation that was enacted two decades before will be serving the purpose? It is easy for the police to arrest individuals under this Act but the challenges arise during charge sheeting due to the inadequate tools to trace the authentic message source.

The POCSO Act aims to protect children from sexual offenses, including those committed online. Aside from these laws, the government has also launched initiatives to combat cybercrime against women, such as the Cyber Crime Coordination Centre (C4C) and the National Cyber Crime Reporting Portal (cybercrime.gov.in). Various types of crimes that are being

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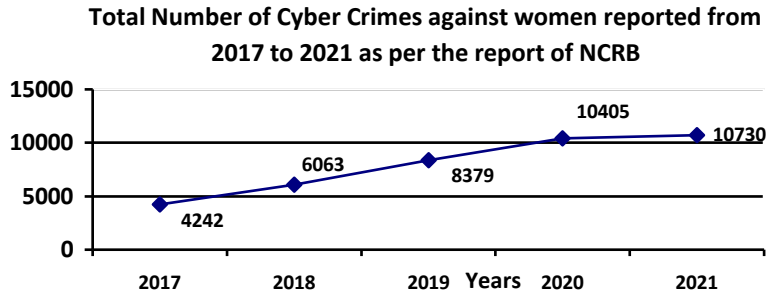
19 The IT Act 2000, s.66C
20 The IT Act, 2000, s.67
21 The IT Act 2000, s.67A
22 The IT Act 2000, s.67B
23 N S Nappinai, "Cyber Law in India: Has Law Kept Pace with Emerging Trends?An Empirical Study" 5 Journal of International Commercial Law and Technology (JICLT) 22 2010.

committed against women are trolling, abusing, threatening, morphing, bullying, establishment of fake profiles However, despite these efforts, cybercrime against women remains a significant challenge in India. One of the main obstacles is that many women are not aware of their rights or are too scared to report cybercrime. Another issue is that investigating and prosecuting cybercrime can be complex and challenging. It is crucial that we continue to raise awareness and provide support to victims of cybercrime, in order to effectively address this issue and protect women in India. Despite these legislative endeavours, a compelling necessity persists for the establishment of a potent legislative apparatus to counteract cyber-crimes, with a pronounced emphasis on those targeting women.

Statistics and Data: An alarming reality

The modern era has brought about remarkable progress, revolutionizing our lifestyles, occupations, and interactions. Yet, as technology continues to evolve, a troubling issue has surfaced i.e. cyber-crimes. In India, one concerning aspect of this problem is the escalating rate of cyber-crimes targeting women. With technology becoming inseparable from our daily routines, women have also become susceptible to various forms of online exploitation. The NCRB and other authorities have been tirelessly monitoring cyber crimes in India, and their findings are troubling. In particular, there has been a notable rise in the number of cases that specifically target women. The most recent data shows a sharp increase in cyber crimes against women in recent years. From online harassment and stalking to revenge porn and financial fraud, women are becoming more vulnerable to the dangers of the digital realm.

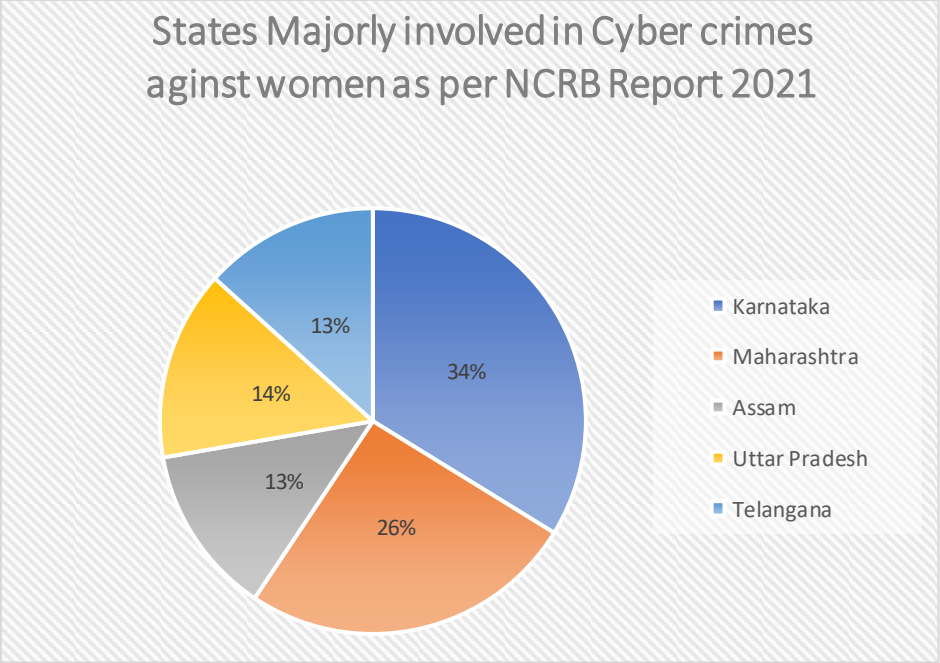
The National Crime Records Bureau (NCRB) compiles and publishes information on crimes against women in its publication 'Crime in India'. As per NCRB a total of 8379 and10730 cases of cyber crimes against women were registered in India in the year 2019 and 2021 respectively[24]. The total number of cyber crimes committed from 2017 to 2021 as per the report of NCRB is described below:



[24] National Crime Records Bureau (Crime In India 2021 Statistics, Vol II).

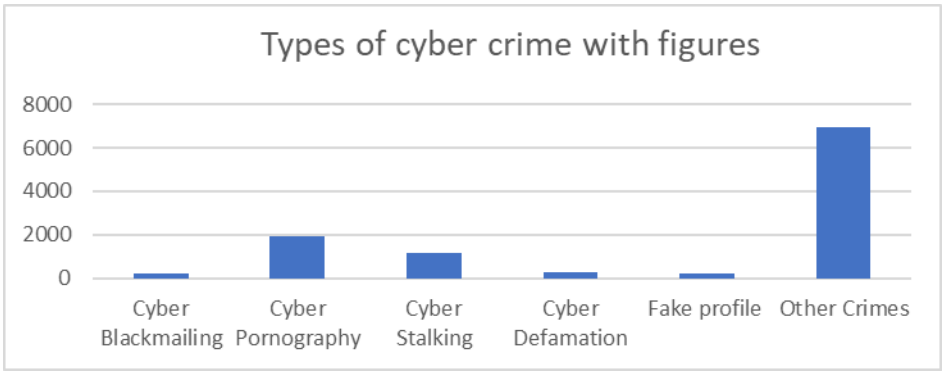
There is an upward curve in the above table and that depicts that crimes against women in cyber space are increasing.

The states which are majorly involved in cyber crimes against women as per the report of National Crime Records Bureau are being mentioned by way of a pie chart which is as follows :



Karnataka is leading the figures in terms of crimes committed against women in India, followed by Maharashtra and then Uttar Pradesh.

And the various types of crimes that were committed in cyberspace as per the particular report are graphically represented as follows:



Addressing the issue: Policy and awareness initiatives

It is evident that India has embarked on a journey of considerable progress in its endeavor to combat cyber crimes against women, however these measures, while commendable, may still exhibit gaps when confronted with the intricate and nuanced nature of cyber crimes targeting women. The 2030 Agenda for Sustainable Development of the United Nations takes into account the use of technology to reduce violence against women and girls, and there is a wealth of data supporting this claim. However, technology also has the ability to incite and carry out new kinds of violence. According to research, over 70% of women and girls who use the internet are exposed to various types of cyber violence. For the most part, these cases go unrecorded. [25] In the year 2018, a pivotal stride was witnessed in this trajectory when the Ministry of Women and Child Development (MWCD) initiated a proactive scheme titled 'Cyber Crime Prevention Against Women and Children'. This initiative was meticulously designed to extend a platform for victims of cyber crimes to voice their grievances, thereby fostering a safer digital environment. Building upon this momentum, the year 2021 witnessed another progressive leap with the Ministry of Home Affairs (MHA) spearheading the launch of the 'Cyber Crime Volunteer Program'. This strategic initiative is crafted to elicit proactive participation from citizens, encouraging them to come forth and report instances of cyber crimes. Under this program, any citizen of India can register himself as a volunteer and report cyber crimes or become an expert in cyber crimes. The goal of the Cyber Crime Volunteer Programme is to unite people who are passionate about helping society maintain a secure and clean online environment.

The Government of India has initiated several schemes and initiatives to address cyber crimes against women which include:

Cyber Crime Prevention against Women and Children (CCPWC)[26]:

The main objective of the Cyber Crime Prevention against Women and Children (CCPWC) Scheme is to have an effective mechanism to handle cybercrimes against women and children in the country. The scheme revolves around an Online cybercrime reporting platform, Training of Police officers, judges & prosecutors, Research & Development and Cybercrime awareness activities, etc. For the effective implementation of the scheme following steps have been taken which are as follows:

- Launch of the Central Cybercrime Reporting Portal (2018):

  The Central Cybercrime Reporting Portal (www.cybercrime.gov.in) was launched on September 20, 2018. Its main goal is to make it easier for complaints about any sexually explicit information, including child

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25 S.Al Nasrawi, "Combating Cyber Violence Against Women and Girls: An Overview of the Legislative and Policy Reforms in the Arab Region", *The Emerald International Handbook of Technology-Facilitated Violence and Abuse* 493-512 (2021).

26 Press Information Bureau, Government of India, Ministry of Home Affairs.

pornography (CP) and child sexual abuse material (CSAM) to be reported.

- Capacity Building Workshops under CCPWC Scheme:

  Four seminars have been held as part of the Cybercrime Prevention against Women and Children (CCPWC) programme. The capacity building of LEAs and officials connected to the Ministry of Women & Child Development (WCD) is the particular focus of these seminars.
- For judges, public prosecutors, and law enforcement agencies (LEAs), specialised training programmes have been devised. The purpose of these programmes is to improve their ability to effectively tackle cybercrimes.The national cyber crime training center was one of the initiatives namely "Cytrain" on capacity building for combating cyber crimes. The National Crime Records Bureau is hosting this virtual training center (NCRB). Officers of all ranks, including senior officers from States, Union Territories, Central Police Organizations, and Central Armed Police Forces, are among the planned trainees.[27] Focusing on course curriculum standardization, creating interactive training modules for cybercrime detection, containment, and reporting through the use of simulated cyber environments, creating MOOCs (massive open online courses), and setting up cyber labs are the main goals of CyTrain.
- There is now a thorough guide in the form of a handbook on cyber safety for students and adolescents. The purpose of this resource is to help young people learn safe digital navigation techniques and provide them with guidance.
- In an effort to increase awareness of cybercrimes, a national radio campaign and the creation of the Cyber Dost Twitter handle (@CyberDost) are proactive measures. These programmes seek to inform a large audience about safety precautions and internet risks.

National Cyber Crime Reporting Portal (Cyber Crime Unit):

The National Cyber Crime Reporting Portal is a crucial initiative by the Government of India, providing a user-friendly platform for victims to report cybercrime complaints online. This portal caters to complaints pertaining to cyber crimes only with a special focus on cyber crimes against women and children.[28] The Home Minister of India dedicated the National Cybercrime Reporting Portal (NCRP) to the nation on 20 January 2020, marking a crucial milestone in the country's efforts to combat and address various forms of Cybercrimes. Some of the features of cyber crime reporting portal are as follows :

- It's a flexible reporting platform designed for seamless collaboration from any location.
- Monitoring dashboards have been strategically deployed at the national, state, and district levels to supervise cybercrime incidents. This initiative

[27] cytrain.ncrb.gov.in

[28] National Cyber Crime Reporting Portal

establishes a multi-tiered system, ensuring efficient tracking and management of cyber threats.

- Complainants experience the advantage of an online status tracking feature, fostering transparency and providing continuous updates throughout the reporting process.
- A group of Cyber Volunteers, registered as Cyber Awareness Promoters, actively supports the initiative, strengthening endeavors to tackle and prevent cybercrimes.
- The National Cybercrime Reporting Portal (NCRP) presents Vani-Cyber Dost Chatbot, an automated assistant equipped with predefined features. It offers users a responsive and user-friendly interface to navigate the portal seamlessly

The Indian Government asserts that, since the inception of the Citizen Financial Cyber Fraud Reporting and Management System, over 1.277 million complaints were documented as of November 15, 2023. This initiative has led to safeguarding a significant financial amount, surpassing Rs 930 Crore, addressing over 380,000 reported cases.

The Mahila Cyber Crime Helpline:

The Mahila Cyber Crime Helpline is part of the National Cyber Crime Reporting Portal, an initiative by the Government of India to facilitate online reporting of cybercrime complaints. The helpline can be reached at 1930 for reporting cyber crimes, with a special focus on crimes against women and children.[29]

The National Cyber Security Awareness Programme (NCSAP):

Under this scheme, various initiatives were taken to raise awareness. Some of the initiatives are as follows:

- National Cyber Security Awareness Month (NCSAM): October is observed as National Cyber Security Awareness Month (NCSAM) worldwide, emphasizing a shared commitment to promoting cybersecurity awareness. In line with this, the Information Security Education and Awareness (ISEA) program, led by the Ministry of Electronics and Information Technology (Meit) in partnership with CERT-IN[30], NIC[31], and C-DAC[32], actively organizes various mass awareness activities to enhance cyber consciousness and resilience among citizens. These efforts aim to empower individuals to contribute to a secure online environment through innovative approaches and collaborative endeavours.
- ISEA Project Phase – II:
  The National Awareness program in ISEA Project Phase – II seeks to promote widespread awareness about Information Security through direct and indirect means. Direct efforts include conducting half-day awareness

[29] Cybercrime.gov.in
[30] Indian Computer Emergency Response Team
[31] National Informatics Centre
[32] Centre for Development of Advanced Computing

workshops tailored for specific target groups, including academic users (school children/teachers, college students/faculty), government users (police/legal personnel), and general users, including parents. These workshops aim to improve understanding and promote Information Security Awareness effectively.[33]

- The Cyber Swachhta Kendra (CSK) Scheme:
  Cyber Swachhta Kendra (CSK), an integral part of CERT-In, plays a vital role in the Government of India's Digital India initiative. Focused on enhancing cybersecurity, CSK is dedicated to improving the digital hygiene of individuals and organizations. In addition to its core mission, CSK offers a range of advanced security tools, showcasing its unwavering commitment to countering cyber threats and maintaining a secure digital environment.[34]

Conclusion

The human intellect is unfathomably capable. Cybercrime cannot be completely eradicated from the internet. It is really feasible to examine them. History bears evidence to the fact that no law has ever been able to completely eradicate crime worldwide. Legislation shouldn't take a paternalistic approach, instead, it should prioritize women's dignity. The only thing that can be done is to educate individuals about their rights and responsibilities (such as reporting crimes as a group obligation to society) and to further enforce the laws to keep crime at bay. An NGO viz centre for Cyber Victim Counselling has presented a report on cyber victimization in India, respondents from different parts of the country were taken and the outcome of the report was that only 35% of the women have reported about their victimization. Thereby this report tries to explain that women prefer not to report about their victimization owing to social issues. Non-reporting of cyber crimes has now become an issue and steps need to be taken and such step is to raise more awareness so that people particularly women won't be reluctant to report this issue. One of the major reasons for the growth of these cyber offences against women is the lack of awareness among the potential victims who unintentionally allow the perpetrators to have access to private information. So everyone particularly women should be taught about the internet and how the internet infringes on privacy. In the education curriculum cyber safety measures should be taught to students, particularly to females who are more vulnerable. Neither the provisions of the IPC nor the IT Act fully reflect the ground realities of women's experiences while dealing with these cyber offences and therefore the need of the hour is to make amendments to the two major statutes. To effectively handle the offences relating to cyberspace it is required to amend the provisions of the IPC and IT Act and it would have been better if there was comprehensive legislation that would consolidate all aspects of cybercrime against women in India.

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33 Isea.gov.in
34 csk.gov.in

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Organising the Unorganised: Illusion or Reality

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Abstract

In India, the informal sector employs most workers. Even though informal employees constitute a sizable portion of the workforce, they are largely ignored by legal and policy circles, for example, domestic workers are non-regulated and unguarded workers. The lack of unionisation among informal employees is a reason for their inaccessibility and hiddenness. Unorganised workers are progressively organising into unions distinct from long-established associations to overcome their invisibility. To overcome these systemic disadvantages, the working poor in the informal economy must organise, because organising gives them the supremacy of unity and the chance to be perceived and governed by deciding authorities who can change their lives. As employees become more involved in the country's significant development, defending their rights becomes more crucial. In this contemporary world, no single country or regional grouping of countries has initiated or recognised changes in micro group employees that would result in widespread occupied service in a planned environment. This article deals with the impact of the lack of trade unions among the informal sector employees. It also states the benefits that informal sector employees can avail if they bargain collectively.

Keywords: Informal Sector, Trade Union, Collective Bargaining, Employees, Decent Work.

Introduction

In developing countries in general, and India in particular, the importance of unorganised or informal activities has skyrocketed. Both self-employed in informal businesses and wage workers in informal occupations make up the informal workforce. However, when compared to organised employees, the informal workforce's legal and social protections are insufficient because labour regulations are skewed heavily in favour of formal employees, making informal employees ineligible for protection.[1] To overcome

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1 Pandhe M. K. "Whither trade union rights in India" 7 International Union Rights 4 (2000).

these systemic disadvantages, the working poor in the informal economy must organise, because organising gives them the supremacy of unity and the chance to be perceived and governed by deciding authorities who can change their lives. The Indian economy was weak after independence from British rule, with only a few industries. Efforts were made to grow industries and create job opportunities. In informal employment, employee and employer relationships are mostly absent, and there is a lack of awareness about the social security measures applicable to them.[2] This has deprived the rights of the employees at large. There is also a shift from employees who are formal to an informal workforce where ever possible, the reason behind this is that employers can avoid providing social security benefits and pay minimal wages to employees in the informal economy. It is shifting from a producer to a facilitator of production by others on its behalf.[3] Industries decrease the socio-economic classes and transfer the burden for salary, profits, and situations onto the distinct employee by eliminating everlasting permanent workers, outsourcing and subcontracting all but essential happenings, and depending on wherever imaginable on insecure forms of workers such as casual, part-time, temporary, seasonal etc.[4] The external sphere of this structure is finished up by waterlogged micro-enterprises and industrial outworkers, usually immigrant workers in industrialised countries, with conditions fading as single transfers from the core to the fringe of the production process. The majority of a transnational firm's so-called "own-account" workers are disguised employees who have had their rights taken away.[5] The informal economy's expansion is incapable of being stopped at a rapid speed in any place in the world. Solemnizing the unorganised sector on a global measure is a pipe dream. In the contemporary world, no one country or collection of countries has the political will or the power to undertake the minimal changes required to achieve worldwide occupied employees under controlled circumstances. In a predictable period of time, we can assume more liberalisation and development of the unorganised sector. It's not about 'formalising' the 'informal', but rather about safeguarding the unprotected. Protection of the labour market is a must-have requirement everywhere over the world. As employees become more involved in the country's significant development, defending their rights becomes more crucial. Employers, the government, and labour unions are three main types of organisations in the country that can protect employee's human rights. The major problems in unorganised sector is lack of employer-employee rapport, the government intervention is also less because there is no recognition in employment, and it is impossible to organise a trade union

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2 Dr.J. N. Pandey, The Constitutional Law of India,20 (Central Law Agency, 58th Edn., 2012)

3 Sodhi, J. S. "Trade Unions in India: Changing Role & Perspective".49 Indian Journal of Industrial Relations,(2013).

4 Sinha, P.R.N. Industrial Relation,Trade Union and Labour Legislation, (Pearson Education, India, 3rd edn, 2017)

5 Supriya

because they do not know each other.[6] To overcome these obstacles, it is vital to begin by organising the informal sector and demanding that their rights be respected.[7]

The informal sector in India: Changing Role & Perspective

Employees working in informal sectors are affected by the informal economy, which is a global phenomenon. Equally salary-based employees and independent workers can be classified as informal labourers. However, their jobs and activities are very different from those of a regular salaried or self-employed worker.[8] Employees generally who are not willing to adapt to the traditional paradigm of industry culture, which is defined by lengthy ties and the generation of comprehensive benefits from such relationships, are known as informal workers. Though the employer in the industry is a primary organisation in charge of the well-being of the workforce, the state monitors and regulates the affiliation between the employer and the employee so that it adheres to its political goals. In contrast to this "formal" framework of employees in the factory, the term "informal" is made to work to represent a wide spectrum of workers who engage in activities that do not fit the mould[9]. Because regulatory concepts in India and elsewhere are based on this formal model, legislation supporting worker's welfare structurally excludes informal labour. While some general regulations should apply to all workers, such as the ban on child labour or the upgrade of social security benefits, their implementation methods are mostly developed with the logical framework in mind, leaving informal workers out of the enforcement process.[10] Domestic employees and workers in the insignificant workplace, for example, have mostly unrecognised employment connections, are probable to employ themself for several employers, are doubtful to obtain legislative minimum earnings, and are often omitted from paid worker claims against their employers. On the other hand, street vendors and garbage pickers are individually employed in Unorganised sectors and sometimes they fall under the definition of self-employed workers. These self-employed unorganised workers are different from the self-employed professionals such as "lawyers, doctors, consultants, and freelancers".[11] Unorganised self-employed employees are rarely familiar or structured, unlisted with any specialized organisation, are

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6 Dan Gallin. "Workers in the informal economy" 17 International Union Rights, (2004).

7 Ravi Naidoot, & Isobel Frye "The Role of Workers Organizations in The Extension of Social Security to Informal Workers" 27 Comparative Labor Law & Policy Journal, (2006)

8 Bishwapriya Sanyal "Organizing the Self-Employed: The Politics of The Urban Informal Sector" Indian Journal of Industrial Relations, 130 (1991)

9 Gyan, I. "Informal Economy: Challenges & Opportunities. IAS Gyan" available at: https ://www.iasgyan.in/ rst v/ infor mal-economy-challenges-opportunities (last visited on December 20, 2022)

10 *Supra*

11 Dan Gallin. "Workers in the informal economy" 11 International Union Rights, 4 (2004).

doubtful to pay professional levies, and their links with the government and its authorities frequently tug in conflicting ways. In India, the elimination of unorganised employees from the ambit of the government's well-being assurance runs counter to constitutional principles that outline specific measures for worker's welfare. The survey report of India's periodic labour force states that 90% of the workers are employed without registration.[12]

The employees employed in unorganised sectors come across many occupational deceases. They become disabled or sometimes die due to the lack of safety measures provided to them in the workplace.[13] The other major issue faced by informal workers is the daily wages which are a smaller amount than the minimum salary. The wages they earn are not adequate for them to run their families. Though they work overtime they are not paid more than the daily wages as they are considered to be informal and they are not aware of their rights. In India, long hours of unorganised sector employment outside of labour and regulatory regulations are widespread.[14] They work for hours and are denied the basic intervals and social security measures they can avail. In unorganised employments, the workers are likely to be poor than those in the organised sector. There are no safety nets in place to cushion the blow of unexpected hardships like job loss or illness and guarantee a minimum standard of life for all citizens. If the government implements certain legislations for these workers, the access to those legislations becomes difficult as there is a minimum level of understanding and bargaining power. The informal economy is rife with issues such as child labour, worker exploitation, bonded labour, and human trafficking. Any reduction in earnings has an immediate effect on spending in the 'Hand to Mouth' economy of informal work.

Because unorganised labour has such a large number of members, it is prevalent throughout India. The bulk of unorganised workers do not have secure, long-term employment opportunities since the unorganised sector suffer from high seasonality of employment. Even people who appear to be gainfully and substantially employed are not, implying that hidden unemployment exists.[15] The unorganised workforce in rural areas is deeply divided along caste and religious lines. Although these problems are much less common in urban settings, they nonetheless exist because most unorganised workers in big cities are migrants from the countryside. The unorganised labourers are disproportionately exploited by the rest of society. They have poor working conditions, including earnings that are significantly lower than

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12 Informal Economy: Challenges & Opportunities available at: https://www.iasgyan.in/rstv/informal-economy-challenges-opportunities (last visited on December 20, 2022)

13 Dan Gallin. "Workers in the informal economy" 11 International Union Rights, 4 (2004).

14 Andy Gilchrist "Workers Identifying Problems and Developing Solution"19 International Union Rights (2011)

15 Marc Bélanger. "The ILO And Human- Trade Union Rights" 15 *International Union Rights* (2008)

those in the formal sector, even for positions that are closely comparable in terms of labour productivity. Work status is of lower quality and terms of employment, both in terms of salary and employment.

Trade unionism and informal sector: Legal Perspective

Despite the main trade unions limited efforts to absorb informal workers, various kinds of organisations adopting novel organising tactics among India's informal workers are emerging. In the 1970s, India's Self Employed Women's Association (SEWA) was the first organisation created as a labour union. In 1972, the Self-Employed Women's Association was officially recognised in Gujarat State.[16] During the 1980s, SEWA achieved remarkable success in the worldwide trade union movement after joining the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers (IUF) in 1983.[17]in the history of Trade Union movement for the first time, own-account, informal labourers were recognised as workers with the right to establish unions. In many regions of the world, domestic workers had formed unions, but their power of speech was lacking the power to perform physically demanding tasks.[18] In 1988, domestic workers in Latin America and the Caribbean came together to form CONLACTRAHO (Confederation of Latin American and Caribbean Household Workers), which had its first Congress. During this time, waste pickers in Latin America began to form cooperatives.[19] In the 1990s, home-based workers came into the spotlight with the establishment of HomeNet International (1994) and the successful advocacy for an ILO Convention on Homework (C177), ratified in 1996. In 1997, WIEGO was established to help the unemployed. In 1995, the very first global gathering of street vendors took place; by 2000, the StreetNet Association had been established; and by 2002, StreetNet International had been established. Waste collectors in Latin America began to form cooperatives in the 1990s. Meanwhile, the trade union movement and the International Labour Organization began to recognise that irregular labour was growing and couldn't be avoided anymore. On a national, regional, and global scale, organising has exploded. In 2002, the International Labour Conference (ILC) adopted a Resolution and Conclusions on Decent Work and the Informal Economy, which acknowledged informal workers (including wage earners and self-employed individuals) as employees with nearly the same rights to decent employment as regular workers. The many mobilisation efforts that took place in the run-up to the ILC 2002 aided in the formation of collective organisation in various sections of the people and societies on the earth. The total number of

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16 Supra 5 at 2

17 N. R. Sheth "Our Trade Unions: An Overview., *Economic and Political Weekly*

18 International Labour Office on Organising Informal Economy Workers into Trade Unions: A Trade Union Guide available at: https://www.ilo.org/wcmsp5/ groups/public/---eddialogue/---actrav/documents/publica tion/wc m s711040.pdf (last visited on August 10, 2022)

19 The History of Organising Informal Workers-WIEGO available at: https://www.wiego. org/history-organizing-informal-workers. (last visited on December 24, 2022)

grassroots level informal sector worker organisations and domestic and international networking activities rose dramatically during this period. In Latin America National Waste Pickers Movement arose and it was launched in 2004.[20] In 2000, despite the collapse of HomeNet International's, HomeNet South Asia was originally originated after a successful regional discussion with government and organisations that eventually resulted in the Kathmandu Declaration. Domestic workers from around the world banded together in 2006, resulting in a legally binding arrangement to bring a visible shape of their nationwide group of interconnected people and the Universal Domestic Workers group of people who exchange information. In 2008, the inaugural "World Conference of Waste Pickers" was held, leading to continued global networking.[21] The movement was growing abandonly in the 2010s. Informal labourers are becoming more visible and recognised and achieving tangible results. Waste pickers presented and insisted on having a union in 2009 at the United Nations Framework Convention on Climate Change (UNFCCC).[22] Domestic workers also gained a huge win in 2011 when the International Labour Conference endorsed an ILO Convention on Decent Work for Domestic Workers.[23]

The International Labour Organization is one of the global organisations that assist unions in promoting and protecting human rights.[24] The UN's International Labour Organization (ILO) is a specialised organisation.[25] It was established in the wake of World War I to foster world peace, alleviate poverty, promote respect for human rights (especially in the workplace), foster economic growth, and addressing issues including workplace discrimination, sexism, and child labour.[26] Its main goal is to produce worldwide labour standards that can be incorporated into the legal frameworks of the countries that make up the organisation.[27] To form Association or a Union is fundamental rights of all working people and employers and the power to collectively bargain for their needs. Nonetheless,

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20 Kesar Singh Bhangoo. "Trade Union in Globalised Economy of India" 41 *Indian Journal of Industrial Relations* (2006)

21 The History of Organising the Informal Workers, WIEGO available at : https://www. wiego.org /history-organizing-informal-workers . (last visited on September 24, 2022)

22 Just Transition & Sustainable Economies Day. (n.d.). United Nation Climate Change available at: https://un fccc.int/pccb/4CBHub/JTDay#What---Objective--Topics (last visited on September 3, 2022)

23 Convention No 189 Domestic Workers Convention 2011 available at: https://www.ilo. org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189 (last visited on January 3rd, 2022)

24 Prof Ahmedullah Khan, Commentary on the International Labour Organisation and Indian Response, (Asia Law House, 2021)

25 N.R. Sherth, "Our Trade Unions: An Overview" Economical and Political Weekly

26 Supra

27 Marc Bélanger. "The ILO And Human- Trade Union Rights". 15 *International Union Rights (2008)*

the applicability of these fundamental concepts continues to be questioned all across the world.[28] Certain types of workers (such as government employees, seafarers, and workers in export processing zones) are prohibited from the ability to organise a union in several nations[29]. Other countries stifle or interfere with labour unions illegally. Some even urge or ignore the assassination of unionists. Freedom of association, strong collective bargaining, and open public discussion are all goals of the International Labor Organization. Employee's and employer's rights are outlined in "Convention No. 87 (Freedom of Association and Protection of the Right to Organise)".[30] Among these are laying the groundwork for their organisation, its administration and operations, the creation of its programmes, and its affiliation with regional, national, and worldwide groups without seeking permission in advance from any of these bodies. Convention No. 98 (Right to Organise and Collective Bargaining) protects workers from anti-union discrimination such as dismissal for union membership or involvement in union activities. It prohibits employers from interfering with requiring workers to join or renounce union membership as a condition of employment. It also ensures proper protection from employer-sponsored intervention and enshrines the right to negotiate their demands with their employers to determine their terms of employment, allowing workers and employers to openly negotiate salaries, benefits, working conditions, and other employment-related concerns.[31] The Home Work Convention (C177)[32], aims to encourage "equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of homework and, where appropriate, conditions applicable to the same or similar type of work carried out in an enterprise", was already implemented by the International Labour Organisation in 1996.[33] "Equality of treatment shall be promoted, in particular, about (a) the right of home workers to establish or join organisations of their choosing and participate in the activities of such organisations; (b) protection against discrimination in employment and occupation; (c) protection in the

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28 Anamitra Roychowdhury. "Effectiveness of Trade Unionism in a Globalised World: The India Case." 45 Social Scientist, (2017).

29 Prof. Ahmedullah Khan, Commentary On The International Labour Organisation And The Indian Response (Asia Law House; 2021).

30 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). (n.d.). International Labour Organisation available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0:: NO::P12100INSTRUMENTID,P12100_LANG_CODE:312232,fr:NO (last visited on August 23rd, 2022)

31 C098 - Right to Organise and Collective Bargaining Convention, 1949.ILO available at: https://www.ilo.org/ dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_ CODE:C098 (last visited on November 20, 2022)

32 Home Work Convention, 1996 (No. 177). ILO available at: https://www.ilo.org/ dyn/normlex/en/f?p=NORML EXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312322 (last visited on October 22,2022)

33 Deepita Chakravarty. "Trade Unions and Business Firms: Unorganised Manufacturing in West Bengal". 45 Economic and Political Weekly,(2010).

field of occupational safety and health; (d) remuneration; (e) statutory social security protection." [34]

In India, labour legislation covers and protects a wide range of working classes. Equally majority of the employees are neither covered nor protected, if covered are unaware of their rights. Informal sector employees are one of those categories. Work and employment are conflated under India's Constitution.[35] The Part III of Indian Constitution elucidates under the concept of Fundamental Rights specific Articles in the relevance of employment, expounds comprehensive provisions on non-discrimination and treatment better than other individuals and thus has the edge over them in areas of public work. It also prohibits the use of children in "forced labour" and "dangerous work."[36] In Part IV, "Directive Principles of State Policy," the Constitution guarantees a fair minimum wage, workplace equality, the health and safety of workers, relief from poverty, unemployment, and old age, financial support for families with children, financial assistance for those in need, paid leave for mothers, significant financial aid for those in need, ethically sound workplaces free from harm, and the active participation of union workers in management. It should come as no surprise that the Indian Constitution has a strong influence on the way that work and workers are protected in Indian law. In India, the factory worker is typically viewed as an individual employee, and the work connection is seen as something other than an employment relationship. The Industrial Disputes Act, 1947, The Factories Act, 1948, The Industrial Employment (Standing Order) Act, 1946, The Contract Labour (Regulation and Abolition) Act 1970, and The Trade Union Act are all critical elements of the current labour legislation in India.[37] Work is viewed as an employment connection, and all the legislations specifies workers as employees. As a result, the legislative techniques used by informal workers to create their unions must be viewed in light of the preceding context. The Trade Union Act, 1946 is one of the most critical legislative instruments employed by labour unions.[38] As "The Trade Unions Act of 1926" states, a trade union as association "formed primarily to regulate the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade business."[39] The trade union movement under the Act, can be formed initially

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34 Covention No 177 Home Work Convention 1996 available at :http s:/ /www.il o.org/dyn/norm lex/en/f? p=NORM LEXPUB:12100:0::NO::P12100_INSTRUMENT _ID:312322 (Accessed on:11-04-2022)

35 Supra 1 at 1

36 Supra 2 at 1

37 Sodhi, J.S. "Trade Unions in India: Changing Role and Perspectives" 49 *Indian Journal of Industrial Relations*, (2012)

38 Marc Belanger "The ILO and Human-Trade Union Rights" 15 *International Union Rights*, (2008)

39 D.K. Srivastava. "Trade Union Situation in India: Views of Central Trade Union Organisations (CUTUOS)" 31 *Shri Ram Centre for Industrial Relations and Human Resources*, (2001)

out of any seven members employed in an industry or under the employer.[40] Apart from these numerous benefits, trade unionism's primary practical function is bargaining, and labour unions can put limited conditions on commerce or business to enhance this negotiating.[41] Labour unions may use tactics that would otherwise be considered trade restrictions, such as strikes, picketing, and fixing minimum salaries and working hours, for bargaining and demanding reasons.[42]

Conclusion and Suggestions

Informal labourers are among India's most vulnerable employees, lacking even the most basic protections in their lives and workplaces. As a result, in both the short and long term, informal workers bargaining collectively must find solutions to overcome the inherent insecurity and marginalisation of informal employees. In this broader context, India's unorganized workers collective intelligence and bargaining power make excellent use of the legal framework. While the Republic of India has the necessary regulatory structure in place to facilitate informal workers aggregation, legal interpretations of labour and workers are prejudiced against informal employees and their actions. Therefore, the following suggestions have been made:

1. There is an urgent need for the Indian trade union movement to unite to protect trade union rights and legislation that protects workers working and living conditions and to fight for expanding the coverage of existing labour legislation to include the entire workforce in the formal and informal sector. The future of the country's trade union movement hinges on their ability to work together to defend whatever gains they have made during the working class's struggles.
2. The organisation of informal employees has traditionally taken place independently of the conventional labour movement; nevertheless, this dynamic is gradually shifting as formal and informal workers increasingly collaborate with one another. Employees in particular global supply chains or industries ought to come together in order to build a united front, as opposed to being divided by large corporations.
3. Even if a trade union is formed outside of the framework, it is still necessary to recognise it. The number of employees engaged as informal workers in a given industry or job may only be estimated if a trade union is recognised. As a result, employers should require employees to join a recognised trade union before hiring them.
4. When only one individual deals with a problem, finding a solution is more difficult. As a result, collective bargaining is required. The

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40 Deepita Chakravarty. " Trade Unions and Business Firms: Unorganised Manifacturing in West Bengal" 45 *Economic and Political Weekly* (2003)

41 Sanjay Modi & Singal, "Workers Participation in Trade Unions" 31 *Indian Journal of Industrial Relations*, (1995)

42 Stefania Marino. "Trade unions, special structures and the inclusion of migrant workers"31 Work, Employment and Society, (2015).

government should take the compulsory steps to protect employees in the informal sector.

5. Equal pay for equal work is an individual's fundamental right. Because informal employees are dispersed throughout the country, even though they work in similar jobs, their salary or wages vary depending on the employer's perspective. If trade unions are recognised, everyone's fundamental rights can be exercised collectively.

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Tracing Right to Abortion in International Human Rights Law and the Constitution of India with Special reference to an Appraisal of the Medical Termination of Pregnancy (Amendment) Act, 2021

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Abstract

The trials and tribulations of women with denial and pervasive discrimination persist even as we enter a new era of technological and psychological enlightenment. There exist rigid stereotypes and elevated expectations that characterize women as mothers and child-bearers. Recently the Government of India passed the Medical Termination of Pregnancy (MTP) Amendment Act, amending the nation's 50-year-old abortion law that was riddled with inadequacies. While the amendment act is welcomed for its liberalised take on abortion by unmarried women as well as prescription of increased gestational limits, the law nevertheless fails to keep pace with the ever-evolving social advancements in the country as the 'rights' or 'choice' based approach continues to be missing from the law. The intent behind the original act as well as the amendment is founded in exemption from criminal liability based on specific grounds rather than a simpliciter idea of 'choice' and 'autonomy'. Furthermore, recognition of alternative medical methods of abortion such as 'supported' and 'self-managed' abortions are absent in a regime that relies completely on third-party authorizations. In this context, the article aims to explore the legal barriers to access of safe abortions in India. The article seeks to illustrate the need for conformity with the 'WHO Abortion Care

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Guidelines, 2022' and the inevitable judicial intervention which will be required for the same.

Keywords: Abortion, Reproductive Choice, MTP (Amendment) Act, 2021

I Introduction

The trials and tribulations of women with denial and pervasive discrimination persist even as we enter a new era of technological and psychological enlightenment. There exist rigid stereotypes and elevated expectations that continue to characterize women as mothers and child-bearers. Abortion laws worldwide seem to find it difficult to detach from such stereotyping which along with *eugenics* continue to be the underlying foundation for all abortion related legislations. The modern Indian tale of 'Right to Abortion' may be traced back to 1966 when the Shantilal Shah Committee[1] recommended adopting a liberal approach to abortion in India with the aim to reduce maternal morbidity and mortality that plagued women's health owing to illegal abortions. In consequence, the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'MTP Act') was implemented with the object "*to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto*"[2]

As we speak of 'Right to Abortion' as the fundamental idea of this research, it is important to mention at the very outset that both the MTP Act, 1971 and the MTP Amendment Act, 2021 do not mandate abortion for all women in all circumstances as a matter of right. Instead, the MTP Act stipulates the permissible grounds, gestational limits, and procedures for the purpose of abortion. The Indian Penal Code, 1860 ('IPC') criminalised what it characterised as "*voluntarily causing miscarriage*" even when the pregnancy has been aborted with the consent of the pregnant woman.[3] The only exception to this criminal liability was a case wherein the miscarriage has been caused only to save the pregnant woman's life.[4] With the coming of the new Criminal Laws IPC will now be replaced by the Bhartiya Nyaya Sanhita ('BNS') from 1st July 2024. BNS has been introduced as a revolutionised version of the archaic criminal law that was in dire need of being updated. Unfortunately, BNS fails to modernise the law in the context of abortion. The new BNS has verbatim reproduced the sections on causing of miscarriage from the IPC.[5] This means that a woman consciously consenting to terminate her pregnancy or who herself undertakes her own miscarriage is criminally liable in India. In this context, the MTP Act is worded as such that it is in essence a provider protection law, aiming to shield the Registered Medical Practitioner

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1 Sarosh Framosh Jalnawalla, "Medical Termination of pregnancy Act Report of the First Twenty months of Implementation" (1974).
2 The Medical Termination of Pregnancy Act, 1971 (Act 34 of 1971).
3 Indian Penal Code, 1860, s. 312.
4 *Ibid*
5 The Bharatiya Nyaya Sanhita, 2023, ss. 88-92

(hereinafter referred to as 'RMP') from criminal prosecution. This means that the law is rooted in creating an exception to criminal liability rather than being rooted in the pregnant woman's bodily autonomy or reproductive choice.

Though the MTP Act allows abortion in necessary circumstances, including pregnancy by rape and failure of contraceptive, thereby displaying qualities of a liberalized legislation however; it has clearly been unable to keep up with the ever-evolving medical and social advancements in the country.

The inadequacies of the law are hard to miss as "*12.3 million abortions, accounting for 78% of all abortions are illegal as per the terms of the MTP Act, even though they may otherwise be safe, solely because they occur outside of health care facilities.*"[6] Without a realistic and empathetic legal framework "*out of all unintended pregnancies that happen each year globally, more than one in seven of these cases occur in India.*"[7]

Women and girls living in rural areas are found impoverished and uneducated increasing their exposure to health risks in case of unintended pregnancies. Women from minority religious communities or oppressed castes are also at a comparatively higher risk of undergoing unsafe abortions or abortions outside of established and recognised health facilities, thus exposing them to adverse health risks and even criminal liability.[8]

1.1. Right to Abortion in International Human Rights Law

The Human Rights Committee ("**HRC**") has emphasised the importance of decriminalisation of abortions worldwide. In its 2019 General Comment No. 36 the committee strongly recommended doing away with any criminal sanctions on pregnant women and health care providers in cases of voluntary abortions. The committee specifically spoke of the dangers of criminalising unmarried pregnancy due to stereotypes and stigma as the same pushes adolescent girls and women to resort for back-alley abortions.[9]

> *"….restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the International Convention on Civil and Political Rights, discriminate against them or arbitrarily interfere with their privacy."*[10]

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6 Mahima Katal, "Women's Right or Crime? The debate and where India stands", Zee News, *available at:* https://zeenews.india.com/india/abortion-womens-right-or-crime-the-debate-and-where-india-stands-2506862.html (last visited on December 29, 2023)

7 UNFPA Division for Communications and Strategic Partnerships, "State of World Population Report 2022: Seeing the Unseen, The Case for Action in the Neglected Crisis of Unintended Pregnancy" (March, 2022)

8 Ryo Yokoe, Rachel Rowe *et.al.*, "Unsafe Abortion and Abortion-Related Death Among 1.8 million Women in India", 4(3) *BMJ Global Health* 1, 11 (2019).

9 United Nations Human Rights Committee, General Comment No. 36, (n 23) para 8 (2019); World Health Organisation, *Safe Abortion: Technical and Policy Guidance for Health Systems* 94 (2nd edn., 2012).

10 Human Rights Committee, General Comment No. 36 (2019).

The Committee on the Elimination of Discrimination against Women characterised forced continuation of pregnancy as well as criminalisation of voluntary miscarriages as gender-based discrimination and violative of the Convention on Elimination of All Forms of Discrimination Against Women ("**CEDAW**").[11]

The UN Special Rapporteur on Health noted that "*criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realisation of women's right to health and must be eliminated.*"[12] Herein, it is of utmost importance to highlight that there is an undeniable connection between women's right to dignity and autonomy and women's right to take a decision as intimate as reproductive choice. Denying women the right to individually make this choice without state interference hampers her basic human right to bodily autonomy.[13] The UN Working Group on the Issue of Discrimination Against Women in Law and in Practice has also urged states to ensure that legislative actions and policies regarding abortion should honour the pregnant woman's choice "*to make a judgment call regarding their reasons for not being able to continue the pregnancy.*"[14] Conditions like making third-party authorisations from courts and medical boards mandatory can lead to undermining the right to bodily autonomy.[15]

1.2. Interpreting Right to Abortion under the Constitution of India— A Judicial Perspective

> *"The MTP Act is an inadequate Act and only appears to have been designed to serve the interest of the family planning program."*[16]

The Supreme Court of India has elevated the right to reproductive autonomy to the status of right to life and liberty under Article 21 of the Constitution stating that the same includes "*reproductive choices ... to procreate as well as to abstain from procreating.*"[17] While the legislation presented with visible

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11 CEDAW Committee, *General recommendation No. 35 on Gender-based Violence Against Women, Updating General Recommendation No. 19*, UN Doc CEDAW/C/GC/35 (July 26, 2017), paras 18, 31(a); CEDAW Committee, General Recommendation No. 24, (n 25) paras 11, 14 as cited in Center For Reproductive Rights, "Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights" (2020).

12 United Nations General Assembly, "Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health", para 21, UN Doc A/66/254 (2011).

13 *Ibid*

14 UN Working Group on the Issue of Discrimination Against Women in Law and in Practice, "Position Paper on Women's Autonomy, Equality, and Reproductive Health in International Human Rights: Between Recognition, Backlash, and Regressive Trends" (October 2017) *available at:* https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf (last visited on December 16, 2023).

15 Office of the High Commissioner for Human Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),* E/C.12/2000/4 (August 11, 2000).

16 *R. and Another v. State of Haryana & Others*, 20 May 2016 (WP C 6733/2016)

17 *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1.

shortcomings, the judiciary has overtime attempted to serve a more liberalised interpretation by allowing abortions even post the 20 weeks or 24 weeks of gestational limit. Most recently, the Apex Court passed an ad-interim order allowing even a single and unmarried woman to terminate her 24-week term pregnancy which was the result of a consensual relationship between the pregnant woman and her partner.[18] Significant observations made by the Indian judiciary with regard to reproductive autonomy and choice have been quoted below to substantiate the need for a shift towards a more rights-based approach in the drafting of the law.

> *"[a] woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so.* ***If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health****."*[19]
>
> "*Pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make."*[20]
>
> "*A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health*."[21]

Opting for a welcome and liberalised approach the Delhi High Court recently allowed a woman to terminate her pregnancy of 23 weeks owing to her decision to separate from her husband and seek divorce.[22] Usually the opinion of the Medical Board is relied upon to allow termination of pregnancy when continuation of such pregnancy poses a threat to the life of the pregnant woman or the foetus. However, in this case Subramonium Prasad J. relied on the opinion of the medical board of the All India Institute of Medical Sciences

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18 *X v. The principal Secretary Health and Family Welfare Department & Anr*., 2022 LiveLaw (SC) 621

19 *High Court on its own Motion v. State of Maharashtra* 2017 Cri LJ 218 (Bom HC)

20 *Ibid*

21 *Ibid*

22 *Mrs. B. v. The Union of India and Anr*, 2023 LiveLaw (Del) 997

(AIIMS) which stated that the foetus was absolutely normal and pregnancy was at this stage normal too and safe to be terminated. The bench had considered the pregnant woman's plight who was suffering physical and mental assault at the hands of her husband.

1.3. Analysing the Medical Termination of Pregnancy Act, 1971 (Status of Pre-amendment Law)

The MTP Act does not mandate abortion for all women in all circumstances. The Act originally entailed that abortion is permitted only when the length of the pregnancy does not exceed twelve weeks (in case of opinion of **one** medical practitioner) or exceeds twelve weeks but does not exceed twenty weeks (in case of opinion formed by at least **two** medical practitioners).[23] It laid down the following conditions[24] under which a woman could terminate her pregnancy legally:

- When the continuation of pregnancy poses a risk to the life of the pregnant woman or of grave injury to her physical or mental health.
- When there is substantial risk that if the child was born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.
- When pregnancy is alleged by the pregnant woman to have been caused by rape.
- When any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children. With respect to competency to consent, the act provides that in case of a woman below the age of 18 years or woman who though has completed the age of 18 years but is a lunatic, her pregnancy can be aborted only with the written consent of her guardian.[25]

It is important to note that for all abortions performed under the Act the consent of the pregnant woman is indispensable.[26] Under the Act pregnancy may be terminated only at government hospitals or other hospitals that have government approval for the purpose of this Act.[27]

1.3.1. *Tracing the need for change – decoding the inadequacies of the pre-amendment law*

a) Section 3 of the Act provides for abortion in case of risk and grave injury to the pregnant woman but omits to define the terms "risk" and "grave injury". This has created ambiguity in the interpretation of what would amount to a risk or a grave injury to the pregnant woman's mental and physical health. Determination of the gravity of injury and the extent of the risk have been left to be interpreted by the RMP without supplying adequate guidelines in this regard.

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23 The Medical Termination of Pregnancy Act, 1971, s. 3(2)
24 *Ibid*
25 *Ibid*, s. 3(4)(a)
26 *Ibid*, s. 3(4)(b)
27 *Ibid*, s.4

b) Explanation 2 appended to Section 3 of the Act provides relief to a woman whose pregnancy is caused despite the use of appropriate device or method of birth control. However, this relief has been made available only to a married woman. This implies that an unmarried woman above 18 years of age, though capable of giving consent for sexual intercourse, has been rendered incapable of exercising abortion in case of contraceptive failure. Thus, despite the broad-based provisions of the Act, it can be said that the legislature still has a long orthodox gap to bridge.

c) The 20 weeks stipulation for a woman to avail of abortion services under section 3(2) (b) was probably the most challenged part of the Act and has been at the center of various debates and cases. The problem is that this stipulation may have been reasonable when the section was enacted in 1971 but has since ceased to be reasonable today when technology has advanced and it is perfectly safe for a woman to abort even up to the 26th week and thereafter.

   The act failed to take into account that in many cases fetal abnormalities can only be determined after the 20th week. Moreover, in India, where many women do not have access to antenatal care, fetal abnormalities may only be detected during the first antenatal check-up late in the pregnancy. Thus, the 20-week ceiling results in unnecessary suffering and agony for women who obtain reports of any serious fetal abnormality after the 20th week. They are forced to go through painful deliveries that in the light of the information obtained they would otherwise choose not to go through. Such violation of informed reproductive choice, consent as well as reproductive autonomy is clearly arbitrary, harsh and discriminatory and violative of Articles 14 and 21 of the Constitution of India.

d) Section 5 of the Act, which lays down an exception to the 20-week rule only when "the termination of such pregnancy is immediately necessary to save the life of the pregnant woman." This phrase is unduly restrictive and arbitrary and violative of Articles 14 and 21 of the Constitution. It gives way to a very literal and narrow interpretation. The present interpretation by government hospitals and practitioners is that the abortion services can only be provided after 20 weeks in circumstances where, if the abortion were not done, the woman would surely die. Thus, it creates the necessity of waiting for the 'worst case scenario' with no regard for the woman's mental and emotional well-being which is an indispensable part of the expression "life". In the present scenario it is imperative that the term 'save the life of the pregnant woman' in Section 5 of the MTP Act be read to include the protection of the mental and physical health of the pregnant mother after 20 weeks of gestation, especially in cases where any serious abnormalities in the fetus are detected after the 20th week of pregnancy.

Even though the Supreme Court and the High Courts have over time expanded the abortion jurisprudence and granted abortion post 20 weeks' gestation, the fact that women are required to move the court in order to move forward with the abortion illustrates the need for an improved system as abortion is a 'time-sensitive' matter. More often than not, the pregnancy

advances while the decision remains pending in the court. Cumbersome procedures and time taking evaluations further delay a termination, which was safe to begin with but by the end of the proceedings becomes precarious. These factors ultimately encourage desperate women whose case falls beyond the MTP act to seek unsafe abortions from untrained medical personnel in shady, unhygienic conditions which puts thousands of women at risk.

2. Appraisal Of The Medical Termination Of Pregnancy (Amendment) Act, 2021

In 2021 the Government of India passed the Medical Termination of Pregnancy (MTP) Amendment Act, amending the nation's 50-year-old abortion law with the aim to meet the challenges and inadequacies as discussed in the previous part of this research. While the amendment act is welcomed for its liberalised take on abortion by unmarried women as well as prescription of increased gestational limits, the law nevertheless fails to keep pace with the ever-evolving social advancements in the country as the 'rights' or 'choice' based approach continues to be missing from the law. The intent behind the original act as well as the amendment is founded in exemption from criminal liability based on specific grounds rather than a simpliciter idea of 'choice' and 'autonomy'.

The key features of this amendment act have been discussed below:

a) Gestational Limit and Opinion of RMP:

Unlike the original Act, the Amendment Act prescribes that for an abortion upto 20 weeks the opinion of only one RMP suffices and for abortion in case of 20 – 24 weeks gestational period the opinion of two RMPs will be required. In both cases, termination is permissible on the grounds that the continuation of the pregnancy would result in:

(i) a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) a substantial risk that the child that would born would suffer serious physical or mental abnormality.

Where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks abortion is permitted only in case of the following categories of women:

"(*a) survivors of sexual assault or rape or incest; (b) minors; (c) change of marital status during the ongoing pregnancy (widowhood and divorce); (d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)]; (e) mentally ill women including mental retardation; (f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and (g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government*." [28]

b) Legislative Recognition of Medical Boards:

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[28] The Medical Termination of Pregnancy (Amendment) Rules, 2021, Rule 3B

A pregnancy may be terminated even beyond 24 weeks in cases of substantial foetal abnormalities diagnosed by a Medical Board which make it imperative to discontinue the gestation. The law mandates that every State Government or Union territory shall constitute a a Medical Board for the purposes of this Act via a notification in the Official Gazette. The members of the Medical Board so formed include :— (a) a Gynaecologist; (b) a Paediatrician; (c) a Radiologist or Sonologist; and (d) such other number of members as may be notified by the Government of the State or Union territory.[29]

c) Expanding the Scope of the Act to Unmarried Women:

Under the pre-amendment regime, failure of contraception was allowed as a ground for termination of pregnancy only in the case of "married woman or her husband". This stipulation has been relaxed by the amendment by allowing "any woman or her partner," to terminate pregnancy in case of failure of contraception. This is a welcome step that accommodates unmarried women in consensual adult relationships.[30]

d) Medical Abortion Timeline Increased to Nine Weeks of Gestation:

Another welcome step of the amendment act has been the increase in the gestational limits for "medical abortion" i.e., abortion undertaken by administering government approved pharmacological drugs. The upper gestational limit has been increased from seven weeks to nine weeks.[31]

2.1. Critically Analysing the Changes Introduced in light of Continuing Barriers to Accessing Safe Abortions in India

Though as per its objective statement the 2021 amendment has been introduced in the interest of "*dignity, autonomy, confidentiality and justice*" for pregnant women, as well as their "*safety and well-being*", it is clear to see that the Amendment Act falls short in securing wholesome abortion care for women due to the following reasons:

a) Failure to Accommodate a 'Rights-based Law Reform':

One of the most problematic aspects of the Law on Abortion was its very fundamental approach towards the idea of 'right to abortion'. What is often discussed as a right is in fact never been conceived as such by the Law. The Law simply creates its foundation as a '*provider protection law*'. This is because even the amended act fails to decriminalise abortion and the act of abortion as an offence continues to remain in the criminal law statute. As a result, what the Indian abortion law does is it protects the RMP from prosecution and as such the law is not rooted in reproductive autonomy. Access to abortion is not at all claimed as a matter of right of the pregnant woman. Thus despite the progressive exterior of the Law, the procedure of abortion in India essentially relocates the power of choice from the pregnant woman to the RMP giving the latter great discretion in determining whether or not pregnancy is to be terminated. Recently, WHO released its Abortion

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29 Medical Termination of Pregnancy (Amendment) Act, 2021, s. 3(2-C)
30 Ibid, s. 3, Explanation 1
31 The Medical Termination of Pregnancy (Amendment) Rules, 2021, Rule 4 (ca)

Guideline of 2022 in which the organisation made the following recommendations[32]:

- Absolute decriminalization of abortion
- Removal of access to abortion based only on technical grounds
- Provision of abortion on demand
- Removal of gestational limits
- Removal of mandatory waiting periods to access abortion.

b) Failure to Recognize Self-managed Medication-based Abortions:

Though the Amendment Act recognises advances made in medicine it nevertheless fails to include within its purview the idea of self-managed abortions which have been advocated by the WHO. It is important to note that a significant development which has taken place in the domain of medical termination of pregnancy is the move from surgical abortions to medicine based abortions. The MTP Amendment Act, 2021 acknowledges this shift by defining termination of pregnancy as both medication and surgical abortions.[33] However the Act does not make any mention self-management of abortions using MA drugs which has been characterised to be safe for up to 12 weeks of pregnancy.[34] On the contrary, MTP Amendment Act, 2021 continues to require all abortions to be performed by RMPs within recognised facilities only.[35] It was previously proposed that the provider base under the Act should be expanded by liberal construction[36] however, in the final version of the Act it is seen that RMP at the very least should be a duly qualified doctor, having some training in obstetrics and gynaecology. Furthermore, even though medical abortions have been allowed by the Act up till 9 weeks there is scope for increasing this limit to 12 weeks in accordance with advancement in technology and public health standards.

c) Failure to Meet Infrastructural Barriers to Accessing Safe Abortions:

The Amended Act has also focuses only on abortions to be conducted in recognised facilities. As a result, the need for private facilities to acquire specific approvals under MTP Act sets the abortion procedure apart from other medical procedures thereby creating an added layer of regulation. It is difficult to acknowledge the importance of such strict regulation for a procedure like abortion which is otherwise considered safe in comparison to many other complex medical procedures which may be undertaken by establishments

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32 Centre for Reproductive rights, "WHO's New Abortion Guideline: Highlights of its Law and Policy Recommendations (March, 2022) *available at*: https://reproductiverights.org/wp-content/uploads/2022/03/CRR-Fact-sheet-on-WHO-Guidelines.pdf (last visited on December 29, 2023)

33 Medical Termination of Pregnancy (Amendment) Act, 2021, s. 2(e)

34 World Health Organisation, "WHO recommendations on self-care interventions: Self-management of Medical Abortion, 2022 update" (Human Reproduction Programme, 2022)

35 Medical Termination of Pregnancy Act, 1971, ss. 3-4

36 Under the MTP Amendment Bill, 2014, s. 2(d) was proposed to be re-drafted to include allopathic as well as non-allopathic healthcare service providers, as well as duly qualified nurses and Auxiliary Nurse Midwives (ANMs) as abortion service providers.

without getting any such specific government approvals. It appears that the objective behind these added layers of regulation is not to protect women's health but to curb abortions in general.

d) The Counter-productive Recognition of Medical boards as Additional Third-party Authorisation Requirements:

Section 3 (2-D) of the now amended Act has provided statutory recognition to medical boards. This mechanism of additional third party authorisation requirement has previously led to delay in relief with gestational period continuing in a time sensitive matter. Moreover, the Act does not provide specific clarity on whether the pregnant woman can approach the medical board directly or if she requires such consideration of the board to be directed by the Courts as it was done earlier. Furthermore, Section 3(2C) of the amended Act mandates the establishment of 'a board' implying establishing only one board for an entire state or union territory. A natural consequence of this provision is the range of access issues that will be faced by underprivileged women or women living in remote areas of a state. Additionally, the law does not even give any clear guidelines on terms and conditions of board referrals and board's decision making. Such institutionalisation of third-party authorisations again reflects the transfer of decision making power from women to other stakeholders in cases of abortion.

e) Failure to Meet Psychological Barriers to Accessing Safe Abortions:

The spirit of the MTP Act continues to stay rooted in the criminalisation of abortion as legal abortion is allowed only if women fall within a certain 'exception' as laid down in the Act. This exception-based model comes with a hierarchy of its own based on what is considered a good reason to abort and what may be considered as a bad reason to want to abort. This is particularly problematic in the context of the amended Act which now permits abortion at any gestational stage only when a medical board finds "substantial foetal anomalies".[37] A far more reasonable model appears to be to decriminalise abortions and allow the pregnant woman to make their reproductive decisions based on their own personal, financial and social circumstances.

3. Conclusion And Suggestions:

Based on the analysis given above a common theme in the string of continuing problems with the abortion law of India is the shift in decision making power from the pregnant woman to the RMPs. In this context, the MTP Act allows RMPs to control pregnant women's reproductive choices.

> "*If a woman is suggested abortion because of foetal abnormality, the doctors do it easily; there is absolutely no difficulty at all. They do it at any point of time irrespective of gestational age. ... The problem is only when the woman herself says she does not want the child. Then there is more problem, if she decides herself. If the doctor suggests because of abnormality or because it is*

[37] Medical Termination of Pregnancy (Amendment) Act, 2021, s. 3(2B).

affecting her health or mental health then it is fine. It is only an issue when she decides herself."[38]

In October 2023 a special bench of the Apex Court delivered a split verdict in a case involving the question of termination of a 26 week long pregnancy of a woman who had successfully proved before the bench that she was suffering from post-partum psychosis after the birth of her first two children and was thus in no condition to bear this third pregnancy. While the medical board informed the court that the foetus was normal and pregnancy was safe to terminate, the bench which had initially allowed the termination later landed in a split verdict. This was because Hima Kohli J. stated that her *judicial conscience* did not permit allowing the abortion while B.V. Nagarathna J. reasoned that the woman's reproductive autonomy was paramount and abortion should be allowed as refusal would amount to forcing the pregnant woman to undergo mental trauma. The matter ultimately reached a three judge bench which finally decided to dismiss the petition and the termination of pregnancy was not allowed on the ground that it would violate Sections 3 and 5 of the Medical Termination of Pregnancy Act.[39] In addition to foetal abnormalities, subjectivity in decision making or moral policing is also witnessed in terms of abortions requested by unmarried women as well as cases of family planning or spacing between children.

"Unmarried pregnancy is the illegal pregnancy and in such cases we have to give police information. We have to give, no? How will you manage the illegal at a legal place? This is a government institution and is a legal place. Here any illegal case has to be reported to the police. We have also studied a subject on forensic medicine. We also know a lot of sections [of the law]. In this case, unmarried is illegal, no?"

— An anonymous health care provider based out of a community health centre in Ranchi, Jharkhand.[40]

In light of the above, the researchers have summarised their suggestions as follows:

a) Decriminalisation of Abortion

It is important to view abortion as a woman's right or a health care right rather than an exception to a criminal prosecution. By decriminalising abortion, India will be able to provide its women with a safe space for abortion wherein the pregnant woman, service provider and other accompanying persons will be free from the fear of a legal process and can safely participate in a voluntary procedure of termination of pregnancy.[41] This will help meet various psychological barriers to access of abortion.

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38 Aparna Chandra Mrinal Satish *et.al.*, *Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study* 37 (National Law School of India University, Bengaluru, 2021)

39 *X v. Union of India*, 2023 LiveLaw (SC) 840

40 *Ibid*, Interview with a medical officer in-charge of a community health centre in a rural district in Jharkhand

41 *See* generally, Alka Barua, Payal Shah, "Technical Guidance: Decriminalisation of Abortion" (Safe Abortion Advocacy Initiative Global South Engagement, 2021)

b) Strengthening of the Public Healthcare System

There is a need to strengthen the public health care system in order to make abortions more accessible, affordable and acceptable. We must as a community also weigh in and focus on dispensing quality information on abortion services. Millions of women undergo abortion every year many of whom are pushed to opt for back-alley abortions due to inability to afford safe and legal abortion care. Around 10% of all maternal deaths in India occur due to unsafe abortion.[42] Unsafe abortion also leads to significant maternal morbidity.[43] In light of the same it is imperative that the public healthcare system is robust enough to avoid any institutional delays and make abortion services available to all.

c) Managing Over-Regulation

The amended abortion law must take note of the advancements made in medicine and accommodate the same when drafting the law. Self-managed abortions up to 12 weeks should be incorporated in tune with the WHO's recommendations. Moreover, the legislature must consider bringing down the layers of over regulation of MA drugs and deviate from a very strict facilities-based approach or RMP-centric law. It is advised that when such added layers of regulation are missing in other far more complicated medical procedures then we must consider doing away with them for abortion as well.

d) Removal of Requirement of Mandatory Reporting of Sexual Activity of Minors under the POCSO Act

The POCSO Act makes it mandatory for doctors to report to the police any offence committed or likely to be committed under the Act. This leaves minor girls with only one of three choices— they can either opt for abortion under the MTP Act which means they open themselves up to prosecution under POCSO or the minor girl can opt for an abortion outside of the MTP Act at an illegal healthcare facility or the last option is to simply carry the pregnancy to term. The mandatory reporting also impacts the RMPs who are then forced to choose between the mandatory reporting under POCSO as well as their ethical duty to maintain their patient's confidentiality. In summary, the MTP Act, with its amendments, is more likely to respect women's reproductive rights, but the implementation of the law and its translation into practice continues to keep abortion inaccessible in India. In this reference, it is submitted that the judiciary has a crucial role to play in cautiously interpreting cases seeking right to abortion on a case to case basis in order to ensure that women's bodily autonomy is not compromised. Moreover, while we have been dedicatedly working towards making abortions safer in India the challenge posed by inherent societal inequalities cannot be ignored. There is a disproportionate negative impact on women from rural areas who are socially

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42 Ann Montgomery, Usha Ram *et.al*., "Maternal Mortality in India: Causes and Healthcare Service Use based on a Nationally Representative Survey" *PLoS One* (2014)

43 Susheela Singh, Lisa Remez, et.al. (eds.), *Methodologies for Estimating Abortion Incidence and Abortion-Related Morbidity: A Review* (Guttmacher Institute; and Paris: International Union for the Scientific Study of Population, 2010)

and economically disadvantaged, often married young, facing gender discrimination and pushed to sex-selective practises. These factors make access to safe abortions even more difficult for them. Thus, the legislature must attempt to tackle the root causes of gender discrimination and son preference in the country as these efforts go hand in hand with the cause of access to safe abortions for all women in India. Additionally, access to information is also a powerful tool that should be used robustly when it comes to helping women understand their rights and exercise better control over their reproductive autonomy.

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Navigating Boundaries of Refugee Protection Laws in India and Internationally: An Analysis of International Refugee Protection Laws

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Abstract

Amidst the ongoing Israel-Palestine conflict and the escalating tensions in Russia-Ukraine, global attention is riveted on the profound challenges faced by refugees worldwide. The savagery these refugees have endured surpasses the darkest nightmares of many. The anguished cries of these victims of war often fade into the background of international politics, security concerns, and economic considerations. Despite the global acknowledgment of the various atrocities suffered by refugees, the international stage struggles to fortify the rights to protection, asylum, and non-refoulement. The paper delves into an analysis of the seventy-year-old convention, subsequent protocols, and their contemporary relevance. Addressing the broader dilemmas surrounding the effectiveness and success of regional mechanisms in combating inhumane treatment, the paper explores the refugee situation arising from the Russia-Ukraine war. Scrutinizing Asia's dissent to the convention becomes the focus of another section, while attention is turned to India's bureaucratic landscape in a discussion of the Constitutional Amendment Act of 2019, the Push-back strategy, and judicial responses. The paper concludes by proposing a strategic approach for India and Asia – one less susceptible to criticism or resistance due to concerns about hidden agendas by individual states.

Keywords: CAA, Refugee, Russia-Ukraine, 1951 Convention, India.

Introduction

While interviewing for her new book[1], Nandita Haksar- a lawyer who won significant number of battels for refugees told a heart wrenching story of

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when she met a refugee from Darfur, outside the UNHCR Office, Delhi. He very politely expressed the worst tragedies of his life simply by saying "I saw my five brothers murdered before my eyes, my mother and sisters are still in camps". He came to India thinking life here would be as colourful as he saw in the Bollywood songs. But, passing by him no one could ever make account of the brutalities he suffered.[2]

Ideally, world is common home for all, yet refugees from different countries, remains uncertain for their status. The term "refugee" was coined to protect and provide relief to the civilians, displaced due to armed conflicts. The cultural and bureaucratic ramifications of refugee laws have not hitherto ensued any consistent policies or ethical resolutions. The epitome of international legislation on the issue is held by 1951 Convention, which was uniquely drawn to shelter the seekers. The focus of this Convention was albeit originally restricted to the Europeans who ended up being refugees owing to range of disturbances that transpired earlier to the beginning of 1951. However, the 1967 Protocol rendered the measures of this Convention relevant to every Refugee, consequently ensuring worldwide enforcement by member states.[3] To begin with, the fundamental provision of the 1951 Convention defines "refugee" as an individual fleeing his own nation "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".[4] It bars discrimination on the basis of race, religion and national group between refugees.[5] The Convention obligates the state to allow refugees access to employment, the convention also recognises self-employment and practising of liberal professions.[6] It upholds the right of legal remedy to the extent that assistance to a refugee must be at par with that provided to a national. In spirit of Article 26 of *Universal Declaration of Human Rights* the convention mandates provisions of education, housing and rationing.[7] The pivotal provision of non-refoulment obligates a state party to restrain from deporting a refugee back to his native country where he has substantial fear of persecution.[8] This principle has also been accepted as a customary international law, mandating its practice by even those nations who are not a party to the convention. Further, imposition of penance for illegal entry is downright prohibited. However, it can be argued that these provisions are mediocre and hardly provide naturalization and assimilation

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1 Nandita Haksar, *Forgotten Refugees: Two Iraqi Brothers in India* (Speaking Tiger, Bengaluru, 2022).

2 Pragya Singh, *Rights Activist Nandita Haksar on Seeing India through the eyes of its Refugee*, The Leaflet, Held on April 26, 2022 available at https://theleaflet.in/rights-activist-nandita-haksar-on-seeing-india-through-the-eyes-of-its-refugees/ (last visited on 12.03.2023)

3 S.S. Jaiswal, '*Standards of Refugee Protection: International Legal Framework and European Practice'*, SML Law Review Journal 124 (2018).

4 The United Nation Refugee Convention, 1951, art. 1(A)(2).

5 *Id*., art. 3.

6 *Supra* note 4, art. 17-19.

7 *Supra* note 4, art. 20-22.

8 *Supra* note 4, art. 33.

required in 21st century. Firstly, the definition of "refugee" provided is very narrow and does not entail in its ambit those fleeing from external aggression, climatic disasters and the likes. Next, the basis of non-discrimination is exhaustive, which provides a leeway to discriminate based on gender/sexual orientation. The nefariousness practised on women during the war to the extent of a woman being raped publicly cannot be unseen yet is completely disregarded. The Convention completely ignores the third gender community, their needs have been completely neglected.[9] Through judicial interpretations and the 'immutable characteristics' theory homosexuality and associated fear of concealment of identity has started to be recognized yet is non-binding. Further, assigning excessive sway on distinctness in LGBT+ asylum requests to indicate membership of a particular social group may be held opposed to the fundamental principles of refugee law.[10] The haze concerning the threshold of persecution is a matter of grave concern as varied interpretations lead to injustice.[11] Further, the vagueness of present provisions allows state parties to digress and farther diminish the standards of support granted. Hence, it can be said that the Convention does not cater to the changing dimensions and varied discords of the new age.

Regional Measures

Common European Asylum System

The necessary foundational basis to CEAS was provided by the 1951 Convention, in order to lay down with additional specificity, the procedure for permitting refuge. The Council of the European Union enforced the Qualification Directive (herein after QD) in April 2004, wherein the term refugee was broadened to take in individuals who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".[12] This definition of refugee was first brought out by the Organization of African Unity (herein after OAU). The directive integrates refugee and ancillary security to establish a general EU definition. In the QD international protection includes ancillary protection in addition to refugee status[13].

It is essential that the broadened meaning of international protection encompasses ancillary security, accessible to an individual who is a "third-

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9 Shriya Kamat and Priyal Singhal, *"We're Here and We're Queer" - A Critical Appraisal of LGBT+ Protection within the International Refugee Paradigm*', National Law University Institute Law Review 120 (2020).

10 *Amanfi* v. *Ashcroft* 2003 3d Cir. 328 F.3d 719; *In Re Acosta*, 1985 BIA 19 I.&N. Dec. 211.

11 Rashi Singh, '*Law, Policy and Practice of Refugee Protection in India: the Benefits and Roadblocks*', Kalinga Institute of Industrial Technology Student Law Review 41 (2015).

12 The European Union Council Directive, 2004, art. 2 (c).

13 Nicholas F Palmieri, '*The Responsibility to Protect*', Willamette Journal of International Law and Dispute Resolution 42 (2019).

country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm". A clause regarding perpetrators of severe hurt or persecutory acts is also included in the QD.[14] The clause lists 3 potential perpetrators, including the government, associations that govern the Nation, and occasionally external parties. The QD further maintains that protection from persecution or severe harm ought to be reliable and perennial in form.

In 2013, the Asylum Procedures Directive (herein after APD) had been revised. In accordance with the QD, the APD aims to create uniform processes for rescinding international protection. The APD renders it obligatory that every time a third world country citizen is inclined to request for international protection, regardless of his existence in detention centre or border posts, the members states of European Union (herein after EU) are bound to offer that individual details pertaining to the procedure and guidance for application.[15] The seekers also have the capacity to stay in the member nation in question until a ruling is rendered on their case. The members states have to guarantee that such request is appropriately investigated by the established jurisdiction to do so independent of the time taken by the applicant for applying, and the deciding jurisdiction has to make certain to practice principles of natural justice.[16] Ruling body will decide preliminary eligibility for subsidiary protection status when the individual applying does not meet the requirements for refugee status. The individual shall be personally interviewed by the deciding body before a conclusion is reached. However, in some situations where the individual's medical condition prevents a personal interview, the deciding body can opt not to schedule the examination.[17] The applicant must be informed in writing of the ruling regarding their application for refuge. If the application is denied, the written communication must include the factual and legal justifications for the ruling as well as the steps in order to contest the order.[18]

Individuals are guaranteed the availability of shelter, nourishment, wellness, employment, in addition to psychiatric and health maintenance, under the Reception Conditions Directive (RCD).[19] Reception Conditions are the entire array of provisions that the member states of the EU provide to applicants for international protection. Minors who qualify, are provided the same educational opportunities as citizens.[20] According to the RPD, the applicant for international protection must be given accessibility to work

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14 Supra note 12, art. 6
15 The European Union Asylum Procedures Directive, 2013, art. 6, 7.
16 *Id*., art. 14.
17 *Supra* note 15, art. 31.
18 *Supra* note 15, art. 46.
19 The European Union Council Directive on minimum standards for reception of asylum seekers, 2013, art. 5.
20 *Id*., art. 14.

within nine months of submitting their request, and this must be maintained until a definitive determination has been issued regarding the individual's status along with access to job-related training.[21] The three frameworks within the CEAS though provides a robust and stringent mechanism yet has its own short falls, which are discussed at 'Russia-Ukraine War' part of the paper.

Cartagena Declaration

Inspired by the OAU, Cartagena Declaration on Refugees was proposed by the Latin America. They further widened the scope the term "refugee" to include those who have fled their country "because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order". This definition has been appreciated globally.[22]

New York Declaration along with Global Compact on Refugee

The New York Declaration was embraced by the United Nations General Assembly in 2016 along with the Global Compact on Refugee (GCR) aimed to develop and promote crisis resolution to refugee movement and a seamless transition through viable strategies that contribute to the integration of both refugees and the regions which provide them protection.[23] The implementation of GCR is supported by the humanitarian ideals of empathy, unity, equality, and freedom as well as the importance of stability. The Comprehensive Refugee Response Framework (CRRF) is an extensive action system intended to make certain swift and effectively guided acceptance strategies and reinforcement for rapid and continuing needs (e.g., protection, health, education). It further offers support to national/local organizations as well as societies absorbing refugees expanded opportunities for durable solutions. However, the Compact's non-binding nature renders the complete system a failure.

Russia- Ukraine War

With the first anniversary of the war, Russia-Ukraine war has been triggering the largest refugee crisis of the century. Many more than 6 million citizens were forced to leave their homes in search of refuge.[24] The EU has granted Ukrainians the automatic right to stay and work throughout its 27 member nations for up to three years. Refugees are housed in reception centres if they can't stay with friends or relatives.[25] They are given food and medical care, and information about onward travel. They are entitled to social welfare

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21 *Supra* note 19, art. 16.

22 Jastram and C.M. Castillo, '*The Cartagena Process: 30 Years of Innovation and Solidarity*', Forced Migration Review 89 (2015).

23 UN General Assembly, *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (October 3, 2016).

24 "How many Ukrainian Refugees are there and where have they gone?", *BBC*, July 4, 2022, available at https://www.bbc.com/news/world-60555472 (last visited on 13.03.2023).

25 *Id.*

payments and access to housing, medical treatment and schools. Poland and Moldova with highest influx and highest proportion of refugees respectively has requested additional assistance to manage the crisis. The presence of CEAS in the region along with adjoining border have rendered EU nations preferrable by the Ukrainian Refugees. This new data shows a progressive trend by the EU when compared to the Syrian crisis.

However, this 'safe haven' has been practising racial discrimination even during such turbulent times. "The priority, it seems, is to provide refuge only to Ukrainians that fit Eurocentric standards".[26] Additionally, it is being widely reported that several individuals of colour (of Nepalese, Indian, and Somalian origin) were assaulted and attacked with sticks as they attempted to move across the border.[27] They have also suffered an identical aggression at the behest of their hosting nation, which has fuelled their prior rhetoric against immigrants and asylum seekers. These double standards tell a tale of mistreatment of Asian refugees by EU. Until very recently, it had also increased security to prohibit entry of seekers from Afghan and Iraq.

Internationally, the paradise island of Lesbos, a Greek island in borders of

Europe and Turkey is titled as 'the worst refugee camp'.[28] The camp is horrifically overcrowded and plagued with disease and acts of violence. Children of a mere age of ten have attempted suicides. Conditions are appalling, there are 70 people per toilet and sewage system does not work properly. One litre of water is supplied per person for 24 hours.[29] The reality of these camps is absolute restriction to employment and education. The good on paper provisions have no bearing on the reality. The press release of International Criminal Court against Putin, the Russian President is based on the grounds of illegal deportation of children from the occupied parts of Ukraine and on the atrocities, he has been committing with the full-blown invasion in Ukraine.[30] The authority of this release is Rome statute. If this arrest warrant is executed and the war subsides, it would be a really big win for the million of people suffering and a sigh of relief for the world. It has been alleged that Russian Commissioner for child rights is also wanted for the same crimes

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26 EU's policy for Refugee towards Ukraine exposes its double standards, available at https://theleaflet.in/eus-policy-towards-refugees-from-ukraine-exposes-its-double-standards/ (last visited on 14.03.2023)

27 "Russia Ukraine invasion: Indians are braving war to study in Ukraine", *BBC*, March 16, 2023 available at https://www.bbc.com/news/world-asia-india-64973574 (last visited on 16.03.2023).

28 BBC News, '*The worst refugee camp on earth*', 2020, available at https://www.youtube.com/watch?v=8v-OHi3iGQI .

29 *Id*.

30 "International Criminal Court issues arrest warrant against Vladimir Putin for war crimes in Ukraine", *Bar & Bench*, available at https://www.barandbench.com/news/international-criminal-court-issues-arrest-warrant-against-vladimir-putin-for-war-crimes-ukraine (last visited on: 18.03.2023).

by ICC and must be brought to face justice.[31] This move of ICC is unconventional as traditionally warrants are kept secret. However, this time an international lesson was the object. The execution of this order is uncertain as Russia is not a signed member of ICC, but there still lies a possibility considering the Slobodan Milosevic's case who was tried for the war crimes in Croatia.

Asia's Dissent to the Convention

One of the main centres of the ongoing refugee problem involves Asia, particularly South and Southeast Asia. Even states that are signatories to the 1951 Convention failed to establish an internal or regional refugee strategy. The majority of the refugees sheltered here are safeguarded by their national constitutions or human rights laws, via ad hoc or extemporary regulations with support from the United Nations High Commissioner for Refugees (UNHCR).[32] Additionally, the region contributes to the increased refugees. As an example, the Convention's signatory and Asian superpower China has frequently impaired the Convention because of the persecuted Uyghur Muslims. China also upheld its agreement with North Korea by deporting the refugees over the non-refoulment principle. Being the strongest in the area, the major Asian powers i.e., Japan, China, Singapore, India, and South Korea have undertaken minimal efforts to shelter refugees and relieve the pressure on their neighbours. The impetus of such stand lies in the political objectives and social issues; the sense of sustaining a uniform community alongside xenophobia in addition to financial limitations have shaped the regulations.

The dissent to the 1951 Convention by the Asian region is also due to its "Euro-centric" nature.[33] This title was given to the Convention as before the 1967 protocol it was moulded to serve the European refugees and hence, disregards the Asian geographical constraints such as the unstable climatic issues, etc. The Indian scholars argue that a convention assembled for a specific race must not be accepted universally unless reformed to cater all.[34] Further, the region is highly developing, consequently managing the actions of refugee would be an added burden on the nations. Moreover, the employment of armed forces is as it is overbearing. Implementing a policy of developed nations to developing countries of Asian region can bring depression and food insecurity for all.

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31 Antoinette Radford & Frank Gardner, "Putin arrest warrant issued over war crimes allegations", *BBC* available at https://www.bbc.com/news/world-europe-64992727 (last visited on: 18.03.2023).

32 Atul Alexander and Antara Bordoloi, '*The Disproportionate Refugee Burden in Asia: Need for Regional Refugee Framework*', National Law University Odisha Law Journal 11 (2021).

33 Priya Anuragini, '*70 Years of Refugee Convention: Where are the Women?*', Dr. Ram Manohar Lohiya National Law University Journal 158 (2021).

34 B.S. Chimni, '*The Geopolitics of Refugee Studies: A View from the South*', Journal of Refugee Studies 11 (1998).

Indian Response to the Distress Calls

Although noteworthy India's open-door approach has the drawback of being primarily ad hoc and discretionary. Consequently, the absence of consistency in the protections and provisions granted to the various immigrants lead to arbitrariness. For instance, even though their status as refugees in India is unclear, Tamils from Sri Lanka have been recognized as such.[35] As a result, even within the same communities and groups, the policies that are so functioning lacking a rigid legislative system appear biased and unjust. It is significant to note that Tibetan refugees arriving in India after 1980 have been granted significantly fewer protections than Tibetans entering in India before 1980. The standard operating procedure to deal with the influx of refugees was published by the Indian government in 2011. These regulations give un-questionable power to the Central govt. for grant of Long-Term Visa after exercising unprecedented power of investigation.[36]

There are several international conventions that are being violated in the process. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obligates state to practice absolute restrain on inhumane treatment.[37] The Convention on Rights of the Child mandates security and equal treatment for child refugee,[38] along with obligation on states to act in their favour.[39] It bestows such children with the Right to life, survival and development,[40] and further grants the Right to be heard, etc.;[41] the International Covenant on Civil and Political Rights also grants the Refugees with several Rights and reaffirms the Right to protection against inhuman and cruel treatment, Right to liberty of movement, etc. anywhere they are granted shelter;[42] the International Covenant on Economic, Social and Cultural Rights ensures the Right to nominal means of survival along with maintaining health care and psychological growth along with other Rights like Right to education.[43] Uniformly, all Human Rights Conventions like-Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; etc. aim to ensure security to all. India has ratified all of these conventions but neglects its duty towards the refugees arguing to be a non-signatory to the 1951 Convention and 1967 Protocol to the extent that India absolutely lacks a

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35 Garima Tiwari and Ankit Dhotrekar, '*Refugee Protection in India : The Conundrum of Human Rights and State Sovereingity*', International Journal of Law and Public Policy, 1 (2019).

36 Press Information Bureau, Ministry of Home Affairs, Government of India, available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=108152 (last visited 16.03.2023).

37 United Nation Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

38 United Nation Convention on Child Rights, 1989, art. 2.

39 Id., art. 3.

40 Supra note 36, art. 6.

41 Supra note 36., art. 12.

42 International Covenant on Civil and Political Right, 1966.

43 International Covenant on Economic, Social and Cultural Rights, 1976.

"refugee" definition. It considers refuge seekers as foreigners, even after realising the vast difference between the two. The Delhi High Court, in order to remedy this lack has mandated consultation with the UNHCR of the Foreigner Regional Registration Office before issuing deportation of any refugee.[44]

The principal of non-refoulment under the Convention has been recognised as a crucial facet and a part of the International Customary law. Hence, because of direct border sharing with Myanmar and Bangladesh, refugees of the states thought to seek shelter in India. As earlier mentioned, India has had a largely discretionary approach to such requests. The Indian Courts have condemned this application of discretion and to correct the wrongs of its legislature, the Supreme Court have time and again recognised and given due respect to the principle of non-refoulment as a customary practice and upheld the right of Rohingya refugees against deportation.[45] In the poem "this matter" by Haymont, author expresses how merely eight minutes decided his status and consequently future life and living conditions based on the severities of past horrors.[46] However, several refugees are not even granted this luxury of eight minutes. It is widely accepted notion that not all refugees are able to approach the Apex judicature of the nation. The need for a stringent legislation thus materializes.

Push-back strategy

To exacerbate the issue, India is employing "Push-back" strategy. It has been remarked by the Indian Ministers that to manage the influx of refugee the best approach is to push them back and restrict their entry into the nation in the first place. The rationale for adopting this strategy is explained by stating that the obligation of non-refoulment only arises once the refugee is inside the territorial jurisdiction of the country further the process of investigation is strenuous and must be avoided at all costs.[47] To implement this policy, the Border Service Force has strictly directed to use stun bombs and *lathis*. The use of these chilli grenades severely violates the *jus cogens* of right to life and prohibition of torture. A similar act practised by Italy was labelled as clear violation by the European Court of Human Rights.[48] The ruling renders it abundantly evident that any interdiction strategy that denies refugees the chance to submit requests for refuge or pursue an appeal against their deportation will be in violation of the ECHR. Another concern of human right

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44 *Dongh Liam Kham & Anr.* v. *Union of India,* 226 (2016) DLT. 208.

45 *Malik Astur Ali* v. *State of Bihar*, 2012 SCC OnLine Pat 228

46 "This matter" by Haymont, available at https://www.freedomfromtorture.org/real-voices/six-refugee-poems-a-unique-insight-into-the-life-of-refugees-and-asylum-seekers (last visited on 13.02.2023).

47 Neeraj Chauhan, "Our policy is to push back Rohingyas and not arrest them: BSF", *The Times of India*, November 29, 2017, available at https://timesofindia.indiatimes.com/india/our-policy-is-to-push-back-rohingyas-and-not-arrest-them-bsf/articleshow/61847366.cms (last visited on 13.02.2023).

48 India pushing back Rohingyas at its border is gross violation of rights, available at https://theleaflet.in/india-pushing-back-rohingyas-at-its-borders-is-a-gross-violation-of-rights/ (last visited on 13.02.2023).

activists against this strategy is that the action is outside the scope of judicial review which violates the Basic Structure of the India Constitution.

Citizenship Amendment Act, 2019 and Refugee Issues

Along with the regional rationale for dissent to the Convention, India has a well-founded fear of national security in sheltering refugees for Islamic territories due to the constant attacks from its neighbour state Pakistan killing not just armed forces but also civilians violating the rules of International Humanitarian Law. Based on this fear, India came up with an amendment to its Citizenship Act in 2019. This highly criticised amendment violates not just all present international convention but also damages the *grundnorm* i.e., the Constitution of India. Founded on the principles of secularity, India has internationally claimed to be a nation accepting all religions but the current amendment essentially discriminates between refugees based on two classifications:

(i) Religion and
(ii) Country of origin

The amendment welcomes refugees who are Hindu, Sikh and Christian from Afghanistan, Pakistan and Bangladesh.[49] This purported intelligible differentia has no nexus to the object of the act. The act furthers the religion-based persecution and gives it a legal basis. This arbitrary provision is in violation of Article 14[50] and the Preamble of the Constitution.[51] The measure used to filter out refugees from infiltrators needs serious reconsideration. A blanket ban on the Muslim refugees gives an account of ignorance of the atrocities of Shia and Ahmadi minorities worldwide. The legislation is incapable of accommodating the current needs of the world as we witness the horrors inflicted on Ukraine. As religion forms an integral basis of an individual's identity and is an immutable marker of identity hence such classification falls foul of all legislations nationally and internationally based on discrimination.[52] To top it all, the choice of cut-off date up to December 31, 2014, has no rationale and the blend of NRC and CAA will further deprive millions from citizenship.

The judiciary's attempt to fill the lacunae of refugee legislation is well supported by the Constitution.[53] The Supreme Court of India ordered the authorities to safeguard the livelihoods and secure the well-being of the *Chakmas* who had fled Bangladesh due to oppression there in the case of *National Human Rights Commission* v. *State of Arunachal Pradesh*.[54] They couldn't be deported to their nation of origin because the *Chakmas* were granted the

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49 The Citizenship Amendment Act, 2019, s. 2.
50 The Constitution of India, art. 14.
51 *Id*.
52 Ten reasons why the Citizenship (Amendment) Act, 2019 is unconstitutional, available at https://theleaflet.in/ten-reasons-why-the-citizenship-amendment-act-2019-is-unconstitutional/ (last visited on 16.03.2023).
53 *Supra* note 47, art. 14, 20, 21, 22, 25, 26, 27, 28, 32, 51(c) and 253.
54 (1996) 1 SCC 742.

rights to life and personal liberty. The aforementioned case, along with *Louis De Raedt* v. *Union of India*,[55] established that everyone, including non-citizens, was covered by Art. 21 of the Constitution[56] and that the State was responsible for defending the life and liberty of every person residing on its land. However, there have been instances where Refugees were ordered to be deported by this Apex judicature of India. Moreover, the Supreme Court is yet to decide on the constitutionality of the amendment. This 'make-believe' existence of protection for refugee is not enough and the complete burden of their protection cannot be left on the judiciary. It is high time that legislature realises the gross violations of national and international commitments and acts upon it.

State of Indian Refugee Camps

UNHCR is responsible for ascertaining refugee status and issuing registration documents. As of August 2020, only about 19,000 of the alleged 40,000 Rohingya refugees settled in India had received such refugee documentation.[57] The protection team of the UNHCR office in India is more often than not missing in action. Current state of refugee camps at the heart of India, *Madanpur Khadar* in Delhi is yet another saga of torment. The language barriers and constant threats of deportation have restricted the number of ears for distress call. These camps have locked gates, restricted communications and cramped spaces. Almost every year due to floods, and other environmental issues refugees are dying. The situation has particularly deteriorated in recent years, the discrimination only begins with "they came from the camps" and is endless.[58] The *Sarairohila's* restriction centre houses 43 refugees and is guarded to ensure absolutely no access to the outside world. These camps are no less then jails.

The Way Forward

While world is awash of refugees, they continue to be in a state of legal limbo. The Convention and Protocol have ceased to be relevant in 21st century and the regional conventions selectively deal with the concern. It is clear that protecting refugees in Asia presents a distinct set of struggles. Enormous migrations and years of hosting countless refugees have posed a threat to national security and state authority. The Rohingya refugee catastrophe has highlighted the urgent need for a regional framework for refugees. India as a growing superpower must act as the leader it wants to be by initiating conversations on this regional agreement. The regional agreement must broadly define the term "refugee" to entail all who seek protection and should respect all religions and nations without any forms of discrimination. Further, provisions for atheists must be made along with third gender, catering to their

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55 (1991) 3 SCC 554.

56 *Supra* note 47, art. 21.

57 *Supra* note 46.

58 Priyagi Agarwal, "No toilets and tents that get flooded for Rohingya refugees", *The Times of India*, August 19,2022, available at https://timesofindia.indiatimes.com/city/delhi/no-toilets-and-tents-that-get-flooded-for-rohingya-refugees-in-delhi/articleshow/93647545.cms (last visited on 15.03.2023).

special needs. Since the area directly perceives the effects of the refugee influx, a regional framework could assist in easing hostilities brought on by the disparate division of refugees. Regional agreements can improve stability throughout. Second, regional mechanisms/actors are greater qualified than global frameworks because they have a deeper understanding of the area and are more capable to coordinate and modify refugee programs to meet regional needs. Thirdly, there is a higher chance that States will agree on a regional initiative. Nations can more effectively harmonize and standardize national laws and practices for refugee security with appropriate backing from the regional level. The regional mechanism may also fill in cracks in the overseas framework because it may be better equipped to address the underlying causes of problems and concerns. The increase of refugees, the monetary expense, and enhanced diplomatic cooperation among nations could all be addressed effectively and efficiently by regional efforts. Despite this, Regionalism should not, be viewed as the ideal response to the refugee concern. By reducing the number of resettlement sites outside the region, it has the potential to further divert blame from the West by causing inequalities in how refugees are treated throughout various regions.

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The Legal Framework for Promoting Green Inventions and Renewable Energy Sources: An Analysis

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Abstract

Intellectual Property Rights (IPR) play a crucial role in addressing environmental matters, especially in the areas of renewable energy, biodiversity, and climate change. The goal of IPR laws is to promote progress and improve human life, however, the negative impact of industrialization on the environment has been a hindrance. India can learn and adopt a program to accelerate the review of green technology applications and encourage innovation. With the use of Green Patents, India can address its environmental issues and promote sustainable growth. Hence, this paper emphasized on that on to combat this problem, IPR laws and its existing mechanisms must be utilized to ensure that carbon emissions decrease and environmental sustainability is achieved. Additionally, IPR, combined with environmental regulations and human rights, can work together to create solutions for renewable energy, biodiversity preservation, and mitigation of climate change. Further, the use of IPR in environmental matters is crucial in promoting innovation and protecting the rights of inventors while also ensuring the health and well-being of our planet.

Key words: Climate, Environment, Intellectual Property Rights, Renewable Energy, Green Technology

I. Introduction

Intellectual property rights (IPR) have been recognized as important in protecting and promoting innovation and creativity in various fields, including environmental matters. The role of IPR in environmental matters is complex and multifaceted, with both positive and negative impacts. On the positive side, IPR can provide incentives for research and development (R&D) of new technologies that can help to address environmental problems. For example, patents can provide exclusive rights to inventors and companies to develop and commercialize new technologies that can help to reduce greenhouse gas emissions, improve energy efficiency, or clean up pollution. This can help to encourage investment in R&D and bring new technologies to market more

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quickly. Additionally, trademarks and branding can be used to differentiate environmentally friendly products and services, which can help to promote sustainable consumption patterns.

On the negative side, IPR can create barriers to access to environmentally beneficial technologies. For example, patents can create exclusive rights to technologies that can be used to address environmental problems, which can make it difficult for others to use or improve upon those technologies. This can limit the spread of environmentally beneficial technologies and slow down progress in addressing environmental problems. Additionally, IPR can be used to restrict access to traditional knowledge and genetic resources that can be used to develop new technologies that can help to address environmental problems. This can be particularly problematic for indigenous communities and other groups that have traditionally relied on these resources. Hence, this paper tries to evolve over the question is that how do intellectual property rights (IPR) laws in India intersect with environmental concerns, particularly in relation to green inventions and the promotion of renewable energy sources?

II. Interface between IPR and Environmental matters

It is also important to note that the role of IPR in environmental matters is not only limited to the protection and promotion of environmentally beneficial technologies. IPR can also play a role in addressing environmental problems related to the management of natural resources, conservation of biodiversity, and protection of traditional knowledge. For example, IPR can be used to protect the traditional knowledge of indigenous communities related to the management of natural resources, such as traditional farming practices or medicinal plant use[1]. This can help to ensure that the knowledge of these communities is respected and protected, and that it is not misused or exploited for commercial gain.

Additionally, IPR can be used to protect the rights of creators and owners of cultural and artistic expressions that are related to the environment, such as traditional music, dance, and art. This can help to ensure that these expressions are respected and protected, and that they are not misused or exploited for commercial gain.

III. Legal and Policy Reforms

One example of legal reform is the use of the '*compulsory licensing*' mechanism, which enables governments to grant licenses to third parties to use patented technologies without the consent of the patent holder, under certain circumstances, such as when it is deemed to be in the public interest. This can be used to ensure that environmentally beneficial technologies are widely available and accessible to all. Another example of legal reform is the use of '*prior informed consent*' (PIC) and '*mutually agreed terms*' (MAT) mechanisms in

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[1] Intellectual Property Right and the Environment by Anil K Gupta, *Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/28023/Intellectual_Property_Rights.pdf?sequence=1&isAllowed=y* (Accessed on 10 Feb, 2023)

the Convention on Biological Diversity (CBD) which aims to ensure that the use of genetic resources and traditional knowledge is based on the informed consent of the communities that hold these resources and that they are fairly compensated for their use. This can help to promote sustainable use of genetic resources and traditional knowledge and to respect the rights of indigenous communities and other groups that have traditionally relied on these resources.

Indian Reforms

In India, there have been several legal and policy reforms implemented to address the impact of intellectual property rights (IPR) on the environment. Some examples include:

1. **The National Biodiversity Act, 2002**: This act aims to protect the country's biodiversity and traditional knowledge, and provides for the establishment of a National Biodiversity Authority to regulate the use of biological resources and traditional knowledge. This act also recognizes the rights of local communities over their traditional knowledge, and requires prior informed consent for the use of such knowledge[2].
2. **The Patents (Amendment) Act, 2005:** This act introduced several changes to the Indian Patents Act, 1970, with the main objective of making the patent system more accessible to Indian citizens and promoting the use of patents for environmental protection. The act introduced provisions for the grant of patents for new forms, new uses, and new methods of using known substances, and for the grant of exclusive marketing rights for new forms, new uses and new methods of using known substances.
3. **National Clean Air Programme:** This program was launched in 2019 by the Indian government to combat air pollution. It aims to reduce particulate matter pollution by 20-30% in 102 cities by 2024. It also focuses on strengthening monitoring, research and surveillance systems, and to engage with the state governments and other stakeholders to take specific and time-bound action to tackle the problem of air pollution.
4. **National Action Plan on Climate Change**: This plan was launched in 2008 by the Indian government to tackle the problem of climate change. It aims to increase the share of non-fossil fuel based electricity generation, to improve energy efficiency, to promote sustainable transportation, and to enhance carbon sequestration in forests, among other things.

These legal and policy reforms in India aim to balance the need for protecting the environment with the need for promoting innovation and creativity. They also help to ensure that access to environmentally beneficial technologies is not restricted by IPR and that the negative impacts of IPR on the environment are minimized.

IV Eco-friendly Inventions

In India, IPR protection has brought about major reforms in biotechnology industry, solar energy, E-waste recycling and even

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[2] The role of IPR in protection of biodiversity, *Available at*: https://www.iiprd.com/the-role-of-ipr-in-protection-of-bio-diversity/ (Accessed on 10 Feb, 2023).

Bioprospecting. IPR serves two purposes: protecting products made with raw materials found in biodiversity, such as furniture made with Kashmiri wood, and securing products that are derived from traditional knowledge, such as the use of Malabar pepper as medicine[3], which is protected by the geographical indications system.

Some of the innovations in India which were a boon to the environment preservation included[4]:

1. A Method for Bioremediation of Heavy Metal Polluted Soils: This patented invention developed by the Indian Institute of Technology, Bombay, uses microorganisms to remove heavy metals from contaminated soils. This technology can be used to clean up contaminated industrial sites and mine tailings, helping to preserve the environment and protect human health.
2. An Eco-Friendly Pesticide Formulation Based on Neem and Other Plant Extracts: This patented invention developed by the Indian Council of Agricultural Research uses a combination of neem and other plant extracts to create a natural pesticide that is effective against a wide range of pests, while being less harmful to the environment and human health compared to synthetic pesticides.
3. A Process for the Treatment of Municipal Solid Waste: This patented invention developed by the Indian Institute of Technology, Delhi, uses a combination of physical, chemical, and biological methods to treat municipal solid waste, including the separation of recyclable materials and the conversion of organic waste into compost.
4. Plastic waste roads - The Government of India has issued an order to use plastic waste in road construction after Professor Rajagopalan Vasudevan of Thiagarajar College of Engineering discovered that plastic could increase the longevity of roads and reduce deformities and potholes.
5. Ocean cleaning ship - The ERVIS, invented by 12-year-old Haaziq Kazi, is a ship that can suck out plastic waste from oceans and analyse and segregate the waste according to size. It also prevents waste from being disposed of by water vessels.
6. Edible bags - Entrepreneur Ashwath Hedge created EnviGreen bags, made of natural starch and vegetable oils, that can degrade naturally in 6 months or dissolve in water in a day.
7. Vertical garden walls - These walls not only beautify buildings but also help purify the air and provide insulation, reducing energy consumption.

With green technology comes green patents. Green Patents have been widely adopted and encouraged in countries like Brazil, Spain, Australia, Japan, Korea, Canada, UK, and USA. Brazil has a Green Patent Program that

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[3] Impact of IP on green technology innovation, *Available at: https://www.expertlancing.com/blog/impact-of-ip-on-green-technology-innovation/ (*Accessed on 10 Feb, 2023).

[4] Ten Clean tech inventions, *Available at: https://iptse.com/ten-clean-tech-inventions-that-could-save-the-world/* (Accessed on 10 Feb, 2023).

expedites the registration of environmentally friendly inventions. The agriculture sector in Brazil has greatly benefited from green technology. A multinational corporation called AGCO has focused on sustainable agriculture through digitization, seeking to conserve natural resources and reduce pesticide usage. Spain has an organization called TECAM that provides technology-driven solutions to mitigate environmental pollution[5]. The UK and USA have programs such as Green Channel and Green Technology Pilot Program to accelerate the review of green technology applications[6].

India can learn and adopt a program to accelerate the review of green technology applications and encourage innovation. India can also create organizations like those in Brazil and Spain to address environmental issues, encourage collaboration between corporations and organizations, and promote green technology. With the use of Green Patents, India can address its environmental issues and promote sustainable growth.

IV. Renewable Energy Sector

India is one of the largest energy consumers in the world, with a population of approximately 1.3 billion people. In the past two decades, energy use in the country has doubled due to rising incomes and population growth, which has led to an increased demand for energy in the transportation, construction, and appliances sectors. Despite the rise in energy use, per capita energy consumption in India remains less than 40% of the world average. The International Energy Agency's 2021 report shows that the energy mix in India has shifted towards renewable energy sources, with renewable electricity generation excluding hydro growing at 12% in 2020, compared to just 1.91% for thermal sources[7]. Renewable energy has the potential to play a significant role in meeting the energy demands of India, as per the Energy Statistics India 2021. The country has a high potential for renewable energy generation from sources such as solar, wind, biomass, small hydro, and cogeneration bagasse. The total potential for renewable energy in India is estimated at over 1 million MW, with the majority of it being attributed to solar power.

The growth of the renewable energy sector has also been reflected in the number of patents filed for renewable energy technologies. The World Intellectual Property Organization (WIPO) reports that the growth rate in renewable energy patents has been impressive over the past two decades, with a 547% increase from 2002 to 2012[8]. The majority of the patents filed relate to

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5 Maasoumi, E., Heshmati, A. & Lee, I. Green innovations and patenting renewable energy technologies. *Empir Econ* 60, 513–538 (2021).

6 Fast tracking green patent applications, *Available at : https://www.wipo.int/ wipo_magazine/en/2013/03/article_0002.html (*Accessed on 10 Feb, 2023)

7 Khurshid, A., Rauf, A., Calin, A.C. *et al.* Technological innovations for environmental protection: role of intellectual property rights in the carbon mitigation efforts. Evidence from western and southern Europe. *Int. J. Environ. Sci. Technol.* 19, 3919–3934 (2022).

8 Ananya Chattopadhyay, 'Role of IPR in Generation of Renewable Energy', *IJPIEL* (2022), *Available at:* https://ijpiel.com/index.php/2022/12/01/role-of-ipr-in-the-generation-of-renewable-energy/ Accessed on (10 Feb, 2023)

solar power, which has accounted for over half of the patents filed for renewables since 2009. Over 1140 patent applications for highly valuable green patents were submitted to the Indian Patent Office in 2013.[9] Further there were about 6000 patent applications for solar energy and 10,000 patents for renewable energy sources like wind, hydro, and solar thermal systems.[10] The most patents are for solar photovoltaic technology, followed by wind power. Improved energy storage technologies have been developed, and there has been an increase in the number of patents and the expansion of batteries and pumped storage. To encourage foreign companies to share technologies with India, the government must enforce stricter patent restrictions.

India is committed to the Sustainable Development Goals of the UN, with Goal 7 emphasising the provision of accessible renewable energy. To develop and implement new and renewable energy, the Ministry of New and Renewable Energy has started a number of initiatives along with NITI Aayog public policy think tank.[11] The COVID-19 pandemic has been a significant setback in India's recent energy development, according to the International Energy Agency. According to the CEEW, India will need to produce 83% of its electricity from renewable sources to achieve net-zero energy use by 2050.[12] The government must provide tax incentives and simple financing options to overcome barriers to the transfer of renewable technologies, which include transaction and assurance costs. The question of whether IP protection prevents the spread of technology at a faster rate in the field of renewable energy, particularly in developing nations, is up for debate. According to research, patents play a different role in the development of renewable energy technologies than they do in other industries, and innovation in this field frequently takes the form of small adjustments to already-existing, non-patent technology. On the other hand, a robust IP protection framework might motivate companies to spend money on R&D, licencing, and technological protection. The duty levied on goods intended to create an ecosystem for the production of renewable products needs to be addressed by the Indian government.

VI Technology transfer to developing countries

A study by Copenhagen Economics[13] on carbon emissions reduction found that various technologies can be used to reduce emissions, some of

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9 Shweta Khurana, Patenting in Renewable Energy Sector, 23 *JIPR 44-50 (*2018).

10 Ananya Chattopadhyay, 'Role of IPR in Generation of Renewable Energy', *IJPIEL* (2022), *Available at:* https://ijpiel.com/index.php/2022/12/01/role-of-ipr-in-the-generation-of-renewable-energy/ Accessed on (10 Feb, 2023)

11 Climate Change and Intellectual Property, *Available at: https://www.wipo.int/policy/en/climate_change/* (Accessed on 10 Feb, 2023).

12 Renewable Energy and patents in India, *Available at: https://www.legal500.com/developments/thought-leadership/renewable-energy-and-patents-in-india/* (Accessed on 10 Feb, 2023).

13 Copenhagen Economics, Are IPR a barrier to the transfer of climate change technology, (2019), *Available at: https://www.copenhageneconomics.com/dyn/*

which are low-cost while others are high-cost. The study found that the patent count on relevant technologies has rapidly increased globally, with 215,000 patent applications filed worldwide from 1998 to 2008, including 22,000 in developing countries. The difference between industrialised and developing nations is large but narrowing quickly. In a developing country, significant technology patents were protected by 1 in 5 in 2008(while 1/20 in 1998). The study found no proof that patents prevent the transfer of technology to underdeveloped nations. Also, it concluded that there is little evidence to support the claim that monopolistic market systems raise the cost of these technologies.

Improved patent protection can encourage domestic innovation and technology transfer in developing market economies that have the capacity to exploit cutting-edge technologies. Competition among patent owners benefits emerging market economies as well by preventing the need to pay exorbitant rates for patents[14]. The lack of technology transfer to low-income developing countries is not due to intellectual property rights, but rather due to other factors such as a lack of technical knowledge, market size, and purchasing power. Policies should focus on overcoming these barriers instead of providing subsidies for IPR-protected technology. It is more effective to support low-income countries in the overall economic burden of carbon abatement, while preserving the incentive to minimize costs.

VII Green washing

Greenwashing refers to a corporate action with the presence of misleading elements, focused on deceiving stakeholders about the organization's environmental or social responsibility. Greenwashing can be perceived and accused in several different ways, making it difficult for consumers to identify its manifestations. The Federal Trade Commission (FTC) in USA is responsible for protecting consumers by enforcing laws that ensure a fair marketplace. FTC offers several guidelines to prevent greenwashing, such as labelling a plastic package as "recyclable" without specifying which part is recyclable, or claiming that a product contains more recycled content than it actually does. By offering these guidelines and examples, the FTC aims to protect consumers from deceptive green marketing claims and encourage companies to provide genuine eco-friendly products[15].

India has no specific laws to rein in greenwashing. The Advertising Standards Council of India (ASCI) requires advertisements to be "legal, decent, honest and truthful", but then it is just a Code for Self-Regulation. As the green

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resources/Publication/ publication PDF/7/27/0/Are_IPR_a_barrier_to_the_transfer_of_climate_change_technology.pdf

14 Rod Falvey & Neil foster, The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence, *UNIDO W.P., V.05-91453—June 2006—600. Available at:* https://www.unido.org/sites/default/files/2009-04/Role_of_intellectual_property_rights_in_technology_transfer_and_economic_growth_0.pdf.

15 de Freitas Netto, S.V., Sobral, M.F.F., Ribeiro, A.R.B. *et al.* Concepts and forms of greenwashing: a systematic review. *Environ Sci Eur* 32, 19 (2020).

market is emerging and growing, it is important to identify and differentiate between truly sustainable products and those that are falsely marketed as sustainable.

1. IKEA: The Swedish furniture giant has taken various measures to reduce its environmental footprint, such as using renewable energy, sourcing sustainable materials, and promoting circular economy principles. However, some critics have accused IKEA of greenwashing due to its reliance on single-use products, such as packaging and disposable furniture.
2. Yes straws: This company offers eco-friendly alternatives to single-use plastic straws, such as bamboo, metal, and glass straws. By encouraging people to switch to reusable straws, yes straws aims to reduce plastic pollution in oceans and landfills. There is no evidence of greenwashing in this case[16].
3. APPLE: The tech giant has committed to using 100% renewable energy for its operations and products, reducing its carbon emissions, and promoting circular economy principles. Apple has also implemented various programs to recycle old devices and reduce electronic waste. However, some critics have accused Apple of greenwashing due to its supply chain practices and use of non-recyclable materials in some products.
4. EBAY: The e-commerce platform allows people to buy and sell used or second-hand items, thus promoting the circular economy and reducing waste. However, eBay has faced criticism for not doing enough to prevent the sale of counterfeit and harmful products on its platform, which could undermine its eco-friendly image.
5. IncrEdible: This UK-based startup aims to reduce food waste by using "wonky" or surplus fruits and vegetables to make healthy snacks and drinks. By diverting food from landfill and promoting sustainable agriculture, Incredible contributes to an eco-friendlier food system. There is no evidence of greenwashing in this case.

V Challenges and Ways ahead

Challenges as to greenwashing or compulsory licensing dilemma remains. IPR are focused on commercialisation of one's intellectual by products which does not necessarily account for environmental concerns. The short-term focus of IPR on commercial exploitation may lead to a focus on profits rather than long-term environmental sustainability[17].

Another challenge is the potential conflict between IPR and other environmental regulations and laws, which may lead to conflicting policy

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16 Ecofriendly brands that are saving the Earth, *Available at: https://yesstraws.com/blogs/news/eco-friendly-brands-save-environment (*Accessed on 10 Feb, 2023).

17 Satish Aher, Brij Lakaria & Balram Yadav, Limitations of Existing IPR in Managing Emerging Environmental Issues, 23 *JIPR 270-72* (2019).

outcomes and a confusing regulatory framework. The lack of public awareness about the role of IPR in environmental protection can also limit its effectiveness in addressing environmental issues. Furthermore,

Finally, enforcing compliance with IPR provisions can be challenging, especially in the case of large and complex technologies that may have numerous stakeholders involved. Despite these challenges and limitations, IPR remains an important tool for addressing environmental issues and promoting environmentally sustainable technologies and processes.

Here are some suggestions for necessary reforms in the Indian legal provisions and procedures related to Intellectual Property Rights (IPR) and environmental protection:

1. *Strengthening of Enforcement Mechanisms*: The Indian legal system could strengthen enforcement mechanisms for environmental violations, including those related to IPR, to ensure that companies that engage in environmentally harmful activities are held accountable for their actions.
2. *Promotion of Alternatives to Patents*: The Indian legal system could promote alternatives to patents for environmentally friendly technologies, such as open-source or open-access models, to encourage the dissemination and implementation of these technologies.
3. *Increased Cooperation between Regulatory Agencies*: The Indian legal system could increase cooperation between regulatory agencies, such as the Patent Office and the Ministry of Environment, to ensure that the regulatory regime is consistent and effective in promoting environmental protection.
4. *Patents for Environment-Friendly Technologies*: The Indian Patent Act provides for the grant of patents for inventions that are new, involve an inventive step and are capable of industrial application. Encouraging and granting patents for environment-friendly technologies can promote the development and use of sustainable technologies. The Indian Patent Office could integrate environmental considerations into the examination process for patent applications, to ensure that environmentally harmful technologies are not granted patents.
5. *Geographical Indications (GI) for Eco-Friendly Products*: Geographical Indications are indications used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. Encouraging GI for eco-friendly products, such as organic food or traditional handicrafts, can promote sustainable production practices and protect traditional knowledge.
6. *Copyright Protection for Environmental Literature*: Copyright protection can be extended to literature and other creative works that promote environmental awareness and education. This can encourage the production and dissemination of educational material on environmental protection.

7. *Trademarks for Sustainable Products:* Trademark protection can be used to promote sustainable products that meet certain environmental standards (Eg MAMAEARTH)[18]. This can help consumers identify and choose products that are environmentally friendly.
8. *International Cooperation on IPR and Environment*: International cooperation can be enhanced to promote the use of IPR for environmental protection. India can collaborate with other countries to share best practices and knowledge on IPR and environmental protection, and promote sustainable development globally.

By implementing these reforms, the Indian legal system can better balance the interests of protecting the environment and promoting innovation and creativity in the area of IPR. The reforms should be continuously evaluated and refined to ensure that the legal provisions and procedures remain effective and responsive to the evolving needs of society.

VIII Conclusion

In order to fully understand the role of IPR in environmental matters, it is important to consider the broader context in which IPR operates. This includes the economic, social, and political factors that influence the development and implementation of IPR laws and policies. The past 10 years have seen significant growth in the field of green technology, as evidenced by the increase in patent filings in areas such as climate change, geothermal energy, wind energy, and recycling. This highlights the importance of IPR in promoting innovation and growth in green technology. By analysing patent data, companies can find ways to improve existing technology and drive further growth in the field. Strong IPR rights provide scalability for the growth of green technology.

To conclude, Intellectual Property Rights (IPR) play a crucial role in addressing environmental matters, especially in the areas of renewable energy, biodiversity, and climate change. The goal of IPR laws is to promote progress and improve human life, however, the negative impact of industrialization on the environment has been a hindrance. To combat this, IPR laws and its existing mechanisms must be utilized to ensure that carbon emissions decrease and environmental sustainability is achieved. Additionally, IPR, combined with environmental regulations and human rights, can work together to create solutions for renewable energy, biodiversity preservation, and mitigation of climate change. The use of IPR in environmental matters is crucial in promoting innovation and protecting the rights of inventors while also ensuring the health and well-being of our planet.

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[18] Role of TM in promoting sustainability, *Available at:* https://www.mondaq. com/india/trademark/1164138/role-of-trade-marks-in-promoting-sustainability (Accessed on 10 Feb, 2023).

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Child Protection and Adoption: Deciphering India's Position to International Legal Standards

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Abstract

Adoption enables a child to enjoy family environment with parental care and protection. There are cases where a child born in one country is adopted by persons of another country. For ensuring protection of children during the transaction involved in inter-country adoption, international standards have been laid down to prevent trafficking and improper financial gains. India being party to international instruments dealing with inter-country adoption has enacted legal provisions relating to adoption of children under juvenile justice law. The discourse on India's position on international standards is pertinent to decipher the efforts undertaken for protecting children during inter-country adoption. Therefore, the present paper is an attempt on the part of the author to analyse the position of India in the context of international standards regulating child adoption.

Keywords: adoption, children, juvenile justice, protection, inter-country.

Introduction

Child adoption involves in being taken care of and protected by person who are not child's natural parents. The practice of adopting children has been vogue since ancient times and the procedure to be followed for child adoption has undergone tremendous changes**.** Children may be adopted in their birth country or they may be given for adoption by persons residing in other countries. The process through which a child born in one country and adopted by prospective adoptive parents who are nationals of another country is termed as inter-country adoption. In international sphere, legal standards have been formulated to regulate inter-country adoption of children. India has incorporated the legal procedure for inter-country adoption of children under the Juvenile justice law. The author in the present article aims to analyse and explore the Indian legal landscape regulating inter-country adoption of children in the context of international standards.

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Analysis of International Legal Standards on Child Adoption

United Nations Convention on the Rights of the Child (UNCRC), 1989 focuses on the human rights standards relating to the survival, protection, development and participation of children.[1] UNCRC stipulates that the best interest of the child should be the primary consideration in regard to all actions concerning children.[2]

UNCRC has contemplated situations where a child may be deprived of family environment and parental care. In order to provide care and protection to such children certain alternate measures which includes inter alia foster placement, kafalah, adoption or the placing of children, if needed in suitable child care institutions has been prescribed under UNCRC.[3] State Parties through their national laws are required to ensure alternative care for a child[4] who has been deprived of his or her family environment either temporarily or permanently or where it is not in the child's best interest to be permitted to stay in that environment.[5]

Child's best interest must be the paramount consideration for the States in which the system of adoption is recognized or permitted.[6] State Parties have to ensure that only competent authorities authorize the adoption of the child. Prior to such authorization competent authorities on the basis of applicable law, procedure and pertinent information are to determine that the adoption of the child is permissible having regard to the status of child in relation to parents, relatives and legal guardians.[7] Inter-country adoption as an alternative means for care of the child may be considered by the State Parties where the child neither finds placement with a foster or an adoptive family nor can be suitably cared for in his or her country of origin.[8] It has to be ensured by the State Parties that the safeguards and standards which are in existence with respect to adoption at the national level are accessible for enjoyment of the same by a child in case of inter-country adoption.[9] In inter-country adoption all appropriate measures are to be taken by the State Parties for ensuring improper financial gain does not occur for those who are involved in such placement.[10] UNCRC requires the State Parties to review their legislations relating to children so as to ensure that laws are in consonance with the provisions of the Convention.[11] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-

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1 Ian Brownlie and Gill (eds.), *Basic Documents on Human Rights* 241 (Oxford University Press, New York, 2006) .
2 Convention on the Rights of Child, art. 3 (1)
3 art 20 (3)
4 art 20 (2)
5 art 20 (1)
6 art 21
7 art 21(a)
8 art 21(b)
9 art 21(c)
10 art 21(d)
11 art 4

SC) 2000 aims at ensuring protection of children from exploitation in the name of adoption which can take place domestically and trans-nationally. Article 3(1)(a)(ii) of the OP-CRC-SC has stressed that State Parties should ensure that their criminal or penal law deals with coercive adoptions irrespective of whether such criminal act has been committed by an individual or organised group either domestically or trans-nationally[12] and that anyone acting as an intermediary indulging in improperly inducing consent for adoption of a child should be punished under the criminal law.[13]

The promulgation of the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption 1993[14] (Hague Adoption Convention) as the first formal international and intergovernmental recognition of international adoption[15] is an important development in the arena of international adoption law and practice[16] which renders protection to children and their families against the risks of illegal, irregular or ill-prepared adoptions abroad[17]. HAC was adopted on 28th May 1993 and came into force on 1st May 1995. Hague Conference on Private International Law (HCCH) at present has 91 Members. As on 14th November, 2022 the number of Contracting Parties to HAC is 105 of which 32 Contracting Parties are not Members of the HCCH.[18] HAC establishes international standards relating to inter-country adoptions and has given effect to the provision stipulated in article 21 of the UNCRC 1989 through incorporation of substantive safeguards and procedures to the principles and norms stipulated in the UNCRC.[19] HAC is focused towards the fulfilment of the following three aims:

i. Establishment of safeguards based on the principle of best interest of the child[20];

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12 United Nations Department of Economic and Social Affairs (Population Division), *Child Adoption: Trend and Policies* (2009) 56.

13 art 3 (a)(ii).

14 *Convention* of *29 May 1993* on *Protection* of Children and Co-operation in Respect of Intercountry Adoption HCCH available at: https://www.hcch.net/en/instruments/conventions /full-text/?cid=69 (last visited on January, 20, 2024).

15 Hannah Loo, "In the Child's Best Interests: Examining International Child Abduction Adoption and Asylum" 17 Chicago Journal of International Law 609 (2016) available at : https://heinonline.org (last visited on January, 20, 2024).

16 Lynn D Wardle, "The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay And Lesbian Couples Or Partners" 18(1) Indiana International & Comparative Law Review 113 (2008) available at:https://mckinneylaw.iu.edu/iiclr/pdf/vol18p113.pdf (last visited on March 22, 2023).

17 Hague Conference on Private International Law (HCCH) available at: https://www.hcch.net/ (last visited on February 23, 2024).

18 I*bid*.

19 Hague Conference on Private International Law, 'The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption Information Brochure' available at:https://www.hcch.net (last visited on February 23, 2024).

20 art 1 (a)

ii. System of Cooperation to be established among the Contracting States for ensuring that safeguards are respected and thereby preventing the abduction, sale or trafficking in children[21]; and
iii. To secure in the Contracting States the recognition of adoptions which have been in accordance with the standards set in the HAC[22].

As regards applicability, the HAC applies to child who is national or habitual resident in one Contracting State ie the State of origin and such child has or is being moved to another Contracting State ie the receiving State either after such child has been adopted by spouses or a person who are/is a habitual resident in the receiving State or for the adoption of such child in the State of origin or the receiving state.[23] It is only those adoptions in which permanent child-parent relationships are created that are being covered the HAC.[24]

HAC has emphasized upon the principle of the best interest of the child with regard to inter-country adoptions and that fundamental rights of child are to be respected. In order to achieve this HAC in the Preamble has stated that children should be brought in the family environment and that where no suitable family has been found for a child in the State of origin inter-country adoption may offer such child with the advantages of a permanent family. Responsibilities of the State of origin and receiving State have been outlined in the Chapter II of the HAC. In order to ensure that adoption falls within the ambit of the HAC the competent authorities of the State of origin and the receiving state are required to ensure the fulfilment of inter-country adoption requirements laid down in articles 4 and 5 of the HAC. Central Authority (CA) of the Sate of origin has to establish that the child can be adopted. CA has the responsibility to determine that the inter-country adoption is in the best interest of the child after due consideration has been given to the possibilities of finding a family in the State of origin.[25] However HAC does not stress on the exhaustion of all possibilities as this would unnecessarily be burdensome on the concerned authorities and result in the inordinate delay of permanently providing a child with a family abroad.[26] The emphasis on considering national solutions prior to inter-country adoption in the best interest of child embodies the principle of Subsidarity[27] imbibed in HAC which also finds reflection in the Preamble. It has to be ascertained by CA that consent necessary for the adoption has been freely, in a written legal form without any inducement of payment has been given by the concerned persons, institutions and authorities who have been counselled and informed about the

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21 art 1 (b)
22 art 1 (c)
23 art 2 (1)
24 art 2 (2)
25 art 4 (b)
26 Hague Conference on Private International Law Permanent Bureau, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice Guide No 1* (Family Law 2008) 29.
27 *Supra* note 19.

effects of their consent.[28] A mother can consent to the adoption of her child only after her child has been born.[29] CA depending on the age and maturity level of a child has to ensure such child has been informed about the effect of his or her consent to adoption and that child's wishes have been considered.[30] Responsibility has been laid upon the CA of the receiving States to determine the suitability and eligibility of the PAPs to adopt; for ensuring that necessary counselling has been provided to the PAPs and that authorisation is or will be given to the child for permanently residing in the receiving State.[31]

Contracting States are required to designate central authority for discharging of duties imposed in Chapter III of the HAC. A central principle of the HAC for protection of children and achievement of its object is the co-operation of Central Authorities with each other and the promotion of the same among the competent authorities in the respective States. Appropriate measures are required to be taken for providing and keep each other informed about the operation of the HAC and adoption laws in each States and also removing any impediments to the application of HAC. In order to ensure that adoption of the child does not effectuate improper financial gains and for deterrence of practices opposing the HAC objects, measures are to be taken directly either by the CAs or through public authorities. CAs in each States have been entrusted with the responsibility of gathering, preserving and exchanging of such information about the child and PAPs which is needed for completion of the adoption; facilitating and expediting the adoption proceedings and work towards the promotion of developing of adoption counselling and post-adoption services.[32] These functions of CAs can also be performed by public authorities or State accredited bodies. Only non-profit objects can be pursued by such State accredited bodies as per the limitations set by the State competent authorities and these bodies are to have such persons as their staff who are qualified and have experience with regard to inter-country adoption work.[33] Competent authorities of each States are to supervise the composition, operation and finance of the accredited bodies.[34] Public authorities or accredited bodies in their States can discharge the functions of CAs specified in Chapter III of HAC within the extent permissible by law.[35] An accredited body of one Contracting State may act in another Contracting State provided that same has been authorised by the competent authorities of both States.[36]

With regard inter-country adoptions, the HAC has prescribed procedural requirements in Chapter IV. Where persons who are habitually

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28 art 4
29 art 4 (c)(4)
30 art 4 (d)
31 art 5
32 art 9
33 art 11
34 *Ibid*.
35 art 22(1)
36 art 12

residing in a Contracting State aspire to adopt a child who is a habitual resident of another Contracting State, application concerning adoption has to be made to the CA of that State in which they are habitual residents.[37] A report containing information about the background, identity, medical history, eligibility, ability to take on inter-country adoption etc will be prepared by the CA of the receiving state subject to its satisfaction about the suitability and eligibility of the applicants to adopt.[38] This report has to be transmitted to the CA of the State of origin. Where it has satisfied by the CA of the State of origin that the child is capable of being adopted a report divulging information pertaining to the child's identity, family, special needs of the child, social environment, medical history etc has to prepared by it.[39] Child's background – religious, ethnic and cultural has to be duly considered by the CA of the State of origin and it has to be ensured that the consent required under article 4 of the HAC has been obtained. Based on the reports of the PAPs and the child the CA of the State of origin has to determine whether such adoption is in the child's best interest.[40] The child's report, proof of consent along with reason for determining such adoption has to be transmitted to the CA of the receiving state.[41] However such transmission is to be done without revealing the identity of child's mother and father in cases where such disclosure is not done in the State of origin.[42]

Decision concerning the entrustment of the child to the PAPs may be made only after it has been ensured by the CA of the State of origin that such placement has been agreed upon by the PAPs[43] and the CAs of the State of origin and receiving State are in agreement that adoption may ensue[44]. Further requirement stated under article 5[45] are also be determined before such entrustment.[46] Without satisfaction of the procedural safeguard stipulated in article 17 of HAC the child cannot be transferred to the receiving State.[47] It has to be ensured by the CAs of the both States that such transfer is done in secured manner in the presence of the PAPs or adoptive parents.

HAC 1993 has specified the procedures for dealing with the breakdown or disruption of adoption under article 21. Where prior to the completion of the adoption process the child is transferred to the receiving State and it becomes evident that the best interest of the child is affected by his or her continued placement with the PAPs then the CA of the receiving State has to render protection to that child by withdrawing the child from the PAPs

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37 art 14
38 art 15
39 art 16 (1)(a)
40 art 16(1) (d)
41 art 16(2)
42 *Ibid*.
43 art 17 (a)
44 art 17 (c)
45 *Supra* note 31.
46 art 17 (d)
47 art 19 (1)

and making arrangements for his or her temporary care.[48] Arrangements for placing such child in another adoption are to be made by the CA of receiving State in consultation with the CA of the State of origin and unless information regarding the new PAPs has been communicated to the CA of the State of origin adoption cannot be done.[49] Child is to be returned to the State of origin only as a last resort provided it is in the child's interest.[50] Measures for dealing with disruption of adoption are to be taken after a child having regard to his or her age and maturity has been consulted and consented to the same.

Recognition and legal ramification of adoptions have been dealt under Chapter V of the HAC. Where competent authority of the State in which adoption has been done certifies that the adoption as per the HAC has been made then by the operation of law other Contracting States are to recognise such adoption.[51] However by concluding an agreement through application of article 39(2) the Contracting States may refuse to recognise such adoptions.[52] Recognition of the adoption effectuates a legal child-parent relationship between the adopted child and the adopter parents and also recognises the adopters acquiring the responsibility as parents of the child.[53] The legal relationship existing prior to the adoption between the child and his or her birth parents are terminated.[54] HAC embodies the principle of non-discrimination by stating that the child in the receiving State will be entitled to enjoy equal rights as to the other similar adoptions which has taken place in that State.[55] The recognising Contracting States are not precluded from applying any other provision concerning the effects of recognition which it might consider more favourable for the child.[56] If the pre-existing relationship between child and parent is not terminated in the State of origin then the receiving States as permissible by its law may effectuate such termination subject to the obtaining of free consent as stipulated in article 4(c)[57] and (d)[58].[59]

Activity done in relation to inter-country adoption should not be for any improper financial and only such expenses and professional fees related to adoption may be charged or paid which are reasonable.[60] Responsibility has given to the competent authorities for ensuring the preservation of information pertaining to the origin of the child, child's parents and medical history.[61] As

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48 art 21 (a)
49 art 21 (b)
50 art 21 (c)
51 art 23
52 art 25
53 art 26 (1)(a) read with art 26(1)(b)
54 art 26 (1)(c)
55 art 26 (2)
56 art 26 (3)
57 *Supra* note 28.
58 *Supra* note 30.
59 art 27 (1)
60 art 32
61 art 30 (1)

permissible by law of each State such information is to be made accessible to children or their representative through proper guidance.[62]

Rules dealing with the improper financial gains in relation to adoption process and the realization of the subsidiarity principle emphasized under HAC require serious consideration and decision by each of the States in the context of their national legal system.[63] Though reservation to HAC is not permissible[64] yet to improve the application of HAC Contracting States may enter into agreements where derogation may be made only with respect to provisions laid down in articles 14 to 16 and articles 18 to 21 of Chapter IV dealing with procedural requirements for inter-country adoption.[65] Moreover declaration may made by any Contracting states not to bound under the HAC to recognise adoptions. While recognising adoption Contracting States have the liberty to apply provisions which would be more favourable for the child rather than those mentioned in article 26 (1) and (2) of the HAC.[66] States are not obliged under the HAC to engage in inter-country adoption and HAC though preeminent, has not been designed to comprehensively implement all the principles governing inter-country adoption but rather HAC addresses in creating inter-country adoption safeguards for combating the practices of abduction, sale and trafficking in children.[67]

Adherence by the Contracting States to the standards specified in HAC is imperative for realization of the objects of HAC. Question arises as to how HAC enforces the compliance of its provisions by the Contracting States. HAC provides that Central Authority of a State be informed by the competent authority in the event of HAC provisions being disrespected or where there might be a serious risk of such disrespect to HAC.[68] Responsibility of ensuring the taking up of appropriate measures has been entrusted upon the CA.[69] As the HAC is based on the system of co-operation between the Contracting States, non-compliance of one State in observing the HAC provisions while dealing with adoption may result in the withdrawal of arrangements relating to adoptions by the other States. There may be refusal on the part of the CA to allow such adoptions from proceeding as per article 17(c) of the HAC.[70] For resolving differences between Contracting states Permanent Bureau can provide its good offices subject to the consent of the concerned States.[71] Meetings at the Hague may be convened at regular intervals for reviewing the

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62 art 30 (2)
63 *Ibid.*
64 art 40
65 art 39 (2)
66 art 26 (3)
67 David M Smolin, "Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption", 48 University of Louisville Law Review 441 (2010) available at: https://heinonline.org (last visited on March 21, 2024).
68 art 33
69 *Ibid.*
70 *Supra* note 26 at116.
71 *Supra* note 26 at116.

practical functioning of HAC.[72] Contracting States under HAC with regard to child's best interest may refuse to recognise only those adoptions which are manifestly in contrary to its public policy.[73] Central Authority under article 6 is charged with the responsibility of enforcing the provisions of HAC in their respective States and the CA are supervised by their governments. Non-adherence to HAC requirements may be dealt by taking recourse to issuance of moratoriums on adoptions from States which fail to comply with HAC standards.

India's Position on International Standards governing Child adoption

India acceded to the Convention on the Rights of the Child 1989 on 11th December 1992. Initial reports of the State Parties under Article 44 of the UNCRC to the Committee on the Rights of the Child (CRC) were due in the year 1995. India had submitted its Initial Report on 19th March 1997.[74] On the matter of adoption under Article 21 of the UNCRC India had acknowledged that adoption had been the part of India's historical social tradition and adoption were going on in India since ancient times. Though emphasizes had been on adoption of male child there had been also adoption of girls. Adoption in India had not been child-centred but parent centred. The customary practice of adoption among Hindus was codified under Hindu Adoption and Maintenance Act (HAMA), 1956 while others could bring into their family a child through Guardians and Wards Act (GWA), 1890. Attempts were made in 1967, 1972, 1978 and 1980 for enabling persons regardless of their religion to adopt children under a Uniform Adoption Bill. Inter-country adoption had started in India in the late 1950s and 1960s. Large numbers of children were taken to foreign countries during 1970s from India. Reports of mal-practice had resulted in the issuance of directions pertaining inter-country adoption procedures by the Supreme Court of India (SCI) from 1984 to 1991. In-country adoption of children was promoted by the Ministry of Welfare (MOW) and resort to inter-country adoption was done only after the exhaustion of possibilities of in-country adoption. In pursuance of the Supreme Court's direction guidelines regulating inter-country adoptions were issued by the MOW. For sponsoring child adoption abroad eighty Indian voluntary agencies and two-hundred and seventy-three foreign agencies were recognized by the MOW. While a total of 1382 children were adopted within India there was sponsor of 1134 number of children for inter-country adoption. For dealing with matters relating to adoption in 1990 Central Adoption Resource Agency had been set up by the MOW.[75] Voluntary Coordinating Agencies (VCA) were set up and strengthened for promoting, facilitating and generating awareness about adoptions. India in its Report had observed that change in social situations and public awareness had enabled adopted children to have their

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72 art 42

73 art 24

74 Office of the High Commissioner for Human Rights, available at https://www.ohchr.org (last visited on March 21, 2024).

75 *Supra* note 74.

own family in India. India had stressed the need for a uniform adoption law (UAL) for conferring irrevocable legal status of a natural child upon an adopted child. Though parents in urban areas were desirous of adopting children yet there was lack of awareness on adoption. India had also in the Report highlighted upon the prioritized actions taken up by it concerning the sensitization of public and authorities regarding UAL, prevention of child abandonment and need for family environment for child rather than institutional care. India had also emphasized upon the need to strengthen the machinery of the State for monitoring placement through adoption of children.[76]

Second periodic reports of the State Parties under Article 44 of the UNCRC were due in 2000. India's report was due on 10th January 2000 and it had submitted its report on 10th December 2001.[77] India had reflected upon the efforts of the Ministry of Social Justice and Empowerment (MSJE), GOI where in pursuance of the principle of child's best interest as envisaged in the UNCRC the MSJE had issued revised Guidelines for Adoption of Children and CAR Agency was given the responsibility of implementing the revised guidelines. CAR Agency had issued a number of circulars to the Government of different States and adoption agencies for dealing with adoption according to the SCI's directives. CAR Agency had recognised seventy-three national agencies and two hundred and forty-eight foreign agencies for the purpose of sponsoring inter-country adoptions. Initiatives and awareness programmes had been taken by the CAR Agency for prevention of private adoptions and to this effect CAR Agency had also issued circulars to State governments for making adoption process legal and transparent. India in the Report had expressed its intention of signing the Hague Adoption Convention and though not a party had already set up CAR Agency which was a CA as per the requirement of the Hague Adoption Convention. India had emphasized that in adoption matter child's interest was accorded priority and as such measures had been taken up for legitimization of the adoption process. MSJE had licensed a number of competent agencies for authorising adoption. Juvenile Welfare Board (JWB) and Scrutiny Agencies had been involved in the adoption process and an abandoned child was free to be legally adopted after declaration by JWB. India had discussed about two adoption related legislations namely the HAMA 1956 and the GWA 1890 and had pointed out that HAMA 1956 was applicable only to Hindus and GWA 1890 had conferred only the status of ward and guardians upon Parsi, Christians and Jews. Further it was accepted in the Report that lack of UAL was the greatest inadequacy. In view of the SCI's directives in the *Lakshmi Kant Pandey vs Union of India*[78] VCA had been set up in India for the promotion of in-country adoption. The Report had elaborately discussed about

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76 Office of the High Commissioner for Human Rights, available at https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode= IND&Lang= EN (last visited on March 22, 2024).

77 *Supra* note 76.

78 AIR1984SC469, 1984(1) SCALE159, (1984)2SCC244, [1984]2SCR795.

the adoption procedure, legal procedure, inter-country adoption; counselling and rights of adopted children. Procedural safeguards specified by the Supreme Court in *Lakshmi Kant Pandey's*[79] case were discussed comprehensively. India in the Report had highlighted upon the increasing trend of adoption from 1995 to 2000 and had indicated that during this period the total adoption which had taken place were 20063 of which 11450 adoptions had taken place within India and 8613 were inter-country adoptions. India had expressed its concern regarding the secret adoptions through illegal means; preference of male child to that of female child and the lengthy adoption process.

India had submitted its Third and Fourth Combined Periodic Report (CPR) on the UNCRC on 26th August, 2011 though CRC had recommended the submission of CPR by India in July 2008. The CPR highlighted the initiatives which had been taken by India with regard to ensuring the rights of the children during the period 2001 to 2008.[80] Indian in its CPR had stated about the existence of large number of children who were orphan and without parental care and also mentioned the programmes and legislative initiative that had been taken up by India for rehabilitation and safeguard of the interest of such children.[81] As regard the status of adoption in India the CPR had projected that approximately 3000 children were given for adoption by CARA every year. There had been a declining trend in child adoption as in-country adoptions had declined from 2533 in 2001 to 2169 in 2008 and inter-country adoptions had decreased from 1298 in 2001 to 821 in 2008.[82] A large number of adoptions had been done directly and between relatives. With regard to policy and legislation on adoption the CPR had revealed that both formal and informal adoptions were taking place in India and children were being formally adopted under the HAMA 1956 and the JJ Act 2000 as amended in 2006. The JJ Act 2000 after its amendment in 2006 had defined adoption and had widened the scope of adoption by the adoptive parents.[83] For adoption of children housed in institutional care the JJ (C&PC) A Act 2006 had provided for the constitution of SAAs in each district. Registration of CCIs was mandated under the JJ Act 2000 for ensuring that adoption of children were done subject to proper documentation and assessment of the prospective parents. In-country Adoption Guidelines 2004 (Guidelines 2004) were notified by the CARA for regulation and monitoring of in-country adoption. India ratified the Hague Adoption Convention on 6-06-2003 and in pursuance of this for regulating inter-country adoption the Guidelines for Adoption from India 2006 (Guidelines 2006) was issued. Attempts were made for the revision of the

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79 *Ibid*.

80 Third and Fourth Combined Periodic Report on the Convention on the Rights of the Child, Ministry of Women and Child Development, Government of India. 2011. 96-100.

81 *Id at* 95.

82 *Id at* 96.

83 *Supra* note 80.

Guidelines of 2004 and 2006 in line with that of the JJ (C&PC) AA 2006.[84] For promotion of domestic adoptions and regulation of inter-country adoptions CARA was designated as the nodal agency. 'Scheme of Assistance to Homes for Children (Shishu Greh) to Promote In-country Adoption' was being implemented by the CARA and grant was provided for promotion of domestic adoptions to seventy-four organisations. Eighteen Adoption Coordinating Agencies (ACAs) were recognised by CARA for promotion of in-country adoptions. ACAs were issuing clearance for inter-country adoptions and were also generating awareness on child adoption.[85] CARA had prescribed the monitoring and evaluation of in-country adoptions and had conducted training programmes on adoption process at the zonal, state and national level for all stakeholders. Activities which had been undertaken by the CARA included development of CARINGS, revision of adoption guidelines and establishment of online database on adoption. The CPR had also mentioned about the promotion of in-country adoption through the set up of SARAs under the ICPS. Identification of bottlenecks in the process of adoption was being focused upon by the ICPS.[86] CARA was designated as the Central Authority for the implementation of the Hague Adoption Convention 1993. In pursuance of its responsibility CARA had developed mechanisms for expediting the adoption of OAS children and also conducted regular inspections for ascertain the child care standards.[87]

On 13th June 2014 the CRC had adopted the concluding observations on India's Third and Fourth CPR. With regard to Adoption the CRC in its concluding observation on the Third and Fourth CPR of India had expressed it appreciation about the Guidelines 2011 and also viewed its concern regarding the practice of informal adoptions and lack of supervision in the adoption procedures. CRC had stated that there were inconsistencies in the adoption laws and that JJ (C&PC) AA 2006 was ambiguous on the matter of adoption deed. The issue on sale of children due to non-regulation of surrogacy was also addressed. CRC had recommended that the adoption laws in India were to be revised in the light of UNCRC and the Hague Adoption Convention 1993 and that in the adoption process the child's best interest was to be given the paramount consideration.[88]

India had ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (CRC-OP-SC) on 16th August 2005. India had submitted its Initial Report on the status of implementation of the CRC-OP-SC under Article 12 (1) for consideration by the CRC on 26th August, 2011. The initial report was

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84 *Supra* note 80 at 97.
85 *Supra* note 80 at 98.
86 *Supra* note 85.
87 *Supra* note 80 at 99.
88 Office of the High Commissioner for Human Rights, available at: https://tbinternet.ohchr.org/_layouts/Treaty BodyExternal/countries.aspx?CountryCode=IND&Lang=EN (last visited on March 22, 2024).

prepared by MWCD, GOI in consultation with agencies and Ministries who were engaged in matters relating to children.[89] India in the Report had pointed that adoptions were taking place formally in India through the HAMA 1956 and inter-country adoptions were being facilitated through the GWA 1890. It was stated that under the JJ (C&PC) AA 2006 children who were destitute could be adopted by any community in India. After India's ratification of Hague Adoption Convention 1993 in 2003 Guidelines 2006 had had been governing the inter-country adoptions and had made adoption process more simple and transparent. Guidelines 2006 through the mechanisms of licensing and follow-up reports had protected the interest of children, birth parents and parents who wanted to adopt children. CARA had been designated as the nodal agency for promoting domestic adoptions and regulating inter-country adoptions. As per the Hague Adoption Convention 1993 CARA was made the Central Authority. Guidelines 2004 was notified by the CARA. Person regardless of religion was empowered to adopt OAS children under the JJ (C&PC) AA 2006. The right of adopted children to inheritance was not addressed in the JJ Act 2000 but with the definition of adoption being incorporated by the JJ (C&PC) AA 2006 this very grey area of law was resolved and court cases by children against their birth parents who had given them up for adoption or where biological parents were exerting claim upon the child that they had given in adoption were being appropriately handled.[90]

India had deposited its instrument of ratification to the Hague Adoption Convention 1993 on 6th June 2003.[91] For India the Hague Adoption Convention entered into force of 1st October 2003. As per official records in the HCCH website under the Country Profiles –State Responses, India's Response had been updated only till 1.06.2015.[92] Country Profile State Responses of Cambodia, France, Germany, Malta, Peru, Switzerland, Togo and United States of America had been updated till 2018 and that of Mauritius is updated till 2019. With regard to information pertaining to Authorities Per Party under the Hague Adoption Convention the details of India has been last updated on 27th February, 2017 wherein it has been mentioned that Central Authority is the Central Adoption Resource Authority (CARA), MWCD, R.K. Puram New Delhi 110 066 and the Competent Authority for India under Article 23 of the Hague Adoption Convention is the Central Adoption Resource Authority.[93]

Inter-country Adoption of Children under Juvenile Justice Law in India

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89 Office of the High Commissioner for Human Rights, available at: https://tbinternet.ohchr.org/_layouts/treaty bodyexternal/Download.aspx?symbolno =CRC%2fC%2fOPSC%2fIND%2f1&Lang=en (last visited on March 22, 2024).

90 ibid.

91 Hague Conference on Private International Law, available at: https://www. hcch.net/en/news-archive/details/?vareven (last visited on March 21, 2019).

92 Hague Conference on Private International Law, available at: https://www. hcch.net/en/publications-and-studies/details4/?pid=6221&dtid=42 (last visited on March 5, 2019).

93 Hague Conference on Private International Law, available at :https:// www.hcch.net/en/states/authorities (last visited on March 5, 2019).

India in fulfilment of its international commitment as a State party to the UNCRC 1989 and Hague Adoption Convention 1993 has repealed the Juvenile Justice (Care and Protection of Children) Act (JJ Act) 2000 and enacted the Juvenile Justice (Care and Protection of Children) Act, 2015 [JJ (C&PC) Act 2015] thereby providing for a clear, defined, transparent and child centric approach to the process of adoption in the best interest of the child.

The procedure relating to inter-country adoption is dealt under section 59 of the JJ (C&PC) Act 2015 and Chapter IV of the Adoption Regulation 2022 (AR 2022). When a child is adopted from India by a person who is of Indian origin or is a Non-resident Indian (NRI) or a foreigner then it is known as inter-country adoption (ICA).[94]

Inter-country adoption of orphan, abandoned or surrendered (OAS) children can be resorted to only after the efforts for in-country adoption have failed. If within sixty days of being declared free for adoption the OAS children do not get adopted by an Indian or NRI PAP inspite of efforts being made jointly by the Specialised Adoption Agency (SAA) and State Adoption Resource Agency (SARA) then such children become free for ICA.[95] However for ICA siblings, children who more than five years of age or are disabled physically and mentally would get preference as compared to other children.[96] With regard to priority for adoption of OAS children, the NRI PAPs are accorded the same status as that of the citizens who are residing in India.[97]

NRI or overseas citizen of India (OCI) or persons of Indian origin or foreigners can adopt children from India. For adoption of children who are Indians the first three categories of PAPs are given priority to that of foreigners.[98] These PAPs habitually residing in a country which is signatory to the Hague Adoption Convention, regardless of their religion may adopt OAS children by applying to an Authorised Foreign Adoption Agency (AFAA) or Central authority (CA) or Government department who are required to prepare the HSR of the PAPs and get them registered in designated portal.[99]

If the PAPs are found eligible the AFAA or CA or Government department are to sponsor the application of the PAPs to the CARA for the child to be adopted from India and then after completion of the HSR, get the application of the PAPs registered in CARA with documents mentioned in Schedule VI of AR 2022.[100]

With a view to ascertain that PAPs are suitable CARA will scrutinize their application, HSR and other relevant documents and if found eligible, the

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94 Juvenile Justice (Care and Protection of Children) Act, 2015, s 2(34).
95 Juvenile Justice (Care and Protection of Children) Act, 2015, s 59(1).
96 *Ibid.*
97 Adoption Regulations 2022, reg 15.
98 Juvenile Justice (Care and Protection of Children) Act, 2015JJ (C&PC) Act 2015, s 59 (2).
99 Juvenile Justice (Care and Protection of Children) Act, 2015JJ (C&PC) Act 2015, s 59 (3) read with Adoption Regulations 2022, reg 16(1).
100 Juvenile Justice (Care and Protection of Children) Act, 2015JJ (C&PC) Act 2015, s 59 (4) read with Adoption Regulations 2022, reg 16(3).

same would then be referred to one of the SAA where there are children who are legally free to be adopted.[101]

Referral of two children's profile will be forwarded by CARA to AFAA or CA or diplomatic mission who would then provide these profiles to the PAPs.[102] Within a period of ninety-six hours the PAPs are required to reserve one child[103] and if they do not make any reservations then there will automatic withdrawal of both the referred profiles[104]. Consideration has to be given to the preferences made by the PAPs at the time of such referrals.[105] After reservation of the child, within thirty days the CSR and MER has to be signed by the PAPs conveying their acceptance of the child.[106] SAA has to send the child's photograph along with MER and CSR to the AFAA or CA.[107] However if after reserving the child the PAPs do not accept such child within the time frame of thirty days then the child's profile will be withdrawn from the designated portal.[108] The PAPs will then be placed at the base of the seniority list and they would be able to again repeat the process of reserving and accepting only when their turn comes provided their HSR is still valid.[109] Prior to their acceptance of the child the PAPs may visit the SAA personally to meet the child provided their application for adoption has been approved by the CARA.[110] The MER of the child to be adopted may be reviewed by a practitioner of the PAPs choice.[111] The documents mentioned in Schedule IX of the Adoption Regulations 2022 which have been submitted by the PAPs have to be forwarded by AFAA for scrutiny by the concerned SAA.[112] With regard to countries which have ratified the Hague Adoption Convention (HAC) HSR and other related documents has to be notarised and the competent authority of the country which will receive the child has to apostil the notary's signature. In case of India all such documents have to be self-attested.[113]

No-Objection Certificate (NOC) favouring the adoption proposed has to be issued by the CARA as per Schedule X of AR 2022.[114] This has to be done within ten days of the PAPs accepting the child and approval letter as per articles 5 and 7 of the HAC being given by the country receiving the child.[115] The NOC has to be uploaded in the designated portal. While the order for

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101 Juvenile Justice (Care and Protection of Children) Act, 2015, s 59 (5) read with Adoption Regulations 2022, reg 16(5).
102 Adoption Regulations 2022, reg 16 (6).
103 Adoption Regulations 2022, reg 16 (7).
104 Adoption Regulations 2022, reg 16 (8).
105 Adoption Regulations 2022, reg 16 (9).
106 Adoption Regulations 2022, reg 16 (10).
107 Adoption Regulations 2022, reg 16 (11).
108 Adoption Regulations 2022, reg 16 (12).
109 *Ibid*.
110 Adoption Regulations 2022, reg 16 (13).
111 *I bid*.
112 Adoption Regulations 2022, reg 16 (14).
113 Adoption Regulations 2022, reg 16 (15).
114 Adoption Regulations 2022, reg 17 (1).
115 *Ibid*.

adoption is pending and NOC has been issued by CARA the child may for a transitory period be taken by the PAPs in pre-adoption foster care (PAFC) after submission of an undertaking by them as per Schedule VIII of AR 2022.[116] After the District Magistrate has issued the order for adoption, the child has to be given the visa and passport and then only the PAPs will finally receive the adopted child's custody and meet the child in person.[117]

Where the country which is receiving the child who has been adopted is signatory to the HAC 1993 then as per article 23 of this Convention a Conformity Certificate mentioned at Schedule XI of AR 2022 has to be issued by CARA within three days from which the order of adoption becomes available in the designated portal.[118] The immigration authorities along with the foreign regional registration office (FRRO) have to be informed that adoption has been confirmed.[119] Within three days of receiving the order for adoption an application for obtaining Indian passport for the adoptive child has to be made to regional passport officer by the SAA.[120] As per the Ministry of External Affairs of the Central Government's circular the passport of the child has be issued within ten days of receiving the SAA's application by the regional passport office (RPO).[121] After SAA has obtained the certified copy of order for adoption it has to within five days obtain the birth certificate of the child adopted by approaching the authority issuing birth certificates. The birth certificate has to bear the birth date of child adopted as per adoption order and the adoptive parents should be named as the child's parents.[122] The child adopted has to be taken by the parent/s who has adopted him or her to their country within two months from the passing of the order for adoption.[123]

Adoption Regulations 2022 under regulation 21 have laid down provisions relating to adoption of children by OCI or foreigners who are citizens from countries which have ratified the HAC 1993 and are staying in India. Application for adoption has to be made online by the OCI or the national of the foreign country as per schedule VI of AR 2022 and the same with required documents have to be uploaded in the designated portal.[124] While documents from India may be self-attested other documents have to be notarised.[125] CARA on receiving these documents has to refer the matter to SAA or District Child Protection Unit (DCPU) which has to prepare the HSR as per schedule VII of AR 2022 and upload the same in the designated portal.[126] Of the children who are referred one has to be reserved by the PAPs within a

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116 Adoption Regulations 2022, reg 17 (2).
117 Adoption Regulations 2022, reg 17 (3).
118 Adoption Regulations 2022, reg 19 (1) read with reg 58.
119 Adoption Regulations 2022, reg 19 (2).
120 Adoption Regulations 2022, reg 19 (3).
121 Adoption Regulations 2022, reg 19 (4).
122 Adoption Regulations 2022, reg 19 (5).
123 Adoption Regulations 2022, reg 19 (6).
124 Adoption Regulations 2022, reg 21 (1).
125 Adoption Regulations 2022, reg 21 (2).
126 *Ibid*.

period of forty-eight hours.[127] The procedures which are prescribed under regs 17 to 19 of AR 2022 and sub-regulations (9), (10), (12) and (13) of reg 16 has to be followed.[128] The HSR and the progress report have to be prepared by the SAA or DCPU as per the provisions of AR 2022.[129] Report on the progress of the child has to be done by SSA half yearly for two years from the date on which the child was taken in PAFC and this report as per Schedule XII of AR 2022 together with child's photographs have to be uploaded in the designated portal.[130] Counselling has to be given to child adopted and adopters by the SAA if there is adjustment problem between them.[131] The procedure specified in regulation 4 has to be followed if the SAA during the PAFU follow-up realises that the adoptee has not been able to cope with his or her adoptive parents or that it is not in child's best interest to stay with the adopters.[132] It has to be ensured by the concerned diplomatic mission that the adopted child after the decree of adoption would acquire the citizenship of his or her adoptive parent's country. Moreover the country where the PAPs are nationals has to issue a passport to the child and copy of such passport is then required to be forwarded to the CARA and the SAA.[133] An affidavit expressing the stipulation that at least for two years from the date on which adoption has taken place personal visits by representatives of the SAA or SARA or DCPU would be permitted has to be submitted by the OCI or foreign PAPs who are living in India.[134] Furthermore the OCI or foreign PAPs also have to undertake that they if they leave India prior to conclusion of two years after adoption they would keep CARA informed about their whereabouts, provide their address and continuously submit for the remainder of the period the report relating to the progress made by the child post-adoption.[135] Where the case is such that application for adoption has been made by PAPs one of whom is Indian or OCI card holder and other is foreigner, then such an adoption matter would be dealt in the same manner as those Indians who are residing in India.[136]

Adoption Regulation 2022 under regulation 22 has stipulated the procedure which has to be followed by citizens of India while adopting a child from a foreign country. Where an Indian citizen adopts a child from a foreign country, formalities necessary for such adoption are required to be firstly completed in accordance with legal procedure of that foreign country. India being the receiving country with regard to adoption of those children who have arrived in India from other countries, CARA after receiving the home study report (HSR) of the PAPs, requisite documents, child study report (CSR) and

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127 Adoption Regulations 2022, reg 21 (3).
128 *Ibid*.
129 Adoption Regulations 2022, reg 21 (4).
130 Adoption Regulations 2022, reg 21 (5).
131 Adoption Regulations 2022, reg 21 (6).
132 *Ibid*.
133 Adoption Regulations 2022, reg 21 (7).
134 Adoption Regulations 2022, reg 21 (8).
135 Adoption Regulations 2022, reg 21 (9).
136 Adoption Regulations 2022, reg 22 (3).

medical examination report (MER) of the child to be adopted has to issue the approval which is required to be done in case of receiving countries as per arts 5 and 17 of the HAC 1993.[137] Where the citizens of India with foreign passport adopt a child oversees and to enter India they need Indian visa such Indians have to apply in the Indian mission of that foreign country for visa or OCI card. Thereafter, the child may be issued entry visa by that Indian mission after it has checked all the related documents with a view to ensure that due procedure has been followed in the adoption of the child.[138] With regard to the child who has been adopted abroad the immigration clearance has to be acquired from the Central Government in the Foreigners' Division, Ministry of Home Affairs, through the Indian diplomatic mission of that foreign country. Inter-country Relative Adoption is dealt under regulation 56 of the Adoption Regulations. A person who is a NRI or an OCI wishes to adopt a child of his or her relative he or she firstly has to approach the Authorised Foreign Adoption Agency (AFAA) or the Central Authority (CA) of the country where he or she resides so that HSR may be prepared and then through designated portal they have to register online.[139] However where there is no AFAA, PAPs in order to adopt the child of the relative are required to take recourse to the Government department or if PAPs happen to be Indian citizens then the Indian Diplomatic Mission (IDM) can be approached.[140] After the HSR has been completed, the application of PAPs will be registered in designated portal along with requisite documents by the AFAA or Central Authority (CA) or the IDM.[141]

After CARA receives the necessary documents on the designated portal from Authorised Foreign Adoption Agency (AFAA) or the Central Authority (CA), it must forward the same to SARA or DCPU.[142] DCPU through its social worker has to conduct the family background report (FBR) of the child who is proposed to be adopted as per schedule XXI of AR 2022. This report of the child and his or her birth family will then be forwarded to CARA by the DCPU through SARA and the same will be submitted to AFAA or the Indian mission by CARA.[143] CARA in pursuance of articles 4 and 16 of the HAC 1993 after obtaining the FBR of the relative's child will forward it to the country which would receive the child.[144] When these relevant documents are received by the AFAA or the CA, arrangement has to be made for issuance of certificate as per articles 5 or 17 of HAC.[145] With regard to Indian citizens, for non-signatory countries to HAC 1993, the FBR of the child of the relative along with the CARA's prior approval letter has to be submitted to the Indian Mission of that country and thereafter a recommendation letter will be issued to CARA by that

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137 Adoption Regulations 2022, reg 23 (2).
138 *Supra* note 137.
139 Adoption Regulations 2022, reg 56 (1).
140 Adoption Regulations 2022, reg 56 (2).
141 Adoption Regulations 2022, reg 53 (3).
142 Adoption Regulations 2022, reg 57 (1).
143 Adoption Regulations 2022, reg 57 (3).
144 Adoption Regulations 2022, reg 57 (4).
145 Adoption Regulations 2022, reg 57 (5).

Indian Mission.[146] CARA has to issue NOC for all inter-country adoptions. This must be done by CARA within ten days of issuance of certificate under article 5 or 17 of HAC by the country which is receiving the child and thereafter the copy of the certificate has to be forwarded to AFAA or concerned Central authority.[147]

The provision relating Post –Adoption Follow up of the child adopted by NRI, OCI and Foreigner PAPs has been specified in regulation 20 of the AR 2022. From the date on which the child adopted has arrived in the receiving country till the following next two years the progress of that child has to reported quarterly in first year and half-yearly in second year online in the designated portal as per schedule XII of AR 2022 with the child's photographs by the AFAA or CA or concerned IDM.[148] If the adopted child has any difficulty in adjusting with his or her adoptive parents and this is taken note of by AFAA or CA based on progress report or from visits made to the home of the adoptive parents after adoption, then arrangements have to be made by them for counselling both the adopted child and the adopters.[149] Where the adoptee cannot adjust with the family which has adopted him or her or that the adoptive child's stay with that family is against his or her interest then such child has to be withdrawn and given counselling by AFAA or CA who are also to make arrangement with the CARA and the IDM for providing adoption of the child by another family or placing that child in a foster home.[150] Where adoption of a child results in disruption or dissolution, such child has the right to be cared for, protected and rehabilitated by child protection services of the receiving country and as per the provisions of Hague Adoption Convention.[151] If it becomes necessary to repatriate the child the same has to be facilitated by the AFAA or CA in contact with the IDM.[152] Annual get-together of the Indian adopted children and the adopters may be organised by the AFAA or CA and the report of such get-together has to be forwarded to the CARA.[153] An undertaking has to be furnished by the PAPs to the effect that the representatives of the AFAA or the CA will be permitted to make personal visits so as to determine the progress of the adopted child with the adopter parents for two years from the date on which the child has arrived in the country of his or adoptive parents.[154]

Conclusion

Adoption process under the Juvenile Justice (Care and Protection of Children) Act 2015, is guided by the principle of 'best interest of the child'. Children deprived of their parental love by reason of death of the parents or

146 Adoption Regulations, reg 57 (6).
147 Adoption Regulations 2022, reg 58.
148 Adoption Regulations 2022, reg 20 (1).
149 Adoption Regulations 2022, reg 20 (2).
150 Adoption Regulations 2022, reg 20 (3).
151 Adoption Regulations 2022, reg 20 (4).
152 Adoption Regulations 2022, reg 20 (5).
153 Adoption Regulations 2022, reg 20 (6).
154 Adoption Regulations 2022, reg 20 (7).

unwillingness on the part of the natural guardian to take care of children or abandoned, are rehabilitated and socially reintegrated through adoption. By incorporating provisions for facilitating inter-country adoption based on the principles of best interest and ensuring that no child becomes a source for improper financial gains and object of exploitation in inter-country adoption as contemplated in the Convention on the Rights of the Child, 1989 and Hague Adoption Convention 1993, India has enabled such children to grow up in nurturing family environment which is vital to their all-round welfare and development.

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Advancement of Criminalistics Forensic DNA for Administration of Criminal Justice System in India: Issues and Challenges

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Abstract

Over the years, the use of forensic DNA testing has become an important and inseparable part of the administration of the criminal justice process. The majority of the cases are decided by the courts relying on the forensic reports submitted by forensic criminalists. This paper explores the study of forensic DNA and its utility in establishing the guilt and innocence of an accused person. The paper highlights the structure and composition of DNA and various processes that are run to generate DNA profiles. The paper also discusses the concerns over the admissibility and reliability of forensic evidence. The paper reveals the role of Indian Judiciary in balancing the public rights as well the rights of an individual guaranteed under Article 20 (3) and 21 of the Constitution of India.

Keywords: Forensic Science, DNA Profiling, right against self-incrimination, admissibility, reliability, criminalists, The Criminal Procedure (Identification) Act, 2022.

Introduction

Forensic DNA testing has been introduced in the mid 1980's[1] and since then it has contributed in a great manner to the judicial system of various countries. The emergence of the study of DNA along with the discovery of its structure and the revelation of how it is a reservoir of genetic information has completely changed our understanding of the evolution and development of

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1 Gill, P., Jeffreys, A. J., & Werrett, D. J. (1985). Forensic application of DNA 'fingerprints. *Nature*, *318* (6046), 577-579.

flora, fauna including other living creatures. Additionally, it has tremendously revolutionized the practice of forensic science.

With the help of DNA profiling, it is now easily possible to link the DNA sample to the suspect with certainty allowing individuality in a specific case. It is a potent identification tool complementing serology, fingerprints, therefore helping the law enforcement agencies.[2] DNA testing has proved to be extremely helpful in establishing the guilt of the accused and exonerating the innocent. During mass disaster bodies of victims are easily identified through DNA testing similarly remains of a missing person after being discovered can be associated and identified with the technique of DNA analysis.[3]

DNA testing is highly effective as compared to the other disciplines of forensic science. In heinous offences like rape and murder, biological matters like blood, semen, saliva is exchanged between the victim and the offender. The traces recovered from the crime scene can be put to DNA testing and the results have the potential to identify the culprit. Except for identical twins the individualization of DNA profile is simply attained by analysis of genetic markers.[4]

Statistical DNA interpretation is based on a sound scientific bedrock. Analysis of forensic evidence is done by testing various question results with known references. This question to references analogy is reliant on the character of outcome collected from scene of crime evidence and the presence of appropriate reference sample. During DNA analysis, when there is enough sample available from a suspect or multiple suspects the question and reference comparison is done through examining the samples at the similar genetic markers.

In cases where there are no suspect found, DNA databases evolved over the past 20 years to furnish prospective profiles from previous criminals, can be hunted through to find a match to the not known profile. Established DNA databases help in identifying the perpetrator. One of the other potential importance of DNA is based on its pattern of inheritance. An individual's genetic structure is deduced from half of his/her mother and half from his/her father therefore, relatives those who are closely related can be used for reference point. Disaster victims and missing persons can be traced from close kinship relations if there is no straight sample present for analysis.[5]

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2 Houck, M.M., & Siegel, J.A. (2009). *Fundamentals of Forensic Science*. Academic Press.

3 Clayton, T. M., Whitaker, J. P., & Maguire, C. N. (1995). Identification of bodies from the scene of a mass disaster using DNA amplification of short tandem repeat (STR) loci. *Forensic science international*, *76*(1), 7-15.

4 Weber-Lehmann, J., Schilling, E., Gradl, G., Richter, D. C., Wiehler, J., & Rolf, B. (2014). Finding the needle in the haystack: differentiating "identical" twins in paternity testing and forensics by ultra-deep next generation sequencing. *Forensic Science International: Genetics*, *9*, 42-46.

5 Prinz, M., Carracedo, A., Mayr, W. R., Morling, N., Parsons, T. J., Sajantila, A., & Schneider, P. M. (2007). DNA Commission of the International Society for Forensic Genetics (ISFG): recommendations regarding the role of forensic genetics for

The polymerase chain reaction (PCR) technique used for amplification of DNA traces is highly sensitive and with the help of it through DNA typing results can be deduced by using a single cell.[6] Such high sensitivity may turn into a bliss and even a curse. There are high chances of pollution from DNA of someone not related to the crime. The contamination of DNA may lead the investigators to altogether a wrong way causing complete miscarriage of justice.[7] In order to check the contamination and prevent the wrong results various techniques such as analyzing negative controls are used. Various International Forensic Institutes have laid down guidelines making DNA testing more authentic and advanced.

Delineating the term DNA

Deoxyribonucleic acid (DNA) is a very important but generally complex molecule present in almost all plants as well as animals. In humans, the red blood cells are exceptions, as it has no nucleus therefore DNA is not found in this region. DNA molecules are known as polymers and are made up of simpler units monomers that are repeated. In a cell, DNA is found in two areas, the mitochondria, and the nucleus. The mitochondrial DNA (mtDNA) is different from that of nucleus DNA in size and shape and is used in a completely different manner for the identification of biologic traces. mtDNA is exclusively inherited from the mother whereas the nucleus DNA is inherited from both mother and father.

Structure and Composition of Nuclear DNA

The geometrical shape of a nuclear DNA is called double helix. DNA appears like two helices twined together to each other just like a spiral staircase. The poles of the DNA structure are made up of alternate molecules of sugar (deoxyribose and phosphate). Each sugar molecule has one out of four nucleotides, adenine (A), guanine (G), cytosine (C) and thymine (T). With the proximity of thymine and adenine base a bond is formed. Similarly, when cytosine and guanine get close, they bond. There cannot be any bonding of A and T with G and C. These base pairs are connected to sugar phosphate backbones and the linkages that are created must be A-T, T-A, G-C or C-G. Apart from the above rule, the principle of inheritance and genetics determine the sequence of pairing. The sequence of base pairing forms a genetic code that decides the nature and characteristic of a person. For instance, the mobile numbers consist of 10 digits but to get a particular person's phone ring the number has to be dialed in the correct order.

Almost all the cells in the human body consist of a nucleus. Through the nucleus, the functions of the cells are regulated. There are 46 structures called chromosomes within the nucleus wherein DNA is arranged. There are 23

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disaster victim identification (DVI). *Forensic Science International: Genetics*, *1*(1), 3-12.

6 Findlay, I., Taylor, A., Quirke, P., Frazier, R., & Urquhart, A. (1997). DNA fingerprinting from single cells. *Nature*, *389*(6651), 555-556.

7 Gill, P. (2014). *Misleading DNA evidence: Reasons for miscarriages of justice*. Elsevier.

pairs of chromosomes. In each pair, one member is from the father's sperm cells and the other is from the egg cells of mother. There are 23 chromosomes contained each in ovum and sperm. The 23 chromosomes of sperm and egg cell when united are paired into 46 chromosomes available in every cell of the offspring. One of the 23 pairs of the chromosomes determines the sex of the child. In case of females, both chromosomes are of the X type. Whereas in males one of the chromosomes is Y and the other one is X type.[8]

Variations and Locus of Genes

There are two copies of each gene found in an individual. A person gets one copy of a gene from the mother and the other one from that of father. A single gene finalizes which blood type will be inherited from each parent. There are basically four different blood types A, B, O and AB. Homozygous is a person who gets the same kind of gene from both father and the mother. When a person inherits different kinds of similar genes then he is said to be heterozygous. A specific gene in the genome at a particular locus is termed as allele. Some of the alleles are dominant and others are recessive in nature. On receiving both dominant and recessive allele from mother and father, the person highlights the dominant characteristics. With the presence of numerous such alleles, there exists a great chance of variation among humans at this locus. This condition is best for DNA profiling as the variation of alleles at different locations can be brought together for the verification of a specific group of alleles in a given population.

Need for Forensic DNA Database in India

Forensic DNA database is a potent tool that can be made use by the Police department to differentiate between the accused and innocent. The database may check the occurrence of various scams and frauds in India. The Central Government of India has been working on establishing new DNA database of offenders for the gathering and processing of DNA samples of the accused in cases of heinous nature. The DNA Profiling Committee constituted by the Department of Biotechnology made suggestions for the enactment of DNA Profiling Bill 2006. This bill was later termed as Human DNA Profiling Bill 2007.[9] The latest Bill that we have for the collection, storage and processing of DNA samples is the Criminal Procedure Identification Bill, 2022.

With the inauguration of State-of-the-Art DNA Analysis Centre at Central Forensic Science Laboratory (CFSL) in 2019, the government ensured the scientific facility for investigation of cases related to offences against women. Rs. 99.76 has been allocated to the Nirbhaya Fund for the establishment of the advanced Forensic DNA Analysis Laboratory. This lab provides for Sexual Assault and Homicide Unit, Paternity unit, Identification of

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8 *Supra* note 2.

9 Kumar, S., Verma, A. K., Singh, P., & Singh, R. (2016). Current scenario of forensic DNA databases in or outside India and their relative risk. *Egyptian Journal of Forensic Sciences*, *6*(1), 1-5.

human unit and Mitochondrial DNA unit. The Center has latest DNA typing equipment and has a capacity of trying 2000 cases per year.[10]

The Identification of Prisoners Act, 1920

The Identification of Prisoners Act, 1920 was promulgated to approve the collection of measurements and images of accused and other persons.[11] The term measurement has been defined to include only finger and footprint impressions to be collected on the order of the magistrate.[12] The definition provided is extremely narrow as it does not authorize the collection of other biological samples. Thus, there was a need felt to enhance the domain of the term measurement by means of amendment to include both physical and biological content.

The Act gives ingress to restrictive categories of individuals convicted of any offence for which the punishment is imprisonment for one or more, or any other offence punishable with increased punishment on a subsequent conviction.[13] It also includes any person ordered to deposit security for ensuring good behavior and establishing tranquility under section 137 of the Bharatiya Nagarik Suraksha Sanhita 2023.[14] A lot has changed after 1920. There have been great developments taking place in technologies that enable various other kinds of measurements to be used in criminal justice systems.

The Identification of Prisoners Act has been time and again challenged before the courts. The Law Commission of India after analyzing the Act had suggested for its revision as it was obsolete and wasn't updated as per the recent practices in criminal investigation.[15] The Expert Committee on Reform of the criminal Justice System chaired by Justice V.S. Malimath in the year 2003 had stressed on the need for amending the 1920 Act, in order to enhance the ambit of the term measurement and approve the collection of hair, saliva, semen and DNA samples.[16]

The Criminal Procedure (Identification) Act, 2022

The Criminal Procedure (Identification) Act, 2022 amends the Identification of Prison Act of 1920. The Act widens the ambit of the people whose samples are to be collected and broadens the scope of measurements. The purpose of the Act is to enable the investigation of the crime to be more effective, efficient, and expeditious to increase the conviction rate.[17] The Act has

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10 https://pib.gov.in/newsite/PrintRelease.aspx?relid=196044 visited on 3 April 2022.
11 The Identification of Prisoners Act, No. 33 of 1920.
12 The Identification of Prisoners Act, No. 33 of 1920, §2(a).
13 The Identification of Prisoners Act, No. 33 of 1920, § 3(a).
14 The Identification of Prisoners Act, No. 33 of 1920, § 3(b).
15 https://lawcommissionofindia.nic.in/51-100/report87.pdf Law Commission of India, 1980.
16 https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf accessed on 11th of Apr.2022.
17 The Criminal Procedure (Identification) Act, No. 11 of 2022.

amended the term measurement to include eye scan, finger impression, physical and biological samples, handwritings, signatures.[18]

The examination of an arrested person on a charge of an offence committed under such circumstances having reasonable grounds for believing that examination of such a person may lead to the actual occurrence of an offence[19] is covered within the ambit of measurement. In addition, an examination of an arrested person accused of committing rape or an attempt to commit rape is included in the definition of measurement.[20] In lieu of section 3 of the enactment, the law enforcement officer is authorized to collect the samples as per the procedure laid down under the law.[21] Any person convicted and arrested of an offence under the law for the time being in force is required to allow his measurement to be taken.

However, biological samples may be taken forcibly only from persons arrested for offences against a woman or a child, or if the offence carries a minimum of seven years imprisonment.[22] Any person arrested or detained under the preventive detention law and any person who has been ordered to submit security for his demeanor or for maintaining peace under section 136 of the Bharatiya Nagarik Suraksha Sanhita 2023 for a proceeding under section 126,127, 128, 129 of the code shall allow to take their measurements on the order of the magistrate.

The Act seeks to empower the Magistrate to direct any person to give measurements for the purpose of investigation.[23] The person against whom such an order is made shall allow the measurements to be taken in accordance with the directions. Refusal to cooperate may lead to forceful extraction of samples as per the law.[24] Any such resistance to give measurements under this Act shall be an offence under section 221 of the Bharatiya Nyaya Sanhita 2023.[25]

In cases where a person is required to maintain good behavior and peace, he may be ordered by the Executive Magistrate to give his measurements.[26] For the purpose of detection, prosecution, prevention, investigation of any offence, the National Crime Record Bureau (NCRB) has been empowered to collect the record of measurements from Union Territory Administration, State Government or other law enforcement agencies. The NCRB is entrusted with the storing, sharing, dissemination, destruction and disposal of record of measurements.[27] The record is to be safely stored in digital or electronic form for a period of seventy years from the date of its collection. Where any person is released without trial, discharged, or acquitted by the

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18 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 2(b).
19 The Bharatiya Nagarik Suraksha Sanhita, 2023 No. 46 of 2023, § 51.
20 The Bharatiya Nagarik Suraksha Sanhita, 2023 No. 46 of 2023, § 51 (2).
21 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 3.
22 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 3(a).
23 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 5.
24 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 6(1).
25 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 6(2).
26 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 3(b).
27 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 4(1).

court after exhausting all the legal remedies, all his measurements taken shall be destroyed from records. [28]

Reliability of DNA Technology

Forensic tests for DNA profiling despite being greeted all over the world as the most potent technique to fight crimes has been repeatedly questioned on the ground of reliability and authenticity. It is alleged by few critics that DNA technology was introduced to the court even before it was scientifically proven.[29] This has led to ambiguity and contradicting opinions in courts. However, DNA evidence has been used earlier to convict the accused in many cases[30].

But recently the courts have out rightly rejected the DNA evidence on the ground of inadmissibility and unreliability.[31] The court suggested that there is a need for reexamination of DNA evidence to ensure its authenticity. Protagonist of DNA evidence contends that few scientists who charged exorbitant fees for expert testimony have stigmatized the entire forensic science technology without any soundproof.[32] It is alleged that few scientists out of frustration sabotage the new technologies by levying untenable aspersions on its utility.

Contrary to this, the critics are of the opinion that the validation of DNA test has been done in haste. These tests are comparatively less compelling than actually what the judges have been made to believe.[33] As per the critics, the major area of controversy is the lack of rigor in forensic laboratories and the latest proficiency and expertise are not subjected to scientific examination before being utilized by the courts.[34] The controversy surrounding DNA test involving various legal and scientific issues necessitates close scrutiny because only then the actual assessment of these forensic techniques can be done. The outcome of the ongoing DNA war will enable the judiciary to better understand the conflicts related to the authenticity of future scientific expertise.[35]

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28 The Criminal Procedure (Identification) Act, No. 11 of 2022, § 4(2).

29 Roberts, L. (1991). Fight erupts over DNA fingerprinting: a bitter debate is raging over how the results of this new forensic technique are interpreted in court. *Science*, *254*(5039), 1721-1723.

30 Thompson, W. C. (1993). Evaluating the admissibility of new genetic identification tests: lessons from the DNA war. *J. crim. L. & criminology*, *84*, 22.

31 State v. Schwartz, 447 N.W. 422 (1989).

32 Moenssens, A. A. (1990). DNA evidence and its critics-How valid are the challenges. *Jurimetrics J.*, *31*, 87.

33 Lewontin, R. C., & Hartl, D. L. (1991). Population genetics in forensic DNA typing. *Science*, *254*(5039), 1745-1750.

34 Neufeld, P. J., & Colman, N. (1990). When science takes the witness stand. *Scientific American*, *262*(5), 46-53.

35 Saks, M. J., & Koehler, J. (1991). What DNA fingerprinting can teach the law about the rest of forensic science. *Cardozo L. Rev.*, *13*, 361.

DNA Evidence and its Admissibility

The contribution of scientists and experts and the role played by them during judicial proceedings have increased the demand for expert evidence since 1980's by lawyers and other professionals.

Forensic criminalists and scientists are called for their expert advice in criminal and civil cases.[36] In criminal trials, all scientific evidence including DNA profiling and reports must undergo the admissibility test. The USA court in Frye v. United States[37] have laid down certain rules for the admissibility of scientific evidence. As per the Frye test, any new scientific expertise in order to be admitted by the court needs to have sought acceptance and the approval by the scientific clique. Secondly as per the relevancy standard scientific evidence must be important and hold relevance to the issues pertaining to the case.

In Daubert v. Merrell Dow Pharmaceuticals[38] the US Supreme Court had propounded a new admissibility standard which replaced the Frye test. In this case it was held that the court must ensure not only the relevance of the scientific testimony but also its reliability. Reliability can be determined by assessing the techniques to be scientifically valid. It can also be asserted by verifying the appropriate applicability of the techniques to the facts in a given case. The court also laid various factors to determine the scientific validity of various scientific techniques and methodology.

A testimony or scientific evidence before being approved by the court must be tested by the scientific community. The new technique should be subjected to rigorous review by peers. The potential rate of errors while utilizing a new scientific technology must be known and revealed. The acceptance of the technique by scientists across the world is also an important factor in determining scientific validity.

National Standards for Admissibility of Forensic Evidence

The Bharatiya Nagarik Suraksha Sanhita 2023 has certain important provisions especially sections 51 52 and 53 which are highly relevant for the collection of evidence through scientific techniques such as DNA tests. Section 51 stipulates that medical examination of a person charged with having committed an offence under certain circumstances where there is an apprehension that such an examination will purvey evidence of the commission of an offence. A registered medical practitioner does the examination at the request of the police officer.[39] Section 53 provides for the examination of the arrested person by the medical officer at the request of the arrested person. The magistrate may order such examination if the arrestee alleges that his body examination may provide evidence that will disprove the commission of any offence by him or will establish the commission of any offence against his body by any other person. Section 52 mandates the

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36 Singh, S. C. (2011). DNA profiling and the forensic use of DNA evidence in criminal proceedings. *Journal of the Indian Law Institute*, 195-226.

37 293 F. 1013, 1014 (D.C. Cir. 1923).

38 509 US 579 (1993).

39 The Bharatiya Nagarik Suraksha Sanhita, 2023 No. 46 of 2023, § 51.

examination of person accused of rape by medical practitioner at the direction of police officer. The amendment has broadened the ambit of medical test, which now includes examination of blood, semen, sweat, swabs, fingernails, and hair samples by the application of latest scientific techniques including DNA profiling.[40]

Section 329 of the Bharatiya Nagarik Suraksha Sanhita explains the validity of the reports submitted by the Government scientific experts including Director of the Fingerprint Bureau, the Chief Controller of Explosives, the Director of a Central Forensic Science Laboratory, or a State Forensic Science Laboratory.[41] The report submitted may be admissible as evidence in investigations, trials under this code.[42] The court may call for such expert and examine him to ascertain the veracity of the report.[43]

Section 39 of the Bharatiya Sakshya Adhiniyam 2023 explains when the opinion of the experts are admissible as relevant facts. Whenever the court is met with a situation of forming an opinion pertaining to foreign law or science, art or is required to verify the handwriting or finger impressions, the opinions of skilled person upon such points and area is considered relevant facts.[44] The Constitution of India promotes the development of scientific temper, humanism and the spirit of inquiry and reform to accelerate in all scientific fields.[45] Article 51A (j) enshrined under the Indian Constitution encourages the citizens to strive towards excellence in various spheres of collective and individual activity so that the country can constantly thrive to higher levels of endeavor and hard work.[46]

Role of Judiciary in Determining the Reliability of DNA Evidence

DNA profiling is now an inseparable part of criminal proceedings. The courts have made many convictions relying on the DNA evidence admissible under section 63 of the Bharatiya Sakshya Adhiniyam 2023.

The significance of DNA evidence is underscored by its reference to sections 52 and 184 of the Bharatiya Nagarik Suraksha Sanhita, 2023, which pertain to the interrogation of individuals accused of rape and victims of rape, respectively. This serves to establish that DNA profiling has now become an integral component of the legal framework. Upon careful examination of multiple precedents, the court has reached the conclusion that a DNA report should be deemed admissible unless it is unequivocally discredited. In the event that the DNA report is deemed invalid, it is imperative to ascertain the absence of both quality control and quality assurance measures. The acceptance of a DNA report is contingent upon the absence of sampling errors and any indications of sample manipulation.

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40 The Bharatiya Nagarik Suraksha Sanhita, 2023 No. 46 of 2023, § 51 (2) (i).
41 The Bharatiya Nagarik Suraksha Sanhita, 2023 No. 46 of 2023, § 329(4).
42 The Bharatiya Nagarik Suraksha Sanhita, 2023 No. 46 of 2023, § 329 (1).
43 The Bharatiya Nagarik Suraksha Sanhita, 2023 No. 46 of 2023, § 329 (2).
44 The Bharatiya Sakshya Adhiniyam 2023, No. 47 of 2023, § 39.
45 INDIA CONST. art. 51 A (h).
46 INDIA CONST. art. 51 A (j).

The courts in India however have never blindly accepted the DNA evidence. Majority courts in India consider scientific reports merely to be evidence of opinion and hardly conclusive. Nevertheless, the court cannot replace its own opinion with that of a doctor until and unless there exists some inherent error in the report. The courts in India uphold the medical evidence only if it is verified under oath and given as oral evidence by the expert in the court of law. Explaining the advisory character of the evidence furnished by the medical officer the Hon'ble Supreme Court in Madan Gopal Kakkad v. Naval Dubey[47] held that the medical expert is expected to enlighten the court of all material facts and technical aspect, which can help him to conclude a case. This helps the court to have its own opinion despite not being an expert and having much scientific and technical knowledge.

In a case, where the father demanded for a paternity test to establish the parentage with a purpose to avoid maintenance under section 144 of the Bharatiya Nagarik Suraksha Sanhita,[48] the court held that no person could be forced to give DNA samples for testing against his/her will. Moreover, no unpropitious inference can be deduced against him/her for such decline.

The Orrissa High court in Thogorani Alias K. Dmayanti v. State of Orissa[49] has restricted the collection of DNA samples for examination. In the opinion of the court, it is important to maintain a balance between the public interest and the rights guaranteed to the accused under Articles 21 and 20(3) of the Indian Constitution. However critical, the court must ascertain the equilibrium by examining the extent of the participation of the accused, the heinousness of the offence, mental and physical state of the accused, his age. If in a given case there exists an alternative way of collecting the evidence that confirms or disapproves the guilt of the accused, the same should be opted for. Relying on these parameters the court may decide whether to issue orders for the collection of DNA samples.

Highlighting the importance of DNA reports, the Hon'ble Bombay High Court held that especially when in a given case if different sample matches, the DNA results could help in identification, which can further lead to exoneration of the innocent and conviction of the guilty.[50]

Addressing an issue related to violation of Article 21 of the Indian constitution and subjecting a person to DNA test, the Hon'ble Supreme Court made it very clear that the right to privacy guaranteed under Article is not an absolute right.[51]

Conclusion and Suggestions

There are certain issues of worries related to collection and retention of DNA and fingerprints as it is tantamount to biological surveillance. Personal demographic information related to ethnic appearance, name, age can be easily

47 (1992) 3 SCC 204 at 221-22.
48 Goutam Kundu v. State of West Bengal, (1993) 3 SCC 418 at 428.
49 2004 Cri LJ 4003.
50 Raghuvir Desai v. State 2007 Cri LJ 829.
51 Sharda v. Dharampal AIR 2003 SC 3450.

extracted using the DNA profile of an individual. If potential employers, insurance companies, have access to this genetic information it could drastically hamper the employability of an individual. Sensitive and personal information can be accessed by terrorist organization by invading the system causing detrimental threats to their life and property.

Collection of DNA samples from the witnesses can risk their life if accessed for disclosure of the identity. Even the lives of the relative can be put to danger as they can be easily traced through familial searching.[52] No doubt DNA examinations have proved to be an important tool in identifying the perpetrators and absolving the one falsely convicted, still its full potential is yet to be proved. There is a need that we have advanced technology and a trusted mechanism for the collection, storage and processing of DNA evidence.

DNA reports cannot be full proof evidence that can be blindly relied on by the courts. When collected and processed by an expert it can provide insightful results. If dealt with by a non-expert it can prove to be trash, which may result into conviction of an innocent person. If there has been negligence in the collection of the sample from the crime scene or a person who has been alleged of committing it, the result deduced out of such samples cannot be correct, irrespective of the process and the science involved. If the samples are polluted or degraded, the result will have less probative value.[53]

To provide speedy redressal and fair justice to the people, there is a need to enhance and develop the use and application of forensic science in criminal investigation and proceedings. In India there is a need of modern and advanced forensic laboratories equipped with latest tools and technologies. The forensic criminalists working in private or public laboratories should be registered as per the government rules. Moreover, the reports generated by the experts should be lucid and easily understandable by the common people.[54]

The herculean task before the judiciary is how to make maximum utilization of the work done within the scientific sphere to enhance and make better use of forensic science in court. Ensuring proper use of forensic evidence in criminal proceedings is quite challenging because lawyers as well as the judges generally need assistance in analyzing the forensic reports submitted before the court. The lawyers and the judges in the court generally, due to ignorance of scientific studies, may fail to acknowledge and verify the evidence in an expert manner. There is a need to establish and start forensic education courses and programs in various legal institutions and judicial organizations.

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52 *Supra* note 9.

53 Singh, S. C. (2011). DNA profiling and the forensic use of DNA evidence in criminal proceedings. *Journal of the Indian Law Institute*, 195-226.

54 Kathane, P., Singh, A., Gaur, J. R., & Krishan, K. (2021). The development, status and future of forensics in India. *Forensic Science International: Reports*, *3*, 100215.

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Technological Innovation in Prevention of Crime: A Review of Newly introduced Criminal Laws in India

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Abstract

Parliament in India recently introduced new criminal laws completely replacing age old all three criminal laws in India. All three Acts have several new provisions to reform the criminal justice system in India. They attempt to introduced reforms to cope up with the challenges India facing due to various technological advancement. This paper seeks to study the implications of various provisions relating to technological integration in the criminal justice system. The new criminal laws enacted by Parliament in India aim to address the challenges posed by technological advancements in the country. These laws introduce several provisions that seek to reform the criminal justice system and integrate technology into its framework. This paper analyzes the implications of various changes and how these changes affect the use of technology in the criminal justice system. These changes if implemented properly can be of much importance and help to achieve the goal of justice.

1. Introduction

The goal of every judicial system is to achieve the end of justice and to form a crime free society. The laws are the important tool to that end. Indian parliament in 2023 have passed Bharatiya Nagarik Suraksha Sanhita, 2023, The Bharatiya Nyaya Sanhita, 2023, and the Bharatiya Sakshya Adhiniyan, 2023 replacing age old criminal laws i.e. the Code of Criminal Procedure, 1973, Indian Penal Code, and Indian Evidence Act, . [1]A parliamentary committee was formed for suggesting changes in these laws. The Parliamentary Standing Committee on Home Affairs has in his report advising to implement safeguards before introducing the use of technology. These laws requires digitization of the entire process, which includes registration of FIRs, filing of

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[1] https://prsindia.org/billtrack/the-bharatiya-nagarik-suraksha-second-sanhita-2023, last accessed on 05/02/2024

charge sheets, and delivery of judgments. The committee also recommends the use of audio-video electronic devices for search and seizure operations. To ensure the secure use and authentication of electronically. Most of the recommendations are included in the newly introduced criminal laws. However, some jurists are of the opinion that whether these changes are sufficient and ready to be implemented. This is because infrastructure of criminal justice system of India is even now follows age old traditions with certain exceptions.

2. History Of Technological Reforms in Criminal Justice System Of India:

Criminal Justice System of India over the year has incorporated various important technological changes like computerization of records, e-filing, video conferencing, and the introduction of the Crime and Criminal Tracking Network & Systems (CCTNS) etc. Forensic tools in the detection of crime also can not be ignored. These changes are very important for the efficient working of the system. However, these changes have proved to be insufficient to meet challenges due to the constantly rising standards of criminal activities. The judiciary in India played a significant role and introduced various technological reforms to enhance accessibility. The E-Courts Project[2] is one of the important changes introduced by the Supreme Court. This provides ICT infrastructure and case management systems along with the National Judicial Data Grid which makes case-related information available online. Case records are also being digitized. There are significant legal improvements in India to address challenges in crime prevention in the digital age. The Information Technology Act, of 2000 was introduced to meet the demand for change and increasing numbers of cybercrimes. A number of times Criminal Procedure Code along with other criminal laws was amended to accommodate technological advancements.

Admissibility of electronic evidence is addressed through Section 65B[3] of the Indian Evidence Act provides conditions for the admissibility of electronic evidence. Section 2(t)[4] of the Information Technology Act defines "electronic record." Further Section 91 of the Cr.P.C. empowers courts to

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2 The e-Courts Project was conceptualized on the basis of the “National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary – 2005” submitted by e-Committee, Supreme Court of India with a vision to transform the Indian Judiciary by ICT enablement of Courts.

3 “Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.”

4 Section 2(t), “ Electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated microfiche.”

summon electronic documents. These legal provisions was aimed to provide a comprehensive framework while ensuring individual rights. They are an ongoing process, adapting to technological advancements. Several provisions and case laws support the integration of technology in criminal investigations. Section 272 of the IPC pertains to technology in food adulteration cases. There is various important case as Anvar P.V. v. P.K. Basheer[5] clarify requirements for electronic evidence admissibility, State of Maharashtra v. Praful Desai[6] recognizes voice recordings as primary evidence, State (NCT of Delhi) v. Navjot Sandhu[7] acknowledges CDRs as crucial evidence, Selvi & Ors. v. State of Karnataka[8] deals with admissibility of advanced tests. These provisions and case laws shape the legal framework for technology integration in criminal justice in India. Now recent Criminal laws i.e. Bharatiya Nagarik Suraksha Sanhita, 2023, The Bharatiya Nyaya Sanhita, 2023, and the Bharatiya Sakshya Adhiniyan, 2023 tries to consolidate and introduce various changes in criminal justice system.

3. Analysis of Important Changes:

When the parliament of India passed the Bharatiya Nagarik Suraksha Sanhita, 2023, The Bharatiya Nyaya Sanhita, 2023, and the Bharatiya Sakshya Adhiniyan, 2023, this step witnessed a significant development in the criminal justice system of India. These laws set to be implemented, when the centre notifies the date of enforcement. There are various significant changes as mentioned below:

a) **New form of sedition law:** The Bharatiya Nyay Sanhita has introduced a new form of sedition law. This law has repealed the sedition law of colonial era incorporated in Section 124A[9] of the Indian Penal Code. Now Section 150[10] Bharatiya Nyay Sanhita of criminalizes acts of secession, armed rebellion, subversive activities, and endangering sovereignty and unity of India. Now the punishment for these offenses has been enhanced to 7 years imprisonment and fine. The objective of this change is to maintain a

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5 2014 SCC ONLINE SC 732

6 (2003) 4 SCC 601

7 (2005) 11 SCC 600

8 AIR 2010 SUPREME COURT 1974

9 "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, [2]*** the Government established by law in [3][India], [4]*** shall be punished with [5][imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

10 "Whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act shall be punished with imprisonment for life or with imprisonment which may extend to seven years and shall also be liable to fine."

balance between national security and individual rights.[11] The introduction of the new form of sedition law reflects a significant change in the legal framework of India. sovereignty and unity demonstrate the seriousness with which the government views these threats.

The Bharatiya Nyay Sanhita, 2023 has abolished the word "sedition". However, the Bharatiya Nyay Sanhita, 2023 formulated Section 150 as a replacement to criminalize actions that pose a threat to the sovereignty, unity, and integrity of India through electronic communications. This new provision has a broader reach than sedition. This provision has the potential to affect free speech, dissent, and journalistic freedom. It is also very important that now punishment under section 150 makes imprisonment compulsory, as compared to the previous provision that allowed for fines in certain cases. The inclusion of "electronic communications" as a method for committing "seditious" acts also raises concerns because it may lead to grave restrictions on online expression and the stifling of dissenting voices.

These laws become more grave because of The Telecommunications Act, 2023. This act allows for legal interception of electronic communications, prompting worries about privacy. If applied to online communication services, providers like WhatsApp and Signal, which use end-to-end encryption for user privacy, might be compelled to intercept, detain, disclose, or suspend various messages. The Act Section 2(p)[12] defines communication in very broad terms."[13]

b) **Strengthening of cybercrime laws:** We all know that day by day incidents related to cyber crimes are rising in India. This is because of the increasing use of technology. The Bharatiya Nyay Sanhita in an important step to deal with the growing threat of cybercrime. Bharatiya Nyay Sanhita increased punishment for offenses related to fraud of electronic documents. Section 335[14], Section 338(Forged document or electronic record and using it as

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11 https://www.legalserviceindia.com/legal/article-13297-section-150-of-the-bharatiya-nyaya-sanhita-bill-2023-a-regressive-step-by-the-union.html ,Last accessed on 12.01.2024

12 "telecommunication" means transmission, emission or reception of any messages, by wire, radio, optical or other electro-magnetic systems, whether or not such messages have been subjected to rearrangement, computation or other processes by any means in the course of their transmission, emission or reception;

13 https://internetfreedom.in/three-new-criminal-law-bills/#:~:text =seditiondigital %20 devicesReforming%20(or%20deforming%3F),Nagarik%20Suraksha%20(Second) %20Sanhita. Last accessed on 12.01.2024

14 "Whoever forges a document or an electronic record, purporting to be a record or proceeding of or in a Court or an identity document issued by Government including voter identity card or Aadhaar Card, or a register of birth, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

genuine) Section 340, etc. of the Bharatiya Nyay Sanhita imposes increased fines and imprisonment for individuals on conviction. This new law is seen as an important step towards insuring the safety of digital infrastructure of country. These reforms shows the intention of government to protecting digital rights of citizen. It will also ensure safety of national security.

For the first time provisions related to Organised crime has been added as an offence in Bharatiya Nyay Sanhita under Section 109[15]. It includes crimes such as kidnapping, extortion and cyber-crime committed on behalf of a crime syndicate. Petty organised crime is also an offence now. It also includes the provision for organised crime relate to cyber crime.

c) **Admissibility of Digital Records:** It is well known that India is going through the era of digital transformation. To equip judicial and investigative infrastructure with advanced technologies newly introduced criminal laws recognizes the admissibility of digital or electronic records as evidence. These records are now have enjoy equal legal validity and enforceability as traditional paper records. These provisions are introduced with the aims to facilitate the transition to a digital advanced world.[16] The loss of records in court is a well known fact. Now it will help in promoting a more efficient and secure way of storing and presenting evidence in legal proceedings. The recognition of electronic records will promote a paperless environment, which in result reduce the need for physical storage space. It will also minimise the risk of document loss or damage. The use of digital records will allow us to easily access and retrieve the information. This recognition also encourages innovation and the development of new technologies that can enhance the efficiency and effectiveness of legal processes

The Bharatiya Sakshya Adhiniyan, 2023 expanded the scope of 'documents'[17] by including electronic or digital records, online

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15 109. (1) Any continuing unlawful activity including kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, economic offences, cyber-crimes having severe consequences, trafficking in people, drugs, illicit goods or services and weapons, human trafficking racket for prostitution or ransom by the effort of groups of individuals acting in concert, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence, threat of violence, intimidation, coercion, corruption or related activities or other unlawful means to obtain direct or indirect, material benefit including a financial benefit, shall constitute organised crime.

16 https://www.azbpartners.com/bank/overview-of-the-bharatiya-nagarik-suraksha-sanhita - 2023/ Last accessed on 01.01.2024

17 Section 2(d) "document" means 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.
Illustrations (vi) An electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents;

communications across various personal devices. This definition includes messages, call recordings, emails, and electronic communication devices like mobile phones, laptops, cameras, and any other electronic device. This provision without any doubt aims for substantial reform however it failed to provide methods to insure the security and proper maintenance of a chain of custody for digital evidence obtained during investigations.[18] Lack of this safeguards may raise questions regarding vulnerability of private information. There is always questions be raised as to tampering, leaks, or breaches of information stored by investigating officers. The Bharatiya Sakshya Adhiniyan, 2023 like Section 65B of the Indian Evidence Act does not specifically requires certification for the admissibility of electronic evidence. Here a contradiction may arise because Bharatiya Sakshya Adhiniyan categorizes electronic records as "documents" that may not necessarily need certification. It is important that classifying electronic records as "documents" shifts their perception from secondary to primary evidence. This is particularly problematic given the susceptibility of electronic records to tampering, making the designation of "primary evidence" a potential source of issues.

d) **Electronic Mode in Investigation, Inquiry, and Trial:** Section 530 of Bharatiya Nagarik Suraksha Sanhita, 2023 provides that all trials, inquiries, and proceedings, including appellate proceedings, may be conducted in electronic mode. These provisions show a change towards the use of technology in legal processes. This further enhances efficiency and embraces electronic communication methods in various stages of investigation, inquiry, and trial.[19] BNSS introduces electronic communication and audio-video electronic means for various procedures.[20] New definitions, such as "audio-video electronic" and "electronic communication," have been introduced. Summons to witnesses and the accused can be served through electronic communication. Statements can be recorded through audio-video means during investigations. Investigating authorities can supply documents in electronic form. Search and seizure procedures can be recorded by audio-video means which also includes the preparation of seizure lists. These advancements in technology have greatly facilitated the criminal justice system. The use of audio-video electronic communication has not only made it easier to serve summons and record statements, but it has also enabled investigating authorities to provide evidence in electronic form. This process reduces the reliance on physical documents. The ability to record search and seizure procedures through audio-video means allows for transparency and accountability.

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18 https://www.thehindu.com/news/national/date-of-implementation-of-new-criminal-laws-to-be-notified-before-january-26-to-come-into-effect-in-nine-12-months/article67699283.ece , Last accessed on 02.01.2024

19 https://www.scconline.com/blog/post/2023/12/31/key-highlights-of-the-three-new-criminal -laws-introduced-in-2023/, Last accessed on 05.01.2024

20 https://www.thehindu.com/news/national/revised-criminal-law-bills-the-key-changes-explained/article67637348.ece, Last accessed on 05.01.2024

This change in various provides greater accessibility and convenience for all parties involved in the legal process. This modernization of the legal system also opens doors for increased collaboration and information sharing among legal professionals. It will also improve the efficiency of the justice system. The use of electronic proceedings will also reduce significantly costs associated with traditional courtroom proceedings. This cost savings can be especially beneficial for individuals and organizations with limited financial resources. Overall, the adoption of electronic proceedings by the BNSS represents a significant step forward in modernizing the legal system and improving access to justice for all.

There is also a question arise that large number of population in India are poor and have no access to these technology. So whether these type of procedure really beneficial to these peoples. There is always possibility of misusing these technology. This is the reason that state also needs to sensitise the citizens of country and provide access to everyone of these technologies.

e) **Forensic investigation:** Forensic investigation plays an important part in securing proper investigation and to meet the end of justice. It also enhances the accuracy and reliability of evidence presented in court. The Bharatiya Nagarik Suraksha Sanhita, 2023 provides provision for forensic investigation for offences punishable with at least seven years of imprisonment. In these cases forensic experts will visit crime scenes to collect forensic evidence and record the process on mobile phone or any other electronic device. If a state does not have forensics facility, it shall utilise such facility in another state. This provison is very important seeing the rising number of criminal activities and lack of percentage in conviction of accused. However, this can also not be ignored that infrastructure related to forensic tabs and trained investigators for forensic science in not sufficient in India.

f) **Data collection for criminal identification:** The Cr.P.C. empowers a Magistrate to order any person to provide specimen signatures or handwriting. The Bharatiya Nagarik Suraksha Sanhita, 2023 expands this to include finger impressions and voice samples.[21] It allows these samples to be collected from a person who has not been arrested. In 2005, the Cr.P.C. was amended to empower courts to obtain handwriting or signature specimens from arrested persons.[22] The Bharatiya Nagarik Suraksha Sanhita, 2023 further inhanced the scope and provided that the Magistrate can also collect finger impressions and voice samples. It also allows collection of this data from persons who have not been arrested under any investigation. The Criminal Procedure (Identification) Act, 2022 allows a broader range of data to be collected including fingerprints,

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21 https://www.mondaq.com/india/crime/1407526/bharatiya-nagarik-suraksha-sanhita-2023-bnss, Last accessed on 29/01/2024

22 Section 311A, The Code of Criminal Procedure, 1973.

handwriting, and biological samples.[23] Such data may be collected from convicts, those who have been arrested for an offence, or non-accused persons as well, and can be stored up to 75 years. With a broader law recently being passed to allow for data collection of criminals and accused, the need for retaining data collection provisions and expanding on them in the Bharatiya Nagarik Suraksha Sanhita, 2023 is unclear. The constitutional validity of the 2022 Act is under consideration before the Delhi High Court.[24]

Bharatiya Nagarik Suraksha Sanhita, 2023 empowers the Court to summon any document or material essential for an investigation, considering it as 'evidence,' which includes digital evidence. Courts can authorize the search and seizure of such evidence for various reasons, including situations where the possessor of the evidence is deemed unable to produce it or is not directly implicated in the trial. While mobiles or laptops may contain irrelevant information to the proceedings, they can still be collected as evidence. The incorporation of digital records under both BSB and BNSS may potentially lead to extensive invasions of privacy and violations of the constitutional right against self-incrimination. Moreover the Bharatiya Sakshya Adhiniyan, 2023 permits a police officer to conduct searches for any material or document (including in digital devices) without a written order if they have "reasonable grounds" to believe obtaining such material or document would be unduly delayed otherwise. This provision raises concerns as it may legitimize and encourage widespread infringement of privacy by the executive. In recent times, there has been a noticeable increase in raids displaying an evident overreach in the powers of search and seizure. Incidents where the police stop individuals on the street and compel them to surrender their phones have also been reported. As mobile devices have become integral extensions of our personal lives, laws like the Bharatiya Sakshya Adhiniyan, 2023 and BNSS, sanctioning unwarranted search and seizure, may persist in allowing the police to access extensive amounts of an individual's private information, thereby infringing upon their right to privacy.

g) **Changes with Respect to Registration of First Information Reports** : FIRs can now be registered via electronic communication. It will be taken on record on being signed within three days, by the person giving such information. This change aims to provide the process and make it more convenient for individuals to report crimes without having to physically visit a police station. The introduction of electronic communication for FIR registration also reduces the need for paperwork and manual documentation, leading to a more efficient and digitized system. Furthermore, the three-day time frame for signing the FIR ensures that the

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23 The Criminal Procedure (Identification) Act, 2022.

24 W.P. (CRL) 869/2022, Harshit Goel v. Union of India, Delhi High Court.

information is verified promptly and prevents any unnecessary delays in initiating the investigation process.

4. **Issues and challenges related to current reforms:**

   a) **Lack of Consultation and Transparency:** The bills were drafted by the Criminal Law Reforms Committee, 2020. The committee lacked representation from the judiciary, the bar, civil society, or marginalized communities. [25]The committee did not publicize its report or draft bills, hindering wider consultation and feedback. This lack of consultation and transparency raises concerns about the legitimacy of the bills and the potential bias in their drafting. Without input from key stakeholders, such as the judiciary, the bar, civil society, and marginalized communities, it becomes difficult to ensure that the bills adequately address the needs and concerns of all those affected by criminal law reforms. Additionally, by not publicizing the report or draft bills, the committee missed an opportunity to gather valuable feedback and incorporate diverse perspectives, further undermining the democratic process. This lack of transparency raises concerns about the legitimacy and inclusivity of the law reform process.[26]

   b) **Potential Violation of Human Rights:** Criticisms include the use of vague terms in the bills that may infringe on the human rights of accused, victims, witnesses, and stakeholders.

   The BNS introduces a new offense under Section 150[27], similar to the repealed sedition offense (Section 124A of IPC), raising concerns about suppressing dissent and free speech. The BNSS grants extensive powers to the police without judicial oversight or safeguards in areas like arrest, search, seizure, and detention. These bills have raised significant concerns among civil rights activists and legal experts. The lack of specificity in terms used in the bills raises the possibility of misuse and abuse of power, leading to potential violations of human rights. The introduction of the new offense under Section 150 in the BNS has alarmed many, as it bears resemblance to the repealed sedition offense, which was notorious for suppressing dissent and curbing freedom of speech. The provision in the BSB that allows confessions made before a police

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25 https://www.indiatoday.in/law/story/new-criminal-code-laws-passed-parliament-challe-nged - supreme-court-2482902-2024-01-01, Last accessed on 12/02/2024

26 https://www.indiatoday.in/law/story/new-criminal-code-laws-passed-parliament-challe-nged -supreme-court-2482902-2024-01-01, Last accessed on 15/01/2024

27 "Whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act shall be punished with imprisonment for life or with imprisonment which may extend to seven years and shall also be liable to fine."

officer to be admissible without proper safeguards increases the risk of custodial torture and coercion. Lastly, the extensive powers granted to the police under the BNSS, without any form of judicial oversight, raises concerns about potential abuse of authority in areas such as arrest, search, seizure, and detention. It is crucial that these bills are carefully reviewed and amended to ensure the protection of human rights and maintain the rule of law.

c) **Lack of Coherence and Consistency:** It is evident from the study of all these Acts that these bills and with existing laws lacks consistency. The BSB introduces a new standard of proof for conviction ("clear and convincing evidence") without clear definition or explanation. The BNSS creates a new category of offenses, "social welfare offenses," without specifying which offenses fall under this category. These inconsistencies within the Acts and with existing laws can lead to confusion and potential misuse of power by law enforcement agencies. Without clear definitions and explanations these new standard of proof for conviction and the creation of a new category of offenses can be open to interpretation. This may further lead to arbitrary decisions and potential violations of human rights. These questions are important and need careful examination and potential revisions to ensure transparency, protection of human rights, and coherence within the legal framework.

5. Conclusion:

It is important to mention that these laws marked a positive change in criminal justice system in India. However, these laws could have been more effective if lawmakers have carefully examined the current situations. They lack clear and comprehensive explanations necessary to avoid any potential arbitrary decisions and violations of human rights. it is recommended that in future amendment in these laws with the consultation of all the stakeholders dealing with criminal justice system may be introduced to remove lacunas and ensure transparency. Consulting with legal experts and conducting thorough impact assessments can help in refining the legislation and ensuring its fairness and effectiveness. These legislation can be assessed to enable policymakers to make informed decisions. The balance of protection of human rights is very important. A transparent and coherent legal framework will foster public trust and confidence in the legislation. It is also very important that law makers must also prioritize the involvement of civil society organizations, human rights advocates, and affected communities in the legislative process. These stakeholders possess invaluable expertise that can contribute to crafting comprehensive and rights-respecting legislation.

In India, newly introduced criminal laws have undergone extensive changes to include technological innovations They have put in place electronic evidence, principles for the recording of evidence through virtual means, and the electronic handling of the whole criminal justice process.

However, there are certain areas in which these laws could potentially fall short:

a) The Law of Cybersecurity: Despite the inclusion of terms for cybercrimes in new legislation, it may not be fully adequate to handle the intricacies of cybersecurity including hacking, data breaches, and other types of cyber-attacks.

b) Data Privacy: There may be inadequate addressing of data privacy matters particularly with regard to electronic evidence and digital data.

c) Technological Neutrality: They may not be technologically neutral given the fast pace of technological development in existence especially for all kind of technologies.

d) Digital Literacy: There is a need for some level of digital literacy among law enforcement agencies, judiciary, and the public for effective implementation of such laws although this aspect is still missing.

e) Infrastructure: Lack of required infrastructure especially in rural and remote areas such as reliable internet connectivity and digital devices may make it difficult to apply these laws effectively.

f) Legal Framework for Emerging Technologies: These could lack comprehensive legal frameworks for emerging technologies like artificial intelligence (AI), blockchain technology, cryptocurrency etc.

It is important to note that despite these potential downsides, the new laws constitute a big leap forward in the process of modernizing the criminal justice system of India. Nevertheless, there has to be continuous review and amendment of these laws to keep up with technological advancements and the attendant challenges.

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The Regulatory Uncertainity around Fintech Products with a Special Reference to the Regulation of Cryptocurrency in India: The Way Forward

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Abstract

FinTech products and services have proven themselves to be revolutionary in various world economies. Many micro, small, and medium enterprises in the world sustain and do business smoothly because of the existence of these FinTech products and services. Such FinTech products and services include digital wallets, payment gateways, asset management services, digital banking, digital insurance aggregators, peer-to-peer lending, financial transaction delivery services and others. The financial payment and settlement system had never been so convenient for persons and businesses but for the presence of the FinTech products and services catering to the B2B (business to business) and B2C (business to customer) space. Emerging economies like India and China are no exception to the global phenomenon of FinTech products and services revolutionizing the way business transactions occur, primarily catering to the objective of the ease of doing business across jurisdictions. However, the financial regulators in these emerging economies of the world (i.e., India and China) and some other European nations like the United Kingdom have demonstrated considerable reluctance to embrace/allow these FinTech products/services with open arms. Regulators have always been highly cautious toward FinTech services and products. The apex banking institution in India, i.e., the Reserve Bank of India (i.e., the RBI), (RBI, *The Reserve Bank of India*)[1] *for the first time, formally took note of the risks that technology has posed to the changing business environment in India. The RBI underscored the point for the first time in its Financial Stability Report published in June 2013* (Financial

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[1] The Reserve Bank of India, i.e., RBI, was established under The Reserve Bank of India Act 1935 on April 1, 1935. The RBI acts as a banker to the Government of India. Refer to the official website of the RBI for more information. Url: Author. (n.d.). *The Reserve Bank of India*. Reserve Bank of India. Retrieved July 10, 2023, from https://www.rbi.org.in/home.aspx.

Stability Unit, RBI, *Financial Stability Report - Indian Rupee* 2013)[2]. *In this article, the author analyses the response of the Indian regulatory authority, i.e., the Securities and Exchange Board of India, toward the new and innovative FinTech products and services. The author further argues that banning FinTech products may stifle the general trend of finnovations in India. The author argues that a more balanced/ nuanced regulatory approach of the regulatory authorities in India may be the best foot forward for the financial regulators in India. Regulatory sandboxes assist financial regulatory authorities in designing and evolving practical and more nuanced regulatory frameworks for addressing some of the regulatory issues and challenges posed by new-age technology-based financial products and services. Banning or derecognizing the finnovative products and services may not be in the nation's best interest, especially when the exact product/service is adopted elsewhere in other jurisdictions. According to the author, all concerns the regulators raise, like consumer protection, money-laundering issues, and terrorism, may be effectively addressed by implementing workable, practical and robust regulations.*

Methodology of Research: *- For this research, all the data primary and secondary data from authentic sources, regulatory authorities, and regulated entities have been analyzed by the researcher to conclude. Care has been taken to utilize data from authentic sources only, i.e., the quantitative and qualitative data available on the websites of the regulatory bodies, research reports of international agencies, research reports published by regulated entities, govt., Committee reports and the like from India and other world jurisdictions are used for this research.*

Keywords: FinTech products, finnovation, Cryptocurrency, Regulation, Sandbox.

Introduction

Technology has played a vital role in making financial products and services accessible to the common masses across the globe (UNSGSA and CCAF, *The Report of the FinTech Working Group of the United Nations Secretary-General's Special Advocate for Inclusive Finance for Development (UNSGSA)* 2019).[3]Consequently, India is not immune to this global phenomenon or the

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[2] Refer to page # 03 of the Financial Stability Report, June 2013 of the Reserve Bank of India (i.e., RBI). A copy of the report is also available at the official website of the apex Bank of India (i.e. RBI), URL: RBI. (2013, June). *Financial Stability Report - Indian Rupee*. rbidocs.rbi.org. Retrieved Nov. 10, 2023, from https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/FSPI260613FL.pdf .

[3] Refer to the report of the FinTech Working Group of the United Nations Secretary-General's Special Advocate for Inclusive Finance for Development (UNSGSA) and the Cambridge Centre for Alternative Finance (CCAF) at the University of Cambridge Judge Business School FinTech Working Group of the United Nations Secretary-General's Special Advocate for Inclusive Finance for Development (UNSGSA) and Cambridge Centre for Alternative Finance (CCAF) at the University of Cambridge Judge Business School. (2019). (rep.). *The Report of the FinTech Working Group of the United Nations Secretary-General's Special Advocate for Inclusive Finance for Development (UNSGSA)* (pp. 10–14). New York. Ref. citation of the report is UNSGSA FinTech Working Group and CCAF. (2019). Early Lessons on Regulatory Innovations to Enable Inclusive FinTech: Innovation Offices, Regulatory Sandboxes, and RegTech. Office of the UNSGSA and CCAF: New York, NY, and Cambridge, UK.

gradual process of a worldwide transformation. Digital e-wallets have revolutionized India's payment system(s) and mode(s). The significance of the FinTech products, especially the e-wallets, increased manifold because of the lack of adequate penetration by the banking organizations in rural India's remote places and locations. This may be because of the infrastructural costs involved in establishing banking institutions in the interior zones of India. This may be coupled with the need for more visibility regarding the business prospects in these rural areas, given that most people residing in these areas have a meager source of income, leading to less or no surplus income or savings. Hence, banks may not attract deposits from these masses. The gap in outreach and penetration of banking institutions into the interior parts of the country (i.e., India) led to the rural people's massive adoption of e-wallets and Unified Payment Interfaces (UPI).

Consequently, the lack of penetration by banking organizations led to the digitization of the payment system in India, i.e., by providing a colossal push/ impetus to the digitization of the payment(s) system. This momentum in digitizing payment systems was triggered and facilitated by the e-wallet companies in India. This move has not only helped the common masses (in India) to switch and adopt digital mode of payments but also pushed a large part of the Indian population to switch to a digital economy from a dominant cash-based economy.[4] This has also smoothened the much-desired e-commerce transaction(s) in India. However, India remains predominantly a cash-based economy to this date.[5]

Adoption Rate of FinTech Products in India vis-a-vis other nations

According to a survey report published by Ernst and Young (i.e., the global financial firm based out of the UK), the FinTech products and services Adoption Rate or the FinTech products and services adoption Index in emerging economies, for instance, the BRICS Nations like Brazil, Russia, India, China, and South Africa is 46%, which is around 13% higher than the global average adoption rate of only 33% for other economies of the world.[6] *Electronic transfer of funds, loan application apps, job application apps, Unified Payments Interfaces (i.e., UPI), internet banking, e-wallets, primary and secondary market trading or transaction(s) in securities markets as well as other financial products are common instances of the underlying role played by the technology in facilitating and providing access to financial products and services in India and elsewhere in the world.* The image diagram on the next page of this article reflects that India and China

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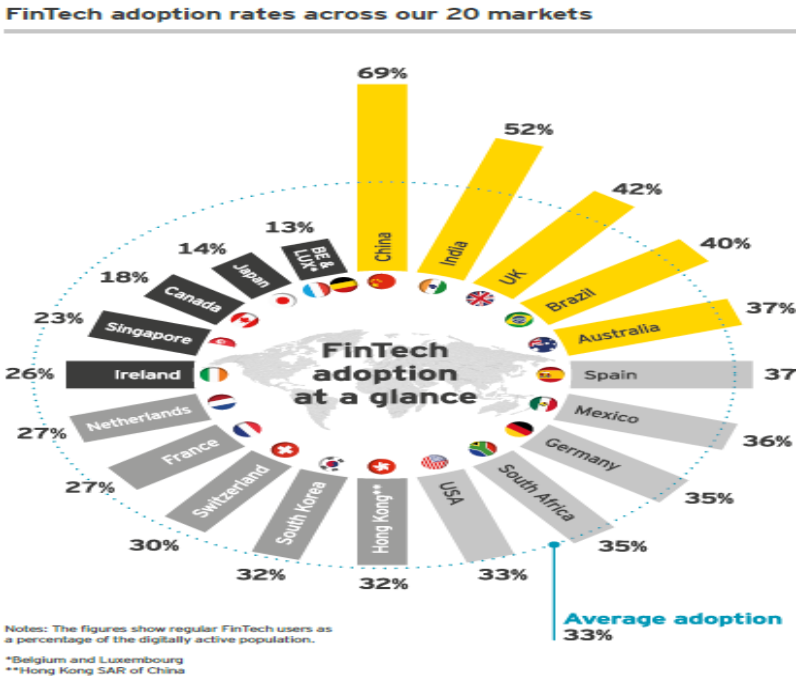
4 Refer to the Executive Summary of the report of the High-Level Committee on Deepening of Digital Payments, constituted by the Reserve Bank of India. A copy of the report is also available at the official website of the Reserve Bank of India, URL: https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/CDDP03062019634B0EEF3F7144C3B65360B280E420AC.PDF accessed on Oct. 29 2023.

5 Ibid

6 Refer to the Ernst and Young report on FinTech Adoption Index/ rate titled '2017 FinTech Adoption Index'. A report copy is available for reference at https://www.ey.com/Publication/vwLUAssets/ey-FinTech-adoption-index-2017/$FILE/ey-FinTech-adoption-index-2017.pdf accessed on Nov. 30, 2023.

have the fastest adoption rate of FinTech products and services worldwide, followed by the UK. Hence, it may be reasonable to presume that FinTech products and services are highly in demand among the common masses in these two jurisdictions like India and China. If the faster adoption or usage of the FinTech products and services are any indicators of growing demand for FinTech products, in that case, the FinTech products and services have the biggest market in India and China as per the Ernst and Young report, the global financial services firm. Hence, prohibiting access to the FinTech products by creating artificial legal barriers, i.e., by banning/ disallowing the possession/ transaction(s) and the likes of these FinTech products and services, may not be the ideal course of action for the regulators in the economies like China and India. It is instead the allowing of access to these FinTech products/ services in a systematic manner, initially through the indirect investment platforms like mutual funds and the likes of it, and the same cushioned by strict regulation and monitoring of the entities issuing or investing in such financial/innovative products may be a (relatively) better regulatory approach with regard to the new innovative products and services in India. This regulatory approach, if adopted by the regulator, may help achieve the dual objective(s) of the regulator, one being the protection of investors' interest in the market and the other being the 'promotion of the market,' as stipulated in section 11 of the Securities and Exchange Board of India Act, 1992.



Source: Ernst and Young's FinTech Adoption Index 2017: Key Findings[7]

[7] A copy of Ernst and Young's (financial services firm) is also available on the official website of the firm. url: https://www.ey.com/Publication/vwLUAssets/ey-FinTech-

Cryptocurrency as a FinTech Product and an asset:

Technology has been the vital force behind the smoother transfer of funds from one account/ location to another, anywhere in the world. It has been the driving force behind international trade flows from one destination to another globally. Despite all the advantages of using technology in smoothening commercial/ trade transactions, the financial regulators in India have shown considerable reluctance and lack of interest or promptness in adopting/allowing the financial product(s), mainly belonging to the FinTech category or species. For instance, the virtual currency, designed and acclaimed to have the 'potential to replace' the usage of physical currency, shortly had a roller coaster regulatory ride in India. The virtual currency based on block chain technology is currently being acclaimed/ perceived by its proponents and enthusiasts (i.e., its users and traders) as the future global currency. Such an initiative would go a long way in smoothening international trade/commercial transactions among various countries worldwide by streamlining the payment and settlement of international trading transactions. This paper shall discuss the two aspects of regulating cryptocurrencies in India, viz. possession or holding of the virtual currency in the bank accounts (which may be regulated by the currency regulator, including the regulator for currency exchange in India, i.e., Reserve Bank of India). The other aspect of regulation may be the trading in virtual currencies (which may be the domain of the commodity and capital market regulator in India, i.e., the Securities and Exchange Board of India, i.e., SEBI).

The regulatory trend of FinTech Products in India

Of late, the financial regulators in India have been viewing financial innovations and products with undue and skewed scepticism/distrust. The records of financial regulators in India are rife with instances of systematically disallowing, followed by banning various financial products from being used or traded in the market. To name a few, they would be banning/ disallowing the trading of financial derivative products like mini contracts and forward contracts in commodities.[8], the very recent ban related to P-notes and short-selling activities, and the like, are the ones to name a few,[9] that was banned by the capital market regulator, i.e., the Securities and Exchange Board of India (SEBI), in the past. In the recent past, the regulator, the Securities and Exchange Board of India, also refused to make a legal intervention in the matter relating to the sharing of information with the Singapore Stock Exchange (i.e., SGX) by the Indian bourses like the National Stock Exchange of India (i.e., the NSE), the

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key-findings-2017/$FILE/ey-FinTech-key-findings-2017.pdf accessed on the 30th of Nov., 2023.

8 Refer to the SEBI circular dated September 20, 2019. A copy of the circular in electronic form is also available for perusal at https://www.sebi.gov.in/sebi_data/attachdocs/1474368821651.pdf accessed on Dec. 14, 2023.

9 Refer to the SEBI circular on imposing certain restrictions or banning P-Notes, https://www.sebi.gov.in/legal/circulars/jul-2017/guidelines-for-issuance-of-odis-with-derivative-as-underlying-by-the-odi-issuing-fpis_35266.html accessed on Nov. 18, 2023.

Bombay Stock Exchange (i.e., the BSE) and the Multi Commodity Exchange of India (i.e., MCX). It is essential to mention that some of the Nifty indices trade in relatively larger volumes at the Singapore Stock Exchange than the Indian bourses. There are other products and services that the SEBI needs to be more prompt in adopting, allowing, and regulating. One such product is the practice of crowdfunding in India, regarding which the market regulator SEBI is yet to bring out / promulgate a set of regulations. However, the regulator has not banned crowdfunding in India; it has yet to address the regulatory vacuum in the space.[10] This is even though a consultation paper on crowdfunding was issued as early as June 2014.[11]

Recently, the legal issue over cryptocurrency regulation has gained considerable momentum and attention from the market players in India. It is for this reason that the banking regulator, the Reserve Bank of India (i.e., RBI), issued multiple cautionary advice like warnings via its circulars and advisory notes,[12] directed especially towards banks and other financial institutions, prohibiting them from dealing in virtual currencies. This banking regulator's approach kept the banks and financial institutions from dealing in virtual currencies. Also, the retail and other categories of investors were systematically dissuaded and refrained from transacting directly or indirectly in any virtual or cryptocurrencies. The regulatory approach adopted by the Indian regulators, viz., the Reserve Bank of India and the Securities and Exchange Board of India (i.e., SEBI), was very contrary to the approach adopted by several regulators worldwide. Financial regulators in most advanced economies like the USA, UK, and Japan were among the first countries to adopt Cryptocurrency and allowed trading the same on their bourses. However, the Indian regulators, viz. the Reserve Bank of India, i.e., RBI and the Securities and Exchange Board of India, have yet to come to terms with the new form of currency—Cryptocurrency- based on block chain technology. As a result, Cryptocurrency is another innovative FinTech product that suffered the same fate at the hands of financial regulators in India as the other such categories of financial innovations and products did in the past. However, the Government of India drafted a bill in February 2019 to ban agencies and persons from holding, trading, mining, using, issuing, or transferring cryptocurrencies in India.[13]

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10 Refer to the answer given by the then Minister in charge of the Ministry of Finance and Ministry of Corporate Affairs, Government of India, Shri Arun Jaitley in response to the question asked by Ms Kanimozhi (the Member of Parliament) in Rajya Sabha (the Upper House of the Indian Legislature) which is uploaded and made available for reference of common masses at the official website of the Ministry of Corporate Affairs, Government of India. url: http://www.mca.gov.in /Ministry/pdf/ru4034_04042018.pdf accessed on the 20th of Nov., 2023.

11 *Ibid*

12 Refer to the Reserve Bank of India's circular no. RBI/2017-18/154, DBR.No.BP.BC.104 /08.13.102/2017-18 issued by the RBI on April 6, 2018, whereby the banking regulator prohibited the banks, NBFCs, and cooperative financial institutions from dealing with virtual currency in any form.

13 The text of the Bill on the Banning of Cryptocurrency and the Regulation of the Official Digital Currency Bill, 2019 is available in electronic form for reference at

Regulatory Journey of Cryptocurrencies in India:

The regulatory origin of cryptocurrencies in India dates back to December 24, 2013,[14] when the apex bank in India i.e., the Reserve Bank of India, issued a press release to caution the users, traders, and holders of the cryptocurrencies (including bit coins) in India, apprising them about the potential operational, financial, legal, customer protection and security related risks that the holders, users and the traders of these forms of currencies are exposing themselves to.[15] Followed by the press release of the Reserve Bank of India dated December 24, 2013[16] was the press release dated February 1, 2017,[17] December 5, 2017[18] and finally, on April 5, 2018. [19]

On April 6, 2018, the Reserve Bank of India, while exercising the powers conferred on it under section 35A[20] read with section 36(1)(a)[21] of

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https://www.prsindia.org/sites/default/files/bill_files/Draft%20Banning%20of%20Cryptocurrency%20%26%20Regulation%20of%20Official%20Digital%20Currency%20Bill%2C%202019.pdf accessed on Dec. 8, 2023.

14 Refer to the press release of the Reserve Bank of India (i.e., the apex bank in India) dated December 24, 2013. A copy of the press release is also available in pdf format at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/IEPR1261VC1213.PDF accessed on Dec. 8, 2023.

15 Ibid

16 Ibid

17 Refer to the press release of the Reserve Bank of India dated February 1, 2017, by which the Reserve Bank of India clarified that it had not issued any license or authorization to an intermediary to deal in Cryptocurrency and anyone dealing in the Cryptocurrency may do so at their own risk. A copy of the press release is also available in electronic form at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR205413F23C955D8C45C4A1F56349D1B8C457.PDF accessed on Dec. 8, 2023.

18 Refer to the second cautionary press release issued by the Reserve Bank of India on December 5, 2017, in the same year to check the growth and popularity of the Initial Coin Offerings (i.e., ICOs) in India. A press release copy is also available at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR15304814BE14A3414FD490B47B0B1BF79DDC.PDF accessed on Dec 8, 2023.

19 Refer to *clause 13* of the press release and the *'Statement on the Developmental and Regulatory Policies'* issued by the Reserve Bank of India on April 5, 2018. The apex bank clarified the Government of India's intention through this press release. The press release made the intentions of the Government of India clear, i.e., to put a final check and discourage completely any dealing(s) in cryptocurrencies in India and by *clause 12* of the *'Statement on the Developmental and Regulatory Policies'* issued by the Reserve Bank of India on April 5, 2018, intended to introduce digital currency pertaining to the high cost involved in the maintenance and management of the fiat/ metallic currency in India. A copy of the *'Statement on the Developmental and Regulatory Policies'* issued by the Reserve Bank of India on April 5, 2018, is also available for reference at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR264270719E5CB28249D7BCE07C5B3196C904.PDF accessed on Dec. 8, 2023. The apex bank also constituted an inter-departmental group to submit its report on the possible guidance, desirability, and feasibility of introducing digital currency in India to replace fiat paper/ metallic currency in India.

20 Section 35A of the Banking Regulation Act, 1949, in India, gives the Reserve Bank of India (i.e., the RBI) the power to issue directions in the public interest. A copy of the legislation is also available in electronic form at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/BANKI15122014.PDF accessed

Banking Regulation Act, 1949,[22] and section 56[23] of the Banking Regulation Act, 1949, section 45JA[24] and 45L[25] of the Reserve Bank of India Act, 1934[26] and Section 10(2)[27] read with Section 18[28] of Payment and Settlement Systems Act,

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on Dec. 8, 2023. For accessing the full text of the provision(s) of law, refer to page 64 of the copy of the legislation, which is also available in electronic form at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/BANKI15122014.PDF accessed on Dec 8, 2023.

21 Section 36(1)(a) of the Banking Regulation Act, 1949 empowers the apex bank (i.e., the Reserve Bank of India) to issue, caution, or prohibit banking companies or a particular banking company from entering into any particular transaction or a class of transaction or give general advice to any banking company or companies. A copy of the legislation is also available in electronic form at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/BANKI15122014.PDF accessed on Nov. 18, 2023. For accessing the full text of the provision(s) of law, refer to page 66, sec. 36(1)(a) of the legislation available at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/BANKI15122014.PDF accessed on the Nov. 18, 2023.

22 A copy of the legislation in electronic format is also available at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/BANKI15122014.PDF accessed on Dec. 8, 2023.

23 For accessing the full text of the provision(s) of law, refer to section 56 (i.e., page number 126) of the Banking Regulation Act, 1949, which brings the regulation of the cooperative societies also within the purview of the regulation of the Reserve Bank of India. A copy of the legislation is also available in electronic form at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/BANKI15122014.PDF accessed on Dec. 8, 2023.

24 Section 45JA of the Reserve Bank of India Act, 1934 empowers the apex bank of India (i.e., the Reserve Bank of India) to determine policies and issue directions in the public interest or to regulate the country's financial system to its advantage. To access the full text of the provision(s) of law, refer to page 70 of the copy of the legislation, i.e., the Reserve Bank of India Act, 1934, available in electronic format for reference at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIAM_230609.pdf accessed on Dec. 8, 2023.

25 Section 45L of the Reserve Bank of India Act, 1949 empowers the apex bank of India (i.e., the Reserve Bank of India) to call for information from financial institutions and to give directions to regulate the country's credit system to its advantage. To access the full text of the provision(s) of law, refer to page 71 of the copy of the legislation, i.e., the Reserve Bank of India Act, 1949, available in electronic form at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIAM_230609.pdf accessed on Dec. 8, 2023.

26 A copy of the legislation in electronic format for reference is also available https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RBIAM_230609.pdf accessed on Dec. 8, 2023.

27 Section 10 of the Payment and Settlement Systems Act, 2007, empowers the apex bank of India (i.e., the Reserve Bank of India) to determine standards of the Payment and Settlement Systems in the country. For accessing the full text of the provision(s) of law, refer to page number 07 of the legislation available in electronic format at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/86706.pdf accessed on Dec. 8, 2023.

28 Section 18 of the Payment and Settlement Systems Act, 2007 empowers the Reserve Bank of India to give directions generally to regulate the country's payment systems effectively. For accessing the full text of the provision(s) of law, refer to page number 09 of the legislation available in electronic format at

2007[29] issued a notification[30] putting a complete ban or prohibition on the dealings in the virtual currencies then prevalent in the country, in any form.[31] The chronological sequence of press releases and notifications issued by the apex bank of India displays a high degree of reluctance and lack of willingness on the part of the banking regulator in India (i.e., the Reserve Bank of India) to acknowledge the intrinsic worth. The virtual currency's value or the virtual currencies' hidden potential to form and run as a parallel system of exchange, competing with the fiat currency system in the future, is wholly dismissed and denied.

The rationale put forth by the Reserve Bank of India (i.e., the apex bank of India) for taking such a hostile stance concerning the introduction of virtual currencies is that such a step would be in the best interest of ordinary/ common investors in the market.[32] The country's apex bank also argued that a ban on dealing(s) in virtual currencies in India is necessary. The same would work like an anti-money laundering measure and would also go a long way in protecting the market integrity in the country, among its other objectives.[33] Additionally, the apex bank of India constituted a high-level Inter-Ministerial Committee (IMC) to submit its report on the desirability and feasibility of introducing fiat digital currency in India. This is to curb the rising costs incurred in maintaining the fiat currencies in their physical form.[34]

The Key Recommendations of the Inter-Ministerial Committee (IMC) on Virtual Currencies

The 'Inter-Ministerial Committee to propose specific actions to be taken in relation to Virtual Currencies' suggested a complete ban on any virtual currency issued and floated by private or non-governmental entities. *The Committee suggested that virtual currencies other than the ones issued by*

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https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/86706.pdf accessed on Sept. 8, 2023.

29 A copy of the legislation, i.e., the Payments and Settlement Systems Act, 2007, is also available in electronic format at https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/86706.pdf accessed on Nov. 18, 2023.

30 Refer to the notification number RBI/2017-18/154 DBR.No.BP.BC.104 /08.13.102/2017-18, issued by the Reserve bank of India on April 6, 2018, and addressed to all Commercial and Cooperative Banks /Payments Banks/Small Finance Banks / NBFCs / Payment System Providers. A notification copy is also available in electronic form at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI15465B741A10B0E45E896C62A9C83AB938F.PDF accessed on Nov. 18, 2023.

31 Ibid

32 Refer to para#13 of the Statement on Development and Regulatory Policies issued by the Reserve Bank of India on April 5, 2018. A copy of the document in pdf format is also available for reference at https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=43574 accessed on Nov. 10, 2023.

33 Ibid.

34 Refer to para#12 of the Statement on Development and Regulatory Policies issued by the Reserve Bank of India on April 5, 2018. A copy of the document in pdf format is also available for reference at https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=43574 accessed on Nov. 10, 2023.

governmental agencies must be banned/ should not be allowed in India. The Committee proposed a draft bill attached to its report submitted on February 28, 2019, to ban any form of dealing(s) in cryptocurrencies in India. *The Committee also suggested that the Government may issue and regulate the introduction of the 'digital (fiat) currency' in India to reduce the cost incurred in maintaining and handling the currencies in their physical form.*

The 'inter-committee committee (IMC) proposed specific actions that may be taken concerning the virtual currencies' and further noted that cryptocurrencies are a subset of the broader spectrum of virtual currencies available worldwide. Among other features, cryptocurrencies work on a decentralized ledger technology (i.e., DLT). Additionally, cryptocurrencies are also protected by cryptographic technology.[35] The Committee submitted its report on February 28, 2019. The Committee also noted that there were currently around 2116 cryptocurrencies with a market capitalization of 119.46 billion American dollars.[36]

The Committee[37] recommended that the Government promote and facilitate decentralized ledger technology (i.e., DLT) in the financial field. This may be done after identifying the areas of its application and that the respective financial regulators in India, viz. the Securities and Exchange Board of India (i.e. the SEBI), the Insurance Regulatory and Development Authority of India (i.e. the IRDAI), the Pension Fund Regulatory and Development Authority (i.e. the PFRDA) and the Insolvency and Bankruptcy Board of India (i.e. IBBI), must develop appropriate legal framework to facilitate the evolution of DLT in their respective domain spaces/ areas.[38]

The rationale behind the refusal to allow Trading in Cryptocurrency,

Risky financial derivative products camouflaged the inherent, grave, and hidden credit risks in the past during the global meltdown in 2007-08. The financial derivatives and innovative products played the spoilsport, paving the way for the deepening of the global meltdown or the global financial crisis by/ around 2007-08. This Global Financial Crisis (GFC) of 2007-08 acted as a speed-breaker in the path of the hassle-free introduction of financial products and innovations across the globe. The GFC exposed the inherent nature, especially the high risks associated with an investment in complex and innovative financial products. In the post-GFC era, financial innovations often started to be identified as products of a complex nature and looked upon with caution by

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35 Refer to page#8, containing the Executive Summary of *'the report of the inter-departmental committee to propose specific actions to be taken in relation to the virtual currencies.'* A copy of the report in electronic format is also available at https://dea.gov.in/sites/default/files/Approved%20and%20Signed%20Report%20and%20Bill%20of%20IMC%20on%20VCs%2028%20Feb%202019.pdf accessed on Dec 11, 2023.

36 Ibid.

37 Ibid.

38 Ibid

developing economies of the world, viz. China[39] and India. Financial innovations/ products soon began to be regarded as a 'double-edged sword' by many regulators and investors across the globe, especially in developing economies of the world, including India. Following the trend adopted by the developing economies, the financial regulators in India started following a trend of banning and putting threshold limits on investments in specific financial products. The regulators in India also resorted to other forms of regulatory measures, intending to discourage investment in specific FinTech, hybrid, and derivative financial products (because of the inherent complexities involved in the designing of these products) that were often beyond the purview of the financial understanding of the common investors in the country. This exercise, though the regulator carried out to better secure or protect the interests of the common investors in the market, has harmed the interests of common investors more by limiting their choice of available investible services or products. The path adopted by the capital market regulator in India, i.e., the SEBI, is backed by its emphasis on principles of 'product suitability' (for the investors in the Indian markets) and the absence of tools and mechanisms to ensure adequate and effective 'product governance.'

Analysis of the Regulator's Role/ Perspective

Under section 11 sub-section (1) of the Securities and Exchange Board of India Act, 1992[40] one of the objectives for which the Securities and Exchange Board of India was formed is to 'promote the development of' the securities market in India. Hence, according to section 11 sub-section (1) of the Securities and Exchange Board of India Act, 1992, the regulator's mandate is to protect investors, restore market integrity, promote financial products/ innovations, and boost fair competition in the market. Banning financial products and services in the market hampers the latter, resulting in limited growth and promotion of the market. Hence, such a regulatory trend of banning or disallowing innovative FinTech products cannot be perceived to align with or

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39 Though China may be regarded a 'developed' nation, however, while measuring its growth and progress on various parameters laid down by the United Nations Organization (refer to the United Nations Organisation's report on World Economic Situations and Prospects, 2018; page – 20, para -03 of the report, available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/ publication/ WESP2018_Full_Web-1.pdf accessed on Nov. 20, 2023), yet according to the World Bank Group, China is still a developing country because of its low per capita income. Refer to the World Bank Group's observation on China, uploaded and available for reference at the website of the World Bank Group at https://www.worldbank.org/en/country/china/overview#1 accessed on Oct. 20, 2023.

40 Refer to section 11 sub-section(1) of the Securities and Exchange Board of India Act, 1992, which lays down the broad objectives with which the SEBI is formed. A copy of the Securities and Exchange Board of India Act, 1992, is also available at the official website of the capital market regulator, i.e., SEBI. url - https://www.sebi.gov.in/legal/acts/jan-1992/securities-and-exchange-board-of-india-act-1992-as-amended-by-the-banning-of-unregulated-deposit-schemes-ordinance-2019-_3.html accessed on the 20th of Nov, 2023.

cater to one of the essential objectives with which the securities market regulator, the Securities and Exchange Board of India (i.e. SEBI) is formed, i.e., promotion of the market.

United Nation's Sustainable Development Goal and the Regulation of Cryptocurrency

The regulation of cryptocurrencies in India is similar to the trend started by many developing economies of the world and adopted by prominent financial regulators in India, RBI, and SEBI in India. The debate and discussion on regulating cryptocurrencies in India began early in December 2013. The banking regulator, i.e., the Reserve Bank of India, 2013 issued a press release cautioning the investors and traders in India dealing or intending to deal in virtual currencies such as bit coins, lit coins, and other virtual currencies.[41] A series of such cautions followed this advice, issued by the banking regulator RBI[42] to the investors, traders, banks, NBFCs, and other categories of actual or potential Indian players in the virtual currency platform. The multiple warnings issued by the Banking regulator, i.e. the Reserve Bank of India, draw the attention of the author towards a general trend followed and adopted by the financial regulators in India, which is in no way in line with or, at times, somewhat contrary to the objectives of Sustainable Development Goals[43] identified and propounded by the United Nations and other global bodies which support financial products and innovations, laying down the objective of providing the same access to all citizens by the UN member states.[44] The eighth

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41 Refer to the press release by the Reserve Bank of India dated December 24, 2013. A press release copy is also available electronically at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/IEPR1261VC1213.PDF accessed on Oct. 20, 2023.

42 Refer to the press releases and circular issued by the Banking regulator in India, i.e., the Reserve Bank of India (or RBI), dated February 1, 2017, December 5, 2017, and also its circular dated April 6, 2018. These press releases and circular are also available at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR205413F23C955D8C45C4A1F56349D1B8C457.PDF , https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR15304814BE14A3414FD490B47B0B1BF79DDC.PDF and at https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/NOTI15465B741A10B0E45E896C62A9C83AB938F.PDF accessed on Oct. 20, 2023.

43 The United Nations Organization identifies seventeen Sustainable Development Goals (SDGs). These goals are to be achieved by the member countries of the United Nations Organization by 2030. All member countries of the United Nations Organization are under a duty to strive to achieve the seventeen goals in their jurisdictions by the year 2030. url : https://sustainabledevelopment.un.org/ accessed on the Oct. 20 , 2023.

44 The 2018 report on progress made by the United Nations Organization member countries toward achieving the Sustainable Development Goals reflects that in a developed /advanced economy, every adult has an account with a bank and/or with other financial institution(s). Whereas in low-income economies, the percentage of adults having access to financial services and products like bank accounts or accounts with other financial institution(s) is only 35%. Further, the report says that women must catch up to men in accessing financial services and products across

Sustainable Development Goal, propounded by the United Nations Organisation, deals with promoting 'sustained, inclusive and sustainable economic growth' by the member countries of the United Nations Organisations.[45]

Regulation of Cryptocurrency across the globe:

Many countries across the globe are now gradually adopting Cryptocurrency in one form or another. An intriguing part of the rapidly developing cryptographic money showcases the ease with which the term 'cryptocurrency' is used to depict various digital currencies that fall within the ambit of the term and/or the product. The different "digital forms of money" may be compared with each other based on their acceptance and prevalence in various jurisdictions. The same may be clubbed together as one financial product category bearing one common feature i.e.; all these products are principally based on a similar type of decentralized innovative technology known as 'block chain technology'. This is inherently possessed with the feature of inbuilt encryption.[46] The terminologies used to depict cryptocurrencies vary across jurisdictions. Some of the terms used by nations to refer to cryptographic money are inter alia, virtual commodity (in Canada, China, Taiwan), digital currency (in Argentina, Thailand, and Australia), crypto-token (in Germany), a payment token (in Switzerland), cyber currency (in Colombia and Lebanon), virtual asset (in Honduras and Mexico) and digital cash (in Italy and Lebanon).[47]

One of the most widely adopted and undertaken actions w.r.t. cryptocurrencies by the governments of various countries across the globe is the issuance of public notices in the form of warnings. This is followed by educating/ spreading awareness among the common public about the dangers of investing in the cryptocurrency markets. The central banks of various global economies have generally issued such alerts. These alerts were intended to caution the populace about the contrast between various forms of money or currency issued and guaranteed by the state and the cryptocurrencies, which are not supported by the legal/ binding force of the state. Most government alerts underscored the additional danger associated with the dealing of cryptocurrencies because of the high instability related to cryptographic forms of money and the way that numerous associations that encourage the common public to transact through such exchanges are unregulated. It is most crucial to note that the residents of these countries who put their monetary resources into the dealings of digital currencies do, as such, at their risk/danger. No legitimate or legal remedy is accessible or available to the investing public in

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all regions. The report is also available for reference at https://unstats.un.org/sdgs/report/2018/overview/ accessed on Oct 20, 2023.

45 Ibid

46 Refer to the Comparative Summary of the World Survey Report on the Regulation of Cryptocurrencies across jurisdictions is also available at https:// www.loc.gov/law/help/cryptocurrency/world-survey.php accessed on Oct. 20, 2023.

47 Ibid

case of any misfortune or loss sustained due to an irregularity or fraud committed by parties while dealing in cryptocurrencies.

Many alerts/ warnings issued by various nations also underscore the generosity with which cryptocurrency transactions open all doors and serve as a conduit for criminal operations, like tax evasion, terrorism funding, money laundering, and the like. Some nations have raised the levels of due diligence conducted by the banks and financial institutions facilitating cryptocurrency transactions. In their respective jurisdictions, these nations have enacted stringent laws that regulate illegal tax evasion, terrorism funding, money laundering, etc.

Taxation of Cryptographic money:

To levy taxes and duties on cryptographic money, various nations have resorted to different classifications of Cryptocurrency into different asset classes. For instance, in Japan, bitcoin/cryptocurrency is treated as a currency, whereas in the USA, Cryptocurrency is treated as a currency and a commodity. In Bulgaria, cryptographic money is taxed as a money-related resource. In Israel, cryptographic money is taxed as a resource. In Denmark, cryptographic money is taxed subject to personal expense, and the losses or misfortune (if any) may be deducted from taxable income. In Switzerland, Cryptocurrency is taxed as unfamiliar cash, and in Argentina and Spain, the same is taxed as a personal expense.[48] In many countries, digital currency mining is exempt from tax assessment. Gains from cryptocurrency investments are not subject to value-added tax in the countries that are member states of the European Union. This is because of the decision of the European Court of Justice in the 2015 case of ***Skatteverket v David Hedqvist Case C-264/14*** [49]**.**

Honourable Supreme Court of India, on the regulation of Cryptocurrency in India

The Hon'ble Supreme Court of India, in its landmark judgment in the case of Internet and Mobile Association of India vs. Reserve Bank of India[50] held that since the RBI has yet to show or provide empirical evidence, the actual damage done by the crypto-currency traders or exchanges, the RBI circular banning mining, trading, etc., in Cryptocurrency, is liable to be set aside. The Apex Court further held in this case that in the absence of any actual, empirical evidence(s) to support that any of the entities regulated by the RBI (viz., the nationalized banks, scheduled commercial banks, or Non-Banking Financial Companies) is harmed with the action of the crypto-exchanges

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48 Ibid

49 Refer to the full judgment text available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150128en.pdf accessed on August 20, 2020.

50 Refer to the judicial pronouncement of the Hon'ble Supreme Court of India in the Internet and Mobile Association of India vs Reserve Bank of India SC Writ Petition(Civil)No.528 of 2018. A copy of the judgment is also available at https://main.sci.gov.in/supremecourt/2018/19230/19230_2018_4_1501_21151_Judgement_04-Mar-2020.pdf accessed on October 30, 2020.

operating in India, even the solid pre-emptive action by the RBI like conducting raids on the premises of entities dealing in cryptocurrencies or freezing of bank accounts, etc. by the RBI is not warranted. However, as per the latest news reports[51] The Government of India may introduce legislation to ban cryptocurrency trading soon.[52]

Way Forward:

Financial products/ innovations are suitable for investors in a market (based) economy, and the same must be encouraged. However, at the same time, the regulatory challenges must also be adequately addressed by the regulators. The regulator may take special care to educate the investors in their jurisdictions to gradually adopt the FinTech products and services. Despite the denial of recognizing 'cryptocurrency' as a progressive financial product/ instrument by various governments worldwide, there is a growing popularity for the product, even though it is forbidden/ banned by regulators in various jurisdictions across the globe. This feature of the 'acceptability' of Cryptocurrency can no longer be ignored. In this paper and according to the author, the trend of regulatory measures adopted by the Indian financial regulators, viz. the RBI and the SEBI in general w.r.t banning and imposing restrictions on innovative financial products, and in particular, the regulatory approach towards Cryptocurrency, is a cause of concern. On analysis, the author believes that the financial regulators in India are over-skeptic, and the same might be stifling innovations in the financial markets. The practice may prove to be harmful in the long run. All the objectives promoting consumer protection, anti-money-laundering measures, anti-terrorism funding, etc., can be achieved through regulation, and an outright ban on these FinTech products and services may not be desirable.

Imposing a ban or undue restrictions on new and innovative market products/ services is not new in terms of practice followed by the regulators, and neither is Cryptocurrency the only financial product experiencing a regulatory hurdle. Many products and services in the past have met the same fate. The judicial intervention by the Hon'ble Supreme Court of India in the matter following which the apex Court issued an order directing the Government of India to enact a policy w.r.t cryptocurrencies within four weeks from the date of the order, maybe a welcome approach by the apex Court in India.[53] RBI has provided the rationale that, behind such issuing of warnings to the investors, traders, and other market players in the cryptocurrency space,

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51 Refer to the news from Bloomberg Quint on electronic media on September 15, 2020. url: https://www.bloombergquint.com/global-economics/india-plans-to-introduce-law-to-ban-trading-in-cryptocurrency accessed on the 30th of Oct. 2020.

52 Ibid

53 Refer to the business news article published in the national daily newspaper The Hindu Business Line at https://www.thehindubusinessline.com/money-and-banking/frame-crypto-policy-within-a-month-supreme-court-tells-govt/article26367690.ece accessed on March 30, 2023.

the regulator's noble objective is to promote consumer (or investor) protection and prevent illegal money-laundering and terrorism financing.[54]

According to the author, allowing new innovative products in the markets and governing them effectively may be the ideal recourse available to India's financial regulator(s). The fiscal regulators in India may refrain from resorting to the regulatory recourse of rigorously banning financial services and innovative products or restricting their usage through legal intervention. In a nutshell, the author emphasizes that 'regulation' and not blanket 'prohibition'/ 'ban' upon innovative financial products (including Cryptocurrency) may be the ideal course of action for India's financial regulator(s). In this regard, inviting the crypto startups, acknowledging/ giving credits to FinTech technologies and identifying areas of importance/focus within the space, building indigenous financial products for rural India/ Bharat, and fast-tracking investment in the fast-growing FinTech industry may be perceived as a humble beginning and a welcome baby-step forward towards the regulation of cryptos in India[55]. However, proper regulation and thorough monitoring of the transactions or trades in Cryptocurrency should be mandatory pre-conditions for allowing an intermediary to trade/ transact in Cryptocurrency in India. Also, the conduct of cryptocurrency awareness programs by coin exchanges in India has to speed up. The same has to become more visible and widespread to develop the requisite ecosystem to introduce and allow cryptocurrency transactions in India. Also, adopting Regulatory sandboxes may help evolve effective regulatory measures and efficiently address regulatory challenges/issues.

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54 Refer to the press release by the Reserve Bank of India dated December 24, 2013. A press release copy is also available electronically at https://rbidocs.rbi.org.in/ rdocs/PressRelease/PDFs/IEPR1261VC1213.PDF accessed on March 20, 2023.

55 Refer to the Press Information Bureau of India's press release regarding the FinTech Conclave, 2019, organized by the Niti Aayog in India. A press release copy is also available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=189530, accessed on March 30, 2023.

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Leveraging Smart Contracts for Fair and Transparent Intellectual Property Transactions on Block Chain

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Abstract

Intellectual Property (IP) transactions are crucial in today's economy, involving the exchange of intangible assets like patents, copyrights, trademarks, and trade secrets. These essential resources drive advancement in several industries by fostering innovation and creativity. Conventional techniques for managing IP transactions are inefficient, slow, and lack transparency, resulting in disagreements and difficulties in enforcing agreements. This study examines how smart contracts on the blockchain can potentially improve IP transactions by enhancing efficiency, fairness, and transparency. Smart contracts, which are self-executing contracts with predetermined terms written in computer code, play a crucial role in this fundamental change. They automatically implement and uphold contracts upon meeting particular circumstances, leveraging blockchain technology, a decentralized and secure ledger. This decreases intermediaries and reduces errors, providing a solution to the time-consuming and unclear conventional transaction procedures that frequently lead to conflicts around intellectual property. Smart contracts offer numerous advantages in intellectual property deals. They streamline licensing, royalty payments, and contract enforcement to speed up the transaction lifecycle. Blockchain decentralization guarantees the security of intellectual property transactions by protecting them from unwanted alterations. Smart contracts also allow for transparent and automated royalty calculations, guaranteeing equitable payment for authors and intellectual property owners. Implementing smart contracts on the blockchain ensures transparency by offering all players equal access to accurate information. Transparency promotes trust and decreases the likelihood of legal action, leading to a more cooperative and effective setting for intellectual property contracts. Nevertheless, it is important to recognize the obstacles and factors involved in using smart contracts into intellectual property agreements. These factors consist of legal acknowledgment and enforcement across different areas, incorporation with current intellectual

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property systems and legal structures, and privacy issues with confidential intellectual property data. Smart contracts on the blockchain provide an innovative solution to the inefficiencies of traditional intellectual property agreements. This article aims to investigate how smart contracts, with blockchain technology, can transform intellectual property transactions. The main objective is to determine how these technology improvements can improve inefficiencies, boost security, guarantee fair pay, and increase transparency in IP transactions. This research intends to provide insights into the practical uses and benefits of integrating blockchain technology in the field of intellectual property by utilizing smart contracts. This paper offers an in-depth analysis of the effects and consequences of implementing smart contracts on the blockchain in the field of intellectual property transactions, utilizing theoretical debates, case studies, and practical examples.

Keywords: Smart Contracts, Blockchain, Intellectual Property, Automation, Security, Fair Compensation

I. CUSTODIAL VIOLENCE AND RULE OF LAW

The very idea of Rule of Law, as enshrined in the Indian Constitution and as can be inferred from the Preamble, makes the Government as well as private players, accountable under law.In the context of Criminal law, it not only aims to strike a fair balance in public interest, but also protects the legitimate rights of the disadvantaged accused against arbitrary actions and indiscriminate application

1. Introduction

Intellectual property transactions are intricate processes involving the negotiation, sale, licensing, or transfer of intangible assets. These assets, including patents, copyrights, trademarks, and trade secrets, hold significant value for individuals, businesses, and industries. The current processes governing IP transactions are characterized by a myriad of challenges that hinder their effectiveness. Inefficiencies in traditional IP transactions often arise from manual and paper-based processes, leading to delays and increased operational costs. The complex and time-consuming nature of these transactions can result in missed opportunities, hindering innovation and economic growth. Furthermore, the lack of a standardized and transparent framework contributes to disputes over ownership, licensing terms, and compensation. Disputes in IP transactions can have profound consequences, including legal battles, financial losses, and damage to business relationships. The ambiguity and subjectivity surrounding certain aspects of IP agreements can lead to disagreements between parties, making enforcement challenging and costly. Moreover, the global nature of intellectual property often involves transactions across different jurisdictions, adding complexity to dispute resolution processes. Smart contracts, as self-executing contracts with predefined conditions encoded in code, offer a promising solution to the challenges plaguing traditional IP transactions. The automation provided by smart contracts can streamline various processes, from licensing agreements to royalty payments, reducing the need for intermediaries and mitigating the risk

of errors. Additionally, the decentralized and secure nature of blockchain technology ensures the integrity and transparency of IP transactions, potentially reducing disputes and enhancing overall trust between parties.[1]

2. Smart Contracts and Blockchain Technology:

2.1 Smart Contracts:

Smart contracts are a ground-breaking development in contract execution that allows for a smooth and automated operation using code. Self-executing contracts have their terms clearly written in code, enabling them to automatically execute and enforce certain conditions upon meeting specific criteria. This innovation greatly decreases the need for intermediaries, making transactions more efficient and reducing the likelihood of disputes. A smart contract's core characteristic is its capacity to carry out tasks autonomously, without the need for human involvement. Conventional contracts may require the involvement of numerous middlemen, leading to heightened intricacy and prolonged duration for reaching agreements. Smart contracts function based on a "if-then" logic, automatically executing activities when specific circumstances are met. This speeds up the execution process and decreases the likelihood of errors and misunderstandings that might occur in transactions involving humans.[2]

Smart contracts have a significant benefit due to their inherent self-executing capability. Once the defined conditions in the code are satisfied, the contract automatically carries out the agreed-upon activities without requiring external verification. This independence improves effectiveness and eliminates the necessity for intermediaries that often fulfill functions like validation, verification, and enforcement in traditional contract implementation. Smart contracts have the potential to transform multiple industries by offering a secure and transparent method for carrying out transactions. Smart contracts can automate licensing agreements, royalty payments, and copyright enforcement in the field of intellectual property. This automation speeds up the process and guarantees that authors are paid fairly without the usual delays and complications of traditional systems.[3]

Challenges in adopting smart contracts include issues related to legal recognition and standardization. Due to their operation on decentralized networks, legal systems in various jurisdictions need to be adjusted to recognize and uphold smart contract agreements. Understanding how standard legal ideas relate to the distinct characteristics of smart contracts is essential.

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1 Leka, M. Sc Elva, and Besnik SELIMI. "Using Blockchain Technology and Smart Contracts in Intellectual Property Management and Data-Management at Universities."

2 De Caria, Riccardo. "The Legal Meaning of Smart Contracts." *Eur. Rev. of Priv. L.* 26, no. 6 (2018).

3 Sklaroff, Jeremy M. "Smart Contracts and the Cost of Inflexibility." *U. Pa. L. Rev.* 166 (2017): 263.

2.2 Fusion of Blockchain Technology in Smart Contracts:

Blockchain technology is the fundamental infrastructure that enables smart contracts. The system is a decentralized and distributed ledger that logs transactions across a computer network, forming a chain of blocks connected and protected by cryptographic methods. Blockchain guarantees transparency, immutability, and security, making it a perfect match for smart contracts. Transparency is an essential aspect of blockchain technology. The ledger is decentralized among a network of nodes, granting each participant full access to the complete transaction history. Transparency fosters confidence by necessitating approval among the majority of the network for any alterations or manipulations of data.[4] In smart contracts, transparency guarantees that all parties have a clear and unambiguous understanding of the contractual terms and actions.[5] Immutability is a critical aspect of blockchain technology. Once a block is introduced to the chain, it becomes extremely difficult to change prior blocks without changing all following ones. This establishes a tamper-resistant system that improves the security and integrity of the recorded transactions. Immutability in smart contracts guarantees that the agreed-upon terms are unchangeable after being recorded, enhancing security and trustworthiness. Security is a top priority in transactions, and blockchain ensures this through the use of cryptographic methods.[6] The security of each block in the chain is ensured by intricate cryptographic methods, which greatly hinder unwanted tampering with the data. Blockchain technology's security features enhance the reliability of self-executing contracts in smart contracts.

The decentralized nature of blockchain significantly contributes to the security and robustness of the entire system. Centralized systems are prone to single points of failure, while decentralized networks disperse control and data storage among several nodes, decreasing the likelihood of system-wide failures or attacks. Smart contracts and blockchain technology provide a significant change in transaction execution, especially in intellectual property and other areas. Smart contracts automate procedures and decrease dependence on intermediaries, while blockchain technology guarantees transparency, immutability, and security.[7] These technologies have the ability to revolutionize different industries by promoting efficiency, trust, and innovation. Overcoming legal and standards barriers is essential for fully realizing the potential of this transformative combination.

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4 Casey, M. J., & Vigna, P. (2018). *The Truth Machine: The Blockchain and the Future of Everything.* St. Martin's Press.

5 Narayanan, A., Bonneau, J., Felten, E., Miller, A., & Goldfeder, S. (2016). *Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction.* Princeton University Press.

6 Ibid.

7 Tapscott, D., & Tapscott, A. (2016). *Blockchain Revolution: How the Technology Behind Bitcoin is Changing Money, Business, and the World.* Penguin.

3. Benefits of Smart Contracts in Intellectual Property Transactions:

3.1 Automation:

Implementing smart contracts in IP transactions offers the fundamental benefit of automating operations, which enhances the efficiency of the entire lifecycle of intellectual property agreements. Smart contracts are automated and contain terms encoded directly into the code, removing the necessity for intermediaries and manual involvement. This automation significantly affects various elements of intellectual property transactions, particularly in licensing, royalty payments, and contract enforcement Licensing agreements in the field of intellectual property are typically complex and entail many stages, ranging from negotiation to completion. Conventional approaches to managing these agreements can be inefficient and prone to mistakes because of the manual procedures involved. Smart contracts automate licensing by encoding the terms and conditions into code that may be executed. The licensing agreement is automatically implemented when certain circumstances specified in the smart contract are fulfilled, such as receiving payment or adhering to usage limits. This speeds up the licensing procedure and minimizes the risk of errors, guaranteeing that agreements are carried out accurately.[8]

Royalty payments are essential in intellectual property agreements as they guarantee that inventors and owners are compensated for the utilization of their intellectual property. Smart contracts automate the process of calculating and distributing royalties, removing the necessity for manual monitoring and billing. The smart contract's terms specify how royalties are calculated according to predetermined parameters, such as usage frequency, geographical scope, or revenue produced. This automation speeds up the payment process and guarantees precision, decreasing the chances of disagreements about compensation.[9]

Smart contracts enhance the effectiveness of contract enforcement in intellectual property transactions. The predetermined circumstances outlined in the smart contract dictate the timing and manner in which the contract is executed. If a party breaches the terms of the agreement, the smart contract can automatically initiate predetermined repercussions, such as penalties or termination of the deal. This automated enforcement minimizes the necessity for legal involvement and speeds up the resolution of conflicts, enhancing the efficiency and dependability of the enforcement process.

3.2 Security:

Ensuring the security of intellectual property transactions is crucial due to the high value and sensitivity of the assets at stake. The decentralized and distributed structure of blockchain technology, along with the tamper-resistant features of smart contracts, improves the security and reliability of IP transactions.

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8 McKinney, Scott A., Rachel Landy, and Rachel Wilka. "Smart Contracts, Blockchain, and the Next Frontier of Transactional Law." *Wash. JL Tech. & Arts.* 13 (2017): 313.

9 Ibid.

Decentralization in blockchain involves a network of computers called nodes, where each participant possesses a complete copy of the transaction history. Decentralization prevents a single point of control or failure, decreasing vulnerability to malicious attacks or system faults. Decentralization in IP transactions enhances the security of the system, making it resistant to illegal access or manipulation. Smart contracts, once implemented on the blockchain, are resistant to tampering. The cryptographic principles of blockchain technology prevent any participant from changing the terms or results of a smart contract once it has been completed.[10] This tamper-resistant feature guarantees that the conditions of intellectual property agreements stay unaltered and are carried out precisely as planned, offering a high level of protection against fraudulent actions or unauthorized alterations.

3.3 Fair Compensation:

Ensuring equitable remuneration for creators and owners of intellectual property is a key objective in IP transactions. Smart contracts are crucial in attaining this goal by offering clear and automatic royalty computations. Smart contracts are programmed to openly compute and allocate royalties according to predetermined parameters. The smart contract's conditions outline the method for calculating royalties, taking into account elements like usage volume, geographic scope, and money derived from the intellectual property. This transparency guarantees that all stakeholders, such as inventors, owners, and licensees, possess a comprehensive comprehension of the remuneration framework. Automated royalty calculations prevent human error or manipulation, ensuring fair compensation.[11]

Smart contracts simplify the royalty payment process by automating the computation and distribution of payments. When certain predetermined criteria are fulfilled, such the end of a licensing period or reaching particular milestones, the smart contract initiates the money release automatically. This guarantees that creators and owners are promptly remunerated for the utilization of their intellectual property, minimizing the delays and uncertainties linked to conventional payment procedures.

3.4 Transparency:

Blockchain technology enables transparency, a fundamental principle that is essential in transforming the dynamics of intellectual property transactions. Blockchain's openness ensures that all participants in intellectual property transactions may access a unified and accurate record. Blockchain functions as a decentralized and distributed ledger, ensuring that every participant in the network possesses an updated copy of the transaction history, creating a single version of the truth. This guarantees a unified truth and assures that all participants have access to the same data set. Within intellectual property transactions, this transparency component removes

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10 Bodó, Balázs, Daniel Gervais, and João Pedro Quintais. "Blockchain and Smart Contracts: The Missing Link in Copyright Licensing?." *Int'l J. L. & Info. Tech.* 26, no. 4 (2018): 311-336.

11 Ibid.

conflicts and misconceptions that can result from different or contradictory records. All parties involved, such as creators, owners, licensees, and other stakeholders, have access to a clear and unchangeable record of the transaction history.[12]

Transparency fosters trust among parties engaged in intellectual property transactions, leading to less disputes. Stakeholders can check smart contracts independently by accessing a shared and unalterable ledger, which decreases the chances of disagreements. Blockchain's transparency promotes accountability by necessitating consensus among the majority of the network to prevent any manipulation or misrepresentation of information. This transparency fosters a cooperative and reliable atmosphere for intellectual property negotiations. Blockchain's transparent and immutable nature streamlines auditing processes in intellectual property transactions. Auditors can effectively confirm the precision and adherence of transactions by examining the blockchain's transparent and immutable records. This efficient auditing process saves time and money and improves the credibility of auditing results, strengthening the intellectual property ecosystem's accountability and resilience.[13]

Ultimately, the advantages of integrating smart contracts into intellectual property transactions are varied. Automation simplifies procedures, decreasing the requirement for middlemen and eliminating errors in licensing, royalty payments, and contract enforcement. The security of intellectual property agreements is enhanced by the decentralized and tamper-resistant characteristics of smart contracts on the blockchain. Transparent and automatic royalty computations ensure fair pay for artists and owners, delivering timely and equitable remuneration. Transparency is a fundamental aspect of blockchain technology that fosters trust, minimizes conflicts, and simplifies auditing procedures.[14] The collective advantages help transform the intellectual property transactions landscape by promoting efficiency, fairness, and transparency in the digital age.

4. Challenges and Considerations

4.1 Legal Recognition:

The acknowledgment and capacity to enforce smart contracts are crucial factors that greatly impact their acceptance and use in intellectual property (IP) transactions. Smart contracts are self-executing agreements with coded terms that function on decentralized blockchain networks. Yet, the legal framework of these agreements differs worldwide, and it is crucial to get their

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12 Gürkaynak, Gönenç, Ilay Yılmaz, Burak Yeşilaltay, and Berk Bengi. "Intellectual Property Law and Practice in the Blockchain Realm." *Computer Law & Security Rev.* 34, no. 4 (2018): 847-862.

13 Antonopoulos, A. M. (2014). *Mastering Bitcoin: Unlocking Digital Cryptocurrencies.* O'Reilly Media, Inc.

14 Fidalgo, Vítor Palmela. "Blockchain(s), Smart Contracts and Intellectual Property." In *Int'l Conf. on Autonomous Sys. & the Law*, 295-319 (Cham: Springer Int'l Pub., 2022).

acknowledgment for broad approval. Legal recognition entails accepting smart contracts as being equal in validity to conventional written agreements.[15] Smart contracts may face differing levels of adoption in various jurisdictions, and their enforceability could depend on the prevailing legal frameworks. Some regions have built legal frameworks that can easily support smart contracts, while others may not have clear regulations or may face difficulties in applying current laws to this new technology.

Legal systems often use written contracts, so transitioning to code-based agreements necessitates adjusting legal ideas. The uncertainty in understanding and implementing smart contracts presents a barrier, as the conventional legal system may not fully comprehend the complexities of agreements based on code. The decentralized nature of blockchain, which is a core aspect of smart contracts, can make things more complex. Identifying jurisdiction and relevant laws for disputes can be difficult when transactions take place over a worldwide and decentralized network. Legal recognition needs to navigate jurisdictional complications and set precise criteria for enforcing smart contracts in the realm of IP transactions.[16]

It is essential to tackle these legal obstacles to build trust and confidence in utilizing smart contracts for intellectual property transactions. Legal recognition establishes a strong basis for parties engaging in smart contract-based agreements, ensuring that the terms and conditions written in code have legal validity and may be enforced in a legal setting.

Currently, regions are progressing in acknowledging the validity of smart contracts. The eIDAS Regulation of the European Union recognizes the legal validity of electronic signatures, which may be utilized as part of the authentication process in smart contracts. The United States Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act (ESIGN) establish a legal structure for electronic signatures and records, setting the foundation for the approval of smart contracts.[17]

4.2 Integration with Existing Systems:

The integration of smart contracts into existing intellectual property (IP) systems and legal frameworks is a complicated task that demands careful consideration of technological, logistical, and regulatory aspects. Integrating smart contracts into intellectual property transactions requires a smooth integration to ensure compatibility and efficiency with existing processes.

One major technological obstacle is the compatibility of smart contracts with current intellectual property systems. Several IP systems use outdated technology and may not have the required infrastructure to easily connect with blockchain-based smart contracts. Incorporating new technology into these systems involves meticulous planning and frequently demands modifications

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15 Leka, M. Sc Elva, and Besnik SELIMI. "Using Blockchain Technology and Smart Contracts in Intellectual Property Management and Data-Management at Universities."

16 Ibid.

17 Ibid.

or changes to current IT infrastructure. Integrating smart contracts with existing legal systems poses logistical hurdles. Conventional IP transactions typically involve multiple stakeholders such as legal professionals, government entities, and industry regulators. Aligning these groups to integrate the new technology necessitates cooperation and transparent communication to set universal standards and protocols.[18]

Smart contracts face regulatory obstacles while operating on decentralized and frequently cross-border blockchain networks. Intellectual property laws differ significantly across different regions, and the implementation of smart contracts might require revisions to adapt to this new technology. Aligning legal norms and guaranteeing adherence to rules is essential for the successful incorporation of smart contracts into the intellectual property sector.[19] To overcome integration difficulties, it is necessary to establish uniform protocols and frameworks for smart contracts in intellectual property transactions. It is crucial for industry stakeholders, legal experts, and technologists to work together to create widely agreed standards that make integration smooth. The International Organization for Standardization (ISO) Blockchain and Distributed Ledger Technologies Technical Committee is attempting to produce standards to address these difficulties.

Ongoing efforts to tackle integration difficulties involve creating specialized blockchain systems designed for intellectual property transactions. The platforms are designed to offer intuitive interfaces and integration tools to facilitate the incorporation of smart contracts into stakeholders' current workflows.

4.3 Privacy Concerns:

Blockchain technology guarantees openness and immutability, but privacy issues arise, particularly for sensitive data tied to intellectual property (IP) transactions. The decentralized and distributed structure of blockchain, a fundamental characteristic, can clash with the requirement to protect sensitive information in the intellectual property field. The immutability of blockchain guarantees that data uploaded to the chain cannot be changed, which raises worries about the persistence of sensitive information. Some details in IP deals may be commercially sensitive or covered by confidentiality agreements. The permanent quality of blockchain might create difficulties in handling and safeguarding information, since any data appended to the chain is permanently recorded on the public ledger.[20] Blockchain transactions usually use pseudonymous addresses instead of personal identifiers. Pseudonymity can improve privacy but might clash with legislative demands in the IP realm.

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18 Bonnet, Severin, and Frank Teuteberg. "Impact of Blockchain and Distributed Ledger Technology for the Management, Protection, Enforcement and Monetization of Intellectual Property: A Systematic Literature Review." *Info. Sys. & e-Bus. Mgmt.* 21, no. 2 (2023): 229-275.

19 Id.

20 Savelyev, Alexander. "Copyright in the Blockchain Era: Promises and Challenges." *Computer Law & Security Rev.* 34, no. 3 (2018): 550-561.

Intellectual property transactions frequently necessitate precise identification of the parties involved for legal and contractual reasons. Balancing the anonymity of blockchain with the requirement for clear identification presents a hurdle in intellectual property transactions.[21]

Off-chain methods are being considered to overcome these challenges and enhance on-chain transactions. Off-chain solutions entail storing particular data or executing specified portions of a smart contract outside the blockchain, preserving anonymity for sensitive information. Yet, this creates a balance between the decentralized and transparent characteristics of on-chain transactions and the necessity for privacy in certain IP-related information. Privacy-enhancing technologies (PETs) are being combined with blockchain to enhance secrecy and address privacy concerns. Zero-knowledge proofs and homomorphic encryption techniques enable parties to verify transactions or calculations without disclosing the actual data involved. Privacy-enhancing technology are essential for addressing issues regarding sensitive information in intellectual property transactions.[22]

Complying with data protection standards is crucial for IP transactions. Regions like the European Union, under the General Data Protection Regulation (GDPR), have strict rules concerning the handling and safeguarding of personal information. Aligning blockchain and smart contracts with legislation while preserving transparency presents a challenging problem that necessitates cooperation between legal and technology specialists.[23]

Ultimately, blockchain and smart contracts provide several advantages for intellectual property transactions, but issues about legal validation, compatibility with current systems, and privacy issues need to be resolved for general acceptance. Standardizing protocols, creating user-friendly interfaces, and incorporating privacy-enhancing technologies are crucial for addressing these issues and realizing the whole capabilities of blockchain in the intellectual property field.

5. Case Studies and Examples

Smart contracts, utilizing blockchain technology, are showing significant promise to transform intellectual property (IP) transactions. This section will examine real-world case studies and examples that demonstrate successful uses of smart contracts in the field of intellectual property, illustrating their efficacy and influence.

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21 Leka, M. Sc Elva, and Besnik SELIMI. "Using Blockchain Technology and Smart Contracts in Intellectual Property Management and Data-Management at Universities."

22 Mougayar, W. (2016). *The Business Blockchain: Promise, Practice, and Application of the Next Internet Technology.* John Wiley.

23 Zheng, Zibin, Shaoan Xie, Hong-Ning Dai, Weili Chen, Xiangping Chen, Jian Weng, and Muhammad Imran. "An Overview on Smart Contracts: Challenges, Advances and Platforms." *Future Generation Computer Sys.* 105 (2020): 475-491.

i) **KODAKOne's Image Rights Platform[24]:**

KODAKOne, a blockchain-powered platform for picture rights, has implemented a solution using smart contracts to oversee and safeguard the intellectual property rights of photographers and content providers. Smart contracts were utilized to automate license agreements and royalty payments. Photographers may submit their photographs to the site, where smart contracts automatically enforced certain terms for licensing and royalty distribution. Smart contracts improved the licensing process, minimized administrative costs, and guaranteed photographers received royalty payments promptly and transparently. This scenario illustrated how smart contracts may automate intellectual property transactions and improve the system's efficiency.

ii) **Chronicled and the MediLedger Project[25]:**

Chronicled, a blockchain technology company, partnered with pharmaceutical businesses in the MediLedger Project to tackle concerns with drug traceability and compliance. Smart contracts automated and secured transactions involving the transfer of intellectual property inside the pharmaceutical supply chain. This involved developing and implementing licensing agreements, assuring adherence to regulatory standards. Integrating smart contracts into the MediLedger Project greatly enhanced the traceability of pharmaceutical items, minimized the threat of counterfeit medications, and effectively handled intellectual property rights across the supply chain.

iii) **IBM and the Food Trust Network[26]:**

IBM partnered with key companies in the food business to create the Food Trust Network, a blockchain network designed to enhance transparency and traceability in the food supply chain. Smart contracts were utilized to automate and uphold agreements concerning the intellectual property of food goods. This encompassed licensing agreements, certifications, and provenance monitoring to ensure compliance with agreed-upon terms by all supply chain players. Smart contracts in the Food Trust Network enhanced transparency in the food supply chain, enabling customers to track product origins and validate certificates. This implementation demonstrated how smart

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24 ROCHESTER, N.Y., "KODAK and WENN Digital Partner to Launch Major Blockchain Initiative and Cryptocurrency", January 09, 2018 https://www.kodak.com/en/company/press-release/blockchain-initiative/

25 PRNewswire, HIBCC and Chronicled Announce HIN Data Integration Within the MediLedger Network Blockchain (2020), https://www.prnewswire.com/news-releases/hibcc-and-chronicled-announce-hin-data-integration-within-the-mediledger-network-blockchain-301131169.html

26 IBM. "Food Trust." (n.d.). https://www.ibm.com/products/supply-chain-intelligence-suite/food-trust

contracts can improve confidence and adherence in businesses that depend on intellectual property agreements.

The case studies showcase the various uses of smart contracts in intellectual property transactions in various industries. Smart contracts have repeatedly shown enhancements in efficiency, transparency, and trust across several industries such as photography, medicines, food supply chains, and food technology. The real-world examples provide vital insights into how blockchain and smart contracts might alter intellectual property transactions. These case studies offer valuable insights into successful implementations of smart contracts in intellectual property transactions. However, challenges like legal recognition and privacy concerns must be carefully addressed to ensure widespread and secure adoption.

6. Conclusion and Suggestions

Exploring smart contracts in intellectual property transactions highlights their potential to revolutionize agreements concerning intangible assets like patents, copyrights, trademarks, and trade secrets. Exploring the advantages, difficulties, and practical examples has offered significant knowledge about the possibilities and factors involved in implementing smart contracts in the field of intellectual property. Smart contracts offer numerous advantages for intellectual property agreements. Automating licensing, royalty payments, and contract enforcement simplifies processes, decreases dependence on middlemen, and reduces the likelihood of errors. Blockchain's security properties, such as decentralization and tamper resistance, improve the security and integrity of intellectual property agreements. Transparent and automatic royalty computations ensure that creators and owners receive fair and timely recompense. Blockchain's transparency fosters trust, minimizes conflicts, and simplifies auditing procedures, establishing a cooperative and reliable setting for intellectual property agreements.

Case studies of KODAKOne, Chronicled, IBM's Food Trust Network, and MycoTech's ClearVue Platform exemplify effective smart contract adoption across several sectors. The case studies demonstrate how smart contracts have enhanced transparency, traceability, and efficiency in the management of intellectual property rights. Smart contracts are significantly changing various industries, from image rights platforms to pharmaceutical supply chains and food technologies. Yet, implementing smart contracts in intellectual property transactions poses certain difficulties. Legal recognition is an important factor to consider because the legal status of smart contracts differs in different jurisdictions. Standardizing protocols and adjusting legal frameworks are crucial to ensure the broad adoption and enforceability of smart contracts. Incorporating smart contracts into current intellectual property systems presents technical and logistical obstacles that necessitate cooperation among industry participants, legal professionals, and technology specialists to set universal guidelines. Exploring off-chain solutions and privacy-enhancing technology is necessary to address privacy issues arising from the permanent

nature of data on the blockchain and the pseudonymous nature of transactions. This exploration aims to find a compromise between transparency and secrecy.

Suggestions:

(a) It is essential to set worldwide benchmarks for smart contracts in intellectual property agreements. International organizations, legal agencies, and industry groups should work together to establish standardized frameworks that promote interoperability and legal recognition across different countries. Efforts to harmonize regulations should concentrate on modifying current legislation to incorporate the distinctive characteristics of smart contracts, creating a favorable climate for their broad acceptance.

(b) Collaboration among industries is crucial for the effective incorporation of smart contracts into intellectual property transactions. Creating optimal procedures and universal criteria would assist stakeholders in efficiently implementing and embracing smart contracts. Organize forums, conferences, and working groups to promote collaboration, exchange thoughts, and collaboratively handle difficulties.

(c) Ongoing research and advancement in privacy-enhancing technologies (PETs) are crucial for tackling privacy issues in intellectual property transactions. Combining zero-knowledge proofs, homomorphic encryption, and other Privacy Enhancing Technologies (PETs) with blockchain can improve confidentiality without compromising transparency. Collaboration among research institutions, technological businesses, and regulatory agencies is essential to promote the progress and acceptance of these innovations.

(d) It is essential to enhance awareness and comprehension of smart contracts among legal professionals, industry stakeholders, and the general public. Implement educational programs to clarify smart contracts, outline their advantages, and offer information on their legal consequences. Stakeholders can enhance the broader acceptability of smart contracts in intellectual property transactions by developing a thorough understanding and making educated judgments.

(e) Authorities should collaborate with blockchain and legal experts to provide precise and thorough regulatory guidelines for smart contracts in intellectual property transactions. The frameworks should offer legal acknowledgment, create methods for enforcement, and deal with privacy issues. Regulatory sandboxes can be used to test and improve regulatory methods in cooperation with industry participants.

(f) Continuous monitoring and adaptation are crucial in the ever-changing technological context. It is important for governments, business organizations, and technology developers to remain alert to new threats and opportunities. Consistent evaluations and revisions of legal and technical frameworks will guarantee their continued relevance and efficiency in meeting the changing requirements of intellectual property transactions in the digital era. Ultimately, incorporating smart

contracts into intellectual property transactions has great potential for improving efficiency, transparency, and justice. Efforts in standardization, education, technological innovation, and legislative development can facilitate the secure use of smart contracts in intellectual property despite existing hurdles. Achieving a digitized, decentralized, and efficient future for intellectual property transactions necessitates collaboration, innovation, and a dedication to tackling the difficulties and opportunities posed by smart contracts on the blockchain.

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Implications of Decriminalization of Adultery law with reference to Joseph Shine Case

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Introduction

Adultery was defined under Section 497 of Indian Penal Code 1980 [1], as a sexual relation between the individuals who were actually not married with each other or we can say both were married to someone else and such physical relation does not amount to rape. Punishment under Section 497 I.P.C was imprisonment up to 5 years or fine or with both. On 27 September 2018 a constitution bench of 5 judges of the Apex Court decriminalized the adultery in India and declared Section 497 I.P.C as unconstitutional in *Joseph Shine* v. *U.O.I,*[2] on the ground that it is violative of Article 14,15 and 21 of the Indian Constitution. The Hon'ble Supreme Court further stated that Husband is not the owner of wife and in this era both wife and husband should have equal governing parameters. If husband and wife cannot maintain good relations within the bond of marriage then it does not make any sense to punish the third party (outsider). Thus, it is right time to say good bye to all the historical perceptions. Thus, in our view Section 497 of Indian Penal Code is arbitrary and unconstitutional under Article 14 of the Indian Constitution but adultery will still be considered as a valid ground for divorce. Adultery may not be seemed as a serious misconduct or it may not have any apparent effect on the society but it plays a good turmoil in the life of an individual who are actually concerned. Infidelity may not seem to be gravest violation as viewed by many people and demanded that it should not be a criminal offence but it brings out the absolute gravest results. It may not pose any direct threat to the peaceful survival of society as it poses in the other types of crime such as theft, murder, grievous hurt, rape, dacoit, defamation, public tranquility etc. but it is having the indirect effect on the society. An individual who commits an adulterous act is already aware of the thing that the person in question is damaging the fundamental standards of the foundation of marriage and that of the general

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1 The Indian Penal Code, 1860 (Act 45 of 1860), s.497
2 (2019)3 SCC 39

public and believability, trustworthiness and reliability of a marital bond are being targeted on. The person who commits infidelity is constantly aware of the fact that if some way or another his/her husband or wife will come to know about the illicit relation, he/she won't take it easy, it is sure that such individual should confront a ton of anger by the family and by the society too. It is a breach of trust and an encroachment of the sacred conjugal guarantees, which morally need to be respected.

1.1 Review of Literature

1) **Decriminalization of adultery in India: A socio-legal analysis.**[3]

Kaur examined that Section 497 of Indian Penal Code which deals with adultery was an arbitrary and illegal act which lowers the dignity of a women. It is the offence which is against the basis of marriage and effects the matrimonial homes. It is committed by a male with the wife of some other man and sexual contact with unmarried women, widow or with the prostitute was not considered as an offence. In many countries woman is equally responsible for adultery like in France, Germany and in Jammu and Kashmir under Ranbir Penal Code 1989. The author further states that Section 497 violates Article 21 and 14 of the India Constitution. Moreover, the husband is not the boss of wife so the governing parameters should be equal. The author is of view that striking down of Section 497 of I.P.C by the Hon'ble Supreme Court and declaring it unconstitutional will probably have a negative consequence on marriage institutions. It will give an open license to the married couple for extra-marital affair which will automatically led to the increase in divorce rates and in turn will have a bad effect on the future of children.

2) **Decriminalization of Adultery: A Draconian to the institution of Marriage.**[4]

Kaushal analyzed that the adultery is such act which effects not only two people, but it is a triparty play in which the most aggrieved and effected person is the one who is innocent, who doesn't have any idea about the bad play. Not only the spouse is affected but children are also great sufferers. The author further stated that sexual fidelity between the married couples is one of the reliable pillars of marriage. Marriage is such a relationship which binds two parties together and forms a family. Marriage is the basic unit of civilized society. The author is of view that adultery is the act of violence which is done by the preparator with full intention and with full knowledge, so such person should be punished. Decriminalization of adultery will be proved as a draconian law for marriage institutions and for sanctity of family life. So, the adultery law should again be considered as a criminal offence as it has been proved effective in keeping the society in control and moreover the norms of society.

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[3] Kaur, A. P. "Decriminalization of adultery in India: A socio-legal analysis" 8 *International Journal of Basic and Applied Research* 411-429 (December 2018)

[4] Kaushal, P. "Decriminalization of Adultery: A Draconian to the institution of Marriage" 1 *Law Audience Journal* (July, 2019).

3) Decriminalization of adultery law endanger the institution of marriage.[5]

Ghoria has discussed the history of adultery law in India and further analyzed the status of adultery law relating to other countries viz. U.S.A, Canada, South Africa, Japan, Malaysia, Turkey, South Korea. The author had analyzed all the cases from *Sowmithri Vishnu* v. *U.O. I* (1985) till *Joseph Shine* v. *U.O. I* (2019). The author is of the view that legislature should revise the civil laws relating to adultery and both parties to the marriage should be equally punished without keeping in mind marital status of unfaithful partner in mind.

4) **Decriminalization of Adultery.**[6]

Bajpai stated that Section 497 IPC was not based on principles of Criminal Jurisprudence. The limit of privacy is not sex but we are forgetting that it is a concern of marital sexes. The author mentioned that sex outside the marriage like adultery and prostitution cannot be brought on equal footing with sexes within the marriage, Same level of privacy cannot be given, there is a need of gender-neutral laws and not the gender biased laws. The writer further stated that adultery is the result of the collapse of faith and conscience in a relationship and requires corrective action rather than penalize. The penalties imposed by the laws can bring relief to the injured party for a short time, but destroys the sacredness of marriage and family life in the long-term. The writer has expressed his view that there is a need for review of adultery law by either decriminalizing the entire act of adultery or otherwise making it a gender-neutral law which will be free from discrimination among all Sections of society.

5) Adultery in India: "Court and Sanctity of Marriage".[7]

In this Article it has been stated that adultery was criminalized in many of the countries like Pakistan, Philippines, and Taiwan but contrary to such, some countries like south Korea, Sri Lanka and Bhutan have struck down law relating to such act. In India also it has been struck down in Judgment of "*Joseph Shine* V. *Union of India*". The government of India after this judgment was of the view that decriminalizing "adultery law" will destroy the sacredness of the matrimonial bond. The mentality of the society is rooted in morality which changes and to some extent has to change with the passage of time. The author has observed that some of the developed countries still have Adultery as a criminal offence. He further stated that we need to understand that we cannot term an act as criminal which is based on consent and when compromise does not work. This judgement acts as a

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5 Soumyadip Ghorai and Shrisha Gautam, "Decriminalization of adultery law endanger the institution of marriage" 1 *Law Audience Journal* (2019).

6 G.S. Bajpai, "Decriminalization of Adultery", *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200823* (last visited at 21 July, 2023).

7 Neha Panchpal, Adultery in India: Court and Sanctity of Marriage" 7 (*RGICS* Policy Watch, 2018*).* Available at https://www.rgics.org/wp-content/uploads/PW.7.05.pdf (Last visited on 09-10-2023).

hope for challenging the "Marital Rape" in future wherein same arguments of sanctity of marriage and where implied consent is involved.

6) **A Study on Adultery in India.** [8]

The author is of view that adultery is the destruction of wedding bed. It is the serious offence and grabs the attention of the society. There had been a continuous conflict between the security of the society and the individual's freedom. No religion is supporting adulterous act. It creates disturbance within the society and thus it is controlled by legislations, social suggestions, morals, beliefs, customs etc. Out of these controlling methods, law is considered as the guardian of ethical values and keeps the society well organized and intact. The author is of view that this Section is biased on the basis of sex. Further the author is of view that the competent authority should make Section 497 of I.P.C gender equal and should deepen the relation between the couples. Similarly, the wife and husband both should not only be allowed to go for the divorce but the third party who weekend the wedding relationship should be criminally liable.

7) **An Overview of Section 497 of IPC on Adultery, International Journal of Legal Developments and Allied Issues.**[9]

Jain analyzed that Section 497 of I.P.C should be amended, and it need to include women under this Section. Marriage is the sacred relationship and its sanctity should be maintained. Marriage promises are meant to make sure that both spouses would perform their mandatory duties specially to remain faithful to each other. This article tries to reconcile the Institution of marriage. The author in this Article emphasizes on the "42nd Law commission report" and "Malimath Report" to include the women under Section 497 of I.P.C and this Section need amendment and recommended the legislative body to make the marriage institution strong.

8) **The social impact of the Supreme Court Ruling on Adultery in India: An Analysis**.[10]

Kala had defined the meaning of adultery and had highlighted the problems relating to Section 497 of I.P.C like the right to file a complaint by husband and not by wife and thus referred the law as anti-woman law. He further stated that the Section 497 of I.P.C had remained a controversial and has been challenged many times. The author stated the impact of supreme Court's judgment relating to adultery on society and described family as a societal fabric and the basic unit of society. Marriage is the socially permitted union between male and female and is also a religious obligation. Marriage is taken as a building block of society and its sacredness has been accepted and respected by all the religions. He further stated whether is it a

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8 Subramanian, S. V and Kannappan, M. "A Study on Adultery in India," 119 International *Journal of Pure and Applied Mathematics* 1425-1434 (2018).

9 " An Overview of Section 497 of IPC on Adultery" 4 *International Journal of Legal Developments and Allied Issues* 56-68 (2018).

10 Kala, N. B., & Anuradha, A. "The Social Impact of the Supreme Court Ruling on Adultery in India: An Analysis." 9*IUP Law Review* 28-35 (2019).

boon or bane particularly on marriage institution that needs an examination.

9) **Decriminalization of Adultery: A Step Towards Rights Based Social Relations.** [11]

Kumar had stated his views related to adultery whether it should be taken as criminal offence as it is against the public morality or it should be kept as a civil offence. The author further stated that the explanation appears simple but there is a several issues connected to it which are very big than the sexual act. The author is of view that the act of adultery is a moral crime and leaving the issue to be decided within family will create chaos and will be more complex to be resolved between husband and wife within the walls of house.

10) Decriminalization of adultery: far-reaching impact upon the marriages.[12]

Dwivedi has stated that Section 497 has remained one of the most debatable issues from many years. Decriminalization of adultery can endanger the marriage institution keeping in view the growth of divorce rate in India. It will not only lead to increase in extramarital affairs but will also lead the children in lurch. The author further stated that:

- Supreme Court should have laid down the remedies for children who will be mostly affected by the divorce.
- Supreme Court directed that if any of the partner commits suicide because of his or her partners adulterous relationship then it will amount to abetment to suicide that means the Apex court knows that such adulterous relationship will create chaos and disrupt in the society. The author further suggested that government should add adultery as a criminal offence under Section 498A of I.P.C.
- The adultery may destroy the basis of marriage. To make adultery law free from gender bias both parties would have been given equal rights for filling case and both should have been equally punished for the adulterous act. In such way it would not be gender bias also.
- The Hon'ble Supreme Court stated about transformative constitutionalism in para 55 of the judgment of Joseph shine that India has adopted the jurisprudence of England but reality is that India has different culture than England.

11) Adultery Judgement and its impact in India.[13]

In this article the author has made an attempt to check whether the judiciary has been able to satisfy the needs of common public of India and the impact of judgement it has created within the citizens of India. The analysis of the

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11 Kumar, S. "Decriminalization of Adultery: A Step Towards Rights Based Social Relations" 10 *Research Journal of Humanities and Social Sciences* 553-558(2019).

12 Dwivedi, S. K. T. A. "DECRIMINALISATION OF ADULTERY: FAR-REACHING IMPACT UPON THE MARRIAGES". *Journal Current Science* (2019).

13 Tamoghna Chattopadhyay, Siva Mahadevan, *et. al.*, "Adultery Judgement and its impact in India" 9 *International journal of Scientific and Research Publications*163-168 (2019).

survey made it abundantly clear that the judgement is still young. people are yet to form their opinions regarding adultery. Most of the respondents were happy with the judgement and believed that women should not be treated as a mere object. They also agree that even if adultery is not a crime it is still a violation of marital values and hence a ground for divorce.

1.2 - Earlier view of Section 497: Critique

There were apparent flaws in the existing law and the problems which an aggrieved person was facing with respect to such gender bias law were as:

1) According to this law only the man was punished and not the women. No legal action was taken towards woman who was involved in the same act even she was not punished as an abettor.
2) Any woman whose husband was having sexual intercourse with another woman outside the beautiful bond of marriage has no right to file a complaint against him because such law had not made any provision for her that means husband can prosecute the wife's lover but unluckily the same provision was not available for husband's lover.
3) There was no need of consent from wife for having sexual intercourse with any women outside the marriage but at the same time if the husband of a woman agrees to have a sexual intercourse outside the marriage at that time such act was not considered as a crime. Thus, we can say she was considered as an object.
4) Wife of the adulterous husband was not considered as an aggrieved person according to Section 198 of Criminal Procedure Code and thus she was not allowed to file case against the husband who was involved in such adulterous act. Thus Section 198 of Cr.P.C clearly expresses the unequal status of Wife and husband within marriage institution.
5) If a married man was involved in sexual intercourse with unmarried women or divorced women at that time too such act does not amount to adultery which means both the parties are exempted from punishment for such act.
6) If an unmarried man was involved in sexual intercourse with unmarried women or divorced women at that time too such act does not constitute adultery and thus at such time there exists no application of Section 497.

1.3 – Review after decriminalization of Adultery: -

After decriminalization many people have expressed their views with respect to the judgement of Joseph Shine. Some of the highlights are as under: -

- On 11 January 2019 that is after decriminalization of adultery, an army chief namely Bipin Rawat stated that adultery is a serious offence and we cannot accept decimalization of adultery as an easy thing. He stated that if decriminalization of adultery is a form of westernization, then we would like to remain conservative and love to be called conservative. Further added that we "the Army men" are not happy with the Apex Court's Judgement related to decriminalization of adultery. So, we will continue to take action against the people who commit the offense of adultery. He

quoted that stealing the affection of a brother's officer's wife" is a heinous crime and for such dangerous crime harsh punishment is needed. We stay away from our loved ones for such a long period of time only for the sake of our country and during that period others look after our families. If those people look after our family with unacceptable purpose, then they should not be left unpunished. The judgement has changed the Indian family structure into the western culture which may result in the increasing number of broken homes. He also pointed that "let us see how this comes in the society, if it happens in your society let us see how long it will last".[14]

- On 1st October 2018 that means immediately after decriminalization Swati Maliwal, Chairperson of DCW (Delhi Commission for Women) stated that we have analyzed that majority of the population who used to come DCW were those women who have been cheated by their husbands. In my view the judgement on Decriminalization of adultery will only enhance the pain of women and moreover the sanctity of marriage will be diluted. Instead of decriminalizing the law on adultery they could have made it gender neutral that is criminalizing both men and women for such act. She further stated that I failed to understand how decision of decriminalization of adultery be right and if this is right then where the sanctity of marriage lies. Then better is that they should put ban on marriages too.[15]
- On 11 July 2018 it was published in a famous newspaper namely "The Hindustan times" that the BJP-led NDA government has opposed the decriminalization of adultery law and stated that Adultery must stay as a crime to protect sacredness of marriage. They expressed their view that the judgement of decriminalizing the adultery law would destroy the marriage institution and will prove to be harmful to the intrinsic Indian ethos too. They further added that striking down the Section 497 would erode the sanctity of marriage and the fabric of society at large.[16]
- On 1st October 2018 it was published in one of the famous newspapers namely Indian today that 24 years old women from Chennai committed suicide after the Hon'ble Supreme Court decriminalized the Adultery law. The matter was like that a wife discovered his husband involved in extra

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14 Army wants adultery to remain offence for discipline in its ranks, *available at:*https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.msn.com/en-in/news/newsindia/army-wants-adultery-to-remain-offence-for-discipline-in-its-ranks/ ar-AAGZUKL&ved=2ahUKEwjaqc7YysblAhUBtY8KHd_fBq0QFjALegQIBhAB&usg=AOvVaw08TMNmky0cHBhjfb2NAEtj&cshid=1572527969140 (last visited on June 5, 2023).

15 SC ruling in adultery : Remarks by DCW chief Swati Maliwal are indication of state of marriage, *available at:* https://www.firstpost.com/india/sc-ruling-on-adultery-remarks-by-dcw-chief-swati-maliwal-are-an-indication-of-state-of-marriage-5296321.html (last visited on June 16, 2023).

16 Adultery must stay a crime to protect sanctity of marriage, says Centre, *available at:* https://www.hindustantimes.com/india-news/adultery-must-stay-a-crime-to-protect-sanctity-of-marriage-says-cente (last visited on July 10, 2023).

marital relation and on enquiring about the same his husband opposed and replied that she cannot do anything, now she has no right to stop him from having extramarital affair as the Court have decriminalized the act of Adultery and now Adultery is no more an offence.[17]

1.4 – Analysis of decriminalization of adultery law with reference to Joseph Shine v. Union of India.

The Constitutional validity of Section 497 I.P.C was challenged on equality clause from time to time in different cases. In 1951 it was challenged in *Yusuf Abdul Aziz* v. *State of Bombay* [18] then again in *Sowmithri Vishnu* v. *union of India* [19]. In 1988 repeatedly challenged in *V. Revathi* v. *union of India*[20] and then in 2012 in *W. Kalyani* v. *State Thro' Inspector of Police and another*[21]. Again, challenged in 2017 and a five-judge bench of Supreme Court which was headed by then Chief Justice of India Deepak Mishra, and others included Justice RF Nariman, Deepak Mishra, DY Chandrachud, Indu Malhotra and AM Khanwilkar finally decriminalized the adultery law in a famous case titled as *Joseph shine* v. *union of India*[22]but still remains as a Civil law that means it can still be a ground for divorce. Thus, this judgement blows the 150 years old patriarchal and archaic law in our country which was drafted a way long back.

- In para 1 of the said judgement the Supreme court stated that the morality is directly linked with the thinking of the society and thinking changes to some extent with the change in time. The civilization of a society is achieved in real sense when it respects women as an individual. One more thing can be added to the civilization is that when a woman is treated with equality with respect to man. Hon'ble supreme court has clearly stated that the beauty of the Constitution lies in all that is "I", "you", and "we". If we look upon the parameters of the fundamental rights it is only the expressions of the judiciary which enhances the beauty of the Constitution. In those situations, the rights of a women are given real space when they make their individual identity rather than making their space in the main building.
- In Para 3 it is stated that it is not compulsory that the binding nature of the earlier judgements should be diluted or they should be allowed to retain their status. Further added that the binding nature of some precedents should not be continued to retain same status of precedent but should be allowed to be diluted with the change of time thus declares adultery law as unconstitutional as it discovered the infringement of Articles 14, 15, and 21 of the Indian Constitution. Discussing about the transformative

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17 Women commits suicide after husband justifies extra marital affairs, *available at*: https://www.indiatoday.in/india/story/woman-commits-suicide-after-husband-justifies-extramarital-affair-citing-sc-verdict-1353315-2018-10-01(Last Visited on July 25, 2023)

18 1954 AIR 321.

19 AIR 1618 1985.

20 1988 A.I.R 835.

21 (2012) 1 SCC 358

22 (2019)3 SCC 39

Constitutionalism, it is not important that the thing which is accepted at one point of time can be accepted again. It can be totally irrelevant at other point of time. So, being a new judgement there is a need to see whether society is ready to accept such transformation.

- In the same para 3 they further stated that in such era women cannot be treated as the property of men and if the relationship of husband and wife does not remain so there is no fun to make the third person (outsider) punishable. As we know that one of the essential elements of crime is knowledge which is present in such adulterous act. They did not take into consideration that the third persons act means the outsider who has deliberately interfered into the relation of married persons after having the knowledge that such person is already married and take advantage of such disturbed situation which arises in the marital relationship.
- In para 5 of the said judgement, they stated that the adulterous Act is committed by both the parties then why to punish only one party and not the other. The Hon'ble Supreme court stated that we fail to understand why she is considered as a victim in such era where women is on equal par with men. Further stated that it seems very old-fashioned law which does not suit to the present society. More over the sustainability of the offence does not exists if the husband gives the consent or connivence for doing such adulterous act, at that time such act does not constitute offence. Thus, this provision treats women as a chattel and is clear reflection of patriarchal dominance. Such law could not go in hand with today's era where women are at equal par with men.
- In para 13 of the said judgement, they had discussed the *Sowmithri Vishnu* [23] case in which it is discussed that while dealing with Section 497 of Indian Penal Code it does not consider such sexual act as adultery where there is a sexual relationship between husband and the unmarried women which means the husband has a free license for having extramarital relationship with the unmarried women.

  Highly appreciating they had also recognized that such expression of Section 497 is a shocking and evident example of legislative despotism, gender discrimination and male chauvinism. On the face of the record, it seems to be beneficial legislation in the interest of women but basically on a closer note it is found that it is a type of romantic paternalism which has its growth from the concept that women are the personal property of men after marriage. So, they had also noted that there is a need of gender neutrality.
- In para 24 they stated that the issue related to Article 21 of the Indian Constitution should be addressed and for that purpose the dignity of a women should be raised and some space should be devoted to the concept of gender equality.

  Here the question of concern is will it promote the dignity of women in real sense. The Hon'ble court has talked about the dignity of women, does

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23 AIR 1618 1985

allowing women to sexual autonomy will be the women empowerment in real sense and the main concern was related to gender equality. Again, the question arises whether decriminalizing the adultery law was the only way to bring both the genders on equal footing. There could be other ways to make Section 497 I.P.C a gender neural law.

- In Para 36 and 37 the dignity of women was discussed and stated that her choice, desire, autonomy, and identity are important aspects of the dignity of women. The Apex court has declared Section 497 I.P.C as unconstitutional which has served husband as master for so many years. The Supreme Court in para 37 of the said judgement stated that adultery law is arbitrary which only offends the dignity of women. The constitutional values will be attained only when we give more emphasis on the liberty, dignity, and freedom. We can fulfill all these things within the space of privacy. An individual can retain the autonomy of mind and body by way of privacy. Article 21 reflects the constitutional values which can be read in consonance with international covenants. In this aspect the Hon'ble Court has made a reference of a famous case of *K.S putta swamy and another* v. *U.O.I and others*[24] in which it was held that "right to privacy" under Article 21 of Indian Constitution is a fundamental right. The actual dignity of women lies in her choice, autonomy, and identity. moreover, in today's era the male dominance is not acceptable.
- In para 41 Chief Justice Dipak Misra and Justice A.M. Khanwilkar stated that after analyzing the whole concept of right to privacy and equality of women it is visible that the dignity and equality of a women for which she is entitled, needs recognition, and cannot be curtailed. Section 497 I.P.C has created unreasonable biasness between the two genders which has created the dent in the women's dignity. The consent or connivance of husband amounts to the subordination of women. So, we don't hesitate in stating that Section 497 does not go in consonance with Article 21 of the Constitution.
- In para 42 they stated that the question which is raised is about adultery-whether it should be treated as criminal offence or not. The Supreme Court finally asserted that adultery cannot be treated as a criminal offence but can be a ground for civil issues only like for the dissolution of marriage. They quoted their words as: -

  "There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. But the pivotal question is whether it should be treated as a criminal offence. When we say so, it is not to be understood that there can be any kind of social license that destroys the matrimonial home. It is an ideal condition when the wife and husband maintain them loyalty. We are not commenting on any kind of ideal situation but, in fact, focusing on whether the act of adultery should be treated as a criminal offence. In this context, we are reminded of what Edmund Burke, a famous thinker, had said, a good legislation should be fit and equitable so that it can have a right to command

[24] (2017)10 SCC 1

obedience. Burke would like to put it in two compartments, namely, equity and utility. If the principle of Burke is properly understood, it conveys those laws and legislations are necessary to serve and promote a good life."

- In para 49 the Apex Court stated that they have gone through many authorities and theories so that they can understand whether adultery should be treated as a criminal offence or not. Offence committed under Section 497 is different from offence committed under Section 498-A or under Protection of Women from Domestic Violence Act, 2005 or for the protection covered under Section 125 of the Criminal Procedure Code or offence under Section 304 B or 306 or 494 I.P.C. These offences serve different purpose related to marital relationship. We are making it clear that the law-making power vests only to the parliament. Further we ae clarifying that we are not making any law but only stating that the act like adultery does not fit into the definition of crime. They further stated that if they treat adultery as a crime that will amount to the interference in extreme privacy of the matrimonial sphere.so, it is better to left it as a ground for divorce only. But if the aggrieved spouse commits suicide because of the involvement in adulterous relationship of his or her partner then it could amount to abetment to suicide.
- In para 53 it was stated that expectation of the law is to remain loyal to their partner which is like a command which intrudes into the realm of privacy. Thus, adultery is a discriminatory command and a socio- moral one. So, attaching a criminal liability to it is inapposite.
- In Para 54 of the said judgement Chief Justice Dipak Mishra stated that in some cases adultery may be the result of unhappy marriage and it is not necessary that adultery can be the reason of unhappy marriage. If punishment is given in such offences, then it would amount to punishing people who are already unhappy in their marital relationship. There are many situations in the institution of marriage where the parties lose their commitment to the sacred relationship of marriage. The court is of the view that it is a clear matter of privacy and the parties who are affected are best to handle this. Here a question was raised whether adultery should be considered as a criminal offence specially at the point when in certain circumstances adultery can be the cause or can be the result. They answered the question as:

  "Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said act should be made a criminal offence especially when on certain occasions, it can be the cause and in certain situations, it can be the result. If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages.

It is bound to become a law which would fall within the sphere of manifest arbitrariness."

It was stated that the law which punishes adultery cannot differentiate between two types of marriages i.e., where adultery can be the result and where adultery can be the cause. As we know that law is concerned about each and every individual then what will be the remedy to that husband or wife who doesn't have any knowledge about the dirty play of adultery and are giving their everything to make home. Is getting divorce a sufficient remedy for that person. In addition to this it is true that most of the countries have decriminalized adultery but at the same time our Indian culture and ethos are different so it not important that the laws which are adapted by the western countries will get fit in Indian too.

- In para 55 of the judgement, it was stated that India has adopted the jurisprudence of England to a large extent but their jurisprudence has never considered adultery as a criminal offence except for 10 years. At international level also most of the countries had abolished adultery as a crime. If we consider adultery as a crime that will be the backward step and not the growing step. we had made its step towards the transformative constitutionalism and any provision which does not treat women with equality cannot be constitutional. Therefore, treating adultery as a crime would be unwarranted in law
- In Para 56, the Apex Court in Joseph Shines Case clarifies that that the offence of adultery under Section 497 should not be treated as an offence because of its reason being unconstitutional. Thus, the procedure relating to the filing of complaint relating to the same offence which is prescribed under Section 198 of Criminal Procedure Code also stands unconstitutional. When the substantive provision goes then the procedural provision also has to adopt the same path. Hence after the analysis Sowmithri Vishnu case and V. Revathi case stands overruled and any other judgement which follows the same precedent stands overruled.

1.5 - Conclusion

The adultery has an unrestrained history of moralistic, religious, societal, and even legal chastisement. The legal expert opinion on adultery has been sexed, with considerable variation among female and male adulterers. The critics are considering the notion that women are the property of their fathers and spouses, much like chattels. Any illicit sexual relationship (whether consented or not) with a married lady by a man married to someone else was deemed assault against the husband. After 150 years, adultery was decriminalized in the case of *Joseph Shine v. Union of India* as a violation of Articles 14, 15, and 21 of the Indian Constitution. The decision has far-reaching implications, as it may have a negative impact on the institution of marriage, the institution of family, and the prevalent moral concepts in our culture. Marriage's entire aim is to prohibit illicit sexual enjoyment. The real purpose behind the petitioner in this case has been misconstrued by the hon'ble court by completely decriminalizing the entire law on adultery. The sexual autonomy is

not considered as real empowerment of women. This extended sexual freedom for women would eventually force the rethinking of other laws such as restitution of conjugal rights, marital rape, and so on. The decision of the Hon'ble Supreme Court to decriminalize adultery in India on the basis of gender imbalance has left certain critical problems unsolved, which must be examined pragmatically in light of the impact on society, particularly marriage institutions. The state is a guardian of the marriage institutions and Courts must preserve and protect these institutions in a very comprehensive manner. The Apex Court, while pronounced this judgment has left important concerns of family unattended. There is also one flaw in the judgment i.e., retaining divorce as an option for "adultery" and in the same breath calling it unconstitutional. According to the Court's ruling, if a spouse commits adultery, the remedy available is divorce rather than criminal prosecution. The free run given to both husband and wife will damage the social fabric of the marriage institution. It won't only encourage extramarital affairs, but rise the divorce rate too. Having divorce as a realistic option for both husband and wife will hasten the breakdown of marriages and putting children of separated parents in the lurch. The problem related to the legitimacy of children born out of adulterous union is likely to arise in future.

Being the Guardian of the Constitution the Supreme court must appreciate the intention of the legislation as this law was made to promote a good life to each individual of the society in general. with due regards a step was taken by the Apex court for the upliftment of women. Since, the society has class of women with different ideologies. The judgement has touched a particular class of women who want to have sexual autonomy but another class of women who are loyal to their partners and want to make home and have no knowledge about the dirty play of adulterous relationship are left with option to choose between death or divorce. That means a loyal partner who wants to make home can't get justice while he or she is alive but the same thing can be achieved after his/her death. One more apparent flaw of decriminalization of adultery which is highlighted in the judgement is that if any partner that is husband or wife commits suicide because of adulterous relationship of the partner then it is to be considered as abetment to suicide. That means a person can't get justice while he or she is alive but the same thing can be achieved after his/her death. The mental trauma he or she carries every day because of the adulterous relationship carries less value than the personal choice of an individual. The situation is getting gruesome and if this unfair individual choice is given precedence over the mental trauma caused by adultery, it will ruin and break the sacred matrimonial bond. In the recent past we have witnessed number of cases where the innocent partners have gone to the extent of committing suicide. Among the most infamous cases we have Aisha's suicide case of Hyderabad and another Chennai suicide case. In Chennai suicide Case, a 24 years old woman committed suicide after she found his husband having extramarital affair and started opposing the same. Apart from the unfortunate death of the victim the highlight part of the case was that his husband expedited adulterous activities as he was having knowledge of the

decriminalization of adultery and on questioning about extra marital affair, he replied that now she has no right to stop him from having extramarital affair as the Court have decriminalized the Adultery and Adultery is not an offence anymore. So, she was left with no remedy except to do suicide.[25] Another case of Aisha's suicide which is one of the best examples where sanctity of marriage can be gauged. In this particular case her husband's extra marital affair left her in lurch and heavy hearted. The mental trauma due to her husband's extra marital affair was troubling Aisha and she was unable to express this mental trauma to anyone. It is pertinent to mention that Aisha was disgusted with the entire human kind because she was not happy with what her husband was doing and the kind of remedy available to her. She wanted to make home with her husband for which she was constantly trying. In the video surfaced in the social media she was seen cursing her destiny for not getting reciprocated for her love and loyalty towards her husband. While going through the facts and circumstances of both the cases it is felt that the balance needs to be struck between the individual sexual liberty and the matrimonial sanctity. we have seen people choosing death over partners infidelity and sentencing for abetment to suicide as has been done in the Aisha's case where her husband has been sentenced to 10 years imprisonment, would not serve any fruitful purpose.[26] leaving a woman in a situation where she has been left with an option to choose between death and divorce is not women empowerment in any sense. Moreover, a semi-interview was done in 2020 on "lived experience of divorced women in Kashmir" was published in a journal of Gender studies. There were many reasons for divorce like incompatibility, childlessness, economic problem etc. but the main reason which the author has highlighted was infidelity of a partner.[27] Every law made by the legislation has some purpose. Despite being gender biased law, the basic object of the adultery law was to protect the purity of bloodline but unfortunately that thing has been left undiscussed by our hon'ble Supreme Court. It is very clear that the question of paternity will be raised whether the child born is out of the adulterous relationship or out of his own real blood line. So, keeping all these things in mind there is a need for looking on the judgement and making new and necessary provisions relating to criminalization of adultery so that the society may be protected from such apprehensions.

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25 Women commits suicide after husband justifies extra marital affairs, *India Today* October 1, 2018*availableat:* https://www.indiatoday.in/india/story/woman-commits-suicide-after-husband-justifies-extramarital-affair-citing-sc-verdict-1353315-2018-10-01(last visited on April 5, 2022)

26 Ayesha suicide case: Husband gets 10 years in jail, *India Today*, April 28, 2022*available at:*https://www.indiatoday.in/cities/ahmedabad/story/ayesha-suicide-case-husband-gets-rigorous-imprisonment-1943092-2022-04-28 (last visited on 30, 2022)

27 Tanveer Ahmed Khan,Wasia Hamid "Lived experiences of divorced women in Kashmir a phenomenological study" 30*Journal of gender Studies* (2021).

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Applicability of Trademark Laws to Cyberspace: An Analysis

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Abstract

The trademark laws across the globe recognize one mark many owner possibility. But these well-known principles of trademark jurisprudence do not fit in cyber space. Cyberspace knows no boundaries. The confluence of the domain name system (DNS) and the intellectual property system refers to the intersection of the global media and territorially-based systems, where in one system traffic circulates without consideration of boundaries and other originate from sovereign power of the area.[1] Over the period of time the courts have recognized that domain names are performing same function in the cyberspace which the trademarks are performing in real space. This intersection has resulted in conflict between the two systems and the same is increasing. The present work is an endeavor to analyse the intersection between trademark laws and domain name system. The work is divided in three parts .First part will discuss the nature and function of domain names, second part will highlight the conflict between the two systems and finally the applicability of principles of infringement of trademark to domain names will be discussed in light of judicial pronouncements .

Key Words: domain names, infringement, passing off, cyber squatting, Top level domain, second level domain

Introduction

Domain names have drawn a great deal of attention on a global scale. The Domain Name System (DNS) makes it possible to access information from host computers and to send and receive messages anywhere on the Internet. It is a virtual address of some resource, device or service[2]. Businesses all around

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1 See report of WIPO entitled "The Management of Internet Names and Addresses: Intellectual Property Issue".Final *Report* of the *WIPO* Internet Domain Name Process, 30 April 1999.

2 M.Tariq Banday & Farooq. A. Mir, Techno-Legal Interplay of Domain Names: A Study with Reference to India, World Academy of Science, Engineering and Technology International Journal of Computer and Information Engineering Vol:8, No:1, 2014

the globe have begun to see the enormous potential of websites as a key tool for enabling electronic trade. The business entities have now started new trade operations and online product marketing campaigns, and they have begun utilising domain names to help people find them quickly online. Concerns over intellectual property have increased as a result of the internet's amazing expansion as a commercial medium.[3]The conflict between domain names and trademarks has grown over the period of time and has given rise to a number of problems that pose important regulatory concerns. These issues result from the internet's structure, which disregards all boundaries and is incompatible with the system intended for the physical, territorial world.[4].

2. Domain Names

The Internet, as we know, is made up of thousands of separate, self-contained networks, each of which has millions of host machines. When two computers need to communicate, they must be able to recognise one another. Internet users who want to connect to another computer need a fixed address to do so in order to connect to that machine and utilise the service it offers. Every machine linked to the internet has an IP (internet protocol) address, which is a number used for identification on a worldwide scale. Generally, users prefer names over numbers even if using numerical addresses is a suitable method of communication through computers. In order to make the identification of destination computer system simple and mnemonic, a Domain Name System (DNS) has been developed which enables to use globally unique easy-to-remember names called domain names for Webpages and mailboxes, rather than long numbers or codes.[5]

The names were referred to as domain names and the mechanism is known as the Domain name system (DNS). The domain name system is the distributed database responsible for the domain name-to-IP address conversion, while the domain name service, as the name implies, is the service offered by this system[6]. Thus the fundamental function of the domain name on the internet is to identify and find the address of the website.[7]

A hierarchy is used to assign each domain name, and it starts at the right end of the name. The domain name is divided into a number of tiers, or domain levels, that are separated by full stops. Its maximum length is 255 characters, with 63 characters allowed for each string.[8]

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3 P.S. Sangal, Trademarks and Domain Names: Some Recent Developments, Journal of Indian Law Institute (JILI) 1999. p. 36

4 V.K. Unni, Trademark Law and Emerging Concept of Cyber Property Rights, Ist Ed., 2002 Eastern Book House.

5 M.Tariq Banday&Farooq.A.Mir, Techno-Legal Interplay of Domain Names: A Study with Reference to India, World Academy of Science, Engineering and Technology International Journal of Computer and Information Engineering Vol:8, No:1, 2014

6 Ibid.

7 Mohammad Hussain, Trade mark and Domain names, Conflict and Conciliation, KULR 2001 p. 96.

8 David W. Quinto, Law of Internet Disputes, 1st Ed, 2002 supp, Aspan Law and Business.

Categories of Domain Names

Domain name consists of two levels of use from right to left.

1. Top level domain TLD
2. Second level domain SLD

a. Top level Domain TLD: - Top Level domain is that part of the domain name which identify the company or the nation where the address was registered. It is present on the right most side of the domain name (URL). For example .com is recognised as the top-level domain in the instance of www.hotmail.com (TLD). There were typically three sorts of TLDs.

a) Generic top level domains (g-TCD)
b) Sponsored Top Level Domains (s-TLD)
c) Country code top level domain (Cc-TLD)

As of 2015, there are thousands of top level domains in the following catagories

Generic Top Level domains (gTLD)
Infrastructure Top Level Domains (ARPA)
Restricted Top Level Domains (grTLD)
Sponsored Top Level Domain (sTLD)
Country code Top Level Domain (cc TLD)
Test Top Level Domain (t TLD)

Root Zone Database maintains the whole list of top level domains by IANA. The list contained 1589 TLD's on March 2021 out of which 68 were not assigned (revoked),8 retired and 11 were test domains so on April 2021 there are 1502 TLD's registered[9]

a) Generic TLD's: - Specifies the sort of company that owns the domain name. Currently, there are seven TLDs; of these,.com,.org, and.net are the three that are freely available. The remaining four g-TLDs, however, are not as widely available, meaning that only a limited number of individuals or organisations are permitted to register after meeting specific requirements. Seven g-TLDs are listed, the first of which is free to use and the next four of which require the fulfillment of additional requirements..com – used for commercial and personal sites[10]

For the first three TLD's i.e. .com, .net. and .org. the information concerning each match is maintained in the registry owned by network solutions Inc. As per of May 2001 more than 35.6 million domain names had been registered worldwide including approximately 22.4 million in the .com registry[11]. On June, 2011, the board of ICANN voted to end restrictions on Top

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9 Root Zone Database IANA.org.

10 . org – Recommended for nonprofit organization ,.net – Recommended for companies involved in internet infrastructure ie., internet providers,.edu- Recommended for educational Institutions, .mil – used by military agencies ,.gov. – used by government organizations, .int – used by international organizations.

11 Current Statistics can be found at <http://www.domainstats.com.
Board of ICANN has approved on Nov. 7, 2000 seven new domain name extensions. They are .info- for information, .biz for business, .name for individuals, .pro for professionals, .museum for museum, .corp for corporations, .aero for aviation Industry. It is clear that in 2001 there was a limited expansion of the top

level domains. Companies and organizations were allowed to choose any top level domain even use of non Latin characters was recognized.

b) Sponsored Top Level Domains (s-TLD): A Sponsored top level domain is a category of TLD's maintained by Internet Assigned Number Authority (IANA) for the use in Domain name system. It is a specialized TLD which has a sponsor which represents a particular community based on professional, ethical, geographical or technical makeup. It represents a narrower community most affected by TLD. For example .asia is sponsored by Dot Asia Organisations , .aero is sponsored by SITA,.edu by Educause and so on

c) Country Code top level domain (CCTLD): There are several TLDs in addition to the standard TLDs that are referred to as CCTLDs (country code top level domains) based on where they are located. Each top-level domain with a country code has a two-letter country code that identifies the nation where the domain name was registered. e.g., .in for India, .de for Germany, .fr for France, .ca for Canada, .au for Australia, .us for USA etc. the CC TLCD's are administered by the respective governments or private organization[12]. The CCTLD's are listed in the International Standards Organization Documents ISO Norm 3166[13].

d) Infrastructure Top Level Domain(.arpa): .arpa is mainly the technical network infrastructure. The top level domain .arpa is the acronym for Advanced Research Projects Agency the funding agency of U.S that developed APRANET. It was originally registered to facilitate systematic running of APRENET computers, but later it became practically difficult to remove the domain after the sanctioning of infrastructural use thus consequently the name was used as backronym Address and Routing Parameter Area (arpa). For example , as.arpa provides sinking of Domain name system traffic for reverse IP address Resolution The domain .arpa provides a lookup function that retrieves information associated with telephone numbers through the ENUM service.

2. Second Level Domain: - (SLD) SLD exists before TLD's in URL they are allotted to the parties for making a brand specific or to differentiate a body

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level domains. Twenty one new top level domains were added in 2008 out of which as per government policy only 14 TLD's were opened for registration .this was done in order to increase the choice in domain names and to give boost to competition.

12 See NTIA, Improvement of Technical Management of Internet Names and Address, the Deptt. of Commerce 63 Fed Reg. 8826, 8828 (1998).

13 ISO is the high powered authority for the promotion of international internet development. It has over 6000 members throughout the world including 130 companies, a no. of internet access providers universities, software procedures and Int. Organizations like World Bank and IMF. For current codes see httpp:// www.din.de/germein/nas/nabd/ISO3166ma/. This list is periodically reviewed by the maintenance agency secretariat to include new born states. There are between 240-250 CCTLD's and the number changes from time to time as new countries gain independence. Since all the countries are not concerned with internet so some domain names are not yet available for use.

from similar entitles or competitions and they are chosen by registrant himself. These second level domains have given rise to dispute. The main difficulty with SLD's is the allotment of one specific name, which could not be used if needed by any other entity or body unlike TLD's e.g., in the URL *abc.co.in*, the word *abc* becomes SLD we find here that no other entity can have same SLD with that of same TLD's[14].

Thus, the domain names are read from right to left, from top level domain names to sub level domain names from general to more specific areas of the internet. For instance, the URL http://www.philips.india.co.in suggests that the domain name has been registered in India, (.in CCTLD), it is a commercial entity (.co.GTLD), known by the entity's preferred name Philips India (SLD) and it is found on the World Wide Web (www). The page uses hyper text[15].

Additionally, locating an Internet site requires more than just typing in the domain name; the computer also needs to know the structure and location of the data file.

Thus the Domain name serves two purposes

1. They are much easier to remember than IP addresses and
2. They allow internet to operate efficiently because the various levels in the domain name are hierarchical[16].

3. Internet and Its Impact on Trademark Law

The basic premise of the legal protection of trademark rests on the fact that the trademark being the source identifier of goods and services, anyone, other than its true owner, using it will create consumer confusion as to its source[17]. Another logical basis of this protection is that no one should be allowed to reap benefits of the goodwill created by hard labor and investment of other. The trademark law gives right to prohibit, the use of the word or words, so far as, to protect the owner's good-will against the sale of another product as his[18]. The real protection of trademark does not goes beyond the prevention of consumer confusion or protection of goodwill. Thus the use of the same mark on two different goods, or services in one place or the use of same mark in similar goods place or the use of same mark in similar goods or services in two different places, where market overlap is not possible, have been generally allowed because of the lack of consumer confusion[19]. Thus the

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14 Pankaj Jain and Pandey Sangeet Rai, Copyright and Trademark Laws Relating to Computers, Ist Ed. 2005, Eastern Book Co, p- 93.

15 Farooq Ahmad, Domain Name Disputes and Trademark Law: Cyberlaw in India, 2000,Pioneer Books p. 136.

16 David W. Quinto, Law of Internet Disputes, 2nd Ed. 2002 Supp., Aspen Law and Business p. 2 (3)

17 WCVBTV v. Boston Athletic Association, 17 US PQ 2d (BNA) 168 - 169.

18 Prestonets Inc v. Coty, 264 us 359, 368 (1924

19 Mead Data Central Inc v. Toyota Motor Sales USA Inc 875 f. 2nd 1026, 1031. Mead's lexus mark and Toyota lexus mark could exist in two different places because of lack of market overlap.

trademark laws across the globe recognize one mark many owner possibility. But these well known principles of trademark jurisprudence do not fit in cyber space. Cyberspace knows no boundaries. It is a global market place that can serve millions of customers across the world[20] and websites acts as a "Shopwindow". The restrictions that apply throughout the globe for the registration of trademark do not apply for domain name registration. So any name whether generic or invented can be registered as the domain name. Since businesses are free to register any name as their domain name, they generally prefer their trademark or famous marks or any other name, that is easy to remember or guess[21] and, as more and more commercial enterprises trade or advertise their presence on the web, DNS have became more and more valuable and potential for disputes is high.

Thus these domain names have affected trademark law in many respects which may be enumerated as under:

1. Trademark law permits concurrent use of the same mark on related or unrelated products or services, as long as users are geographically apart and there is no risk of customer misunderstanding. Under the present domain name registration system, this is not feasible. Due to the domain name's exclusivity, its concurrent usage is not allowed. There cannot be two users of the same mark registering it in the same top-level domain and sub domain, for example, there can only be one whirlpool com. Due to the fact that the Internet is only one big geographic region, no matter how different two people or firms' products or markets are, only one domain name may be granted to them.[22].
2. The domain name registration is based on "first come first serve" principle. Any person who may not be associated, in any way, with a well known name can register it, as his domain name, with the result the legitimate owner having goodwill in that name will be prevented from registering it as his domain name. However, a person can register the same sub domain in another top level domain for instance, it is possible to register the trademark "Amazon" as amazon.com or amazon.org. Similarly amazon.com and amazon shopping.com can be registered. The same domain name can be registered with any of the other country top level domain amazonshopping.in,amazonshopping.us, where .in stands for India and .us stands for United states. Furthermore only the same domain names cannot be registered twice, but the names that look alike can be registered. For instance, leberty.com can be registered as a domain name even if liberty has been registered. It has been laid down that the domain

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20 See Yahoo Inc. V. AkashArora 1999 IPLR 196, noting that an internet site could be reached by anyone anywhere in the world who proposes to visit to said internet site (pg. 208) also see Rediff Communication v. Cyberbooth AIR 2000 Bom. at 27. Internet is one of important features of information revolution

21 Gayle Weiswasser, Domain Names, the Internet and Trademarks: Infringement in Cyber space, Computer and High Technology Law Journal vol. (13) 1997 at p. 140.

22 Farooq Ahmad, Domain Name Disputes and Trademark Law: Cyber Law in India (Law of Internet), 2001, Pioneer Books p. 139.

names identify internet sites to those who reach it, much like a person's name identifies particular person or more relevant to trademark disputes, a company's name identifies a specific company[23].

3. The current technology does not make possible to differentiate domain names through the use of capitalization stylized format or fonts.[24] Since a website can be accessed from any part of the globe, a famous mark of one actually registered in another country in sub domain, can be accessed in the country of its origins and is likely to result consumer confusion there, especially when the registrant offers the same good or services for which the mark is famous in the country of its origin.
4. The application of current substantive and procedural principles has been altered by the development of the Internet. The national boundaries of each country are the extent of the courts' jurisdiction. There boundaries recognize the rules controlling jurisdiction that the courts develop and establish, parties better understand the boundaries of their own jurisdiction as well as the locations of the other parties they were engaging in business with. But this nineteenth-century philosophy finds it challenging to address the problems brought about by the arrival of Cyberspace, which has basically a worldwide scope and recognises no political boundaries.[25] Through the internet, participants may carry out transactions without revealing their identities and may even be geographically dispersed. The parties may be located in two distinct continents or nations. A website may be accessed from any place. The question arises that in case of trademark infringement which court has Jurisdiction. The owner of the web site may be residing in one place, web site may be hosted at another place and it can be accessed from any part of the Globe. The Internet, which is completely defiant of any territorial restrictions, and the conceptions of personal jurisdiction, which are fundamentally territorial in nature [26].This complicates the implementation of ideas with a territorial foundation.

Businesses first paid little attention to domain names since they believed they had no real value beyond having computer addresses that needed to be distinctive like phone digits. They did not object to their registration, though. Furthermore, technical personnel who paid little to no regard to market factors picked these domain names.

The problems with domain names first surfaced when a business

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23 Id p. 139.

24 See Andre Brunel, Billions Registered But No Rules: Scope of Trademark Protection for Internet Domain Names, Journal of Intellectual Proprietary Rights, March 1995, p. 4. (Stating that although the words "wire" and "wired" look quite different on paper the technology of internet cannot yet allow this differentiation to translate to domain name address).

25 See Howard B. Stravitz, Symposium, Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce, 49 S.C.L. Rev.925 (1998).

26 Andrew E. Costa, Comment, Minimum Contacts in Cyberspace: A Taxonomy of the Case law, 35 House. L. Rev. 453, 455-56 (1998).

seeking to register its trademark as a domain name discovered that another party, not in any way connected to the brand, had already registered it as his own domain name. Therefore, corporations are prepared to invest a significant amount of time and money into the acquisition of these names and conflicts over the registration of domain names have resulted from this pursuit. When businesses with similar names or providing same kinds of goods try to use similar or identical domain names, it results in several disagreements. Generally speaking, two situations have led to domain name conflicts.

1. a person or group may register a website with a name they do not already have any other interests . This could be done for a number of reasons, including blackmail, taking advantage of goodwill, diverting online traffic, defamation, etc.
2. Parties have equal rights to a name.

Having said that, the truth of the matter is that a memorable, easy to spell domain name is more valuable than diamond[27] for corporations wishing to establish their presence on Internet. People are losing privilege of using words on the Internet because somebody else has already registered these words as his domain name[28]. Search results reveal that virtually all words describing people's daily lives are registered.[29] The sole person or entity that may own a given domain name, plus the fact that there is no Internet counterpart of a phone book or directory assistance, are the two factors that have caused this rush for domain names. When a customer is unsure of the firm's domain name, they frequently assume it to be the same as the company name. Because it makes it easier to communicate with a customer base, a domain name that is an exact match to a company name may be a significant corporate asset. Customers also often expect businesses to avoid utilising their trade names or trademarks as domain names. These consumers utilise the same information to navigate directly to that page by entering it into a browser. . If this doesn't work, users employ search engines' assistance and enter key terms or phrases they believe will be connected to the desired website. Due to this, the website's owner is compelled to use the same name as the domain name by which it is known outside of the internet.

Domain names have assumed much the same role in virtual space as trademarks in real space. This emerging area of cyber law eventually involves trademark law, with its emphasis on domain names, with a gradual increase of internet uses of trademarks. There is, no doubt, currently a great deal of confusion surrounding issues of trademark as domain names. Trademark law

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27 David Yen, Virtual Reality: Can We Ride Trademark Law To Surf Cyberspace? Fordham I.P.M.E.L.J (2000) Vol. 10. 871Domain names are highly valued. Because millions of Internet users may potentially view them. See Jerome Gilson, Trademark Protection & Practice §5.11(1)(1997). Similarly in Cardservice Int'l v. Mc. Gee, 1950 F. Supp. 737, 741 (E.D. va 1997), it was laid down that a domain name mirroring a corporate name may be a valuable corporate asset, as it facilitates communication with a customer base

28 Id at 872

29 Id at 872

has to grapple with the issues thrown open by the Internet especially in the field of domain names. The principal allegation is usually of Trademark infringement. The primary question which arises is whether the use of domain name amounts to trademark infringement and whether the law of trademark applies to domain names. It will therefore be worth devoting some attention to the principles of infringement of trademark before probing into its effect on domain names.

Faced with a situation like this, the trademark holder has below mentioned options:-

1. The trademark holder could file a lawsuit under trademark law for infringement of trademark.
2. Common law remedy of passing off.
3. Applicability of Principles of Infringement of Trademark to Domain Names

The principles determining infringement[30] have been debated before various courts[31] and carry now a well-defined meaning in the trademark jurisprudence. The courts in America have decided a good number of cases on domain names. These cases can help in interpreting the provisions of TM Act relating to infringement of trademark in cases involving domain names. Objectively, a person is said to have infringed a trademark when he makes

a. Commercial use of the mark.
b. That mark is identical with or deceptively similar to a registered mark
c. Dilutes the distinctive quality or repute of the mark that results into consumer confusion.
d. Use of mark by other results in likelihood of confusion.

(a) Commercial Use of the Mark

The plaintiff has to prove in an action for trademark infringement that

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30 Specifically, the act complained of must meet the following criteria in order to constitute an infringement:
(a) the mark used by the person must be either identical with or deceptively similar to the registered trade mark;
(b) the goods or services in respect of which it is used must be specifically covered by the registration;
(c) the use made of the mark must be in the course of trade in areas covered by the registration;
The use must be done in a way that makes it appear to be the use of a trademark. The following uses, however, also constitute infringement under Section 29 if they are likely to confuse the public or to be associated with the registered mark:
(a) Identical mark used in relation to similar goods or services.
(b) Similar mark used in relation to identical or similar goods or services.
(c) Identical mark used in relation to identical goods or services.

31 For cases on the point-see HaidiramBhujiawala V. Anand Kumar Deepak Kumar 200 (1) Arb. LR 531 se at PP535, Kamal Trading Co. V. Gillette UK Ltd. (1988) ILPR 135; Ham Par Bros International Ltd. v. Tiger Bairn Co. (P) Ltd. and ors 1996 PTC 311; Apple computer Inc v. Apple leasing K. Industries (1993) IJLPR 63; Willium Grant K Sons Ltd. v. MC DoweH and Co. Ltd. I.A. No. 9721 of 1993 in Suite No. 2532 of 1993 Judgement dated 27-05-94.

the defendant has made a "commercial use" of the registere d mark. A person is said to be using a registered trademark in the course of business when

i. they apply it to products or the packaging of those products,
ii. they offer or expose products for sale, put them on the market, or stock them for those purposes using the registered trademark, or
iii. imports or exports goods under the mark, or
iv. uses the registered trademark on business paper or in advertising [32]

The expression "commercial use" is not confined to the above instances only because the provision contains the word "in particular" which suggest that courts may consider any use, of the registered trademark other than the one mentioned in the provision as commercial use. The words 'commercial use' have found place in the America Lanham Act and Trademark Dilution Act, 1995. While discussing the scope of this expression in domain name context the US courts have laid down many principles. *In Lackheed Martin Corp v. Network solutions, Inc*[33], it was laid down that when the registrar of domain names accepts domain name registration, he cannot be said to have used the domain name for commercial use.

In *PanavsionInt v. Toeppen*[34], it was laid down that trying to sell trademark-based domain names to the legitimate trademark owners qualifies for commercial use. It has been observed that a registrant who registers a domain name merely to store it and sell it later on for profit is using the domain name for commercial purposes. In *Intermatic, Inc. v. Toeppen,* the court laid down that the defendants' desire to re-sell the domain name is sufficient to meet the "commercial use" requirement.[35] However, merely registering a domain name does not qualify it as using a trademark for commercial purposes. Non-commercial use of a domain name that inhibits the use of the same domain name by the owner of a trademark does not constitute trademark infringement.[36]

The Ninth circuit in *Avery Dennison Corp v. Sumption*[37] laid down that

> *"the commercial use means capitalizing on trademark status. Where a trademark has not been used as a trademark but for non-trademark purposes, that does not constitute commercial use .But a sham website using domain name based on some one's trademark does not fall within the exception of non commercial purpose because these web sites are created as a front, a pseudo-legitimate use of the domain name, till the real trademark owner comes forward to purchase it."*

Commercial use was defined by the court in *Planned Parenthood Federation of America v. Bucc*[38] as the impact on the plaintiff's activities as a

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32 . Section 27 (b).
33 985 F Supp. 949 959-60 (C. D. Cal. 1997).
34 No. 97-55467 1998 WL 178553 at 1 (9th cir Apr.177598.
35. Id at 1239.
36. Panavision Int. L. v. Toeppen, No. 97-55467, 1998 WL 178553 at 1.
37 189 F. 3d 868, 980 (9th Cir. 1999).
38 42 U.S.P.Q. 2d at 1446.

result of the defendant's appropriation of the plaintiff's mark.. The defendant registered the domain name *plannedparenthood.com* for a web site promoting anti-abortion book. The domain name was based on plaintiffs federally registered trademark "*Planned Parenthood*" that is meant to provide abortion services.

The court found that the defendant was found to have used plannedparenthood.com to hurt the plaintiff commercially, promote his book, and raise money for his anti-abortion causes, all of which the court determined to be commercial use.[39]This proposition was confirmed in Jews for *Jesus v. Brodesky*.[40]

(b) Similarity of Mark with the Registered Mark

The statutory requirement that the mark in issue should be identical with or deceptively similar to the registered mark so as to call it infringement is a question of first impression. The decision must be made from the perspective of a man with average intelligence and faulty memory. A man of average intelligence is probably going to be confused by the two marks due to their overall phonetic similarity and concept resemblance.[41] The Bombay High Court in *Hiralal Parbhudas v. M/s Ganesh Trading Co.*[42] has lad down nine non exhaustive principles to determine similarity of the two marks[43]. In *Comp.*

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39 42 U.S.P.Q. 2d at 1446.

40 993 F. Supp. 282, 308 (D.N.J.) aff'd, 159 F. 3d 1351 (3d Cir. 1998).

41 Corn Products Refining Co. v. Shangrila Food Products Ltd. AIR 1960 SC 142.

42. AIR 1984 Bom.218 See also Sachdeva and Sons v. Loti Ram MakhanLal 2000 PTC 20; Om PrakashMahjan and Narinder Kumar Mahajan v. Hero Cycles Limited 1999 PTC 23; VisnudasKishandes v. Vazir Sultan Tobacco Co. Ltd. AIR 1996 SC 2275. These are (i) main idea or salient features (ii) general impression of the marks on the public as the marks are remembered by general impressions or by some significant detail rather than by a photographic recollection of the whole (iii) overall similarity of the two marks (iv) first impression of a person of average intelligence and imperfect recollection (v) overall structure, phonetic similarity and similarity of idea are important and both visual and phonetic test must be applied (vi) the purchaser must not be placed in a state of wonderment (vii) marks must be compared as a whole, microscopic examination being impermissible (viii) marks should not be placed side by side to find out the commodity,, the class of purchasers, the mode of purchase and other surrounding circumstances have to be taken into account. The above principles are elastic enough to cover domain name disputes. Almost similar principles have been invoked by the American courts to decide domain name cases.

43 These are (i) main idea or salient features (ii) general impression of the marks on the public as the marks are remembered by general impressions or by some significant detail rather than by a photographic recollection of the whole (iii) overall similarity of the two marks (iv) first impression of a person of average intelligence and imperfect recollection (v) overall structure, phonetic similarity and similarity of idea are important and both visual and phonetic test must be applied (vi) the purchaser must not be placed in a state of wonderment (vii) marks must be compared as a whole, microscopic examination being impermissible (viii) marks should not be placed side by side to find out the commodity,, the class of purchasers, the mode of purchase and other surrounding circumstances have to be taken into account. The above principles are elastic enough to cover domain name

Examiner Agency, Inc v. Juris[44], the plaintiff is the owner of trademark *JURIS* and the defendant registered *Juris.com* as his domain name. Rejecting the plea of the defendant that his domain name is not identical with the plaintiffs trademark, the court held that although the trademark was registered in all capital letters, it is also entitled to protection for other formats and design variations. The trademark is entitled to protection in all lower case letters including in the domain name "Juris.com". Furthermore, because capital letters and lower case letters do not differ functionally on Internet, an Internet user arrives at the same web site with either JURIS.com or Juris.com .

In *Hasbro v. Internet Entertainment Group Ltd*[45], Internet Entertainment Group Ltd. (IEG), It was established that the difference in capitalization had no bearing on the similarity analysis.

In *Prince Pipes and Fittings Limited* v. *Prince Platinum Pipes and Fittings,*[46] The court issued temporary injunctions prohibiting the defendant from using the trade mark "PRINCE PLATINUM,", the domain name "www.princeplatinumplastindia.com," the contested business name "Prince Platinum Pipe & Fittings," any other contested mark, domain name, company name, trading style that contains the term PRINCE, as well as any other contested trade mark, domain name, business name, or trading style that is confusingly similar to the Plaintiff's well-known trade mark "PRINCE"

(c) Dilution of Trademark

Where a trademark is used in such away that it dilutes the distinctive quality or repute of the mark that results into consumer confusion it amounts to infringement.

The American Courts have traditionally been granting protection against the dilution of the distinctive qualities of the trademark. The defendant is forbidden from "distorting" or pruning away the mark's distinctive quality and from degrading the mark by creating unfavourable associations through his use. Famous trademarks are protected by the Federal Trademark Dilution Act of 1995. Dilution, according to this Act, is the loss of a well known mark's ability to identify and differentiate products or services. Despite the fact that this Act did not specifically address domain name problems, it was hoped that its "anti-dilution Statute can help stop the use of misleading Internet addresses obtained by individuals who are picking marks that are connected with the products and reputations of others." The injunctive relief is possible only when a plaintiff proves that the following conditions are in his favour.

a. He is the proprietor of a well-known mark
b. The defendant has used that mark in commerce

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disputes. Almost similar principles have been invoked by the American courts to decide domain name cases.

44. No.96-0213 WMB, 1996 WL 376600 at I (C.D.Cal. Apr.26, 1996).
45 No. C96-I30 WD, 1996 WL 84853 at I (W. D. Wash. Feb. 9, 1996)
46 Prince Pipes & Fittings Limited vs Prince Platinum Pipes & Fittings decided by Bombay High Court, on 10 March, 2021.

c. The plaintiff's mark gained fame before the defendant's use
d. The distinctiveness of the mark was diluted by the defendant's usage.

The aforementioned dilution argument has broadened the court's jurisdiction even in situations where consumer confusion is unlikely to occur but where the defendant's improper use of the mark has the potential to gradually obscure the source of products or services.[47]Many cases have been decided by the American courts, in the Internet context, on the ground of dilution.

(d) Likelihood of Consumer Confusion

The rational basis of trademark protection is to avoid consumer confusion. The standard to determine consumer confusion is that of a man of ordinary intelligence. The courts generally look from the angle of man of average intelligence and imperfect recollection. The following factors are typically considered by the courts when determining whether there is a likelihood of consumer confusion[48]:

" *(a) the nature of the two marks, including the alphabets used, the manner in which they have been used, the device on which they have been used, and the trademark colour combination used;*
(b) the class of customers;
(c) the degree of reputation;
(d) the trade channels; and
(e) the existence of any connection in the course of trade".

The above non exhaustive list can still form the basis for deciding the consumer confusion in the Internet context. Nevertheless, some of these principles may be inapplicable in Cyberspace. For instance, it is not possible, in Cyberspace, to differentiate domain names through the use of capitalization, stylized format or fonts. The courts have followed "average intelligence" test in Cyberspace also. In *Rediff Communication limited v. Cyberbooth*[49], the claim that Internet users are intelligent and only literate persons who can figure out how to access the actual Internet site that they desire to visit was rejected by the Bombay High Court. It has been held that

"*even if an individual is a sophisticated user of the Internet, he may be an unsophisticated consumer of information and such a person may find his/her way to the defendant's Internet site.*"

The Delhi High Court in *Yahoo! Inc., v. AkashArora and Anr*[50] has held that

"*due to easy access of Websites, a very alert vigil is necessary and, a strict view is to be taken to prevent defendant from passing off his goods or services as that of the plaintiff.*"

The courts have taken the stand that there is no single factor, which could be called as the only factor necessary to establish likelihood of consumer

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47 15 U.S.C. § 1127 (Supp.IV 1998) (defining dilution)
48 KedarNath Gupta v JK Organization 1998 PTC 189; HiralaiParbhuda: v. M/S Ganesh Trading Co. AIR 1984 Bom. 218.
49 AIR 2000 Bom. 27 See; also Jews for Jesus v. Brodsky 993 F. Supp. 282-308.
50 Yahoo Inc v. AkashArora IPLR 1999 April 96.

confusion. The test to determine likelihood of confusion depends upon a number of grounds, it is the overall impression of a mark that has to be taken into account.[51]

The America Court in Polariod*Corp. v. PolariodElecs. Corp*[52], has propounded eight non exclusive grounds to establish likelihood of confusion[53].

The American courts have used these tests in Internet-related cases. *In Jews for Jesus v. Brodsky*,[54] the court found defendant's web site jewsforjesus.org based on his trademark "Jews for Jesus". The court took overall impression of the two Websites into account and laid down that they may differ in minute details but those subtle differences are not strong enough to ward off the possible confusion because Internet users are not sophisticated enough to comprehend the distinguishing features of the two Websites.

In *Brookfield Communications, Inc v. West Coast Entertainment Corp.*[55], the court developed for the first time "initial interest confusion" doctrine in Cyberspace.

5. Common Law Remedy of Passing Off

In absence of domain name specific legislation and for the marks which are not registered , the Indian courts favoured the common law strategy[56] and used the Passing Off doctrine to settle disputes over domain names.

5.1 Applicability of Principles of Passing off to Domain Name Disputes

Internet domain names have come into prominence only very recently. The courts have seized the opportunity and many principles have evolved which guide them to resolve domain name disputes under the law of passing off.

(i) Domain Names More Than Simple Address: Protection Justifiable

High business importance and potential value can be found in internet domain names as company assets. A domain name has the same legal protections as a trademark and is more than just an internet address. The

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51 Supreme Bedi Factory v. ArdathTahacco Company Ltd. (1999) PTC (19) 150 at151; Punjab Tractors Limited v. PramodGarg 2000 PTC 260 at 276; HeralalPrebudas v. M/S Ganesh Trading Co. AIR 1984 Bom. 218.

52 287 F 2d492, 495 (2nd Cir 1961).

53 These are:
"(1) the strength of the mark
(2) the degree of similarity between the two marks
(3) the proximity of the products
(4) the likelihood that the prior owner will bridge the gap
(5) actual confusion
(6) defendant's good faith in adopting its own mark
(7) the quality of defendant's product and
(8) the sophistication of buyers."

54 Supra note 45.

55 174 F.3d at 1061-65.

56 In UK there is no domain name specific legislation the courts are relying on passing off and trademark infringement principles. Marks and Spencer PLC v One In A Million (1998) 4 All 6 R476 CA at P. 497 is a leading case and this decision is relied by courts all around the globe and the common wealth countries in particular.

domain name provided by an online resource must also be acknowledged and approved, and it is protected against passing off. As a result of the development of modern technology, especially that pertaining to cyberspace, domain names or Internet addresses are now eligible for trademark protection because they are more than just an address[57].

With the advancement of Internet communication the domain name attained as much legal sanctity as a trade name. Since the services rendered in the Internet are crucial for any business the domain name needs to be preserved so as to protect such provider of services against anyone else trying to traffic or usurp the domain name.

In India, the first important case regarding the domain names is that of *Yahoo v. AkashArora and Anr*[58]; the Delhi High court was called to restrain the defendant from using the domain name yahooindia.com for Internet related services. The plaintiff is a well known Internet Service Provider of America having yahoo and yahoo.com its trade mark and domain name respectively and other domains names which are country specific, for instance, yahoo.co.in for India yahoo.in. ca forCanada. The argument raised by the plaintiff was that the defendant's domain name yahooindia.co is deceptively identical and confusingly similar to its domain name yahoo.co.in or yahoo.co. The defendant has deliberately copied the colour scheme, layout, design, contents and source code of the plaintiff's Indian specific website with a sole purpose to cause consumer confusion, as to source and affiliation of the Website. The consumers are likely to believe that either defendant's Website is an affiliate of the plaintiffs Website or the defendant's Website is a regional section of the plaintiff's Website. The defendant opposed the contentions of the plaintiff on the ground that the trade and Merchandise Marks Act, applies only to goods and not to services. Yahoo! is an Internet Service Provider so its case cannot be decided under the Trade and Merchandise Marks. Act. Furthermore, the defendant has posted disclaimer in its site stating that the defendant is not an associate of yahoo.com. The defendant also objected the use of word "yahoo" on the ground that it is a dictionary word and has no special significance for the plaintiff.

The judge rejected the defendant's arguments. The court brought it under a passing off action rather than deciding it under the Trade Mark Act. The court acknowledged that although service marks are not recognised in India, rendered services must be acknowledged to prevent passing off. It was decided that the plaintiff is entitled to injunctive action as a result of the defendant's appropriation of the word "Yahoo" The defendant's website's disclaimer was deemed insufficient by the court to completely rule out potential consumer confusion. While agreeing with the defendant that "Yahoo" is a dictionary word, the court maintained that it has acquired distinctiveness,

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57 Rediff Communications Ltd. v. Cyberbooth, AIR 2000 Bom.27; Tata Sons Limited v. Manu Kosuri 2001 PTC 432.

58 Yahoo Inc v. AkashArora IPLR 1999 April 96; Acqua Minerals Ltd. v. PramodBorse AIR 2001 Delhi 463.

gained widespread reputation, and is closely linked with the plaintiff. No one is permitted to profit from such fame by arguing that it is just a dictionary word. The defendant was given an injunction by the court.

The defendant's claim that internet users are sophisticated users and only literate people are able to determine and approach the actual website that they intend to visit was also rejected by the learned judge Dr. M.K. Sharma (J). He noted that

> If an individual is a sophisticated user of the Internet he may be an unsophisticated consumer of information and such a person may find his/her way to the different internet site which provides almost similar type of information

In *TATA sons limited v. Manu Kosuri*[59], the defendant had registered a series of domain names based on well known registered and famous trademark TATA. The domain name involved include: tatatelservices.com, tatassl.com, tatapowerco.com, tatahydro.com, tatawestiae.com jrdtata.com, ratantata.com, tatahoneywell.com, tatayodogawa.com, tatatde.com, tatatimeken.com. The plaintiff claimed that the defendant is a cybersquatter whose only goal is to monetize the plaintiff's identity and renown by selling these domain names. TATA has been the trademark of the plaintiff since 1917 in connection with a variety of items, and it is registered in 9 additional nations. The domain name is as good as any other trademark, according to the court, which upheld Yahoo Inc.'s ruling in this matter. The domain name needs the same protection as the trademark since it is more than just an address.

Similarly, *In case of Info Edge India Pvt.* Ltd[60]. Court held that domain name is more than an internet address and is entitled to equal protection as that of trademark. In the case of *Satyam Info way ltd. V. Sifinet Solutions Pvt. Ltd*[61].

According to the Supreme Court, domain names were undoubtedly first used to provide Internet computers a physical address. However, the Internet has evolved from being just a tool for communication to a platform for conducting business. A domain name is also utilised as a means of identifying a business due to the growth of online commerce. As a result, the domain name not only acts as an Internet address but also identifies particular Internet site.

(ii) Nature of Domain Name Results in Consumer Confusion

The foundation of trademark law is the assumption that consumers will likely become confused by similar marks on products or services but the question arises whose intelligence should be used as a benchmark to assess consumer confusion? Should the benchmark be normal, above average, or just ordinary intelligence? The general perception is that Internet users are sophisticated, intelligent, and possibly not so readily duped. The Bombay High Court *in Rediff Communications Ltd. v. Cyberbooth*[62] held that a domain name is

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59 2001 PTC 432.

60 2002 (24) PTC 355 (Del.)

61 (2004) 6 SCC 145.

62 Rediff Communications Ltd. v. Cyberbooth, AIR 2000 Bom. 27.

entitled to protection under the Trade and Merchandise Marks Act, 1958 as a Trade mark.

The court acknowledged that:-

Internet users are sophisticated and literate people. But held that even if an individual is a sophisticated user of the Internet, it is quite possible that he may be unsophisticated consumer of information and such person may find his/her way to the defendant's Internet site."

However, in *Invest Smart India Ltd. v. ICICI,*[63]despite the fact that the lawsuit included a misspelt domain name that had previously been registered, the court did not offer the plaintiff any interim relief.

In *Info Edge (India) Pvt. Ltd v. Shailesh Gupta*[64], the Court determined that the Defendant had used a slight misspelling of the Plaintiff's domain name and showed the Defendant's dishonest intent. In *Titan Industries Ltd. v. Prashant Kooapati*[65], the Court granted the Plaintiff broad passing-off remedies and restrained the Defendant from registering a name, running a business, producing, offering for sale, marketing, or otherwise dealing in any items bearing the name or the aforementioned mark on the Internet or in any other manner. *Dr. Reddy's Laboratories Limited* v. *Manu Kosuri& Anr,*[66]The court held that:

given that two names are almost same or similar in nature, it is obvious that there is a good chance that an Internet user could be misled into thinking that both domain names belong to the plaintiff even when they actually do not.A permanent injunction was issued in the plaintiff's favour.

In *Celador Productions Ltd. v. Gaurav Mehrotra,*[67] also, in order to prevent the defendent from offering online games based on the format of the programme and its distinctive features, which are confusingly similar to the plaintiff's programme, the Delhi High Court issued an order prohibiting the dependent from directly or indirectly operating any website using the name "CrorepatiKaun" or "KaunBanegaCrorepati" as their second level domain name or using the name in any manner whatsoever.

The Supreme Court of India gave a Landmark Judgement in case of *Satyam Infoway Ltd. v. Sifynet Solutions.*[68]

The Supreme Court ruled that giving computers connected to the Internet an address was without a doubt the domain name's initial purpose. However, the Internet has evolved from being just a tool for communication to a platform for conducting business. A domain name is also utilised as a means of identifying a business due to the growth of online commerce. As a result, the domain name not only acts as an Internet address but also as a moniker for a

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63 Mumbai High Court Suit No. 1040 of 2000, Notice of Motion No. 860 of 2000.
64 2002 (24) PTC 335 (Del).
65 Delhi High Court Interlocutory Interim Application No. 787 of 1998 in Suit No. 179 of 1998.
66 2001 (58) DRJ 24
67 (2003) 26 PTC 140 (Del).
68 (2004) 6 SCC 145.

particular Internet site. The developments in the Indian domain name jurisprudence can be identified in cases of *Times Internet Ltd.*v. *Just Flowersand another*[69]and *Super Cassette Industries* v. *MR.WangZhi Zhu Ce Yong Hu*[70]*Rolex Sa*v.*Alex Jewellery and othes,*[71] It was held that the trademark owner has legal recourse against the registrant, regardless of whether the domain name was registered in good faith or without malice. As a result, the Trade Mark Act's protection is more robust than that provided by other means. The Trade Mark Act's geographical restrictions, meanwhile, raise questions because domain name protection demands worldwide ownership.

Conclusion

The study demonstrates that trademark law eventually plays a role in the developing field of cyber law, with a focus on domain names. Regarding the interrelationship between trademark and domain name issues, there is now a lot of uncertainty. When a business wants to register a trademark as a domain name and discovers that another party who is not connected to the trademark has already registered it as a domain name, domain name difficulties arise. Any goodwill and intangible value contained in a trademark are conveyed in a domain name based on that trademark. If domain names were just used to locate websites, there would be a case for treating them separately from trademarks; but, because domain names are considered as source identifiers, this role brings them inside the purview of trademark law.

Organizations are now willing to invest a significant amount of time and money into acquiring domain names due to the realisation of their significance. Conflicts over the registration of domain names have resulted from this pursuit, as was to be expected. The adoption of similar or identical domain names by businesses with similar names or that produce the same kinds of goods have given rise to several disputes. When businesses with similar names or that provides the same kinds of goods tried to use similar or identical domain names, several disagreements resulted. Generally speaking, types of situations have led to domain name conflicts. In the first, a person or group may register a website with a name they do not already have any other rights to. This could be done for a number of reasons, including extortion, taking advantage of goodwill, diverting online traffic, defamation, etc. Due of the global reach of the Internet, disputes of the second kind frequently occur between parties who have equal rights to a name. Thus due to the unauthorised use of internet domain names, trademark law grapple with a number of problems for which there is no clear solution. The protection that domain names have received from courts around the world is equal to that of trademarks. However, the widely accepted concepts that apply to trademarks don't fit in cyberspace.

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69 Manu/De/2909/2007. 37 Cs(Os) No. 769/2004,

70 Del H/C 2008. https://www.the-laws.com/encyclopedia/browse/case?caseId=108002196200&title=super-cassettes-industries-ltd-vs-wang-zhi-zhu-ce-yong-hu.

71 Manu/De/0796/2009

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Unabated Conversion of the Agricultural Land & Food Insecurity: An Appraisal of Legal Framework in Jammu & Kashmir

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Abstract

Under Naya Kashmir Manifesto[1] the promised land reforms in Jammu and Kashmir aimed at abolishing absentee landlordism foisted on the peasantry of J&K from 1846 by the despotic rulers. The transfer of Land in ownership rights to the tenants for its better utilization by them was considered as the only alternative for attaining critical landmarks in the production of food grains & other cereals leading eventually the erstwhile State towards self-sufficiency in this behalf. These underlying thematic twin aspects of epoch making land reforms could not have been achieved unless restrictions were laid down on utilization of the land and its alienation also regulated. This paper attempts to highlight the legal framework and present challenge of unabated conversion of the agricultural land and threat of food insecurity.

Keywords: Land Revenue, Orchards, Conversion, Agrarian Reforms.

Introduction

Before the de-operationalization of Article 370[2] & enactment of The J&K State Reorganization Act 2019, the laws which dealt with the subject of agricultural Land & its conversion were as follows:

1. The J&K Agrarian Reforms Act 1976,
2. The J&K Land Revenue Act Svt 1996,
3. The J&K Big Landed Estates Act Svt 2007,
4. The J&K Land Utilisation Act Svt 2010 &
5. The J&K Prohibition on Conversion of Land & Alienation of Orchards Act 1975.

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1 socio- economic treatise formulated before partition.

2 On 5th August, 2019 by Parliament of India.

The Laws figuring at serial 3 to 5 stand repealed as a whole & wherever warranted in the estimation of Govt. of India (MHAs) & UT Govt. selective coverage provided to relevant provisions of the repealed laws by amending & substituting various provisions of remaining two laws in force. Before amendments were carried out vide Statutory Order 3808 dated 26.10.2020, Section 13 of the J and K Agrarian Reforms Act 1976 provided that after 13.07.1978 (commencement of the Act) a person can hold land for personal cultivation only except wherever tenancy permitted, for residential purposes upto 2 kanals per family or subject to the provisions of repealed law i.e. The J&K Prohibition on Conversion of Land & Alienation of Orchards Act 1975 for horticulture purposes or with permission of Revenue Minister/ his delegatee for industrial and commercial purposes. After 1st May 1973 tenancy created in respect of any Land is invalid except in cases where permitted (i.e. Religious Institutions and places). It is this later part of the section only (forbidding the creation of tenancy) which continues on the statute and rest of the provisions have been omitted. The restrictions omitted have, however, been introduced in a holistic manner by substituting/ inserting Sections 133-A, 133-B, 133-C & 133-D in Land Revenue Act. The salient features emerging from aforementioned provisions of law are as under:-

i. The Land used for agricultural purposes cannot be used for non-agricultural purposes except where permitted by the District Collector (DC). The permission in case of saffron Land is to be processed in accordance with the J&K Saffron Act 2007. The Board of Revenue in J&K is charged with the responsibility for notifying procedures enabling DCs to grant permissions.

ii. The owner of agricultural land has been enabled to raise construction thereon for residential purposes or agricultural improvement subject to the ceiling of 400 Sq mtrs (4305 Sq feet) in total.

iii. Any attempt to convert agricultural land into non-agricultural use by contravening the provisions of Sec 133-A is deemed as violation of the Land Revenue Act. However the non-agricultural use in conformity with Regional Plan, Development Plan or Master Plan doesn't attract evil consequences provided the prescribed conversion charges are paid. The redeeming feature is that the areas notified by the Govt. as Eco-sensitive Zones (ESZs) are exempted from the jurisdiction of District Collectors and others & hence no permission can be granted for conversion in Land use insofar ESZs are concerned ,

iv. The District collectors have been empowered to grant permissions subject to prescribed limits for change in the use of proprietary land falling under the categories of grazing, arak, kap, kahi krishm or which grows fuel & fodder & belongs to such class as is notified by the Government.

v. The land converted for purposes other than agricultural or grazing etc. in violation of Sec 133-A, 133-B & 133-BB vests in the State subject to grant of opportunity to the person ,found to have violated the law, to remove the contraventions. Alienation / transfer of Land and protection to "Agriculturalists".

vi. Sections 13 & 28-A of the Agrarian Reforms Act laid down a highly restrictive mechanism for alienations by vesting the powers at highest level in the Revenue Minister & placed total embargo on transfer of Land, the ownership rights whereof acquired under the Act of 1976, in favour of any person except the Govt. of J&K respectively. Under existing provisions the aforementioned embargo has been removed by relaxing the prohibition enabling beneficiaries of Land reforms to transfer such Land after expiry of 15 years from the date the said Land has vested in the State u/S 4 but subject to the provisions of Sections 133-H to 133-L of the Land Revenue Act. In addition, grant of lease, contract farming and transfer in the form of simple mortgage have been added. In the event of a transfer of land Or rights therein not falling under above, such course of action is deemed as null & void resulting in its vesting in the State after providing an opportunity of being heard. U/Sec 133-H no Land or rights therein can be transferred to a non- agriculturalist & "Agriculturist" is one who has been cultivating Land personally in J&K on Ist November 2021 as notified vide S. O.373 Dated 01.11.2021 or such category of persons as may be notified from time to time. However the Govtt is empowered to allow an agriculturalist to alienate Land to a non-agriculturist through the medium of Sale, gift, exchange or mortgage.

vii. The Liberalised legal framework, being implemented for National/ UT Industrial policies including Hospitality, Services & Housing sectors may diminish faster cultivable land unless a) the alienation is restricted in favour of Land owners owning Land adjacent to the alienor's holdings on rates determined by the Collector who shall adopt the rates prescribed for stamp purposes as minimum for assessing & fixing the prevailing current market rates to prevent distress sales or cartelization in the procedures. This shall also put to an end the fragmentation of the land holdings & non – agricultural use of unviable land units, b) Land obtained under Land reforms not to be used for purposes other than agricultural & allied purposes like fruit bearing trees, vegetables and other cash crops, & c) the sites used and recorded as Village Abadies to continue to be as such & complemented by introduction of duplex Housing clusters / vertical housing depending upon the feasibility & extension in the Abadi Deh resorted to at intervals as may be fixed and legal cover for the purposes borrowed from the repealed law namely "The J&K Common Lands (Regulation) Act 1956.

viii. The existing provisions in Land Revenue Act permitting change in Land use for residential purposes or agricultural improvements or both upto 400 Sq Mtrs per family needs review as otherwise the disproportionate limit would not only pave the way for rampant change in Land use under the camouflage of housing for residential purposes but also the likelihood of agricultural Land becoming scarce in view of 83.78% of the holdings in J&K falling in marginal category for 47.17% of the area under cultivation (2015-16) with average holding size of 0.42 in Valley, 0.77 in Jammu Division & 0.59 (ha) at UT level. The introduction of a

restrictive & regulated mechanism in use & transfer of the agricultural land would amount to compliance with the purposes underlined in the Preambles of the Land reforms Laws in the backdrop of their inclusion in the Nineth schedule of the Constitution. The laws included in Nineth schedule can't be challenged on the ground of constitutionality only. The owners of the structures raised in violation of prescribed legal regime to be disentitled to infrastructure facilities including electricity and safe drinking water connections apart from action flowing against them through relevant laws enforced with consistency.

Challenges and Strategies

The estimated population of Jammu & Kashmir was 1.23 Crores in 2011 & on the basis of the decadal growth rate for 2001-11@ 23.64% the projected population in 2023 should be 1.52 Crores. The rationed population during 2019-20 was 119 Lakh souls which fell to 117 lakhs in 2020-21. The import of food grains during 2019-20 & 2020-21 has been to the extent of 7.13 & 7.35 & off take to the extent of 7.13 & 7.09 Lakh Mts respectively . Total area in 2022-23 sown under Paddy has been 274467 Hects & wheat 284468 Hects yielding 90653.36 & 58 671 . 22 Mts together with import of 1.37 Lakh Mts wheat and Paddy over 5 Lakh Mts (assumed on the basis of imports during preceding two years) . By no stretch of imagination & in face of limited availability of cultivable Land, Jammu and Kashmir can aspire at least in immediate future to attain food security by dint of self -sufficiency. Introduction of farm technology and use of high yielding & hybrid seedlings may marginally provide impetus to growth spurt but against the annual requirements of 7 to 8 Lakh Mts & local production of 1.5 Lakh Mts only the gnawing short falls would increase manifold owing to increase in population, disproportionate spread of military and security guards owing to disturbed conditions, manifold increase in tourist arrivals & pilgrims. Given chance the local peasantry may convert the remaining holdings into orchards & vegetable farms in view of higher returns & availability of untapped market potential in mainland & beyond.

Conclusion

The conversion of fertile lands into orchards in plains of the Valley isn't an appropriate response in view of the limited shelf life of fruits grown thereon & therefore strategy needed for its optimum utilization for diversified cash crops. There are States producing surplus food grains & area is expanding gradually leading to increase in the production and creation of huge stocks. With liberalization, the free movement of food grains and compulsion for sale due to surpluses short falls in J&K can be met with. Therefore, there is a dire need of striking a sustainable balance between maintaining paddy fields and use of orchards in J&K by invoking strict and wise legal mechanism which will ensure production of food grains, this mitigating threat of food insecurity. The unabated conversion of agricultural lands for construction purposes in J&K is not only a threat to food insecurity but also to the ecology which can also be mitigated by invoking a legal mechanism and principles of sustainable development.

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Power Struggles and Legal Legacies: The Evolution of Judicial Appointments in India

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Abstract

The Indian judicial system has evolved from colonial to constitutional democracy. This article examines judicial appointments in India from pre-independence to the current constitutional system. British imperialism affected colonial court hiring, often ignoring native input and credentials. After India's independence, the Constitution makers created an autonomous judiciary with checks and balances. The Constituent Assembly's deliberations and concerns shaped the judicial selection process, creating a meritocratic paradigm without political interference. Judicial appointments have improved throughout time as the legal system has matured. This article examines the development, highlighting key events that have affected India's judicial selection procedure looking for an ideal process for appointing judges.

Keywords: Judicial Appointments, National Judicial Appointment Commission, Collegium System, Constitution and Judicial Appointment, Participatory Consultative process.

Introduction

Since ancient times, humans have sought the finest person to administer justice and distinguish right from evil. Dharmaraj and other legends illustrate the search.[1] History shows that no appointment model is flawless. Every procedure has flaws. So the quest continues. In current times, overestimating the importance of judiciary is difficult.[2] The court is the final hope and ultimate guardian of individual rights in a welfare state since the government's role and powers have been increased with the legislature's support.

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1 Pratibha Murti, "Evolution Problem and Challenges in the Indian Judiciary", JCLJ (2023) 1214.

2 Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159

This is especially important in states where the Constitution is written and the court interprets it. Thus, they rule the Constitution. They determine which legislation will become law and which don't. The person of authority conferred with such broad powers and influence over people's lives and rights is inherently important.

With independence, our freedom fighters had to create a government that could provide the liberties we valued so much in our darkest days. For prosperity and progress, we required a strong government, and an independent court to protect these rights. The essential premise of an independent judiciary was an appointment procedure that guaranteed the brightest people reached the top and no government organ had unfettered power over appointments. This ensures merit is the main factor, but no one can influence Court's judgements.

With this in mind, the Constituent Assembly gave the executive the power to appoint judges but included a consultation clause to limit government power. This check and balance is part of our constitution.[3] The established order was reinterpreted, by the judgments of the Supreme Court may be partially because of the atrocities committed by the executive during and after the emergency. The last time the legislature attempted to reverse the effects of judgment with a modern outlook and needs of changing time, the judiciary refused to accept the provision in light of the argument that it was an attempt to change the basic structure of the Constitution.[4]

The executive is both drawn from the legislature and accountable to the legislature. The executive consists of the people belonging to the party, which has the majority in Parliament. Besides this the legislature felt that executive's role should be increased in present regime of judicial appointments. Through the 99th Amendment, Parliament wanted to ensure the executive branch's participation in the process of appointing High Court and Supreme Court judges. This is where both the executive and judiciary came at loggerheads as the judiciary considered the involvement of the executive will most importantly undermine its independence among many other things.[5] To have an understanding as to when the problem began and where it has reached today and why it remains painstakingly unresolved, one must know about it from the nascent stages of its development in our great country. With this in mind, this article will start with pre-independence period.

II The History of the Judicial Appointments: The Pre-Independence Period

Appointments of Supreme Court and Federal Court judges during the pre-independence period were made by Her Majesty by warrant, under the last colonial Constitution i.e. Government of India Act, 1935. There was no provision for consultation with the Chief Justice, but the custom was to consult the Chief. However, the executive was not bound by the recommendations.

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3 N. Gopalaswami v. Union of India, (2023) 7 SCC 1

4 Supreme Court Advocates-on-Record Association and Another vs. Union of India, AIR 2015 SC 5457.

5 Kamini Jaiswal v. Union of India, (2018) 1 SCC 761

The Prime Minister (equivalent to the pre-Constitutional Prime Minister of India), in consultation with the Chief Justice, recommends the name to the Governor-General of India, who, through the Secretary of State in London, recommends the name to the King.[6]

How it practically worked can be better understood with the help of work done by G. H. Gadbois. George H. Gadbois conducted detailed research on the appointment process by interviewing 116 judges. His work reveals several internal dynamics of the appointment process.[7] Abhinav Chandrachud's book Supreme Whispers gives a vivid account of the appointment process based on Gadbois's research.[8] Based on incidents enumerated in research by George H. Gadbois as well as otherwise also few inferences can be drawn about the then appointment process.

The pre-independence appointments to higher judiciary had two striking features. First, the crown was not bound by the advice of the judiciary and secondly, the elected politicians had little to no say in the appointment. This is clear from the incidents such as Prime Minister R.S. Shukla recommending Judge Vivian Bose's name to Vallabhbhai Patel to be appointed as Chief Justice of the High Court. However, a member of the ICS was appointed Chief Justice of the High Court. To which Prime Minister wrote to Vallabhbhai Patel about his displeasure to which Vallabhbhai Patel wrote that he came to know about the appointment through Prime Minister's letter itself.[9] This happened at around 1947.

Therefore it will not be wrong to conclude that the underlining feature of the pre-independence period was that the appointments were being made by the executive and there was no checks and balance. Hence, some argued that we needed a process that incorporated checks and balances. With this in mind, Sapru Committee was established in 1945 which recommended that "the appointments of Justices to the Supreme Court should be done by the President in consultation with the Chief Justice of India and the appointment to the High Court in consultation with the Chief Justice of that High Court and the head of the state concerned."

III Constituent Assembly on Judicial Appointment

Once the framing of the Constitution started in the Constituent Assembly the Union Constitution Committee established an ad-hoc committee to consider the issue of appointments to the Supreme Court and High Court. The ad-hoc committee recommended that "the power of judicial appointments to the Supreme Court should not be vested with any one organ of government." For the aforementioned purpose, the committee recommended two ways for the

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6 Valmiki Choudhary, Dr. Rajendra Prasad: Correspondence and Select Documents: Presidency Period, 292, (Allied publishers limited, New Delhi, Ist Edition, 1950).

7 George H. Gadbois Jr.: Judges of Supreme Court of India 1950-1989 (Oxford University Press, New Delhi, 2011).

8 Abhinav Chandrachud, *Supreme Whispers*, 149 (Penguin Random House India, Gurugram, 2018).

9 Abhinav Chandrachud, *Supreme Whispers*, 121(Penguin Random House India, Gurugram, 2018).

appointment. The first is the process by which the president proposes a name to a committee of chief justices, members of the legislature, and prosecutors. In the second process, the commission will recommend three names to the President, and the President, in consultation with the Chief Justice of India, will appoint one of them.

Sir B.N. Rau, the Constitutional Advisor to the Constituent Assembly, submitted a memorandum on the Union Constitution, agreeing in part with the Ad Hoc Commission's recommendation that the appointment of Supreme Court Justices should be made by the President. But he also suggested that then the names should be approved by majority of two-thirds of the Council of State. Similarly, the Union Constitutional Commission also deviated from the recommendations of an ad-hoc commission set up for the same purpose, ruling that the appointment of Supreme Court Justices should be made by the President in consultation with the Chief Justice of India.[10]

The State Constitutional Commission suggested that the President designate High Court judges after consulting with the appropriate High Court Chief Justice and State's Chief Minister. The proposed Constitution comprised Union and Provincial Constitution committee recommendations.

Justice H. J. Kania, Chief Justice of the Federal Court, was among the first to comment on the draft Constitution's higher judiciary appointments. He worried that provincial politics may influence the appointment process in the draft. He also advised that High Court selections be decided in close collaboration with the Chief Justice and Governor to avoid state home ministry's participation and internal politics.

The Chief Justices of the High Court and Federal Court examined the judicial nomination procedure in March 1948 and wrote a memorandum recommending revisions to the foregoing clauses. After careful consideration, the justices concluded that such appointments, even if made after consultation with the Chief Justice of the High Court and the Chief Minister, require an extra protection. They determined that we must incorporate protection against local politics in the form of concurrence of C.J.I.

They also recommended excluding state cabinet ministers from judgeships. Despite comparable proposals from other reputable sources, the draft Constitution committee rejected these ideas. This, like other draft committee decisions, was reasoned out before rejection. The proposed amendment by judges was rejected because it failed to propose a contingency plan if the High Court Chief Justice and the Chief Justice of India disagreed.

One month later in April, 1948 Justice H.J. Kania wrote to Vallabhbhai Patel about his discontent over the appointment of Chief Justice R.F. Lodge to the Assam High Court over the fact that the first High Court established after independence will have an English I.C.S. officer as Chief Justice.[11] Vallabhbhai

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[10] Constituent Assembly Debates, on May 24, 1949 available at: http://164.100.47.194/loksabha/ writereaddata/cadebatefiles/C26051949.html (last visited on April, 10.2024)

[11] Durga Das (ed.), Sardar Patel's correspondence-vol. 6, p. 277, (Navajivan Publishing House, Ahmedabad, 1973)

Patel replied to this displeasure that the Assamese people had a deep-rooted aversion to the Bengalis which in light of the deep underlining factor of lack of merit at the time led to the appointment of an English I.C.S. officer as the Chief Justice.

Thereafter there were many controversies in the appointment of judges to the High Court of Madras. To name one which will surmise the controversy related to the high court; congress leader N.G. Ranga wrote to Vallabhbhai Patel expressing discontent with the fact that there have been no appointments from the non-I.C.S. subordinate judiciary.[12] Vallabhbhai Patel explained that once there is a unanimous recommendation by the Chief Minister, Chief Justice, and Governor, nothing can stand in the way. It will be wrong to reject the candidature by an executive after such a recommendation.[13]

After then, the drafting committee proposed some last-minute changes. The drafting committee proposed Instrument of Instruction for the appointment. The document mandated that the President must appoint based on advisory board recommendations. The advisory board will evaluate candidates proposed by President after consulting Supreme Court Judges and High Court Chief Justices. The president will be almost bound by the advisory board's proposal. Though President may ignore the advice also. If so decided the President must submit a memorandum to Parliament explaining why the candidate has been rejected. The Union Constitution Committee and Provincial Constitution Committee's initial suggestions were adopted in the draft Constitution while all the others were rejected for one reason or other.

All Constituent Assembly debates, discussions, and deliberations on appointment, directly or through committees, may be summed up into 3–4 basic ideas. The first idea was that the President should have unrestricted ability to select judges. The second option was for the President to appoint with Council of State approval. The constituent assembly also debated whether President nominations should be approved by the Chief Justice of India. Another question was whether the Judicial Appointment Commission should suggest appointments. The panel may recommend names to the president in collaboration with the Chief Justice of India to the president, who will make the appointments.

The reason of existence of the adopted method of appointment can be better understood by knowing why these selection methods were rejected. The reasons for rejecting each idea is as follows:

1. The first appointment procedure was giving the President full powers, akin to the U.S. This was rejected because Indian democracy isn't as developed as the U.S. and such an experiment will certainly fail.
2. The next possibility examined was legislative approval. It was regarded excessively complicated and likely to politicise the appointment process. It

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[12] Durga Das (ed.), Sardar Patel's correspondence-vol. 4, p. 414, (Navajivan Publishing House, Ahmedabad, 1972).

[13] Durga Das (ed.), Sardar Patel's correspondence-vol. 4, p. 415, (Navajivan Publishing House, Ahmedabad, 1972).

might substantially impair the judiciary's independence, thus it must be rejected.

3. Subsequently the use of the word concurrence was put on the table.[14] The drafting committee chairman, Dr. B. R. Ambedkar, said, "There is no question that the Chief Justice of India is a man of greatest respect and prestige, but he is a human being with prejudices, biases, and may err. It was also claimed that invoking concurrence would give the Chief Justice of India power that we would not grant the President or Government.
4. Another consideration was whether the Judicial Appointment Commission should propose appointments. This was rejected because it would slow down the process and introduce immature politics.

The Constitution chose a middle ground for appointing judges that avoided legislative intervention, no supremacy to any one organ, and at the same time the process was not cumbersome and there was little to no politics involved.

The key characteristics of the appointment process under the Constitution are:

First, the President was not bound by the Chief Justice's advice. The conference of Federal Court and High Court Judges recommended that the appointments be made with the concurrence of the Chief Justice of India, but the assembly refused because he was only a human who could make mistakes and using concurrence would give too much power to one person who may be prejudiced and make mistakes.

Secondly, while concurrence was not in the Constitution, consultation with the Chief Justice of India was meant to limit presidential appointment power. The Constitution did not allow the government to make nominations without restriction.

Thirdly, the role of Chief Justice of India was emphasised in consultations. The President was to consult the other Justices, but the Chief Justice of India was to play a leading role.[15]

Fourthly, the President was to exercise his powers on aid and advice of the Council of Ministers. Therefore, the executive had a say in the appointments of the Supreme Court and High Court judges.

IV From Independence till Pre-Emergency Period

The day India enforced the Constitution and became a republic, the Supreme Court in its present form came into being. It is an institution that has to be alert and on the lookout i.e. it is a sentinel on the qui vive[16]. The Supreme Court was made guardian and protector of the Constitution. It is thus a very powerful institution that was given the penultimate task. Though there were certain reservations about conferring such wide powers the Constituent Assembly was clear that we need an independent judiciary that can do the required task and a subservient judiciary, will not be good. Moreover, a peep into

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14 VII, Constituent Assembly debate, 232-238.
15 VIII, Constituent Assembly debates, 231.
16 State of Madras v V.G.Row, 1952 SCR 597 [13].

the mind of Constitution makers while drafting the appointment process is clear from the following words of Pt. Jawaharlal Nehru in Constituent Assembly:

"The Constitutional provisions governing the appointment of Judges must be such that the merit is a primary factor affecting the outcome of selection. The process must not only give us the best judges but who have integrity, honest men and at the same have the guts to stand to the government or anyone who stands in their way."[17]

The Indian judicial system cherished the principles of an independent judiciary for a long time and it was clear to the members of the Constituent Assembly that an untainted appointment process was an absolute requirement for an independent judiciary. After serious deliberation in the Constituent Assembly, the President was accepted to be the appointment authority who will exercise the power in consultation with the Chief Justice of India. This established a process under which the appointment commenced from the office of Chief Justice of India and a final decision was to be made in consonance of consultation with the Chief Justice, by the President.

The entire period from independence to the proclamation of emergency saw a period where the judiciary moved through different phases. In the initial days, it accepted the preventive detention laws in A.K. Gopalan v. State of Madras[18] in 1950. Later in Keshwananda Bharti v. State of Kerala[19] the Hon'ble Supreme Court restricted the power of Parliament to amend the Constitution, which is a long way from accepting the black letter of the law, to limiting the powers of the legislature. So borrowing the words of American Chief Justice Charles Evans Hughes, "We are under a Constitution but what is Constitution is to be decided by the Hon'ble Supreme Court". During this period there were 14 Chief Justices of India and there were 53 appointments. These years can be summarised as the years of fictional concurrence. The thing is the Chief Justice of India at times did not agree to some names but signed under pressure from the executive to keep the concept of concurrence alive, though fictitious.

Soon after the independence of our country, in February 1950 to be precise the Home Ministry prepared a memorandum of procedure for appointments to the courts of record. The memorandum mandated that as and when the vacancy arose in the office of Judge in the High Court the Chief shall initiate the process by recommending the name to the Chief Minister of the state who in consultation with the Governor of state shall forward the name to Union Home Ministry. Then the Home Ministry in consultation with the Chief Justice of India and Prime Minister of India will advise the President as to whom to appoint to the post. The underlying theme of the memorandum was that the executive of the day was given a definite role despite no mention of the same in such details in the Constitution.

Now coming over to the implementation of the mechanism in actual practice as to how it functioned? Justice Hiralal Kania was at the loggerheads

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17 VIII, Constituent Assembly Debates, 247-260.
18 AIR 1950 SC 27
19 (1973) 4 SCC 225

directly with the executive on many distinct occasions.[20] Justice Kania had certain reservations about the appointment of Justice Basheer Ahmed Sayeed to be a permanent judge of the Madras High Court. He wrote a letter to Prime Minister Jawaharlal Nehru against the permanent seat of Justice Sayeed. The exact contents of the letter are not known but the reaction of the Pt. Nehru was that he was shocked by the letter. He sent a letter to Sardar Patel suggesting that we should ask for the resignation of Justice Kania. He felt that his conduct as a judge has been unbecoming of a person holding such a high Constitutional post, especially that of a Chief Justice of the Supreme Court.[21] Sardar Patel convinced Pt. Nehru that any such request would be considered to be interference with the judiciary and undermine its independence. He told Prime Minister that he will communicate to Justice Kania denying the permanent seat to Justice Sayeed would be considered to be a communal decision. He further wrote off to Governor General C. Rajagopalachari that Prime Minister is naturally upset but he would agree with him that the storm should be allowed to pass over.[22] He further told Nehru that, "Justice Kania is sensitive to certain issues. He becomes petty-minded and persists in his attitude at times but that is not uncommon to heads of the judiciary as they consider themselves sole protector and guardian of judicial independence".

At last Justice Kania, who initially opposed the candidature of Justice Sayeed but, under pressure from Nehru and Patel, agreed to make him a permanent judge of the Madras High Court.

Another conflict of the Judiciary with the government of the day was on the appointment of Justice Wanchoo from Allahabad High Court to the Rajasthan High Court as the Chief Justice there. This was proposed because the government agreed that the Judges from Part- A States like Bihar should be transferred to Part- B states such as Rajasthan so that the level of the judiciary be uplifted throughout the country. But Justice Kania had reservations about this because he had distaste for ICS judges and more specifically he wanted Justice Naval Kishore, acting Chief of Rajasthan High Court to be made permanent instead. Even C. Rajagopalachari agreed to Justice Naval Kishore's name. But V.P. Menon an I.A.S. officer, Private Secretary to Vallabhbhai Patel, who was associated with his office for a long time met with Chief Justice Kania to convince him about the candidature of Justice Wanchoo to the Rajasthan High Court.[23] He felt he has been successful in convincing him but Justice Kania wrote a letter against it, on the 4th of November, 1950. Menon was sent again to request the candidature of Justice Wanchoo. This time Justice Kania agreed but did put a rider that he would agree only if the transfer was only a temporary adjustment.

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20 Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford University Press, New Delhi, 2003).

21 Durga Das (ed.), Sardar Patel's correspondence-vol. 6, p. 377, (Navajivan Publishing House, Ahmedabad, 1973).

22 Durga Das (ed.), Sardar Patel's correspondence-vol. 6, p. 378, (Navajivan Publishing House, Ahmedabad, 1973).

23 Durga Das (ed.), Sardar Patel's correspondence-vol. 6, p. 502, (Navajivan Publishing House, Ahmedabad, 1973).

Patel suggested to Justice Kania that it cannot happen as a temporary adjustment. Finally, Justice Kania acceded to Justice Wanchoo's appointment as Chief Justice of the Rajasthan High Court.[24]

Pt. Nehru wrote to Sardar Patel about his discontent over the casual manner in which the Chief Justice of India was dealt with and was made to surrender. Sardar Patel who had otherwise also had difficult relations with Pt. Nehru wrote that Concurrence should not be read as surrender. He drew his attention to the episode of Justice Sayeed's appointment and how Justice Kania is the last person to yield to pressure. The eventuality of conflicting views resulted in Justice Wanchoo being appointed as Chief Justice and Justice Naval Kishore retiring as High Court Judge.

This was the status of appointment in this period that government was so dominant that it was not only able to enforce its will but was able to secure concurrence for its decisions. But this is also equally true that the executive interference was limited this is evident from the fact that Justice B.P. Sinha and Justice Gajendragadkar later said that their recommendations were always accepted. This was the general state of affairs during the Prime Ministership of Pt. Jawaharlal Nehru. In the words of Justice Vivian Bose, rarely did the executive try to influence the judicial appointments and C.J.I. always had his way.[25]

This continued for some time even after Pt. Nehru for instance, Justice Subba Rao recommended the name of Justice K.S. Hegde for elevation to the Supreme Court. Soon after the recommendation the C.J.I. resigned to be Joint Candidate of the opposition for the post of President of India.[26] His resignation came in April 1967 and even though Justice Subba Rao was contesting against the government's candidate, Justice Subba Rao's candidate, Justice Hegde was appointed to the Supreme Court in July 1967.

V After Nehru to Eighties

Though there were signs of change after the judgment of Hon'ble Supreme Court in I.C. Golaknath v. State of Punjab[27] where the court held that the Parliament cannot amend the fundamental rights but nothing significant changed. Though the Chief Justice M. Hidayatullah recommended the name of three judges for elevation to the Supreme Court. To which the Union Home Minister queried, what does he know of their political ideologies? To which Justice Hidayatullah replied, "I don't, and neither did I know yours until 4 days ago when you told me you were a socialist".[28] So the political ideologies were

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24 'Former Chief Justices', Rajasthan High Court website, available at: http://hcraj.nic.in/ formercj.aspx(last visited on 26 May 2022); George H. Gadbois, Jr., *Judges of the Supreme Court of India, 1950-1989,* 80(Oxford University Press, New Delhi, 2011).

25 Gadbois, *Judges of the Supreme Court of India*, 77–78 (Oxford University Press, New Delhi, 2019).

26 Ibid.

27 AIR 1967 SC 1643.

28 Abhinav Chandrachud, *Supreme Whispers,* 149 (Penguin Random House India, Gurugram, 2018).

started to be taken into consideration for appointments to the Supreme Court and things started to change a bit. Later all three recommendations made were accepted by the center and appointments were made in August 1969.

Then the conflict between executive and judiciary increased particularly with the court passing judgments against the government and nullifying the bank nationalization policy of the government in the Bank Nationalization case[29] in February 1970 and Privy Purse case[30] in December 1970, where the Hon'ble Supreme Court held that privy purses paid to Indian Princes cannot be abolished by the government even through the central legislature, as it did not have the legislative competence to do so. After this Justice Hidayatullah retired from the Supreme Court in December of 1970 after making recommendations of Chief Justice S.P. Kotwal of Bombay High Court and M.S. Menon of Madras High Court for elevation but these recommendations were never accepted and appointments were not made.

This is when the central government began to make frequent incursions in the domain of judicial appointments. All the recommendations made by Justice J.C. Shah, who had a short tenure as Chief Justice of India were ignored by the Government. When asked about why it happened, so? Justice Shah told at the end of the day, it is the Government who has to be making the appointments.

Another change that took place at this time was that instead of Home Ministry, the Law Ministry started to play an active role in the appointment process. The Indira Gandhi government through its ministers had started packing the courts to change the Golaknath case's judgment of the Hon'ble Supreme Court. This judgment changed a few things permanently. To put it in the words of Upendra Baxi "If the courts had just refused to give the Parliament last say in amendment to the Constitution, matter would not have become so worse. It was this decision that everything in the Constitutionally approved mechanism which allowed changes to the Constitution was put down itself that led to the crisis".[31]

Though the conflict between the judiciary and executive was old never did the executive try to overpower the judiciary for its decisions. This happened when the judiciary curtailed the power of the legislature to amend the Constitution and mandated preserving the basic structure of the Constitution that the executive used supersession as a tool to punish the judiciary who did not toe the line of executive and started to pack the bench with committed judges. Besides this, the 24th, 25th, 26th, and 29th Constitutional amendments were primarily focused on undoing, what the court did through a series of judgments, over the years in the Golaknath case[32], Bank Nationalization case[33], privy purse's case[34] inter -alia.

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29 Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248.
30 Madhav Rao Scindia v. Union of India, (1971) 1 SCC 85.
31 Upendra Baxi, *The Indian Supreme Court and Politics*, 21-23 (Eastern Book Company, Lucknow, 1980).
32 AIR 1967 SC 1643
33 Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248.
34 Madhav Rao Scindia v. Union of India, (1971) 1 SCC 85.

At this time it was felt that, Article 124(2) of the Constitution allows the President of India to consult judges of the Supreme Court and High Courts, in addition to the Chief Justice of India, when appointing judges to the Supreme Court. The Chief Justice of India has the option to seek the opinions of fellow judges and recommend suitable candidates for appointment. Historically, all the eminent judges who have served in the Supreme Court were appointed under the existing constitutional provisions. The quality of appointments reflects the caliber of the government responsible for making them. Ultimately, it depends on the sensitivity and sense of responsibility of the executive to make appointments based solely on merit, without considering any extraneous factors. The absence of effective checks on the executive to ensure such appointments leads to the possibility of appointments that fall short of excellence.

In theory, Parliament is meant to oversee and control the actions of the executive, but in practice, this is not always the case. The Hon'ble Supreme Court, in the case of K.L. Reddy v State of Jammu and Kashmir,[35] acknowledged that the legislative check on the executive is weakening, and there is a tendency for governments to accumulate more power. Furthermore, the opposition in Parliament is often weak and divided, and even opposition parties in power in some states may not be entirely free from biases in patronage distribution regarding judicial appointments. At present, there is little difference between the ruling party and the opposition in Parliament when it comes to judicial appointments. Additionally, within the ruling party, there may not be Members of Parliament who possess the same vigilance as Feroz Gandhi to hold the government accountable on this matter. The only possible check on the executive lies in public opinion, but unfortunately, organized public opinion is not sufficiently strong to influence the government to make appropriate appointments to the bench.

Thus the underlying theme of the appointments in this period was that interferences by the government especially by the union government saw a significant rise. Secondly, the ideology of the judge was taken as a significant factor in selecting a person for the post of Judge, be it High Court or the Supreme Court (as shown in later part of this article). Through these two significant changes from the previous regime the government attempted to pack the courts with committed judges. As if this was not enough, the government had three tools to set the judges right and make them toe the line of the executive; which are supersession, transfer, and non-confirmation of temporary judges.

VI Supersessions

The supersessions began with the appointment of Justice A.N. Ray as the Chief Justice of India on 25th of April, 1973 (a day after the historic judgment of Kesavananda Bharti Sripadagalvaru & Others v/s State of Kerala[36]). Though this was not the first instance of supersession as Justice Gajendergadkar superseded Justice Imam which was done based on the medical condition in which Justice Imam was at that time. He was physically unable to discharge his duty to the

35 AIR 1980 SC 1992
36 AIR 1973 SC 1461.

office of Chief Justice of India. So, it was medical exigency that led to supersession and nothing else. Whereas Justice Ray had superseded three senior-most judges on the grounds of political vendetta, as the three gave judgment against the government in the landmark judgment of the Kesavananda Bharti case.

When Justice Sikri retired in 1973, Justice J.M. Shelat was the senior-most judge of the Supreme Court and as per the convention as old as the Constitution itself, he was to be appointed C.J.I. And after him, Justice Hegde would have been the C.J.I., and after him Justice A.N. Grover. Justice A.N. Ray would never have been the C.J.I. had he not been superseded.

When Justice A.N. Ray was to retire, the senior-most judge was Justice H.R. Khanna but the seniority rule was again overlooked and Justice M.H. Beg junior to him superseded the post. This supersession like the previous one was done because Justice H.R. Khanna had delivered judgment against the government in the A.D.M. Jabalpur case[37] as well as Kesavananda Bharti case[38]. Justice Chandrachud was to be next C.J.I. There were rumors that he too will be superseded by Janta Government, but he was not and the seniority principle has been followed strictly since then.

VII Transfers

Two types transfer of High Court judges took place after independence: normal and punitive. Punitive transfers were made where the wrongdoing of lordship was not substantial enough to warrant impeachment. Normal transfers were mostly administrative. But the key requirement for both types of transfers was that, the consent from transferee was always obtained.

Under Indira Gandhi, judges were transferred as punishment for being independent and refusing to follow the administration. In an emergency, 16 judges were relocated at once including Justice A.P. Sen who used the Habeas Corpus case to rule against the government while working at Madhya Pradesh High Court.

After the Emergency was declared in June 1975 upon the Allahabad High Court invalidating the election of the then Prime Minister on the grounds of corrupt practices and she could not get remedy from the Supreme Court (Indira Nehru Gandhi v. Raj Narayan[39]), the Constitution was extensively amended mostly through the Constitution (Forty-Two) Amendment Act, 1976, and High Court Judges were mass-transferred.

A major transfer convention following independence was that the Judge being transferred consented. This concept was also disregarded since no transfers during emergency were consented to. The transfer of Justice Chandra Reddy underscores the importance of consent clause. He was accused of favouring Reddy people. After investigation, the C.J.I. found the claims to be true. He was to be transferred to Madras High Court. Transferee permission was obtained in this situation too. He seems to have consented inter-alia because he was to work

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37 Additional District Magistrate, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.
38 AIR 1973 SC 1461.
39 Indira Nehru Gandhi v. Raj Narayan AIR 1975 SC 2299

as acting governor as well. Consent, obtained despite his established misbehaviour, is crucial.[40] Such was the state of affairs during emergency that absurd decisions were also taken.

VIII Non-Confirmation of Additional Judges

The third weapon in the arsenal of the executive was the non-confirmation of the additional Judges. The message was clear either surrender to the will of the government or face consequences. This power was used for the first time on July 15, 1975, against a bench of Delhi High Court judges consisting of Justice S. Rangarajan and Justice R.N. Aggarwal for declaring the detention of Kuldip Nayar, illegal. Though both of them were punished by the government but Justice R.N. Aggarwal suffered more as he was not only denied confirmation but reverted as District and Sessions Judge. Something similar happened with Justice U.R. Lalit of the Bombay High Court. Shah Commission formed after the emergency labeled this as an abuse of powers on the part of government. In the case of Justice U.R. Lalit, the Commission said, "It amounted to subversion of well-established conventions and practices and amounted to abuse of authority and misuse of power."[41]Additionally, the executive also uses delay tactics to delay appointments. This is the general trend from 80's till now.[42] This inter-alia has resulted into large number of vacancies.[43]

IX First Judges Case

One of the major developments of the 80's concerning judicial appointments was the First Judges' Case [44]. This is a seven-judge bench judgment and a landmark judgment for many reasons. It is more about the judges than by the judges. Justice Bhagwati speaking for the majority in the case said that the matter of interpretation of the word Consultation is not res integra anymore in light of the judgment of the Supreme Court in the Judges' transfer case.[45] But explained the concept in more detail and advocated more broad-based consultation. The court held that consultation with the Chief Justice of India includes consultation with the Chief Justice of the High Court and such other Judges of the Supreme Court and High Court as the President considers necessary. Moreover, it was emphasized that the consultation has to be full and effective. The consultation to be full and effective needs to be done as follows:

"All the material collected through government machinery along with the opinion of the President is to be forwarded to C.J.I. Now, the Chief Justice of India needs to gather information regarding the proposed candidate from his

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40 Abhinav Chandrachud, Supreme Whispers, 157 (Penguin Random House India, Gurugram, 2018)

41 Dr. Janak Raj Jai, Betrayal on appointment in Judiciary, 56 (Law & Justice Publishing Co., New Delhi, 2022).

42 Fresh term, same story: Central government continues to delay judicial appointments, available at: https://www.barandbench.com/news/fresh-term-same-story-central-government-continues-delay-judicial-appointments (last visited on: 21.08.2024).

43 Lok Prahari v. Union of India and Others (2023) 1 Supreme Court Cases (L&S) 684.

44 S.P. Gupta v. Union of India and others, 1982 AIR 149.

45 Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193.

trusted sources, make himself aware of the information so obtained, and suggest his recommendation after due deliberation, discussion, and applying his judicial mind about the candidature, propose the person may or may not be appointed."[46]

Justice Bhagwati was critical of the view that the Chief Justice of India should be consulted individually rather he was of the view that the consultation process should be more broad-based. The Law Commission of India in its 121st report was also of the view that the consultation with other Judges of the Supreme Court will lead to greater acceptability and eliminate arbitrariness from the decision.[47] But at the same time, the consultation with C.J.I. was to carry great weight, he being the pater familias of the judiciary, though the judgment stopped short of granting primacy to C.J.I. This was the view of the Hon'ble Supreme Court in the first judges' case.

Though the idea of broad-based consultation did not fructify it laid the course for future development. Justice Pathak was of the view that there are three different Constitutional functionaries having distinct roles to play and are involved in the process. Though, the President is not bound by the views of the Chief Justice of India because the word used is consultation and not concurrence in the Constitution. But the Chief Justice of India while advising the President should take note of the views of the Chief Justice of the state concerned. There was a different rationale for it but the underlying proposition of Justice D.A. Desai, Justice M. Murtaza Fazal Ali, Justice Pathak, and Justice V.S. Venkataramaiah was on the same that the Chief Justice of India does not have primacy in the appointment process of Judges to courts of record. There was agreement amongst the judges on the bench while deciding the case that consultation should be broad-based. But the opinion of the Chief Justice of India will carry more weight than the Chief Justice of the High Court in judicial appointment to the High Court.[48]

Another striking feature of this judgment was the importance it gave to the democratic processes. In a democracy, the powerful is always made accountable to the people. The power is vested in the hands of the citizens of the country either directly or indirectly. Moreover, the largest democracy in the world does lay the groundwork for the answerability of the appointment process though a bit differently. The appointment is to be made by the President who acts on aid and advice of the Council of Ministers. The Council of Ministers is answerable to the Parliament directly and in turn to the people through the democratic process of the election to the legislature. Justice Venkataramaiah made a point in the judgment while suggesting that, "the appointment of judges, by the judges would raise a sentiment among that they are judges' judges and it will be not fit in the scheme of popular democracy."

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46 S.P. Gupta v. Union of India and others, 1982 AIR 149.

47 Law Commission of India, "121st report on A New forum for Judicial Appointments" (July, 1987)

48 Aakriti Srivastava, Appointment of Judges in India, JCLJ (2023) 1800.

This judgment received certain harsh criticism at the hands of members of the legal fraternity. They dubbed it as a judgment that gave primacy to the executive in judicial appointments and surrendered the independence of the judiciary at the hands of whims and fancies of the government. Upendra Baxi believed that judgment was full of "inconsistency and lacked perspective."[49]Seervai considered the judgment to have completely undermined judicial independence.[50] Upendra Baxi remained critical "of executive, the power of which was not restricted, at the same time the judiciary that was not independent cannot withstand the pressures from executive and that is set to undermine its independence."[51] Seervai was of the viewpoint that until and unless reconsidered the judgment has caused an irreparable loss to judicial independence.[52]

The entire plethora of arguments rendered against the judgment was based on the bitter experience of the emergency and how the government was able to bulldoze the rights of citizens and was able to wound judicial independence. The judgment undoubtedly correctly interpreted the intention of Constitutional makers and simply rebutting it as surrender to the executive does not give the credit to the judgment that it deserves.

X Appointments during the Eighties

The extraneous considerations had already started to be taken into consideration for appointments to High Court and Supreme Court. The extraneous factors taken into consideration included ideological leanings. This meant that even if a person is well qualified and otherwise fit for the job, he still was refused an appointment if he was not expected to be favorable to the government of the day.

Ashok Sen was Union Law Minister and overlooked appointments from 1984 to 1987. He said that "the government would not appoint anyone with anti-government views though they were not looking for minions who would do whatever the government say."[53]

Thus the government scrutinized the record, judgments, and association of the judge with any person or organization against the government. Anything remotely connected even though inconsequential that associates the person with the organization against the government would make him unsuitable for the post. This is clear from the arbitrary denial of appointment to Justice Chandurkar by the government. He was Chief Justice of Bombay High Court and then transferred as Chief of Madras High Court. His name was recommended by the

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49 Upendra Baxi, *'Judiciary at the cross roads'* 231, (Journal of the Bar Council of India, 1982).

50 H.M. Seervai, *'Constitutional Law of India'*, 2854 (Universal Law Publishing, 4th Edition, 2008).

51 Upendera Baxi, *'Courage, Craft and Contention: The Indian Supreme Court in the Eighties"* 23, 55 (N.M. Tripathi Pvt. Ltd., Bombay, 1985).

52 H.M. Seervai, *'Constitutional Law of India'*, 2781 & 2762(Universal Law Publishing, 4th Edition, 2008).

53 Abhinav Chandrachud, Supreme Whispers, 185 (Penguin Random House India, Gurugram, 2018).

C.J.I. Chandrachud on different occasions. The appointment was never made by the government. The government replied to the recommendations of C.J.I. that he had attended the funeral of M.S. Golwalkar (an RSS leader) and said nice things in his eulogy. Justice Chandrachud thought that this was preposterous on the part of the government to deny Chandurkar's appointment on this ground. Justice Chandrachud later raised the recommendation with Prime Minister Rajeev Gandhi, who told him that his party men think he is not good and is not likely to help us.

Another instance happened when the government decided not to appoint Justice G.P. Singh to Supreme Court. The government refused to appoint him without giving reasons for the same after C.J.I. Chandrachud's recommendation. Justice Chandrachud wanted him to appoint him very badly. But his independent image worked against him. He had refused to recommend the names of candidates proposed by the state government having a Chief Minister from Congress (I).

Moreover it was felt at this time that I.B reports can be structured to oppose or support a particular candidate. During this period it had become widely known that intelligence reports play a significant role in influencing certain judicial appointments. During the inauguration of a Lawyer's Conference in Kerala, Justice O Chinnappa Reddy explicitly mentioned instances where competent lawyers' elevation to the bench was hindered based on intelligence reports regarding their past social activities. Such one-sided reports, sometimes tailored specifically for the occasion, would not withstand judicial scrutiny for even a moment. The Supreme Court has established, in the case of the appointment of civil servants (State of M.P. v. R.S. Raghuvanshi[54]), that a person's prior affiliation with a recognized political party should not be considered as a disqualification. The same principle should have been applied to judicial appointments as well.

The government at times simply did not offer reasons for inaction and this was the state of affairs for a long during the tenures of three successive Chief Justices, they are Justice Chandrachud, Bhagwati, and Pathak.[55]

XI The Second and Third Judges' Case

The Union Judiciary with best of the intentions held in second Judges Case[56] that C.J.I. representing the whole judiciary will represent its view to the Government who in turn will make the appointment. The C.J.I. in forming the opinion about a candidate will take into consideration the view of the collegium of two senior judges and in case of conflict of opinions between Constitutional functionaries, the opinion of the C.J.I. will have primacy.

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54 AIR 1983 SC 374

55 Abhinav Chandrachud, *Supreme Whispers*, 186 (Penguin Random House India, Gurugram, 2018).

56 Supreme Court advocates-on record association vs Union of India, (1993) 4 SCC 441.

The second judge's case[57] held in unequivocal terms that the President is bound by the views of C.J.I. and no appointment can take place without a positive recommendation of the judiciary speaking through collegium. This was seen as a massive step to ensure judicial independence. It was taken positively by citizens and media and startled the judges abroad with its boldness.

This unilateral control and primacy given to the judiciary by its judgment was a result of atrocities done during the emergency and period preceding it. The actions of the executive changed a few things permanently for instance the judiciary and masses to a great extent, lost trust in the executive. This is all the more evident from the views of Pandian J. which set the tone for judgment in this historic case, "This case raises primary objections to the functioning of appointment mechanism with the underlying purpose that the judiciary (a) be free from an atmosphere were judicial independence cannot survive and structure of the system be replaced; (b) to give judiciary primacy if not supremacy for this purpose; (c) to allow the judiciary to breathe in unpolluted air of executive dominance and will of the masters of the Constitution be implemented in accordance with the oath of allegiance to Constitution inter-alia."[58]

This judgment thus was based on the opinion that executive interference impaired judicial independence. Though, the judges themselves accepted in the second judge's case that the judiciary in India has worked better than in other countries. Thus there was executive interference but it was occasional and the executive and judiciary by and large agreed to the names for judicial appointments.

The judgment was a historic one for many reasons but in the opinion of Seervai, there was too less of discussion amongst brethren judges for such an important verdict. To support this Seervai provided this account from the judgment in words of J. Punchi, which was along the lines that the day the bench sat first and the day arguments for it closed, was within a month. Thereafter, within a few days, the Supreme Court had summer vacations. J. Punchi believed that after the break the brother judges will sit and decide upon every aspect of the judgment, if not before that i.e. during vacations. But on the second day after summer break J. Punchi received a draft judgment from the majority judges in the case. This put him in a hopeless situation where nothing could be done as the majority had already decided and made up their mind."

Moreover, this judgment has not been able to establish the grounds that proved that judicial independence was under threat by executive interference and what necessitated the judgment. But even if there was a threat there is little to no explanation for reading the word 'consultation' as 'concurrence'.

Another rationale provided by the Supreme Court in this judgment for taking control of the judicial appointments to the Constitutional courts is that the importance given to the opinion of the C.J.I. by executive mandates that the

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57 Ibid.

58 Supreme Court Advocates-on Record Association vs Union of India, (1993) 4 SCC 441.

practice has to conform with the Constitutional spirit of the provision envisioning the mandatory consultation with the Chief Justice of India.[59] This argument cannot be sustained based on the research at hand which proves that the concurrence was fictional in many cases and the executive at times was able to enforce its will upon the judiciary. At the same time, it is also true that even if the importance given to the advice of C.J.I. in judicial appointments by the executive has to be considered as the intention of the Constitution makers then why the intention of makers of the Constitution was not enough to suggest consultation does not mean concurrence? The acceptance by the executive of the judiciary's views given through C.J.I. was the acceptance of the participatory consultative scheme of the Constitution and the random exercise of the power of the executive to defer the names proposed by C.J.I. was an exercise of power given to it by the Constitution as it was exercised after full and effective consultation with C.J.I. The research at hand tends to substantiate that the executive had subverted the appointment process and power given to it by the Constitution at times but that owed not to the provisions of the Constitution but rather was because of the person at the helm deciding to interpret the Constitution in accordance of their own free will.

Another rationale supporting the claim of the judiciary that the opinion of the collegium should be given primacy over the opinion of the government is the fact that the judiciary's opinion is like an expert opinion. The judiciary can give technical advice for the candidature of a given name that's why also the judiciary should have primacy. This view was also not accepted by the dissenting judges Justice Ahmadi and Justice Punchi. The dissenting judges drew a parallel between the recommendation to the candidature of District and Session Judge and held that the Constitution is clear where the advice of Constitutional functionary is recommendatory or consultative and laid down that therefore primacy to the judiciary in matters of judicial appointment can be awarded by Constitutional amendment only.

The second judge's case had some ambiguity regarding the working of the collegium where the President of India and the Government were in disagreement over the operation of the Collegium. This paved the way for consultation by the Hon'ble President on nine questions from the Hon'ble Supreme Court in 1999 via the Re Presidential reference case. The case was decided by a nine-judge bench and held the collegium is a broad-based entity that includes the Chief Justice of India along with 4 senior-most judges of the Supreme Court. The collegium must include the judge as a member who will be the next C.J.I. If he is not among the 5 senior-most judges of the Supreme Court and in that case the collegium will consist of 6 members. They are the C.J.I. plus the 4 senior most judges and the next C.J.I.[60] The third Judges case also laid down that when two or more judges are of adverse opinion regarding the candidature

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[59] Supreme Court Advocates-on Record Association vs Union of India (1993) 4 SCC 441; Manoj Narula v. Union of India, (2014) 9 SCC 1

[60] "Judicial Appointments In India: Collegium System vs NJAC - July 26, 2024" https://www.clearias.com/judicial-appointments-in-india/ (last visited on 21.08.2024).

of a person then it will be appropriate for the C.J.I., not to recommend the name.[61]

Thus, a unique mode of appointment was established by Hon'ble Supreme Court through these two Judgments. The National Commission to review the working of the Constitution (NCRWC) 3 years after the third judge's case recommended the dissolution of the collegium and a commission be set up to suggest an ideal mode of appointments to the Courts of record.

XII N.J.A.C. Judgment

Supreme Court Advocates-on-Record Association and Another versus Union of India[62] or NJAC case was mandated after the passing of the 99th Constitutional Amendment Act, 2014 which established the National Judicial Appointment Commission for appointment of judges to the courts of record. This judgment has been criticized on many grounds. To name a few prominent ones, in the opinion of many the judgment is based on a rationally shaky foundation. This is a strong statement to be made against a Constitutional bench judgment of the Hon'ble Supreme Court. But, this seems to be justified based on a few arguments. First of all, the second judges' case which created collegium, did not just create it but, also supported the premise of it by interpreting 'consultation' in article 124 of the Constitution as 'concurrence'. But this was not the sole basis for reaching the desired outcome favouring the collegium system.

The petitioners in the NJAC case argued that judicial primacy is an indispensable feature of judicial independence which is in turn a part of the basic structure. This argument of the petitioner mandated that the second judge's case must be interpreted to understand the ratio decidendi. There's all the more reason to understand and interpret the second judge's case because if the second judge's case held that the judicial primacy is necessary for maintaining our judiciary independence, then the Constitution bench of the Supreme Court is simply incompetent to alter the decision. Thus a larger bench, probably an 11-judge bench should have been constituted to decide the Constitutionality of the premise of the second judge's case.

Even if a larger bench was not constituted the answer to the question of judicial primacy was essential for judicial independence. And if the answer to the question that, if judicial primacy is tampered the basic structure of the Constitution will not be intact, is 'Yes' then also this required interpretation of the second judge's case, and if the answer was 'No' then the court should have decided that judicial primacy is a sine qua non for judicial independence and give a reason for the same. But on the other hand, what the bench did was it explained and mandated that the collegium is founded on a strong Constitutional foundation. [63]

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[61] Collegium System and Appointments, 16 May 2024, available at: vajiraman-dravi.com/quest-upsc-notes/collegium-system-and-appointments (last visited on 21.08.2024)

[62] AIR 2015 SC 5457

[63] Arghya Sengupta and Ritwika Sharma, *Appointment of Judges to the Supreme Court of India*, (Oxford University Press, New Delhi, Ist Edition, 2018).

There is one more implication of 'No' as the answer which is if the judiciary's final say in the matter does not affect the basic feature of the Constitution then the Parliament has the legislative competence to amend the law and dissolve the collegium by NJAC Act. The 99th Constitutional Amendment Act of 2014 is thus constitutional because the court has held in several judgments that Parliament can amend the law contrary to previously decided judgments of the Supreme Court.[64]

The second judge linked judicial independence and primacy in paragraph 72, and paragraphs 40 and 41 state that the judiciary will have primacy in a stalemate between executive and judiciary, but the judgement does not state that primacy is necessary for independence. The Constitution bench in NJAC ignored this. The conflict between executive and judiciary has only intensified only since NJAC case.[65]

The NJAC case was also criticised for the judges' preoccupation on defending collegium principles. The collegium was formed after the Hon'ble C.J.I. gave five reasons in the second judges' case.[66] First, collegium was supported by precedent before the second judge's case. Second, the executive's role did not reduce but gave the judiciary prominence in stalemates. Thirdly, Collegium protects judicial independence. Fourthly, after independence, C.J.I. consultation has been scrupulously observed, therefore collegium didn't alter much in judicial appointment process. Fifthly, collegium ensures separation of powers. If these arguments are accurate, it merely proves that the collegium is constitutionally valid, not that the judiciary must be supreme to retain judicial independence, which is necessary to preserve the Constitution's core structure.[67] In the words of J. Chelameswar it is necessary to declare the 99th Constitutional Amendment Act as unconstitutional that the judicial primacy was necessary to ensure judicial independence or is the part of basic structure of the Constitution.[68] Even if this was not done the Court should have suggested in what other way the amendment violated basic structure.[69]

XIII Conclusion

The continuous discourse around the procedure of judicial nominations in India highlights the crucial topic of keeping an equilibrium among various organs of government. Preserving the independence of the judiciary while still guaranteeing participatory consultative process is of utmost importance. The

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64 Ibid.

65 V. Venkatesan, "Judiciary vs. Executive: Turf war intensifies over judge appointments." Frontline, 8 Dec. 2023.

66 Supreme Court Advocates-on Record Association vs Union of India (1993) 4 SCC 441.

67 Ibid.

68 Judges' appointment, vacancies, pendency key challenges before Law Minister," June 10, 2024. Available at: https://www.business-standard.com/india-news/judges-appointment-vacancies-pendency-key-challenges-before-law-minister-124061000947_1.html (last visited on 21.08.2024).

69 Judicial Primacy Necessary to Ensure Independence: Justice Chelameswar on NJAC," The Hindu, October 16, 2015.

present difficulties center on identifying a method that preserves the essence of the Constitution, guaranteeing that no individual branch - executive or judicial - exerts excessive control over the process.

The deliberations of the Constituent Assembly tried to achieve a fair and equitable approach by establishing a participatory consultative process. As it was acknowledged that completely excluding the executive branch may not eliminate biases, but it may result in an excessive concentration of power in the judiciary, which could lead to internal prejudices and a lack of accountability. The absence of executive participation in judicial selections may lead to a closed and exclusive process, which might restrict the inclusion of varied viewpoints and potentially encourage bias within the judicial community. Hence, although the reduction of executive engagement may appear to enhance judicial independence in theory, it might unintentionally result in an imbalanced system that lacks the necessary checks and balances required to sustain both independence and integrity within the court.

In order to progress, an approach that entails improving the consultation process as described in the Constitution is crucial. This would include promoting a more open and inclusive system where contributions from all parties involved are taken into account without compromising the independence of the judiciary. An efficient system should incorporate a strong system of checks and balances, guaranteeing that the appointment process remains impartial, transparent, and free from prejudices or undue influences. The judicial appointment are still plagued by delays.[70] These changes will fine tune the judicial appointment procedure in consonance of Constitutional mandate and be helpful in tackling delays. The objective of appointments should be to improve the credibility and legitimacy of the judicial appointment process, thereby bolstering public confidence in the judiciary and fortifying the principles of democracy.

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[70] Aday Vora, "*Judicial Appointments in Limbo: Supreme Court Expresses Concerns Over Delayed Collegium Recommendations"* Supreme Court Observer, November 20, 2023.

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Children of Uxoricide: A Criminological Study from Tamil Nadu

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Abstract

Uxoricide (from Latin uxor "wife" and -cide, from caedere "to cut, to kill") is the murder of a spouse or intimate partner. The murder of one parent by the other, known as uxoricide, has immediate and catastrophic consequences for the children. In most situations, the child loses both parents in a single act. The victim has died, and the culprit is either deceased (homicide/suicide), a fugitive, or in police custody (Black & Kaplan, 1988; Saltzman, Mercy, O'Corroll, Rosenberg, & Rhodes, 1992). The purpose of this research is to identify the explanation for uxoricide and its impact on the progeny.In India, there are no sentencing criteria or policies for uxoricide cases; instead, our criminal justice system considers all murders similarly and sentences perpetrators to life in prison, which has a significant impact on uxoricide victims' children. This is a qualitative study using the case study method. The study will look at the effects of uxoricide on children as well as the status of uxoricide-affected youngsters.

Keywords: Uxoricide, Children, Parents, Criminal Justice System

Introduction

Society has changed and social values have collapsed and our age-old traditional family system has undergone changes because of urbanization and social change. From joint family we came down to nuclear family and people have become self-centric and materialistic and it paves ways to intimate partner violence which happens within the four walls. The intimate partner violence finally results in spouse murders (both uxoricide and mariticide), which shows an increasing trend in the metropolitan cities like Chennai, Bangalore, etc. In 2014, Chennai had 141 homicides, including 90 cases involving spouse murders as a result of unlawful and extramarital affairs. The All Women Police Station in Tamil Nadu confirms that the majority of complaints they receive are about family troubles caused by affairs perpetrated by either partner. In many situations, police attempt to advise the couple, but family members frequently commit violent crimes against their spouses, resulting in uxoricide and double

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victimization for the children by losing their mother to death and their father to the criminal justice system.

Uxoricide:

The term Uxoricide is derived from the Latin word Uxor, which means wife, and Cide, which means to cut, kill, and so on. Uxoricide refers to the murder of one's wife or intimate partner. The United States has a far higher rate of uxoricide than mariticide, according to the many studies that have looked at domestic violence and deadly violence. Furthermore, there is a lack of publicly available statistics on children who are victims of uxoricide and no extensive empirical study on this topic within the Indian context.

Children of Uxoricide:

When one parent kills another parent (particularly when the father kills the mother), the children suffer considerable distress. The father is likely to be in prison or have committed suicide, and the child will suffer considerable loss.With the death of one parent and the incarceration of the other, the child has suffered the trauma of being a victim twice over. The child's physical and mental health might take a serious hit if they witness the uxoricide in a highly stressful environment.

A system that pays little attention to their issues has trapped them, and it's not even their fault. Grandparents typically do not have the financial means to provide for their grandchildren's basic needs and send them to school. These children constantly struggle with behavioral issues, depressions and anxiety and more vulnerable when compared to other children and have possibility to fall into child labor or criminal activities.

Review of Literature

International Scenario:

Barbara Parker, Richard Steves, Sarah Anderson, and Barbara Moran (2004) investigated **Uxoricide: A Phenomenological Study of Adult Survivors** from the perspective of an adult who had experienced it as a kid. The study provides the adult's entire experience, providing insight into growing up following uxoricide.[1]

Mensah Adinkrah's (1999) research study, **Uxoricide in Fiji: The Socio-cultural Context of Husband-Wife Killings,** shows the link between uxoricide and patriarchy in a non-western country. The study found that uxoricide is more common in conservative patriarchal societies, and marital infidelity was one of the major causes of spousal killings committed by men.[2]

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[1] Parker, B., Steeves, R., Anderson, S. and Moran, B. (2004). Uxoricide: A Phenomenological Study of Adult Survivors. *Issues in Mental Health Nursing*, 25: 133-145.

[2] Adinkrah, M. (1999). Uxoricide in Fiji: The Sociocultural Context of Husband-wife Killings. Violence against Women, Vol. 5, No. 11, 1294-1320.

Carolus Van Nijnatten and Renate Van Huizen (2004) found that the majority of children of uxoricide come from dysfunctional families, families with a dominant father, and families with a mentally disturbed parent. This study calls for child welfare measures and a safe environment for children exposed to uxoricides.[3]

Dr. C.J. Lennings (2006) in his study – **Uxoricide: When Dad Kills Mum, What to do with the Child?** Explains that when a child witnesses the Uxoricide, they suffer from post-traumatic stress disorder extremely, and the shock and fear continuously affects the confidence in the children of Uxoricide.[4]

Amanda Burgess- Proctor, Beth M. Huebner and Joseph M. Durso (2016) in their study titled- **Comparing The Effects Of Maternal and Paternal Incarceration on Adult Daughter's and Son's Criminal Justice Involvement** discovered that parental incarceration, particularly maternal incarceration, increases the risk of offending and incarceration among adult offspring.

Indian Scenario:

The article in **Times of India- Spouse killings on the rise (October 18, 2010)** depicts that from January to October 2010, out of 142 murders registered in Bangalore, spouses were behind the murder in 45 cases and it is not a male dominated phenomena , because women are also not lagged behind in the commission of these murders.[6]

The newspaper article- **homicides due to Affairs on the Rise in City, published in DT-Next (July 14, 2016),** illustrates how adultery and extramarital affairs can have a devastating effect on family members, leading to horrific murders committed by spouses. In 2016, Chennai city alone had 65 homicides, 50 of which were the outcome of a problematic extramarital relationship.[5]

The news article in the **Hindu –Uxoricide (January 03, 2013)** reveals that man named Gopal murdered his wife by crushing her head over a domestic quarrel at sholavandan and took his children out and left them at his mother's place and surrendered before police.[6]

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[3] Nijnatten, V. C. and Huizen V. R. (2004). Children of Uxoricide: The Anti-therapeutic Effects of the Construction of Parenthood Pathology in Cases of Family Trauma. *The Journal of Social Welfare & Family Law*, 26 (3): 229-244.

[4] Lennings, J. C. (2009). Uxoricide: When Dad kills Mum, What to do with the Child? Children's Law News. [6] Madhav, V. (2010). Spouse-Killing on the Rise. The Times of India. Retrieved Oct. 18, 2010 from https://timesofindia.indiatimes.com/city/bengaluru/Spouse-killing-on-the-rise/articleshow/6765942.cms.

[5] Kumar, P. (2016). Murders Due to Affairs on Rise in City. DT Next. Retrieved Jul. 14, 2016 from https://www.dtnext.in/News/City/2016/07/14000852/Murders-due-to-affairs-on-rise-in-city.vpf

[6] Sarappa, C., Sica G., Aurino, C., Auricchio, S., Buccelli, C., Lorenzo, D. P. and Galletta, D. (2013). Crime and Mental Illness: Impulsivity and Jealousy in a Case of Uxoricide. Forensic Research, Vol. 4, Issue 5.

The news article in the **Hindu (September 22,2018) – 'Uncle Raja' is changing the lives of the children of prisoners** (Soma Basu) shows that Raja, who established the nonprofit organization Global Network for Equality. There were 205 children whose mothers had been murdered and whose fathers were also in prison when Equality was found in Palyamkottai Prison. In Madurai alone, there are 230 children whose mothers were killed by their fathers and serving life. It hurt him to see the stigma and shame these children face.[7]**Rationale of the Study:**

The assessment of the literature unequivocally shows that the majority of research on homicide in an international setting focuses on adult survivors and the coping strategies used by the victims' children. Unfortunately, research on the effects of xoricide on children in India is lacking in both empirical and field-based studies.

The study's justification stems from the February 21, 2018, Madurai bench of the Madras High Court heard the case of E. Athiyasakumar v. the state of Tamil Nadu. The practicing advocate filed a writ petition opposing the state's non-utilization of the Victim Compensation Fund, highlighting in particular the children of spouse murders who are not awarded benefits from the Victim Compensation Fund in Tamil Nadu because they are not deemed victims of crime. Consequently, the court ordered the prison administration to compile a list of spouse murder victims' children and distribute victim compensation funds to them in accordance with rule 486 (6) of the Tamil Nadu Prison Rules, 1983, which states that twenty percent of inmates' wages should go to crime victims. Understanding the current situation of these children is the reason for this study.

Objectives of the study:

- To find the socio -economic status of the children of Uxoricide
- To find the reason behind Uxoricide and its impact on children
- To learn about the social networks that help victims of uxoricide.

Research Questions:

1. What is the present status of children of Uxoricide in Tamil Nadu?
2. What is the reason behind Uxoricide, and the problems faced by them after Uxoricide?
3. What social supports are available for children who have experienced uxoricide?

Theoretical Perspective of Uxoricide:

"The infant and young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother substitute) in

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[7] Basu, S. (2018). 'Uncle Raja' is changing the lives of the Children of Prisoners. The Hindu. Retrieved Sep. 22, 2018 from https://www.thehindu.com/society/uncle-raja-is-changing-the-livesof-the-children-of-prisoners/article24993698.ece.

which both find satisfaction and enjoyment" (Bowlby, 1951, p. 13), according to Bowlby's primary conclusion drawn from the available empirical evidence. Stories that follow usually gloss over the surrogate mother's or partner's joy. Also, they don't take into account Bowlby's work on mother-child relationships and how social networks and economic and health factors develop. Children depend entirely on their parents for survival, and even in the most basic of tribes, parents—especially women—depend on the larger community for financial assistance. His appeal for society to support parents, however, remains unanswered today. A community must treasure its parents if it appreciates its children. (Page 84 of Bowlby, 1951)

Methodology:

Methods used in research are more than simply tools; they represent a social scientist's strategy for looking at social reality from many theoretical angles (Bryman, 2008). The researcher chooses the research methodology based on presumptions about the issue (McNeill and Chapman 2005). This research was qualitative in nature and used a case study approach. Case studies place an emphasis on in-depth contextual analysis of a small number of circumstances or occurrences, along with their connections. The case study research approach has been employed for many years by a number of social scientists and academics in several disciplines. This qualitative research approach has been widely used by social scientists in particular to analyze current real-life events and serve as the foundation for the application of concepts and the expansion of methodologies. In cases where there is a lack of clarity regarding the boundaries between the phenomenon and its context and where multiple sources of evidence are utilized, the case study technique is employed as an empirical investigation, as stated by Robert K. Yin (Yin, 1984, p. 23).

Data Collection:

From the organization Global Network for Equality, which aims to support the well-being of children of prisoners, ten cases were chosen for the study. These cases were gathered from various districts in southern Tamil Nadu, including Tirunelveli, Tuticorin, Ramanathapuram, Madurai, and Kanniyakumari. Both male and female offspring of Uxoricide are included in these cases.

Ethical Considerations:

Because of the sensitive nature of the research subject, informed consent, confidentiality, and a nonjudgmental attitude were used throughout the data collection and writing stages. The children who were victims of uxoricide have their identities concealed in the case studies by using pseudonyms.

Limitations of the study:

This research aims to uncover the phenomenon of Uxoricide and gain a better understanding of the situation of children affected by this crime. There

are no official statistics about Uxoricide children in the public domain, such as NCRB data, data from the Ministry of Women and Child Development, data from the National Commission for the Protection of Child Rights, and so on. Due to the sensitivity of the matter, only few cases were accessible in Tamil Nadu's southern districts.

Case Studies:

Case I:

A 17-year-old girl from the Madurai district named Muthulakshmi comes from a nuclear family; her parents are both agricultural labourers and neither of them has completed high school. There is one younger brother who is a tenth class and she is a practicing Hindu. Due to a family dispute, her father strangled her mother, and she died when she was thirteen years old; their marriage was a love marriage. The Deprival of her mother's care gave more pain and was in extreme traumatic condition, since she witnessed the incident. She does not wish to keep a cordial relationship with her father or any of his relatives, and she is currently a student at a college in Madurai earning a Bachelor of Arts degree in Tamil literature. The government has not compensated her in any way, so she is currently living with her maternal grandparents. They have no social support system at all, aside from sympathy. Muthulakshmi wish is to get a government job after her graduation.

Case II:

Originally from the Tuticorin district, Margaurite is a middle school student. In addition to her brother, she has a younger sister. She follows Christianity and belong to the nuclear family. Her father was a cable tv operator and her mother was working in the salt plant as laborer. Both parents had their wedlock through arranged marriage. When she was 7 years old, due to the extra-marital affair of father led to suspicion and dispute in the family which led to the murder of mother by her father. She developed post-traumatic stress disorder after being unable to cope with the death of her mother when she was a young child. The parental incarceration affected her socially, economically and psychologically. She lives with her paternal grandmother and keeps in close contact with her dad and his family. She receives the victim compensation from the government and she feels the social acceptance is there for her in the society. Marguerite wishes to become a doctor in her future.

Case III:

Nathan is 24 year old unmarried Youngman from Tuticorin district. He is from a joint family who follows Christianity religion. The parent's solemnization of marriage was an arranged marriage.There is a younger brother and a younger sister in Nathan's family. Nathan has completed his post- graduation and preparing for the government exams. Tragically, her mother passed away after her father, who was heavily intoxicated, brutally assaulted her with an iron rod during a family argument when he was 10. After his mother passed away, Nathan was deeply disturbed. He lived apart from his siblings and went to school in a hostel, where he felt emotionally distant from

his family. He lives with his maternal grandparents and keeps cordial relations with his father's side of the family as well. One of Nathan's long-term goals is to work for the government.

Case IV:

A married woman from the Tirunelveli district, Santhanamari is 24 years old. She is from a nuclear family and has no siblings. Her father was a mason, and mother was house wife. Their wedlock happened through arranged marriage. Their mother passed away when she was just ten years old. Her father under the influence of alcohol smashed the head of her mother in the wall during a family quarrel .After her mother passed away, she moved in with her maternal grandparents because she was struggling with life without her. Not every one of her established rapport with her dad and his family. She is B.sc Nursing discontinued, and married. There is no social mechanism in place to help her, and the government has not compensated her as a victim either. The couple currently resides together, and she hopes to do a wonderful job taking care of their child.

Case V:

Originally from the Tirunelveli district, Sornam is an 18-year-old girl. There is only one older brother in her joint family. Both of her parents worked outside the home; her dad as a mason's assistant and mom as a housewife. The marriage of their parents was arranged. In a domestic dispute that broke out when she was eight years old, her father murdered her mother over money issues and lack of resources. She lived a painful life without her mother, and her elder brother dropped out from school. She stays close to her father and the people who are related to father. Presently she is pursuing her graduation and residing with her maternal grandparents, and she has no supportive environment and seeks educational support from the ngo's and she wishes to become a science teacher in her future.

Case VI:

Valathi is a 17 year old girl from Tirunelveli district. She hails from nuclear family and has one younger sister. Her father is agricultural laborer, and mother was house wife. The parent's solemnization of marriage was an arranged marriage. Over a disagreement about money, her father killed her mother when she was 12 years old, and she was devastated to see it. The crime gave her the head injury. This terrible thing happened to her and she will never forget it. Because of what happened, she doesn't talk to her father or his family anymore. She has no other supportive system in the society and lives with her maternal grandmother and receives the victim compensation fund from the government. She presently pursues her 12th class education and wishes to become a teacher in her future.

Case VII:

Ajish is a 20 year old male person from Kanniyakumari district. He is unmarried and presently pursuing his diploma in printing technology. He is

from a nuclear family and has two siblings-one younger sister and one young brother. His father was a laborer and mother was house wife, and the parent's wedlock happened through arranged marriage. By the time he turned eleven, her mother was killed by her father, due to the suspicion over her fidelity. He was psychologically disturbed to accept the fact. After the incident, he lived in hostel and deprival of mother's care affected a lot. He resides with his paternal grandmother at the moment and keeps cordial relations with his father and his father's relatives. He receives the victim compensation fund from the government, and he no other supportive mechanism other than the compensation and he wishes to become an owner of printing shop.

Case VIII:

From the Tirunelveli district comes a girl named Ramalakshmi, who is thirteen years old. Growing up, she shared a home with her two older brothers. The union between her working-class father and housewife mother was prearranged. She killed her mother at the tender age of nine after becoming entangled in a domestic dispute brought on by her father's extramarital affairs. Because their father was in prison, they were financially and educationally disadvantaged. She resides with her aunt from her father's side and has no contact with him at the moment. There are no social support systems in place to help her, and the government has not provided her with victim compensation funds. She aspires to be a teacher one day and is currently enrolled in eighth grade.

Case IX:

Mathesh is an 8 year old boy from Tirunelveli district. He is from a joint family and has one younger sister. Her father is a laborer and mother was a house –wife and their wedlock happened through arranged marriage.His father murdered his mother when he was just five years old because he was suspicious of her faithfulness. As a child, he was not able cope up with it. The deprived of mother's love was very painful to him.The relationship between him and his father and his father's family has completely gone. He presently studies 3rd standard and lives with his maternal grandmother. He has not received any victim compensation fund from the government, and no other supportive mechanism to him in the society. He wishes to become a police officer in his future.

Case X:

The boy from Ramnathapuram district, Mohammad Sahideen, is fourteen years old. There is just one younger sister in his nuclear family. His love marriage brought together his father, a hotel worker, and mother, a housewife. The father's mental illness made his son extremely possessive and suspicious; at the age of four, he murdered his sleeping mother. Without his mother's care and support, he was deeply troubled. The relationship he has with his father and his father's family is strong. He is a ninth grader at a private school and currently resides with his paternal grandparents. He has not benefited from the government's victim compensation fund, and there is no

social support system in place to help him. In the long run, he hopes to build a career in medicine.

Case study Analysis:

The cases pertaining to Uxoricide reveals that most of the parental homicide has taken place only due to domestic dispute which occurs within the four walls, a few domestic disputes have occurred due to alcoholic influences and rest of the cases are due to extra- marital affairs and infidelity issues. Both the offender and the victim in an uxoricide case are likely to hail from economically disadvantaged backgrounds, and the crime tends to occur among the most vulnerable members of society. The Children of uxoricide face several psychological problems and stay in extreme trauma due to the deprival of the mother's care. The parental incarceration also stigmatize the children of uxoricide. Most of the children are lost their mother during their teenage. Generally the children who witness the Uxoricide live in extreme trauma, when compared to other children of uxoricide. Following the incident, the majority of Uxoricide children live with their maternal grandparents and do not continue to maintain a relationship with their father. In very few cases, the victim compensation has been disbursed to the children of uxoricide, and no other support mechanism to the children of uxoricide exist in the society. Generally the children of Uxoricide lack financial and educational support to them.

Results and Discussion:

A Child of today will be the citizen of tomorrow. He is the future of the nation. If state does not protect a child from moral and social danger, there cannot be justification to speak about child welfare measures in the country. Even though there may not be a large number of Uxoricide children, it is important to pay close attention to them because they lack the resources that are vital to their healthy development and socialization. Therefore, in order to save the lives of children who have been victims of uxoricide, the criminal justice system should work to eliminate criminogenic influences in society. This will allow these children to grow up to be contributing members of society.

Conclusion:

Due to the fact that most cases of parental homicide occur as a result of domestic disputes or sudden provocation, the criminal justice system should not view uxoricide offenders as dedicated or habitual criminals. There is hope for rehabilitation among these criminals, unlike other murderers. Offenders convicted of uxoricide should be granted early release so that they can reestablish a relationship with their children, providing emotional support for the development of the child, and the criminal justice system should pay attention to the well-being of uxoricide victims' children by providing them with appropriate educational and institutional support. If the government of Tamil Nadu is serious about helping the victims' families, it needs to establish fair sentencing guidelines and speed up the distribution of victim compensation in uxoricide cases.