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Editor
Prof. M. Afzal Wani

School of Law
Fairfield Institute of Management & Technology
FIMT Campus, Bijwasan Road, Kapashera,New Delhi-110037
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Chairman's Message

It is a matter of immense pleasure to put the latest issue of FIMT Law Journal, April 2022 in the hands of our respectful and responsive readers. It is really quite appreciable that many of them are cooperative in suggesting themes for the conduct of research and publication through this journal. That is truly our valuable treasure and strength to grow further to fulfill the expectations of the country. The present issue is carrying entries on important aspects of legal education scenario with NEP 2020 in context along with pieces broadly relating to criminal law, constitutional law, human rights, law and gender, arbitration and other topics. These are providing ideas for national development, law teaching, advocacy, policy framing, legislation, judging, public administration, diplomacy, system-management, regulation of technology and artificial intelligence and social reform. I wish the journal to contribute to nation-building as a rich think tank by projection of well researched factual situations and viable ideas and recommendations.

I am grateful to the Patron, Editor and editorial board of the journal for their efforts in bringing out this issue of the journal. Further suggestions from anyone for improvement are most welcome.

Thanks.

V. K. Nangalia Bhardwaj,
Chairman, FIMT

From Editor's Desk

The FIMT Law Journal is a biannual peer reviewed law journal, an inspirational venture to create and provide space to law researchers and explorers for putting across the opinions and knowledge of law for the benefit of all and augmentation activities of creation and innovation. It is accordingly devoted to publication of articles on a wide range of legal issues including comments on legislation, case comments, book reviews, research reports, etc. Thus, through this journal we seek to craft a vital stage for building a body of high quality erudition on legal and allied issues. It is in this context that this issue of FIMT Law Journal addresses some of the most pressing issues related to policy and research on law and interrelated aspects, both on National and International level. Many academicians, scholars, and advocates have enriched this publication by contributing their papers.

This issue carries 17 papers that are in line with the focus of the edition. It outlines the ambitions of NEP 2020 with respect to legal education and draws comparisons in evolution of legal education and pedagogy over the past few decades. It offers several suggestions and potential solutions towards reforming the legal education. Constitutional perspective of formations in village community with reference to 73rd and 74th amendment is included in this issue. Examination in detail is dealt with to cover the Syrian legal framework around prohibition of chemical weapons suggesting stricter punitive sanctions incase of their use in a non international armed conflict. About ADR it analyses whether arbitral tribunals have the power to punish for contempt of court under Arbitration and Conciliation Act, 1996. One paper argues that the linking of Aadhar with the electoral roll will allow the state to intrude the privacy of its citizens and is violative of Article 21.

The impact of GST on the textile industry of Rajasthan is discussed taking into consideration opinion of experts and court judgments. About

social and legal combine, this issue explores whether India has sufficient legal recourse to address false rape accusations and if they are effective and suggest accordingly. And examines in detail the discrimination, subjugation and, violence inflicted on women in conflict areas. It also explores the role of international organizations in dealing with this issue. What entails in the right to marry and challenges with respect to inter-caste and inter-religious marriages is an important projection in the journal. From corporate law an analyses how SEBI regulates the Indian stock market, traces the recent reforms and suggests improvements has been given. The other inclusions are: the competence of legislations dealing with Tiger trafficking with the help of recent precedents; the liability of aviation industry towards its passengers in case of death mid-air, loss of baggage, and cancellation or delay of flights; if Indian laws like GST Act (2017), Hindu Succession Act(2005), Army Act(1950), Maternity Benefit Act(2017), Mines Act(1952), Transgender Protection Act(2019) are gender neutral or biased towards a particular gender; the concept of social justice in the Constitution and examines the intent and application of provisions of preamble, equality, non discrimination, equal opportunity and directive principles in Indian context; the power vested in Foreigner Tribunals under the constitution and issues and challenges in their working; and a comparative analysis of the sentencing policy in India with respect to sentencing policy in the United States of America and United Kingdom, especially the precedents set by Supreme Court over the past few years. I sincerely appreciate all the contributors for their efforts and heartily congratulate them for their endeavors in the development of theoretical and empirical legal research. I express my deep gratitude to members of the editorial board and peer reviewers whose deep knowledge and experience have helped bringing out this issue. Above all I am grateful to the Management of the Fair Field Institute of Management and Technology for their gracious support to all academic pursuit of the Institute.

Prof. (Dr.) Afzal Wani
Editor

CONTENTS

ARTICLES

NEW GENERATION OF LEGAL EDUCATION AND IMPERATIVES OF TIME CHANGES AND THE NATIONAL EDUCATION POLICY 2020

Prof. M. Afzal Wani[§]

Abstract

"Children are the future, educate them well and let them lead the way". Every few years a new education policy comes into effect. The last one was introduced in 1986 with plan of action in 1992. NEP 2020 is a significant shift over its predecessor. The author in the first part discusses in detail interlink between Sustainable Development Goals and education. The second part outlines the ambitions of New Education Policy, 2020 with respect to legal education. How a holistic evolution of pedagogy in legal institutions is required due a change in employment landscape. In the third part, author examines the origin and development of law as a career option, and the influence of scientific advancement & cultural history on its systematic growth through centuries. In the end, the author deliberates about how the law has been amended time and again to keep up with the scientific and technological advancements in the society and suggests that legal institutions should broaden the horizon of their teaching to include new disciplines like artificial intelligence, information technology, genetics, etc.

Keywords: NEP 2020, Legal Education, Scientific development, Legal Pedagogy, Law Universities.

Perspective

Education is basic to attain full human potential and development of an equitable, unbiased, reasonable, and just society, and creating an edifice

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for promoting nationwide progress and enlargement. The key to India's sustained way up and leadership at home and on the global juncture in requisites of economic augmentation, collective justice and equal opportunity, scientific progression, national integration, and cultural safeguarding is an earnest devotion to providing universal right of entry and access to quality education. The issue for cool consideration is that does the nation not require a universal high-quality education which is the primary and best way forward for awakening and enabling the rich talent of the country to endeavor for the multiplication of resources and their utilization for the excellence of the individual, the fairness in the society, the just order in the country, and the cooperation in the world. The future is for the nation which has the best of the talented youth in maximum proportions as may be counted at the global level. Thus, India, as is going to have the highest populace of young people in comparison to the nations world over in the next decade, the most important commitment of all governments should be to build capacity and to provide access to high-quality educational opportunities to all people in the county. They must have the vision and potential to determine and establish the future of India with globally notable standards. This is what constitutes the basic thought behind India's National Education Policy 2020.

Taken in a global context, the United Nations has come out with an ambitious agenda of Sustainable Development Goals (SDGs) or Global Goals which is a well-assorted collection of 17 mutually dependent global goals planned to be a proposal to realize an enhanced and more enduring future for all. They are included in the UN-GA Resolution called the 2030 Agenda or what is colloquially known as Agenda 2030.[1]

[1] These 17 SDGs are: (1) No Poverty, (2) Zero Hunger, (3) Good Health and Well-being, (4) Quality Education, (5) Gender Equality, (6) Clean Water and Sanitation, (7) Affordable and Clean Energy, (8) Decent Work and Economic Growth, (9) Industry, Innovation and Infrastructure, (10) Reduced Inequality, (11) Sustainable Cities and Communities, (12) Responsible Consumption and Production, (13) Climate Action, (14) Life Below Water, (15) Life On Land, (16) Peace, Justice, and Strong Institutions, (17) Partnerships for the Goals.

The SDGs pay attention to multiple cross-cutting issues, like gender, equity, education, and culture across all of the SDGs.

Though the goals are broad and interdependent, two years later (6 July 2017) the SDGs were made more "actionable" by a UN Resolution adopted by the General Assembly. The resolution identifies specific targets for each goal, along with indicators that are being used to measure progress toward each target. For example, it requires to ensure by 2030: [2]

1) that all girls and boys complete free, equitable, and quality primary and secondary education leading to relevant and effective learning outcomes;
2) that all girls and boys have access to quality early childhood development, care, and pre-primary education so that they are ready for primary education;
3) equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university;
4) substantially increase the number of youth and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs, and entrepreneurship;
5) eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples, and children in vulnerable situations;
6) that all youth and a substantial proportion of adults, both men, and women, achieve literacy and numeracy;

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[2] Sustainable Development Goals Available at: https://en.wikipedia.org/wiki/Sustainable_Development_Goals accessed on 26th May at 12.59 pm
List of Sustainable Development Goals , Tragets and Indicators Available at: *https://en.wikipedia.org/wiki/List_of_ Sustainable_Development_Goal_1targets_and_indicators 26th May at 12.59 pm*

7) that all learners acquire the knowledge and skills needed to promote sustainable development, including, among others, through education for sustainable development and sustainable lifestyles, human rights, gender equality, promotion of a culture of peace and non-violence, global citizenship, and appreciation of cultural diversity and of culture's contribution to sustainable development.

It further requires:

a) to build and upgrade education facilities that are child, disability, and gender-sensitive and provide safe, non-violent, inclusive, and effective learning environments for all;

b) to substantially expand globally the number of scholarships available to developing countries, in particular, least developed countries, small island developing States, and African countries, for enrolment in higher education, including vocational training and information and communications technology, technical, engineering and scientific programs, in developed countries and other developing countries;

c) to substantially increase the supply of qualified teachers, including through international cooperation for teacher training in developing countries, especially least developed countries and small island developing States.

The global education development agenda reflected in Goal 4 (SDG4) of the 2030-Agenda for Sustainable Development seeks to "ensure inclusive and equitable quality education and promote lifelong learning opportunities for all" by 2030.[3] Such a superior goal will necessitate a reconfiguration of the whole education system to prop up and advance learning for achieving all vital targets and objectives of the 2030 Agenda.

[3] See generally, 'Introduction', National Education Policy 2020.

NEP and Professional Education

The preparation of professionals should involve instruction in a discipline well-rooted in the ethic and significance of public function, practically achievable. The delivery of the curriculum and nurturing of the talent should be through critical thinking, an interdisciplinary approach, candid discussions, sharp debating, goal-oriented research, and true innovation.[4]

Professional education thus becomes an integral part of the overall higher education system. Stand-alone agricultural universities, legal universities, health science universities, technical universities, and stand-alone institutions in other fields, shall aim to become multidisciplinary institutions offering holistic and multidisciplinary education. All institutions offering either professional or general education will aim to organically evolve into institutions/clusters offering both seamlessly and in an integrated manner by 2030.[5]

Regarding legal education, the National Education Policy of 2020 provides:

> Legal education needs to be competitive globally, adopting best practices and embracing new technologies for wider access to and timely delivery of justice. At the same time, it must be informed and illuminated with Constitutional values of Justice-Social, Economic, and Political-and directed towards national reconstruction through instrumentation of democracy, rule of law, and human rights. The curricula for legal studies must reflect socio-cultural contexts along with, in an evidence-based manner, the history of legal thinking, principles of justice, the practice of jurisprudence, and other related content appropriately and adequately. State institutions offering law education must consider offering bilingual education for future lawyers and judges-in

[4] Clause 20.1, NEP 2020

English and in the language of the State in which the institution is situated.[6]

The policy, therefore elaborates that with the 'quickly changing employment landscape and global ecosystem', the children must not only learn but more notably '*learn how to learn'*. Change must be for less course content while improving more culture of critical thinking, problem-solving, and adopting and absorbing 'new material in novel and changing fields'. Regarding pedagogy and curriculum development the NEP 2020 clarifies: "Pedagogy must evolve to make education more experiential, holistic, integrated, inquiry-driven, discovery-oriented, learner-centric, discussion-based, flexible, and, of course, enjoyable. The curriculum must include basic arts, crafts, humanities, games, sports and fitness, languages, literature, culture, and values, in addition to science and mathematics, to develop all aspects and capabilities of learners; and make education more well-rounded, useful, and fulfilling to the learner. Education must build character, and enable learners to be ethical, rational, compassionate, and caring, while at the same time preparing them for gainful, fulfilling employment. The gap between the current state of learning outcomes and what is required must be bridged through undertaking major reforms that bring the highest quality, equity, and integrity into the system, from early childhood care and education through higher education".[7]

Law as a Career[8]

Studies in law have increased in the contemporary world with enormity both in magnitude and worth. It has become catchy for career and

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5 Clause 20.2, NE 2020

6 Clause 20.4, NEP 2020

7 See generally *Ibid.*

8 The proceeding part of the paper is published earlier also. Being reproduced only for the benefit of students and putting in context to NEP 2020; see Vol. III Nos. 1 & 2, *Indraprastha Technology Law Journal*, pp 97-110 (2014) and *The Sunday Express* on 1st April 2016.

individual grace as the first option for many brilliant students who earlier used to look for studies in medicine and engineering. Largely the legal education system has been restructured, in the world in general and in India in particular, to meet the emerging challenges to the profession in ever-widening areas of operation due to fast-changing developments in the globalizing world caused unabatedly by technology and trade. Like an active frolic, to a keen eye, every moment gives a new view of its premises. It turns with time and swings with space. Legal studies have turned into a compact program for promoting skills in perusal, analysis and investigation, systematizing and extensive ordering activities, planning and realizing goals, predicting and preparing for challenges, and promoting communication and confidence.

The justice delivery system, with the growing complexity of life, is no more a calm shore of the sleeping ocean of society. It is full of *Hungama-e-Hayat* (the tempestuous panorama of life) with hope and dismay at large together. The nature of disputes in courts is not now the few patterned traditional *Diwani* (civil) and *foejdari* (criminal) cases. The enormity in kind and extent of the conflicts and cases has resulted in the creation of many new kinds of courts, registration offices, fora, tribunals, commissions, committees, authorities, investigative agencies, treatment mechanisms, and so on. This is in addition to the local customary mechanisms of conflict resolution which continue to supplement the formal systems. From personal relationships to trade, travel, business, profession, industry, property, service, sustenance, or entertainment, nothing is in any situation free from friction in society and the implications of the law. The tendency of the people to invoke the law in all matters of differences has added fuel to fire.

The state is under a heavy burden of managing its affairs of multiple natures and dimensions. Security has become a big issue. Old trust-based models of administration do no more work. These are losing space to new rights base models of governance. This also has opened

up a door for specialized studies in management and governance. Further strides in the form of e-governance and e- management have resulted in the need for persons skilled in law with due awareness about the use of technology in management and governance.

The people in the society can no more afford to manage their day-to-day multi-challenging affairs without the necessary awareness of the law and legal system and support from civil society. It is a pressing area where the service of law must be available to all to maintain the life of the individual and the health of society. In any case, the ocean of law has over whelmed life and people have to be largely educated and trained to navigate in this ocean to make sustenance of life possible with harmony and dignity.

Thus there is a huge requirement for law professionals to manning the various wings of the judicial system, administration, law enforcement agencies, registration offices, tribunals, commissions, committees, authorities, investigative agencies, business organizations, corporate affairs, civil society conglomerates, social activities concerns, diplomatic assignments, public offices, public institutions, common affairs groups, political parties, and media. There are many more increasing areas where lawmen will be in extreme demand.

Contemporary Imperatives

Law embraces the whole gene kind and runs through the gamut of all human activities maintaining a constant flow in the form of statutes, regulations, orders, judicial decisions, and other legal processes, Being a process in itself law is a reflection of attitudes and behavior of people and generally takes a course to mold and control the same. Like an active frolic, to a keen eye, every moment gives a new view of its premises. It turns with time and swings to giving a new view of its premises. It turns with time and swings with space. Its study, therefore, is not a mere fact-finding exercise rather it is a compact program of

perusal, fact ordering, fact systematizing, predicting, and communicating. Being largely an exhaustive exercise of intelligence the effectiveness of legal education will much depend upon its rationalized character and as a functional science. The test of learning law demands much care because its expressions and language are always deficient, leaving big gaps to be filled. The least that a person with legal studies must be capable of is finding the law and interpreting and understanding its process of application and enforcement.

Looking at its history the motivation and content of legal education have generally been economic, political, and individualistic. Rationality and the common good have been the late medieval factors. Greater scientificity is the modern base on which law stands to flourish and grow as a science. This study shows the manner these pedestals of law have controlled legal education and how the interaction of science, technology, and law is influencing the restructuring of legal education now. The study is expected to be helpful in the initiation of a new era in legal education suited to the 21st century.

It is generally believed that nothing was ever done "until everyone is convinced that it ought now to be done, and has been convinced for so long that it is now time to do something else."[9] Whatever is the thinking of people now, scientific developments have already made serious intrusions into the field of humanities and law, leaving no room for receding or mere restraining. It is reshaping the law and demands a restructuring of legal education both in method and content.

An Evolutionary Retrospect on Legal Education

The perception of legal education we possess has its origin in the specific historical events and attitudes of the founders of legal thought. In its narrow sphere, it is usually tied to a nation's history and culture. The

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[9] Cornford, F.M., *Microcosmographia Academicas, p. 2, (5th ed., 1953).*

dominant culture of legal education at present has its roots in the study of law in continental Europe. The university tradition in legal education began in Europe in the twelfth and thirteenth centuries in two universities, the University of Bologna and the University of Paris. Bologna provided instruction in Roman law and Canon law. The University of Paris, which was influential for its performance in theology and liberal arts, was influential for its organizational structure. In England, the dominant avenue to legal careers remained apprenticeship and not law school education. The American universities, by the end of the nineteenth century, adopted elements related to goals, methods, and structure of legal education from Europe, especially Germany with influences from Roman and Civil law. So modern American legal education is a part of the old university tradition.[10]

As regards external influences, in a society one can always trace the relationship between university legal education and dominating spheres of influence, like religion, state or economy. Every such sphere aims at controlling and thereby making a benefit from universities and legal education. It will, however, not be correct to assume that universities do always maintain contact between their education in the faculty and the imperatives of the dominant spheres.

In the twelfth century, a need to combat externality was felt by the universities and they began the formulation of evolving means of corporate individual academic freedom. This was, of course, crucial to the growth of universities as a separate estate but law faculties met the political, religious, and economic pressures from the state and church by providing them the officials or jurists capable of promoting their respective interests as well as the maintenance of order and further values. Law faculties in

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[10] David S. Clark, "The Medieval Origin of Modern Legal Education: Between Church and State", *American Journal of Comparative Law,* Vol. 35, No 4 (1987), pp. 653-719.

this situation developed and transmitted new ideologies about law and government and prescribed the methods that modeled the culture. Making advancement over the earlier theoretical and theological defense for monarchical, power, emperor or Pope, the jurists and philosophers constructed highly complex and efficient theories that humanized the state power resting or rational argumentation.[11]

Legal studies at Bologna favored the supremacy of the imperial over ecclesiastical power. The emperors helped to establish Bologna as the center of Roman law studies to attract thousands of students from throughout Europe, including Germany and England. The lawyers trained in Bologna promoted rationalism and labored to reduce the role of the church in government and worked to expand the authority of other political entities. A staff of educated notaries, attorneys, judges, and accountants from the thirteenth century worked at the imperial chancery to process the flow of petitions directed to Hohenstaufen emperors. Other graduates worked as legal advisers, notaries, or judges to cities, kings, princes, and lords of manors. Legal training facilitated the task of legislating, administering, and providing ideological support for policies. The University of Bologna became famous through its teachers who taught and wrote about Roman and Canon law and it became the norm in Europe until the modern era. It may, however, be noted that at Bologna the primary force was that of the students and student activity.[12]

In Paris, another university evolved whose structure developed mainly from the activity of teachers. This became later the dominant model in northern Europe.

The University of Paris at the end of the 12th century offered civil and Canon law besides other disciplines of theology, medicine, and liberal

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[11] Tierney, *The Crisis of Church and State* – 1050-1300, p.2 (1964).

[12] See *Supra* note 2.

arts. Pope Honorius III banned the study of Roman law in Paris in 1219 to protect the privileged position of theology in Paris and counterbalance the secular spirit in Bologna. French King Philip II August supported the move because he felt that Roman law, with its affinity to German imperial claims, had endangered the supremacy of French customary law in Parisian courts.

Nevertheless, some Roman law after 1210 probably was mixed with instruction during extraordinary lectures in Canon law. The papal prohibition on Roman law was later repealed by French kings who maintained it with some evasion until 1679.

As regards the universities' political importance according to the medieval eulogists the University of Paris was the third of the great European powers. As a center for theology and philosophy, it was France's equivalent to the Italian papacy and the German empire. Parisian scholars were generally cosmopolitan in outlook.[13]

Evolution of the Present Structure

The church completed its official compilation of canon law with the Constitutions Clementinae in 1317. Also after 1300, no imperial decrees were added to the Corpus-juris civils. The successors of Emperor Frederic II preferred to consolidate power in Germany rather than deal realistically with the empire as a universal polity. Nascent states of England, France, and Spain developed thereafter. Italian cities and German principalities developed a political structure with increasingly less interference from these universal polities. Just as the French Monarchy gradually increased its control over the University of Paris, other rulers saw it in their interest to provide for and to control universities. Thereafter many princes and city leaders founded universities to have

[13] *Ibid.*

centers where lawyers could be trained to assist in the political development and administration of their regimes.

In the 14th century, the universities became involved with the aristocratic element. Even before that many doctors of law demanded to be called lords rather than masters and doctors. Learning and Knighthood became complementary pillars of society.[14]

Scientific advancement had a great impact on intellectual traditions in general and legal thought in particular. Under the influence of the growth of natural sciences, thinkers like Auguste Comte (1798-1857), and Emile Durkheim (1822-1903) developed a new scientific way of studying society called sociology. Legal thought also passed through a series of investigations with different approaches at the hands of Jeremy Bentham, John Austin, Hans Kelsen, Von Savigny, Henry Maine, Roscoe Pound, and others. Their views are not without influence from theories developed under social sciences and natural sciences. Intelligibility, rationality, reasonability, and function are now the controlling factors in the interpretation and enforcement of laws. Thus, the modern legal system and their education having developed from our medieval models of Bologna and Paris have obtained much scientific color. Legal education is least controlled by the 'state' or 'market'. This has turned into an empire of rationality and scientificity. Legal education cannot now be complete without an experience and observation of interactions between science, technology, and law. Many areas of interaction between them have already become well known.

Areas and Extent of Interaction and Influences

The interaction between science, technology, and the law does not exist in one way. It has attained many dimensions. The extent of interaction

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[14] *Ibid.*

also cannot be easily measured, because it has developed many parameters. It extends from genetic manipulations to space rummaging and from evidentiary mechanisms to conflict management. It will be apt to look into some specific instances.

Since our age is termed as the age of science we in our lives passed through the atomic age, electronic age, space-age, the computer age, and now the biotic age. Biological sciences have shown tremendous development. Secrets of the atom are now much disclosed. The social and behavioral sciences have also shown their dominance. There is a pressing need to relate science and technology to law. The biological era with amniocentesis, cloning, and *in vitro fertilization* as its leading marks is being termed as an era of nightmares. Information technology is now in every expression of human feeling thinking and action influencing every movement and step forward in human life. This has emerged as a big challenge to the whole body of law in all its jurisdictions.

Genetic technology raises many legal and ethical questions. In 1959 the Italian scientist Dr. Danielle Petrucci successfully effected test-tube fertilization but the Pope condemned his work and his result was destroyed. It is a piece of old news now that in vitro fertilization babies have taken birth. They are healthy and strong. The consequences of biological experimentation need a proper appreciation along with the big question mark (?) it has placed in front of our traditional, religion-based, and customary family laws relating to marital status, legitimacy, and succession. The ethical support for these laws has also weakened which is creating enforcement problems. Questions of liability may also become important when an abnormal child is born.

In the 1990s, the laboratory that produced the cloned sheep Dolly has said that it had for the first time used a similar technique to produce a lamb carrying a human protein gene. News of the feat raised concerns about the possible cloning of humans and generated widespread ethical

debate.8 President Clinton, the then, USA warned scientists against "trying to play God" and charged the National Bioethics Advisory Commission with setting limits on research. The commission has recommended human cloning be banned. Mere experimentation and the capability of cloning also bear serious legal implications. The process of cloning is said to bear the advantage of producing proteins useful in human medicine, to treat burns, etc., but it raises vexing questions about the "soul", 'behavior' and 'identification' of individuals.[15]

The questions of 'surrogacy' are also with any legal ramifications. Womb renting incident in India by a woman in the 1990s, namely Nirmala, had woken everyone up to all the possible social, ethical, and legal complications of the new reproductive technologies. Such technologies leave scope for many disputes and call for laws that set down procedures for all aspects of the process. The recent Bill of 2016 prohibiting commercial surrogacy has invoked mixed responses and the debate is going on.

The use of genetic technology for having a better progeny can also create many problems with rule of law and the sanctity of human rights. Legislation has already taken the ground on the use of abortion techniques and amniocentesis.

In the sphere of criminal law, modern genetics has revealed the impact of genetic structure on personal character and behavior. This development affects the traditional basis of legal responsibility. Subjective factors of individual behavior become more important in cases of rape, murder, and suicide. On similar lines, insanity may not be treated as a good defense in all cases.

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[15] *The Times of India*, July 26, 1997 9 *Id.*, August 8, 1997.

Science and technology have produced sophisticated devices which can enable organized agencies to pry into the private lives of individuals. Electronic surveillance lays bare all men and women. What kind of protection they should law afford in these cases of intrusions into privacy is a significant question.

In the field of criminal law and law of evidence, many other matters have gained importance which includes sudden and unexpected deaths in infancy and the pattern of post-neonatal deaths; badge enamellings; abnormal fundal appearances in cases of poisoning by cyanides; distribution of "trace elements" in human hair, fingerprints; Gm and Ivan Grouping of bloodstains and differentiation of toothed marks; artificial insemination and the question of a dead donor's sperm.[16]

In controlling organized crime technology has a major role to play. There are only three traditional forms of evidence-witnesses, forensic exhibits, and confessions. Either there are no direct witnesses or they are too frightened of either retribution or the ordeal of court appearances. Forensics is less and less available owing to the greater sophistication of anti-forensic measures often as a result of what they have learned from disclosures in other cases. Confessions are rarely obtainable. The police have, therefore, to contemplate entirely new strategies based on intelligence techniques that can allow a reasonable forecast of what will happen next and convert invasion of conspiracies to plan commission.[17] If the edge against organized crime is lost the justice system will become a sideshow. Due to the public interest immunity policy, the use of technology has become of added importance.[18] It can create space and

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[16] *R.* v *Human Fertilization and Embryology Authority, ex parte, The Times,* Law Report, 18 October, 1996.

[17] David Phillip, *The Seventh Veil, MED. Sci. Law* (91997), Vol. 37, no 2, pp. 98-104.

[18] *Khan* (1996) 3 WLR 162; R. v. *Judith Ward* (1993), WLR 619.

logic for judicial intervention and timely capture of evidence even before the actual commission.

The question of assessing damages is not now possible without scientific aid and technology.[19] Negligence is no more a simple question to be determined without scientific expertise.[20] About the use of computers, besides so many known problems, novel questions also arise when courts have to declare a disc containing an obscene article for publication as a "copy of an indecent photograph".[21]

The matters which have now been agitated before courts involving technological know-how for their understanding include – "averaging alcohol levels",[22]doctor's negligence or providing deficient services,[23] getting impregnated by a person whose vasectomy had failed,[24]catching diseases at workplaces,[25]environmental pollution, problems of sex workers, drug addiction, gender justice, the effect of involuntary intoxication on criminal intent,[26] the definition of a firearm,[27] organ transplantation and DNA testing in rape and legitimacy cases[28] and so on.

A new Intellectual Property Regime has ensued claiming the attention

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19 *Smolden* v. *Whiteworth and another, Med. Sci. Law* (1996), Vol. 36, 274.

20 *Pickford* v. *Imperial Chemical Injuries* Plc, *The Times Law Report* 31 August, 1996.

21 *R.* v. *Fellow* and *R.* v *Arnold, The Times, Law Report,* 3 October, 1996.

22 *DPP.* v. *Welsh, The Times, Law Report* 18 November 1996.

23 *McCandles* v. GMC, *The Times Law Report,* 12 December, 1995.

24 *Good Will* v. *British Advisory Service*, *Independent, Law Report,* 19 January, 1996.

25 *Hancock* v. *Turner & Newall, Daily Telegraph,* 28 October, 1995.

26 *R.* v. *Kinston,* The Times, Law Report, 22 July, 1994.

27 *Med Sci. Law* (1987,) Vol. 27 220; Flack v. *Baldry*, The Times Law Report, 7 November, 1987.

28 *R.* V. *Deen, The Times Law Report,* 10 January, 1994.

of policymakers and legislators to ensure the protection of their rights in Intellectual Property likely to be infringed any time using information and communication technologies and biotechnology through piracy and unauthorized copying for profit.

Law, therefore, has not remained unaffected by the tremendous advancement made by science and technology. If the traditional methods of law-making and law teaching are retained a lawyer may fail to fulfill the demands of his profession or he has to undergo fresh training after spending his precious days of learning at a law college or a university.

New Model for Legal Education

The progress made by science and technology has made it incumbent to have fresh scrutiny of laws to make necessary changes and make them adapt to the changing situations. Without such changes, the law cannot serve the needs of society. In 1996, it was observed: "After some years of further development many of the existing laws will prove inadequate and useless. A revolutionary change is needed, not only in the process of law-making but also in the process of law teaching. It may not be possible for a lawyer or law student to have the total expertise of a scientific expert it is also not possible for him to maintain isolation between law on one side and science and technology on the other. Requirements of justice demand a fair deal of technical know-how from lawyers so that they can form opinions and argue on matters involving scientific and technological complicacies. A lawyer cannot understand most of such technical issues without having received courses of study during his education and training. Thus legal studies which are now being carried on with integration with some social sciences need to be made more fruitful and viable by supplementing them at least with some short courses in science and technology". Today we find that we have brought a revolutionary change in the process of law-making and also in the process of law teaching. It is not now possible for a lawyer or law student to

have the total expertise of a scientific expert but it is also not possible for him to maintain isolation between law on one side and science and technology on the other. Technology has already become a significant component and vehicle of legal education, profession, and the justice system. To run the system of justice and requirements of performing the task of justice demand a fair deal of technical knowhow from lawyers and judges so that they can have access to relevant information to form opinions and argue on matters, ordinary as well as those involving scientific and technological complicacies, as expected now with better efficiency and quality. A lawyer cannot understand most of such technical issues without having received courses of study during his education and training. Thus legal studies which have been carried on with integration with some social sciences need to be made more and more fruitful and viable by supplementing them with required courses in science and technology. Laws relating to crime, business, governance, and enforcement of rights can no more be studied, without the integrative studies of the use of the technologies, which are operational in these areas.

Science and technology can also help us in preserving legal materials and in making them more easily and speedily available. Computers and other devices of digitization can make out teaching and study programs easier enabling us to save time and energy. Given this, the study of science and technology as a component of legal studies will not be an additional burden upon students and trainees. It will be rather a feast to be enjoyed with due content of vitamins. The subjects that need added consideration are genetics, in vitro fertilization, amniocentesis, AIDS, abortion, narcotics, forensics, intellectual property rights, strategic intelligence techniques, the general process of treatment of patients, medical testing, ecology, environment, and bio-diversity. A proper study of international law and its enforcement is not now possible without knowledge in sciences and technology. During instructions in these matters, students must be trained not only to have access to the materials on these laws but also to

evolve legal principles and doctrines to face new questions of procedure and substance and challenges ahead. Courses for law degrees can be shaped after due consultations with experts in the field of law as well as those of science and technology. This can be possible only by an integrated approach being adopted for the purpose.

To sum up, the law courses must, inter alia, include the following areas for study:

1) Artificial intelligence;
2) Genetics and genetic manipulations;
3) Techniques of abortion and sterilization, contraception, artificial insemination, amniocentesis;
4) Corona; Omicron, AIDS;
5) Narcotics;
6) Forensics and strategic intelligence techniques;
7) Ecosystem and biodiversity;
8) Health care systems and treatments of patients;
9) Use of computers, internet, and any other devices;
10) New communication systems used in commercial transactions;
11) Social media;
12) E-Governance;
13) Peace studies.

The list can never be exhaustive but caution must be observed that these subjects must not only be adjusted in law courses but be taught in such ways that these can enable a judge and lawyer to use the knowledge gained from them in his actual practice of law. The purpose is to make the justice administration system more accurate than turning a lawyer into a biologist or a physicist.

Conclusion

To sum up it may be pointed out that the present model of legal education has developed from its medieval base in the twelfth century with its own kinds of dominant influences from 'state', 'market', and the 'church'. Later it advocated and advanced with doctrines of academic freedom and contributed much to the development of civil liberties, human values, administration of justice, and maintenance of peace and order. In the present century, it accepted the influence of scientific and technological advancement. Now because of major strides made by science and technologies and their direct interactions with the law, there is a need for revolutionary changes in legal education in universities in the light of the discussions made in this paper above to include much of ethics, experiential learning, trans-disciplining, peace prospects, stress eliminating and comfort assuring.

FORMATIONS IN VILLAGE COMMUNITY: CONSTITUTIONAL PERSPECTIVE

Dr. S. P. Singh[1]

Abstract

The present work entitled formations in village community. Constitutional perspective is related with the study of distortion of equality at theoretical level as well as at applied level. To understand the concept of equality, views of different thinkers at different point of historical times have been examined from Plato to Gandhi. Specific reference of liberal thinkers have been examined in the context of contemporary society which has a different socio, economic and political environment. Inequalities and disparities have been identified and generalised by taking the data from a small village of district Meerut. Qualitative data have also been taken into account in determining the gravity of the situation. Empirical observation taken from daily information availed from primary and secondary sources, have also been the basis of our conclusions. Since we have looked at the ground socio, economic situations from constitutional perspective, we have tested the society from the point of view of values referred in the Preamble of Indian Constitution. Values of equality and justice are the torch bearer to measure the agony of the people who were in the grip of inequalities and disparities of basic needs of life. We have also referred the impact of 73 rd and 74 th constitutional amendment as the effort to empower those sections of society who had been a neglected lot for a long time. In our concluding remarks, we have underlined the need to evolve minimum and maximum for a common man with regard to basic need and to build the egalitarian society. Such

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formations are necessary to build a society based on legitimacy and democratic values.

Keywords: Panchayat, 73rd Amendment, Constitution, Preamble.

Introduction

Indian society had been fragmented in different socio-economic, cultural and political structures in which man and humanity had been the casualty to a larger extent. Essentials of life had been denied to a large section of the society while microscopic class had been found rolling in abundance. This kind of society never got the harmonious relations among its members. It is not that resources were not adequate but it was concentration of resource in few hands which created unnecessary disparities among different classes of the society. In different phase of Indian history such types of man-made grave disparities and inequalities are found to be created. It is because of such situations; the genuine political community could not be created. Every part of the history transmitted its negative legacies to next part of history. We see such type of relationship in Mughal period and British period. In all eras, large sections of society are found deprived of basic needs of life in the presence of abundance resources of life. Unfortunately, in independent India also we find the reflection of history in Indian society in this regard.[2]

At the time, when we are celebrating Azadi ka Amrit Mahotsav, it becomes our responsibility to study and diagnose the socio-economic structure of the present society and to know how we could bring the change in life of common man with the policies and programmes of the central governments and state governments and how they could have

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[2] Shubhangi Rathi, "Gandhian concept of village development and India's development policy. Available at: Gandhian concept of village development and India's development policy | Gandhi's Views | Articles on and by Mahatma Gandhi (mkgandhi.org) (Last accessed on 12 May 2022)

fulfilled the promises of their election manifesto and commitments of the constitutional values. To build the egalitarian society, was the main thought of all the commitments made at constitutional level and political level, but the ground reality of contemporary India reflects the negation of such commitments. These patches of glaring man-made disparities and inequalities look like formations.

Objective of the Study

The objective of this study is to specify different kinds of disparities pertaining to equality which we have described as formations. It is true that several meaningful socio-economic measures have been taken at administrative and policy making level and they have been helpful in transforming life in India, yet lot of grounds are needed to be covered because fact remains that these measures are not only insufficient but they have become the causes of aggravating the inequalities in Indian society. In this study we will try to reflect the ground reality of Indian society taking some important issues of socio-economic life as variables and relate them with normative view of the constitution.

Further, instead of describing conventional aspect of inequality, we have taken up the distortion of equality at human level. Logically we have considered differences of intake of food by the people of different classes.

Conceptual Clarification

The term formation may appear to be peculiar one in social sciences because it is a biological concept indicating a particular undesirable development in human body. It is therefore necessary to explain the concept of formation in the sense it is being used here. Its liberal meaning, as defined by the oxford dictionary, is a manner in which a thing is formed. It appears to be the result of a process.[3]

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[3] Constituent Assembly Debates, Vol. 7 (Jan. 4, 1949).

In fact, here we have dealt with inequality in all walks of life, which has been affecting the human dignity. Different types of formations (Inequalities) seen to be the result of unconscious and unplanned development. These formations appear to be scattered in the form of patches in rural as well as urban society as some kind of symptoms of some fatal disease as found in human body and plant body. There are cancerous out growth in the society. Different kind of inequalities are the root cause of growth of these formations which are eating the vitals of the society. To diagnose these formations and to suggest some remedial measures, it is desirable to study equality and inequality in broader perspective and multilateral aspects.[4]

Inequality constitutes one of the most significant formations in the society. Hence, it has engaged the attention of great thinkers and common man in all ages. The concept and situation of inequality is as old as the history of civilisation itself. It has been found, manifested in different forms and degrees in all ages. Natural differentiation of sex and colour have to be accepted but what is targeted and objectionable is the man-made inequality in the form of formations. Equality has also been defined differently by different thinkers in different phases of history and in different socio-economic environment. The term equality has been termed with different connotations.

In general, the best state of human nature is that in which, where no one is poor and no one desires to be richer and urging that social policy should be directed to promote equality in the society.

Equality does not mean identity of treatment, equality does not even imply identity of rewards for efforts, equality broadly speaking is a

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[4] Formation of Village Development Council : A Faciliator's Mannual, *WASTAN Publishers* (2000).

coherence of ideas, each one of which needs special examination. Undoubtedly, it implies fundamentally a revelling process.

1. Equalitythereforemeans, first of all, absence of special privileges. Equality is not largely a problem in proportions.
2. Equalitytherefore, involves upto the margin of sufficiency and identity of response to primary means.
3. Plato's rejection of equality as preferred values has had its echo throughout western history.

Tocqueville describes equality as threat to democracy. Freud elaborates psychological arguments to show that equality is a myth. Burns says that equality is a scientific impossibility and draws a sharp line between natural and unnatural morbid conditions.

On the other hand, Montesquieu and Voltaire champion the cause of equality as the basis of social organisation. Utilitarians uphold the principle of equality. Similarly socialistic thinkers accord high value to the principle of society.[5]

All modern, social and political liberal thinkers seek to build the present society on the principle of equality. Gandhi Ji also accepted the Marxism formula toeach according to the need. To build equalitarian society was the ultimate objective of Gandhinian philosophy. It can be safely said that in spite of negative and distorted view of equality in large part of the history. Liberal view based on humanitarian values has become most acceptable and demanded view of equality in contemporary society.
Constitutional Perspective of Indian Society

India's constitution is based on Liberalism seeking to build an egalitarian society. Most of the constitution makers were followers of

[5] Herald J. Larki, grammar of politics, George Allen and Univin Ltd., London, 1967, P 154

liberal values which is reflected in the Preamble. Chapters of fundamental rights and Directive principles of state policy. The decisions of Avadi sessions of Congress became the basis of building socialistic patterns of society.[6]

Fraternity, equality, liberty and justice are the main prominent constitutional values which are sought to be achieved by the process of governance and administrative justice. Planned economic development and introduction of grass root democracy have been main institution to restructure Indian society to achieve the constitutional goals.[7]

In this study effort has been made to test and examine these constitutional values at the ground level. Data collected from the village and empirical observations have been used to draw some conclusions.

Empirical View of the Universe of the Study

Data collected from the small village of district Meerut regarding very basic human condition of food, cloth, house and land have given us vision to look at the present Indian society. Empirical data collected from different sources qualitatively and quantitatively verify the fact that Formations (undesirable situations) are still available in present times i.e., 2022. Even today more than 30% people live below the poverty line, we see the variations at income level and consumption level among different classes. We can say that on the face of planned economic development number of classes have been increased from destitute class to microscopic state class. We see inequality in different variables from state to state and region to region. Today the whole of India is our universe of study and research. We see inequality in per capita income, per capita land holding, per capita housing and per capita clothing. Still,

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6 C.A.D. VII, pp. 520-527.

7 Pandey, J.N., The Constitution of India, Central Law Agency, 50th Edition, 2013.

we see the situation where people live in worth and we see the people living in abundance. Both the situations are not good for a healthy society with harmonious relations.[7]

Today is our considered observation that situation which prevailed 35 years earlier in a small village, is still visible in mother India in 2022.

It is not that conscious effort is not made, it is also not that situation is not shifted and also it is not that resources are not multiplied but the lacking has been at the level of distribution and implementation of policies. Distributive justice has been the casualty at the hands of policy implementation.[8]

Impact of 73rd And 74th Amendment

Credit needs to be given to P.V Narsimha Rao's who brought 73rd and 74th Amendment introducing one-third reservation for women and backward caste in local, urban and rural institutions. It gave new hope to women for participation in decision making process in local bodies which are grass root democratic institutions. Several studies done by myself have revealed the fact in spite of tardy pace and obstacles of man dominated society, women have taken up the place where they had been denied in the history. In every local election, state assembly election and the upward trend of increase in number and effective participation of women at political as well as administrative set up. This also has affected the structure of family units.[9]

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8 Nath, Akshaya, National Panchayati Raj Day: Here are few things that you need to know about Panchayati Raj,SaddaHaq (last visited 15 March, 2017).

9 P. L. Mehta and Surender Singh Jaswal, Genesis of Panchayati Raj philosophy in India: some reflections, http://dspace.cusat.ac.in/jspui/bitstream/123456789/10861/1/Genesis%20of%20panchayati%20raj%20 philosophy%20in%20India_%20some%20reflections.PDF, (last accessed 17 May 2022)

Conclusion

On the perusal of all the studies done at different phases of history about the understanding of the concept of equality, it becomes necessary to redefine equality with its new ingredients keeping in view the human and constitutional perspective in mind. We will have to build a new society with reasonable and acceptable minimums and maximums at the possession level as well as the consumption level. The parameters should be decided by keeping dignity of man in mind to build an egalitarian society.

[10] Subrata K. Mitra, Making local government work: Local elites, Panchayati Raj and governance in India, in Atul Kohli (Ed.). The Success of India's Democracy. Cambridge: Cambridge University Press.

ARBITRAL TRIBUNALS AND THE POWER TO PUNISH FOR CONTEMPT

Ravinder Aggarwal[1]

Abstract

The power to punish for contempt is a weapon conferred on the constitutional courts, though seldom used, to ensure that the majesty of law and the administration of justice are preserved.

These are of paramount importance to ensure that the trust in the institution of judiciary is not disturbed and our society continues to be governed by the rule of law. Arbitration as a mode of justice delivery system has been conceptualised and evolved to ensure speedy and effective administration of justice in private disputes. Arbitral Tribunals, thus, discharge the inherent judicial function of the state - namely dispensation of justice and preservation of the rule of law. Deliberate disobedience of the orders passed by the Arbitral Tribunals or otherwise obstructing or scandalising their proceedings surely has the potential to disturb the sacred foundation of the rule of law. Whether, an Arbitral tribunal, constituted under the Arbitration and Conciliation Act, 1996, has any power or authority in law to ensure that its dignity is not undermined, is the question that this article proposes to answer. This article proposes to analyse the scheme of the Arbitration and Conciliation Act 1996, as also various judicial precedents on the issue, and an attempt would be made to answer the question.

Keywords: Arbitral Tribunals, Awards, Arbitration, Mediation, Alternate Dispute Redressal Mechanism

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Introduction

In a constitutional democracy like ours, where the Constitution itself delineates the respective spheres of the three organs of the State namely the Parliament, Executive and the Judiciary, it is the Judiciary which has been entrusted with the unholy task of ensuring that each organ of the State works for the welfare of the people in their respective spheres; to ensure that the rights of an individual or not trampled upon and to come to rescue when his or her right is pitted against the power of the State. Given the nature of duties which the superior judiciary is called upon to exercise, it has always been deemed to be vested with the inherent power to punish for contempt[2]. In our constitutional scheme of things, this inherent power is given constitutional recognition under Articles 129 and 215 of the Constitution[3]. In order to regulate the exercise of this 'vague and wandering jurisdiction[4]' to punish for contempt, the Parliament enacted the Contempt of Courts Act, 1971.

Section 2(a) of the Contempt of Courts Act, 1971, define 'contempt of court' to mean "civil contempt or criminal contempt. Civil contempt means wilful disobedience to any judgement, degree, directions, order, writ or other process of a court or wilful breach of an undertaking given to a court"[5]. Criminal contempt means "publication whether by words spoken, or written or by signs or otherwise, of any matter, or the doing of any act which:

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

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2 E.M SankaranNamboodripad V. T. Naryanan (1970)2 SCC 325

3 Articles 129 and 251 confer on the Supreme Court and High Court, respectively to punish for contempt

4 ShreyaSinghal V. Union of India (2015) 5 SCC 1

5 Section 2(b) of the Contempt of Courts Act, 1971

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner[6]''.

Section 10 of the Contempt of Courts Act confers power on the High Court to punish for contempt of any court which is subordinate to it.In the context of the Arbitration and Conciliation Act, 1996 (for short the Arbitration Act) the expression 'court' has been defined in section 2(1)(e), to mean the principal civil court of original jurisdiction in a district including High Court in exercise of its ordinary original civil jurisdiction. It is no longer *res-integra* that an arbitral tribunal is not a court within the definition of 'court'as given in section 2(1)(e) of the Arbitration Act[7]. Though, an arbitral tribunal is not a court, it undoubtedly adjudicates private disputes, between parties. The award of an arbitral tribunal is enforceable as if it were a decree of a court[8]. Thus, notwithstanding that an arbitral tribunal is not a court, it is very much part of the justice dispensation mechanism. If the stream of justice is polluted, the Contempt of Courts Act 1971, comes to rescue, to preserve the rule of law, which is the bedrock of our constitutional democracy. Would the Contempt of Courts Act 1971, come to rescue if the stream of justice flows not through the formal set up of courts, but through an arbitral tribunal, is the question, which this article proposes to analyse.

Enforcement of Interim Orders – Earlier View

Wilful disobedience of any judgement, degree, direction or order passed by a court tantamount to civil contempt[9].An Arbitral Tribunal, under Section 17 of the Arbitration Act, has been conferred with the power to pass interim orders. In the context of enforceability of interim orders passed by an Arbitral Tribunal under Section 17 of the Arbitration Act,

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6 Section 2 (c) of the Contempt of Courts Act, 1971

7 Union of India v. Ambica Construction, (2016) 6 SCC 36

8 Section 36 (1) of the Arbitration and Conciliation Act, 1996

9 Section 2(b) of the Contempt of Courts Act, 1971

the Supreme Court in *Sundaram Finance Ltd V. NEPC India Ltd*[10] observed that though Section 17 gives the arbitral tribunal power to pass interim orders, the same cannot be enforced as orders of a court.

The aforesaid view was again reiterated by the Supreme Court in *Managing Director, Army Welfare Housing Organisation V. Sumangal Services Pvt Ltd.*[11], wherein it was observed that under Section 17 of the Arbitration Act,no power was conferred upon the arbitral tribunal to enforce its orders nor does it provide for judicial enforcement thereof.The necessary concomitant of the observations of the Supreme Courtin*Sundaram Finance*[12] *and Sumangal Services*[13]was that even wilful disobedience of such interim orders passed by an arbitral tribunal would not attract the provisions of the Contempt of Court Act, 1971.

Giving Teeth for Enforcement of Interim Orders

Interestingly, neither in *Sundaram Finance*[14] nor in *Sumangal Services*[15] was the attention of the Court drawn towards Section 27(5) of the Arbitration Act, which reads as under:

> "(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court."

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10 (1999) 2 SCC 479
11 (2004) 9 SCC 619
12 Supra note 9
13 Supra note 10
14 Supra Note 9
15 Supra Note 10

For the first time, in the context of enforcement of interim orders passed by an Arbitral Tribunal under Section 17 of the Arbitration Act, the Delhi High Court in *Sri Krishan V. Anand*[16] took note of Section 27(5) of the Arbitration Act and held as under:

> "11. Though neither of the Counsel had drawn attention to the aforesaid provision but in my opinion the same is a complete answer to the cause of action for the present petition. The petitioner seeks same interim orders from the court as already granted to him by the arbitral tribunal only for the reason of the breach of the order of the arbitral tribunal being remediless. But that is not the position. The aforesaid provision provides the remedy for such breach. Any person failing to comply with the order of the arbitral tribunal would be deemed to be "making any other default" or "guilty of any contempt to the arbitral tribunal during the conduct of the proceedings". Thus the remedy of the other party is to apply to the arbitral tribunal for making a representation to the court to meet out such punishment, penalty to the guilty party, as would have been incurred for default in or contempt of the court. Naturally, the arbitral tribunal would make such a representation to the court only upon being satisfied that the party/person is in default or in contempt. Once such a representation is received by this court from the arbitral tribunal, this court would be competent to deal with such party in default or in contempt as if in contempt of order of this court i.e., either under the provisions of the Contempt of Courts Act or under the provisions of Order 39 Rule 2A CPC."

The Delhi High Court also observed that perhaps Section 27 (5) of the

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16 2009 (112) DRJ 657

Arbitration Act was not taken note of by the Supreme Court in *Sundaram Finance*[17] and *Sumangal Services*[18] casebecause the power of the arbitral tribunal to make a representation to the court for imposition of penalties and punishments on any person making 'any other default' or 'guilty of any contempt to the arbitral tribunalwas hedged in the heading – "court assistance in taking evidence".

The Law Commission of India and its 246th report[19] took note of the judgements of the Supreme Court in *Sundaram Finance and Sumangal Services*[20], as also the view of Delhi High Court in *Sri KrishanV.Anand*[21], and concluded that the judgement of the Delhi High Court was not a complete solution'. The Commission highlighted that it was imperative to provide teeth to the interim orders of the arbitral tribunal, and therefore, recommended that the orders of the arbitral tribunal under Section 17 of the Arbitration Act should be statutorily enforceable in the same manner as the orders of a court[22].

Pursuant to the recommendations of the Law Commission of India, sub-section (2) to Section 17 was added by the Arbitration and Conciliation (Amendment) Act, 2015, specifically providing that subject to any orders passed in appeal under Section 37, orders issued by the arbitral tribunal under Section 17 shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil procedure, 1908 in the same manner as if it were in order of the court.

This amendment to Section 17 was not in derogation of Section 27 (5) of the Arbitration Act, but in addition thereto. To borrow the

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17 Supra Note 9
18 Supra Note 10
19 https://lawcommissionofindia.nic.in/reports/report246.pdf
20 Supra Notes 9 and 10
21 Supra Note 15
22 Para 49 of the 246th report of the Law Commission of India

expression from the report of the Law Commission of India, the amendment was aimed to providing 'a complete solution'. In other words, post the 2015 amendment, any interim order passed by the arbitral tribunal under section 17 can now be enforced under the provisions of Order 39 Rule 2A of the CPC.This, however, does not take away the power of the arbitral tribunal to make a representation to the Court under section 27 (5) of the Arbitration and Conciliation Act, 1996.

Artbitral Tribunal and the Power to Punish for Contempt

The Supreme Court in *AlkaChandewar V. ShamshulIshrar Khan*[23], approved the decision of Delhi High Court in *Sri Krishan V. Anand*[24], and held as under:

> "If Section 27(5) is read literally, there is no difficulty in accepting the plea of learned senior advocate for the Appellant, because persons failing to attend in accordance with the court process fall under a separate category from "any other default". Further, the Section is not confined to a person being guilty of contempt only when failing to attend in accordance with such process. The Section specifically states that persons guilty of any contempt to the Arbitral Tribunal during the conduct of the Arbitral proceedings is within its ken. The aforesaid language is, in fact, in consonance with the Chapter heading of Chapter V, "Conduct of arbitral proceedings". Further, it is well settled that a marginal note can be used as an internal aid to interpretation of statutes only in order to show what is the general drift of the section. It may also be resorted to when the plain meaning of the Section is not clear. In the present case we must go by the plain meaning of Sub-section (5).

[23] (2017)16 SCC 119
[24] Supra Note 15

> This being the case, we find it difficult to appreciate the reasoning of the High Court. Also, in consonance with the modern Rule of interpretation of statutes, the entire object of providing that a party may approach the Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such Tribunal are toothless. It is to give teeth to such orders that an express provision is made in Section 27(5) of the Act."

The Supreme Court in *AlkaChandreshwar's case*[25], clarified that a person making 'any other default' or 'guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings' by themselves formed a separate category than the persons 'failing to attend in accordance with the court process'. By so clarifying, provisions of the Contempt of Courts Act, 1971, stood implicitly applicable. A person violating orders of the arbitral tribunal fell in the category of 'any other default', and conduct of any person which had the propensity to interfere or obstruct with the due course of Tribunal's proceeding or otherwise scandalise or lower the authority of the Tribunal fell in the latter category. In both the circumstances, the arbitral tribunal had the power to make a representation to the court for imposition of such penalty or punishment, in accordance with law. The only law in accordance with which the punishment or penalty could be imposed is Contempt of Courts, Act 1971.

Even after the 2015 amendment of the Arbitration Act whereby Section 17(2) was inserted making interim orders passed by the arbitral tribunal enforceable under the Code of Civil Procedure, the position has not got altered. In *Amazon.Com NV Investment Holdings LLC V. Future Retail Ltd*.[26] the Supreme Court drew distinction between

[25] Supra Note 22

[26] (2022) 1 SCC 209

the power conferred on courts under Order 39 Rule 2A of the Code of Civil Procedure and orders made in contempt of court in the following words:

> "61.It is one thing to say that the power exercised by a court under Order 39 Rule 2-A is punitive in nature and akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. It is quite another thing to say that Order 39 Rule 2-A requires not "mere disobedience" but "wilful disobedience". We are prima facie of the view that the latter judgment in adding the word "wilful" into Order 39 Rule 2-A is not quite correct and may require to be reviewed by a larger Bench. Suffice it to say that there is a vast difference between enforcement of orders passed under Order 39 Rules 1 and 2 and orders made in contempt of court. Orders which are in contempt of court are made primarily to punish the offender by imposing a fine or a jail sentence or both. On the other hand, Order 39 Rule 2-A is primarily intended to enforce orders passed under Order 39 Rules 1 and 2, and for that purpose, civil courts are given vast powers which include the power to attach property, apart from passing orders of imprisonment, which are punitive in nature. Orders passed under Section 17(2) of the Arbitration Act, using the power contained in Order 39 Rule 2-A are, therefore, properly referable only to the Arbitration Act. Neither of the aforesaid judgments are an authority for any proposition of law to the contrary.

Thus, if any interim order passed by the arbitral tribunal in exercise of the powers conferred by Section 17 of the Arbitration Act is violated, aggrieved person has two remedies. The first remedy is aimed at enforcement of the order by invoking the powers under Order 39 Rule

2A of the Code of Civil Procedure. The second remedy is for getting the defaulting party punished by invoking Section 27 (5) of the Arbitration Act and seeking a representation from the arbitral tribunal, to the court, for imposition of penalty or punishment on ground of 'making any other default'. Invoking second remedy, namely, seeking representation from the arbitral tribunal under section 27 (5) of the Arbitration Act, would necessarily mean invocation of the powers under the Contempt of Court Act, 1979, through Court, for punishing the defaulter for committing civil contempt.

CONCLUSION

In *AlkaChandreshwar's case*[27], the Supreme Court conferred literal interpretation to Section 27(5) of the Arbitration Act, and concluded that persons 'making any other default' or 'guilty of any contempt to the arbitral tribunal during the conduct of the arbitral tribunal' falls 'within its ken'. These observations of the Supreme Court are far reaching, in so far as Section 27(5) has now been interpreted by the Supreme Court to mean that an arbitral tribunal also has the power to make a representation to the Courtfor imposition of penalty or punishment under the Contempt of Courts Act,if a person, and who may not necessarily be a party to the proceedings, is found guilty of either civil or criminal contempt. Thus the answer to the question - whether Contempt of Courts Act, 1971 would come to rescue, if the stream of justice, which flows through the setup of arbitral tribunals, is polluted, is an emphatic yes.

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[27] Supra Note 22

THE ELECTION LAWS AMENDMENT ACT, 2021: A NOVEL ATTACK ON RIGHT TO PRIVACY

Akrati Goswami[1] and Pradeep Verma[2]

Abstract

The principle that an individual should have full protection in person and property is as old as common law. The fact that it has been found extremely necessary from time to time to define and evolve the contours of this protection suggests that how important it is. Privacy is one such consideration which has been looked upon not only by the judiciary but also by the legislature so as to include it within the ambits of fundamental protection. Privacy allows each human being to be left alone in a core which is inviolable. The concept of privacy is founded on the autonomy of an individual. The Hon'ble Supreme Court in K.S. Puttaswamy v. Union of India[3]declared that privacy is a fundamental right under Article 21 and thus is a part of Right to life.

Recently, The Election Laws Amendment Act, 2021 has received the assent of the President of India on 29th December, 2021. The Act amends the Representation of People's Act, 1950 and The Representation of People's Act, 1951. A major electoral reform introduced by the Act is the linking of Aadhaar with the electoral roll data for the purposes of establishing the identity of a person. Privacy has double aspects i.e., positive and negative. What is meant by the negative aspect of privacy is that the State is restrained from committing any intrusion upon the life and liberty of the citizen.

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The present paper presents an argument that the provision of linking Aadhaar with the electoral roll in the said amendment allows the state to intrude with the right to life and personal liberty of a citizen by establishing a surveillance State and thus is violative of the right to privacy. The present paper attempts at analyzing the concept of right to privacy and to present an argument that the said Amendment is in violation of the judgment of the Hon'ble Supreme Court in both the K.S Puttaswamy Decisions(Privacy Judgment and Aadhaar Judgment).

Keywords: Privacy, Surveillance State

Right to Privacy

Right to Privacy was identified as a fundamental right by the Supreme Court of India in a Nine Judge Bench decision in *K.S. Puttaswamy v. Union of India*[4]. This Judgment not only so declares Right to privacy to be a Fundamental Right but also discusses the ambit and scope of the right to privacy in great details.

Privacy has always been a natural right

Right to privacy is a concomitant of an individual's right to exercise effective control over his personality. This statement seeks its genesis from the theory that there are certain rights which are inherent or intrinsic in a human being, as it is not possible to conceive human element in life in absence of natural rights. Natural rights are not a charity of the State, they inhere in a human being only by the reason that they are human, these rights exist irrespective of class divisions, strata differentiations.

Right to privacy is an important element for the wholesome enjoyment of the guarantees enumerated in Part III of the Constitution. It must be stressed that there is an essential interplay and interdependence

[4] Id. at 1.

of life, liberty, and dignity, of which privacy is an essential element. Article 21 of the Constitution provided for right to life and personal liberty. The element of life is the most important but what make life important are the freedoms, liberties and rights attached to it, whereby an individual is allowed to make choices, to take decisions. This implies that State as guardian or *parenspatriae*is to protect this right of an individual to take decisions freely and to protect autonomy of an individual. This when ensured allows an individual to lead his life to fullest extent.

Facets of Privacy

Privacy would imply the preservation of sanctity of self, the family life, marriage, the home, personal intimacies and sexual orientation. It also includes within its ambit the right to be left alone. Privacy not only safeguards the individual autonomy but also ensures that a person exercises an effective control on the vital aspects of life. Privacy recognizes the "plurality and diversity of our culture". It would imply that an individual is to be allowed to function, to take decisions whether personal or public, without any interference by the State.

The Constitutional core of human dignity lies in the effective exercise of right to privacy. In privacy judgment two functions of privacy were identified: -

a) *Normative function* where the right to privacy serves as one of the foundational elements upon which the guarantee of life, liberty and freedom are founded.

b) *Descriptive function* whereby the right to privacy ensures that several entitlements and interests which lie at the foundation of ordered liberty are available to a human.

Apart from this it was also held that privacy has both positive and negative content, the positive content imposes upon State a positive duty to take

such measures or steps as are necessary to protect the Right to Privacy. The negative content of it prevents the State from intruding the life and personal liberty of a citizen.

It was also held that Privacy has distinct connotations including,i) spatial control ii) decisional autonomy; and iii) informational control. By spatial control, an individual has a right to create private spaces. Decisional autonomy signifies "intimate personal choices" and the choices which may be expressed in public. Informational control means the power to exercise control over the information pertaining to the person.

Limitations of right to Privacy

The State can have no legitimate interest when what it seeks to achieve is merely profiling of an individual. State whenever seeks to hinder with the right to privacy of a citizen must ensure that the *threefold test* is satisfied. As is clear and stated that no fundamental right is absolute in nature, therefore the right to privacy also has limitations. The threefold test applies to check the validity of any law which is in violation to Article 21 of the Constitution of India. *Firstly*, there has to be a *law in existence* in order to justify any encroachment on right to privacy which is a derivative right from Article 21 of the Constitution of India. *Secondly*, such law/intrusion in the right to privacy must serve a *legitimate State aim*. This step is essentially meant to ensure that the action of State is reasonable and is not arbitrary in nature and that it satisfies the requirement of Article 21. *Thirdly*, it should satisfy the *test of proportionality* meaning that the measure so adopted by the State to achieve a given legitimate aim is the least intrusive and that there is no other manner which is less intrusive to achieve the given legitimate aim of the State. Also, that the extent of such interference must be proportional to the object sought to be achieved by the State.

The Aadhaar Act (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016

The Aadhaar Act received the presidential assent on 25th March, 2016. The preamble of the Act states "An Act to provide for, as a good governance, efficient, transparent, and targeted delivery of subsidies, benefits and services, the expenditure for which is incurred from the Consolidated Fund of India, to individuals residing in India through assigning of unique identity numbers to such individuals and for matters connected therewith or incidental thereto." The Act has been passed with an object of providing an effective, secure and accurate delivery of benefits, subsidies and services from the Consolidated Fund of India (CFI) to targeted beneficiaries and authenticating their identity through a unique identity i.e., Aadhaar number. The said enactment was required, as has been stated in the Statement of Objects and Reasons of the Aadhaar Bill, so as to ensure the identification of the beneficiaries of various social welfare schemes funded out of the CFI which has been a major challenge with respect to the implementation and thus resulting in hindrances in achieving the said outcomes.

Section 2 (a) of the Act defines Aadhaar as an identification number issued to an individual under Section 3 of the Act and any virtual alternative issued by UIDAI.[5] Under the Act every resident shall be entitled to Aadhaar number after the submission of his demographic and biometric information.[6] The Government *may* require an individual to furnish his Aadhaar for the purpose of establishing identity of an individual making it necessary for such individual to possess Aadhaar number.[7] The authentication of the Aadhaar number is to be carried by the Authority

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5 Targeted Delivery of Financial and other Subsidies, Benefits and Services Act, 2016, § 2, No. 18, Acts of Parliament, 2016 (India).

6 Targeted Delivery of Financial and other Subsidies, Benefits and Services Act, 2016, § 3, No. 18, Acts of Parliament, 2016 (India).

7 Targeted Delivery of Financial and other Subsidies, Benefits and Services Act, 2016, § 7, No. 18, Acts of Parliament, 2016 (India).

on the basis of the demographic or biometric information of a person.[8] Having said this, Section 57 of the Act (now omitted by the Aadhaar 2019 Amendment Act) also calls for our attention. The provision of this repealed Section was in nature of an enabling clause providing that the State, body corporate or person pursuant to any law or any contract may use the Aadhaar number to establish the identity of an individual which was also under challenge in ***K.S. Puttaswamy v. Union of India[9] (Aadhaar Judgment).***

One of the issues against the validity of the Aadhaar Act was that it was passed as a *Money bill* thereby surpassing the normal route as is followed in any other ordinary Bill. The Rajya Sabha in case of a money bill cannot amend or reject the Money Bill and the retention period by Rajya Sabha of such a Bill is 14 days which is 6 months in case of an ordinary bill. Thus, passing a Bill as a Money Bill has serious implications on the federal nature of the Indian polity. The significance of the Upper House of the Parliament was elucidated by the Hon'ble Supreme Court in *KuldipNayar v. Union of India.*[10]

This hurdle was cleared by the Hon'ble Supreme Court in the 5-judge bench decision in *Puttaswamy case(Aadhaar Judgment)* on the ground that section 7 deals with the expenditure on the social welfare schemes by the State from the CFI. The Court held that Section 7 of the Act is "the core provision of the Aadhaar Act and this satisfies the condition of Article 110 of the Constitution of India." The Court also ruled that other provisions of the Act are merely incidental and are only auxiliary in nature so as to answer the proper functioning of the Act.

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8 Targeted Delivery of Financial and other Subsidies, Benefits and Services Act, 2016, § 8, No. 18, Acts of Parliament, 2016 (India).

9 K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

10 KuldipNayar v. Union of India, (2006) 7 SCC 1.

The Election Laws Amendment Act, 2021

The Election Laws (Amendment) Act, 2021 received the assent of the President of India on 29th December, 2021. The Bill seeks to amend the provisions of the two election laws i.e., 'The Representation of People's Act, 1950' (hereinafter referred as the "RP 1950 Act") and 'Representation of People's Act, 1951' (hereinafter referred as the "RP 1951 Act"). The Act *inter alia* seeks to introduce provisions for linking of Aadhaar with the electoral rolls, making election services gender neutral and introducing additional qualifying dates for voting.

The Committee Report

The Election Laws Amendment Bill was introduced in Lok Sabha on December 20, 2021 on the recommendations of the *105th Report of the Departmentally related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice*. The said committee report dealt with several important topics such as Access to justice, Alternate Dispute Resolution, All India Judicial Service, Common Electoral Roll for local body to Lok Sabha Election, Electoral Photo Identity Cards (EPIC), etc. The Committee report observed that maintenance of free and fair elections in the country is the bedrock of democracy and part of the Basic Structure of the Constitution of India[11] which cannot be compromised. According to the recommendations and observations of the Committee the linkage of the Unique Aadhaar ID card number with the Voter Identity Card of a person can ensure participative democracy as due to such linkage the incidence of the multiple entries could be eliminated and monitored. The committee focused on mooting the idea of linkage of Aadhaar card number with the voter ID of a person reasoning in on the argument that such a measure will ensure the purification of the electoral roll and thus is in the larger interest of the democratic policy.

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[11] Kihoto Hollohan v. Zachillhu & Ors., 1992 Supp (2) SCC 651.

The said committee report is subsequent to the proposals of the Election Commission of India vide a letter[12] to the Ministry of Law and Justice. The said letter mentioned about the decision of the Hon'ble Supreme Court in Aadhaar Judgment which prohibited the using of Aadhaar details for any purposes other than the Public Distribution System Scheme and LPG Distribution scheme, pursuant to which the Commission suspended the collection of the Aadhaar numbers of the electors who volunteered the same for the purposes of purifying the electoral rolls. Thus, the letter proposed appropriate statutory amendments in the 1950 and 1951 Acts so as to link Aadhaar with EPIC. Thus, the Committee appreciated the proposal of the Commission and recommended for the initiation of relevant amendments in the 1950 and 1951 Acts. According to the Committee the linking of Aadhaar number with the EPIC would reduce several malpractices in the elections.

Salient Features of the Election Laws (Amendment) Act, 2021

On the recommendations of the Committee, The Election Laws (Amendment) Bill, 2021 was introduced in the Lower House of the Parliament on December 20, 2021 and was passed on the same day. The Bill was passed by the Upper House of Parliament on December 21, 2021. As mentioned earlier, it seeks to amend the RP, 1950 and the RP, 1951 Acts. The 1950 Act provides for the allocation of seats in and delimitation of constituencies for the purpose of election to, the House of People and the Legislatures of States, the qualifications of voter at such elections and the preparation of the electoral rolls, etc. the 1951 Act on the other hand provides for the conduct of elections of the Houses of Parliament, the qualifications/disqualifications of the members, the malpractices at or in connection with such elections, etc. The Statement of Objects and Reasons of the Election Laws (Amendment) Bill, 2021 provides that the said bill is proposed on the proposals from various quarters to the Central Government, in relation to the amendment of

[12] Letter No. 3/ER/2018/SDR dated 13th August, 2019.

certain provisions of the 1950 and 1951 Acts. To achieve the object of curbing the menace of multiple enrolment of same person to the electoral roll, in different place, the linkage of Aadhaar with the electoral ID of a person is proposed by the Bill.

Following are certain features of the Act as passed and received the assent of the president: -

Linking of Aadhaar with the Electoral Roll

The most controversial and debated provision in the Amendment Act is the provision for linking of Aadhaar number of a person with the electoral roll. **Section 4** of the Amendment Act amends Section 23 of the 1950 Act by inserting sub-sections under it. The said provision empowers the electoral registration officer to ask for furnishing the Aadhaar number as given by the Unique Identification Authority of India (UIDAI) so as to establish the identity of such person. The said provision uses the word "may' so as to make it voluntary and not mandatory. But the question that whether the said provision can be misused by the electoral registration officer is discussed later in the paper.

The proviso of Section 4 of the amendment Act further empowers the electoral registration officer to require the Aadhaar number from the persons who are already registered under the electoral roll for the purposes of authentication of entries. This provision gives effect to the recommendation of the Committee so as to ensure purification of electoral rolls by reducing the possibilities of multiple entries from different constituencies. Other safeguard provided under the provision for the persons who may not have Aadhaar number or who don't want to intimate their Aadhaar number is that such a person "may be allowed" to furnish any other alternate document.

Qualifying Date for enrolment

The Act amended Section 14 of the 1950 Act under which only one

qualifying date for enrollment in the electoral roll which is January 1. This implies that a person on turning 18 years of age can enroll only when the roll is revised in the next year. The amendment Act changes this provision and provides for four qualifying dates i.e.,"the 1st day of January, the 1st day of April, the 1st day of July and the 1st day of October." The said amendment is required to remove the disparity that despite the Constitutional guarantee that any person above age 18 can vote, the person actually is not eligible for vote due to the fact that he is not enrolled in the electoral roll because of only one qualifying date as provided under the previous Act.

Gender Neutral Provisions of the Act

The Act amended certain provisions of the RP 1950 and 1951 Acts so as to make them Gender neutral. Section 20 of the 1950 Act provides for the meaning of "ordinarily resident." According to clause (6) of Section 20 "wife" of persons ordinarily resident in a constituency are deemed to be ordinarily residing in the same constituency if they reside with such persons. Such persons include persons holding a service qualification, members of armed forces or Central Government posted outside India. Section 3 of the amendment Act substitutes the word 'wife' with the word 'spouse'. Similarly, Section 60[13] of the RP, 1951 Act has been amended to the effect that the word 'wife' in the said section shall be replaced by 'spouse'.

Validity of the Election Laws Amendment Act, 2021

It is argued by the Authors that the Election Laws Amendment Act, 2021 was rather passed by the Parliament in a haste manner without

[13] Section 60 of the Representation of People Act, 1951 provides for Special Procedure for voting by certain classes of persons. These persons are as mentioned in Section 20 of the RP Act, 1950. For the purposes of representation of such person's provisions can be made by rules under the Act. Clause (b) (ii) of the said Section provides that the wife of such persons would also be covered under the provision.

proper consideration and discussions. In the Lower House of the Parliament during the debates and discussions several points against the validity of the Bill were raised which were overlooked. The Bill all and above is against the landmark Judgment of the Supreme Court in K.S Puttaswamy case[14] and Aadhaar Judgment. During the introduction of the Bill in Lok Sabha, Union Law Minister Mr. KirenRijuju justified the Bill on the grounds that it is passed so as to eradicate the disparities in the existing election laws. With respect to the provisions of linkage of Aadhaar number with the electoral roll he explained that it is in order to weed out bogus voters from the electoral rolls so as to maintain purity of elections. Furthermore, he explained that the Bill is rather voluntary and not mandatory and thus not violate the sanctity of the judgment of the Supreme Court and is in consonance with the Right to Privacy of a citizen.However, it is argued by the Authors that the practicality of the said provision entails the violation of the right to privacy of citizen and the judgment of the Hon'ble Supreme Court. The evidence of the said statement is the instance wherein the Aadhaar number was used to clean up databases of the Mahatma Gandhi National Rural Employment Guarantee Scheme and it rather ended up causing deletion of people from the database. Thus, it undermines the negative aspect of the right to privacy according to which State cannot encroach upon the right to privacy of citizens.

The following part of the paper would be checking the validity of the Act as per the standards as laid down by the Hon'ble Supreme Court in the Privacy Judgment[15] and the Aadhaar judgment.

The three-pronged test

In order that a State on legitimate interests can encroach upon the privacy of a citizen, three-pronged test as has been enumerated by the Court in

[14] Supra at 1.
[15] Supra at 1.

Privacy judgment has to be complied. The Election Laws Amendment Act does not satisfy this three-pronged test. The first condition i.e., Requirement of Law, in this case stands satisfied as the intrusion in privacy of an individual in form of linking Aadhaar to the voter identity card is done of the basis of Section 4 of the Amendment Act. Secondly, legitimate state aim test is also satisfied in this case as the amendment is aimed at de-duplication of the voters in electoral roll and placing a curb on fake and bogus voting so as to ensure fair elections.

However, the third and most important condition being the test of proportionality is not met in the case of 2021 Amendment Act. The reason being, that less intrusive means could be adopted so as to meet the compelling interests of the State and citizens. Even in the Country like the **USA**, using biometrics for the purposes of verification and authentication of identity of a person is not done for the purposes of voting in the elections. More than 15 States in the USA have non-strict methods for the purposes of verification of identity of the citizen in the voting list. These States in USA use methods such as signature against the information file.[16] States like New York asks from the citizen to sign the poll book and it is the duty of the election officer to compare such signature with the signature on the file of voter and moreover to compare the physical appearance of voter with the information on record. Even in the countries which use stricter laws for the purposes of identification of voter, verification through biometrics is not practiced. The voters who do not have any valid or acceptable identification are asked to vote on a provisional ballot and to take additional steps after the day of election for the same to be counted.

The Election Commission has not tried any other less intrusive measures to ensure the de-duplication of the electoral roll. The

[16] National Conference of State Legislatures, https://www.ncsl.org/research/elections-and-campaigns/voter-verification-without-id-documents.aspx (last visited Mar. 3, 2022).

Commission did not show as to how the door-to-door survey method for the voters was not effective, the use of indelible ink, etc. Insisting directly on the intrusive method of using the biometrics of an individual for voter identification, de-duplication is constitutionally unsound.

Aadhaar- an Act to provide for targeted deliveries of subsidies, benefits incurred from CFI

In the *Aadhaar Judgment* one of the arguments against the validity of the Aadhaar Act was that the word benefits used in Section 7 of the Act is very loose and vague and will allow the State to bring within the ambit of Aadhaar all or any of the governmental activity. Refuting this argument Hon'ble Supreme Court read 'benefits' *ejusdem generis* with 'subsidies' specifying that benefits are those social welfare schemes for which resources are drawn from the CFI. The Supreme Court thus struck down the actions of CBSE, NEET, JEE and UGC wherein the said institutions have asked the students to furnish their Aadhaar details in order to avail scholarship benefits on the ground that it was not demonstrated that such scholarships were a charge on the CFI. Similarly, the notification of Ministry of Telecom to link mobile numbers with Aadhaar card was also struck down on dual ground. Firstly, it was not backed by any law and secondly that operating mobile numbers is not a subsidy or benefit borne out of the CFI.

The Amendment Act is bad in law on the mentioned ground alone. Right to vote is both a Constitutional and legal right. Hon'ble Supreme Court has identified democracy as the part of basic structure of the Constitution for which right to vote is *sine qua non*. Right to vote is an obligation on the state and not a charity in form of any subsidy or benefits borne out of the CFI. The Court in Aadhaar Judgment has clearly specified that the State cannot insist on the Aadhaar authentication u/s 8 of the Aadhaar Act unless the act or transaction for which authentication is required falls squarely within the ambit of Section 7.

Section 57 (now repealed) of the Aadhaar Act as has been mentioned above was in nature of an enabling clause, it aimed at providing Authorization to the State to use Aadhaar for purpose other than those mentioned in Section 7 of the Act. The said provision was struck down by the Hon'ble Supreme Court in Aadhaar Judgment on the ground that it was *patently unconstitutional*, as it failed to pass the proportionality test, as *"it allows an unrestricted extension of the Aadhaar platform to users who may be Government agencies or private sector operators."* The Court held that this provision has a scope much wider that what was originally meant to be achieved by the Act. The Court went on to hold that a provision like this would enable the establishment of a Surveillance State as it enables the State to seed the Aadhaar of individuals across various sectors and services provided. Thus, this Section was repealed by the Aadhaar Amendment Act of 2019.

Section4 of The Election Laws Amendment Act provides for using Aadhaar for authentication of the voter list without any provision in this regard in the Principal Act i.e., the Aadhaar act. Thus, the said provision suffers the vice of unconstitutionality as there is no basis for this Amendment Act in the Aadhaar Act. This Section as has been indicated above in the Judgment of the SC is an attempt on the part of the State to become Surveillance State.

The Aadhaar Act as has been mentioned earlier was passed as a Money Bill on the ground that it dealt with the expenditure from the CFI. However, the Election Laws Amendment Act is not anyhow related to Section 7 of the Aadhaar Act and is not a charge on the CFI. The Election Laws Amendment Act, is unconstitutional on the basis that it is a colourable piece of legislation as it allows the using of an Act passed as Money Bill to be used for purposes other then those enumerated in Art. 110 of the Constitution.

Voluntary nature of Aadhaar

Section 3 of the Act uses the word "entitles" and thus is enabling in nature and not mandatory. In the case of *BinoyViswam v. Union of India*[17], the division bench of Supreme Court held that the Aadhaar Act has been enacted to enable the State to identify individuals for delivery of benefits, services, subsidies and other welfare schemes. It is mentioned in Section 7 that when an individual intends to avail the benefits of social welfare schemes, he may be required to furnish his Aadhaar number but even in case that he/she does not possess Aadhaar, other modes of identification may be resorted to. If an individual is enrolled for Aadhaar he may voluntarily use it as many places for the purpose of identification or authentication as he likes. However, the State cannot insist an individual to supply his Aadhaar number in case when he/she is not availing any benefits borne out of the CFI.

Section 4 of the Election Laws Amendment Act, 2021 as is clear from the phraseology, presupposes that every individual has an Aadhaar number assigned to him. This Section empowers the Election Registration Officer to not only ask the new voters to furnish their Aadhaar number but also the existing voters to do so. Clause (5) of the said section mentions that every person whose name is so included in the voter list may supply his Aadhaar number to Authority as notified by the Central Government. As mentioned earlier that the impugned Section of the amendment Act proceeds on an understanding that Aadhaar registration is compulsory in nature. This understanding, it is argued, is against not only the Aadhaar Judgment wherein the Supreme Court citing *BinoyVishwam*[18] case held that Aadhaar enrolment is completely voluntary but also the Aadhaar Act, Section 3 of which is only enabling provision and not mandatory.

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[17] BinoyViswam v. Union of India &Ors., 2017 SCC 7 59.

[18] Ibid at 14.

Section 4 of the Amendment Act also specifies that no names shall be removed from the voter list "*for inability of an individual to furnish or intimate Aadhaar number due to such sufficient cause as may be prescribed*." A proviso appended to this sub-clause states, that such individual may be allowed to furnish other alternate document as *may be prescribed*. The use of the words as "may be prescribed" implies that the Government may provide by rules the sufficient cause on the basis of which no names of individuals are to be struck down out of the voter list as well as the other modes of identification. However, an argument against this can be that the Government has till date not prescribed any rules in this behalf leaving this aspect of the Act at the discretion of the Election Registration Officer, which can lead to arbitrary use of powers by such officer.

Citizenship distinguished from Residence

One of the arguments presented in favour of the Amendment Act by the Hon'ble Law minister in the Parliament is that illegal migrants have registered themselves as voters and they will be removed from the voter list by Aadhaar authentication. But the proposition that such migrants once they have obtained voter cards would have failed to get themselves enrolled in Aadhaar which is only a proof of residence and can be easily obtained just by parting with biometrics in any registered Aadhaar Center, seems incorrect.

Lexicon Universal Encyclopedia defines citizenship as a relation between an individual and State where the individual owes allegiance to the State and the State in turn provides protection, rights and privileges. Citizen is defined as "a member of a legally constituted State, possessing certain rights and privileges and subject to corresponding duties." Citizenship is different from residence as the latter only implies a place where one lives and is different from domicile; it is an act of living somewhere for some time or permanently. Citizenship is a matter of great import as it entitles a person to a great deal of rights and duties.

Article 5-11 of the Constitution of India are specifically dedicated to citizenship. Right to vote which is both a Constitutional right[19] as well as a legal right[20] is available only to the citizens of a country and not merely to any resident.

Section 16 of the RP Act, 1950 provides that every citizen provided that he is not subject to disqualifications mentioned therein shall be eligible to be included in the electoral roll. Whereas Section 3 of the Act of 2016 clearly specifies that every resident is eligible to be enrolled in Aadhaar scheme. Now the Election Laws Amendment Act is problematic as what it seeks to achieve is authentication of the enrolment list on the basis of linking Aadhaar with voter card to eliminate de-duplication, which is only a proof of residence and not citizenship.

Conclusion

Privacy as mentioned is one of the most important aspects of living a life with liberty and dignity and thus is declared as a part of fundamental right to life under Article 21 of the Constitution of India. A State which is the protector of rights and liberties of its citizen cannot accord a status of a surveillance State so as to violate and hinder with the privacy of its citizens and thus encroaching upon their liberty and dignity. One of such attempts by the State of causing such hindrance was the enactment of the Aadhaar Act, some of the provisions of the Act which sought to interfere with the privacy of the citizens and thus declared unconstitutional by the Supreme Court in the Aadhaar judgment.[21]The vitality of right to privacy was never ignored by the Courts in India even before the 9-judge bench decision of Supreme Court in *K.S Puttaswamy v. Union of India*.[22]

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19 INDIA CONST. art. 326.

20 *Peoples Union for Civil Liberties v. Union of India, 2019 SCC Online SC 1820.*

21 Supra at 8.

22 Supra at 1.

The Data Protection Regime in India is still in its nascent stage, as the Data Protection Bill is still under consideration of the Legislature. In absence of such a safeguard against the Infringement of Right to Privacy by the State and the Private Players, the Legislation of this Election Laws Amendment Act is rather a drastic step and an ill-planned one. It cannot be denied that in today's age when the internet is ubiquitous escaping from any data foot prints is impossible however, as the Right to Privacy has both a positive and a negative aspect it is expected out of State that the State should take steps in this direction, even if the State is moving on this aspect of Privacy with snail's pace the State should not at least take steps which are in fact impinging on the Right to privacy. Some databases as those which are mandated under Section 7 of the Act is a legitimate one, however, collecting and storing data in absence of a robust Privacy regime is nothing less than a mistake. As it is well known that there is a risk associated with storing the information which forms the very basis of an individual's identity as the misappropriation of the same will have an impact of denying that individual, his very Identity and may as well result in placing limitations of the personal freedom.

The Aadhaar card are well linked to several of the phone numbers, these phone numbers are often used to make social media accounts, the Aadhaar are mandatorily to be authenticated for those who are taking benefits of the social services and other benefits borne out of the CFI. Now, if the Elections Laws Amendment Act is complied with then in that case it cannot be denied that the State may well be in a position to become from an intrusive state to Surveillance State. The State may very well differentiate between those who are availing the services and those who are not availing any of these services. The State which is omnipotent powered with this data may also engage in profiling of the voters, this indeed is a grave threat to the very democracy.

Apart from the Privacy Aspect, it is also clear that the Parliament has enacted the Law in question without adhering to the Judgment of the

SC in the Puttaswamy 5J bench Decision[23], in the case of *Madras Bar Association v. Union of India[24];* SC cited the decision in the case of Patel *GordhandasHargovindas&Ors. v. Municipal Commissioner, Ahmedabad &Anr*.[25]and held that it is not sufficient for the Legislature to declare merely that the decision of the Court shall not be binding or, to enact a Law without validly removing the basis of the decision. This has been very clearly illustrated in the case of the Election Laws Amendment Act as the Parliament has enacted this amendment without validly removing the basis of the Judgment. The Parliament has not taken care of the recommendations of the Aadhaar Judgment of the SC.

It can be summed up that the Section 4 of The Election Laws Amendment Act, does not qualifythree-pronged test is not qualified as the third aspect of this test that is the Proportionality test is not qualified as the Election Commission has not provided as to why other ways of voter identification and de-duplication were not used. Also, the right to vote is inherent in an individual in case of a democracy and is not a charity of the State and in no way a charge upon the CFI. Further, there is no legislative basis as the enabling provision in the case i.e., Section 57 of the Act was omitted by the 2019 Amendment Act after the same was declared to be patently unconstitutional as per the Aadhaar Judgment. Thus, on the basis of the above points the Authors argue that Section 4 of the Election Laws Amendment Act, 2021 suffers from the vice of unconstitutionality as it is above all in violation to the fundamental right of privacy and also the principles of privacy enshrined Privacy Judgement and Aadhaar Judgment of the Supreme Court.

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[23] Supra at 8.

[24] Madras Bar Association v. Union of India, (2015) AIR SC 1571.

[25] GordhandasHargovindas&Ors. v. Municipal Commissioner, Ahmedabad &Anr., (1964) 2 SCR 608.

EXAMINING THE LEGAL FRAMEWORK OF THE PROHIBITION OF CHEMICAL WEAPONS IN NON-INTERNATIONAL ARMED CONFLICTS: SYRIA IN PERSPECTIVE

Oreoluwa Oduniyi[1] and Ogbole Ogancha[2]

Abstract

In recent times, hostilities have taken the form of non-international armed conflict with its attendant gory effects, it has become more pronounced in the 20th and 21st Century warfare. The means and methods engaged in such hostilities have been on the spotlight in International Humanitarian Law. Very recently, the entire world was shocked with the deployment of chemical weapons chemical weapons in the Syrian war, particularly its adverse effect on the civilian population. The effectiveness of the Convention on the Prohibition of the Development and Production, Stockpiling and use of Chemical Weapons and on their Destruction, Common Article 3 of the Geneva Convention, and the Protocol II additional to the Geneva Conventions relating to the protection of victims of Non-international Armed Conflicts readily comes to mind. Although, scholars had in times past advocated for the prohibition of the use of chemical weapons in armed conflict which led to the enactment of the Chemical Weapons Convention and establishment of the Organisation for Prohibition of Chemical Weapons. However, the Syrian situation has once again exposed the need to devote more effort to the prohibition of the use of chemical weapons in non-international armed conflict by providing a more effective punitive sanctions for perpetrators of this heinous crime through the establishment of appropriate legal and institutional frameworks to ensure adequate protection for civilians against chemical weapons and promote the core values of international humanitarian law.

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Introduction

One fundamental objective of International Humanitarian Law (IHL) is the control of the use of weaponry in warfare. Its aim is not to outlaw war or make it impossible to be fought in accordance to its rules; IHL seeks to reduce human suffering while recognising the realities of war in human relations[3]. The need to mitigate unnecessary suffering of victims of armed conflict served as the underlying factor for the prohibition of several weapons which were famous for wreaking havoc and causing untold suffering to both combatants and civilians alike. By the agreement of States through several international treaties under international law, the use of certain weapons has been forbidden during warfare. Among these are explosive projectiles[4], expanding dum-dum bullets[5], poisonous gases[6], biological weapons[7]and chemical weapons[8], *inter alia*. The principal focus in this article is the use chemical weapons during armed conflicts; the use of which was prevalent during the World War I and

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[3] Laurie R. Blank, Gregory P. Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War,* (Wolters Kluwer 2019)

[4] St. Petersburg Declaration of 1868 (full Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight at Saint Petersburg, Russian Empire, November 29 / December 11, 1868)

[5] The 1899 Hague Declaration Concerning Expanding Bullets

[6] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925

[7] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction signed 10 April 1972, entered into force on 26 March 1975.

[8] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980

even more recently employed in the on-going conflict in Syria[9]. Interestingly, the use of chemical agents in warfare did not start with World War I. It has been reported that chemical agents were employed in the 5th century B.C during one of the wars between Athens and Sparta in Ancient Greece.[10] The world experienced an unprecedented use of chemical weapons during the First World War. Research shows that both parties to the war had chemists who explored over 3,000 chemical substances as prospective chemical weapons. Though just thirty agents were actually used and about twelve achieved the desired military advantage[11], the effects of these weapons cannot be downplayed.

The 21st century chemical weapons (CW) warfare has however evolved from the use of the mustard gas (which usually was yellow or brown and smelled like garlic, onions or mustard)[12] to the use of Sarin Gas, an odourless, tasteless and colourless toxic gas which is regarded as one of the most toxic chemical weapons in existence[13] and the 'most murderous weapon in modern warfare'[14]. Evidence of the use of this

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9 UN inspectors Confirm Chemical Attacks in Syria(CBS News, 12 December 2013) available at:https://www.cbsnews.com/news/un-inspectors-confirm-chemical-attacks-in-syria/(Visited on February 23, 2022).

10 Charles E. Heller, *Chemical Warfare in World War I: The American Experience, 1917-1918*, Combat Studies Institute Leavenworth Papers No 10, 1 (1984) available at:https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/leavenworth-papers-10-chemical-warfare-in-world-war-i-the-american-experience-1917-1918.pdf(Visited on February 23, 2022).

11 *Ibid.*

12 Centers for Disease Control and Prevention, 'Facts about Sulfur Mustard' available at: https://emergency.cdc.gov/agent/sulfurmustard/basics/facts.asp(Visited on February 20, 2022).

13 AmarnathAmarasingam, *A History of Sarin as a Weapon*, (The Atlantic, 2017).Available at: https://www.theatlantic.com/international/archive/2017/04/sarin-syria-assad-chemical-nazi/522039/ (Visited on February 20, 2022).

14 "Sarin: the deadly history of the nerve agent used in Syria" *The Guardian*, September 17, 2013 available at: https://www.theguardian.com/world/2013/sep/17/sarin-deadly-history-nerve-agent-syria-un(Visited on February 23, 2022).

deadly chemical weapon can be seen from the 2013 Ghouta Attack in Syria which claimed the lives of more than 1,400 persons[15]. The situation in Syria can be categorised under International Humanitarian Law as a Non-International Armed Conflict (NIAC). However, in this situation, though Additional Protocol II to the Geneva Conventions 1977 (AP II) applies to Non-International Armed Conflicts between a state and dissident armed force, it does not apply to Syria as the latter never ratified the Additional Protocol II.[16] Therefore the rules under Common Article 3 of the Geneva Conventions 1949, apply. It is also important to note that compared to International Armed Conflicts (IAC), treaties relating to Non-International Armed Conflicts are relatively scarce and, in most cases, customary rules of international humanitarian law are said to apply to both IAC and NIAC. In fact, the ICRC has come to the conclusion that 136 out of the 161 rules of customary humanitarian law applicable in International Armed Conflicts also apply in NIACs[17].

Against this backdrop, this article set out to examine the legal framework on the prohibition of chemical weapons in Non-International Armed Conflicts under International Humanitarian Law, using Syria as a case study.

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[15] JobyWarrick, "More than 1,400 Killed in Syrian Chemical Weapons Attack , U.S Says"*The Washington Post*, August 30, 2013, available at: https://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html(Visited on February 20, 2022).

[16] Louise Arimatsu, MohbubaChoudhury The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya(2014) Chatham House International Law, 1,16.Available at: https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/20140300 Classification Conflicts ArimatsuChoudhury1.pdf(Visited on February 23, 2022).

[17] ICRC, Non-International Armed Conflict, available at: https://casebook.icrc.org/law/non-international-armed-conflict(Visited on February 23, 2022).

Legal Framework for the Prohibition of Chemical Weapons

A number of treaties prohibit the use of chemical weapons in international armed conflicts. They include: the Hague Declaration Concerning Asphyxiating Gases of 1899,[18] the 1925 Geneva Gas Protocol,[19] the Rome Statute of the International Criminal Court which classifies its use as a war crime[20] and lastly the Chemical Weapons Convention,[21] which is described as the most comprehensive treaty chemical weapons in international law.

Chemical Weapons Convention

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereinafter known as the Chemical Weapons Convention) was adopted 13th January 1993 and entered into force four years after, on 29April 1997.[22]

Prior to the adoption of the Chemical Weapons Convention, there had been attempts in history to regulate the use of harmful substances during warfare. The 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV) in article 23(a) specifically prohibits

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18 Declaration (IV,2) concerning Asphyxiating Gases. The Hague, 29 July 1899.

19 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925.

20 Rome Statute of the International Criminal Court 17 July 1998, Art 8(2)(b)(xviii)

21 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980, 1342 UNTS 137

22 United Nations Treaty Collection, 'Chapter Xxvi Disarmament: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction', available at: https://treaties.un.org/pages/ViewDetails.aspx?src=Treaty&mtdsg_no=XXVI-3&chapter=26>(Visited on February 23, 2022).

"…poison or poisoned weapons…" in hostilities [23] without any further clarifications on what constituted poison or poisoned weapons. The Convention did not however envisage the horrors of the World War I (1914-1918) where there was a consistent use of 'mustard gas' whose effects were a combination of the effects of lachrymator poisons (which affect the eyes and the respiratory system), asphyxiator poisons (which prevents oxygen from reaching the blood) and systemic poisons (which caused delayed toxic effects in the body)[24] . This initiated the enactment of the 1925 Geneva Gas Protocol which condemned, and outlaws the deployment of asphyxiating, poisonous or other gases and also extended the prohibition to the use of bacteriological methods of warfare[25]. This treaty however had its shortcomings. Asides from the low number of ratifications, several reservations that the obligations of a State not to use prohibited gases would cease to apply if another state used the prohibited gases against it, were made[26].

Furthermore, there were issues regarding interpretation as to whether the definition included tear gas and herbicides.[27] The rather scanty instrument also failed to make provisions on the production, storage, testing, and transfer of the prohibited weapons and this gave leeway to states such as the Soviet Union and the United States to stockpile huge amount of chemicaland bacteriological weapons[28]. The

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[23] 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV), Art 23(a)

[24] Charles E. Heller, supra note 8.

[25] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, Para 4

[26] Frits Kalshoven, LiesbethZegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (England: Cambridge University Press 4th ed., 2011).

[27] *Ibid.*

[28] David A. Koplow, "back to the Future and Up to the Sky: Legal Implications of 'Open Skies' Inspection for Arms Control", Georgetown University Law Centre, available at: https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2749&context=facpub (Visited on March 24, 2022).

1972 Biological Weapons Convention (BWC)[29] however took care of the former and was a major step towards disarmament[30].

The Biological Weapons Convention and the Chemical Weapons Convention are significant global agreement prohibiting the deployment of CW and biological weapons like previous instruments, but goes further by prohibiting their possession and production and provides procedures for their destruction.[31]

Though both the Chemical Weapons Convention and the Biological Weapons Convention aim to reduce human suffering in times of war by prohibiting chemical and biological weapons respectively, their approach differs significantly. On one hand, the BWC only prohibits possession, acquisition and transfers of biological weapons but takes no further step to elaborate on scope of the prohibition or even set up mechanisms for its compliance[32]. The CWC on the other hand is very detailed as to the scope of prohibition and also set up the Organisation for the Prohibition of Chemical Weapons "…to ensure the implementation of its provisions, including those for international verification of compliance with it…"[33]

The Chemical Weapons Convention comprises a preamble, 24 Articles, and 3 Annexes — the Annex on Chemicals, the Verification

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[29] 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

[30] Michael Bothe, NatalinoRonzitti, Allan Rosas, *The New Chemical Weapons Convention: Implementation and Prospects* (Belgium: MartinutNijhoff Publishers 1998)

[31] Kalshoven and Zegveld, supra note 24.

[32] *Ibid.*

[33] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (10 October 1980, 1342 UNTS 137) art VIII

Annex, and the Confidentiality Annex. The Convention in Article 1 lists the basic obligations of State Parties to include not to:

> *To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.*[34]

It also stipulates the obligation to destroy CW in the possession of the state within its jurisdiction or control,[35] CW abandoned in the territory of another state,[36]chemical weapons production facilities[37] and lastly the obligation not to use riot control agents as a method of warfare.[38] It also provides for the complete destruction of CW by States who have them not later than 10 years after its entry into force.[39]

Article II is dedicated to definitions and criteria and as such, defines 'Chemical Weapons' to jointly or separately mean:

> *(a)Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes; (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic*

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34 Chemical Weapons Convention, Art. I (1)
35 *Ibid.* Art. I (2)
36 *Ibid.* Art. I (3)
37 *Ibid.* Art. I (4)
38 *Ibid.* Art. I (5)
39 *Ibid.*, Art. IV para 6

> *chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).*[40]

The other purposes for which toxic chemicals may be used not prohibited by the Convention, so far as the quantities and types are in tandem with those purposes include:

> *(a) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; (b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; (c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; (d) Law enforcement including domestic riot control purposes.*[41]

A significant feature of the Convention is its provisions on reservations. Unlike the 1925 Geneva Protocol which allowed reservations, the CWC does not allow for reservations of any kind. Article XXII is instructive in this regard:

> *The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.*[42]

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40 *Ibid.*, Art. II (1)
41 *Ibid.*, Art. II (9)
42 *Ibid.*, Art. XXII

Furthermore, asides the establishment of an organisation to oversee the implementation of the Convention, another innovative feature of the Chemical Weapons Convention among others, is the 'Challenge Inspections' Procedure under the Verification Annex of the Convention[43]. Basically, a state party to the Convention possesses the right to request a challenge inspection and have the challenge inspection conducted when it has doubts about another state's compliance with the Convention[44]. However, challenge inspections must be requested only for the purpose of clarification with regard to compliance with the Convention and must also be within the scope of the Convention.[45] To prevent abuse of this procedure, the Convention warns states to abstain from making 'unfounded inspection requests.'[46] The aim of this procedure is to serve as deterrence to non-compliance to the Convention by a State party and to re-establish trust with regards to a suspected state's compliance so far results from the investigation clarifies doubts regarding the state's compliance.[47] The Convention also establishes The Organisation for the Prohibition of Chemical Weapons(OPCW), whose functions amongst others includes the conduct of challenge inspections.[48] The OPCW is responsible for the implementation organization of the Convention.

Organisation for the Prohibition of Chemical Weapons (OPCW)

Article VIII of the Chemical Weapons Convention establishes the Organisation for the Prohibition of Chemical Weapons OPCW. It provides that:

> *The States Parties to this Convention hereby establish the Organisation for the Prohibition of*

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43 Parts II, IX, X Annex on Implementation and Verification 'Verification Annex'
44 *Ibid.*, Art IX (8)
45 *Ibid.*, Art. IX (9)
46 *Ibid.*
47 Bothe et al, supra note 28
48 *Ibid.*

> *Chemical Weapons to achieve the object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.*[49]

It further stipulates that States become members of the Organisation by being a party to the Convention and such membership cannot be jettisoned in any way.[50] The Organisation is also seated at The Hague, the Netherlands [51] and has three principal organs which are the Conference of the State Parties; the Executive Council and the Technical Secretariat.[52] As at 31st December, 2019, there are 193 States parties to the CWC and OPCW.[53]

The Organisation carries out several functions bestowed upon it by the Convention. These functions *inter alia* include the conduct of international verification activities, organisation of consultations and ensuring cooperation among member states, settlement of disputes, taking steps against non-compliance with the obligations under the Convention.[54] The OPCW has a mechanism for the effective implementation of the Convention and is armed with rights and duties as an international organisation to fulfil its objectives. By the virtue of the Convention the OPCW enjoys certain immunities and privileges. It possesses legal capacity as well as the privileges and immunities that are needed to carry out its functions effectively, in the territory or jurisdiction of a member

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[49] Chemical Weapons Convention, Art. VIII (1)

[50] *Ibid.*, Art. VIII (2)

[51] *Ibid.*, Art. VIII (3)

[52] *Ibid.*, Art. VIII (4)

[53] OPCW by the Numbers, available at: https://www.opcw.org/media-centre/opcw-numbers(Visited on March 24, 2022).

[54] Bothe et al, supra note 45.

State.[55] However, certain officials and staff of the OPCW also enjoy privileges and immunities to ensure the independent exercise of duties and functions connected to the OPCW.[56]

It is important to state that the OPCW is not a specialized agency of the United Nations though both organisations have a special working relationship. In 2001, a relationship agreement was signed by the OPCW and the United Nations (UN), which outlines the plans and patterns for future cooperation and consultation mechanisms on matters of mutual concern.[57] The functions of the OPCW do not fall within the powers of the Economic and Social Council(ECOSOC), as earlier stated, the OPCW is not categorised as a specialized agency of the UN within the meaning of Articles 57 and 63 of the UN Charter.[58]

The organisation, which is over 20 years old, having been formed alongside the CWC in 1997. Its mission is the implementation of the CWC to ensure that its objective to "…achieve our vision of a world free of chemical weapons and the threat of their use, and in which chemistry is used for peace, progress, and prosperity is achieved".[59] The OPCW received the well-deserved Nobel Peace Prize 2013 for its efforts in the elimination of CW, which threatens global peace and security.[60]

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55 *Supra* note 50,Art. VIII (48)

56 *Ibid.*, Art. VIII (49)

57 OPCW, Vital Partners: OPCW and International Organisations, available at: https://www.opcw.org/about-us/our-partners(Visited on March 24, 2022).

58 Bothe et al, supra note 52

59 Mission A world free of chemical weapons, a Publication of the OPCW about its mission and objectives, available at: https://www.opcw.org/about-us/mission (Visited on November 24, 2021).

60 United Nations 'Organisation for the Prohibition of Chemical Weapons (OPCW): The Nobel Peace Prize for 2013'available at: ttps://www.un.org/en/sections/nobel-peace-prize/organisation-prohibition-chemical-weapons-opcw/index.html (Visited on November 24, 2021).

Common Article 3 of the Geneva Convention

The Common Article 3 (CA3) is applicable in armed conflicts 'not of international in character' which are between State forces and non-state actors, and between non-state actors, within the territory of a State. The mini- convention which enjoys universal application has been ratified by 196 states, the 1949 Geneva Conventions,[61] did not expressly prohibit the use of chemical weapons. However, it prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture…" of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds or detention.[62] The prevention of unnecessary suffering is the underlying principle enshrined in CA3, which is a core IHL objective. It can reasonably be inferred that the prohibition on the use of CW is also applicable in conflicts 'not of international character'. The status of the prohibition of CW has become that of customary international law. The provisions of CA3 are important for states like Syria for example, that have not ratified Additional Protocol II to the Geneva Conventions whose provisions develops the category of Non-International Armed Conflicts in International Humanitarian Law.

Additional Protocol II (Protection of Victims of Non-International Armed Conflicts)

The Additional Protocol II applies to conflicts between government forces and organised armed groups and not to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence.[63] While AP II does

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[61] States Party to the Geneva Conventions and their Additional Protocols, available at: https://reliefweb.int/map/world/states-party-geneva-conventions-and-their-additional-protocols(Visited on March 24, 2022).

[62] Geneva Conventions I, II, III, IV, Art 3(1)

[63] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Art 1

not also expressly make provisions for the prohibition of chemical weapons in Non-International Armed Conflicts, as a matter of customary international law established by state practice, the use of chemical weapons is prohibited in both International and Non- International Armed Conflicts[64]. The wordings of Article I of the CWC have been interpreted to mean that the Convention is applicable 'under any circumstances' including Non-International Armed Conflicts'.

This view was also expressed by the International Criminal Tribunal for Former Yugoslavia in its decision in the case of Tadiæ,[65] the Tribunal stated that:

> *It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals - a matter on which this Chamber obviously cannot and does not express any opinion there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.*[66]

Furthermore, it has also been stated that the prohibition on the use of chemical weapons under customary international humanitarian law not only applies to the direct usage against combatants but also extends to civilians, who are non-active participant in hostilities.[67] The CWC is

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64 ICRC, Customary IHL, 'Rule 74: Chemical Weapons', available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule74#Fn_A9C2FAD0_00018(Visited on March 24, 2022).

65 Prosecutor v. DuskoTadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995

66 *Ibid*para 124

67 Michael Bothe, *The Handbook of International Humanitarian Law,* (London: Oxford University Press 2013)

also responsible for the prohibition of 'toxic contamination of water supply installations and foodstuffs'[68].

Article 14 of AP II provides that:

> *Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs crops, livestock, drinking water installations and supplies and irrigation works.*

Chemical warfare also includes the contamination of food and water supplies of civilians in order to cause terror upon the civilian population as seen in Iraq's use of chemical weapons on its Kurdish population.[69]

Chemical Weapons and Disarmament

The preamble to the CWC brings to light the determination of international community to "…act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction…"[70] The Convention is described as the foremost globally negotiated disarmament treaty that dealt with eradicating an entire category of weapons of mass destruction,[71] its strength and application has been tested by the CW deployed during the hostilities in Syria.

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68 *Ibid.*

69 *Ibid.*

70 Preamble, Chemical Weapons Convention.

71 United Nations Office for Disarmament Affairs, 'Chemical Weapons', available at: https://www.un.org/disarmament/wmd/chemical/(Visited on March 24, 2022).

The United Nations investigation team confirmed the deployment of CW by parties engaged in hostilities in the Syrian Arab Republic[72], Syria acceded to the Chemical Weapons Convention by depositing its instrument of accession on 14 September 2013, making it the 190th State Party to accede to the treaty[73]. Furthermore, Russia and the United States entered into an agreement in Geneva to create a framework for the elimination of Syria's CW programme.[74] On 27 September, 2013, the executive council of the OPCW adopted a milestone decision which established a fast-tracked programme for the removal and elimination of CW and the destruction of all chemical production facilities in Syria. Moving forward, the UN Security Council passed resolution 2118, authenticating the decision of the executive council of the OPCW.[75] In October 2013, the OPCW-UN Joint Mission was established to ensure the elimination of the chemical weapons programme in Syria, which derived its mandate by decision EC-M-33/DEC.1 of the Executive Council of the OPCW and UN Security Council resolution.[76]

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[72] Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013, (September 2013), available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_553.pdf (Visited on March 24, 2022).

[73] 'Syria's Accession to the Chemical Weapons Convention Enters into Force' (OPCW, 14 October 2013), available at: https://www.opcw.org/media-centre/news/2013/10/syrias-accession-chemical-weapons-convention-enters-force(Visited on March 24, 2022).

[74] AhmetÜzümcü, 'International Law and Disarmament: The Case of Chemical Weapons' adapted from the 2015 Justice Stephen Breyer Lecture on International Law, given on April 9, 2015 at the Brookings Institution in Washington, DC,available at: https://www.brookings.edu/wpcontent/uploads/2017/04/ios_20170411_breyer_lecture_uzumcu.pdf>(Visited on March 24, 2022).

[75] *Ibid.*

[76] Organisation for the Prohibition of Chemical Weapons - UN Joint Mission, Mandate and Timelines, available at: https://opcw.unmissions.org/mandate-and-timelines(Visited onMarch 24, 2022).

While the OPCW Fact-Finding Mission was established in 2014 to look into the facts regarding allegations of the use of toxic chemicals in Syria, the OPCW-UN Joint Investigative Mechanism (JIM) proceeded to identify the perpetrators of the chemical weapon attacks confirmed by the Fact-Finding Mission; a mandate derived from the UN Security Council[77]. Having made presentations with regards to its findings to the Security Council as well as the OPCW, The JIM's mandate came to an end in November 2017[78]. In 2018, the OPCW established the Investigation and Identification Team recent occurrence however, was the setting up of the Investigation and Identification Team (IIT), which has been described as a laudable feat, but has caused an increased polarisation among member States.[79].

Conclusion

The underlying objective of the existing legal framework on the prohibition of CW is the prevention of its production and use in hostilities. Where it cannot pre-emptively prevent the deployment from occurring, it is structured to provide voluntary remedy mechanism. It is evident that the existing legal framework for prohibition of CW in NIAC cannot effectively ban the use of CW despite the existing mechanisms for implementation of the existing international treaties. The Syrian conflict has revealed some shortcomings of the existing legal framework, hence the need to same and explores a more comprehensive collective effort in dealing with cases of breach and violation of the CWC.

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77 Blank and Noone, supra note 1

78 *Ibid.*

79 Una Becker-Jakob, *Countering The Use of Chemical Weapons in Syria: Options for Supporting International Norms and Institutions,* EU Non-Proliferation and Disarmament Consortium, Non-Proliferation and Disarmament Papers No. 63, (2019), available at:https://www.sipri.org/sites/default/files/2019-06/eunpdc_no_63.pdf (Visited on March 27, 2022).

Disarmament treaties like the CWC basically rely on adherence by the international community, both to their disarmament obligations and their compliance regimes. They are often drafted and signed by, states that agree with their purpose or which have already undertaken the disarmament process. Therefore, their compliance mechanisms are often not designed to deal with major or fundamental breaches. The reverse was the case in Syria, there was a fundamental breach, another factor is the fact that Syria just acceded to the CWC in 2013 in a response to international pressure to do so. There is need for an amendment of the CWC to provide for a detailed punitive measure for violators who engage in the production and use of CW during armed conflict particularly the non-international in nature. Hence, there is need go back to the drawing board to examine the compliance with disarmament mechanism of the CWC as well as effective sanctions to curb and avoid similar cases like that of Syria.

The UN Security Council could refer the use of CW in Syria to the International Criminal Court for prosecution through an amendment of the Rome Statute to incorporate the use of CW as a war crime to be tried within the jurisdiction of the ICC. The Amendment would grant the ICC subject-matter jurisdiction and expanded the list of war crimes in a non-international armed conflict.

The UN can also create specialise *ad hoc* international criminal tribunal to prosecute the use of CW in Syria, this gesture is not strange as it was the case of Yugoslavia and Rwanda whose tribunal were specifically set up to prosecute war crimes and genocide. It would bring about a collective punitive measure to the use of CW in armed conflict and serve as deterrent.

Criminal prosecution by national court of the country where CWC was breached should be encouraged, if the government of the country is willing to enact national legislation to criminalise the production and use

of CW by citizens. However, such legislation may appear biased except if there would be provision for criminal liability of the government if the violation is done by the State.

Finally, there is no doubt that the legal framework for the prohibition of chemical weapons is applicable in situations of non-international armed conflicts like the one in the Syrian Arab Republic. Despite the efforts of the international community as well as the Organisation of the Prohibition of Chemical Weapons with regards to the disarmament of chemical weapons in Syria, there have been doubts as to the effectiveness of the complete elimination of chemical weapons in Syria as there were alleged reports of use of chemical weapons in attacks in Syria such as the 2018 Douma Attack which formed the basis for unauthorized airstrikes launched by the United States, the United Kingdom and France[80].

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[80] "Syria: US, UK and France launch strikes in response to chemical attack"*The Guardian*, April 18, 2018, available at: https://www.theguardian.com/world/2018/apr/14/syria-air-strikes-us-uk-and-france-launch-attack-on-assad-regime (Visited on March 27, 2022).

THE NOTION OF FALSE RAPE ACCUSATIONS IN INDIA

Sheetal Gahlot[1]

Abstract

Rape is a horrendous and traumatic offense, and India is still learning how to reach out to, communicate with, and rehabilitate survivors humanely. The government established the Justice Verma committee to reform the criminal justice system in response to the criticism that followed the gruesome Nirbhaya rape case. As a response, rape laws were amended, and a broader definition and harsher punishment for rape were implemented. Unfortunately, an often ignored issue is the misuse of the above laws to file false rape charges against men in India which is not a new phenomenon and yet our criminal justice system is miles behind in granting a uniform, just, and effective remedy for them. In cases where the accusation of rape is determined to be false, India is yet to arrive at a no-crime classification or anonymity for rape acquits. In rape cases, malicious prosecution can also lead to mental anguish, damage to reputation, financial constraints, and loss of employment for the said accused. The basis of this study is to identify and elaborate upon whether the existing legal recourses available to those charged with false rape accusations in India are effective and the judicial interpretations of the same. In this narrow evidential realm, the victim and accused veracity comes to the force. The aim is to avoid the adverse implications of false rape charges and the associated hostility against actual rape survivors. And yet identifying the underlying victim in a case and providing them with the legal recourse and reparations they deserve.

Keywords: Rape, False Accusations, False Charges

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Introduction

Rape is a horrendous and traumatic offense, and India is still learning how to reach out to, communicate with and rehabilitate survivors humanely. It is defined under Section 375 of the Indian Penal Code, 1860 as a sexual intercourse committed by a man with a woman against her will and without her consent under any of the seven circumstances mentioned in the provision.[2] The government established the Justice Verma committee to reform the criminal justice system in response to the criticism that followed the gruesome Nirbhaya rape case.[3] As a response, rape laws were amended, and a broader definition and harsher punishment for the offense of rape were implemented.[4] Unfortunately, there is still a misuse of laws to file a false rape charge against men in India which is not a new phenomenon and yet our criminal justice system is miles behind in granting a uniform, just, and effective remedy for them. In cases where the accusation of rape is determined to be false, India is yet to arrive with a no-crime classification or anonymity to rape acquits.[5] In rape cases, malicious prosecution can also lead to mental anguish, damage to reputation, financial constraints, and loss of employment for said accused, as well as their families.[6] Their concerns are often ignored. As per a BBC News case study, an employee who was caught embezzling money from his employer sent a woman to him as a

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2 Indian Penal Code, 1860 (Act 45 of 1860), s. 375.

3 Justice J.S. Verma, "Report of the Committee on Amendments to Criminal Law"(Government of India, 2013).

4 The Criminal Law (Amendment) Act, 2013 (Act 13 of 2013).

5 Yophika Grace Thabah & Rini Jincy Paul, "Role of Police and Prosecution in Eliminating False Rape Cases: Applying the British No-Crime Label in Indian Criminal Justice Administration", 10 *Indian Journal of Law and Justice* 46 (2019).

6 Sahaj Karan Singh, "False Rape Accusation – Requirement for a Meaningful Legislation" 27 *Supremo Amicus*(2021).; Philip N. S. Rumney & Kieran F. McCartan, "Purported False Allegations of Rape, Child Abuse and Non-Sexual Violence: Nature, Characteristics and Implications" 81 *The Journal of Criminal Law*497 (2017).

prospective buyer and coerced her to file a false rape allegation against the employer.[7] The CCTV footage was the only evidence that rescued the employer from the purported rape accusation. "Nobody listened to what I had to say", the employer stated.[8] He suffered public ridicule and was a victim of the system that labeled him as a criminal from the get-go. The Indian Penal Code was amended to include Section 166A, which compels the police to lodge a mandatory FIR for all allegations of rape.[9] The Delhi Commission for Women released disturbing numbers in research, suggesting that 53.2 percent of rape cases registered in Delhi between April 2013 and July 2014 were found to be false.[10] The National Crime Records Bureau's Crime in India report 2020 identified 3375 cases of rape in which a final report stating that it was a false allegation was submitted by the police.[11] By the close of 2020, 94.2 percent of rape trials in India were still unresolved.[12] There has been no clear distinction drawn across cases wherein the woman claimed the allegation was untrue, instances in which the prosecution was unable to substantiate the case, and incidents in which a woman was compelled to retract her claim.[13] The Supreme Court of India in Sham Singh vs State of Haryana asserted that"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation

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7 Joanna Jolly, "Does India have a problem with false rape claims?",*BBC News*, Feb. 8, 2017.

8 *Id.*

9 *Lalita Kumari v. Govt. of U.P. & Ors*, AIR 2012 SC 1515.

10 IndiaToday, "53.2 per cent rape cases filed between April 2013-July 2014 false, says DCW", *IndiaToday.in*, Dec. 29, 2014.

11 National Crime Records Bureau, "Crime in India 2020 Statistics Volume I"(Ministry of Home Affairs, Government of India, 2021).

12 Deepika Narayan Bhardwaj, *NCRB Report 2020 | Crimes Against Women | Cases Registered V/s False; Conviction Vs Acquittal*, Men's Day Out (Jan. 10, 2021), available at<https://mensdayout.com/ncrb-report-2020-crimes-against-women-cases-registered-v-s-false-conviction-vs-acquittal/> (last visited on May 20, 2022).

13 S*upra* note 6.

of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved."[14] After seven years in jail, the Supreme Court acquitted the accused, noting that there was a high likelihood that the accused was falsely implicated in the rape case to seek revenge in a long-running inter-family feud.[15] Dola @ Dolagobinda Pradhan vs The State of Odisha is another instance in which the accused was acquitted of charges of rape by the Hon'ble Supreme Court of India after a mighty 28 years in a case where the FIR was lodged with false accusations of rape to obtain vengeance from the appellants, who had unearthed the informant and her husband's theft of forest produce.[16] False accusations of rape have been lodged in the past to settle personal scores, seek vengeance, obtain monetary benefits[17], gain an advantage in a divorce or other legal proceedings, conceal pre-marital sex, pregnancy, or relationship, force someone to marry them or their daughter, and harass the accused.[18] Oftentimes, it is the individuals' relatives or dear ones who suffer. Vengeance against one leads to victimization of another. All used as a pressure technique to get what the accuser or her family wants.[19] Apex court while upholding the conviction in Rajinder @ Raju vs State Of H.P., "highlighted how in the Indian context, a woman who is a victim of sexual aggression would rather suffer silently than to falsely implicate somebody…the Courts must always keep in mind that no self-respecting woman would put her honor at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her

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[14] *Sham Singh v. State of Haryana*, (2018) 18 SCC 34.

[15] *Id.*

[16] *Dola @ Dolagobinda Pradhan v. The State of Odisha*, (2019) 3 SCC (Cri) 239: (2018) 18 SCC 695.

[17] *Radhu v. State of Madhya Pradesh*, (2007) Crl.L.J. 4704.

[18] Corinne Morgan, "Rape" 1 *Legal Seryice Bulletin (Fitzroy)*225 (1975).

[19] S*upra* note 6.

testimony is unnecessary and uncalled for."[20] Due to the general repercussions of Rape Trauma Syndrome, a victim's allegation could be filed late, premised on a discombobulated recollection of facts, be incoherent, or lack substance, and may be perceived as untrue.[21] The researchers have long asserted that rape is an underreported crime due to the inherent social stigma attached to the crime, often the rapist being a known person, the angst that no one would ever believe you[22], the dearth of witnesses, the fear of names being published in the media, and the callousness of the police.[23] These are, unfortunately, the same considerations that render the accused of a false rape charge into a victim. English Chief Justice Sir Matthew Hale stated in 1680 that "[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused; tho never so innocent."[24] Another concern raised by the Delhi High Court was the unnecessary time and resources spent by the police in investigating these false charges and the superfluous wastage of the court's time in these frivolous litigations.[25] It is a perversion of the judicial process, and individuals who make false rape charges should not be allowed to walk free. The court considered imposing exemplary costs on petitioners who lodge frivolous rape claims.[26]

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[20] *Rajinder @ Raju v. State of Himachal Pradesh*, AIR 2009 SC 3022.

[21] Jennifer J. Freyd, "What juries Don't Know: Dissemination of Research on Victim Response is Essential for Justice"*Trauma Psychology Newsletter*15, 16 (2008).

[22] Joanne Belknap, "Rape: Too Hard to Report and Too Easy to Discredit Victims" 16 *Violence Against Women*1335, 1340-41 (2010).

[23] Morris Revelman, *Sex and Politics in Australia* (Publicity Press Books, 1968)., as referred in Corinne Morgan, *supra* note 17.

[24] Matthew Hale, *The History of the Pleas of the Crown*635 (London, Professional Books, 1972, (1678))., as referred in Brett Erin Applegate, "Prior (False) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault" 17 *Lewis & Clark Law Review*899 (2013).

[25] *Vimlesh Agnihotri & Ors. v. State & Anr.*, High Court of Delhi, Crl.M.C. 1524/ 2021 (2021).

[26] *Id.*

The Existing Legal Recourses

Presently, false rape allegations are penalized under the purview of Sections 182 and 211 of the Indian Penal Code, 1860.[27] Section 211 of the Indian Penal Code, 1860 necessitates four key elements: "intention to cause injury to any person", "instituting any criminal proceeding against that person", or "falsely charging any person for an offense", and "knowing that there is no just or lawful ground for such proceeding or charge against that person".[28] Giving false information to persuade a public servant to use his legal authority to harm another individual is punishable under Section 182 of the Indian Penal Code, 1860. The following conditions must be met: "the person to whom information was given was a public servant", "the person gave that information with the intent to cause injury or annoyance to any other person", "such information was false", and "the person knew or believed such information to be false at the time it was given".[29] The investigating officer or the court recommends in writing the prosecution if a case is determined to be false after investigation and cognizance is sought as per section 195 of the Code of Criminal Procedure, 1973.[30] On July 18, 2012, the Delhi High Court reiterated in Bhuvan @ Binku Tyagi vs State & Anr that rape is a particularly severe allegation and that no woman may be allowed to falsely accuse an innocent man of rape, regardless of the provocation.[31] The rape charge was brought against the individual who was acquitted in the victim's husband's murder trial.[32] It was held that the trial court will have to assess whether Sections 182 and 211 of the

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[27] Indian Penal Code, 1860 (Act 45 of 1860), ss. 182, 211.

[28] *State v. Farukh @ Chhotu & ors.*, FIR no. 369/06, Karkardooma District Court, Delhi (2013).

[29] *Id.*

[30] *Sk.Badruddin v. State of Bihar,* Patna High Court, Cr.Misc. No.25702 of 2009.; Code of Criminal Procedure, 1973 (Act 2 of 1974),s. 195.

[31] *Bhuvan @ Binku Tyagi v. State & Anr, Delhi High Court,* CRL.M.C. 2344/ 2012.

[32] *Id.*

Indian Penal Code were applied in this case.[33] The Judge determined in Mahila Bhagwati Bai vs State of Madhya Pradesh that there had been substantial evidence in the file to establish that the appellant made a false complaint under Section 376 of the Indian Penal Code and that she thereafter altered her narrative and withdrew the charges.[34] The appellant was sentenced in the district court to 6 months of rigorous imprisonment under Section 182 of the IPC and 2 years of rigorous imprisonment and a fine of Rs.1,000 under Section 211 of the IPC.[35] Nonetheless, since the issue arose ten years ago and the appellant had already spent four days in detention, the appeal was granted, and the sentence of 4 days was deemed to be "just, proper, and sufficient".[36] And only the sentence of the fine was confirmed.[37] Those convicted of rape charges after prolonged delays in the criminal justice system are seldom treated with this kind of leniency. The Judicial regulations are crucially needed to bring uniformity in State practice, bridge operational gaps created under section 195 of the Code of Criminal Procedure[38], and mandate magistrates to commence false case proceedings in all matters where the accused has substantial evidence to establish that the rape accusation was untrue. Researchers have largely downplayed the disgrace and misery of being identified as a pedophile or an alleged rapist.[39] The aim of this provision is to shield persons from vexatious prosecution at the behest of individual citizens for the charges enumerated therein solely on meager evidence or scant grounds provided by a person driven by hatred, enmity, or frivolity of deposition.The specific provisions are imperative, and the

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33 *Id.*

34 *Mahila Bhagwati Bai v. The State of Madhya Pradesh,* Cr.A.No.1859/2008, Madhya Pradesh High Court (2012).

35 *Id.*

36 *Id.*

37 *Id.*

38 Code of Criminal Procedure, 1973 (Act 2 of 1974),s. 195.

39 Sara Jahnke and Juergen Hoyer,"Stigmatization of People with Pedophilia: A Blind Spot in Stigma Research"25 *International Journal of Sexual Health* 169 (2013).

Court seems to have no statutory authority to take account of any of the offences stated within it except if the public servant associated records a formal complaint as considered necessary by the provision, failing which the prosecution under Section 182 and 211 of the Indian Penal Code becomes void ab initio. The Judge must approve such a complaint. There have been occasions where the court of law has not registered such complaints due to procedural lacunae.The Law Commission of India's 277th report, titled "Wrongful Prosecution (Miscarriage of Justice): Legal Remedies," delved into the need for compensation for wrongful incarceration and indictment in India.[40] The Committee proposed that the Code of Criminal Procedure, 1973, be amended to give vindicated prisoners the ability to prosecute for compensation in instances of perversion of justice occasioned by erroneous prosecution.[41] The accused individual, or his authorized agent, or his descendants upon his demise, should be able to bring a lawsuit for reparation for damage to his person, psyche, prestige, or possessions.[42] A special court should be constituted to adjudicate such claims expeditiously and provide both monetary and non-monetary reliefs.[43]

Lessons for the Coming Years

The necessary state-backed empirical data to find the extent, consequence, and root cause underlying the filing of these false rape cases is still missing. After engaging with all stakeholders, directives must be developed and implemented on a phased basis. It's been hypothesized that addressing false rape charges might reinforce cultural prejudices of females being dishonest, malevolent liars, and lead to resentment towards

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[40] Law Commission of India,"277th Report on Wrongful Prosecution (Miscarriage Of Justice): Legal Remedies"(Government of India, 2018).

[41] Roshni Sinha, PRS Legislative Research, "Law Commission Report Summary Wrongful Prosecution (Miscarriage of Justice): Legal Remedies"*Institute for Policy Research Studies*(2018).

[42] *Id.*

[43] *Id.*

trusting victims.[44] Indian society must strive to reinforce its core values and measures for the protection of women from sexual assault and harassment. Even if a statute can sometimes be misused it does not entail it shouldn't provide legal recourse for wrongdoing. Individuals falsely accused have a compelling argument to make that they had been wrongly imprisoned.[45] They ought to be able to file charges against the accuser who falsely accused them of rape. The police officials or the judges should not have exclusive right to determine a false rape accusation; somewhat, the accused ought to be eligible to partake and carry the onus of proof that such a report was untrue. After an inquiry, the legislation should specify a particular intention of fraudulent misrepresentation to conclusively prove that the act of sexual abuse never transpired.[46] These cases should serve as a deterrent to anyone who intends to lodge similar spurious claims in the future. Such instances should be addressed in the press and be an element of the legal literacy initiatives. False reporting laws must adequately safeguard sexual abuse victims against being wrongfully convicted of malicious prosecution because of slight discrepancies in their narrative.[47] Every accusation of sexual assault must be thoroughly investigated, and the authorities should stipulate the pieces of evidence that might be used to substantially indicate a report's falsehood.[48] A not guilty decision should not automatically lead to a false accusation or malicious prosecution charges.[49] The only way to successfully balance those prerogatives is to explore social

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[44] Philip N. S. Rumney & Kieran F. McCartan, "Purported False Allegations of Rape, Child Abuse and Non-Sexual Violence: Nature, Characteristics and Implications" 81 *The Journal of Criminal Law* 497 (2017).

[45] *Id.*

[46] Kelsie Plesac, "Remedying Cursory Police Investigation of Sexual Assault and the False Reporting Charges That Result"53 *Valparaiso University Law Review*509 (2019).

[47] *Id.;* Lisa Avalos, "The Chilling Effect: The Politics of Charging Rape Complaints with False Reporting" 83 *Lewis & Clark Law Review*807 (2018).

[48] *Id.*

[49] S*upra* note 22.

dynamics and legislative basis that exist in sexual abuse.[50] In this narrow evidential realm, the victim's and accused's veracity comes to the fore. The aim is to avoid the adverse implications of false rape charges and the associated hostility against actual rape survivors.[51]Monetary redress for wrongful indictment, such as in defamation suits, or a framework for imprisonment, whatever it is, it must be carried out carefully.Being not guilty sometimes does not occasion acquittal. And acquittal does not always lead to freedom. It is not meant to be an emotional debate about men's versus women's issues. Conversely, it should be about identifying the underlying victim in a case and providing them with the legal recourse and reparations they deserve.

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[50] Brett Erin Applegate,"Prior (False) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault" 17 *Lewis & Clark Law Review*899 (2013).

[51] Christopher Bopst, "Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform" 24 *Journal of Legislation*125 (1998).

VIOLENCE INFLICTED UPON WOMEN IN CONFLICT AREAS: PROBLEMS AND PROSPECT

Shruti Ghosh[1] and Ashika Pradhan[2]

Abstract

In this world of burgeoning globalization and tales of wonderful synthesis through connection, there works a parallel narrative of augmenting conflict and war. These sensitive and volatile areas bring about disturbance and mass displacement. Women in conflict stricken places constitute a problematic entity: their ambit of existence is brought into question not just based upon mortality but also the dehumanization women in particular have to go through owing to the violation of myriad human rights pertaining to physical to sexual. Violence against women in areas warped in areas of conflict has been called "one of history's great silences".[3] The status of women has been evolving leap and bound with the change in dimension of the society. On one hand there are women who are achieving wonders on the other there are women who have been the victims of different forms of discrimination, violence and subjugation. Women in conflict areas are such victims who have been silently enduring the pain of violence over several decades. There are enormous cases of women being a victim of sexual assault, rape, custodial rape, rape by army militant and many others.

Despite of enactment of international instruments for the protection of women who are considered to be as a vulnerable sections there have been increasing instances of violence against women around the world majorly in the areas of conflict. The present paper

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[3] Special Rapporteur on Violence Against Women, 2005, cited in Ward, 2005, p. 67.

endeavours to study the different forms of violence inflicted upon women in conflict areas. It discusses about the role of international instruments in combating the violence inflicted upon women, the humanitarian approach and the mechanism that could be adopted to combat the increasing violence and marginalization against women.

Keywords: Conflict areas, International Instruments, Rape, Violence, Women

Introduction

Women all over the world through ages has been victimized, humiliated, tortured and exploited as long as history can tell. They have been the victim of different form of violence, neglected and ignorance in every sphere of life. Living in a country with a world largest democracy with the comprehensive charter of rights in the Constitution of India for the benefit of the citizen, special protection for the benefit of womenand signatory to most treaties to combat the exigencies and different form of violence against human mankind is a matter of pride for every national. But underneath its impressive veneer there is a history of systematic violation of basic civil, democratic and human rights of large section of the population such as women.

Violence against women in conflict area has been a major concern all over the world. There are instances of women being the victims of different form of violence and discrimination. Sexual violence is a common instance of crime that has been committed against women all over the world. Women are asked to reside at residence so as to be safeguard them from being raped by the militant or an aggressor in an ongoing conflict area. Several international organizations laid a stress on the protection of women in conflict areas who are mostly vulnerable in such state of affairs. Therefore the present paper aims at studying thevarious avenues of different form of violence against women in conflict area.

Problematic Connotation of Violence Against Women in Areas of Unrest

In violent and conflict prone areas, there is usually division of the population into self and other[4]: the always already assumed benevolent self and the other or the external entity towards which the self develops an internalized[5] fear and animosity. This works on the principle of identity construction. Identity formation of the female subject and the nation or culture or community happens through long standing interpellation[6] of dominant values and norms. People generally behave in a way which is concurrent to their notions and understanding of their identity formation and retention. Therefore, in a situation of conflict and unrest, preservation of one's identity and through it retention of the identity and longevity of one's community becomes of primary importance. Any riot, dislocation (forced or due to natural calamity) of vast majority of people, wartime tension, or genocide or communal cleansing is bound to divide the population in the sectors of self and other. In these situations possession and subsequent violation of the woman's body becomes a matter of asserting dominance as well as polluting the lineage of the other; this is far greater a reason than the mere sexual gratification and perversion of few opportunistic people. The establishment of the woman's body as the site of racial and communal sanctity is a by-product of universal patriarchal attitude and set up. Woman is objectified and made means to the end of achieving racial superiority and hatred. Her body is treated as an object through which conquests can be registered. Thus, women

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4 The alienated person or a group of people, who are cast aside as inherently different from the self, so as to strengthen the concept of self and in the process endeavouring to evade the fear aroused by the potential danger posed by the culturally/socially other: the outsider.

5 Absorption of ideas or emotions within self either consciously or subliminally

6 Concept introduced by French philosopher Louis Althusser: deposition and absorption of consequent (dominant societal) ideas and norms on a certain individual whereby the subject over the years develops a sense of his or her own identity based on those.

as the essential spoils of wars and conflict constitute the most vulnerable group. Murder is final, but rape and sexual crime against women eliminates the probability of annihilation of shame that comes associated with it (which can be linked to a veritable sense of defeat greater even than one inflicted through murder or death) since its product could be the birth of a hybrid child which would perpetuate this stamp of shame and defeat.

Causes and Contributing Factors of Violence Against Girls and Women

In conflict areas the causes of violence against girls and women are often assigned to the conflict itself with the general understanding that the extent, gravity and impact of this violence would naturally lessen when the main conflict subsides. While that may be true, but there is a larger need to address the underlying thought procedure and response system that allow this kind of violence to occur, and the ingrained patriarchal inculcation from which this behaviour stems. The attitude that allows, promotes, and trivialises discrimination against girls and women during peacetime is responsible for the extreme subjugation, dehumanization, humiliation and utterly miserable situation of women during conflict and unrest. Set gender roles of a patriarchal society relegate the position of women to an *already always* status of inferiority; this inferiority allow men to assert dominance and control over women and in turn over their bodies. This is one of the main reasons for objectification of women and this inherent lack of agency is translated to violent proportions in an escalated form during unrest. That is why, the situation of women in conflict areas achieves such peculiarity wherein their hurt and trauma are different from men, and they become the means to register power dynamics.

The contributing factors to such violence are factors which aggravate the already existing violent situations:

- It becomes even more difficult for women to sustain and survive

since family and community support is severed, and often girls and women are separated from their families.

- Health care facilities and other social institutions such as policelack support staff or fall into complete chaos
- There prevails a situation of gross human rights violation and lawlessness.
- Owing to displacement people are dependent upon aid services and therefore become prone to exploitation and abuse.
- Temporary housing arrangements and camps are mostly unstable, short on supplies, overcrowded, and maybe located on sequestered locations. [7]

The different kinds of abuse that women have to face in this situation can be classified under four categories:

- Sexual abuse
- Physical abuse
- Emotional and psychological abuse
- Economic abuse[8]

Among these Sexual abuse is the most egregious and unfortunately the most rampant form of violence faced by women in periods of unrest.

Impact of Violence Upon Women

Women are subjected to numerous associated abuse and violence apart from the direct repercussions of the conflict: owing to this particular

[7] Violence against Women in Conflict, Post-conflict and Emergency Settings,<https://www.google.com/url?sa=t&source=web&rct=j&url=http://www.endvawnow.org/uploads/modules/pdf/1405612658.pdf&ved=2ahUKEwj7l8Lp-znAhUBb30KHRN3B9gQFjABegQIARAB&usg=AOvVaw0IXWhkzA-PjRwbGYbDUiW1&cshid=1580444082094>(Visited on 10 January, 2020)

[8] *Ibid.*

context the suffering of men and that of women differ in a conflict setting. Women are subjected to *double victimization.*[9] This situation is caused due to the prevalence of patriarchal norms and practices. Women suffer from harsher consequences of conflict due to lack of power and agency on all accounts. According to a study conducted by the UN, around 60000 women were raped in the war in Croatia and Bosnia and Herzegovina; from 1991 to 2001 an estimated 64000 incidents of war related sexual violence against women and girls occurred in Sierra Leone.[10] Women are affected both by the outsiders as well as by their own. Suspension and unavailability of basic amenities from cardinal pillars of society like education, healthcare and the general societal anarchy cause aggravation the already disadvantageous and miserable position of women. They also suffer because of the unavailable or absent male members (due to engagement in movement, death or disappearance or displacement); as familial overlords in patriarchal societies, the male members are also the agents of livelihood upon whom the women and children depend. The absence of male members of family place women in the unfamiliar helm of responsibility: they now have the task to hold the family together and also provide for them. In circumstances where social peace and order get obstructed women find this new role of responsibility unpredictable as they become more and more vulnerable to exploitation, adding emotional trauma to their already existing lot. However, their misery is intensified as their basic human rights are violated particularly through sexual mistreatment and abuse.

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[9] Double victimization is the dual marginalization of women: (in this particular context) first, because of them being placed in the general situation of violence and conflict, and secondly, owing to their gender identity in a patriarchal society, and the vulnerability attached to such identity. In this specific case they suffer from a social outrage (and breakdown of law and order) in addition to their gendered disadvantage and eternal under-privilege.

[10] Rachel Mayanja, 'Armed Conflict and Women, - 10 years of Security Council Resolution 1325', *UN Chronicle.*

Bodies of women become the site of conquest. Their bodies are ravaged by sexual harassment, abuse and rapes and ownership rights are asserted. Ownership of women's bodies through rapes is possessed to humiliate the rival groups and community.[11] According to Ruth Seifert, there could be three reasons for rapes in war time and conflictual situation: first, women are treated as the spoils of war and are divided among the men of the winning group or community or camp as victory booty. This is something which is wont to continue for months even after the war or conflict is concluded. Secondly, rape works as a psychological reminder to humiliate *other*[12] men because they could not save their women. And lastly, rapes, especially gang rapes, increase the sentiment of camaraderie and brotherhood among the soldiers or men of the victorious camp and this is often allowed and promoted by the men in superior ranks.[13] Moreover, women are also discriminated against and made to suffer by their own. Subsequent to the rape their own community fails to accept them; they are thus alienated and a greater trauma is inflicted on them. Sexual violence exposes the sheer powerlessness and vulnerable position of women and at the same time an entire community's pride is deflated depending solely upon the so-called violation of honour which resides conveniently in the woman's custody. This also becomes provides an excuse to further restrict and confine women and girls to restrained spaces under the wary and punitive male gaze.[14]

Effects of Gender Based Violence in conflict areas, as also in post conflict zone, are many. One of them is Sexually Transmitted Diseases (STDs). STDs have long term consequences. Sometimes STDs are planted in a planned manner so that the population of the opposition side can be

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[11] Patriarchy, Armed Conflict and The Agency of Women in Kashmir, <http://hdl.handle.net/10603/78491> (Visited on 24 January, 2020)

[12] Supra note 5

[13] Ruth Seifert, *War and Rape*: *analytical Approaches*, 1-25, (Women's International League for Peace and Freedom, 1993)

[14] Supra note 12

systematically exterminated. Men who have these diseases intentionally rape women of the local area and spread these diseases. Moreover, STDs like Gonorrhea and Chlamydia come wither own host of painful conditions, effecting the lives of women on a daily basis.[15] These diseases also require immediate medical attention so as to prevent their spread and transmission, which again unfortunately is quite lax in conflict and post conflict area. The consequences of Gender Based Violence affect women as well as their community as a whole. Rapes often become expression of violence and hatred and therefore are often perpetrated with the accompaniment of various sharp objects, for example, knives. Injury to reproductive organs, therefore, is a general outcome of such violent interface. There are myriad other physical harms and also the possibility of miscarriage of the offspring begotten from rapes. In addition there are long standing psychological trauma associated to violence such as post-traumatic stress disorder, shock, memory loss and sexual apathy, malfunction and dysfunction. Rape Trauma Syndrome is a pathetic repercussion which disrupt women's daily life where they lose Sense of control, are intrigued by guilt, anger, and various kinds of phobias. They become suicidal and frequently become school drop-outs or refuse to engage in the regular work they used to do. Such vulnerability makes them more and more home bound, looking at a life fraught with powerlessness and subjugation.

Reintegration of women in post conflict set-up is a difficult feat to attain. While some families refuse to take them back, there are numerous girls and women who never find suitable partners for marriage. Some marriages end in separation and divorce in post conflict scenario. For mothers whose husbands leave them subsequent to rape, providing for

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[15] Rashida Manjoo&CalleighMcraith , "Gender- Based Violence and Justice in Conflict and Post Conflict Areas" 44 *CILJ*(2011), also available on < https://www.lawschool.cornell.edu/research/ILJ/upload/Manjoo-McRaith-final.pdf>(Visited on 21 January 2020)

the family as well as being a single parent augur grievous ramification. Seeking justice and reparations for the wrongs done to them is also a mammoth task as sexual exploitation and abuse is primarily viewed as an infringement upon men's property rights rather than violation of women's human rights.[16]

Some of the necessary evils of the entire sexual threat paraphernalia to women are forced sexual labour, repeated and brutal sexual violation, female genital mutilation, and trafficking them as cheap domestic and industrial labour and prostitution rings. Their bodies are also used as carriers to transmit messages to various camps.[17]

The nature of violence against women has many more facets **beyond the ambit of sexual exploitation.** Apart from poor nutrition and health conditions, women sometimes lose reproductive potential and are hence ostracized from society. Again a natural result of conflict and unrest is displacement. Though both men and women experience the devastating repercussions of displacement, the plight of women is again double fold because of their perceived and literal vulnerability[18]. There is loss of livelihood, sense of uprooted-ness, scarcity of employment opportunities and the fear of being separated from families. Complete or partial breakdown of the social institutions at these crucial time results in increased risk and woe to the womenfolk. Woman's body renders her most vulnerable, and her maltreatment and abuse at the core of conflict to the refugee camps is a constant reminder of her inferior status and utter and pathetic lack of agency.

Displacement and overturning of specific gender roles in post-conflict areas reflect **socio-cultural violence** against women. Often

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16 *Ibid.* 17-18

17 Anuradha M. Chenoy, *Militarism & Women in South Asia*, 28(1st Kali for Women, 2002)

18 Supra note 10

women have to become providers for families. The men are upset by this overturning of gender roles. Even if women become providers and take care of the economic responsibility, they unfortunately are not able to transcend gender roles. When the rigid division of the public/private assignment of gender roles in a patriarchal society breaks down, it affects the whole family. The men bear the psychological brunt equivalent of castration complex owing to the sense of losing control and they tend to become more and more aggressive. Women are, of course, at the receiving end of this aggression and misplaced frustration. Finally, the movement and agency of women are subjected to extreme restrictions in order to preserve the proverbial family and community honour.[19] Thus, patriarchal oppression results in perpetuation of further patriarchal bias and curbing of agency.

Need for the Protection of Women Armed Conflict Areas

Women all over the world are affected by the conflict due to their role and existing status in the society. Discrimination, that women often have to face in times of peace get reinforced in war as the community becomes militarized.[20] Militarism and masculinity values i.e., supremacy, violent behavior and forcefulness and closely intertwined. Where women in India during the time of peace faces repercussion of patriarchal society, where man have a control over their productive power, reproduction, sexuality and many others. Where women themselves are considered as a property of a man, they are considered as the wives of man and mother of children and a badge of honour for a man. These symbolic perceptions towards women make them prone to different form of violence during armed conflict. Rapes of a woman are common instances which take place during an armed conflict so as to humiliate their enemies.

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[19] Supra note 12

[20] Women Rights in Conflict Zone: A Focus on India(2010) *available at:* <http://www.hrln.org/hrln/images/stories/pdf/Report%20-%20Women%20Rights%20in%20Conflict%20Zones%20-%20A%20Focus%20on%20India.pdf >(Visited on January 21, 2020)

Rape is just one instance to the different forms of violence that has been committed against women in the areas of armed conflict. There are instances where the survivor of the violence suffers a long time health hazards including psychological trauma like fear, isolation and many others.

Notwithstanding the troubles men have to go through in armed conflict, it is clear that women face specific issue in this situation due to their vulnerability. Therefore this makes it essential to give a special protection for women in conflict areas so as to combat the plight against them and discuss the necessary remedies for the upliftment and protection of women.

Women and rheir Rights and Protection Under International Intruments

Women have been the worst sufferer of different forms of evils in areas of conflict. There are encroachment upon the fundamental right and freedom of women where women are the victim of sexual slavery, human rights abuse as a part of military as well as the breakdown of the community. The rampantmasculinityprejudice, being offensive to human rights and human dignity has emerged as a fundamental crisis worldwide.[21] The term "women's rights" refer to the rights and freedoms to which women are entitled as human being. Since human right is the right of every human being to ensure the right to live with equal dignity and respect, women being an essential component of society automatically enjoy these rights.[22]

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[21] Mamta Rao, *Law relating to Women and Children* (4thedn, Eastern book Company, 2018)

[22] 'Women's right and armed conflict situation',*available at:* <https://shodhganga.inflibnet.ac.in/bitstream/10603/77530/10/10_chapter%202.pdf >(Visited on January 24, 2020)

The human rights of women are therefore avital, undisputable, and integral part of human rights. Any violence againstthem shall violate the undeniable, irrefutable rights of a woman. The International Organization, taking cognizance of the repression all over, United Nations, has come a long way and has come up with several international instruments focusing on women's emancipation and enhancing the dignity of women worldwide, and transforming itself from being a custodian to becoming an organization concerned with human rights, justice, and egalitarianism. Matters related to women have gathered enormous support whereby several instruments have been laid down to promote and protect women's rights and freedom.[23] United Nation at present has been vigilant in addressing rights of the women and the progress made in securing women's rights across the world in recent decades. However,the grey area remains to be there between the protection granted to the women and the actualities of the women's status in India. There has been an emergence of new forms of violence and discrimination against women in the changing society. Violence inflicted upon women in conflict areas is yet another emerging form of violence that needs attention.

History attests that women have always been inflicted with or more prone to a different form of violence either before or during or after the armed conflict which includes sexual assault, rape, sexual harassment and many others. Be it a woman in the North-Eastern part of India or a Kashmiri woman. The hue and cry amongst the women remain the same. Taking into consideration the condition that exacerbates inequalities in gender relations in the armed conflict area, currently, it has received tremendous international attention.

Humanitarian Law in Relation to Armed Conflict

International humanitarian law is one of the facets of universal international law whose purpose is to forge and confirm peaceful relations between

[23]*ibid*

peoples. It makes a significant contribution in upholding peace and promoting humanity in times of war.[24] It is concerned with the protection of basic human rights without which the existence and survival of human beings is not possible.For instance the right to life, the right to health, the right to humane treatment, and the right to acquire adequate materials to satisfy basic needs.

The International Instruments like Geneva Conventions confers several provisions for the protection of women. **Article 27** of the **Fourth Geneva Convention** provides that **"Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault".** [25] The additional protocols which were later added to the convention further specifythe ground to uphold respect and dignity of women. Article 76 of the Protocol I provide that "women shall be the subject of special respect"[26]. The expression like "*with all consideration due to their sex*" or "*with due regard to their sex*" used in the convention implies that extraordinaryattention has been given by the convention to the safeguard of women.

Thus Geneva Convention as a whole has played a major role in the protection of victims of the armed conflict in general and has also laid specific provisions for the promotion of equal treatment, and elimination of violence against women worldwide.

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[24] 'Sexual Violence in Armed Conflicts – A Violation of International Humanitarian Law' *available at:* https://www.legalserviceindia.com/legal/article-2-sexual-violence-in-armed-conflicts-a-violation-of-international-humanitaraian-law.html (Visited on January 25, 2020)

[25] The Geneva Convention relative to the Protection of Civilian Persons in Times of War, of August 12, 1949, art.27

[26] Protocol Additional to the Geneva Convention of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 76

Convention for the Protection of Women

The Convention on Elimination of Discrimination Against Women (CEDAW) is the most significantlegal document concerning human rights issues of women worldwide.CEDAW is an exclusive international documentdealing exclusivelywith the promotion and protection ofwomen's rights. It addresses the reality of entrenched and multifaceted gender inequality throughout the world and underlines the difference between de facto and de jure equality of women in the world.[27]

The convention redresses the violence faced by women in terms of socially, economically, culturally, and many others. The Convention mandates the signatory countries to adoptapposite legislative measures and other effectiveresorts, including sanctions for the eliminationof all forms of discrimination against women[28] and ensuring a safer society for women. The convention also refrains the nation from engaging in any practices of discrimination against women or any act which derogates women's status in society and ensures that every public authority and institution acts in conformity with this obligation.

The provision of this convention provides for affirmative actions for the protection and benefit of women. Though it does not provides specific provision for safeguarding women in armed conflict, however, it prohibits any forms of discrimination or violence against women. India being a signatory to this convention has been vigilant in complying with the obligation that has been specified by the conventionin safeguarding every woman from any forms of discrimination or violence inflicted upon them.

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[27] Dr. Ishita Chatterjee, *Gender Justice and Feminist Jurisprudence*487-488(1st edn, Central Law Publication, 2017)

[28] *ibid*

Declaration on the Protection of Women and Children In Emergency and Armed Conflict (1974)

It is an evident fact that during any form of conflict women as well as children are the most disadvantaged section of the society. The UN General Assembly resolution led to the formation of a declaration on the protection of women and children in emergency and armed conflict and gave an express recognition to the susceptibilitythe women goes through in the situation of armed conflict identifying and recognizing the specific need for the protection of women.

The declaration states that every effort should be made by states involved in armed conflict and military operations in foreign territories to spare women and children from the ravages of war.[29] The declaration requires the signatory state to take the necessary state to prevent persecution, torture, degrading treatment, andany form of violence against women and also take punitive measures for the protection of their dignity and welfare.

The Declaration also required that woman who finds themselves in a state of armed conflict should be provided with adequate food, medical aid, shelter, and other inalienable rights. This declaration aims at protecting women against every form of discrimination or every form of violence against women during the armed conflict.[30]

Declaration on Elimination of Violence Against Women, 1993

The Declaration on the Elimination of Violence against Women is the first international human rights instrument thatwholly deals with the issue

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[29] Women and Human Rights, *available at:* < https://www.diakonia.se/en/IHL/The-Law/International-Law1/International-Human-Rights-Law/Women-and-IHRL/ >(Visited on 25 January 2020)

[30] U Chandra, *Human Rights*,272 (8th edition, Allahabad Law Agency Publications, 2010)

of violence against women. It recognizes every form of violence inflicted upon women. It affirms that violence against women violates, impairs, or nullifies women's human rights and their exercise of fundamental freedoms.[31] The declaration provides that violence against women includes any form of physical, sexual, and psychological abuse which includes rape, sexual abuse and harassment, trafficking of women, and forced prostitution.[32] Sexual abuses and trafficking of women are the common instances of violence committed in conflict areas.

The declaration along with recognizing the different forms of violence encompasses various resorts the signatory state should adopt in combating violence against women. It has been recommended to the signatory state to condemn any form of violence and ensure a safer and healthier society for women.

Protection of Women Against Violence in Conflict Areas in Indian Context

India being a signatory to international convention is bound to comply with the obligation ensured by international commitment. Despite several international commitments to protect women in areas of armed conflict, the increase in crime against them shows the failure on the part of national machinery in complying with the standard obligation that has been laid by the international instruments. There are several instances of sexual assault against women committed by the aggressor that go unreported in the areas of armed conflict. Armed conflict in Kashmir, Assam, and other northeastern states is a witness to it.

There are instances of women not being provided with adequate medical treatment. The hue and cry of the women victims of conflict from the Vedic period to the contemporary world always remain to be

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[31] Declaration of Elimination of Violence against Women, 1993

[32] *ibid*

unseen and unheard. The abuse inflicted upon women isconsidered a tactic to increase man's superiority and authority.

The major problem the researcher found is the lack of proper recognition of the violence inflicted upon women or the damages that could cause to women in the areas of armed conflict by the international instruments. The Geneva convention dealing with the armed conflict has been framed on the perspective of harm that could be caused to man in an armed conflict and the ground realities of harm caused to a woman physically, mentally, socially, and culturally have not been recognized.

In the present state of affairs, India, despite it being a signatory of the international organization has failed as a nation to provide adequate protection to women from emerging harm caused to women in armed conflict areas. Though reliefs are provided under the Constitution of India as well as several other statutesthe increase in crime against women in the normal circumstances as well the armed conflict areas shows the failure or ignorance of the nation as a whole is complying with the obligation of international instruments.

Suggestions

1. The international convention which is made especially for the protection of women needs to recognize the different forms of violence inflicted upon women in armed conflict areas.
2. The international instruments should cater to not only physical violence against women but also every other kind of problem faced by women as a result of armed conflict. As it not only affects physically but also affects socially, mentally, and economically.
3. Generally most kind of offence against women is the result of a lack of awareness about the violence inflicted on them as well as the lack of awareness about the remedies available to them. Thus

awareness of the women about the existence of legal rights and remedies is the need of an hour.

4. In India, there are inadequate laws for the protection of women in the armed conflict area, there is hardly any legislation that recognizes the violence inflicted upon them.

5. In India, the army personnel is given WITH special power under AFSPA for the maintenance of law and order but the power given to the army personnel is too wide as there are several instances of it being misused rampantly. Thus there is need to revisit the existing laws giving powers to the army for safeguarding the interest of women.

Conclusion

There have been several instances of women being victims of sexual assault or rape or different forms of violence. Any form of violence upon women has an everlasting effect on the victim and society at large. This act of violence against women used as a weapon to show supremacy over the aggressor is creating a blot in society as well as human mankind. Despite several efforts by the international organizations where several conventions have been enacted to improve the status of women and ensure safety for women but the increase in crime against women especially in the areas of conflict shows the lack of proper implementation of obligation that has been laid down by the international instrument. Along with the effective implementation of laws, the people at large should join hands collectively in combating any form of violence against women and also aid women who have been the victims of such violence with emotional support. A major step towards achieving this goal would be the rejection of patriarchal norms and practices from the very core of society; rejection, since the removal of patriarchy is not an easy task to accomplish. Patriarchy is something deeply ingrained in the very moral and cultural fabric of society.Objectifying women and inculcation of systematic misogyny through generations lie at the root of the ill-treatment,

abuse, and exploitation of women. This abuse of and hatred towards women, in general, attain monstrous proportions in a society and/or community ravaged by conflict. Therefore, it is high time that there be systematic redress of society by removal of systematic patriarchy through various educative platforms as well as the implementation of appropriate policies.

MARRYING A PERSON OF CHOICE IS A FUNDAMENTAL RIGHT: ISSUES, CHALLENGES, AND ROLE OF THE JUDICIARY

Roma Pradhan[1] and Puja Sharma[2]

"Freedom of choice is more to be treasured than any *possession earth can give."* ….by David O. Mckay

Abstract

Marriage is one of the universal social institutions recognized by human society to control and regulate the life of man. The right to marry is a component of the right to life under article 21 of the constitution of India. However, the marriage right of a person by own choice is a fundamental right that only uncommon Indian women are privileged to exercise. Hindu society is selective in its dislike for inter-caste marriage.

The marriage rightsof inter-caste,and inter-religion is a fundamental right guaranteed by the Constitution. United States President, George W. Bush has understood the necessity of marriage and has said that he will support an amendment to the constitution that defends marriage against the threat of cultural breakdown. The United States Supreme court in the case Loving v. Virginia, struck down state laws banning interracial marriage in the United States. The right of marriage is protected under International Instruments such as UDHR, ICCPR, ICESCR and European Convention on Human Rights. There is an urgent need to protect a couple's right to marry inter-caste or inter-religion under the Special Marriage Act has become necessary with time. These days inter-

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caste marriage has become a heated debate among political parties. Recently the term "Love Jihad" was frequently used by radical leaders as their vote bank policy. Thisword was created by the right-wing Hindutva outfits.

Keywords: Fundamental Right, Inter-caste, Marriage

Introduction

According to Veda, a man is incomplete until he gets married and meets his partner.[3] The concept of marriage and marital institution is to establish a relationship between husband and wife. Hindu Law considers marriage as a sacred tie and the last of ten sacraments that can never be fragmented. It is a relationship that is recognizedfrom birth to birth. As Constructed on smiritikars even death cannot break this relationship. In a valid marriage in India, the two conditions need to be satisfied. Firstly, the parties must have the capacity to marry. Secondly, they must undergo the necessary ritualsand formalities of marriage according to the Hindu Marriage Act,1955.

Marriage in the Mahomedan legal system is not a sacrament but a civil contract.every right and obligation that it forms rises immediately and is not dependent on any condition precedent such as the payment of dowry by a husband to a wife.[4]

Ashabah says, "*Marriage is a contract underlying a permanent relationship based on mutual consent on the part of a man and woman.*"[5]

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[3] Nature of Hindu Marriage under Hindu Law, *available a*t: https:// blog.ipeaders.in/nature-hindu-marriagehindu-law/(Last visited on 7th December, 2020).

[4] Marriage Under Muslim Law, *available at:* https:// www.lawctopus.com/academike/marriage-undermuslim-law.(Last visited on December 6, 2020).

[5] Ibid.

Marriages in our country are mostly registered under the respective personal law, either the Hindu Marriage Act, of 1955 or the Muslim Marriage Act, of 1954. However, those couples who could not register their marriage under any of the personal laws were shielded under the Special Marriage Act, of 1954. The Special Marriage Act, allows people from two different religious backgrounds to come together in the tie of marriage. This Legislationprovides a procedure for both solemnization and registration of Marriage, where either husband or wife is not Hindu, Buddhist, Jainor Sikh.[6]

Right To Marry By Choice: Concept And Importance

- Definition of Marriage:

Legally, Marriage is a binding contract between the two parties that joins together their possession, income, and lives. Marriage has a legitimate recognition to get united. Society accepts the union of two souls because the primary object of marriage is to beget and bear children, and to them until they can take care of themselves. The purpose of marriage is spiritually, emotionally, and physically to unite a man and a woman together, as husband and wife, in a covenantal relationship between themselves and their creator. Spiritually in the logic to get spiritual benefit by performing religious duties.[7]

- Concept:

When it comes to marriage in India, arranged marriages are well-thought-out to be the finest way to get a boy and a girl to tie the marital knot. The

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[6] Editorial, "How to register marriage under special marriage Act in India" *India Today*, December.6, 2020.
Right to Marry, available at: http://www.legalservicesindia.com/article/1001/right-to-marry.html.(lastvisited on December 6, 2020).

[7] Things to know about Special Marriage Act, available at: https://blog.ipeaders.in/10-things-every-indianshould-know-about-the-special-marriage-act1954(Last visited on December 7,2020). [12] The Constitution of India, art.21. [13] 1967

Indian parents are the ones who take utmost interest in it, right from the girl or boy they want their child to get married to, till the date and time of the marriage. That is so because here succeedsthe rationale that they are a lot wiser and more experienced than their children, and will decide the best for them. The Indians consider marriage as an auspicious culmination of two souls, and they adopt every ritual of marriage according to the astrological positioning of the stars of the bride and groom.

Earlier in primitive society, marriage was a practice where the bride and the groom were uninformed about their partner, as all the choice was initiated by their respective parents and guardian. The consultation of the bride and the groom was not a prevalent practise duringthat time. However, the new society has transformed and the situation has changed and every choice concerning marriage is taken up by the bride and the groom themselves and not the society or any family members.

There is a massive influence of caste and religion in our country and when it comes to the institution of marriage it is designated the most fundamental criteria for properly solemnizing the marriage. The Parents usually select the prospective bride/groom for their children from the same caste as theirs.

Inter-caste marriage is still measured to be taboo in many places in India. We follow a very rigid structure of the caste system. The People have to be compulsory to marry inside their caste and whosoever get married outside their caste and rebelled wererejected in the society. Several honour killings are reported every year, mostly stated in Haryana and unfortunately, they show pride in doing so. Thus,there is severe need for legislation to protect the welfare of those persons who roseoverhead these caste and religious splits, to marry a loving partner. So,the Parliament of India enacted a Special Marriage Act, 1954 which provides for a superior form of marriage for those couples who are

Indians and all nationals in foreign countries, irrespective of caste and religion they follow.[8]

The right to marriage by a choice is recognised under the right to life as Article-21 of the Indian Constitution which observes that any of the people shall not be deprived of his life and personal liberty but the exception is only according to the process established by law.[12] This assures that an individual has a choice and right to marry any person of his or her own choice and that the state will not interfere in the matters relating to the marriage of a person as marriage is held to be a personal or private right of an individual. However, the state is under a compulsion to protect the rights of those couples who are proposing to marry inter-caste or inter-religion.

In a country like the United States, marriage is known as a civil right. It is operative Constitutional text in section 1 of the 14th Amendment, which was ratified in 1868. It conveys that "No state shall prepare or enforce any law that abridges the rights or protections of citizens of the United States, nor shall any state deny any person of life, liberty, or property, without due process of law or deny any individual within its jurisdiction the equal defence of laws." The U.S Supreme Court applied this standard to marriage in the *Loving v. Virginia*[13]case where it struck down a Virginia law banning interracial marriage. As Chief Justice Earl Warren wrote for the majority that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness viaa free man.

The 14th Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Freedom to marry resides with the individual and cannot be exceeded by the state.[9]

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8 Right to Marry, available at: https://www.legalservicesindia.com/article/1001/right-to-marry.html.(Last visited on December 7th, 2020).

9 The Universal Declaration of Fundamental Right, 1948, art.15.

Legal Framework on Marrying a Person of a Choice

- ***International Instruments:***

The modern international concept of Human rights can be traced to the aftermath of World War II. Human rights law upholds the positive right of all peoples to marry and found a family. Family is an important and natural unit of society and requires the full protection of the state. The various international instruments uphold the idea of equal and consenting marriage and try to guard against abuse which undermines these principles. It is not prescriptive as to the types of families and marriages that are acceptable, recognizing tacitly that there are many different forms of social arrangements around the world.

A) The Universal Declaration of Human Rights, 1948-
The Preamble of the declaration recognizes the dignity and equal and inalienable rights of all members of the human family are the foundation of freedom, justice, and peace in the world. Article-16 of the Declaration says men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights to marriage, during the marriage, and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses. And family is considered to be a natural and fundamental group unit of society and is entitled to protection by society and the state.[10]

The International Covenant on Civil and Political Rights, 1966-

This Convention under Article 23, protects the interest of a person who intends to marry by his or her choice, the article states that the man and women have the right to marry at their marriageable age and the right to found a family also recognized under this article. It also recognizes that no marriage shall be entered into without the free and full consent of the

[10] The International Covenant on Civil and Political Right, 1966, Art.23.

intending spouses. The state parties to this Convention shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during the marriage, and at its dissolution. [11]

B) The International Covenant on Economic, Social and Cultural Rights, 1966 This Covenant under Article 10, entitles the state parties to protect and recognize accorded to family in the widest possible and asserted that the marriage must be entered into with the free consent of the intending spouses.

C) The European Convention on Human Rights, 1950
It contains the fundamental rights and freedoms which are believed to be common to all people. This Convention sets out a list of fundamental rights and freedoms which are believed to be common to all people. There is a provision for individuals' right to respect their private and family life.[12] And also provides the right to marriage at marriageable age according to national laws governing the exercise of this right.[13]

- ***National Instruments***

The Constitution of India provides a fundamental right under Article-21, which talks about the right to life and personal liberty. It reads "No person shall be deprived of his life and personal liberty except according to the procedure established by law." The right to marry a person of choice is a right that covers under the head of the Right to Life and Personal liberty. In the case *Lata Singh v. State of Uttar Pradesh*,[14] Supreme Court viewed the right to marry as a component of the right to life under Article 21 of the Constitution of India. In the case *ShafinJahan*

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[11] The European Convention on Human Rights, 1950, Art.8.
[12] Ibid, Art.12
[13] AIR 2006 SC 2522.[20] (2018) 16 SCC 368
[14] W.P [C] No. 57068 of 2014

v. Ashokan K.M and Ors,[20] also known as the Hadia case, where a girl Hadia, previous name Akhila converted to Islam and married a Muslim boy. The father of the girl filed a case and said there should investigation of this marriage as it is a matter of 'Love Jihad'. And they take my daughter to Syria and force her to join the Islamic State; the Kerala High Court in 2017 annulled the marriage citing it as not legal. The matter went to the Supreme Court of India, the court once again retreated from the scope of Article-21 of the Constitution. Court said if Article-21 talks about tight to life and personal liberty it also gives a right to marry. The court further observed that, "If they are adults the state has no power to control them and impose its view on these adult couple, it is their life and responsibility. No matter how they want to live their life. Even their parents cannot force them to marry the person of their choice." In case *Smt. Noor Jahan Begum v. State of U.P and others*,[15] the Allahabad High Court gave an order that conversion just for marriage is unacceptable. The marriage is valid and legal if there is an honest conviction on the individual concerning the tenents of a new religion that the individual is adopting.

But the Allahabad High in the case of *Priyanka Kharwar v. the State of U.P*[16] a division bench of the Allahabad H.C overruled the earlier cases on the ground of Article 21 observing the Right to live with a person of his or her choice irrespective of religion professed by them is intrinsic to right to life and personal liberty.

In the case *Salamat Ansari and others v. State of U.P and others*,[17] in this case, a Muslim husband and Hindu wife shout to protect their marriage for F.I.R that has filed against them, that alledges forcefully

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15 Crl. Mis. Writ Petition No- 11367 of 2020

16 Ibid

17 WRIT PETITION (CIVIL) NO 494 OF 2012

18 Special Marriage Act, 1954, section.5 Notice of intended marriage.

abduction of women and conversion. The Allahabad H.C declares if religion conversion is done solely for marriage is not legal but also guaranteed fundament right as a choice of one religion and choice of one partner, falls under personal liberty which is guaranteed Fundamental Right under Article 21. Court has relied on the Right to Privacy as declared in the landmark case *Justice K.S. Puttaswamy v. Union of India*[18] that declared the right to choose a partner and the right to choose one's faith fall under the right to privacy and the state should not interfere with these personal relationships.

Right to Marry Under Special Marriage Act: Issues and Challenges

The Special Marriage Act was passed in 1954 as a part of a series of reforms to personal laws in India that Jawaharlal Nehru had finished a priority. It governs marriages that could not be celebrated according to religious customs,thatwere inter-faith or inter-caste marriages. This legislation is ac circumventing cultural taboos against marrying outside one's religion or caste.

Conditions for Getting Married underthe Special MarriageAct, 1954

Chapter 2 of the Act deals with the substance of the solemnization of special marriages. Section 4 of this legislation lays down the condition relating to the solemnization of special marriage. It provides the following circumstances to be satisfied for marriage:

- Neither of the parties to the marriage has a spouse living.
- Should not be incapable of giving valid consent to the marriage due to unsoundness of mind.
- Neither of the party has been suffering from mental aliments to such an extent, that they are unfit for marriage and the procreation of children.

- Who are Party to the marriage should not be laid open to an attack of epilepsy or insanity.
- The marriage age of the groom should be 21 years and the bride should be 18 years of age.
- Parties should not within the degrees of prohibited relationship, provided the custom governing at least one of the parties permits marriage between them, such marriage may be solemnized, notwithstanding that they are within the degree of prohibited relationship.

When the marriage is intended to be performed following the Act, the parties of the marriage shall be required to give a notice in the form specified in the second schedule to the marriage officer of the district, where the marriage is going to be observed.[19]

The marriage shall be solemnized after the end of 30 days of the notice period that has been issued under the provision of the Act.

At least one of the parties of a marriage should have resided for not less than 30 days, immediately preceding the date on which the notice for marriage is dispensed to the registrar. The marriage officer is bound to display the announcement of the intended marriage, by affixing a copy to some conspicuous place in his office.[20]

If any part to marriage is aggrieved by the non-solemnisation of intended marriage by the marriage officer, then the aggrieved party can seek an appeal to the District Court within local limits of whose jurisdiction the marriage officer has the office. But the period of appeal is 30 days of

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[19] Ibid, Section.6 Marriage notice book and publication.

[20] Inter-caste and inter- religious marriages: social and legal issues, available at: https://www.lawctopus.com/academike/inter-caste-inter-religious-marriages-social -legal-issues/.(Last visited on December 8,2020).

intended marriage. The decision of the district court, regarding the solemnization of the intended marriage, shall be final.

From the above provisions of the Act, it can be held that it is legislation that formalized marriage which is not protected under Personal Laws. Due to this feature, the act is the most secular form of law dealing with civil matters. This step can help in solidification ofa good relationship between various castes and religions.[21]

Right to Marry By Choice: Issues and Challenges in India

The legislation regarding special marriage was completed to facilitate the couples who intend to marry Inter-caste inter-religion, but the same legislation creates giant hurdles. In most of the cases a couple of different religions convert to marry, to escape performing marriage under the special marriage act due to its 1 month notice period requirement, for registering a marriage. During that one month, the couple drops the idea of marriage because of family pressure. Sometimesfamily of the couple forcesthem to do such an idea through force coercion and also in some cases took their lives in name of saving the family and societal prestige. While no such notice period is required if a person of the same religion under the personal laws of Hindus and Muslims, the Special Marriage Act, says that the submission of marriage application can be initiated only in a jurisdiction where at least one of the parties resides. So, if both the parties reside in different states and both the families are against their marriage, the couple cannot register their marriage. The last option available to the couple is to elope or run away and apply for marriage in another state. Again, if the couple applies for marriage under another state under Special Marriage Act, that particular state sends a notice to the resident state of the couple by saying that one of your residents is going to get married in our state.

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[21] Ibid

It will be like inviting the family of the couple to come and book your flight or train tickets use force and stop the marriage. As the provision of the above act says:

> "*the marriage officers must send a letter to the permanent address of the parties, informing them that their son or daughter is about to do the unthinkable, in exercising his or fundamental right to marry someone of his or her choice.*"

Thus, this exercise ensures that the parents, as well as caste or community and religiousleaders, have the prior knowledge of the time and location of the marriage to be happened and the Indian state perform as a marvellous KhapPanchayat, by ensuring the society to choose and decide whether the couple would get married or not.

The recent development to this regard is that the Uttar Pradesh government has promulgated The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020. It outlaws religious conversion by marriage. This law shifts the burden of proof onto the accused to prove that religious conversion is a bona fide by making such a marriage as null and void. It has been carried out under thetag of inter-faith marriage. This ordinance which was promulgated by UttarPradesh government was prompted by Allahabad H.C in *Salamat Ansari Case,*[22] but government relied upon the Noor Jahan case, where the judge ruled that the religious conversion carried out solely for marriage is valid and legal only if there is an Honest conviction on the individual concerning the tenants of the new religion that the individual is adopting. But Allahabad H.C argued the government argument thatwasfounded on the finding of the *Noor Jahan case*[23] and stated that this was an erroneous judgement, because Article 25 of the constitution of India promises thefreedom of

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[22] Ibid

[23] Ibid

conscience that allows individuals freely conscience, practice and profess and propagate any religion and alsopromisesto an individual or her sense of moral right and wrong and permits them to make their personal choices when comes to intimate matters such as one faith and religion. The Right to marry come under their same personal choice without interference from the state. However, the Anti-religious conversion provision that have been anticipated by the member states are possible to be grounded on the Supreme Court pronouncement of 1977, where court has upheld a couple of anti-conversion that was passed by the state government of Madhya Pradesh and Odisha. However, thisruleensures that before a marriage in the district, it is mandatory to obtain the approval of the district magistrate. Thus, allowing the state to play a direct role in regulating the personal life of individual by interfering in marriage and religion affairs.

Conclusion

The observation of the Allahabad High Court in the Case of Salamat Ansari is extremely vital because the High Court said that it wouldlook at the husband and wife as just two individuals and not as a Muslim man and a Hindu wife asthey are adults and can give their consent. They enjoy the freedom of conscience and liberty to choose a partner and religion according to their choice. These values of the Indian culture that styles India cherished for the years.

In a country like India, only 95 to 99% marry within their caste and religion only a few percentages of inter-caste and inter-religion marriages took place in India and only based on this if the government is trying to bring a law to curb the forceful conversion, then it's nothing but a communal agenda for vote bank policy. The society has been grappling with the shackles of the caste system from ancient times,but today the situation has changed and the intermingling between people of different caste is happening at diverse forums. So, his should not be a grave consequence when marriage arrangements also involve such marriage. The Special Marriage Act mandates certain pre-conditions essential for

a marriage to be observed under this law. However, this legal provision is a step toward a broad-minded society that can provide the right to marry a person of own choice. The Legislature and the Governmentnecessarily to come up with some modificationunder the Special Marriage Act,including the provision and rules which would let the marriage officers to furnish a letter to the permanent resident of the parties, andupdating them about the marriage of their son and daughter in the exercise of their privilege fundamental rights.

ROLE OF SECURITY EXCHANGE BOARD OF INDIA IN REGULATING INDIAN STOCK MARKET: WITH RESPECT TO INVESTOR'S PROTECTION

Ipsa Saxena[1]

Abstract

The Security Exchange Board of India (SEBI) established under SEBI Act 1992 is the regulatory authority for the stock exchanges in India. The SEBI was originally established in 1988 by govt. of India but became a legal entity in 1992. The Securities and Exchange Board of India (SEBI) has been a visible entity in the Indian capital market. The SEBI has played the major role in protecting the investor interests, promoting, and regulating the Indian securities markets. Its goal is to provide and build a market zone in which investors can strongly generate fund operations. SEBI always give first preference to protect investor's wealth in the stock market. This paper mainly focuses on the Role of SEBI in regulating Indian Stock market with respect to protect investor's wealth in the stock market. The paper traces the recent reforms by SEBI mainly in primary and secondary market.

Keywords: Securities and Exchange Board of India, SEBI, Indian Securities Market, Primary Market, Secondary Market

Introduction

Securities and Exchange Board of India (SEBI) was first established in 1988 as a non-statutory body for regulating the securities market to promote different corporate securities through different stock exchanges in all over India. Its main concept is encouraging the investors and traders

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by protecting the interest of investor's rights. On 30 January 1992 it became an autonomous body and was authorized statutory powers with the passing of the SEBI Act 1992 by the Indian Parliament. The Indian Capital Market has witnessed various changes since 1980's. This ever-expanding participation of Investors in the Indian Stock Market has created a demand to monitor and control stock market operations in a systematic way. Currently there are 14 exchanges approved by SEBI in India and listed under SEBI. Stock market provides a platform for investors and traders to buy and sell stocks, mutual funds through this platform. In recent scenario, the percentages of investors and traders have increased tremendously as compared to last few decades. During the 1980s, the capital market experienced significant expansion, which was characterized by increased public participation. As the number of investors and market capitalization grew, corporations, brokers, merchant bankers, investment consultants, and others involved in the securities market committed a variety of mistakes. The existence of self-styled merchant bankers, unofficial private placements, price rigging, unofficial premium on new issues, non-compliance with the Companies Act, violation of stock exchange rules and regulations, and listing requirements, among other things, are all examples of these malpractices. Investor confidence has been undermined and investor disputes have grown as a result of these malpractices and unfair trade practices. As stock market operations are enhancing eventually malpractices are also growing in stock market. The governments of India, stock market exchanges, stock market intermediaries were helpless for redressing the investor's complaints because of lack of proper penal provisions in the existing legislation in India.[2]

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[2] Dasari Rajesh Babu, "The SEBI Role in Indian Stock Market"*International Journal for Research in Engineering Application & Management* (2019). Available at:http://www.ijream.org/SpecialIssueConference/ICDOMP2019023.pdf (last accessed on:19/05/2022)

Objective of Study

The objective of this paper is to highlight the role of SEBI in Indian Stock Market with giving special reference to investor's protection. This paper observes the performance and review the key initiations made by SEBI, in relation to supervision of the stock market and Investor Protection Measures taken since 1992 by SEBI. This paper brings the valid points about the reforms initiated by SEBI in order to protect the investors. It majorly focuses and highlights the area of investor's protection.

Literature Review

Dasari Rajesh Babu (2019): To maintain the integrity of the financial markets and improve investor protection, strengthening fund governance is vital.

Painoli, Girish & Shaik, Abdul & P., Nagaraja (2021): In a country of large population, it is baseless to expect everybody to be, monetarily proficient, administrative bodies are utilizing the watchwords like Straight forwardness and financial backer forwardness. Additionally, it is tracked down that the laws were initiated and planned by the administrative bodies are likewise not accurately and successfully authorized and put into utilization for protecting the interests of the financial backers. BSE & SMC, (2009) "Investor protection is one of the most important listing fees collected by it in each financial year, as fundamentals of a thriving securities market or may be prescribed by SEBI or as may be specified in other financial investment institution. Investor should look into the relevant Regulations from time to time. The protection focuses on making sure that investors Exchange may also augment the Investors' are fully informed about their purchases, Protection Fund from such other sources, as it may transactions, affairs of the company that they have invested"

Organizational Structure of SEBI

The structure of SEBI mainly consists of 9 members including a chairperson along with 5 members, who are chosen by the Union Government of India, 2 members, who are officers from Finance Ministry of India, 1 member, who is chosen from RBI officers and six members, appointed by the Central Government. There are two senior members of the minister. SEBI is headquartered in Mumbai, with branch offices in the remaining Indian metro, namely Delhi, Kolkata and Chennai.

In 1988 SEBI was formed with an initial capital of 7.5 crore INR. IDBI, ICICI and IFCI were the promoters who provided the funding. The interest generated on the amount invested is usually used for bearing all day-to-day expenses of the department.[3] SEBI has vested all the statutory powers for regulating the Indian capital markets.[4]

Precisely SEBI is an aggregate of the following:

1. One Chairman of the board – appointed by the Central Government of India
2. One Board member – appointed by the Central Bank, that is, the RBI
3. Two Board members – hailing from the Union Ministry of Finance
4. Five Board members – elected by the Central Government of India

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[3] Painoli, Girish & Shaik, Abdul & P Nagaraja, "The Sebi Role in Creating Awareness about Investor Protection and Education"*International Journal of Management and Humanities 5. 53-57. 10.35940/ijmh.F1295.045821* (2019).Available at:http://www.ijream.org/SpecialIssueConference/ICDOMP2019023.pdf (last accessed on:16/05/2022)

[4] BSE & SMC, "Towards Investor Awareness and Protection" *S.l., BSE Investor Protection Fund* (2009).Available at:https://smcindiaonline.com/wp-content/uploads/2018/05/BSE_Investor_Awareness.pdf (last accessed on:15/05/2022)

Objectives of SEBI

The Security Exchange Board of India has been set up to fulfill specific objectives which are as follows:

- For regulating the stock exchange and security markets to ensure the proper and orderly functioning;
- For the protection of the rights of the investors in order to ensure safety to their investment;
- For the prevention of fraudulent and malpractices by having a balance between self regulation of business and its statutory regulations;
- For regulating and developing the code of conduct for brokers, underwriters etc;
- For restraining fraudulent practices by maintaining a balance between statutory regulations and self-regulation.

How Does SEBI Regulate the Stock Market?

The SEBI efficiently regulates and tackles the Indian Capital Market. SEBI regulates the security market and how does security market function. SEBI along with The Reserve Bank of India and the Ministry of Finance efficiently regulates and tracks the Indian Capital Markets. The Ministry of Finance operates via the Department of Economic Affairs (Capital Markets Division).[5] The role of the division is to formulate policies for organized policy development of securities markets. In particular, the division works to safeguard the interests of traders and investors trading in the stock market of India.

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[5] Bebchuk, L, "Investor Protection and Interest Group Politics" *Review of Financial Studies, Society for Financial Studies, vol. 23(3), pages 1089-1119, March*(2010) Available at:https://doi.org/10.1093/rfs/hhp042(last accessed on:18/05/2022)

Powers of SEBI

The powers of SEBI can be classified into the following three parts which are as follows -

1. **Quasi-Judicial** - The first and foremost power of this organization is that it has partial judicial powers to declare judgments in the fraudulent matters or misconduct in the Indian Securities Market.
2. **Quasi-Executive** –SEBI also has the power for incorporation of rules and implement legal actions in order to establish fair and transparent environment in the Indian Stock market. SEBI also has the power to take steps against the violators.
3. **Quasi-Legislative** - The third power of SEBI lies in the legislative domain. SEBI has the power to formulate laws and regulations and frame guidelines for the protection of the rights of investors and prevent it from violations.[6]

Functions of SEBI

The securities market in India is still in its infancy. SEBI is tasked with both regulation and development. It also has some protective properties. The Functions of Regulation include:

1. Registration of brokers, sub brokers, and other market participants.
2. Registration of collective investment schemes and mutual funds
3. Regulation of stockbrokers, portfolio exchanges, underwriters, and merchant bankers, as well as the business of stock exchanges and other securities markets.
4. Corporate takeover bids are regulated.
5. Obtaining information through inspections, inquiries, and audits of stock exchanges and intermediaries.

[6] Babu, K. J. & Naidu, D. S., "Investor Protection Measures by SEBI" *ArthPrabandh: A Journal of Economics and Management, 1(8), pp. 72-80* (2021)Available at: http://www.ijirst.org/articles/IJIRSTV4I9019.pdf(last accessed on:13/05/2022)

6. Imposing fees or other charges in order to carry out the Act's purposes.
7. Performing and exercising such authority under Securities.[7]

The Development Functions are as follows:

1. Training for securities market intermediaries.
2. Conducting research and disseminating information that will benefit all market participants.
3. Taking measures to develop capital markets while remaining flexible.

The Protective Functions include:-

1. Prohibition of fraudulent and unfair trade practices such as making false statements, manipulating prices, and so on.
2. Controlling insider trading and penalizing those who engage in it.
3. Taking steps to protect investors.
4. Promotion of ethical business practices and a code of conduct in the securities market.

Decisions taken by SEBI to Protect the Investors in Indian Stock Market

SEBI is the regulatory body for the Indian Stock markets and has taken various decisions to ensure smooth and healthy functioning of the capital markets. These include:

- **Simplifying the Share transfer and allotment procedure:** SEBI has appointed a committee for suggesting expediting and simplified

[7] Chung, H. "Investor Protection and the Liquidity of Cross-listed Securities: Evidence from the ADR Market" *Journal of Banking & Finance 30 (2006) 1485–1505*(2005)Available at:https://ir.nctu.edu.tw/bitstream/11536/14361/1/000237406400009.pdf(last accessed on:15/05/2022)

procedure for share transfer and allotment. The draft report of the committee has been circulated to various market intermediaries for their feedback. The report will be finalized, and necessary action will be taken for the implementation of the recommendations. It is expected that these recommendations would ease the procedure and difficulties faced by investors on account of inordinate delays in share transfers and bad deliveries.

- **Unique order code number:** SEBI has mandated all the stock exchanges to assign a unique order code number which will be intimated by the broker to his client. After the order execution the generated number will be printed on the contract note. This would help in identifying every transaction.
- **Time stamping of contracts:** Under this the stock broker has to maintain a record of time as in when the order is placed by client and when the execution was made, also need to reflect the same in the contract note. This will make sure that broker is giving due preference to the client's order and charging the absolute price without gaining any profit on Intraday price fluctuation.
- **Abolishing Insider Trading:** One of the biggest loopholes in Indian stock Market was Insider Trading. Insider trading had been used for making huge profits. SEBI introduced the SEBI regulation 1992 which ensures the honesty and transparency in the Indian Capital Market and ensure that brokers don not make unethical profits from it.[8]
- **The control on Mutual Funds:** SEBI Mutual Funds Regulation was announced by SEBI in 1993 which gave the authority to take

[8] Girish Kumar Painoli, Shaik Abdul Mazeed, Nagaraja.P. "The Sebi Role in Creating Awareness about Investor Protection and Education" *International Journal of Management and Humanities (IJMH)) Volume-5 Issue-8, April* 2021Available at:https://www.ijmh.org/wp-content/uploads/papers/v5i8/F1295045821.pdf(last accessed on:18/05/2022)

over the direct control of all mutual funds of private sector and government. As per the regulation, any company whose net assets worth is over INR 5 Crores can float mutual fund and has to consist of a contribution of at least 40% from the promoter.[9]

- **Control on FIIs:** Foreign Institutional Investors or FIIs now need to be registered with SEBI before they step in the Indian Capital Markets. The directives issued by SEBI in this regard state that every FII who is investing in Indian Capital Markets needs to have a SEBI registration.
- **Investor protection fund:** In case of single claim by an investor arising out of default by a broker member of any stock exchange, the amount of compensation available has increased to Rs.25000 for smaller stock exchanges i.e., Guwahati, Madhya Pradesh, Magadh etc., Rs. 1 lakh in case of major stock exchanges and to Rs. 50000 in case of other stock exchanges.[10]

These are some of the major directives and decisions which are undertaken by SEBI to ensure the protection of investor and smooth and healthy functioning of the Indian Capital Markets.

Conclusion

SEBI plays a very prominent role in the smooth functioning of the Indian Capital Markets. SEBI in one of the important bodies which regulates both Primary as well as Secondary Market. The constitution of SEBI ensured that the loopholes and fraudulent practices in the systems are

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[9] Raju, M. T., and Anirban Ghosh. "Securities and Exchange Board of India." (2004). Available at: http://www.sebi.gov.in/sebi_data/attachdocs/1321590556913.pdf(last accessed on:16/05/2022)

[10] Maheshwari, Deepika. "Investor protection through Investor Grievance Redressal Mechanism at SEBI." *NJRIP-National Journal of Research and Innovative Practices* (2016).Available at:https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681284v(last accessed on:18/05/2022)

eliminated. However, as an investor, it is important to understand your role and deal only with SEBI registered brokers and SEBI registered investment advisors, because these entities have been thoroughly verified by the SEBI. Reinforcing SEBI's force in the analytical, authoritative, and lawful parts of authorization would empower it to expediently address legitimate difficulties, for example, those looked during dematerialization or exposure necessities.[11]

In conclusion it can be told that SEBI encourages both growth and development of the security market and act as a watchdog. Protecting investors is one of the primary objectives of SEBI and SEBI is taking all the appropriate actions required for investor's protection, the availability of investor's protection, they are of no avail if it is not combined with the adequate knowledge and awareness.[12]

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[11] Bansal, Shipra. "Role of SEBI in investor protection." *South Asian Journal of Marketing & Management Research* 3.9 (2013) Available at:https://www.indianjournals.com/ijor.aspx?target=ijor:sajmmr&volume=3&issue=9&article=005(last accessed on:18/05/2022)

[12] Akron, Sagi, and Taufique Samdani. "Investor protection and institutional investors' incentive for information production." *Journal of Financial Stability* 30 (2017)Available at:https://www.sciencedirect.com/science/article/pii/S157230891730181X(last accessed on:19/05/2022)

TIGER TRAFFICKING IN INDIA: A CONCEPTUAL ANALYSIS

Chithranjali R Nair[1]

Abstract

Just beyond what is seen around us as normal the concept of wildlife trafficking cannot be just penned simply. Ever since we human became self sufficient and we started to believe in the concept of self evolution materialistically, directly or indirectly we started taking the life around us for granted. The role of each and every micro organism in the balance of the life on this earth is relevant as the absence of one leads to an abnormality of the other. Being a human being the author realises the importance of animals and the compassion we should show to them while co existing with them. Often there will be situations where we should help each other cohabit on this earth till we are back home. The concept of wildlife trafficking is an internationally addressed issue. It requires ardent time and energy to find out what can be done to keep this in control and to prevent this eventually. Exploiting the animals illegally for monetary benefits simply can be called as wildlife trafficking. Poaching of elephants for ivory and tigers for their skins and bones are two well-known examples of illicit wildlife Trafficking. Many other species, from sea turtles to timber trees, are equally overexploited. Wildlife trade isn't always illegal. Thousands of species of wild plants and animals are trapped or harvested in the wild and then legally marketed as food, pets, ornamental plants, leather, tourist souvenirs, and medicine. When an increasing amount of wildlife commerce is illegal and unsustainable, it becomes a crisis, posing a direct threat to the existence of many wild species. In this

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article the author conveys the conceptual analysis on the wildlife trafficking especially Tigers in India with relevant understanding about the threats and problems in the country, legal competency of the issue along with a short conceptual analysis. The author also analysis to what extend the Legislations of the country tackles the same issue.

Keywords: Wildlife, tiger, trafficking, crime, India

Tiger Trafficking in India: A Conceptual Analysis

Just beyond what is seen around us as normal the concept of wildlife trafficking cannot be just penned simply. Ever since we human became self sufficient and we started to believe in the concept of self evolution materialistically, directly or indirectly we started taking the life around us for granted. The role of each and every microorganism in the balance of the life on this earth is relevant as the absence of one leads to an abnormality of the other. Being a human being the author realises the importance of animals and the compassion we should show on them while co existing with them. Often there will be situations where we should help each other cohabit on this earth till we are back home. The concept of wildlife trafficking is an internationally addressed issue. It requires ardent time and energy to find out what can be done to keep this in control and to prevent this eventually. Exploiting the animals illegally for monetary benefits simply can be called as wildlife trafficking. Poaching elephants for ivory and tigers for their skins and bones are two well-known examples of illicit wildlife Trafficking. Many other species, from sea turtles to timber trees, are equally overexploited. Wildlife trade isn't always illegal. Thousands of species of wild plants and animals are trapped or harvested in the wild and then legally marketed as food, pets, ornamental plants, leather, tourist souvenirs, and medicine. When an increasing amount of wildlife commerce is illegal and unsustainable, it becomes a crisis, posing a direct threat to the existence of many wild species. In this article the author conveys the conceptual analysis on the

wildlife trafficking of Tigers in India and to what extend the Legislations of the country tackles the same.

Wild Life Trafficking in India- An Overview

Wildlife Trafficking is considered to be the third largest illegal trade in the world after arms and narcotics. In India, around 2054 incidences of wild animal killing or illicit trafficking were documented between 2018 and 2020. Approximately 3836 people were arrested for the offence over the course of three years. In 2018, there were 648 cases reported, with 1099 people arrested, followed by 805 cases and 1506 arrests in 2019, and 601 cases and 1231 arrests in 2020. The information was compiled from cases reported to the Wildlife Crime Control Bureau and State Forest and Police Authorities over the previous three years. The details were published to the public by the ministry of forest, environment and wild life. The wildlife trafficking includes killing of tigers for skin and nails, elephants for their tusks, rhinos for their horns, Lion tailed Monkeys for their Fur and flesh, turtle shells, Deer for their musk pods, snake skins and so on. The alarming factor here is that a demand of all these are found in the international markets than in India. Recently as per the information received from the Maharashtra forest department a case of animal trade was reported and it included 40 sea fans, mongoose fur, lizard genitals, porcupine quills, and musk deer parts. While the matter was questioned, the same was conducted on behalf of many superstitious practises such as occult and black magic. India does have legislations and regulations to protect the animals from wildlife trade but the main problem lies in its implementation and enforcement. The Lack of political will and governance issues frequently hamper beneficial initiatives to solve wildlife trafficking and trading concerns. Disincentives for over-exploitation and illegal commerce, such as sanctions for legal infringements, are all insufficient due to lack of political backing.

Despite the trafficking of many wild animals, Tigers among them are often considered to be the main target due to its strength, power and

charm. Unfortunately, tigers are valued higher than the other species. Traditional Chinese medicine uses every part of the tiger, including whiskers, eyeballs, penis, teeth and its bones, hence the majority of the demand for tiger parts comes from our neighbour, China. Prices have recently risen dramatically, owing to the scarcity of wild tigers as well as the expanding purchasing power of China's economy. Regrettably, India has emerged as the primary source of tiger parts. During the period between 2000 – 2015, India is the only country where maximum number of tiger poaching and its trade has been reported, which indicates the country's National Animal is vulnerable to poaching and international trade on an extreme basis. The concept of Tiger trafficking is to be addressed with major seriousness because the trafficking of tiger includes the trade of its claws, skin, teeth, skull etc. there by a minimum number of 5 tigers are been killed. While the most recent census puts India's tiger population at 2,967, the Traffic report utilises a 2016 WWF[2] estimate of 2,226, with India accounting for more than 56% of the world's wild tiger population. India had the most seizure incidents (463 or 40% of all seizures) and the most tigers seized (625). India has the highest percentage of tiger skins (38 percent), bones (28 percent), and claws and teeth (28 percent) comparing with other countries (42 percent).[3] The top three countries with the highest number of Tiger trafficking reported were India, China and Indonesia. The majority of seizures were reported in Madhya Pradesh and its neighbouring areas and the Uttar Pradesh-Nepal border. "High tiger population, porous borders with countries like Nepal, Bangladesh, Myanmar and Tibet that fall in the tiger trade route to East Asia, growing economies and transport infrastructure in east Asian make Indian tigers extremely vulnerable to

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[2] World Wildlife Fund.

[3] "Explained: Report on illegal global tiger trade counts 2,359; highest in India", *The Indian Express*,<https://indianexpress.com/article/explained/tiger-trade-report-counts-2359-shows-where-5924998/#:~:text=A%20new%20report%20has%20quantified,also%20happens%20in%20the%20country>,(February 24,2022, 12:46 PM).

poaching for illegal trade," said Shekhar Niraj, head, TRAFFIC India.[4]The investigation revealed that traffickers were still using a previously established trade route that ran from Thailand to Vietnam via Laos – three countries where the number of tiger farms has increased. India has invited neighboring tiger-range countries to submit photographic proof of seized skins for comparison with camera-trap photographs of wild tigers in order to curb poaching. The stripe pattern on each tiger is unique, similar to a person's fingerprints, which aids law enforcement and tiger biologists in identifying poached tigers and tracing their origins. The demand of the tiger parts in the international markets are fulfilled accordingly through the trade by India, China, Indonesia and Vietnam. Tigers who are found in the wildlife are often found to be more subjective for trafficking than the those inside the captivity because there is a belief that the former are more stronger compared to the latter. All parts of the tiger are trafficked on the black market for illegal animal goods, and they are generally utilised for medical purposes all over the world. China was the most popular destination for tiger parts, followed by Thailand and Vietnam. Tigers' bones are the most precious bodily parts, and they are the most sought sections of their bodies. Tiger bone medications are used to treat injuries relating to the bones, joints, and ligaments.[5] Beyond the above mentioned purposes, Tiger parts are used as exotic luxury commodities which are sold for unimaginable prices.

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[4] Kumar Sambhav Shrivastava, *Tigers vulnerable to poaching: 30% of illegal trade export from India*,Hindustan Times, New Delhi, <https://www.hindustantimes.com/india-news/tigers-vulnerable-to-poaching-30-of-illegal-trade-export-from-india/story-UcCEidULvlvwFMCASS4jQK.html>, (March 5,2022, 1:33pm).

[5] "India amongst biggest suppliers of Tiger body parts in the world: UN World Wildlife Crime Report", *The financial express online*<https://www.financialexpress.com/lifestyle/science/india-amongst-biggest-suppliers-of-tiger-body-parts-in-the-world-un-world-wildlife-crime-report/2036420/>, (March 5, 2022, 1:50pm).

Tiger Trafficking Groups in the Country

The Baheliyas of Madhya Pradesh and the Bawarias of Haryana are two important traditional hunting communities, both of which specialise in killing big cats. They travel about the country in small groups for much of the year, camping near woodlands they know are vulnerable. They're proficient and proud of their jungle craft and ability to understand and slay tigers. They leave no trails or evidence, making them difficult to catch. These groups of people do have company with the local communities and they often tend to roam around like beggars. The local communities give secret information regarding the availability of the tigers and their protection levels to the poaching groups. In return they get random petty payment for the activities done to the poaching groups. A location is usually surrounded by four to six metal spring traps, particularly near a fresh tiger kill, a waterhole, or an animal track. The traps are buried in the ground and hidden by soil and leaf litter. The jaws of the trap snap shut with enormous force when a tiger steps on it. The tiger cannot escape because the trap is locked with an iron chain. When a tiger is caught, the hunters use clubs to kill it. They have no fear and will approach a tiger trapped in a metal spring trap and beat it to death with wooden *laathis*. The immaculate skin is so expensive so they take great care not to leave any signs or sores. They put the end of a long wooden rod wrapped in lumps of mud into the tiger's jaws if it makes any noise to silence it. The majority of the slaughter takes place late at night, with skinning and cleaning taking place after dawn. The evidence, as well as their trace, is immediately removed. Because killing a tiger brings in such large sums of money, many poachers now possess homes and land and have taken out insurance plans. They normally have no trouble producing huge sums of money to post bail if they are caught. Then they suddenly vanish, never to be seen again. These poachers are experts and their knowledge is passed to the next generations. They are prideful people, probably illiterate and clad in rags, yet they believe they are superior to others because they can kill a tiger, which is indeed a difficult problem to solve.

Case-Laws of Wildlife Protection in India

In R Simon v Union of India[6], The Wildlife Act was revised in 1991, based on suggestions from the Indian Wildlife Board and the Ministry of Environment and Forest. The recommendations were made in light of the country's rapidly rising poaching operations, which have resulted in a significant decline in the country's animal population. The amendment made it illegal to deal with animal products. The petitioner in this case, a maker of animal-derived products such as purses, shoes, and briefcases (made from snakeskin), challenged the amendment on the grounds that it violated his fundamental right to practice any trade or profession under (Article 19(1)(g) of the Constitution).He went on to say that there are some animal species that are dangerous and rarely serve a helpful purpose. The court dismissed his contentions, stating that Article 19(6) enables the court to enact rules restricting the right to trade and profession in the public good. The preservation of flora and fauna is unquestionably in the public interest. The court also stated that, despite the fact that many species serve no beneficial use to people, they must be protected, and that every person has a responsibility to safeguard and improve animals and the environment. In **Pradeep Krishenv Union of India & ors**[7], This example demolished the widely held belief that individuals who live near forests are always obedient to the natural order. The lawsuit challenged a government directive allowing locals to collect tendu leaves from contractors in Madhya Pradesh. He said that a huge number of trees had been felled as a result of the order. The Madhya Pradesh government has been ordered by the Supreme Court to bar any villager or tribal from entering wildlife protected areas. This however had resulted in a huge leap of protection when it comes to wildlife encroachment thus safeguarding the green and its residents from poaching. In **Indian Handicrafts Emporium v Union of India**[8], the validity of 1991

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6 AIR 1997 Delhi 301, 1997 (41) DRJ 604, (1997) 117 PLR 66.

7 *Writ Petition (C) No. 262 of 1995.*

8 *W.P.(C) No. 35 of 2003)*

amendment was upheld and it was held by the court that the balance of social commitments and the fundamental rights should be in substantial balance so as to provide maximum harmony to all the beings.

Legal Competency

The State is required by Article 48-A of the Constitution to work and to protect the country's animals and forests. Article 51-A imposes a fundamental obligation on all residents to maintain and improve the natural environment, which includes woods, lakes, rivers, and wildlife, as well as to have compassion for all living things. Although fundamental duties are not legally enforceable in and of themselves, a statute could be included to make them so.[9] The prevention of Cruelty to Animals Act, 1960 draws a distinction between cognizable offence and non cognizable offence where the former gives the investigating officer the right to arrest without warrant and the latter requires the officer the right to arrest only after a warrant. This Act was enacted to prevent animals from being subjected to unnecessary pain or suffering as a result of illegal poaching operations. If a person violates Section 11 by subjecting an animal to cruelty in any way, he will be held accountable and penalized with a fine of up to 50 rupees. However, subsequent offenders who commit the offence within three years after the prior one are subject to a fine of not less than 25 rupees and up to 100 rupees. Furthermore, repeat offenders are prohibited from owning any animals. The wildlife protection Act of 1972 is the most knowing legislation when it comes to wildlife trafficking. The schedule 1 of the act lists out endangered species which requires special and rigorous attention and any offence against them shall be recorded and the offender will be severely punished for the same. Wild bird hunting is also prohibited under Section 9 of the Act. Although hunting is usually connected with the capture and eventual slaughter of

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[9] Shreya Dasgupta, *Hotspots in India's tiger-trading network revealed*, <https://www.newscientist.com/article/dn26274-hotspots-in-indias-tiger-trading-network-revealed/>, (8 March 2022, 12:08 PM).

wild animals, this section also included activities of capturing and trapping. If a person is in possession, control, or custody of a wild animal, it is presumed that he does not have lawful possession of the animal, according to Section 57 of the Act. Any person who violates any of the Act's conditions is punishable under Section 51 by imprisonment for up to three years, a fine of up to 25,000 rupees, or both. Under the Indian penal code the sections relevant are s.428, s.429, s268, s2690, 378, 79. According to Section 3 of the Performing Animals (Registration) Rules, in order to train or show any animal performance, one must first request for registration. Furthermore, while issuing registration, the considered authority may impose any condition(s) that it deems acceptable in the animal's best interests (s). Conditions may be imposed, such as ensuring proper watering and feeding stops during transportation, preventing unnecessary infliction of pain and suffering during such training/ exhibition, training an animal to perform an act in accordance with its natural instincts, and preventing the performance of a sick, injured, or pregnant animal, among others. Based in the findings done by the researcher we need to realize that there are actually rules and laws for the protection of wildlife, but their enforcement strategy is to be looked upon keenly to find out whether they are properly implemented or not. Before checking on the implementation its high time to know that the cases of wildlife trafficking goes often unnoticed or un identified.

Analysis

As per the information collected by the Wildlife protection society of India, it had been found that the number of reported cases in the tiger trafficking was 32 in the year 2014. Whereas it was increased to 45 in the year 2015. This shows that despite having much legislation in the country, the number of poaching cases are *not on a decline*. There is an extensive chain of poachers across the country. It has been found that the tiger trade starts from the Southern end and moves through the central part of the India reaching till the border end of the country with Nepal.

Another interesting fact is about the means of conducting the tiger trade is via Train service. Because the Railway connectivity is established in almost all the parts of the country including the remote areas. Due to the Tiger Poaching in 2004 the entire population of tigers got wiped out in the Sariska Tiger Reserve in north-west India. Because of the huge demand for tiger parts elsewhere in Asia, the illegal trade in tiger parts continues to thrive in India. The investigation discovered 73 districts in India that could be active tiger poaching and criminal trafficking hotspots. These hubs did not have to be in close proximity to tiger habitats. The Delhi region was one of 17 districts that were active in the Tiger Poaching.[10] Several laws safeguard endangered animals in India and around the world. The Wildlife Protection Act of 1972 protects a variety of endangered creatures in India, including tigers, rhinos, and elephants. Under the shadow of this enactment people are forbidden from killing, owning, buying, or selling protected wild animals or animal parts under this law. India also joined the Convention on International Trade in Endangered Species (CITES) in 1976, committing to the convention's regulations on the protection of the endangered species. The government's approach to wildlife crime was flat denial until only a few years ago, in 2006, to be exact. Of course, we can't address a problem if we don't even recognise it! Since then, a lot of constructive action has been taken, but there is still a lot to be done on the ground, where it matters the most. Many park managers continue to declare that their reserves are devoid of poaching, and they frequently dismiss particular evidence of poaching.[11] Although India has pretty robust wildlife regulations (the Wild Life (Protection) Act is particularly strong), a law

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[10] Prerna Singh Bindra, *Wild India's Grim Reapers — Interview with Belinda Wright*, WPSI, <https://www.conservationindia.org/articles/trends-in-wildlife-crime-interview-with-belinda-wright-wpsi>(7 March 2022, 1:09 AM).

[11] Prerna Singh Bindra, *Wild India's Grim Reapers — Interview with Belinda Wright*, WPSI, <https://www.conservationindia.org/articles/trends-in-wildlife-crime-interview-with-belinda-wright-wpsi>(7 March 2022, 1:09 AM).

is only as good as its execution. Aside from weak field enforcement, our legal system is completely overburdened. Thousands of cases are pending in the courts, and tiger poaching cases simply do not receive the attention they deserve. Cases drag on for years, and only a few people are convicted. WPSI's Wildlife Crime Database holds records of 882 people charged of tiger-related offences, including poaching and the seizure of tiger parts, throughout the last decade (2000-2009). Surprisingly, only 18 persons have been found guilty in only six court trials. Another issue is that field police frequently do not understand how to apply the law properly, and there is no incentive for them to file wildlife cases. Once a case is scheduled, the officer in charge must travel to court for years and years, even after he has been posted elsewhere or retired, as the matter grinds on with little or no departmental support. Then, despite all of that effort, there is frequently a lack of conviction. How can there be any desire to investigate the cases in these circumstances? The judiciary is often unaware of the specifics of the Wild Life (Protection) Act since wildlife crime is not a priority. There have been cases where border security forces have been aware of wildlife trade near their border posts, but it has been overlooked since it is not deemed a priority concern. So a matter which is troublesome in nature can only be resolved when we find out the route cause of the same. So it is quite important to work out on the basis before taking it forward.

Conclusion

It is quite evident that many of the legislations in the country are absolutely focussed of the wildlife protection. The main issue might be not about the application of these laws but the reporting of a wildlife crime and actually finding out the defective area. Beyond the reporting of a crime there comes the other difficulty of the smooth conducting of the already reported cases. Due to the administrative malfunctioning and the unforeseen intricacies in any taken department, it becomes extremely difficult to implement the laws. The author personally feels that the

government should implement short term goals for the effective tackling of issues on the wildlife. Thus from the basic level, imagine each illegal attack against the animals being found and punished accordingly! India doesn't lack laws for the protection of the wildlife or the environment but India faces the problems of proper reporting and effective implementation of these made laws. The author looks forward for a system where everything will be in harmony in the coming 20 years.

A LEGAL ANALYSIS INTO THE LIABILITY OF AVIATION SECTOR TOWARDS PASSENGERS

Megha Middha[1]

Abstract

The growth of any nation is largely dependent upon its economy and there are a number of factors that influence the increase or decline in economy. Aviation sector is one such factor boosting the economy of any nation. The sector owes varied kind of responsibilities towards the safety of its passengers and the safe keeping of the luggage carried by them. The present article shall highlight the various types of liabilities of the airlines towards its passengers and the related legal statutes dealing with the same. The article shall not only study the Indian laws but the International legal aspects shall also be dealt into. Additionally, the article shall try to incorporate the effect Covid-19 situation had upon the aviation sector. It shall try to look how the liability of the aviation sector all the more increased during the pandemic times. The article shall be based upon secondary data and non-empirical research. A descriptive study of the Indian and International laws shall be done to arrive at the findings of the article. The objective of the article is to protect the passengers from the negligence caused by the airlines. The article shall deal with aspects like loss or damage of baggage of passenger by the fault of airlines, or liability of airlines in case of delay or cancellation of flights. The article is a brief and comprehensive study of the aviation sector, rights and responsibilities of the airlines and the passengers and the Covid effect on the sector. It shall try to economically analyze the effect, the Covid scenario had upon the aviation sector, thereby resulting into loss of employment of many employees.

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Keywords: Airlines, Covid-19, Passengers, Delay, Cancellation of flight, Warsaw

Introduction

The pandemic has led to huge losses to various industries across the globe, thereby impacting the economy of the countries. Many have lost their jobs due to the pandemic and it has also affected the common citizens in a myriad ways. The consumers have also been affected during CORONA times. This article shall discuss about the aviation sector, the duties it carries towards the passengers, and also how it has been affected in the Corona times. The article shall incorporate in detail the various laws that exist in India and at International level regarding the Aviation Sector. It shall also include the laws related to the duties of the aviation industry personnel towards its consumers. The article shall analyze in detail the problems faced by the consumers during pandemic. Covid-19 left almost no sector untouched and aviation sector was also hit hard. It was not only in India that the sector faced problems but all across the globe, there were rising issues in the sector, whether it was job of many people or it was consumers who were indirectly being affected. There are many issues related to aviation sector like liability in case of baggage misplacement or delay or cancellation of flights, etc. All these issues shall be looked into detail in the article.

Laws and International Scenario

Warsaw Convention of 1929 deals with the air carrier's liability towards passengers. Another Convention dealing with the liability of air carriers is Unification of Certain Rules for International Carriage by Air-Montreal, 1999. This deals with, that in the case of any death or injury that took place during an accident while on board on the plane or any of the related operations of it, and then it will be the liability of the carrier. But at the same time, the burden of proof lies upon the passenger to prove the fact that damage or injury has been caused to him/her due to the

accident on board. The term 'accident' has been defined by the US Supreme Court in the case of *Air France v. Saks*[2] as an "unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." But if a passenger only fears the contracting of any virus and because of this suffers any emotional or psychological distress but actually suffers no physical injury then the passenger shall not be entitled to Compensation under the Warsaw Convention.[3]

From International perspective, there were certain limitations found in Hague Convention which were needed to be rectified and therefore, a diplomatic Conference was held at Hague in 1955 and consequently, Hague Protocol came into force. To revise the limits on accidental claims, another Conference called Montreal Conference took place wherein USA due to the high litigation costs in its country suggested for high limits on the claims but the other countries were not in favor of the same as they argued that it is not possible for the poorer countries to pay such hefty amount, and thereafter, the amount was reduced. Because of the poorer nations not being in favor of the US, another Conference was held at Gautemala City in 1971, which was officially known as Warsaw Convention. This is how Warsaw Convention came into force.

In various cases the term 'accident' has been interpreted. In a case Brandi Wallace v. Korean Air Wallace, the plaintiff has filed a case for sexual harassment suffered on the plane. In this case, Supreme Court stated that the negligent act of the crew members of the plane constitutes 'accident'. Despite of the ruling given by the court, there have been many interpretations to the case as the harassment on the plane does not qualify under the term 'characteristic risk factors of flying and

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2 40 US 392 405 (1985)

3 Eastern Airlines, Inc. v. Floyd, 449 U.S. 530 (1991)

therefore, the same does not fall under the ambit of the term 'accident'.[4]

Indian Laws

The various laws governing air transport in India are -The Aircraft Act, 1934, The Carriage by Air Act, 1974, The Anti-High -Jacking Act, 1982. The Anti-High-Jacking Act is related to the Convention for the Suppression of Unlawful seizure of the Aircraft. The Suppression of the Unlawful Acts against Safety of Civil Aviation Act, 1982 provides for punishment for the offence committed onboard. There is Aircraft (Carriage of Dangerous Goods) Rules, 2003 which deals with the carrying of dangerous goods through aircraft like explosives, etc. In case of death of any passenger, the same is governed by Carriage by Air Act of 1972. In a case in India, Air Carrying Corporation v. Shibendra Nath Bhattacharya[5], due to the negligence of the defendant Corporation, there was a loss of baggage of the passenger. In this case, although the defendant Corporation took the defense of Act of God or accidental destruction of the air craft but the Court held the Air Carrier guilty for the loss of baggage, declaring the contract which ousted out the liability of the defendant Corporation as invalid and inoperative.

Throwing light upon the International carriage by air, the same is governed by the Montreal Convention of 1999. The question that pops in mind is in case of International flights; where a passenger is able to establish the fact that an injury has been caused to him due to accident onboard then where should the passenger file a suit? In such circumstances, the jurisdiction lies at various places, like, the place where

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4 Attila Sipos, "The liability of the air Carrier for damages and the state of health of the air passenger (Accidents and Diseases) Covid-19", 61 (1) *Hungarian Journal of Legal Studies*, (2021) ; *available at:* https://akjournals.com/view/journals/2052/61/1/article-p85.xml (last visited on 11th May, 2022) .

5 AIR 1964 Cal 396

the airline has registered itself, even the suit can be filed at a place where the ticket was purchased by the passenger, at the place of destination of the flight and also the suit can be filed at the place where there is the permanent address of the passenger. The period of limitation for the cases to be filed in the court of law is fixed to two years from the arrival at the destination or the expected arrival date.

Covid -19 and Liability of Aviation Sector

As per the Data Protection Act of 2019, the Airline is not supposed to disclose the sensitive health related details of the passengers and if they do so, then the same will be in violation of the Data Protection Act, 2019. Another question that turns up is in such circumstances, should there be disclosure of information if a patient on board tests Covid positive? Looking at the situation of CORONA pandemic and how it has affected the people across globe and how it is still affecting, it becomes important in the public interest to protect people from coming in contact with the infected people. This information is necessary for the people at large to be disclosed and should be exempted from the term 'sensitive personal information'.

Another pertinent question is that if the transmission of CORONA can be put under the umbrella term 'accident' in the Warsaw Convention and Montreal Convention as discussed above. Though nowhere in the Convention, the term 'accident' has been defined and the same has left the doors open for the judiciary to interpret the term according to the facts and circumstances of the case. The Saks case as discussed above has been the landmark case wherein the term accident was interpreted by the judiciary. As it defined accident to be any external, unexpected or usual happening but can the same is applied in case of COVID also? So considering the situation of CORONA, where social distancing is required the most and in flights, it is not possible to maintain the social distance. Therefore, it is not an 'unexpected' happening which could be covered under the term 'accident'. While travelling during pandemic

times, it can easily be expected that a person can comes into contact with the virus and get infected. There is yet not any medicine discovered for the complete cure of the virus.. But at the same time, it is also argued that the terms 'unusual', 'unexpected' should be looked into while examining the cause of the infection and not the infection itself.

Death of Passengers and Liability of Carrier

Looking at the liability of the carrier in cases of death of a passenger, the liability under Warsaw Convention 1929 is a presumed fault liability and that under Montreal Convention, 1999 is an absolute or strict liability in tier one and a presumed fault liability under tier two. Under Warsaw Convention, the burden of proving the liability is on the carrier that due care has been taken by him. It is different from that of the Common Law Concept where the burden of proof lies with the claimant.[6] There are various defenses available to the carrier under Warsaw Convention wherein if the carrier is able to prove that all necessary measures have been taken by him to avoid the accident or the circumstances were such that it was not possible for him to take such measures rather it was impossible, in such circumstances the carrier would not be held liable.[7] There was a defense added by Montreal Convention which absolved the carrier of the liability wherein a third party was responsible for any kind of negligence, omission or wrongful act. Article 20 of the Montreal convention, 1999 also provides for the defense of Contributory negligence of the passenger, in such circumstances the carrier would be partly liable or completely absolved of the liability depending upon the facts and circumstances of the case.

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6 George W. ORR, "Fault as the Basis of Liability", 21 (4) *Journal of Law and Commerce*, (1954); *available at:* https://scholar.smu.edu/cgi/viewcontent.cgi?article=2912&context=jalc (last visited on 7th August, 2020)

7 Warsaw Convention, 1929, art. 20/1.

Cancellation or Delay of Flights

Additionally, also the carriers should be made liable in case of flight delays and cancellations. Due to the delay in flights or cancellation flights without prior information to the passengers, the carriers are to be made liable to compensate for the same. In case of delays, the carriers need to provide meals and accommodation to rest for the passengers that too free of cost.[8] On the other hand, if there is cancellation of flights without prior information, the carriers need to refund the amount of ticket and additionally provide compensation for the loss and damage the passenger would have incurred due to such sudden cancellation. The passenger might have an important interview in another city, or a meeting with a client scheduled on a particular day and if due to the sudden cancellation of flight by air carrier, if the passenger is not able to reach on time, there are high chances of him suffering from any kind of loss. Henceforth, in such circumstances, it becomes the liability of the carrier to compensate the passenger. It is clearly mentioned in the US rules of transportation that there is no compensation provided to the consumers in case of flight delays and cancellation.[9]

Moreover during the COVID -19 scenarios, it is both the aviation sector and the passengers that faced difficulties. And not to forget also, the employees working in the aviation industry also had to suffer either in terms of their jobs or in terms of their income. Many flights were suspended , moreover there were travel restrictions due the aviation sector incurred losses, the passengers were also stuck in the places

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[8] Mahesh Kumar & Simran Soni, "Avaition Consumer Protection and Liability in India", (May 14, 2018); *available at:* https://www.lexology.com/library/detail.aspx?g=809aa382-2269-4717-bc34-44d99deec15e; (last visited on 7th August 2021).

[9] U.S. Department of Transportation, *available at:* https://www.transportation.gov/individuals/aviation-consumer-protection/flight-delays-cancellations; (last visited on 5th August, 2021).

where they were. There were many temporary suspensions of flights from various countries, like, U.K., Oman, and Kuwait etc.[10]

In addition to this, in India, the Central Government through its Ministry of Civil Aviation has set up a Charter which prescribes rules for passengers along with their rights. Also, the Ministry has prescribed responsibility and liabilities upon the air carriers in case the flights are delayed. It has prescribed various guidelines that in case the delay is of minimum two and maximum five hours, then the airlines needs to provide free meals and refreshment to the passengers. In case the delay extends beyond six hours, then prior communication should be made and the passengers should be given the option to choose an alternative flight or ask for the refund amount.[11] The government also imposes liability upon the airlines in case the flight is diverted to some other destination. While deciding upon the compensatory amount that the airlines need to pay, the government makes 'block time' as it's standard for deciding the amount. Block time is the time gap between the time of departure of the flight and its arrival at the destination.[12]

Loss of Baggage and Liability of Airlines

It has time and then been observed that baggage are often lost or misplaced or found in damaged condition by the negligence of the airlines. It is the passengers who then have to suffer. In this context also, one can make the respective airline liable and demand compensation. Different governments have laid down their policy. As in U.S., the government clearly states that in case the luggage of a passenger is found in a damaged condition, then it becomes the duty of the airlines to compensate the

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[10] Ministry of Civil Aviation, *available at:* https://www.civilaviation.gov.in/en/covid-19; (last visited on 7th August , 2021).

[11] Tinesh Bhasin, "Flight delayed? Know your Rights", (13 March, 2021), *available at:* https://www.livemint.com/news/india/flight-delayed-know-your-rights-11615641853455.html (Last visited on 4th May, 2022).

[12] *Ibid*

aggrieved passengers. The compensation will only be made by the airlines if the luggage was damaged by the mistake of the airlines and not the damage was pre-existing or that it was due to the wrong packing. In case of missing luggage, the airlines owe responsibility in helping the passenger track the luggage. In case the baggage is delayed, the compensation is to be paid by the airlines to the passenger and if the luggage is lost and airlines are not helping the passenger in finding the same, then action can be brought before the proper authorities, like in U.S., the proper authority is DOT, i.e. Department of Transportation.[13]

In India, the industry regulator is Directorate General of Civil Aviation (DGCA). As per reports, complaints for baggage have increased. As per policies, it is stated that if a passenger checks in with no baggage, the passenger can buy ticket at lower price but as soon as the passenger pays for the flight, the airlines become responsible for the baggage of the passengers. DGCA has prescribed for the monitory amount to be paid as compensation in case of loss, damage or delay of the baggage. If one is not able to find the luggage or if the same is found to be in damaged condition, then one can file the property irregularity report at the counter. In case a baggage is not found for 21 long days, it is generally declared as lost and then the airlines have to compensate the passenger for the same.

Economics and Aviation Industry

Also, not to forget the aviation industry is linked to various industries like hotels, restaurants, etc. and due to this there is a lot of employment generated. But because of Corona that has hit the globe; the various industries have been impacted thereby, many employees losing their jobs. There are many Packaged Tour Organizers and the money of

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[13] "Lost, Delayed or Damaged Baggage", *U.S. Department of Transportation*, (27th May, 2021); *available at:* https://www.transportation.gov/lost-delayed-or-damaged-baggage, (Last visited on 10th May, 2022).

passengers is stuck for which they have been demanding the refund. Many countries have taken the issue seriously and have issued guidelines for the refund of payment to the consumers thereby respecting the rights of the consumers. European Commission allowed for attractive scheme by issuing credit vouchers in place of cash refund to the consumers. Though these attractive offers have lessened the pain of the consumers but it has not been a good solution for their problem as they have not been refunded the amount of cancellation of the package tours.[14] On the other hand, UNCTAD issued the notice that refund should be made to the consumers. It also stated that the attractive vouchers can be made an option but the same should not be imposed compulsorily on the consumers. It should be left at the choice of the consumers if they want to opt for the vouchers or the cash refund only. European Commission even stated that "Refund is a Right and Voucher is a choice."[15]

The problematic situation was also when the staff employed in the sector started losing jobs during Covid because of the drop in the number of flights and travel restrictions. Moreover, then the industry had to be more careful and bear more costs with respect to maintaining high standard safety measures.[16] Covid is yet not completely ended. The cases are still high at some places. It is only the precautions that can help its spread.

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[14] "Protection of Consumer Rights in COVID-19 Pandemic Airlines & Package Tour Refunds" , *Fifth Session of Intergovernmental Group of Experts on Consumer Protection Law and Policy, available at :* https://unctad.org/system/files/non-official-document/ccpb_IGE5_CON_Contrib_India_en.pdf (Last visited onon 12th August, 2021).

[15] European Commission on 13th May, 2020

[16] "Covid-19 and the Aviation Industry: Impact and Policy Responses" (15th October, 2020) *OECD;* https://www.oecd.org/coronavirus/policy-responses/covid-19-and-the-aviation-industry-impact-and-policy-responses-26d521c1/ , (Last visited on 9th May, 2022).

Conclusion

The rights of the consumers specifically in CORONA times have been affected adversely. Though government of different countries have come forward for the protection of consumers and issued guidelines to the airlines to provide refund to the consumers but the question is how effectively the same has been looked into? The International Consumer reports have also stated that its consumer member associations have come forward to respect the right of the consumers.[17] The governments around the world provide huge amount of money to the airlines in order to save the airlines from turning bankrupt. If the government is doing so much then the airlines also owe duty towards the consumers to protect their rights.

Therefore, it is the duty of the airlines to respect the rights of the consumers not just in CORONA times but also during normal times as well. Consumers can seek protection under Consumer Protection Law. Additionally, if they wish they can also approach Directorate General of Civil Aviation (DGCA) and now a special cell named 'SUGAM' is also established under DGCA which looks into the consumer grievances.[18] In case of any consumer complaint, there should be smooth process designed for addressing the issues faced and proper dispute redressal mechanism should be made effective so that the consumers are not harmed from the arbitrary practices of the airlines.

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[17] Pamela Coke Hamilton, "Airlines must respect Consumers' Rights", *UNCTAD* (June 4, 2020), *available at:* https://unctad.org/news/airlines-must-respect-consumers-rights; (Last visited on 12th August, 2021).

[18] "Consumer Protection in Airlines Sector", *available at:* https://clap.nls.ac.in/wp-content/uploads/ConsumerGuide/6AirlinesSector.pdf; (Last visited on 12th August, 2021).

GENDER NEUTRALITY OF INDIAN LAWS- A MYTH OR REALITY!

Swati Pandita[1]

Abstract

Gender inequality harms both men and women. In India it is quite prevalent in the socio-economic and political sphere. Constitution has played a major role in the growth and upliftment of women but many legal provisions have a tinge of patriarchy. As Nehru rightly said, the condition of a nation can be judged by the status of women. So there is an urgent need to amend laws and tread towards gender neutrality. In this article, I have examined various laws like GST Act(2017), Hindu Succession Act(2005), Army Act(1950), Maternity Benefit Act(2017), Mines Act(1952), Transgender Protection Act(2019) etc. for provisions that are discriminatory towards any gender and gave suggestions to achieve the goal of gender neutrality.

Keywords: Gender, Sexual Minorities, Discrimination, Neutrality.

Introduction

Gender Neutrality is defined by Oxford Dictionary as an adjective that is suitable for, or applicable to, every individual irrespective of gender. It subscribes to the idea that policies, laws, and social institutions should not discriminate on the basis of gender and every individual should have access to equal opportunities and resources irrespective of their gender assigned at birth or reassigned. Indian constitution has done a fair job in making gender neutrality as one of its fundamentals. Preamble guarantees

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all its citizens Justice, Liberty, and Equality in matters of status and opportunity. Article 14 says that every person is equal before the law and will be provided with equal protection of law by the state within Indian Territory. Article 15 cites that states can't discriminate based on sex only. It goes beyond equality and empowers women by way of positive discrimination under Article 15(3) that allows the state to make any special provision or statute for the benefit of women. Article 16 furthers the mandate of Preamble by providing all citizens equal opportunity in matters of employment. The 73rd constitutional amendment ensured that 1/3rd elected seats are reserved for women in local self-governing bodies. But is this the true picture at ground level? Are all these provisions being implemented in its true sense or they are just used to silence women when they talk about their rights? "*How much more rights you want, huh?"*

So, primarily human beings are the subject of law, which includes men, women, and the LGBTQI+ community. And we assume for the time being that our laws are gender-neutral and do not consider any gender as special or the standard norm.

Constitutional Provision

Article 15(3) of Indian Constitution says that the state has the authority to make special provisions for the welfare of women. So it denotes that any legislation to correct the historical wrong done to women by patriarchy and providing them with equal status will be considered as 'special' in nature. If we see from another perspective, this Article has been used to grant differential benefits to women and if any law is found violative of Article 15(1), it can be rescued by clause (3) of Article 15. In *Yusuf Abdul Aziz v State of Bombay* [2] Supreme Court ruled that women could not be prosecuted for adultery under provisions of IPC by invoking Article 15(3). It did not take into account that the provision

[2] AIR 1954 SC 321

is based on gender stereotypes where women can only be victims and not perpetrators of sexual offenses. Later in 2007, a bench comprising of S.B Sinha J. and Harjit S Bedi J. in *Anuj Garg & Ors vs Hotel Association Of India & Ors* [3] ruled that stereotypes about gender roles cannot be taken as the basis of law and cannot grant unequal benefits and burden any specific gender. Therefore, a law prohibiting women from working as bartenders for their own benefit and long protected under Article 15(3) was scrapped. There is a need for the state to realize that its responsibility is to create an equal society and not deprive women of the right to work and personal liberty on the pretext of protecting them from potential exploitation.

Goods and Services Tax India Act, 2017

Every woman within the age group of twelve to forty-five (approx.) goes through menstruation as a normal body function. Earlier sanitary napkins were taxed as luxury items, not as essential items which they are. Meanwhile, Condom was tax-free. Before the amendment of 2017, sanitary napkins were heavily taxed at 12% which made them inaccessible to many women in rural areas leading to hygiene issues and girls dropping out from schools. But one considerable fact stands tall, that price of sanitary napkins did not reduce even after the reduction in GST. The reason is that the raw material required for making them was increased. In the case of polythene sheets tax rate was increased from 12% to 18%, adhesives at 18%, paper and cotton yarn at 5%, and wood pulp at 12%.

Bihar has been providing leave to female employees since 1992 on grounds of menstruation as it is a normal biological process and makes doing work difficult because of discomfort. In 2017 Congress MP Ninong Ering moved a private member bill (Menstruation Benefit Bill) which proposed 2 days of paid menstrual leave for women working

[3] [2008] 3 SCC 1

in both public and private sectors. This bill could not be passed in the house for it was not considered necessary as women already have medical leaves. This reflects the indifference of authorities towards women's upliftment.

Succession Laws

Inheritance rights are mostly based on customary laws and differ from religion to religion just like other personal laws. They can be considered as the harbinger of arbitrariness notwithstanding the constitutional guarantees of fairness and reasonable classification.

Section 15 and 16 of the Hindu Succession Act, 2005 states that the self-acquired property of a Hindu woman in the case of her dying intestate will go to her husband's relatives and not to her parents. But in case of a Hindu man dying intestate the self-acquired property will proceed to his relatives, not his wife's parents[4]. If a widow remarries then she can't claim right in her former husband's property. Under Islamic law, women get a lesser share than men. Since upon marriage, she gets some amount as Mehar and maintenance. Such provisions suggest that need of the hour is to implement a uniform single body of inheritance laws applicable to women irrespective of their marital status and religion.

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

This act was passed to protect the transgender community from discrimination and fast forward their mainstreaming in society. Activists have recognized serious loopholes in the enactment. If a person wants to change their legal gender from male to female or vice versa or want a

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[4] "Presence of gender bias in succession laws", *Economic Times, available at:* https://economictimes.indiatimes.com/wealth/real-estate/presence-of-gender-bias-in-succession-laws/these-need-immediate-overhaul/slideshow/70588932.cms

transgender certificate they are required to give proof of gender reassignment surgery. Also, it gives unnecessary discretionary power to the screening committee regarding the correctness of that medical certificate. Justice K. S Radhakrishnan in *NALSA*[5] judgment ordered that trans-genders have the right of self-determination and declaring sex reassignment surgery mandatory for legal recognition is immoral as well as infringement of their fundamental rights. The government needs to separate the legal and medical recognition process. It fails to address violence against trans-persons in an adequate manner. Punishment for sexual violence against trans-genders is less than what is prescribed in IPC for women. Isn't sexual violence infringement of one's right to life irrespective of gender?

The statute does not provide horizontal reservations which is much needed keeping in mind the social backwardness of trans-persons. This act not only failed to protect their rights but snatched away existing rights also. It needs to direct attention towards socio-legal problems faced by the community like rape and abuse by police, economic exploitation by pimps and customers, lack of educational and employment opportunities.

Military Laws

Armed forces laws regulating army, navy, air force, coastguards, or central police laws (BSF, ITBPF etc.) have a grim/flinty view on homosexuality. Although gay sex has been decriminalized by Apex court but Military laws are substantial statutes. Their provisions need to be specifically repealed or amended. The Army Act, 1950 considers consensual sexual relations between personnel as disgraceful conduct of indecent or unnatural kind, punishable with seven years of imprisonment and dismissal from service if found guilty[6]. Similar

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5 WP (Civil) No 400 of 2012

6 The Army Act, 1950 (Act 46 of 1950), s.46(a)

provisions can be found in Coast Guard Act,[7] , Border Security Force Act [8] and ITBPF Act,[9]

There is no prohibition in armed forces with a man and woman marrying while serving but any same-sex relationship is prohibited. This ousts the infringement of fundamental rights envisaged in the Constitution.

Family Laws

According to this Hindu Marriage Act, 1955, marriage can be solemnized between any two Hindus which should portend 'any' is irrespective of gender. But the language of the statute has hetronormative underpinnings and hints that it takes into account only binary genders, for example, it refer to parties to the marriage as bride and bridegroom, wife, and husband. Legislative bodies did not bother to make the language gender-neutral even though homosexuality has been decriminalized and transgender have been recognized as the third gender. One of the characteristics of personal laws is that they don't fall under the test of fundamental rights. So one of the ways for an LGBT couple to marry under HMA 1955 is that one person presents themselves as a bride and another as a bridegroom. This approach might or might not be upheld as a correct statutory interpretation by the court which leaves room for injustice.

Therefore, it does not recognize same-sex marriage expressly which means that legal protection and remedies afforded to heterosexual couples in case of marital discord will not be available to them and unfortunately, the bench which declared Section 377 of IPC as unconstitutional did not give any ruling on marriage, adoption or

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7 Section 23(a)
8 Section 24(a)
9 Section27(a)

inheritance. From the joint reading of *Shakti Vahini case*[10] and *Navtej Johar case*[11] we can interpret that same-sex unions are recognized under the secular Special Marriage Act. In July 2011 a Gurgaon court recognized a lesbian union after they were made to sign affidavits that they meet all the legal requirements of a valid marriage. There are some more legislative loopholes that the judiciary needs to address like even if same-sex unions are legally recognized what about other ancillary rights of maintenance, inheritance, employee provident fund scheme, and compensation under Worker Compensation Act, 1923.

Tort Law

In the case of the death of the husband, the court decides compensation payable based on his salary and relationship with his wife. But if the wife dies and she was working as a *homemaker* it is considered that her work was equivalent to that of the semi-skilled laborer. It is significant to note that all the housework, cleaning, laundry, cooking, child-care amounts to semi-skilled work and is not considered equal to the work done by men outside households.

Labour Law

There are laws protecting women in the formal sector but they exclude contract labor and women working in the informal sector which constitutes 96% of the women force so the majority of them barely have any legal protection or social security afforded to them. This is one of the dominant causes for the decline of working women force as they have a double burden of production as well as reproduction on them.[12]

Equal Remuneration Act, 1976 which was passed in consonance

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[10] AIR 2018 7 SCC 192

[11] AIR 2018 SC 4321

[12] Government of India, "*Employment and Unemployment in India*"(NSSO 66th Round)

of directive principles legally enforced an obligation on the employer to pay equal wages for equal or similar work under similar working conditions. This beneficiary provision resulted in comparisons being drawn regarding the work done by males and females. So the parliament should amend the phrase similar work to 'work of equal value'. Many other discriminatory provisions were declared unconstitutional courtesy feminist lawyering in *PUDR V UOI*[13] , *C.B. Muthamma v. Union of India*[14] and *Rajendra Grover v. Air India Ltd & Ors*[15].

POSH, 2013[16] is considered as breakthrough legislation but some provisions caught the eyes of feminists. The first one being that in case of sexual harassment the women will be paid compensation from the salary of accused thereby excluding the employer from incurring any liability. The second one is, the acts call for action against women making a false or malicious complaint which might deter many women from filing complaints about lack of tangible evidence or employers exploiting the provisions to take the side of the alleged offender. This beats the very spirit of guidelines laid down in *Vishakha v State of Rajasthan*[17]. MGNREGA, 2005 was passed to implement the right to work. But ground reality says something different. In some backward areas of North India, women were told by officials that they do not come under the ambit of this act to keep the discriminatory social norms intact, also older widows were not given work and whenever there was a situation of extra workers women were the first one to be turned away.[18] A clear breach of statutory provisions was seen as no child care facility was being provided.

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13 AIR 1982 SC 1473.

14 AIR 1979 SC 1868

15 [2020] 2 SCC 723

16 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act 14 of 2013)

17 AIR 1997 SC 3011

18 Aruna Bagchee(2005), "Political and Administrative Realities of the EGS", *Economic and Political Weekly*, XLI(42)

Factories Act, 1948 provides for laws that regulate labor force working in Factories. Madras High Court took a step towards reforming the Factories Act when it declared Section 66 (1) (b) which prevented women from working at night shifts as violative of Article 14, 15, and 16(3).[19] Section 22 (2) prohibits women from cleaning, lubricating or adjusting any part of heavy machinery while it is in motion, Section 27 does not allow women to be employed in a factory for pressing cotton in which a cotton opener is at work, Section 87 of the act says that if the state thinks fit it can prohibit any woman from working in manufacturing or operations department if there is a possibility of her being exposed to any disease, poisoning or grave bodily injury. These provisions imply that women are not suitable for particular jobs as they are highly vulnerable without any reasonable grounds therefore hampering women's right to work.

The Mines Act, 1952 under Section 46 provides that women are prohibited from working underground and above ground at night time. As a result, women are excluded from technical jobs at mines and have to resort to menial work.

Maternity Benefits Act, 2017 is considered a special act to benefit the women under Article 15(3) and not Article 14 because pregnancy and childbirth is something that women bodies go through and not male bodies reemploying the hidden fact that law considers male bodies to be the standard norm and anything deviating from it is considered as special. This act grants 26 weeks of maternity leave to those women also who do not give birth biologically but legally adopt a child and whose egg was used to create an embryo implanted in another woman. So, why there is no provision for paternity leave for fathers or work from home options? It implies that even if women do not give birth but she is the one primarily responsible for taking care of the child and its

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[19] *Vasantha R. v. Union of India* ,[2001] I ILLJ 843 Mad

well being, hence the relief. It again imposes the typical gender-role assigned to mothers by society.

Also, it excludes women working in the Informal sector who constitute 93% of the Indian workforce even though the Law Commission of India recommended it in 2015. So are some women's bodies special than others? Furthermore, it did not take into account the far-reaching consequences of its beneficial provisions that resulted in employers especially of Micro and Small industries not recruiting females and preferring males to do the job as they already struggle with operating costs and cannot risk lowering the productivity.

OECD 2011[20] in its research encouraged paid paternal leaves to fathers so that child care is not supposed to be the duty of mothers alone and the 'Labour of love' considered innate to women can be redistributed equally between both parents.

Another law that manifests the gender-biased attitude of the legislature is Immoral Trafficking Prevention Act, 1956 which does legalize prostitution but declares all the surrounding activities illegal which makes it difficult for them to earn their livelihood. Sex work is one of the oldest professions and but like other professions, it is not looked upon with dignity and considered essentially as a social evil, therefore, denying more than 660,000 women their right to work.[21] Before the amendment of 2013 which introduces 370A making physical exploitation of sex worker an offense, there were many shocking judgments which ruled that provisions of gang rape will not be applicable if the prostitute was working at her own will.

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[20] OECD (2011), " *Family Database*", *available at:* https://www.oecd.org/els/soc/ PF2_1_Parental_leave_systems.pdf

[21] HIV and AIDS Data Hub for Asia-Pacific, *"Female Sex Workers", available at:* https://www.aidsdatahub.org/sites/default/files/FSW_Slides_December_2018.pdf

Criminal Laws

Indian Penal Code grants the right of private defense under section 96 to 106. It says that any person has the right to protect his body or property or that of another from any offense. These sections limit the exercise of private defense to the extent it is necessary, that is to defend the body or property. It some other conditions are that force used should be proportional, cant inflict more harm than necessary, danger should be imminent and this right will not sustain if the victim has time to approach public authorities for adequate protection.

This right of private defense as exercised by women against their abusers has been looked upon differently by the judiciary. In *R v Kiranjit Ahluwalia*[22], where the victim was married off in England at the age of 23. For 10 years she suffered domestic violence, marital rape, and food deprivation at the hands of her husband. One evening husband threatened her and after some hours Kiranjit burned the bed he was sleeping on. The court convicted her of murder at first, on the ground that she had a cooling-off period, the inflammatory substance she used was not of common knowledge implying she planned the act and it was cold-blooded murder. Counsel for Kiranjit pleaded that it was not cooling down period but boiling over period and years of abuse made her take such step to prevent herself from future threats to her body. Now Indian society is hypergamist, where there are substantial physical differences between the bride and bridegroom. The husband is usually taller and heavier than wife which makes it near impossible for women to use proportional force in case of a fight. That is why it has been a common tendency among them to do bodily harm to husbands when they are asleep or in an intoxicated state. Also if we observe criminal cases there comes out a pattern where wives mostly use poison to kill their husbands for its easy availability and convenience to give/administer. It can be

[22] 4 All ER 889

concluded that domestic violence law and provision of private defense is based on the male standard of behavior where a person is supposed to react immediately. It also ignores the social, cultural, and economic position of women stuck in abusive relations which prevents them from running away or seeking the help of authorities.

Section 300 of IPC that deals with murder is considered to be gender-neutral provision by all means but its application by the judiciary in numerous exposed its biased take on behavioral norms. An exception I to Sec 300 says that culpable homicide will not be considered murder if the malefactor is deprived of self-control as a consequence of sudden and grave provocation. The main ingredient is that act of killing must be done under immediate impulse. The offender should not have reflected, deliberated, or cooled down.

In *Nanavati v State of Maharashtra*[23] court held that mere words, gestures, or confession will be considered enough in some cases to cause grave and sudden provocation. In this case, the Offender got three hours of the cooling-off period between he came to know about his wife's affair and he killed the victim. Hence this exception was not considered applicable.

Fatta V Emperor[24] court ruled that if an accused sees his wife with her lover in compromising position it will be considered as grave and sudden provocation. It would not be wrong to say that the law thinks that a reasonable man would kill his wife if she is not faithful. The term reasonable man includes women also, but usually, when women get to know that their husbands are cheating on them they either get into a verbal fight, leave the matrimonial home, file for divorce, and in some cases defend their husbands. Like in the case of Hillary Clinton,

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[23] AIR 1962 SC 605

[24] 30 Cr. L.J. 481

Dharmender, Shiney Ahuja to name a few. How does a court decide what normal or reasonable conduct is? So somewhere it normalizes primarily *male behavior.* It does ignore the behavioral differences between men and women. While men tend to react immediately, women take more time to react or take action which court labels as planning and their case does not come under exceptions to murder.

Another provision that is considered discriminatory is Adultery under section 497. It is considered as an offense relating to marriage. A male commits adultery if he has carnal relations with a woman who is and he knows or has reason to believe to be married to another person. Firstly, It does not take into cognizance married men having sexual intercourse outside marriage with an unmarried girl. Wife has no right to prosecute the husband. Only the husband has a monopoly over the wife. And if the sexual intercourse happens with the consent of the husband. Is it not an offense against marriage anymore? Marriage, which is still considered a sacrament under Hindu law and is largely based on religious and moral sanctions? Secondly, male offender alone is liable for an act which has the consent of woman also. The reason is that women are gullible, naive, and too innocent to know the nature of their act and are not taken to be seducers by law. It is a double-edged sword. It denies the fact that women can be abetters of sexual offenses also. Court of law generally perceives women as victims and men as perpetrators of sexual offenses.

Conclusion

It has been quite evident from legal provisions discussed above that law has maleness to it. For decades it has turned a blind eye to the plight of women and sexual minorities. Male experience and perspective have been the norm. A thorough reading of many laws will give an understanding that women have been stereotyped as passive and dependant.

It is high time that Indian laws be made gender-neutral concerning the definition of victim and perpetrator.

First, it is to be understood that gender neutrality would not result in the law being oblivious towards any gender or eradicate the difference but be more sensitive towards the behavior, functioning, and needs of all genders across spectrum/paradigm.

Second, the argument that gender neutrality of rape or sexual abuse laws will result in its misappropriation by men as they can file counter complaints which would lead to women being deterred more than ever from going to authorities to report sexual crimes stands hollow. Every law has a fear of misappropriation but that should not stop the authorities from implementing it. Instead, they should pitch for step by step approach to implement gender-sensitive laws that lead us towards an equal society as visioned under Article 14 of the constitution.

Making the definition of Victim and perpetrator gender-inclusive will increase the ambit of justice only and do away with law enforcing gender biases. Arguments against it can be traced to an incorrect understanding of sexual offenses. Cases of male to male rape and female to female rape and marital rape are increasing and need to be addressed proactively.

Also, the philosophy of 'Romantic Paternalism' visible clearly in Labour laws and Constitution should be shunned as it has turned out to be systematically biased towards a particular gender and hampered their empowerment.

There is an urgent need for more women and sexual minorities as legislators, lawyers, judges, and policymakers to highlight their perspective.

Lastly, it's very important to realize the goal of gender neutrality that lawyers bring to the notice of judiciary any discriminatory law. More feminist lawyering like in the cases of *Tukaram*[25], *Bodhisattva*[26], *Chandrima Dass*[27], and *Vishakha*[28] must be done. The main objective of legislative bodies and the judiciary should be to incorporate the best of each precedent.

[25] *Tukaram v State of Maharashtra,* 1979 AIR 185

[26] *Bodhisattwa Gautam vs Miss Subhra Chakraborty,* 1996 AIR 922

[27] *Chairman, Railway Board & Ors vs Mrs. Chandrima Das & Ors,* (1997) 1 SCC 416

[28] *Vishaka & Ors vs State Of Rajasthan & Ors,* (1997) 6 SCC 241

THE CONCEPT OF SOCIAL JUSTICE IN THE CONSTITUTIONOF INDIA

Srijana Basnet[1]

Abstract

Discrimination is one of the biggest social evil to erode the concept of equality and justice in any civilized society. Even though we have been fighting discrimination since time immemorial it still seems to linger here and there. The concept of Social Justice is not entirely new and it can be stated that it is not in toddler stage. Social justice has been prevalent in India since ages. It however hasn't stopped evolving in accordance to the change in society. Social justice in a layman language would mean to provide equal opportunities to all the people without any kind of discrimination based on race, caste, religion, color and other such attributes. No person should be deprived of these opportunities as they form the basic rights that all individual are entitled to enjoy. Social justice is mainly based on the concept of equality. The principle of Equality, Justice, liberty, freedom from oppression and discrimination is the basic values of the constitution.

This article aims at analyzing the concept of Social Justice in the Constitution of India. It endeavors to study the various provisions in the constitution of India in relation to social justice and the new provisions adopted thereafter.

Keywords: Social Justice, Discrimination, Oppression

Introduction

Social justice is one of basic needs that every individual is entitled to have access to. It is source from where everyone derives the concept of

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equality, liberty and justice. The constitution of India is a liberal one wherein focus is laid upon individual rights. Social justice can be understood to mean that every person should be free from any form of discrimination and should be able to enjoy his/her rights without any prejudices. No one should be barred from exercising his/her rights based on caste, religion, race or sex. It requires equal social opportunities to all individuals. If we define social justice more precisely it involves the ordering of the society in a manner that the material and moral benefits of society accrue to each and every one specially the weaker and marginalized section of the society so that they can enjoy every opportunity just like the privileged ones[2]. John Rawls in his "Theory of Justice" laid down two main principles that every state must adopt in order to secure social justice and they are as follows:

a. Principle of Equal Liberty

It is the first principle laid down by John Rawls that states that the principle of justice must be derived from its original position. It exclusively suggests that every individual possess the right to enjoy the most extensive liberty with similar to liberty of others.

b. Principle of Equality

It states that economic principle of any State must be laid down in a fashion that is arranged in such a way that it is accessible to all individual specially those less privileged and marginalized section of the society.

From the above statement we can clearly state that Social Justice implies the balance of rights between different sections of society. It lays emphasis on the less privileged section of the society. The onus lies on the State to safeguard the rights amongst different people. It is the duty of the government to implement such robust rules and regulation that

[2] Subhash Shukla, "Social Justice in India: Constitutional Vision and thereafter",74 no. 2 The Indian Journal of Political Science, 357 (2013).

can have positive effect on its citizen. It should benefit all the section of the society equally. It should have an effect to eliminate any form of discrimination that exists. No one should be barred from exercising their rights on the basis of color, race sex or religion.

Preamble and SocialJustice

In the landmark case of GolakNath*v/s* State of Punjab[3] it was laid down that the Preamble to an Act sets out the main objectives which the legislation is intended to achieve. It states various important purposes which are-

1. It lays down the enacting clause that brings the Constitution into force.
2. It lays down various rights and freedom which are to be secured.
3. It throws light on the source of Constitution viz. the People of India[4].

The preamble of the constitution sets out to state India to be a Sovereign, Socialist, Secular, Democratic and Republic. It emphasis on the four important concept ofLiberty, equality and fraternity. Dr. Ambedkar in his speech in the constituent assembly stated that: "The principles of liberty, equality and fraternity are not to be treated as a separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality liberty would produce the supremacy of the few over the many. Equality without liberty, would kill individual initiative[5]. Preamble serves the following objectives-

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[3] AIR 1967 SC 1643.

[4] M.P. Jain, *The Constitution of India*, p. 12, (Lexis Nexis, Haryana, 8th edn., 2018).

[5] M.P. Jain, *The Constitution of India*, p. 13, (Lexis Nexis, Haryana, 8th edn., 2018).

a. Justice- social, economic and political

b. Liberty- Of thought, expression, belief, faith and worship

c. Equality- Of status and of opportunity and to promote among them all

d. Fraternity- Assuring the dignity of the individual and the unity and dignity of the Nation[6],

According to the Supreme Court in Samathav. State of Andhra Pradesh the Constitution of India envisions to establish an egalitariansocial order rendering to every citizen social, economic and political justice in a social and economic democracy of the Bharat Republic[7]. Preamble to the Constitution of India secures justice to all its people which is one of the most important form of rights without which it handicaps all other form of right. Social Justice ensures that the State is devoid from any form of discrimination. Preamble by declaring India to be socialist country by 42nd amendment has secured and established social justice in the country. It establishes an institution that aims at furthering the welfare of the country. The spirit of preamble is further strengthens in the form of fundamental rights and Directive Principle of State Policy. Thus, it can be said that the makers of Constitution envisaged the concept of social justice without any discrimination on the basis of gender, caste color and other such attributes.

Constitutional Provisions Securing Social Justice

India is a predominantly a welfare state that guarantees its people economic and social wellbeing. It safeguards all the social values that the framers of the Constitution aimed at promoting and protecting. It follows the principle of equal opportunity to all its citizen. It aims at

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6 *Ibid*.

7 AIR 1997 SC at 3326

promoting equitable distribution of wealth wherein no individual is barred from availing such rights.

Since, the independence of the country we have come a long way in terms of balancing social justice in the country. They have been many instances wherein the rights and plight of the marginalized individual has been provided with equal opportunity and the provisions in the Constitution of India is the living proof of this fact. Before we delve into these provisions it is of utmost importance to understand the term 'marginalized'. Marginalization in the simplest form means to treat a certain group of people with less importance or peripheral. They are mostly treated unequally in the society. They have less opportunity as compared to other people due to various reasons mostly owing to prejudices and social substrata. Therefore, there is constant intervention of the government to keep a check on various marginalized section of the society and try and keep a balance on the social values of the Constitution via various governmental led programmes.

Constitutional Provisions

The provisions in the Constitution of India provides for social, economic, cultural and political rights in the form of fundamental rights via part III of the Constitution and Directive Principles of State Policy via part IV of the Constitution. These provisions clearly states the rights of the weaker section of the society and has paved ways to protect and safeguard the same.

Article 15 of the Constitution[8]: Article 15 (1) prohibits discrimination on the ground of religion, race, caste, sex, place of birth

[8] The Constitution of India 1949, art 15 " Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth(1)The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them(2) No citizen shall, on grounds only of religion,

or any of them. The onus in on the State to protect all individual from any form of discrimination while clause 2 of section 15 prohibits all individual from discriminating any individual on the basis above stated grounds from having access to shops, public places and other such day to day life activities that other general public is entitles to enjoy. However, clause 3 and 4 of Article 15 is an exception to clause 1 and 2 which allows the government to formulate any special provision for the advancement of any backward classes including the educationally backward classes which was added by the 1st amendment of the constitution after the case of*State of Madras v. Champakam Dorairajan*[9]. The brief fact of the case was that the government of Madras had by a G.O. reserved medical and engineering seats in its colleges on the basic of religion, race and caste. The government defended its step of reservation under the veil of Article 46 for promoting social justice for all the section of the society specially the marginalized section of the society by reason of race, caste and religion. The court however held the G.O. to be void as it classified students on the basis religion, race and caste instead of merits. In order to modify this decision Article 15 was amended and clause 4 was added.

However, clause 4 of article 15 is just an enabling provision and does not enforce the State to take abide by it. The discretion is on the

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race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to(a) access to shops, public restaurants, hotels and palaces of public entertainment; or(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public(3) Nothing in this article shall prevent the State from making any special provision for women and children(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

9 AIR 1951 SC 226.

State to from any special provision to benefit the socially backward classes.

Article 16 of the Constitution[10]**-** Article 16 talks about equal opportunity in public employment. It lays down that there should be discrimination in terms of providing equal opportunity to all its people. It prohibits discrimination not only based on religion, caste, sex but also on the grounds of descent, place of birth, or residence. Article 16 is somewhat narrow as it only talks about employment as compared to Article 15 which is much broader that prohibits discrimination on various occasions. Clause 4 of the article provides that the state may make reservation in favor of the backward classes. Explaining the true nature of Article 16 (4) has stated in the well known case of Mohan Kumar Singhania*v* UOI [11] lays down that the government has the discretion to enact any special provision that would benefit the backward classes.

Article 29 and 30[12]: Article 29 and 30 of the constitution lays down the cultural and educational rights of the minorities. In the earlier India had witnessed various kinds of educational discrimination based caste, religion and race. These provisions in the constitution safeguards the cultural interest of the minority and to safeguard the same.

Directive Principle of State Policy

The Directive Principle of State Policy is incorporated under Part IV of the Constitution of India. It sets out certain rules and obligation on the State to follow and abide by. This part of the Constitution has been borrowed from the Constitution of Ireland[13]. DSPS lays down the foundation for social order, social justice and distributive justice.

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[10] The Constitution of India 1949, art 16

[11] AIR 1992 SC 1.

[12] The Constitution of India 1949, art 29 and 30.

[13] Dr. J.N. Pandey, *Constitutional Law of India*, p.476 (Central Law Agency, Allahabad, 58th edn., 2021).

a. Article 38 (1): The state is obligated to strive to protect and promote the welfare of the people.

b. Article 39 (A): It states that the State must ensure that free legal aid to weaker section of the society. They should not be barred from accessing legal justice based on poor economic background.

c. Article 46: Article 46 of the DPSP the Constitution has strengthen distributive justice. It promotes the educational and economic interest of the weaker section of the society.

Constitutional Provision on the Safeguards to Minorities. Castes, Scheduled Tribes and Backward Classes

India has a composite population wherein people belonging to different classes live together. The framers of the Constitution considering the chances of conflict between different interests of group of people safeguarded the rights of those people who seem to be more prone to violation. It protected them against any from discrimination and helps them to get integrated within the society.

The policy of the Constitution is to do away with any form of discrimination based on caste and to strives as a casteless society[14]. Upon close analysis of the Constitution, it appears that the main intention of the framers was to make country secular wherein people could live harmoniously with each other wherein no group could subdue other group of the people in the society.

a. Schedule Caste and Schedule Tribe

The Constitution of India does not define as to which group of people belong to Schedule Caste or Schedule tribe. However, the power is vested on the President to give out a list of caste and tribes. Article 341

[14] M.P. Jain, *The Constitution of India*, p. 13, (Lexis Nexis, Haryana, 8th edn., 2018).

provides that the president must consult with Article 341 provides that the president must consult with the Governor of the State and specify list of Schedule Caste ad Schedule Tribe.

b. Reservation of Seats in LokSabha and State Assembly- Article 330 and 332

Article 330 and 332 provides for the reservation of seat in Lok Sabha and State Assembly except for Schedule Tribes in the autonomous District of Assam[15]. This Article gives opportunity to the people of schedule caste and schedule tribe to take part in the country's political scenario and reserve a seat in LokSabha and State Assembly.

c. National Commission for Schedules Castes- Article 338

Article 338 states that there must be a National Commission for Schedule Caste. The duties of the Commission are as follows-

1. To look into matter relating to safeguard the minorities (schedule caste). To monitor any law or order formulated by the Government and to assess the working of such safeguards provided for SC's.
2. It is also empowered to look into the complaints of violation or deprivation of the rights of the SC's.
3. It is also required to participate and advice the process of socio-economic developments of SC's and to evaluate their development under the Union and any State.
4. It is the duty of the Commission to make report to President on the working of the safeguards for SC's annually.
5. It should also make recommendation to the State and the Union all the measures that the government should implement in order to protect the rights of the SC's.

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[15] Dr. J.N. Pandey, *Constitutional Law of India*, p.805 (Central Law Agency, Allahabad, 58th edn., 2021).

6. To discharge such other function that the President may think so for the protection, development and advancement of the SC's subject to the provision of any law implemented by the Parliament, by the rule specify[16].

Conclusion and Suggestions

The main objective of social justice is to strike a balance between the rights of different group of people and also to provide a special treatment to marginalized people. The Constitution of India has provided enough protection to such people via various provisions. It has aimed at providing safeguard to the people belonging to backward class, ST's and SC's. There is a history of domination and discrimination of such group of people. Their interest and rights are often seen to be violated by the class of people that seem to have a upper hand.

From the foregoing discussion the researcher proposes the following suggestion

a. The Constitutional Provision under Article 15 and 16 forms just an enabling provision. It does not enforce State to make any special provision for safeguarding the rights of the ST's, SC's and backward classes. It is in the discretion of the State Government to take any robust action for the improvement of the status of such group of people. If these articles were made obligatory there would be better chances of protection of rights of these group of people considering the vastness of Article 15.

b. There should be more reservation for ST's, SC's and the backward classes as there is constant increase in the population.

c. The government should take robust action whenever there is any form of discrimination in terms of employment, education and in medical institution.

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[16] *Ibid* at 807.

d. The State should take more concrete steps to safeguard the rights as it appears that the State is taking very little steps to secure the rights of the minorities.

e. The Judiciary must also take active part in coming up with new steps to safeguard the constitutional provisions of social justice.

f. There should be a new constitutional amendment in order to secure seats in private sector as well.

FOREIGNERS TRIBUNALS IN INDIAN CONSTITUTION

Aditi Sharma[1]

Abstract

Tribunals in legal fold can be understood as an adjunct piece attached to bureaucracy. They are constituted by parliament for adjudication of quasi-judicial matters. Formed with an intent to ameliorate the excessive burden of judiciary. Impression to insert this notion in Indian constitution was done through 42nd amendment act 1976. Whole consolidate concept is bifurcated in two article namely article 323-A (administrative tribunals), article 323-B (tribunals for other matters). Brought through pre-constitutional and colonial foreigner's act 1946 and under foreigners (tribunal) order 1964, they were empowered by the supreme court of India to ascertain the citizenship of people in Assam. Reverse situation faced by the people of Assam due to deprived nationality. Indian nationals are declared as doubtful voters. Wholesome responsibility on the suspected person to prove its nationality in front of foreigner's tribunals. Further lack in procedure guidance as how reference can be made against a person to the tribunal. It does not have an appellate body. Only 10 days' time is given for document presentation after receiving notice. Moreover, low standard eligibility criteria for tribunal members is prescribed. No fixed tenure and are recruited on contractual basis. More pending cases whereas less than 10% people are declared as foreigners in disposed cases. This labeled migration is a security threat and is continually wrecking the lives of many in Assam. Working trail of these tribunals marks a black blot on the framework of international human rights law. Grey functioning is witnessing arbitrary deprivation of nationality in India.

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[1] Advocate

Keywords: Tribunals, arbitrary, deprived, nationality, adjudication.

Introduction

The word tribunal is marked from the word 'Tribunes' which means 'Magistrate of the Classical Roman Republic'. It is an administrative body possessing quasi-judicial duties. It is neither a Court nor an executive body, placed midway. Major responsibility to avoid crises of delay and backlogs in the administration of justice. Provide a platform for faster adjudication than traditional courts. 42nd amendment, 1976[2] bought two additional articles namely 323A and 323B specifically dealing with administrative tribunals. In 2010, apex court have given power to legislature to create tribunals on any subject matter under the purview mentioned in seventh schedule of the Indian Constitution. It can be created both at center and state level, article 323B is not exclusive. As this paper is dealing with Assam issue where these tribunals are working arbitrarily regarding citizenship of Assam residents. Foreigner's act 1946, a colonial legislation doesn't talk about citizenship. In Assam, they are formed through ministry of home affairs order 1964 not through legislative scheme. A modern, democratic, civilized society is facing nationality crises through a colonial legislation with various errors. Reforms should be brought. Government and High court attention required in this citizenship issue because that is basic fate of a human being.

Issues for Discussion

1. Tribunals vests the powers to do justice. Are they brought through a valid legal path?
2. No procedure prescribed in foreigner's act as to how a person can be identified as a foreigner. Violation of human right by non-mentioning of deportation time.

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[2] Law Commission of India, "Report No. 272, Assessment of Statutory Frameworks of Tribunals in India" 21-33 (October 2017), A*vailable at:* https://lawcommissionofindia.nic.in/reports/Report272.pdf(last visited on March 22, 2022)

3. A serious issue whether case deciding members possess essential qualifications.
4. Arbitrary working of tribunals reporting various elements of errors. Is it a rational way to do justice to the citizens of a country?

Discussion

Tribunals are quasi-judicial bodies formed to decide disputes speedily than ordinary civil courts. They are not ordinary courts neither appendages of Government departments. They are machinery of administration, for which Government have pointed scrutiny and responsibility. They are less formal, excluding basic rules of evidence. They are cheaper than courts and limited legal representation is required. Responsible to adjudicate wide range of subjects that is related to everyday life. To avoid elaborate procedures, legalistic forms and attitudes, work is transferred to them. Judicial members having sole specialized knowledge about an area sounds more interesting than traditional courts.

Assam has recorded establishments of tribunals to decide citizenship of various Assam residents who were of Assam or came in by crossing borders. "Foreigner"[3] means a person who is not a citizen of India. A person can be a citizen of a country if it passes all the citizenship tests. He will be a recognized member of a state and allows to follow all the customs and laws which are embedded in that country. He has the right to enjoy all the legal rights and privileges granted by a state. India is a democratic country who provides certain rights and responsibilities on its citizens. A democratic system always provides freedoms to its citizens. Fundamental rights bestowed in Indian constitution are those freedoms. "Any individual domiciled in India automatically became an Indian citizen in 1949 if they were: born in India, born to at least one parent who

[3] The Foreigners Act, 1946, (Act 31 of 1946)

themself was born in India, or living in India for at least five years prior to the Constitution's commencement. Individuals of Indian descent living outside of the country could register for citizenship, but a person who had voluntarily acquired a foreign nationality was barred from Indian citizenship."[4] According to Indian citizenship act, 1955 a person can be detected as a foreigner if it accomplishes the provisions of foreigners act, 1946 and foreigners (tribunals) order, 1964 constituted by the said order. A person shall be deemed to be a foreigner on the date on which tribunal constituted under the foreigners (tribunals) order, 1964, submits its report that he is a foreigner to the officer or authority concerned. These provisions do not talk about citizenship. Foreigner tribunals are formed through foreigner's act, 1946 which is a colonial legislation. Official members have given conclusive rights to decide the procedure which they want to follow. Is it a just thing which is going on in a democratic and civilized society? There is no procedure prescribed under the foreigners act as to how a person can be identified or detected as a foreigner. These tribunals are not working in legal manner as there is no specific legislative framework formed for them which they can follow.

Deportation time means expulsion of an alien from a country. Those who are not the nationals of a country have given certain time to leave that country once they are proved non-nationals. There no deportation time mentioned in the said act. Maximum six months deportation time is given according to 1951 international convention. If a person is declared

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[4] Indian Nationality Law, *available at:*https://en.wikipedia.org/wiki/Indian_nationality_law#:~:text=Entitlement%20by%20birth%20or%20descent,-All%20persons%20born&text=Children%20born%20overseas%20are%20eligible,for%20citizenship%20to%20be%20granted. (last visited on March 21, 2022)

[5] Rohini Mohan, " 'What's Going On Is Really Unfair': Inside The Foreigners Tribunals in Assam", *Huffpost*, August 5, 2018, *available at:* https://www.huffpost.com/archive/in/entry/what-s-going-on-is-really-unfair-inside-the-foreigners-tribunals-in-assam_a_23496313 (last visited on March 21, 2022)

foreigner then the same is transferred to detention centers. No certain time is mentioned for his detention that is clear violation of human rights. Barpeta[5] district of Assam witnessed various cases of doubted citizenship, addressing one of 'DilipBiswas'[6] a farmer who is living in Assam from 40 years targeted by police authorities. Despite of having land revenue and other documents, declared foreigner and showed the way to prison. He was there for nine years because tribunal made an error in trial proceedings. Many more cases are still pending and yet to come. Many citizens facing this problem are minorities, poor and illiterate, unprepared to deal with the harsh tribunal process. The principle of Indian evidence act 1872 states that if a person is asserting something then he must prove that. State has the responsibility to prove its side when they are taking a genuine person to these trials. Because some low-level government official who have entered a data earlier made mistake in entering, after lapse of many years taking citizenship back of Indian citizen on this basis is not valid. Are these provisions and procedures hampering basic principle of rule of law in a just society?

To be a member of these tribunals a person should be a district judge or additional district judge or having a good judicial experience. This original provision was diluted and advocates having 10 years' experience or of 55 years of age can also become a member. It is not sorted here and further changed with a new addition considering advocate of 7-year experience or retire civil servant to be a member. 200 and more members are appointed burdening lakhs of cases. Will they easily execute these cases in limited time frame is a big question? Lack of judicial experience is causing more miseries day by day. Only two-day orientation is provided for executing such a large task of nationality. All major government appointments such as IAS, IPS have two years

[6] Rohini Mohan, " Inside India's Sham Trials That Could Strip Millions of Citizenship", *Vice News*, July 29, 2019, *available at:* https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship (last visited on March 20, 2022)

training. Learning a procedure in such short time frame is exceptional. Retirement of High Court judge is 62 years, and this has been raised to 67 years for tribunal members. Earlier they appointed for two years but know stabled for one year. Most of the members are deciding cases baselessly and asking pointless questions from people. Giving their judgments based on documents which contains various flaws made by government officials. If a foreigner tribunal declared as much as it could be, "foreigner" then it is good tribunal. Government is deciding the eligibility, age, tenure, salary issues of members when they are under the scrutiny of High Court.

Most of the citizens are declared foreigners in ex-parte cases without giving an opportunity of hearing. This is not a valid justice system. Notices are given before 24 or 40 hours. T.N Seshan chief election commissioner introduced a new concept of "Doubtful" voter. Three lakhs' persons are declared 'D' voters and their voting right is ceased. Children and descendants of 'D' voters are not included in the NRC list. On 31st march, 2019, 1.17 lakh people are declared foreigners. Only five are deported. 63,953 are declared ex-parte. Assam continuously face floods and many natural calamities, people didn't have their permanent native place due to that, still we are expecting from these people to show their documents. Assam border police is detaining people on simple doubt. This not a fair justice system these government forces are showing when we have such strong laws.

Foreigners' tribunals are working arbitrarily with executive adjudication. They are not quasi-judicial. They are working as kangaroo courts. Having unofficial court set up breaking basic rules and procedures of law. Disagreement among people regarding their case decisions sounds their unpleasant anticipation of fear. These courts should bring transparency in their procedures. Proceedings should be open to all and should work under strict check of High Courts so that their functioning can improve. Notice served to suspiciously declared 'foreigners' without

having the main ground is unjust. Notices are issued on imaginary grounds showing serious blot on civilized judicial or quasi- judicial system.

Findings

Tribunals[7] are bought to restore justice in a society. Foreigners' tribunals are set up to declare illegal migrants are foreigners. To stop cross border activities and to control illegal migrants', government has taken a good step. This step is taken to control the crime rate in India and provide citizenship to those who are rationally sound citizens of India. It will also help in controlling the population growth which raised in Assam in few years. But these tribunals which are set up to decide these issues are not working properly. There is no set legal framework for these tribunals as they came into existence from foreigners (tribunals) order, 1964. Rule of suspicion is imposed on the citizen; this should be removed. Favor should be given to Indian nationals as they are living in this country from so many years and earning their livelihood. Simple doubt by police authorities should not be a criterion of detainment for so long. Burden of proof should be on the state to prove a person's citizenship. Just because simple spelling mistakes in identity cards and other documents, citizenship should not be denied. After all these documents are made by government officials only. Solid proof or material should only be the criteria of deportation. Members should be trained properly to execute such heavy tasks. They should be well qualified. Equal and ample opportunities should provide to declared foreigner to defend his case. Timely notices and proceeding should be conducted. Basic principle of rule of law and due process of law should keep in mind while deciding a person's nationality.

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[7] **The Tribunal System in India**, *available at:*https://prsindia.org/billtrack/prs-products/the-tribunal-system-in-india-3750 (last visited on March 22, 2022)

Conclusion

Tribunals are formed to exercise judicial matters according to the principle of natural justice. Foreigners' tribunals need reforms for better functioning. Clear-cut legal provisions can make them effective. Effective and knowledgeable members acting judiciously will remove illegal migrants and restore citizenship who really deserve the same. Strict monitoring of High court will take them to next level. Deportation should not base on Muslim minority. It should on valid grounds stated in law. Clerical error shouldn't snatch a person citizenship. Illiterate and poor declared foreigners should be given fair and equal opportunity of hearing and show casing their citizenship. Citizenship is a human right and protection of the same is fundamental duty of government as well as our Indian Constitution.

SENTENCING POLICIES IN INDIA: CHANGE IS NEED OF THE HOUR

Deepali Padhy[1]

"Justice without force is powerless; force without justice is tyrannical"

-Blaise Pascal

Abstract

Sentencing guidelines are necessary in a country. India is a country that carries a bag of crimes. A country's sentencing policy reflects the morale, logic, and judgement present in the country. It aids in the establishment of a set level of punishment, and therefore the law of a given community, in order to diminish the prevalence of crime by reprimanding, rehabilitation, or any other legitimate or justified technique. However, the concept of reprimanding and sentencing policies has evolved and developed throughout ages. This constant evolution has resulted in a discrepancy in sentencing policies. A disparity exists based on the judges' discretion, i.e., their decisions and judgments. Before developing a punishment policy, a balance between the victim's and offender's rights must be achieved. In comparison to the United States and the United Kingdom, the Indian criminal justice system has a weak sentencing policy. The article proposes that the legislature enact certain rules and procedures in order to reduce the number of conflicting judgments and to ensure fairness and consistency when it comes to criminal sentencing. The article also discusses the current Indian criminal justice system, the principles that should be followed, and the rules that have been proposed and recommended for proper justice.

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Keywords: Sentencing, Punishment, Victims Rights, India, Life Imprisonment.

Introduction

The judge formally imposes a sentence on the offender at the sentencing phase of a court hearing. "In general words, the main purpose of sentencing is for the accused to recognise that he has committed an act that is harmful not only to the society of which he is a member, but also to his own future as an individual and as a member of society. The country has sentencing and punishment rules in place, but they need to be altered and evaluated at some point. However, the existing guideline regarding the sentencing is being formulated in a way to give justice to the society. Sentencing is often regarded as one of the most important components of criminal law, and it is widely seen as the state's most powerful and intrusive tool[2].

This is because sentencing affects not only the accused in court, but also his family, friends, the crime victim(s), and the society or community as a whole. Furthermore, sentencing should be viewed as a concept that is influenced by the moral and social ideals that exist in a given culture at a given period. Indeed, it is often assumed that the type of punishment meted out for specific offences determines the fundamental validity of any criminal justice delivery system. As a result, it must be fair and proportionate.

Judges should ideally be replaceable and mutually consistent, making comparable conclusions in similar circumstances, so that no one gains an unfair advantage by selecting the judge or exerting undue influence over the official or the process in which he works. We expect the judges to use their discretion with wisdom, justice, and competence to prevent

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[2] Mirko Bageric, "Punishment and Sentencing: A Rational Approach," *Cavendish Publishing*, p.3, 2001

arbitrary, insolent, discriminatory, biased, intrusive, and corrupt administration. However, determining which actions or omissions are punishable, as well as who is to be punished and with what kind of punishment or extent of punishment, necessitates consideration of a number of factors, including the applicable law, the role of the offender in the commission of the offence, the nature or severity of the offence, the availability of evidence against the accused, and judicial evaluation of such evidence.

If we look from another perspective then the culmination of the judicial process, which begins with the detection, enforcement of the law, prosecution, and judgement, is the sentencing of a convict. Thus, the significance of sentencing resides in the fact that it serves as the face of justice as well as a future deterrence to potential lawbreakers. There is no doubt that Criminal Courts have excelled in the art of fact-finding and law application, but there remains a gap when it comes to the process of sentencing.

Sentences are statements in judgments that specify the legal punishment for a certain offence. When the same is implemented and operationalised, it is referred to as a 'penalty.' As a result, the sentence might be considered the precursor to the actual imposition of punishment.

Historical View

When we examine India's history, we can see that the concept of Penology has been present since the beginning. It took on the meaning of danda-niti, which literally translates to "principle of punishment." Manu, India's famous law giver, said emphatically that *Danda*[3] is a derivative of Dharma. Though criminology is a recent development in the West, it was a fully established topic in our country before the Christian era began. Our Dharmashastras, such as the Vedas, Smritisastras, and

[3] *Kunju Janaratharan v. State of Kerala,* AIR 1979 SC 916

Kautilya's Arthasastras, have a wealth of literature on danda-niti or criminology. The offender was treated with the greatest tolerance in India's ancient civilization, when Dharma reigned supreme, but was gradually evicted by the state's political power throughout the Mughal and British centuries.

Sentencing policies in India

The sentencing policy of a country refers to the system it uses to punish its criminals. The sentencing policy represents the society's level of judgement and rationale for a particular offence. It is the basic guiding principle of a country's criminal justice delivery system. Sentencing guidelines can be thought of as a formula for determining what appropriate punishment for a certain offence is. This article focuses on the type of punishment and its generality in the criminal justice system, rather than the type of offence.

Before we get into the different types of sentences and punishments, as well as the regulations that govern them in India, it's vital to first define what a sentencing policy is. The criminal justice systems of each country differ. Some countries place a greater emphasis on the punishment that should be meted out to the criminal, while others place a greater emphasis on the rehabilitation that can be provided to the perpetrators. A particular court system's sentencing policy would be the primary rationale used in this case. There is no uniform or stringent punishment regime in India.

Although courts have occasionally put out specific concepts and considerations that judges should examine when considering sentences, no such guidelines have been established. Deterrence, proportionality, and rehabilitation were all stressed in *Soman vs. State of Kerala*[4], for example.

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[4] AIR (2013)11 SCC 382

"Punishments are dealt with in Chapter III of the IPC. Section 53 primarily contemplates five types of punishment. Here's an inventory of a number of them:

- Death
- Life imprisonment
- Rigorous imprisonment or ordinary imprisonment
- Property forfeiture
- Fine

Every crime outlined by the IPC has a minimum and maximum penalty that can be imposed.

Why Sentencing Guidelines are Necessary in India?

Over time, the Indian courts have indirectly pointed out the necessity for a sentencing policy by uneven decision-making and erroneous rationales. The concept of aggravating and mitigating variables is likewise a question of instance and circumstance, as is the concept of rarest of the rare cases. It has not been specified and is entirely up to the discretion of the individual making the decision; what is harsh for one person may not be terrible for another. The requirement for a sentencing policy does not end when the trial is over. It comes into play once more when determining the length of an offender's probation.

In March 2003, the Committee on Criminal Justice Reforms, also known as the "Malimath Committee," a body established by the Ministry of Home Affairs, issued a report emphasising the need for structured sentencing guidelines in order to reduce uncertainty in sentence awarding. Similar findings were made by the Madhav Menon Committee in 2008 regarding the necessity for a strong protocol guiding sentences handed down by Trial Courts. In addition, in 2010, India's then-Law Minister indicated publicly that attempts were being made to establish an unified sentencing policy in line with US and UK Sentencing Guidelines.

With section 354(1) (B) of the CrPC[5], which requires judges to declare reasons before imposing the death sentence, and section 354(3), which requires judges to state reasons before imposing life imprisonment or the death penalty. Despite these protections, the lack of sentencing guidelines gives judges and the court a lot of power. The ultimate part of the procedures is sentencing, which awards justice to both the victim and the criminal. Nonetheless, judges' and legislators' personal opinions and laws are used to determine punishment. Some judges reduce the sentence in order to help the criminal rehabilitate. Nonetheless, some judges impose harsher penalties just to set an example.

The trial court additional session Judge G P Thareja acquitted the defendant in the Priyadarshini Mattoo case[6], despite knowing that he had simply committed the crime. The judge was obligated to acquit him in this case because he was granted the benefit of the doubt. The government was forced to seek an appeal in the Delhi High Court and was handed capital punishment only because of media and public pressure. The convict filed another appeal at the Supreme Court, claiming that the lower court's decision to impose capital penalty was based solely on media pressure. The Supreme Court maintained the High Court's decision but lowered the death penalty to life in prison.

The majority of judicial discretion is found in S.360, which allows a felon to be released on probation. The section's goal is to try to reform criminals who pose no substantial threat to society. This is communicated by limiting the section's application to circumstances in which the following conditions are met:

- A woman convicted of an offence for which the punishment is not death or life imprisonment.

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5 The Code of Criminal Procedure, 1973, (Act 2 of 1973), §354(1)(B),

6 State (Through CBI) v. Santosh Kumar Singh, 2007 CriLJ 964,133 (2006) DLT 393

- A person under the age of 21 who is guilty of a crime for which the penalty is not death or life imprisonment.
- A male over the age of 21 who has been convicted of a crime punishable by a fine or a term of imprisonment of not more than 7 years.

In the case of *Modi Ram and Lala v State of Madhya Pradesh*[7], the defendants hacked off the victim's nose and male organ in retaliation for the victim marrying his wife. The trial court sentenced him to one year of solitary confinement, citing the victim's provocative act as a factor in the crime's commission. In an appeal, the top court reduced the sentence to eight years of solitary confinement. Even if the victim's act was offensive, the high court stated that the trial court's lenient attitude was insufficient. Furthermore, the sentence was reduced to three years of solitary confinement after exceptional leave was granted by the Supreme Court.

The Supreme Court attempted to strike a balance between the seriousness of the offence and the circumstances of the case, eventually admitting that the behaviour was offensive. The complexity of India's sentencing policy is demonstrated by the three ending punishments imposed by three courts. This creates a need for the guidelines in India.

Purpose of Sentencing In India

There are two basic dimensions to punishment. The purpose should be such that it justifies punishment and the proportionality of nature and quantum of punishment in relation to the nature and seriousness of the crime. There is also a difference between the purpose and the severity of the punishment given by the courts.

- "Retribution" is founded on the notion that inflicting pain on the

[7] AIR 1972 SC 2438

perpetrator or subjecting them to other unfavourable consequences is the moral and proper course of action. Man has a natural want to retaliate, and if this desire is not sated, the party who has been victimised by crime is likely to take law and order into their own hands, bringing the community to its knees. Though it appears to be of a rudimentary character, its presence in the Criminal Justice system is constantly felt.

- "Deterrence" is based on the assumption that man is a rational being with free will. However, the claim that human beings and their behaviour are too unpredictable to be reduced to a mechanistic formula can be disputed. Punishments are frequently harsh in order to send the message that everyone who commits a crime will be dealt with similarly, thus acting as a deterrent.
- "Rehabilitation" is based on the premise that human criminality is influenced by external and internal variables that can be predicted by professionals in order to prevent future crimes. It has been heavily chastised because the focus has shifted from the courts to the prison authorities.
- "Prevention", this approach allows for the administration of suffering in order to deter future criminal activity. General prevention attempts to deter members of society who have not committed certain crimes from doing so in the future, as well as to create a frightened environment for those who have a predilection for doing so.

Issues Associated with Sentencing Policies

It should be evident from the preceding section that the government must address a number of challenges. In a case involving the confirmation of a death sentence, the High Court of Delhi[8] acknowledged that India has a clear sentencing strategy, stating that "for certain offences, a

[8] State v. Raj Kumar Khandelwal, date of judgment 08 May 2009

minimum term is imposed with a cap in so far as the maximum is concerned." For some offences, a maximum sentence is set, leaving the minimum to the Court's discretion, which could be a single day. The notion of proportion between crime and punishment, which requires the Judge to produce a balance sheet of mitigating and aggravating circumstances and, after balancing the two, awarding an appropriate sentence, has evolved over time to help ease the problem of sentencing. We take notice of many decisions on the subject, each of which brings up a situation or two, and we categorise them as aggravating or mitigating. The Supreme Court of India recognised the absence of judiciary-driven rules in India's criminal justice system in *State of Punjab v. Prem Sagar & Ors*[9]., adding, "In our judicial system, we have not been able to formulate legal principles as regards punishment." Except for making notes about the purpose and intent of the sentence inflicted on an offender, the superior courts had not provided any guidelines.""Whereas the quantum of penalty for commission of a similar type of offence varies from minimum to maximum, even if the same sentence is imposed, the principles employed are determined to be different," the Court observed. Similar inconsistencies have been observed in the application of fines. In India, neither the legislature nor the judiciary have issued any structured sentencing guidelines. In March 2003, the Ministry of Home Affairs' Committee on Reforms of the Criminal Justice System (The Malimath Committee) issued a report emphasising the need for sentencing guidelines to reduce uncertainty in sentence awarding, stating, "The Indian Penal Code prescribed offences and punishments for the same." Only the maximum penalty is mentioned for many offences, whereas only the minimum is specified for others. The Judge has a lot of latitude in determining the punishment within the statutory parameters. The Judge is no longer guided in selecting the most appropriate penalty based on the circumstances of the case. As a result, each Judge uses his or her discretion in accordance with his or her own judgement. As a result, there is no consistency. The penal code and sentencing guideline rules in

[9] AIR (2008) 7SCC 550

various nations provide guidelines on sentence options. In our country, such legislation is required to reduce confusion in the sentence-giving process.

Disparity in Sentencing

Convicts' unguided punishment results in the offender's fundamental rights being violated indirectly. Everyone must be treated fairly, according to Article 1416. However, when different sentencing offenders who committed the same crime in the same situation are given different sentences based on the convict's background, this violates article 14. It leads to an increase in the number of appeals to higher courts by convicts who believe their conviction was unjustified and want to seek redress. Because of the delay in sentencing, the case is dismissed after a considerable period of time. Both the criminal and the victim will be subjected to mental and physical suffering, as well as the loss of property of the parties involved in the case, all of which affect the right to a dignified life. This delay is a violation of the right to a speedy trial under Article 21 in the case of *Kartar Singh vs. Punjab*[10].

One of the arguments in the Jagmohan case[11] was that section 30220 of the IPC, which gives the judiciary broad authority, is unconstitutional. The constitutional bench of the court, however, rejected it, arguing that the legislature has delegated authority to the judiciary. There is a lot of leeway in deciding on a sentence, and it's hard to know all of the rules for exercising discretionary power, and found that the judiciary has been acting in accordance with the law. Since the IPC's inception, the rules have remained the same and are based on well-established concepts. One of the difficult difficulties in Rajendra Prasad's case[12] was the phrase discretion.

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[10] AIR 1787, 1962 SCR (2) 395

[11] Jagmohan Singh v. The state of U.P, 1973 AIR 947, 1973 SCR (2) 541

[12] Rajendra Prasad Etc v. State of U.P, 1979 AIR 916, 1979 SCR (3) 78

The court ruled because of the lack of criteria and the use of a discretionary in imposing a sentence is a violation of the Constitution. The court also expressed reservations about the well-established ideas in the by interrogating the judges in the Jagmohan case, it became clear that each judge's opinion would differ based on their viewpoints. The court further stated that if the court itself had to make a decision, it would create ambiguity. It creates its own set of rules. Following the delivery of these two judgments, special reasons were given to the judges inquired if they wanted to mention the death penalty.

International Scenario

- The US Federal Sentencing Guidelines have been in effect in the United States since 1987. These guidelines establish a consistent framework for sentencing persons and organisations convicted of crimes and misdemeanours in federal courts across the United States. Only more serious offences, such as misdemeanours and crimes, are covered by the Guidelines. The Guidelines were initially mandatory for Federal Court Judges, but after the US Supreme Court's decision in US v. Booker, the federal guidelines were ruled to be unconstitutional, although they were upheld as advisory only.

- Since 2010, the UK Sentencing Guidelines have been in effect in England and Wales. In the United Kingdom, courts are required to follow sentencing guidelines unless it is in the interests of justice to do otherwise.

- The guidelines specify key elements that the Crown and the Magistrate's court should consider when deciding on a punishment. The Sentencing Council is a non-profit organisation that provides guidelines, supports a consistent approach to sentencing, and raises public knowledge about it. The Coroners and Justice Act of 2009 established a new system of sentencing guidelines, which have been in effect since then.

- It established the Sentencing Council, a legislative organisation that develops sentencing guidelines and oversees their implementation and effects.

Public Opinion Regarding Sentencing Policies

People's reactionary remarks, widely known as Opinion Polls, are frequently misconstrued with public opinion. People's reactions are largely emotional in character and are dependent on his socio-political and cultural connection. A well-managed public discussion can help to create an informed public. Sentencing Policy is a fundamental necessity in India, as evidenced by the examples and judicial decisions. Because of an established model that is opaque, non-responsive, and unaccountable, the judiciary is undergoing a crisis of confidence. India's Supreme Court is the only court in the world that has the sole power to interpret the law. The judiciary is thought to be an elite class, and its separation from the public is regarded acceptable and necessary since it gives it a sense of authority. In India, the courts have the sole authority to interpret laws and to expand its interpretation to the point that it interferes with other government agencies.

Policymakers' perceptions of public opinion are significantly more complicated. Frequently, they will encounter a wide range of viewpoints on a potential policy issue involving sentencing. It is a blessing in disguise since it provides abundant chance for them to implement alternative sentencing reforms, which, if implemented, will not only speed up the decision-making process but also lower the policy's cost impact. By involving society in conversations that may not be acceptable to individuals individually, these improvements can be made acceptable to society. It is not always essential to increase the harshness of the sentence to generate a legitimate deterrent in the minds of potential convicts. For example, following the recent Nirbhaya case[13], a popular demand that

[13] Mukesh &Anr v. State for NCT of Delhi &Ors, 2017, 6 SCC 1

has been supported by the media and the public is that the rape convict be sentenced to death. However, policymakers should make people aware that death sentences are among the "rarest of rare" punishments, with a high bar of proof. As a result, it's possible that the sentence will be reduced. This position can only be made apparent by including the public in debates.

Guidelines Put Forth By Supreme Court of India

The Supreme Court has issued several sentencing guidelines for certain sentences in specific cases, which are discussed below:

1. In the case of *Dhananjay Chatterjee vs State of West Bengal*[14], according to the reasoning given by the court, the accused got married and has a girl child, forgetting and forgiving his past conduct of stalking for almost two years despite being a lawyer, the manner and motive of crime commission, and to top it all off, suggesting the possibility of reform after the death of his high-profile police officer.
2. *Raju v.State of Karnataka*[15] is a case where the plaintiff sued the state of Karnataka. This case demonstrated that the Indian judiciary is not victim-centred; the convict's sentence was lowered solely on the basis of the victim's alleged immoral character in the eyes of the law.
3. Focusing on mitigating circumstances, the court upheld the conviction of the accused but replaced the 'death penalty' with 'life imprisonment' on the grounds that:

   The court stated unequivocally that aggravating circumstances exist, and that parents' proclivity to overindulge their children often leads to the most heinous of situations, such as the one at hand, in which

[14] AIR 1994 SCR (1) 37, 1994 SCC (2) 220
[15] AIR 222, 1994 SCC (1) 453

an accused belongs to a category with unlimited power or pelf, or, even more dangerously, a volatile and heady cocktail of the two. Despite the fact that the court noted the worrisome episodes of such social class realities, it concluded that the balance of the case favours the appellant, and that the goals of justice would be served if his death sentence was converted to life imprisonment.

4. The identification and application of the 'rarest of rare' theory, enunciated in Bachan Sigh's case, required significant specificity in the case of *Machhi Singh v. State of Punjab*[16]. One of the concerns that drew the court's attention in this case was the primary rules to follow in its application. In five consecutive episodes, a violent feud between two families resulted in the deaths of 17 people. The Sessions court heard the applicant and his associates. This appellant was one of the four people who received the death penalty. His death sentence was upheld by the Punjab High Court, forcing an appeal to the Supreme Court.While hearing the appeal, the Supreme Court considered and lay down what may be deemed standard guidelines to be followed in order to clarify the "rarest of rare cases" formula for imposing a death sentence, as outlined in Bachan Singh's case.

5. The Accused in the matter of *Mohd Chaman v. State (N.C.T.of Delhi*)[17], viciously raped and killed a one-year-old child. The death penalty was imposed by the lower courts, who viewed the incident as the rarest of the rare occurrences. The death penalty was awarded by the lower courts, but when the case was submitted to the high court for clarification, the high court overruled the lower courts, declaring that the convict did not pose a threat to society and lowered the punishment.

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[16] AIR 1983, SCR (3) 413
[17] AIR (2001) 2 SCC 28

Conclusion

The sentencing guidelines should be established in such ways that it should pay heed to the voices of the voiceless and even punish the offenders to give justice to the survival. The significance of justice for society's members is paramount in any legal system. In this sector, the protection of rights through fair trials, as well as a competent punishment system capable of striking a balance between the victim and the offender, must be considered. Cases can no longer be determined by giving judges such broad powers and leaving the criminal justice system to the judges' whims and fancies. Judges support their decisions with rationales, yet these rationales are insufficient to meet the objectives of criminal justice delivery systems, resulting in an incoherent legal system. India requires a sentencing strategy that limits this large range of punishment options. The Indian judiciary has matured, and suitable punishment policies are due. Individualization, non-uniform or random sentencing must be abandoned in India in favour of certainty and rationale in sentencing. With sentencing standards in place, the courts will be able to react to the community's daily cries for justice. Judges must be able to impose suitable penalties that are proportional to the offence committed. The retributive and just desert conceptions of criminal punishments can only be met in this way.

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