

Vol 13 No. 1

MARCH 2022

ISSN: 0976-3570

**INDIAN JOURNAL OF  
LAW AND JUSTICE**



অসম্ভবং কালং নঃ অসিত্বিত্বিঃ অসম্ভবতী

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**Vol. 13 No. 01**

**March 2022**

**ISSN-0976:3570**

***INDIAN JOURNAL OF LAW AND JUSTICE***



**सम्मानो मन्त्रः समितिः सम्मानी**

**DEPARTMENT OF LAW**  
UNIVERSITY OF NORTH BENGAL  
DARJEELING, WEST BENGAL, INDIA

## INDIAN JOURNAL OF LAW AND JUSTICE

*Cite This Volume as IJJ (2022)*

Printed at North Bengal University Press, Raja Rammohunpur, P.O-North Bengal University, District: Darjeeling, Pin – 734013, West Bengal, INDIA for the Department of Law, University of North Bengal.

*The Indian Journal of Law and Justice is a biennial publication. Contributions to the Journal are invited in the form of articles, notes and case comments. Contribution should be typed in double space on one side of A-4 size paper and sent in CD or as an attachment with e-mail at: [ijlnbu@gmail.com](mailto:ijlnbu@gmail.com)*

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## **Editorial Note**

**The last two years have been immensely difficult, worldwide, due to the Covid-19 pandemic. We are glad that the world is recovering gradually. However, the pandemic has ensued global crisis exacerbating deep-seating social inequalities within our societies. Women, low-income households, children and young people, as well as low-skilled, part-time temporary and self-employed workers, all have been disproportionately affected.**

**Keeping these issues in mind, the Editorial Board presents the 13<sup>th</sup> Issue of the Indian Journal of Law and Justice. Once again, with the incessant efforts and ‘never-say-die’ spirit of the editorial team, the India Journal of Law and Justice sets its foot in its journey for the second decade.**

**Keeping in tandem with the objective of the journal of being a multi-disciplinary journal, the key focus of this edition ranges from human rights issues of women, women refugees, human trafficking, trans-rights, the criminal justice system to public health management, artificial intelligence and big data in health sector and human gene editing. This volume contains a Notes and Comments section with short articles highlighting concerns like terrorism and international criminal justice system, right to fair trial of victims and feminist perspective of the Kamtapur Movement. The book review segment contains review of the edited and annotated version of the celebrated Annihilation of Caste which has been edited and annotated by S. Anand and the foreword of which has been penned down by Arundhati Roy.**

**I thank all contributors for their submissions to this edition and their cooperation with the editorial team during the production phase. I would also like to express my gratitude to the entire Editorial Team whose commitment and perseverance made this publication possible.**

**Suggestions and opinions for the improvement of the journal is solicited.**

**With Best Wishes**

**Chief Editor**





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## Assessment of Consumer Protection Act 2019 to Support Tobacco Control in India

*Prof. (Dr.) Ashok R. Patil<sup>1</sup>*

### Abstract

*The use of tobacco products has been clearly established to cause significant medical and economic harm. While specific tobacco control legislation has been enacted in the form of the COTPA 2003, it is important to examine if other legislations can be utilised for regulation of tobacco consumption. One such legislation is the Consumer Protection Act 2019, which significantly expands the rights of consumers and protection given to them in terms of product safety and product quality. Accordingly, this paper provides an in-depth analysis of the Consumer Protection Act 2019 and the scope of utilising this legislation and the jurisprudence on consumer law with the aim of effective regulation of tobacco consumption.*

**Keyword:** *Consumer Protection; Tobacco Control; Public Health; Illicit Trade; Misleading Advertisement.*

### I. Introduction

Tobacco is the foremost preventable cause of death and disease in the world today, killing half of the people who use it.<sup>2</sup> As per Global Adult Tobacco Survey-India (GATS 2) India is home to over 27 crore tobacco users and globally it is the second largest producer and consumer of tobacco products. Available estimates in India show that smoking-attributable annual deaths<sup>3</sup> were about 930,000, while the smokeless tobacco (SLT) attributable annual deaths<sup>4</sup> were

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<sup>2</sup> WHO, *MPOWER: A Policy Package To Reverse The Tobacco Pandemic* (2008) [https://www.who.int/tobacco/mpower/mpower\\_english.pdf](https://www.who.int/tobacco/mpower/mpower_english.pdf) (Last Visited Sept. 4, 2020)

<sup>3</sup> Jha P, Jacob B and Gajalakshmi V et al., 'A Nationally Representative Case-Control Study of Smoking and Death in India' 358(10) *New England Journal of Medicine* 1137 (2008)

<sup>4</sup> Sinha DN, Palipudi KM, Gupta PC, et al 'Smokeless tobacco use: a meta-analysis of risk and attributable mortality estimates for India' 51(5) *Indian J Cancer* 73 (2014)

about 350,000, together accounting for about 1,280,000 deaths per year or approximately 3500 deaths every day.

Although tobacco control legislations such as the Cigarettes and Other Tobacco Products Act 2003 (COTPA 2003) are in force, it is worthwhile to examine other domestic legislations which can be utilised for further regulation in an attempt to close the loopholes utilised by tobacco companies. One of such legislations is the Consumer Protection Act 2019, which seeks to protect the rights of consumers.

This article seeks to examine the scope of utilising the Consumer Protection Act 2019 and the existing jurisprudence developed on the subject for the effective tobacco regulation. For this purpose, the article is divided into five parts. The first part provides a brief overview about the history of the Consumer Protection Act. The second part discusses the relationship between consumer protection and tobacco regulation. The third part analyses important provisions of the Consumer Protection Act 2019 and other consumer protection legislations. The fourth part explains the procedure under the Consumer Protection Act 2019 and the fifth part discusses the Central Consumer Protection Authority.

## **II. Background of Consumer Protection Act**

The sovereignty of the Consumers is to choose the goods or services according to the preferences and preferences assume significance in the context of his choice. But in the present day scenario it has become the myth, because the consumer's freedom of choice is limited and is been abused in common market places. Consumers are duped and cheated because of deceptive advertisement and false and exaggerated descriptions about the quality of goods/services which they propose to sell. Therefore, protection of the consumer is considered to be the utmost importance and all around the world, it has paved a way to consumer movement. In India, the protection of the consumer was not new to India; but it is as old as the civilization. But it has been statutorily recognised during the period of British regime which has brought out number of initiatives and statutory regulations to protect consumers such as the Indian Contract Act, 1872; Indian Penal Code, 1860; Sale of Goods Act, 1930; Agriculture Procedure (Grading and Marketing Act), 1937; Drugs and Cosmetics Act, 1940;

After Independence Indian Parliament made various enactments from time to time to protect the interest of the consumer such as The Drug and magic Remedies (Objectionable Advertisement) Act, 1950; Industrial Development and

Regulation Act, 1951; Indian Standards Institution (Certification of Marks) Act, 1956; Essential Commodities Act, 1955; Bureau of Indian Standards Act, 2016; Competition Act, 2002, The Legal Metrology Act, 2009; Food Safety and Standards Act, 2006; but all these were not successful as they were expected to be and under the above enactments consumer was moving from the pillar to post to avail the justice as the redressal mechanism was expensive and time consuming. Meanwhile, the United Nation Guidelines on Consumer Protection, 1985 were passed in General Assembly resolution 39/248 on 9th April 1985. Based upon the guidelines, Government of India enacted a special legislation 'Consumer Protection Act, 1986' for the better protection of Consumer's rights and intended to protect the interest of consumer from exploitation. Meanwhile, the Act has been amended three times in 1991, 1993 and 2002, and every efforts have been taken to ensure to grant relief to all aggrieved consumers in an expedited manner as quickly as possible, keeping in mind the provisions of the Act for disposal of cases.

Major issues with the Consumer Protection Act 1986 were that it did not address the dispute regarding the consumer contract entered between consumers and the manufacturer that contain unfair terms and also challenges like privacy, data protection, product returns or refund, delivery of faulty goods etc., that posed due to advent of e-commerce transaction of sale of goods and service which has earmarked as the fastest growing market in India at an annual growing rate of 51% and the highest in the world.

In view of the above, Law Commission of India had recommended that a separate law needs to be enacted for the better protection of the consumer. The Law Commission of India presented a draft bill in relation to Unfair Contract Terms. In 2011, a bill to amend the 1986 Act was introduced in the parliament but lapsed due to the dissolution of the 15<sup>th</sup> Lok Sabha. The Consumer Protection Bill, 2015 was introduced in Lok Sabha with various new provision which included (i) product liability; (ii) unfair contracts; and (iii) setting up of a regulatory body. The Bill was examined by the Standing Committee on Consumer Affairs which submitted its report in April 2016. The Committee gave several recommendations with regard to: (i) product liability; (ii) powers and functions of the regulatory body (Central Consumer Protection Authority) being set up; (iii) penalties for misleading advertisements and endorsers of such advertisements; and (iv) pecuniary jurisdiction of the adjudicatory body at the

district level. The Consumer Protection Bill, 2019 was introduced in Lok Sabha by the minister of Consumer Affairs, Food and Public Distribution on July 8, 2019. This bill of 2019 is similar to the Consumer Protection Bill, 2018 to replace the Consumer protection Act, 1986. The Consumer Protection Bill, 2019 received the presidential assent on 9 August 2019 and published in official gazette. But it shall come into force on such date as the Central Government may so notify or on such different dates as may be notified for different States and for different provisions of this Act.

Recently Ministry of Consumer Affairs, Government of India in exercise of the powers conferred under section 2(3) enforced the consumer Protection Act 2019 w.e.f. 20th July 2020 & 24th July 2020.

### **III. Consumer Protection Act and Tobacco Control**

The pernicious, inherent viciousness and harmful effects of tobacco use is well established and accepted medically as well as in judicial pronouncements. The link between use of tobacco products, cancer, cardiac and respiratory diseases etc., is well documented and accepted. Similarly, the calculated approaches of tobacco industry designed to attract a new generation of tobacco users through marketing campaigns which are aimed at replacing the millions of people who die each year from tobacco-attributable diseases with new consumers is also well documented and accepted.

*Ban and prohibition on direct advertisements of tobacco products has prompted manufacturers and traders to adopt indirect methods or surrogate advertisements to achieve the same result. The fear of falling sales, adverse articles and medical and media reports have prompted the tobacco industry to portray tobacco use as glamorous and socially acceptable, by showing pictures and use by stars and reputed actors, as a stress buster, a habit nurtured by intellectuals, a fashion accessory etc. The list is virtually endless.<sup>5</sup>*

Tobacco and related industries have employed sustained tactics to attract a new generation of tobacco users by using flavours/adulterants accompanied with misleading claims of reduced harm and by selling of cigarettes and other tobacco products in single stick and in the close vicinity of educational institutions, thus

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<sup>5</sup> Justice Sanjeev Khanna (WP Nos. 18761/2005), judgment dated 07.02.2008. (India).

making tobacco products easily accessible to youth. Direct and indirect or surrogate advertisements of tobacco and related products through endorsements by celebrities who are youth icons, have a strong influence on children and youth of young impressionable minds. The effort and desire to attract young and gullible to the world of tobacco has always been the objective of the manufacturers. "Catch them young" is the moto, and use of tobacco products is projected as synonymous with adulthood, modernity, affluence, social class norm, elegance, etc.

The Consumer Protection Act of 2019 (CPA) endeavours to protect a consumer from misleading advertisements, unfair trade practice and use of adulterants, which can be a potent tool to counter tobacco advertisement, promotion and sponsorship.<sup>6</sup>

#### **IV. Important Provisions of the Consumer Protection Act, 2019**

The preamble of the Consumer Protection Act, 2019 which reads as *“An Act to provide for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental thereto”* makes very clear that it need to protect the consumer by all means. Where **"consumer"** means any person who buys any goods or hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods or beneficiary of such service other than the person who buys such goods or for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; The expression ‘Commercial Purpose’ does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment; and “buys any goods” and “hires or avails any services” includes offline or online transactions through electronic means or by teleshopping or direct selling or

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<sup>6</sup> *‘Important changes to India’s product liability and consumer laws’* (Lexology, 27 September 2019) <https://www.lexology.com/library/detail.aspx?g=8a2ece1d-773a-4a51-bcd4-982d85a064c6>, (Last Visited Sept. 4, 2020).

multi-level marketing;<sup>7</sup> Therefore, any person who consumes tobacco products will be a consumer under the Consumer Protection Act 2019.

The Consumer Protection Act 2019 has empowered consumer with six "consumer rights" which includes, —

- i. the right to be protected against the marketing of goods, products or services which are hazardous to life and property;
- ii. the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;
- iii. the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;
- iv. the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora;
- v. the right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and
- vi. the right to consumer awareness;<sup>8</sup>

As per Section 2 sub-section 9 of the Act, the Consumer has the right to be protected against the marketing of goods, products or services which are hazardous to life and the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices. Further Advertisement of tobacco products whether direct or indirect (surrogate) and sale of tobacco product loose or outside its package, thereby undermining the hazardous nature of the product and concealing from the consumer its injurious nature is in contravention of consumer rights. Therefore, any consumer of tobacco products has a right to be protected from harmful products, has a right to be informed about the quality of the products they are consuming, and have a right to seek redressal against unfair trade practices.

**A. Act to not be in derogation of other laws**

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<sup>7</sup> Consumer Protection Act 2019, s 2(7).

<sup>8</sup> Consumer Protection Act 2019, s 2(9).

The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.<sup>9</sup>This provision was also present in Section 3 of the Consumer Protection Act 1986. As explained by the Supreme Court in *Secretary, Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha*<sup>10</sup>, the purpose of the Act is to provide better protection of the interests of the consumers and establishment of appropriate fora for settlement of consumer grievances. In order to achieve this purpose, it is important that the provisions of the Act are interpreted broadly, positively, and purposefully which can confer additional/extended jurisdiction to consumer courts. A consumer can hold a tobacco manufacturer liable under the Consumer Protection Act 2019 as well, and is not limited to relying on the provisions of the COTPA 2003.

### **B. Unfair Trade Practice**

Any manufacturer of tobacco products who makes a misleading advertisement commits an unfair trade practice under Sec. 2(47) of the Consumer Protection Act 2019. The "**unfair trade practice**" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

- (i) making any statement, whether orally or in writing or by visible representation including by means of electronic record, which—
  - a) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
  - b) falsely represents that the services are of a particular standard, quality or grade; etc.,

Manufacturers and sellers of tobacco products adopt various trick and tactics to promote the sale of their product and also indulge in deceptive practice to disguise the hazardous nature of the product to entice consumers especially the younger generation of impressionable mind. The unfair trade practise amongst others includes the following:

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<sup>9</sup> Consumer Protection Act 2019, s 100.

<sup>10</sup> *Secretary, Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha*, Civil Appeal No. 92 of 1998. (India).

1. Surrogate or indirect advertisements, by use of brand name/logo /colours/layout and presentation associated with particular cigarette, bidi and chewing tobacco products, through advertisement of non-tobacco products, at point of sale, print and electronic media. They are often sold in the same shop, in same product format, in same brand name, in similar packaging, in similar pricing and similar display.
2. Selling tobacco products loose, single sticks or outside its package. Thus, depriving the consumer about the harmful effect of the product through health warning on the pack. The sellers often in contravention of prevailing laws display single stick price in the shops.
3. Display/placing of tobacco products with toffees, candies, chocolates and other food articles meant for children. Though sale to minor or person below the age of 18 years is prohibited, however retailer or sellers often place tobacco products with food articles to influence/entice children.
4. Sale of pan masala conjoint with chewing tobacco. In *Central Areca-Nut Marketing Corporation & Others v. Union of India*<sup>11</sup>, the Hon`ble Supreme Court of India observed: To circumvent the ban on the sale of gutkha, the manufacturers are selling pan masala (without tobacco) with flavoured chewing tobacco in separate sachets but often conjoint and sold together by the same vendors from the same premises, so that consumers can buy the pan masala and flavoured chewing tobacco and mix them both and consume the same.
5. Promotion of cigarette with tag line low tobacco, slim etc., with false representation of it being less harmful and thereby misleading the usefulness of the product.
6. Promotion of herbal cigarettes or herbal hookah as being safer alternatives or aiding cessation. Herbal Cigarette are as harmful as conventional tobacco cigarettes, as they contain vegetable matter that's when burned produces tar, carbon monoxide and other toxins harmful to health. Similarly, herbal hookah (without tobacco and nicotine) is toxic to health, as the smoke from hookah/shisha is filled with carbon monoxides and other harmful carcinogens. Thus, promotion of herbal cigarette or herbal hookah as safe

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<sup>11</sup> Central Areca-Nut Marketing Corporation & Others v. Union of India, (Transfer Case (C) 1 of 2010) order dated 23.09.2016. (India).

product is an attempt to mislead a consumer about its quality as well misrepresent about its usefulness.

7. Sale of tobacco products without issuing bill or cash memo or receipt.
8. Promotion of pan masala through misleading advertisement by undermining its injurious nature and the mandatory health warning prescribed under the law.
9. Promotion and sale of pan masala by displaying on the packs and its advertisements that there is “no nicotine or 0% nicotine” or “no magnesium carbonate”, whereas lab test reports confirm presence of adulterants such as nicotine, magnesium carbonate etc. Thus, permitting sale of goods to consumers, contrary to the standards prescribed by the competent authority and mixed with adulterants.

### ***Measures to prevent unfair trade practices***

For the purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers, the Central Government may take such measures in the manner as may be prescribed.<sup>12</sup> In exercise of the powers conferred on the Central Government under Sec.94 and Sec. 101(2)(zg) the central government has enacted the Consumer Protection (E-Commerce) Rules, 2020 which mandatorily requires the E-commerce entity to provide the accurate information as to contractual information required to be disclosed by law; mandatory notices and information provided by applicable laws; and all relevant details about the goods and services offered for sale by the seller including country of origin which are necessary for enabling the consumer to make an informed decision at the pre-purchase stage;

### **C. Drugs and Cosmetics Act 1940**

Government of India, on the recommendation of an Expert Committee in the year 1992 banned the use of tobacco in tooth-pastes/tooth-powders under the Drugs and cosmetics Act, 1940 (Notification GSR 443(E), dated 30th April, 1992). The said ban was challenged for being violative of fundamental right to trade. In *Laxmikant v. Union of India*<sup>13</sup>, the Hon`ble Supreme Court of India, upheld the

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<sup>12</sup> Consumer Protection Act 2019, s 94.

<sup>13</sup> *Laxmikant v. Union of India*, (1997) 4 SCC 739. (India).

ban and held: *the view taken by the Government of India imposing total prohibition on the use of tobacco in the preparation of tooth-powder and tooth-paste is well justified in the public interest covered by Article 19(6) of the Constitution, though it offends the right to carry on trade guaranteed under Article 19(1) of the Constitution. The imposition of total ban is in the public interest. However, tobacco is still used in the preparation of tooth-powder and tooth-paste.*

#### **D. Food Safety and Standards Act, 2006**

The objective of the Act, is laying down standards for articles of food/regulate their manufacture and sale/ensure availability of safe and wholesome food for human consumption.<sup>14</sup>

- a) Section 16 explains the duties and function of Food Authority.
- b) Section 18 of the Act explains general/guiding principles.
- c) Section 26 of the Act explains the responsibilities of the Food Business Operator (FBO) to provide safe & wholesome food and to ensure protection of human life and health
- d) Section 30(2)(a) empowers the Commissioner of Food Safety of a State to prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food for a year.
- e) Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, lays down standards for pan masala, which may contain betelnut, lime, coconut, catechu, saffron, cardamom, dry fruits, mulethi, sabnermusa, other aromatic herbs and spices, sugar, glycerine, glucose, permitted natural colours, menthol and non-prohibited flavours.
- f) Food Safety and Standards (Prohibition and Restrictions on Sales) Regulation, 2011, Clause 2.3.4 of the Regulation prohibits the use of tobacco and nicotine as ingredients in any food products.  
Food Safety and Standards (Packaging and Labeling) Regulations, 2011, states that every package of supari or pan masala and advertisement

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<sup>14</sup> M/s. Dhariwal Industries Ltd.& Ors Vs State of Maharashtra & Ors., (W.P. No.1631/2012); Rajiv Kumar Gupta And Ors. vs The State of Maharashtra (28 October, 2005, 2006 CriLJ 581, 2006 FAJ 135); Centre for Public Interest Litigation Versus Union of India And Others (W.P.(C) No. 681/2004). (India).

relating thereto, shall carry the warning:“Chewing of Pan Masala or Supari is injurious to health”

- g) Food Safety and Standards (Food Products Standards and Food Additives) Regulation, 2011, regulates/prohibits the use of anti-caking agents, such as magnesium carbonate.

### ***Misleading Advertisements***

Under the Consumer Protection Act 1986, there was no separate provision for misleading advertisements. However, in the Consumer Protection Act 2019, it has been separately included with intent to make the Act more holistic and stringent. The Act defined the "misleading advertisement" in relation to any product or service, means an advertisement, which *falsely describes such product or service; or gives a false guarantee or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or deliberately conceals important information,*<sup>15</sup> where as "**advertisement**" means any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents;<sup>16</sup>

If any manufacturer or seller of any tobacco product makes an advertisement which misleads consumers about the quality of the product, then it is a misleading advertisement. For example, claiming that a product is free from tobacco, but in reality, it contains tobacco.

### ***Punishment for false or misleading advertisement***

Any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers shall be punished with imprisonment for a term which may extend to two years and with fine which may extend to ten lakh rupees; and for every subsequent offence,

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<sup>15</sup> Consumer Protection Act 2019, s 2(28).

<sup>16</sup> Consumer Protection Act 2019, s 2(1).

be punished with imprisonment for a term which may extend to five years and with fine which may extend to fifty lakh rupees.<sup>17</sup>

For instances, Pan Masala is labelled as well as advertised with a tagline “0% nicotine/nicotine-free or no magnesium carbonate”. On testing of Pan Masala nicotine and magnesium carbonate is found in several samples of pan masala, deliberately concealing important information. Pan Masala is also endorsed by celebrities in print and electronic media with misleading statements about the nature, substance, quality of the product.

The aforesaid misleading tactics to entice consumer by falsely describing the product and further giving false guarantee about the safety of the product, as well as misleading the consumers by deliberately concealing material facts about the harmful nature of the product amounts to causing false and misleading advertisement punishable which shall under section 89 of the Consumer Protection Act.

Pan Masala, is a standardized food article under the Food Safety & Standards Act 2006 and its Regulations and prohibits adding of injurious ingredients such as magnesium carbonate, tobacco and nicotine. Consumption of Pan Masala is also linked with several cancerous and non-cancerous diseases and is therefore required to be labelled as “Chewing of Pan Masala is injurious to health” under the FSS Regulation. A tobacco manufacturer who makes a false/misleading advertisement can incur a penalty of imprisonment for upto 2 years with a fine upto Rs. 10 lakh, which for every subsequent offence is extended with an imprisonment for upto 5 years with a fine upto Rs. 50 lakh.

### ***Endorser's Liability***

Under the Consumer Protection Act 1986, endorsers were not liable for misleading advertisements. Important examples are - (i) Maggi was found to contain excessive quantity of lead and MSG. Its endorsers were Amitabh Bacchan, Madhuri Dixit and Preity Zinta. (ii) Pierce Brosnan endorsed Pan Bahar which contained adulterants like magnesium carbonate (iii) Ajay Devgan endorsed Vimal Pan Masala which contained adulterants like magnesium carbonate, similarly others like Kamla Pasand Pan Masala, Rajshree Pan Masala,

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<sup>17</sup> Consumer Protection Act 2019, s 89.

Mehak Pan Masala etc, containing adulterants have also been endorsed by celebrities. Pan Masala is labelled as well as advertised with a tagline “0% nicotine/nicotine-free or no magnesium carbonate”, despite testing proving the contrary. But the Consumer Protection Act 2019 recognised the liability of an endorser, filling in a gap which had existed in the previous legislation. It defines "**endorsement**", in relation to an advertisement, means

- i. any message, verbal statement, demonstration; or
- ii. depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or
- iii. depiction of the name or seal of any institution or organisation, which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement<sup>18</sup>

Important questions arise from the introduction of endorser’s liability in the CPA 2019, which have been answered on a plain reading of the provisions:

- a. Do the provisions only cover commercial advertisements or pro bono/ unpaid advertisements as well?

The definition of ‘advertisement’ under the CPA 2019 makes no distinction between commercial and pro bono/unpaid advertisements. Further, there is no exception given in the CPA 2019 for endorser’s liability.

- b. Are any objective standards of ‘due diligence’ or tests prescribed?

No, the Consumer Protection Act 2019 does not lay down any objective standard of ‘due diligence’. For ex, the US has the ‘good reason to believe’ test i.e. whether the endorser actually uses or believes in the features of the product. If he does not himself believe so, he fails the test and is held liable.

Under Sec. 21(6), no person shall be liable to such penalty if he proves that he had published or arranged for the publication of such advertisement in the

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<sup>18</sup> Consumer Protection Act 2019, s 2(18).

‘ordinary course of his business’.<sup>19</sup> However, the scope of ‘ordinary course’ has not been given in the CPA 2019.<sup>20</sup>

In addition, it is possible to see reimbursement clauses and/or robust indemnity provisions in celebrity contracts with companies covering any pecuniary liability arising out of any untoward incident, making the celebrities immune, monetarily.<sup>21</sup>

### Inter-Jurisdictional Comparison

Other jurisdictions have comprehensive codes for endorser’s liability which are especially important for regulating endorsements which happen over the internet. Similarly, international organisations have released guidelines for endorser’s liability and good advertising practices. These are given below:

(A) UK –The ASA (Advertising Standards Authority) has released the CAP Code (Non-broadcast advertising) and BCAP Code (Broadcast advertising).<sup>22</sup> Certain decisions which display endorser’s liability are as follows<sup>23</sup>:

1. OFT v. HPM – Any commercial bloggers who are paid to promote the activities of the advertiser *must notify on the blog that it is a sponsored post.*

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<sup>19</sup> Chinmoy Pradip Sharma, ‘Law governing Endorsements: The Global Perspective and its emergence in India’ *Bar and Bench* (8 December 2019) <https://www.barandbench.com/columns/law-governing-endorsements-the-global-perspective-and-its-emergence-in-india> (last visited Sept. 4, 2020)..

<sup>20</sup> Saket Agarwal, ‘Liability of the Endorser of a Brand in Light of the Consumer Protection Bill 2019’ (*The RMNLU Law Review Blog*, 22 September 2019) <https://rmlnlulawreview.com/2019/09/22/liability-of-the-endorser-of-a-brand-in-light-of-the-consumer-protection-bill-2019/> (last visited Sept. 4, 2020).

<sup>21</sup> ‘India – Celebrity Endorsements and Liability Under the Consumer Protection Act, 2019’ (*CoventusLaw*, 4 February 2020) <http://www.conventuslaw.com/report/india-celebrity-endorsements-and-liability-under/> (last visited Sept. 4, 2020).

<sup>22</sup> ‘Advertising codes’ <https://www.asa.org.uk/codes-and-rulings/advertising-codes.html> (last visited Sept. 4, 2020).

<sup>23</sup> ‘Was Gemma Collins’ Toni & Guy Tweet Misleading’ <https://marketinglaw.osborneclarke.com/online-advertising/was-gemma-collins-toni-guy-tweet-misleading/> (last visited Sept. 3, 2020).

2. ASA v. Toni & Guy – *Adhoc commercial endorsements by celebrities on social media should be labelled as such*
3. Twitter v. GoNike – *the phrase #ad or #spon should be included in a tweet by celebrity endorsers.*

(B) US – The FTC has published the ‘Guide Concerning Use of Endorsements and Testimonials in Advertising’.<sup>24</sup> Certain decisions which display endorser’s liability are as follows:

1. In re Teami LLC – Settlement of 15 million dollars. Teami was alleged to be misleading consumers by paying celebrities and Instagram influencers to make claims about weight loss by using the tea product of the company. *The influencers were sent warning letters by the FTC due to lack of disclosure about their commercial ties with Teami.*<sup>25</sup>
2. In re Solace Technologies – 4 companies which produced e-liquid products were sent warning letters by the FTC as *social media influencers who were paid to promote the product did not have the statutory warning* “This product contains nicotine – Nicotine is addictive” which is required under 21 C.F.R. § 1143.3.<sup>26</sup>
3. In re Creaxion Corp – 2 companies were paid athletes to promote their mosquito repellent product using a media campaign. They settled

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<sup>24</sup> ‘Guides Concerning the Use of Endorsements and Testimonials in Advertising’ <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf> (last visited Sept. 4, 2020).

<sup>25</sup> Lesley Fair, ‘FTC’s Team case: Spilling the tea about influencers and advertisers’ (*Federal Trade Commission*, 6 March 2020) <https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers> (last visited Sept. 4, 2020).

<sup>26</sup> Lesley Fair, ‘FTC-FDA warning letters: Influential to influencers and marketers’ (*Federal Trade Commission*, 7 June 2019) <https://www.ftc.gov/news-events/blogs/business-blog/2019/06/ftc-fda-warning-letters-influential-influencers-marketers> (last visited Sept. 4, 2020).

with the FTC for *engaging in misrepresentation as the endorsements were shown as impartial and independent opinions*.<sup>27</sup>

C) The ICPEN is an international organisation comprising of the consumer protection authorities from over 60 countries. It has released the ‘ICPEN Guidelines for Digital Influencers’ as a general guideline for digital influencers to act appropriately to achieve a balance between endorsement and consumer protection.<sup>28</sup>

(D) The OECD has released the ‘Good Practice Guide on Online Advertising’ which seeks to elaborate key principles of online advertising and provide practical guidance for the application of these principles.<sup>29</sup>

### ***Adulteration***

Any person by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any product containing an adulterant shall be punished if such act, does not result in any injury to the consumer, with imprisonment for a term which may extend to six months and with fine which may extend to one lakh rupees; causing injury not amounting to grievous hurt to the consumer, with imprisonment for a term which may extend to one year and with fine which may extend to three lakh rupees; causing injury resulting in grievous hurt to the consumer, with imprisonment for a term which may extend to seven years and with fine which may extend to five lakh rupees; and results in the death of a consumer, with imprisonment for a term which shall not be less

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<sup>27</sup> ‘PR Firm and Publisher Settle FTC Allegations They Misrepresented Product Endorsements as Independent Opinions, Commercial Advertising as Editorial Content’ (Federal Trade Commission, 13 November 2018) <https://www.ftc.gov/news-events/press-releases/2018/11/pr-firm-publisher-settle-ftc-allegations-they-misrepresented> (last visited Sept. 4, 2020).

<sup>28</sup> International Consumer Protection and Enforcement Network, *ICPEN Guidelines For Digital Endorsers* (2016) <https://icpen.org/sites/default/files/2017-06/ICPEN-ORE-Guidelines%20for%20Digital%20Influencers-JUN2016.pdf>, (last visited Sept. 4, 2020).

<sup>29</sup> OECD, Good Practice Guide on Online Advertising (DSTI/CP(2018)16/FINAL, 10 September 2019) [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2018\)16/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2018)16/FINAL&docLanguage=En) (last visited Sept. 4, 2020).

than seven years, but which may extend to imprisonment for life and with fine which shall not be less than ten lakh rupees.<sup>30</sup>

The offence of adulteration resulting injury into grievous hurt and death of the consumer shall be cognizable and non-bailable whereas "grievous hurt shall have the same meaning as assigned to it in Section 320 of Indian Penal Code.

The court may, in case of first conviction may suspend any licence issued to the person, under any law for the time being in force, for a period up to two years and in case of second or subsequent conviction, cancel the licence.

As per the prescribed standards of Pan Masala adding of adulterants such as magnesium carbonate and nicotine is prohibited, however, on testing of Pan Masala nicotine and magnesium carbonate have been found consistently in samples of pan masala despite the contrary claims on its label and advertisement of "0% nicotine and no magnesium carbonate". Presence of adulterants to mislead the consumer and make the product unsafe is a punishable offence under Section 90 of the Act.

### ***Defect and Deficiency***

The twin concepts of the Consumer Protection Act also play a vital role in protection of consumers and its rights. The Act defines "**defect**" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression "defective" shall be construed accordingly;<sup>31</sup> It is mandatorily required a manufacturer is required to adhere to all laws and regulations governing the quality, quantity, potency, purity or standard of goods. If they fail to comply, then the consumer can file a complaint under the Consumer Protection Act 2019 because the manufacturer has sold a 'defective' good to the consumer. For example –Manufacturing, selling of Pan Masala mixed with adulterants such as magnesium carbonate and nicotine, despite contrary claims on

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<sup>30</sup> Consumer Protection Act 2019, s 90.

<sup>31</sup> Consumer Protection Act 2019, s 2(10).

pack/advertisements. Selling, handling, serving of unsafe food contaminated by smoking in the restaurant. The consumer can then file a complaint against the restaurant for giving him defective food.

Whereas "**deficiency**" means *any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service* and includes any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and deliberate withholding of relevant information by such person to the consumer;<sup>32</sup>

Similarly, a manufacturer or service provider is required to ensure that the service provided is free from any fault, imperfection, shortcoming or inadequacy in terms of quality, nature and manner of performance which is required to be maintained. If they fail to comply, then the consumer can file a complaint under the Consumer Protection Act 2019 because the manufacturer has provided them with 'deficient' services to the consumer. For example - a person goes to a restaurant. The restaurant does not prohibit smoking, which causes the experience of the consumer to be ruined as a result of the smoke. The consumer can then file a complaint against the restaurant for providing him deficient service. Consider the following cases on smoking in hotels. Numerous decisions of the Karnataka High Court have held that<sup>33</sup>:

- a. Any restaurant which has a hookah bar must have a specific designated area for smoking, and the said area can be used only for smoking of tobacco and not any other illicit substance.
- b. In any case, smoking should not inconvenience other customers as it is a public place.

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<sup>32</sup> Consumer Protection Act 2019, s 2(11)

<sup>33</sup> M.B. Shivakumar v. State of Karnataka (2019 Indlaw KAR 12563); P and P Ventures v. State of Karnataka (2019 Indlaw KAR 7878); Hangover v. Government of Karnataka (2019 Indlaw KAR 8031); Irfan Mohammed v. State of Karnataka (2019 Indlaw KAR 6476); Nikhil R. v. State of Karnataka (2018 Indlaw KAR 13156); Soundarya Jagadeesh Hospitalities v. State of Karnataka (2018 Indlaw KAR 11781) (India).

Similarly, the Hon`ble Madhya Pradesh High Court has observed<sup>34</sup> that “*Hotel and restaurant owners cannot be permitted to offer Hookah or use of tobacco products by pipe or by "any other instrument" on each and every table under the garb of service; in fact it can be permitted in a smoking area or space only. However, it is directed that smoking may be permitted in hotel and restaurants only in the "smoking area or place", otherwise action may be taken in accordance with law.*”

### ***Product Liability***

The Consumer Protection Act 1986 did not have any provision for product liability. It is a new chapter introduced under the Consumer Protection Act 2019 for empowering consumers and can be utilised for tobacco control as well. The Act defines "**product liability**" as the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto<sup>35</sup> and any complaint filed by a person before a District Commission or State Commission or National Commission, as the case may be, for claiming compensation for the harm caused to him is called as ‘**product liability action**’.<sup>36</sup>

**The "product manufacturer"** means a person who makes any product or parts thereof; or

assembles parts thereof made by others; or puts or causes to be put his own mark on any products made by any other person; or makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product or is otherwise involved in placing such product for commercial purpose; or designs, produces, fabricates, constructs or re-manufactures any

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<sup>34</sup> Restaurant and Lounge Vyapari Association, Bhopal and one another Vs. State of M.P. And others (W.P. No.15487-2014); Shoeab Aslam Vs Ministry of Health & Family Welfare (W.P. No. 08704/2015)

<sup>35</sup> Consumer Protection Act 2019, s 2(34).

<sup>36</sup> Consumer Protection Act 2019, s 2(35).

product before its sale; or being a product seller of a product, is also a manufacturer of such product;<sup>37</sup>

**The "product seller"**, in relation to a product, means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and includes a manufacturer who is also a product seller; or a service provider, but does not include a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats; a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction; a person who acts only in a financial capacity with respect to the sale of the product; is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider; leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;<sup>38</sup>

### ***Product Liability and Correlation to Tobacco use***

As per WHO FCTC Article 4.5 general guidelines “liability as determined by each Party within its jurisdiction is an important part of a comprehensive tobacco control. Under WHO FCTC Article 19.” Member states can take various types of action to hold the tobacco industry legally liable for the harm caused by the use of their products and to promote international cooperation. Recognizing that legal systems may need to be adapted in order to enable tobacco industry liability to be pursued, all the member states were asked to consider developing civil liability clauses in their legislations under Article 19 of the WHO FCTC.<sup>39</sup>

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<sup>37</sup> Consumer Protection Act 2019, s 2(36).

<sup>38</sup> Consumer Protection Act 2019, s 2(37).

<sup>39</sup> FCTC’s Seventh Session at Delhi in 2016, FCTC/COP7(11) *Implementation of Article 19 of the WHO FCTC: “Liability”*, [https://www.who.int/fctc/cop/cop7/FCTC\\_COP7\\_11\\_EN.pdf?ua=1](https://www.who.int/fctc/cop/cop7/FCTC_COP7_11_EN.pdf?ua=1), (last visited Sept. 4, 2020)

Product liability essentially covers e.g. Product defects (in manufacturing or design); failure to warn; breach of warranty; recalls etc.

*Synopsis of 50 Years of Tobacco Litigation in the US*<sup>40</sup>

In 1950s, consumers in the US first cited the connection between smoking and cancer and filed product liability cases against tobacco companies for their failure to make a safe product. The cause of action was based on negligence, strict liability, common-law fraud, and statutory violations of consumer protection laws. Strict liability claims were based on design defect and marketing defect theories, arguing that the cigarettes were unreasonably dangerous and that the manufacturers failed to provide warnings of their risks. However, the tobacco industry defeated most consumers' cases, arguing that the link between smoking and cancer was not sufficiently direct to prove causation and that the consumers assumed the risk of lung cancer by choosing to smoke.

In the 1980s, the focus shifted towards the addictive properties of cigarettes relying on the failure to warn theory, which proved to be only slightly more successful. It was argued that tobacco companies not only knew about the link between smoking and cancer but also knew that cigarettes were addictive. Manufacturers revived the assumption of risk defense and also argued that federal laws pre-empted certain state laws that regulated advertising practices. While consumers won some jury verdicts in lower courts, these cases were generally reversed on appeal, and manufacturers generally prevailed again.

In the 1990s when newly discovered evidence suggested that manufacturers actually had been aware of the health hazards posed by tobacco. Vast majority of states sued tobacco companies, arguing that their products imposed a significant burden on public health systems because they caused cancer. By suing on the basis of consumer protection laws, the states circumvented the defense that consumers assumed the risk of lung cancer by choosing to smoke. These cases resulted in a settlement with four major tobacco companies, known as the **Master Settlement Agreement**, which required:

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<sup>40</sup> WHO, *Towards health with justice: Litigation and public inquiries as tools for tobacco control* (2002), <https://escholarship.org/content/qt8kj1f6st/qt8kj1f6st.pdf> (last visited Sept. 4, 2020); Richard A Daynard and Eric LeGresley, 'Product Liability' 21 *Tobacco Control* 227 (2012)

- Tobacco companies to stopped advertising cigarettes to minors and modified other advertising practices;
- To pay hundreds of billions in compensation for health care costs incurred by states in treating smokers and;
- A National Public Health Foundation was set up to combat smoking by young people and fight diseases related to smoking.

In the 2000s there was more success (including obtaining punitive damages) in suing tobacco companies, based on intentional concealment of the health risks posed by cigarettes. However, many of these were appealed and damages were reduced. Efforts to bring these cases as class actions generally were unsuccessful.

Besides these creative legal strategies and stronger evidence to support their claims, recently some consumer have found success in lawsuits, including class actions against advertising for “light” cigarettes. “Light” cigarettes create the false perception that they are ‘safer than ordinary cigarettes’ violating consumer protection laws “light” actually refers to the taste of the cigarette rather than the volume of smoke inhaled]. Manufacturers’ argument that federal laws on marketing cigarettes pre-empt state laws that regulate advertising, was rejected by the U.S. Supreme Court. Though the plaintiffs still need to prove the merits of the underlying claim that the manufacturers violated consumer protection laws.

### ***Tobacco Litigation in India***

In India, claims against tobacco companies using consumer protection laws have been unsuccessful due to technical requirements of fixing liability on manufacturers and use of the ‘volenti non fit injuria’ defence. All manufacturers, producers, distributors and sellers of tobacco products have a moral and legal duty towards consumers to warn them about the dangers of tobacco consumption. It must be noted that since a lot of consumers start to consume tobacco when they are minors, the defence of ‘volenti non fit injuria’ or contributory negligence should not be accepted.<sup>41</sup>

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<sup>41</sup> Amit Yadav and Nisha Yadav, ‘Million Preventable Deaths and Liability of The Tobacco Industry in India’ 3Amity International Journal of Juridical Sciences 47 (2017)

## V. Procedure

The procedure to be followed under the Consumer Protection Act 2019 by a consumer for filing a complaint is given as follows:

### A. Who can file a complaint?

A complaint can be filed before a consumer forum by:

- (i) A consumer to whom the goods are sold or delivered, agreed to be sold or delivered, or any service provided or agreed to be provided; or who alleges unfair trade practice in respect of such goods or services.
- (ii) Any recognised consumer association, on behalf of a consumer whether or not they are a member of the association.
- (iii) One or more consumers (when there are numerous consumers with the same interest) with the permission of the District/State/National Commission, on behalf of, or for the benefit of all consumers so interested.
- (iv) The State Government, or the Central Government, or by the Central Consumer Protection Authority.<sup>42</sup>

### B. How to approach a consumer forum?

The complaint can be made on plain paper and you can file it in person or through an authorised agent, after it has been notarised, through registered post or regular post. It is important that a personal or legal notice be served to the opposite party before filing the complaint.

### C. What are the documents needed to file a complaint?

You will need to file four copies, plus additional copies for each opposite party.

To file an appeal, you need the following:

- (a) Documents of record with correct name of all parties and their addresses;
- (b) Certified copy of the district forum order;

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<sup>42</sup> Consumer Protection Act 2019, s 35.

- (c) More than four additional copies for each respondent for filing an appeal;
- (d) Any conditional delay, interim orders and other petitions to be submitted along with an affidavit; and
- (e) A statutory deposit of 50 % of the award / compensation amount is to be made by the appellant / opposite parties.

#### **D. Pecuniary Jurisdiction**

The pecuniary jurisdiction of the consumer fora depends on the value of the goods or services paid as consideration:

Forum	Provision	Pecuniary Jurisdiction
District Commission	Sec. 34(1)	Upto Rs. 1 crore
State Commission	Sec. 47(1)	From Rs. 1 crore to 10 crore
National Commission	Sec. 58(1)	More than Rs. 10 crore

#### **E. Territorial Jurisdiction**

The territorial jurisdiction of the consumer fora is as follows:

- (i) Where the opposite party or each of the opposite parties (when there are more than one) originally resides, or carries on business, or has any branch office, or personally works for gain when the complaint is instituted.
- (ii) Where the opposite party or each of the opposite parties (when there are more than one) actually and voluntarily resides, or carries on business, or has any branch office, or personally works for gain when the complaint is instituted and permission is granted by the District/State/National Commission.
- (iii) Where the cause of action, either wholly or in part, arises.

- (iv) Where the complainant resides or personally works for gain.<sup>43</sup>

## **VI. Central Consumer Protection Authority**

The Consumer Protection Act 2019 provides for the establishment of the Central Consumer Protection Authority (CCPA).<sup>44</sup> It must be noted that the CCPA is different from the grievance redressal commissions under the Act because they empower consumers to file complaints more easily. Particularly, if a consumer wants to file a grievance regarding any defect/deficiency/unfair trade practice etc, they must first purchase the good or avail the service before they are legally entitled to file a complaint before the grievance redressal commission. A complaint before the CCPA, may be forwarded in writing or in electronic mode to any one of the authorities namely District Collector or the Commissioner of regional Office or the Central Authority following which the CCPA will conduct its own inquiry into the matter. Its salient features are as follows:

### **A. Role of the CCPA**

The functions of the CCPA are as follows:

- (i) To protect, promote and enforce the rights of consumers and prevent violation of consumer rights.
- (ii) To prevent unfair trade practices.
- (iii) To prevent any false or misleading advertisement, and to prevent any person from taking part in publication of a false or misleading advertisement.
- (iv) To inquire/investigate into violations of consumer rights or unfair trade practices, either suo moto or on directions from the Central government.
- (v) To file complaints before consumer fora.
- (vi) To review issues faced by consumers and recommend international best practices for promotion of consumer rights.
- (vii) To encourage cooperation between consumer protection agencies and NGOs.

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<sup>43</sup> Consumer Protection Act 2019, s 34(2); Consumer Protection Act 2019, s 47(2); Consumer Protection Act 2019, s 58(2).

<sup>44</sup> Consumer Protection Act 2019, s 10.

- (viii) To mandate the use of unique and universal identifiers in goods to prevent unfair trade practices.
- (ix) To issue safety notices to consumers against hazardous or unsafe goods and services.<sup>45</sup>

## **B. Powers of the CCPA**

The powers of the CCPA are as follows:

### *Investigation*

The CCPA has an Investigation Wing for conducting inquiries and investigations.<sup>46</sup> The District Collector/other designated officials are authorised to inquire into/investigate complaints where there has been an unfair trade practice or a false/misleading advertisement.<sup>47</sup> In addition, the CCPA can initiate a preliminary inquiry suo moto or on receiving any complaint or information from the Central Government. If a prima facie case exists, then it can start an investigation into the issue.<sup>48</sup>

### *Search & Seizure*

The authorised officer who is conducting the investigation after a preliminary inquiry has been completed can enter the premises of the person who is alleged to have violated consumer rights or engaged in unfair trade practice or made a false/misleading advertisement and then seize any document, record, article or evidence of the same.<sup>49</sup>

### Orders

Where the CCPA is satisfied on the basis of the investigation that there is a violation of consumer rights or unfair trade practice, it can pass an order after providing the person a reasonable opportunity to be heard for:

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<sup>45</sup> Consumer Protection Act 2019, s 18.

<sup>46</sup> Consumer Protection Act 2019, s 15.

<sup>47</sup> Consumer Protection Act 2019, s 16.

<sup>48</sup> Consumer Protection Act 2019, s 19.

<sup>49</sup> Consumer Protection Act 2019, s 22.

- (i) Recall of goods and withdrawal or services which are dangerous, hazardous or unsafe.
- (ii) Reimbursement of the prices of goods recalled or services withdrawn to the purchasers of such goods and services.
- (iii) Discontinuation of unfair trade practices.<sup>50</sup>

#### *False or Misleading Advertisements*

If the CCPA is satisfied on the basis of the investigation that there is a false or misleading advertisement, it can:

- (i) Direct the concerned trader/manufacturer/endorser/advertiser/publisher to discontinue the advertisement or modify it appropriately.
- (ii) Prohibit the endorser of the false or misleading advertisement from endorsing any products or services for upto 1 year.
- (iii) Impose a penalty of upto Rs. 10 lakh on the manufacturer or endorser, which may be extended to Rs. 50 lakh for subsequent contraventions.
- (iv) Impose a penalty of upto Rs. 10 lakh on any person who publishes or is a party to the publication of the false or misleading advertisement.<sup>51</sup>

#### *Appeal against Orders*

A person who is aggrieved by the order of the CCPA under Sec. 20 or Sec. 21 can file an appeal to the National Commission within 30 days from the date of receipt of order.<sup>52</sup>

#### *Penalty for Non-Compliance*

Failure to comply with the order of the CCPA can cause a person to be penalised with imprisonment for upto 6 months and/or with a fine of upto Rs. 20 lakhs.<sup>53</sup>

### **VII. Conclusion**

The objective of the Consumer Protection Act 2019 is to protect and promote the rights and interests of consumers, and establish proper mechanisms for settlement of consumer disputes. The rights of a consumer include the right to be protected

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<sup>50</sup> Consumer Protection Act 2019, s 20.

<sup>51</sup> Consumer Protection Act 2019, s 21.

<sup>52</sup> Consumer Protection Act 2019, s 24.

<sup>53</sup> Consumer Protection Act 2019, s 88.

against hazardous goods, the right to be informed about the quantity and quality of goods, and the right to seek redressal against unfair trade practices.

From a plain reading of the provisions of the Consumer Protection Act 2019, it is clear that people who consume tobacco products are considered to be 'consumers' under the Act and can accordingly seek redressal for disputes arising out of the unfair practices carried out by the tobacco industry - such as misleading advertisements/surrogate advertisements, sale of loose/single-stick cigarettes, attempts to hide the injurious health effect of tobacco consumption, enticement of children, attempts to portray certain tobacco products as 'safer', false claims about absence of tobacco in products such as pan masala etc.

For the purposes of regulation of tobacco consumption, the provisions of the Consumer Protection Act 2019 can be utilized as follows:

1. The Act uses broad definitions which confers extensive rights on consumers in relation to tobacco consumption.
2. The Act contains provisions to curb the unfair trade practices of tobacco companies. Particularly, it penalises misleading advertisements and provides for endorser's liability for the first time.
3. The Act introduces product liability for the first time, which can be used to hold tobacco companies liable to consumers.
4. The Act empowers consumers by allowing easy filing of complaints in an electronic mode.
5. The Act provides mediation as an alternative means of dispute settlement to the consumers.
6. The Act provides for speedy and efficient redressal of consumer grievances.
7. The Act establishes the CCPA, which has been given an important mandate to regulate unfair trade practices and misleading advertisements which are harmful to consumers. Further, it has been empowered to investigate, conduct search and seizure, and can order a recall of harmful goods.

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[The Author acknowledges Mr. Ranjit Singh, Advocate, Supreme Court of India, New Delhi; Mr. Praveen Sinha, National Professional Officer (NCD); Ms. Purva Singh, National Legal Consultant (NCD); Mr. Akshay Yadav, NLSIU and Mr. Arjun Singh, NLSIU for their valuable comments and the World Health Organization(WHO) Country office for India for their technical support.]

## Judicial Approach towards Socio-Cultural Paradox on Entry of Women at Sabarimala

*Prof. Tarun Arora<sup>1</sup>*

### Abstract

*Justice is an attribute, in other words, a value addition to the dignity of life. Underscoring the vitality of this virtue of governance, the Constitution of India places it as the foremost goal of the polity. The juristic connotations indeed envision Constitution as a leveler lifting the veils from age old traditions of subjugation of women. Various provisions of the Constitution reflect gender neutrality as well as affirmative clauses of enabling nature equipping the State to take special legislative and executive measures for special classes or categories. Undoubtedly, the purpose of these clauses is to ensure a transformation not only of polity but also placing individual at the centre of a just societal order. Though little yet the significant impact of constitutional provisions on the lives of women can be witnessed on ground level. It cannot be ignored that the constitutional spirit is usually vulnerable to dynamic socio-cultural paradoxes owing their origin to political constructions and narratives. These paradoxes turn the situation into more aggravated form due to interface of law, administration, religion and politics in Post Truth World. Overflow of information in cosmetic democratic make over by the totalitarian or populist regimes with subtle ideologies block thought process in making the rational choices.*

*In view of the above, the present paper highlights the role of judiciary being the final interpreter of the provisions of the Constitution to ensure constructive transformation. It elaborates the meaning, nature and scope of freedom to profess, practice and propagate the faith or religion and its inter-relationship with liberty to manage religious affairs in reference to gender inclusivity. The discussion revolves around the judgment of the Supreme Court of India in Sabarimala Matter, 2019 wherein the court attempted to find out the solution of the paradox prevailing in India from ages. Bodenheimer's backward full forward push theory has been applied as a constitutional tool to filter out constitutional spirit from multi-polar assertion of truths- truth of social-cultural taboos viz a viz the truths of constitutionalism.*

**Keywords:** *constitutional morality, discrimination, exclusive, gender neutrality, governance, inclusiveness, silences, sounds, spatiotemporal analysis.*

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## I. Introduction

Administration of justice through the scale of law warrants fine tuning between what is said and unsaid. Construction of sounds of the texts of the constitutions is a job of significance beyond words. Justice is an attribute, in other words, a value addition to the dignity of life. Underscoring the vitality of this virtue of governance, the Constitution of India places it as the foremost goal of the polity. The sweeping content of the preamble of the Constitution of India clearly establishes its inalienability from different facets of individual liberty in context of thought, belief, faith and worship, equality of status and of opportunity. In furtherance of the preambular goals, the Constitution of India recognizes variety of rights enabling individuals to develop their personality to the fullest possible extent and live life in a dignified way.

The juristic connotations indeed envision Constitution as a leveler lifting the veils from age old traditions of subjugation of women. The universe comprehended in thoroughly crafted script of the preamble carries substantial value than its face value. Various provisions of the Constitution reflect gender neutrality as well as affirmative clauses of enabling nature equipping the State to take special legislative and executive measures for special classes or categories. Undoubtedly, the purpose of these clauses is to ensure a transformation not only of polity but also placing individual at the centre of a just societal order. Though little yet the significant impact of constitutional provisions on the lives of women can be witnessed on ground level.

Indeed, the constitutional spirit is usually vulnerable to dynamic socio-cultural paradoxes owing their origin to political constructions and narratives. These paradoxes turn the situation into more aggravated form due to interface of law, administration, religion and politics in Post Truth World. Overflow of information in cosmetic democratic make over by the totalitarian or populist regimes with subtle ideologies block thought process in making the rational choices.<sup>2</sup>

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<sup>2</sup> Parmod Kumar, *Supreme Court Judgment on Sabarimala disappointing, will have problematic repercussions*, INDIAN EXPRESS, Sep. 28, 2018. Samanwaya Rautray, *Women of all ages can enter Sabarimala Temple, rules Supreme Court*, ECONOMIC TIMES Sep. 29, 2018; O B Roopesh, *Sabarimala Protect*, EPW Vol. 53 Issue 49, Nov. 2018; Maneesh Chibber, *Delhi Election & Sabarimala: Why Article 25 is now caught between*

In no uncertain terms, freedom of religion covering belief, faith and worship is an equally guaranteed fundamental right.<sup>3</sup> Construction of the different provisions of the Constitution in the light of all-encompassing content of the preamble clearly depicts the vision of the framers of the Constitution. It conveys the idea of equal liberty in domain of belief, faith and worship for building a considerate, humane and just social structure. Articles 14,<sup>4</sup> 15,<sup>5</sup> 17<sup>6</sup> read with Articles 25-26<sup>7</sup> incorporate the mandate of equality of status and opportunity affording liberty to profess, practice and propagation of the faith. Indian social order is proposed to be built on the foundations of liberty of individuals, equality and, fraternity among them assuring justice to all without any distinction on the ground of race, religion, colour, creed, place of birth and sex. Interpretations of the text of constitutional provisions in last seven decades clearly reflect the attempt to secure the worth of an individual in a humane society.<sup>8</sup> There are numerous instances where the silences of the Constitution were construed to the

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*Constitution and Religion*, THE PRINT Feb. 5, 2020; See also *Sabarimala verdict: CPM happy, Congress treads middle path, BJP seeks consensus*, INDIAN EXPRESS, Sep. 28, 2018, *Sabarimala verdict: Review pleas filed in S.C., Pinarayi says will follow court order*, INDIAN EXPRESS, Oct. 9, 2018.

<sup>3</sup> The Constitution of India, Article 25. Freedom of conscience and free profession, practice and propagation of religion.

<sup>4</sup> The Constitution of India, Article 14: Equality before law.

<sup>5</sup> The Constitution of India, Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

<sup>6</sup> The Constitution of India, Article 17: Abolition of untouchability.

<sup>7</sup> The Constitution of India, Article 26: Freedom to manage religious affairs.

<sup>8</sup> *Kharak Singh v. State of U.P.* A.I.R. 1963 S.C. 1295, *Satwant Singh v. Union of India and Another* ILR 1986 Del 451, *Maneka Gandhi v. Union of India* A.I.R. 1978 S.C. 597, *Sunil Batra v. Delhi Administration* A.I.R. 1980 S.C. 1579, *Hussainara Khatoon v. State of Bihar* A.I.R. 1979 S.C. 1369, *Khatri v. State of Bihar* 1981 S.C.R (2) 408, *People Union for Democratic Rights v. Union of India* A.I.R. 1982 S.C. 1473, *Bandhua Mukati Morcha v. Union of India* A.I.R. 1984 S.C. 802, *M.C.Mehta v. Union of India* A.I.R. 1987 S.C. 1086, *Francis Coralie Mulin v. The Administrator, U.T. Administration* A.I.R. 1981 S.C. 746, *Olega Telis v. Bombay Municipal Corporation* A.I.R. 1986 S.C. 180, *Subash Kumar v. State of Bihar* A.I.R. 1991 S.C. 420, *Vishakha v. State of Rajasthan* A.I.R. 1997 S.C. 3011, *Payal Sharma v. Superintendent, Nari Niketan, Agra* A.I.R. 2001 All 254, *Justice K.S. Puttaswamy and Others. v. Union of India* A.I.R. 2017 S.C. 4161, *Navtej Singh Johar v. Union of India* A.I.R. 2018 S.C. 4321, *Joseph Shine v. Union of India* (2019) 3 S.C.C 39, A.I.R. 2018 S.C. 4898, *Shaira Bano v. Union of India*, (2017) 9 S.C.C 1.

advantage of ruling class pushing different vulnerable sections on the margin. On most of these occasions, the Supreme Court of India (SCI) considerably portrayed a tale of corrective actions to synchronize sounds of these silences proportionately to satisfy the requirements of the rule of law, justice and constitutionalism.<sup>9</sup>

Against this backdrop, the present paper deals with the approach of the Indian judiciary redefining freedom of religion to solve socio-cultural paradox through transformative constitutionalism. The paper deals with meaning, nature and scope of freedom to profess, practice and propagate the religion in context of liberty to manage religious affairs and its inter-relationship with gender equality. The discussion revolves around the judgment of the SCI in the Indian Young Lawyers Association and Ors. v. The State of Kerala and Others (also known as Sabarimala Matter).<sup>10</sup> The SCI attempted to find out the solution of the paradox of contradictions prevailing in India from ages. The glorification and veneration of the women as goddesses on one side and denying them equal status in various walks of life such as prohibiting the entry of female devotees of specified age group in the Temple at Sabarimala, Kerala are on the other hand. Their entry is denied on the basis of custom and usage recognized under Rule 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965 framed by exercising the powers specified under Section 4 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965. The petitioners have challenged the legitimacy and constitutionality of these Rules being in conflict with Articles 14,15, 25 and 51-A (e) of the Constitution of India.

The SCI evaluated the constitutionality of regulatory framework banning the equal right of female devotees. The regulatory mechanism prima facie appeared excluding the female devotees from the mainstream and was examined on the touchstone of constitutional dictums. Though a dissenting opinion was given by Justice Indu Malhotra yet the vigor of the Courts to discontinue the perpetuity of discrimination based on parochial & misconceived notions of culture is apparent.

## **II. Objectives**

### **A. General objectives**

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<sup>9</sup> *Id.*

<sup>10</sup> (2019) 11 S.C.C 1.

- (i) To critically elaborate the contours of freedom of religion in context of gender equality under International Human Rights Law and Indian Constitutional Law;
- (ii) To underline the silences concerning meaning of untouchability, their implications on right to privacy, freedom of religion and infuse sounds soothing to constitutionalism.

#### **B. Specific Objectives**

- (i) To revisit the meaning, scope and significance of constitutional morality in democratic governance in post truth world;
- (ii) To critically evaluate the meaning ascribed to essential religious practice and denomination under provisions of the Constitution;
- (iii) To assess the inter-relationship between different fundamental rights in context of transformative constitutionalism.

### **III. Material and Method**

The discussion is based on the secondary sources of information available in the form of various judgments of the SCI, High Courts and some notifications issued by various Ministries and Departments. The scope of the discussion has been confined primarily to the judgment in Sabrimala matter integrating gender equality with freedom of religion. Bodenheimer's backward full forward push theory has been applied as a constitutional tool to filter out constitutional spirit from multi-polar assertion of truths- truth of social-cultural taboos viz a viz the truths of constitutionalism.

### **IV. Analysis and Discussion**

Analysis of the judicial approach towards freedom of religion in context of gender equality through this judgment can be presented as under:

#### **A. Indian Young Lawyers Association and Ors. v. State of Kerala and Ors.<sup>11</sup>**

Originally, the matter was heard by three Judge Bench in Indian Young Lawyers Association and Ors. v. State of Kerala and Ors. where the decision of the Kerala

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<sup>11</sup> (2017) 10 S.C.C 689.

High Court<sup>12</sup> on same matter was also considered. The Bench of three judges, understanding the gravity of the issues involved and with the inputs of amicus curiae formulated following five questions to be considered by the SCI in reference:

- (1) the constitutionality of ban imposed on the female devotees due to a biological factor in view of Articles 14, 15 and 17 and its validation by the expression 'morality' in Articles 25 and 26 of the Constitution;
- (2) scope and validity of the expression 'essential religious practice' under Article 25 and 'right to manage its own affairs in matters of religion' under Article 26 of the Constitution;
- (3) denomination character of Ayyappa Temple and its implications on its funding from constitutional fund of India and constitutional principles spelt out under Articles 14, 15(3), 39(1) and 51-A(e);
- (4) constitutionality of Rule 3 (b) of Kerala Hindu Places of Worship (Authorization of Entry) Rules 1965 banning entry of female devotees between the age of 10-50 years<sup>13</sup>;
- (5) legitimacy of Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authority of Entry Rules, 1965 on the anvil of its parent Act titled Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965.

### ***Judgment***

The judgement was pronounced by five Judge bench in four parts. Part I covered the concurring opinion of JJ. Deepak Mishra (then Chief Justice of India) and A.M. Khanwalikar. Part II was scholastically penned down by J. R.F.Nariman. Part III was scripted eloquently by J. D.Y.Chandrachud. J. Indu Malhotra expressed her dissenting opinion in Part IV.

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<sup>12</sup> S.Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthpuram and Ors. Manu/ME/0012/1993, A.I.R. 1993 Ker. 42.

<sup>13</sup> The Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965- Rule 3(b) lays down that "Places of public worship to be open to all sections and classes of Hindus unless otherwise, any religious denomination exercises their right to manage its own affairs in matters of religion".

***Justice Deepak Mishra and Justice A.M. Khanwalikar***

The excerpts of the opinion can be provided as under:

Article 26 of the Constitution of India clearly recognizes right of every religious denomination to establish, maintain religious institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire movable and immovable property, and to administer such property in accordance with law. Nonetheless these rights are subject to public order, morality and health.

IV.I.II Sabarimala temple is a public temple. It is under the direction, control and supervision of Section 15 of Travancore Devaswom Board, 1950. The Board is covered within the scope of 'other authority' used in definition of State under Article 12 of the Constitution. Therefore, fundamental rights including those guaranteed under Article 25(1) are enforceable against the Board and other incorporated Devaswoms including the Sabarimala temple.

The right guaranteed under Article 25(1) does not indicate any consideration for gender by employing the expression 'all persons'. So female devotees, on account of their certain physiological considerations, attributable to womanhood cannot be kept beyond the guarantee of Article 25(1).

***Justice Rohinton Fali Nariman***

- a. The expression 'All persons' used in Article 25 implies reference to natural persons.
- b. A fundamental right of a religious community has a right to practice the religion so long as it does not, in any way, interfere with the corresponding right of co-religionists to do the same.
- c. The essence of meaning of Articles 25-26 should be constructed in the light of the Preamble to the Constitution. The right to profess, practice and propagate the religion should be interpreted in pursuance of thought, belief and worship.
- d. Superstitious beliefs based on extraneous grounds, unnecessary additions to religion cannot be considered as essential parts of religion. Such matters need to be adjudged on the basis of evidence the test to determine any practice as essential religious practice is well defined. However, where the different groups of a religious community opine

differently without any evidential value, the Courts may take a commonsense view and proceed with consideration of practical necessity.

- e. Freedom of religion, if interfered with by the State, it may invoke Articles 14, 15(1), 19 and 21. Where it is interfered by non-State actors, Article 15(2) along with Article 17 would be applicable.
- f. Unlike Article 25(1), fundamental right given under Article 26 is for religious denominations or sections thereof. Followers of various sects believing in Hindu religion do not constitute a denomination.

***Justice D.Y.Chandrachud***

- a. It is not a religious denomination.
- b. The claim of exclusion of female devotees from entry of temple is denial of their right to worship even if it is prescribed in religious text and it is overridden by constitutional attributes of liberty, dignity and equality.
- c. Exclusionary ritual or practices are contrary to constitutionalism and constitutional morality.
- d. Exclusion of female devotees in any event is not an essential religious practice. Such practices are not legitimate being derogatory to the dignity of women and their right to equal opportunity of status, belief, faith and worship.
- e. Exclusion of female devotees, based on menstrual state, is a kind of untouchability- an anathema to constitutional values. It cannot be a part of constitutional order.

***Justice Indu Malhotra***

Justice Indu Malhotra was the sole dissenting judge and took note of different facts that practice of exclusion is age old, possesses antiquity and continued from time immemorial without any interruption. According to her dissenting opinion, it was a pre-constitutional custom covered within the domain of Article 13(3) (a) of the Constitution.<sup>14</sup> It was acknowledged that there are around 1000 temples of

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<sup>14</sup> The Constitution of India, Article 13(3)(a): In this article, unless the context otherwise requires- law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India

Lord Ayyappa and the exclusion of female devotees is not absolute or universal. It is only where the deity is in form of a 'Naishtik Brahmachari'. The mode and manner of worship in those temples differ from that of in Sabarimala Temple as the deity has manifested himself in a distinct form. Restriction on the essential practice of this temple is a matter of 'religion' and 'religious faith and practise' and the basic. This practice is based on basic principle underlying the prathishtha (installation) of the Sabarimala Temple. Thus the dissenting opinion found a reasonable nexus with the object sought to be achieved that was to preserve the identity and manifestation of the Lord Ayyappa as a 'Naishtik Brahmachari'. This practice was found consistent with 'Naishtik Buddhi' of the deity. The judge found that there was a reason behind this custom and it could not therefore be in derogation to the dignity of the female devotees. It was only to protect the manifestation and form of the sacredness and divineness of the deity to presser the penance undertaken by the devotees. Besides, Section 31 of the Travancore-Cochin Hindu Religious Institutions Act, 1950 empowered the Board to administer the temple in accordance with the custom and usage of the Temple. The excerpts of dissenting judge can be presented as under:

- a. Article 14 and the principles of rationality cannot be the criteria of assessment of constitutionality of religious customs and practices. In this regard, Article 25 itself categorically provides the equal treatment to every individual to profess, practice and promote their religion. However, this equal treatment guaranteed under Article 25 is qualified by the essential beliefs and practices of any religion or sect equality in matter of religion needs to be construed in reference of the worshippers of the same faith.
- b. Right to equality under Article 14 claimed by petitioners is in conflict with the rights of the devotees of the temple guaranteed under Articles 25 and 25 of the Constitution. It is beyond the purviews of this court to examine which of these practices of a faith are to be struck down except if they are malicious, tyrannical, or a social evil such as sati.

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before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

- c. The Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965 is a legislation in furtherance of Article 25(2) (b) providing for opening of Hindu places of public worship. The proviso to Section 3 of the 1965 Act carves out an exception to the applicability of the general Rule contained in Section 3, with respect to religious denominations, or sect(s) thereof, so as to protect their right to manage their religious affairs without outside interference.
- d. Constitutional morality in a secular fabric would cover the freedom of every individual, group, sect, or denomination to practise their religion in accordance with their beliefs and practices. Constitutional morality implies moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution and achieve the objects contemplated therein.
- e. Constitutionality morality in a pluralistic society and secular polity implies space and respect for devotees of different sects to practise their faith according to their own religious dictates. In matters of religion, the rationality or logic is irrelevant and need not to be applied by the Courts.
- f. The framers of the Constitution were aware of the rich history and heritage of this country. Envisioning a secular society, with diverse religions and pluralistic faiths, Articles 25 and 26 forbid the State to interfere except in matters warranting social welfare and reform.
- g. The devotees of Lord Ayyappa at Sabarimala Temple constitute a religious denomination as they follow the 'Ayyappan Dharma'. 'Ayyappans' for male and 'Malikapurnams' for female devotees carries a distinction with it. A pilgrim on their maiden trip to Sabarimala Temple is addressed as 'Kanni Ayyappan'. The devotees are referred to as 'Ayyappaswamis'. A devotee has to observe rigorous code of conduct namely Vruthum, before starting their 'Pathinettu Padikal' to enter the Temple at Sabarimala.
- h. Regarding public character of the temple, it has been observed that the temple owned a large property before independence. As per the Devaswom Proclamation of 12 April 1922 issued by the Maharaja of Travancore, the temple used to receive annuity to the temple from the exchequer of the State. After the merger of Travancore State in

Union of India, the obligation of releasing annuities for the landed properties to the GoI. Presently, it is administered by the Travancore Devaswom Board. It does not receive funds from the Consolidated Fund of India, so it cannot be covered within the scope of the meaning of 'State' or 'other authorities' under Article 12 of the Constitution.

- i. Article 17 –‘Untouchability’ cannot be applied here as it pertains to untouchability based on caste prejudice. In literal or historical sense, untouchability was never construed to apply to female devotees as a class. Precedents referred by petitioners concerning entry of Dalits in the temple entry movements have no relation with restriction on female devotees of a specific age group. Especially when this restriction has its specific historical origin in beliefs and practices of the Sabarimala Temple.

### ***Reasoning of the Court***

The Constitutional Bench of the SCI by 4:1 decided that restriction of female devotees due to biological reasons did not meet the core values of the Articles 14,15 and 17 and ultra vires of the norms of morality referred under Articles 25 and 25 of the Constitution. The questions concerning ‘essential religious practices’ and ‘denominational character’ referred for consideration were answered in favour of petitioners while the minority opinion accepted the pleas of respondents and considered them practice of ban on entry of female devotees as a part of their distinct practice in view of manifestation of deity as ‘Naishtik Brahmachari’.

The dissenting opinion was drawn on the basis of construction of the word ‘law’ as used in Article 13 (3) (a) covering ‘customs or usage having in the territory of India the force of law’. The custom of prohibition of entry of female devotees of 10-50 years age group was declared as valid being a pre-constitutional custom in minority’s opinion. However, the analogies drawn by majority were based on the principle of statutory construction of ‘statute should be read as a whole’ and meaning to be construed in the context. The context of Article 13 (1), if read as a whole, and construed in the light of its heading –‘Law inconsistent with or in derogation of the fundamental rights’ are void. It is validated further in the

enforceable part of the Article 13(1) clearly stipulating that all laws in force in the territory of India immediately before the commencement of this Constitution, insofar, as **they are inconsistent with the provisions of this part**, shall, to the extent of **such inconsistency, be void**. Moving a step further to construe Article 13(2) to substantiate the reasoning of the majority judgment, it is clear that the State shall not make any law which takes away or abridges the rights conferred by this part, and any law made in contravention of this clause shall, to the extent of contravention, be void.

So far as the inter-relationship between the Constitution, Parent Act namely Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965 and Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965 is concerned, it was observed by the majority that the Parent Act is in consonance with Constitution. It is Rule 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965<sup>15</sup> which is ultra- vires not only of Sections

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<sup>15</sup> Rule 3: The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship: (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.

3,<sup>16</sup> 4 and 4 (1) of the Parent Act<sup>17</sup> but Articles 13(1) (2) (3), 14, 15(2), 25, 26, 51, 51-A(e) of the Constitution.

If one evaluates the implications of this exclusionary custom of denial or restriction of entry of female devotees of menstrual age group, it is against the notions of dignity not only under Constitutional Law and national legislations but also international human rights jurisprudence.<sup>18</sup> The State is placed under an obligation to address any social or cultural custom or pattern based on prejudices which amount to discrimination and denial of equality of women with man through appropriate measures. If Article 13(1) (2) (3) of the Constitution are construed in the light of Article 5 of CEDAW, the signatories have to take appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to eliminate the prejudices and customs and other

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<sup>16</sup> Section 3: Places of public worship to open to all Sections and classes of Hindus: Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindus generally or to any Section or class thereof, shall be open to all Sections and classes of Hindus; and no Hindu of whatsoever Section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever Section or class may so enter, worship, pray or perform: Provided that in the case of a place of public worship which is a temple founded for the benefit of any religious denomination or Section thereof, the provisions of this Section shall be subject to the right of that religious denomination or section, as the case may be, to manage its own affairs in matters of religion.

<sup>17</sup> Section 4: Power to make Regulations for the maintenance of order and decorum and the due performance of rites and ceremonies in places of public worship: (1) The trustee or any other person in charge of any place public worship shall have power, subject to the control of the competent authority and any Rules which may be made by that authority, to make Regulations for the maintenance of order and decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein:

Provided that no Regulation made under this Sub-section shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular Section or class.

<sup>18</sup> Articles 1, 2, 18, 28 of UDHR, Article 13 (1) of ICESCR, Article 18 of ICCPR, Articles 1, 2(a) (b) (c) (d) (e) (f) (g) (3) (4) (5) of CEDAW.

practices based on the consideration of inferiority, superiority or stereotypes. The obligation of the State is further validated by Article 51 (c) of the Constitution of India to foster respect for international law and treaty obligations in dealings of organized people with one another.

The majority opinion cleared the doubt by applying the rule of purposive construction, harmonious construction along with mischief rule of construction to construe the non-obstante clause. It observed that the every places of worship will remain open to Hindus generally or to any section of class thereof. No Hindu person shall be in any way discouraged from entering place of public worship or offering prayers or performing any religious service. The SCI meticulously dissected the script of Section 3 while holding that these rights are available to all sections and classes of Hindu irrespective of any contrary law, custom, usage or instrument having effect by virtue of law or any decree or order or court. It also took note of proviso to Section 3 wherein a religious denomination is authorized to administer its own affairs in matters of religion. Worth mentioning fact is that proviso of Section 3 derives its further validity from Article 26(2) of the Constitution. The Sabarimala temple was not considered as entitled to avail the advantage of the same.

So far as meaning of expression 'public order, morality, health' in non obstante clause of Article 25 is concerned, the Court held that all these words are qualified by the word 'public'. Entry of women devotees of the specified age group cannot endanger public order or public health. Furthermore, to explain the scope of 'public morality', it has to be kept in mind that this Constitution was not imposed by any external agency. It was adopted and given by the people of this country to themselves. Therefore, the meaning of such terms 'public morality' etc. has to be aptly construed as synonym of constitutional morality.

To decide on the point of exclusion of women of the specified age group as an essential practice is equivalent to a doctrine of Hindu religion or a practice, the Court replied negatively. It observed that nature of Hindu religion cannot be altered in absence of such an exclusionary practice. Hindu religion allows women to enter into a temple as devotees and to offer their obeisance to the deities. Therefore, the Court declined any submission for considering exclusion of women in the absence of any scriptural or textual evidence

The majority opinion further underscored the unique nature of proviso to Section 4 as it contained an exception to Section 4(1). It observed that the proviso carried more importance than the rule itself. It clearly prohibits State from discriminating against any Hindu on the ground of their affiliation or belonging to a particular section or class. Therefore, the rule banning the entry of female devotees of the specified age group was held as unconstitutional to recognize the right of the women to enter the place of worship with a conjoint reading of Articles 14, 15(2), 17, 21, 25 and 26 of the Constitution.

Furthermore, the minority judgment refers Constituent Assembly Debates to support its narrower construction of untouchability in reference of caste based discrimination<sup>19</sup>, Justice Chandrachud also referred some excerpts of the Debates. He emphatically reiterated that Article 17 is a social revolutionary provision and the framers of the Constitution deliberately left the term ‘untouchability’ undefined. It was done to make the prohibition of the practice comprehensive.<sup>20</sup> He quoted the opinion of Shiva Rao, member of the Constituent Assembly that untouchability in all its forms- whether it was within a community or between various communities is covered within the scope of Article 17. It was further suggested to ingrain the imposition of any disability of any kind or any such custom of ‘untouchability’.<sup>21</sup> To support his view, the reference of the Protection of Civil Rights Act, 1955 was made which penalise the act of preventing any person from entering a place of public worship, worshipping or offering prayers under Sections 3, 4 and 7 clearly encompassing untouchability in any form on historical, philosophical or religious grounds. Certainly it is a positive step towards constitutionalisation of international human rights and revisiting the scope of the social contract.

## V. Conclusion

The upshot of aforesaid analysis is that the Constitution is a confluence of societal, moral, legal and philosophical values to bring about a social revolution by addressing marginalization and restoring dignity of life. These values need to

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<sup>19</sup> *Indian Young Lawyers Association Ors. v. State of Kerala and Ors.* MANU/S.C./1094/2018, Para 310.4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

be construed harmoniously to sub-serve the common good without being detrimental to the interests of its stakeholder. The primary aim of the State under the theory of social contract is to place dignity and liberty of every individual at higher places than institutions. Goal of fraternity may certainly warrant space for individual recognition in the age of human rights and inclusive growth. The Court, at its best, metamorphosed the democratic set up with the culture of constitutional inclusiveness, equality and freedom. The spectacular inclination of the Court towards strengthening constitutionalism on the soil of script of Indian Constitution was visible through:

- i) the application of ‘rule of purposive construction’ transmuting the seeds of transformative constitutionalism from volkspele jurisprudence to toyitoyi jurisprudence to construe the silences of the texts and infused melodic sounds;
- ii) declaring practice of social exclusion of female devotees based on menstrual status as an anathema to constitutional spirit of rule of law and constitutional morality;
- iii) spatiotemporal construction in distinguishing constitutional morality from individual and social morality redefining the interrelationship among and between culture, law and society.

The length of the judgment touching different aspects of human rights law, constitutional law and inclusive governance depicts the sensitivity with which the Constitutional Bench has pronounced its judgment in Sabarimala matter. Numerous precedents were referred by both the sides were taken into consideration and their relevance was examined so minutely by each of the five judges. It reflected the relative strength of the past oriented and future oriented forces in legal development to make the proper functioning of legal system possible. Bodenheimer’s Backward Pull Forward Push dictum was applied by all judges to validate their reasoning.<sup>22</sup> Reiterating its earlier approach in *Manoj Narula v. Union of India*<sup>23</sup> the SCI observed that ‘constitutional morality’ implies utmost respect to the norms of the Constitution and placing Rule of Law on higher footing. Commitment to the Constitution can be strengthened by constitutional morality. In fact, constitutional morality is a laser beam in

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<sup>22</sup> EDGAR BODENHEIMER, *POWER, LAW AND SOCIETY*, 5-6 (New York, 1973) .

<sup>23</sup> (2014) 9 S.C.C 1.

institutional building and resolving paradoxes. The concept of constitutional morality should not be confined narrowly to black and white letters but liberal construction encompassing a pluralistic and inclusive society as a core principle of constitutionalism.

The Courts declared the bans in both these cases as unconstitutional and rejected the denial of the right of the female devotees to their search for divinity and democratized freedom to profess and practice their belief, faith and free conscience. Cross border transmutation of principles of international human rights law may have its own socio-politics implications across the states, national and international jurisdictions which will surface in due course of time.<sup>24</sup> Sound of bugle can be heard and recent order on Sabarimala for referring a review petition to a Seven Judge Bench in a populist regime and it has raised the eyebrow of rationalists.<sup>25</sup> It justified its decision to refer the matter to larger bench by clubbing Sabarimala matter with other pending cases on subjects as varied as female genital mutilation among Dawoodi Bohras to entry of Parsi Women who married inter-faith into the fire temple and Muslim Women into Mosques. Legendary Senior Advocate Fali Nariman also objected on this exercise being out of the realm of the facts of the cases. Prof. Baxi called this development as betrayal of constitutional discipline and overruling constitutional morality. He opined that constitutional morality was above any religious thought or dominant ideology. It should be kept in mind that a Constitution has to protect its people first than institutions to honour the terms of social contract. Thus, gender equality in not only in religious domain but all walks of life along with contextualization of constitutional provisions to integrate human rights is indeed the need of hour.

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<sup>24</sup> Krishandas Rajagopal, *Sabarimala Case: Supreme Court upholds referring religious questions to larger Bench, frames 7 questions of law*, THE HINDU Feb. 10, 2020, Abhilash Thadathil, *Adivasi Claims over Sabarimala Highlight the Importance of Counter narratives of Tradition*, EPW Vol. 54, Issue no. 1.Jan., 2019.

<sup>25</sup> Upendra Baxi, "How to Engender the Basic Structure Doctrine? The Elusive Future of Women's Rights as Human Rights," 25<sup>th</sup> Justice Sunanda Bhandare Memorial Lecture, THE WEEK (Sep 17,2021) <https://www.theweek.in/news/india/2019/11/30/SC-astonishing-sabarimala-judgement-betrays-constitutional-discipline.html> visited on Aug., 13, 2021; Soni Mishra, *SC's astonishing Sabarimala judgment betrays constitutional discipline*, INDIAN EXPRESS, Nov. 30, 2019.

## Human Gene Editing and Its Inherent Conundrums: Legal Perspectives

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### **Abstract**

*Gene Editing, as a work of human ingenuity and innovation, opens up a vast range of possibilities for human existence in the future. While Gene Editing, on the surface, opens up the possibility of human perfection, it also raises a slew of ethical, philosophical, economic, and legal difficulties. From the standpoint of India's commitment to ensuring an egalitarian society in which access to the fruits of science and technology is made available to both the rich and the poor, the prospect of Gene Editing raises deep and complex questions about the disparity in the capacity of the less resourceful to reap the benefits of this scientific advancement. The propriety of pushing such a disruptive technology - of men having the potential to fundamentally and dramatically alter nature's systems of creation and sustenance - is also a factor in Gene Editing. Gene Editing also brings up the classic "Frankenstein" question: are we unleashing a beast beyond our control? Is it possible to get a global consensus on Gene Editing's inherent limitations, if there are any? Because Gene Editing involves decrypting the fundamental building components of any human person, it raises the important question of whether such information should be made public, as well as the risks that come with it. Within its limited scope, this study makes a determined effort to address the aforementioned conundrums. It also attempts to provide a glimpse into the future that we are moving towards in terms of Human Gene Editing. While the scope of the various issues relating to Gene Editing is vast, the paper focuses primarily on the dimensions of Gene Editing's economic perspective in India, its ethics, law, and scientific progress, informed consent and counselling in the domain of Gene Editing, and the need for transparency and accountability in the domain of Gene Editing.*

**Keywords:** *Human Gene Editing, CRISPR-Cas9, Law, Ethics, Governance, Regulation.*

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## I. Introduction

The ‘Gene Editing’ Technology is a prodigy by itself. It has grasped a good amount of attention in a little span of time, specifically, since two women researchers, namely, “Emmanuelle Charpentier and Jennifer A. Doudna were awarded with the Nobel Prize in Chemistry, by the Royal Swedish Academy of Sciences, in 2020, for the development of a method for Gene Editing.”<sup>3</sup> This indeed encouraged the significant role a promising technology of this kind may play in the advancement of human health. With the application of gene editing technologies involving the CRISPR-Cas9 and other comparable molecular scissors, scientists and researchers can make a breakthrough in healing a variety of severe diseases.<sup>4</sup> It’s a sign of good things to come. This necessitates for a competent legal framework that will both improve and constrain the anticipated technical advancements. The ethical and moral considerations must be addressed right from the start, which will help the researchers and policymakers use the framework in the process of development and implementation of this new technology, hence, benefiting society to the best extent possible.

Various bioethicists and researchers from around the world have been debating the legal and ethical challenges that have arisen as a result of the usage of gene editing technologies in recent years.<sup>5</sup> In terms of India, it is right time to recognise these scientific and ethical concerns and establish a regulatory framework for the application of this unique technology. It is crucial to advance science and technology; yet, it is also critical to use the best research available in the greater interest of humanity without inflicting harm. Given the socio-economic difference, it is necessary to thoroughly assess the benefits and drawbacks of this technology. Actual facts, not false notions, must be adhered to in order to facilitate improved comprehension and expand opportunities. In order to launch prospective advances in human health, a new technology that is still in the

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<sup>3</sup> The Royal Swedish Academy of Sciences, “Press Release: The Nobel Prize in Chemistry 2020”, *Nobel Prize Org.*, (7<sup>th</sup> October 2020), available at: <https://www.nobelprize.org/prizes/chemistry/2020/press-release/> (last visited on Feb. 21, 2021).

<sup>4</sup> David Baltimore, Paul Berg P, *et. al.*, “A prudent path forward for genomic engineering and germline gene modification”, *Science*, 36-38, 348 (6230) (2015).

<sup>5</sup> Arthur L Caplan, Brendan Parent, *et. al.*, “No time to waste - the ethical challenges created by CRISPR”, *EMBO Reports*, 1421-1426, 16(11) (2015).

development stage but has huge promise must be explored to broader boundaries.<sup>6</sup>

## II. Indian Perspective of Human Gene Editing

A large proportion of the Indian population is afflicted by complex diseases and even hereditary monogenic ailments that have no treatment alternatives. These genetic abnormalities frequently result in life-long incapacity, putting a financial strain on society and putting a strain on India's healthcare system. "Haemophilia, thalassemia, sickle-cell anaemia, muscular dystrophies, retinitis pigmentosa, primary immunodeficiency (PID) in children, lysosomal storage disorders such as Pompe disease, Gaucher's disease, haemangioma, cystic fibrosis, and others are only a few examples of complex diseases. In India, 11,586 persons have been diagnosed with haemophilia A, with a frequency of roughly 50,000 patients. Similarly, there are approximately 100,000 thalassemia patients, 150,000 sickle cell patients, 500,000 (Duchenne Muscular Dystrophy) muscular dystrophy patients, and a greater incidence of 1 in 4000 retinal dystrophies."<sup>7</sup> Furthermore, unusual genetic illnesses must be addressed urgently. "The morbidity and mortality associated with uncommon genetic illnesses are unknown due to a lack of epidemiological data on their prevalence and burden. However, based on an International estimate of 6% to 8% of the population being affected by rare diseases, India's population of 72 to 96 million people is likely to be affected by rare diseases, which is a major source of concern for the health-care industry."<sup>8</sup> As a result, it's critical to develop new, safe, and focused treatments for all of these illnesses among Indian patients. Changing a person's genetic makeup is a difficult task, both scientifically and physiologically. It is possible to relieve patients' suffering provided correct scientific and ethical protocols are followed.

## III. The Scientific Progress of Gene Editing

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<sup>6</sup> Richard Owen, Phil Macnaghten P, *et. al.*, "Responsible research and innovation: From science in society to science for society, with society", *Science and Public Policy*, 751-760, 39 (2012).

<sup>7</sup> Indian Council of Medical Research (ICMR), Central Drugs Standards Control Organisation (CDSCO) & Department of Biotechnology (DBT), "National Guidelines for Gene Therapy Product Development and Clinical Trials, 2019", 5 (November, 2019), available at: [https://main.icmr.nic.in/sites/default/files/guidelines/guidelines\\_GTP.pdf](https://main.icmr.nic.in/sites/default/files/guidelines/guidelines_GTP.pdf) (last visited on August 25, 2021).

<sup>8</sup> *Id.*

Gene editing traces back to the late 1980s, however it came into limelight in the year 2012 when two women scientists, namely, Jennifer Doudna and Emmanuelle Charpentier established that the CRISPR technology could be utilised to edit genes. Gene Editing is a difficult task since it limits how far scientists can alter genomes.<sup>9</sup> Despite the potential hazards involved with the technology, practically any part of a genome, whether in plants, animals, or humans, might be altered precisely and reliably. Genetic engineering is not a new concept; scientists have long used various approaches to change genes.<sup>10</sup> However, gene editing differs in that it is simple, inexpensive, and precise, allowing genetic engineering on a previously unimagined scale. Such a technology can be utilised to produce and conduct various medical treatments and develop vaccines as well. Gene editing associates itself with various approaches but CRISPR-Cas9 has hit the spotlight.<sup>11</sup>

Gene Editing includes making changes to a specific target in a cell's DNA. This alteration can bear the consequence of introducing a modest deletion or even a precise sequence change. Gene editing can be applied through various modes, although "**Clustered Regularly Interspaced Short Palindromic Repeats (CRISPR/Cas9)**"<sup>12</sup> is currently the most straightforward. In 2012, the CRISPR-Cas9 technology was first published.<sup>13</sup> CRISPR-Cas9 is a versatile method that may be employed without any prior knowledge of protein engineering. Because

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<sup>9</sup> Puping Liang, Yanwen Xu, *et. al.*, "CRISPR/Cas9-Mediated Gene Editing in Human Trippronuclear Zygotes", *Protein Cell*, 363-372, 6 (5) (May, 2015).

<sup>10</sup> David Cyranoski, "CRISPR Gene-Editing Tested in a Person for the First Time", *Nature*, 479, 539 (November, 2016)

<sup>11</sup> Bonny Lemma, "CRISPR Dreams, The Potential for Gene Editing", *Harvard International Review*, 6-7, Vol. 40, No. 1 (2019)

<sup>12</sup> Your Genome Organisation, "What is CRISPR-Cas9?", *available at* : <https://www.yourgenome.org/facts/what-is-crispr-cas9#:~:text=The%20CRISPR%2DCas9%20system%20consists,then%20be%20added%20or%20removed> (last visited on March 20, 2021).

<sup>13</sup> Martin Jinek, Krzysztof Chylinski, *et. al.*, "A programmable dual-RNA-guided DNA endonuclease in adaptive bacterial immunity", *SCIENCE*, 816-21, 337 (6096) (August, 17, 2012).

of the method's nature, many changes affect a cell at the same time. CRISPR-Cas9, although its ease of use and inexpensive cost, is not without flaws.<sup>14</sup>

#### IV. Gene-Therapy Ethics: Somatic vs. Germline

The ability to create accurate modifications within the human genes, be it somatic or germline, leads to fundamental concerns about how far it may be used in a socially acceptable manner. As a result, we must comprehend the fact that germline gene editing alterations may be heritable, and questions such as whether gene editing techniques should be employed to prevent genetic disorders or not and whether genetic enhancement upon severe disorders must be addressed.<sup>15</sup> It's high time, one should distinct the features of Gene Editing techniques, in terms of what is acceptable and what is not.<sup>16</sup> It's unclear if germline gene editing will be a boon or a bane for humanity.<sup>17</sup> Modifications are not heritable and will not be passed down to future generations, in case of somatic cell gene editing as because they may require similar treatment. It has therapeutic promise and has the ability to remove disease, resulting in a higher quality of life.<sup>18</sup> However, due to the current level of our understanding, Gene Editing may create concerns that are yet unresolved, extreme caution is required. An International moratorium on clinical use of human germline editing was announced, preventing the creation of genetically modified children and providing time for debate on moral, ethical, scientific, societal, and legal issues, as well as the development of regulatory frameworks to govern the technology.<sup>19</sup> There has been a progressive start but highlighted with controversies, like- In China, delivery of twin babies with a gene

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<sup>14</sup> Fani Memi, Aglaia Ntokou, *et. al.*, "CRISPR/Cas9 Gene-Editing: Research Technologies, Clinical Applications and Ethical Considerations", *Semin Perinatol*, 487-500, 42(8) (December, 2018)

<sup>15</sup> E Lanphier, Fyodor Urnov, *et. al.*, "Don't edit the human germ line", *Nature*, 519: 410-411 (March, 2015).

<sup>16</sup> J. Benjamin Hurlbut, Krishanu Saha, *et. al.*, "CRISPR Democracy: Gene Editing and the Need for Inclusive Deliberation", *Issues in Science and Technology*, FALL, 25-32, Vol. 32, No. 1 (FALL 2015).

<sup>17</sup> K Krishan, T Kanchan, *et. al.*, "Germline Editing: Editors Cautionary", *Clin. Ter.*, e58-e59, 169 (2) (2018).

<sup>18</sup> Otieno MO, "CRISPR-Cas9 Human Genome Editing: Challenges, Ethical Concerns and Implications", *Journal of Clinical Research & Bioethics*, 6:6 (December 26, 2015).

<sup>19</sup> The National Academies of Sciences, Engineering, and Medicine, "On Human Gene Editing: International Summit Statement" (2015).

modified for HIV, which received wide condemnation by the International community.<sup>20</sup> It was thought to be a scientific breakthrough, yet found to be unethical and morally reprehensible. The scientific community slammed it and openly rejected it, citing flaws in the investigators' safety assessments, ethics review, and informed consent, among other things.<sup>21</sup> This example demonstrates the significance of having a governance and monitored framework, as well as ensure that scientific research is conducted in a socio-culturally acceptable way, so as to support community values and practices. Further, here underlies a specific responsibility of removing fears and reluctance associated with irreversible changes or inaccuracy in germline gene editing, off target mutations, probable implications upon future generations, interactivity with other genetic variations or misuse for prenatal testing, resulting to fetal manipulations which remain unregistered, creation of designer babies, eugenic practices or similar exploitations as such.<sup>22</sup>

## V. Emerging Ethical Issues

In the realm of scientific study and development, ethics plays an important role. Integrating ethical principles and values would protect and promote high-quality research. An ethical review is significant because scientific technology and social norms have to be acknowledged by the researcher in order to conduct a research project ethically while assuring safety of the participants, which will, thus, protect rights, incorporate monitoring, and remain harmless.<sup>23</sup> The participants must have a complete overview of the situation and make their own decisions. As a result, it is critical that Gene Editing research be thoroughly examined by

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<sup>20</sup> Marilyn Marchione, "Chinese Researcher claims first Gene-Edited Babies", *AP NEWS*, Nov. 26, 2018, available at: <https://apnews.com/article/ap-top-news-international-news-ca-state-wire-genetic-frontiers-health-4997bb7aa36c45449b488e19ac83e86d> (last visited on January 26, 2021).

<sup>21</sup> Erika Kleiderman and Ubaka Ogbogu, "Realigning gene editing with clinical research ethics: What the "CRISPR Twins" debacle means for Chinese and international research ethics governance", *Account Res.*, 257-264, 26(4) (May, 2019).

<sup>22</sup> The National Academies of Sciences, Engineering, and Medicine, "Committee on Human Gene Editing, Human Genome Editing: Science, Ethics, and Governance" (Washington, D.C.: The National Academies Press, 2017).

<sup>23</sup> Jennifer Kuzma and Lindsey Rawls, "Engineering the Wild: Gene Drives and Intergenerational Equity", *Jurimetrics*, 279-296, Vol. 56, No. 3 (2016), available at: <https://www.jstor.org/stable/26322676> (last visited on November 19, 2021).

an ethics committee that is competent, up to date, prompt, and independent in its assessment and decision-making processes.<sup>24</sup> An ethics committee's recommendations can help enhance the entire study and provide protection to the participants. Currently, this unique technology has potential therapeutic benefits in case of healing diseases but also accompanies with it, hazards. The ratio between the benefit and risks must be adjusted in a way which favours humanity.<sup>25</sup> Guaranteed advantages and minimized hazards, are two important aspects related to the safe use of Gene Editing technology which is in question right now. At this time, there are a number of ambiguous technological risks, many of which are unknown and unproven based on current knowledge. Protection of people must be ascertained through prevention of exploitation, proper counselling and mechanisms, with the use of this technology. It becomes vital while working with people of vulnerable nature, whether because of a disease, condition, age, or lack of comprehension. Moreover, they require greater safety also for their autonomy, as they may not be able to preserve their own rights. Any personally identifiable information must be appropriately protected and clinical records must be meticulously preserved with access to few authorised individuals only.<sup>26</sup> Gene Editing, involving any synergetic research that requires data sharing must also address concerns about personal clinical information of those involved in the project.<sup>27</sup>

## **VI. Social Inequality and Justice**

There are a number of socio-economic concerns about the possible use of embryo Gene Editing for healthcare purposes, all of which require more investigation. There's a chance that embryo germline editing might be used in non-therapeutic research, may be to create designer kids with specific characteristics. Designer traits or specific qualities of certain eye colour, height, hair, complexion or even physical endurance of kids might be inserted, if humans get an easy control over

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<sup>24</sup> Indian Council of Medical Research (ICMR), "National Ethical Guidelines for Biomedical and Health Research Involving Human Participants, 2017", 22 (October, 2017), *available at:*

[https://main.icmr.nic.in/sites/default/files/guidelines/ICMR\\_Ethical\\_Guidelines\\_2017.pdf](https://main.icmr.nic.in/sites/default/files/guidelines/ICMR_Ethical_Guidelines_2017.pdf) (last visited on August 25, 2021).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Gene Editing and more, if it becomes commercially available on the basis of affordability.<sup>28</sup> Thus, resulting in a socio-economic divide and societal inequity. There are still unanswered questions about the high costs of technology, when it should be used, how to ensure benefit sharing and access, and when it should not be utilised. In the lack of efficient communication, there can be significant societal issues and misunderstanding among the general population. It is necessary to explain the ramifications of giving solutions in agriculture, pest resistance, sustainable farming, and the treatment of life-threatening diseases such as cancer, muscular dystrophy, diabetes, thalassemia, and others. Community engagement and education could be crucial in making technology acceptable and dispelling any unfounded fears. There is a need to engage people and address concerns about socio-economic, religious, or other cultural views, as well as societal difficulties. In circumstances where the technology is valuable, access must also be guaranteed. With any new technology, issues such as appropriate steps to make these technologies available to the general public at an affordable cost, issues related to marketing and commercialization, economic interests restricting therapeutic use, IPR and patenting, and unknown implications for the future of our society can be expected. Furthermore, all engaged stakeholders must be held accountable, and research must be conducted in a transparent manner.<sup>29</sup> Both positive and negative research findings should be conveyed and publicised so that they can be shared with stakeholders for further discussion. As a result, Gene Editing technologies must be thoroughly scrutinised to ensure that the benefits are passed down to future generations.<sup>30</sup>

## VII. Principle of Transparency and Accountability

New technologies pose an inherent challenge due to inadequate understanding and long-term consequences.<sup>31</sup> It becomes necessary to establish the

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<sup>28</sup> Jane Brophy, "Dream Babies, China Dreams", *ANU Press* (2020), available at: <https://www.jstor.org/stable/j.ctv12sdxmk.18> (last visited on January 25, 2021).

<sup>29</sup> K Krishan, T Kanchan, et. al., "Germline Editing: Editors Cautionary", *Clin. Ter.*, e58-e59, 169 (2) (2018).

<sup>30</sup> Roli Mathur, "Ethical Considerations in Human Genome Editing—An Indian Perspective", *Asian Biotechnology and Development Review*, 47-58, Vol. 20 No. 1&2 (2018).

<sup>31</sup> Sara Reardon, "NIH reiterates ban on editing human embryo DNA", *Nature, Breaking News* (29<sup>th</sup> April, 2015), available at: <http://www.nature.com/news/nih-reiterates-ban-on-editing-human-embryo-dna-1.17452> (last visited on November 15, 2021).

accountability in the event of an unforeseeable occurrence, as well as assess the possible consequences. Understanding and implementing appropriate use of Gene Editing technology, as well as having mechanisms to safeguard, offer medical treatment and compensate from harm caused while conducting research, is a sound ethical practise.<sup>32</sup> All Gene Editing techniques and processes should be carried out in accordance with established guidelines and ensure transparency and reliability, equally. Implementation must be preceded by procedures subjected to a rigorous scientific and ethical evaluation, as well as a peer review process to ensure the most up-to-date understanding. To the degree practicable, all the stakeholders underline a shared obligation to ensure participant's safety and well-being and connected risks are minimised.<sup>33</sup> The research findings, whether favourable or negative, must be published in journals as soon as possible and made publicly available data's such as the "**Clinical Trial Registry-India (CTRI)**."<sup>34</sup> It is necessary to make efforts to communicate results and facilitate their translation for the benefit of others.<sup>35</sup>

### **VIII. Informed Consent and Scope for Counselling**

Adequately informed and understood consent is a prerequisite for conducting any type of experiment, and it must improve voluntary decision-making without the appearance of coercion. This is the most critical factor for any type of biomedical study, but it is especially related to new technologies.<sup>36</sup> The information should be delivered and disseminated in a simple and comprehensible language. Genetics terminology is often difficult to comprehend and contains technicalities which could be misunderstood if left without proper explanations. Genetic testing must be followed by non-directed pre-post counselling to explore the options, limitations, and likely consequences and to facilitate understanding and voluntary consent which has to be provided without any undue influence or

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<sup>32</sup> Marcy Darnovsky, Nathaniel Comfort, *et. al.*, "CRISPR Regulation", *Issues in Science and Technology*, 5-12, Vol. 35, No. 4 (2019).

<sup>33</sup> *Supra* note 24, at 4.

<sup>34</sup> *Supra* note 24, at 18.

<sup>35</sup> *Supra* note 24, at 4.

<sup>36</sup> R. Isasi, E. Kleiderman, *et. al.*, "Editing policy to fit the Genome?", *Science, New Series*, 337-339, Vol. 351, No. 6271 (2016), *available at*: <https://www.jstor.org/stable/24741334> (last visited on January 19, 2021).

coercion.<sup>37</sup> There should be adequate chances of denial or acceptance to participation and even in case of participation, you should be able to withdraw at your own stance. It is often critical to disseminate all details about potential adverse effects, many of which may be unknown based on current knowledge. The procedure should not be rushed, allowing enough of time and opportunity to talk about it in private. The research has to be organised in a way culturally acceptable and language easily understood; and preferably by those who can commit gently and provide appropriate answer to the doubts, may be by a genetic counsellor or a lead investigator. Informed consent is a process, which is beyond a piece of paper and the interaction must undertake throughout the study.<sup>38</sup> Research experiments must involve strict compliance and cautious approach while receiving consent.<sup>39</sup>

### **IX. Bridge between Public Trust and Science and Technology**

The scientists and society, both are critical, without which giving effect to positive change would be impossible. The Gene Editing benefits can be gained, when ethical issues get addressed up front, and communication gets enhanced and carried out in a way that is easily understood by the general public. To effectively communicate science, you'll need skills, enthusiasm, and initiative to unravel its complexity. Researchers, doctors, bioethicists, ethical committees, legal experts, social scientists, research institutions, and policymakers must examine all the concerns surrounding Gene Editing in depth.<sup>40</sup> To progress in the use of technology for the greater good, efforts must be made to comprehend, connect, properly disseminate and create a public conversation in which all the advantages and drawbacks may be explored.<sup>41</sup> Fair, honest, and open talks are required, as well as the use of various advocacy venues. Understanding local sentiments, practises, or religious beliefs which may impact public decision is critical at this time. An open discourse will aid in improving knowledge, dispelling doubts, and ultimately fostering faith in technology. Typically,

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<sup>37</sup> *Supra* note 24, at 113.

<sup>38</sup> Roli Mathur, "Gene Editing - Ethical Pathways to Connect Science & Society", *Asian Biotechnology and Development Review*, 43, Vol. 23 No. 1 (2021).

<sup>39</sup> *Supra* note 24, at 114.

<sup>40</sup> Brendan P. Foht, "Gene Editing: New Technology, Old Moral Questions", *The New Atlantis*, 3-15, No. 48 (Winter 2016).

<sup>41</sup> *Supra* note 24, at 11.

researchers and scientists develop technology in laboratories and present their findings but these findings relate to a tiny audience but not the general public.<sup>42</sup> It is necessary to make efforts to engage with the general public by translating these discoveries into a simple form or style that is relevant to bigger audience. All the parties must work jointly to identify methods to engage the public, which has to start from the beginning of the project. They must discuss the plan's specifics, predicted outcomes, potential constraints, methods, and result into benefits. Furthermore, a conversation on how to ensure trust, eliminate unneeded stress and assure positivity must be held. Another factor to consider is that public trust does not develop overnight, and that engagement is a process that is determined by how frequently and successfully scientists communicate and respond to the public in an understandable language. Open public debates at the regional level, broader stakeholder meetings, generating advocacy, connecting with social media, such as newspaper articles or television channels, are some of the techniques that have proven to be effective. Public Trust can be assured by the community, if significant efforts are initiated in a culturally sensitive way while conducting research.<sup>43</sup>

#### **X. Technology Access and Distributive Justice**

Another significant responsibility must be to ensure measures that could make Gene Editing technology available to those who require it. At this time, no one knows if this will be an extremely expensive technology that will only be available to a select few who will benefit.<sup>44</sup> Is it really ethical if the technology is only available to a few privileged people while the rest remain mainly uninformed of it and have limited resources to acquire it? It's critical to debate which applications of technology are permissible and for whom. How will folks be able to get their hands on these? What are the options for ensuring equal access? There is the task of making technology acceptable and dispelling unfounded fears, and also ensuring that technology is equitably and beneficially enjoyed by all. Proper investments are required to accelerate the technological development so that it could be easily accessible and inexpensive to people who require them. In India, the government agencies as well as other sponsors are

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<sup>42</sup> *Supra* note 38, at 44-45.

<sup>43</sup> *Supra* note 24, at 141.

<sup>44</sup> Rama Devi Mittal., "Gene Editing in Clinical Practice: Where are We?", *Indian J. Clin. Biochem.*, 19-25, 34(1) (2019).

expected to provide significant funding for the progressive research while also educating, training, benefiting, and developing advocacy tactics to improve comprehension and, ultimately, acceptability.<sup>45</sup> It is also critical to ensure that India advances and is able to meet the country's needs after the fruits of research have blossomed. There is a commercialization and profiteering component to the technology because most genetic testing is extremely expensive and only available at a few specialised institutes.<sup>46</sup> Despite the fact that the technology is not expensive in and of itself, the commercial potential for treating a range of significant genetic illnesses, malignancies, and other polygenic diseases has piqued the interest of private players. As science progresses toward providing individualised medication to humans, the technology risks being limited to those who can pay it. To protect ethics and initiate equity and access to breakthrough technologies to sustain mankind, all of these problems must be discussed on a larger scale.<sup>47</sup>

### **XI. Capacity Building and Collaborative Research**

Only a few institutions have the facilities and mandate to conduct extensive Gene Editing research.<sup>48</sup> Unless further chances arise, the influential people will reap the benefits from the technology and qualified labour will remain scarce to work with novel research approaches. Institutions must provide a supportive enhancement to promote breakthrough research, as well as create an environment for inventive work, scientific exploration independence and infrastructure solving the purpose. Institutional assistance with regards to policy making and leadership is critical in encouraging people to engage in research and development. Investments in lab work may be required to initiate assistance, training, collaborations, resource sharing, and exchanges of ideas. Specific objectives, cooperation, roles and duties, data sharing, publications, patents etc. must be ascertained when there is a collaborative research.<sup>49</sup> The government

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<sup>45</sup> *Supra* note 24, at 8.

<sup>46</sup> *Supra* note 38, at 46.

<sup>47</sup> Andrew W. Torrance, "CRISPR Becomes Clearer", *The Hastings Center Report*, 5-6, Vol. 47, No. 5 (September-October 2017), available at: <https://www.jstor.org/stable/26628303> (last visited on January 19, 2021).

<sup>48</sup> *Supra* note 38, at 47.

<sup>49</sup> The National Academies of Sciences, Engineering, and Medicine, *Human Genome Editing: Science, Ethics, and Governance* (USA, 2017).

must develop the research on Gene Editing techniques and build connections for bench to bedside including medical personnel.<sup>50</sup> All parties must now work together to establish communication, develop collaboration, and build trust.<sup>51</sup> Because this is a new field, more scientists and medical professionals may be required to collaborate in order to explore ways to improve human health while adhering to proper regulatory and ethical considerations.<sup>52</sup>

## **XII. The Need for an Indian Legal Framework**

The governance of Gene Editing involves a number of parties. Various institutions, committees, sponsors, regulators, government agencies and everyone else associated with conduct, review and monitor research are all affected. The policy framework must be designed in that way which promotes high-quality research, assists in translating advantages to the general public, and regulates, monitors, and protects the general public's interests. There is a need to assess the frameworks which regulate technology in order to support public-interest. Despite lack of clear rules, there are principles and regulations in place that would make it easier to regulate Gene Editing research and uses.<sup>53</sup>

Speaking of India, "*The Rules for the Manufacture/Use/Import/Export and Storage of Hazardous Microorganisms, Genetically Engineered Organisms or Cells, 1989*"<sup>54</sup> (known as the Rules, 1989) govern the Gene Editing technology. "**The Ministry of Environment, Forest and Climate Change (MoEFCC)**" enumerated these Rules in order to provide for a legislation with holistic framework to protect and preserve the environment under "**The Environment**

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<sup>50</sup> *Supra* note 24, at 124-125.

<sup>51</sup> Steven Pinker, "The moral imperative for bioethics", *The Boston Globe*, available at: <https://www.bostonlobe.com/opinion/2015/07/31/the-moral-imperative-for-bioethics/JmEkovzITAu9oQV76JrK9N/storv.html> (August 1, 2015) (last visited on November 15, 2021).

<sup>52</sup> *Supra* note 24, at 21.

<sup>53</sup> Murali Krishna Chimata and Gyanesh Bharti, "Regulation of Genome Editing Technologies in India", *Transgenic Research*, 175–181, 28 (2019).

<sup>54</sup> Ministry of Environment and Forests, "*The Rules for the Manufacture/Use/Import/Export and Storage of Hazardous Microorganisms, Genetically Engineered Organisms or Cells, 1989*", (December 5, 1989), available at: <http://www.indiaenvironmentportal.org.in/content/453231/rules-for-the-manufacture-use-import-export-and-storage-of-hazardous-micro-organisms-genetically-engineered-organisms-or-cells/> (last visited on August 26, 2021).

**(Protection) Act, 1986 (the EPA, 1986).**<sup>55</sup> Consecutively, various regulatory authorities, time and again, have set out guidelines and norms to address all such possible challenges which are imposed by modern Biotechnology. The Rules, 1989 provide for the competent authorities, their composition, powers and functions.<sup>56</sup> Accordingly, there are six competent authorities at present:

**Table 1:** Competent Authorities under “The Rules for the Manufacture/Use/Import/Export and Storage of Hazardous Microorganisms, Genetically Engineered Organisms or Cells, 1989”<sup>57</sup>:

<u>Name of the Authorities</u>	<u>Role of the Authorities</u>
The Recombinant DNA Advisory Committee (RDAC)	Advisory
Institutional Biosafety Committee (IBSC)	
Review Committee on Genetic Manipulation (RCGM)	Regulatory/ Approval
Genetic Engineering Approval Committee (GEAC)	
State Biotechnology Coordination Committee (SBCC)	
District Level Committee (DLC)	Monitoring

The use of Biomedicine in India is primarily administered by the “**Indian Council of Medical Research (ICMR), Department of Biotechnology (DBT) and Central Drug Standards Control Organization (CDSCO)**” Guidelines and

<sup>55</sup> Murali Krishna Chimata and Gyanesh Bharti, “Regulation of Genome Editing Technologies in India”, 175-181, 28 *Transgenic Research* (2019), available at: <https://doi.org/10.1007/s11248-019-00148-z> (last visited on August 24, 2021).

<sup>56</sup> Vibha Ahuja, “Regulation of Emerging Gene Technologies in India”, *BMC Proceedings*, 5-11 (2018).

<sup>57</sup> Ministry of Environment and Forests, “*The Rules for the Manufacture/Use/Import/Export and Storage of Hazardous Microorganisms, Genetically Engineered Organisms or Cells, 1989*”, 2-5, (December 5, 1989), available at: <http://www.indiaenvironmentportal.org.in/content/453231/rules-for-the-manufacture-use-import-export-and-storage-of-hazardous-micro-organisms-genetically-engineered-organisms-or-cells/> (last visited on August 26, 2021).

Regulations. The DBT has been empowered under Section 6<sup>58</sup>, Section 8<sup>59</sup> & Section 25<sup>60</sup> the EPA, 1986, adhering to which, it has ascertained to upgrade the existing guidelines namely: “*Recombinant DNA Safety Guidelines, 1990*”<sup>61</sup> and “*Revised Guidelines for Safety in Biotechnology, 1994*”<sup>62</sup> in the areas of bio-safety. National and International consultations have been acknowledged by the DBT in the process of notifying new guidelines titled: “***Regulations and Guidelines for Recombinant DNA Research and Biocontainment, 2017***.”<sup>63</sup> These new guidelines are in replacement against the earlier ones. Wide scope of research, laboratory use, import/export, storage and handling, manufacture, disposal and emergency procedure and facility certification, all have been included in these guidelines.<sup>64</sup>

The Rules 1989 impose a duty upon the “***Institutional Biosafety Committees (IBSC’s)***” and host institutions involving research, development and handling of Genetically Engineered Organism, to comply with the rules, failing which, it

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<sup>58</sup> “Rules to Regulate Environmental Pollution”, the Environment (Protection) Act, 1986 (Act 29 of 1986), s. 6.

<sup>59</sup> “Person handling Hazardous Substances to comply with Procedural Safeguards”, the Environment (Protection) Act, 1986 (Act 29 of 1986), s. 8.

<sup>60</sup> “Power to make Rules”, the Environment (Protection) Act, 1986 (Act 29 of 1986), s. 25.

<sup>61</sup> Department of Biotechnology (DBT), “Recombinant DNA Safety Guidelines, 1990”, (January, 1990) available at: <https://biosafety.icar.gov.in/recombinant-dna-safety-guidelines-1990-2/> (last visited on September 15, 2021).

<sup>62</sup> Department of Biotechnology (DBT), “Revised Guidelines for Safety in Biotechnology, 1994”, (May, 1994), available at: <http://biochem.du.ac.in/web/uploads/30%20Guidelines%20for%20Safety%20in%20Biotechnology.pdf> (last visited on September 15, 2021).

<sup>63</sup> Department of Biotechnology (DBT), “Regulations and Guidelines for Recombinant DNA Research and Biocontainment, 2017”, (April 1, 2018), available at: [https://rcb.res.in/upload/Biosafety\\_Guidelines.pdf](https://rcb.res.in/upload/Biosafety_Guidelines.pdf) (last visited on August 26, 2021).

<sup>64</sup> Department of Biotechnology, Ministry of Science & Technology, Govt. Of India, “Office Memorandum: Regulations and Guidelines for Recombinant DNA Research and Biocontainment, 2017”, 1 (April 1, 2018), available at: [https://ibkp.dbtindia.gov.in/DBT\\_Content\\_Test/CMS/Guidelines/20181115134719867\\_Regulations-Guidelines-for-Reocminant-DNA-Research-and-Biocontainment-2017.pdf](https://ibkp.dbtindia.gov.in/DBT_Content_Test/CMS/Guidelines/20181115134719867_Regulations-Guidelines-for-Reocminant-DNA-Research-and-Biocontainment-2017.pdf) (last visited on August 26, 2021).

shall attract penal provisions under Sections 15<sup>65</sup>, Section 16<sup>66</sup> & Section 17<sup>67</sup> of the EPA, 1986.<sup>68</sup>

The Indian Council of Medical Research's (ICMR's) "**National Ethical Guidelines for Biomedical and Health Research Involving Human Participants, 2017**"<sup>69</sup>, "**National Guidelines for Stem Cell Research, 2017**"<sup>70</sup>, and "**National Ethical Guidelines for Biomedical Research Involving Children**"<sup>71</sup> has acknowledged the ethical aspects of Gene Editing technology. All clinical trials initiated to develop products must follow "**The Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetics Rules, 1945**"<sup>72</sup> and "**The**

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<sup>65</sup> "Penalty for contravention of the provisions of the Act and the rules, orders and directions", the Environment (Protection) Act, 1986 (Act 29 of 1986), s. 15.

<sup>66</sup> "Offences by Companies", the Environment (Protection) Act, 1986 (Act 29 of 1986), s. 16.

<sup>67</sup> "Offences by Government Departments", the Environment (Protection) Act, 1986 (Act 29 of 1986), s. 17.

<sup>68</sup> Department of Biotechnology, Ministry of Science & Technology, Govt. Of India, "Office Memorandum: Regulations and Guidelines for Recombinant DNA Research and Biocontainment, 2017", 1 (April 1, 2018), available at: [https://ibkp.dbtindia.gov.in/DBT\\_Content\\_Test/CMS/Guidelines/20181115134719867\\_Regulations-Guidelines-for-Reocminant-DNA-Research-and-Biocontainment-2017.pdf](https://ibkp.dbtindia.gov.in/DBT_Content_Test/CMS/Guidelines/20181115134719867_Regulations-Guidelines-for-Reocminant-DNA-Research-and-Biocontainment-2017.pdf) (last visited on August 26, 2021).

<sup>69</sup> Indian Council of Medical Research (ICMR), "National Ethical Guidelines for Biomedical and Health Research Involving Human Participants, 2017", (October, 2017), available at: [https://main.icmr.nic.in/sites/default/files/guidelines/ICMR\\_Ethical\\_Guidelines\\_2017.pdf](https://main.icmr.nic.in/sites/default/files/guidelines/ICMR_Ethical_Guidelines_2017.pdf) (last visited on August 25, 2021).

<sup>70</sup> Indian Council of Medical Research (ICMR) & Department of Biotechnology (DBT), "National Guidelines for Stem Cell Research, 2017", (October, 2017), available at: [https://main.icmr.nic.in/sites/default/files/guidelines/Guidelines\\_for\\_stem\\_cell\\_research\\_2017.pdf](https://main.icmr.nic.in/sites/default/files/guidelines/Guidelines_for_stem_cell_research_2017.pdf) (last visited on August 25, 2021).

<sup>71</sup> Indian Council of Medical Research (ICMR), "National Ethical Guidelines for Biomedical Research Involving Children, 2017", (October, 2017), available at: [https://main.icmr.nic.in/sites/default/files/guidelines/National\\_Ethical\\_Guidelines\\_for\\_BioMedical\\_Research\\_Involving\\_Children\\_0.pdf](https://main.icmr.nic.in/sites/default/files/guidelines/National_Ethical_Guidelines_for_BioMedical_Research_Involving_Children_0.pdf) (last visited on August 26, 2021).

<sup>72</sup> Ministry of Health & Family Welfare, Government of India, "The Drugs and Cosmetics Act and Rules", (April 10, 1940), available at: [https://cdsco.gov.in/opencms/export/sites/CDSCO\\_WEB/Pdf-documents/acts\\_rules/2016DrugsandCosmeticsAct1940Rules1945.pdf](https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/acts_rules/2016DrugsandCosmeticsAct1940Rules1945.pdf) (last visited on August 26, 2021).

*New Drugs and Clinical Trials Rules, 2019*<sup>73</sup>; which have provisions to regulate the new technology by CDSCO and also administer the conduct of clinical trials of new technology upon humans. The ICMR, CDSCO & DBT have jointly brought up a new “*National Guidelines for Gene Therapy Product Development and Clinical Trials (2019)*”<sup>74</sup> as well, which provides description of requirement for the research and clinical trials.<sup>75</sup> The guidelines also provide a flow chart that explains the step-by-step procedures to be followed, including review by the CDSCO committee on gene/genetic alteration and oversight by the various committee such as: “Institutional Biosafety Committee, Ethics Committee, Review Committee on Genetic Manipulation, Gene Therapy Advisory and Evaluation Committee.”<sup>76</sup> In India, in germline or *in utero* gene editing are currently forbidden, whereas somatic cell gene editing is permitted as part of a clinical trial study.<sup>77</sup> Before being filed to the CDSCO to be carried out as a clinical trial using a pre-clinical and clinical research model, the applications will need to be approved by multiple committees. Existing legal frameworks can be further modified and reinforced to assist Gene Editing technology and application. Within the regulatory system, there is a need to build expertise and capacity to tackle Human Gene Editing related concerns and guide against potential misuse of the technology. The government must make the necessary arrangements immediately to fund quality research studies through various grants, as well as ensure high-standard outputs; and also implement socially acceptable, ethical, legal and regulatory framework for monitoring this new technology.<sup>78</sup>

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<sup>73</sup> Ministry of Health & Family Welfare, Government of India, “The New Drugs and Clinical Trials Rules, 2019”, (March 19, 2019), *available at*: [https://cdsco.gov.in/opencms/export/sites/CDSCO\\_WEB/Pdf-documents/NewDrugs\\_CTRules\\_2019.pdf](https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/NewDrugs_CTRules_2019.pdf) (last visited on August 26, 2021).

<sup>74</sup> Indian Council of Medical Research (ICMR), Central Drugs Standards Control Organisation (CDSCO) & Department of Biotechnology (DBT), “National Guidelines for Gene Therapy Product Development and Clinical Trials, 2019”, (November, 2019), *available at*: [https://main.icmr.nic.in/sites/default/files/guidelines/guidelines\\_GTP.pdf](https://main.icmr.nic.in/sites/default/files/guidelines/guidelines_GTP.pdf) (last visited on August 25, 2021).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Supra* note 38, at 47-48.

### **XIII. Conclusion**

Human Gene Editing technology appears to be too valuable for humanity to pass up, but it also has unintended consequences that should not be overlooked. With medicinal interventions especially suited to certain problems, it is a rapid, affordable, and remarkably precise technique to eradicate hereditary abnormalities. Not surprise, these are exciting times for research, and they hold out hope for patients suffering from terminal diseases. The first step in pursuing Gene Editing is to bridge the gap between research and society with a framework that is governed by ethical values. It is critical to raise public awareness about various elements of Gene Editing, as well as among other stakeholders such as researchers, clinicians, doctors, regulators and policymakers. Because this is a new area, knowledge and comprehension among the medical community will be limited, and efforts will be required to improve this and stimulate study. This is a constantly changing topic, and we must learn as the research advances and new global experiences emerge to inform the development of standards and regulatory frameworks. Ensuing state-of-the-art quality research in India can lead to the development of safe, economically accessible, and trust-worthy technology, making it affordable to the general public. To serve social interests, techniques must be humane, and efforts must be made to stay up with technological advancements in order to fully utilise them through sufficient involvement and communication. Before commercial implementation of Gene Editing technology, more extensive studies upon the socio-ethical and technical elements are required.<sup>79</sup> Scientists can make an experiment work in a lab because the setting is so regulated and ordered, but in real world it might fail. In cutting-edge science and technology, this is especially true. Off-target effects of Gene Editing technology must be controlled by some means. Policymakers and bio-security specialists are grappling to spot out and assess the troubles and advantage these new technologies associate with; because policy responses would be inadequate and less productive without proper assessment. To summarise, National regulation of Human Gene Editing technologies (like CRISPR-Cas9) applications and commercialization is the best strategy to regulate the technology's societal implications in order to maximise public health benefits while minimising the potential of techno-racism or market-based

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<sup>79</sup> Kathleen M. Vogel & Sonia Ben Ouagrham-Gormley, "Anticipating Emerging Biotechnology Threats: A case study of CRISPR", *Cambridge University Press; Politics and the Life Sciences*, 203-219, Vol. 37, No. 2 (Fall 2018), available at: <https://www.jstor.org/stable/10.2307/26677575> (last visited on December 20, 2021).

eugenics. Human Gene Editing Technology may be impossible to halt,<sup>80</sup> but with enough foresight, countries may ensure that its use is focused on actual public health issues rather than what huge firms can pitch as problems that need to be solved with their products.

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<sup>80</sup> James Kozubek, "Crispr-Cas9 is Impossible to Stop", *Georgetown Journal of International Affairs*, 112-119, Vol. 18, No. 2 (2017).

## Challenges Before the Institution of Marriage in the Era of Globalisation

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### Abstract

*Globalisation has set off many social changes and has impacted upon the family in many ways posing a threat to the survival of the institution of marriage. This article discusses the many changes that the institution of marriage faces. Just as marriage is much more than just an institution for legitimate sexual relations, "globalization" too is a phenomenon that involves much more than just the economic dealings between the developed and developing nations. Modern cultural values such as expressive and utilitarian individualism cannot sustain marriage without a public theology of covenant and subsidiarity that defines marriage not only as a deeply meaningful personal and spiritual relationship but as a public institution. Today the question is what kind of institutional support does marriage need. Can we do away with the institution of marriage? The 19th-century antidote to the negative impact of the market on family life was the family model of the breadwinning father and domestic and economically dependent mother is no longer tenable. The 19th-century divided spheres, paternal authority, and power hierarchy should be put at rest. A middle position of a complex cultural transformation to support marriage and a solution for the tensions between work and family wrought by the forces of modernization is the need of the hour.*

**Key words:** *Concept of Marriage, Family, Globalization and Private International Law.*

### I. The Canvas

Marriage is an important social institution of the civilised world. It gives rise to change of status -that of bachelor to "husband", maiden to "wife", and "legitimate" and "Legitimated" (those who are conferred legitimacy under the law of the land) children. Process of globalisation and modernisation has given rise to several possibilities of conceptual changes regarding family that have the potentiality of threatening the stability of the family and quality of marriage.

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Marriage is the coming together of not only two individuals of the opposite sexes and all that it entails, these two individuals also represent two distinct cultures, family traditions and values. On marriage, these two people pass on the combined (or should we say hybrid?) wisdom of their own traditions and experiences to their next generation. This is the basic unit of human society,

In a world where the concept of individual freedom is obtaining ever greater significance in people's lives, the challenges that come with marriage, involving people needing to go beyond their stereotypes, defined comfort zones, has led to an increasing number of people opting out of marriage or staying out of wedlock. Empowerment and education has enabled the women and men alike to make informed choices, express defined needs, and decide on preferred attitudes and lifestyles. Especially in today's world of integration, marriage means the coming together of people with completely different cultural backgrounds age differences, values etc. that may not conform to the so called societal norms. However, the breaking up of families is not a sign of the invalidity of marriage or the family. In a world of changing values, the family, is being restructured. It now requires that those stepping into this fundamental social unit to be more mature and wiser and capable of making informed choices. Gone are the days when the parties to the marriage (specially girls) were merely informed that their marriage has been fixed with "so and so" and "your parents know what is best for you". This is the wisdom that the current generation of parents needs to accept and encourage and pass down to their children.

Just as marriage is much more than just an institution for legitimate sexual relations, "globalization" too is a phenomenon that involves much more than just the economic dealings between the developed and developing nations. What some might label as the "abusive" relations between the "haves" and "have-nots" in today's world should not cause people to want to stop and drop the progress that is being made. Globalisation has the immense potentiality for homogenisation. It can undo hetero culturalism. Give rise to identity crisis of the individuals, extinction of distinct races and cultures.

Globalisation can therefore change the traditional cultural approach to marriage. It will do away with old stereotypes and values. Since it will take some time to adjust to these changes there will be more conflicts of interest. Perhaps personal awareness brought through education, need to be sought after.

Human life is a process of growth and development, and there are certain pains involved when one has to go beyond the comfort zone that one has gotten accustomed to.

Education, employment and empowerment has led to many women being employed. In the event of both spouse being employed, a considerable time is spent in the work place or being apart from each other in two far off places. A person turns to a co-worker to share emotions and alleviate loneliness, in many cases leading to emotional alignment or extramarital relationships. In such situations the marriage may break or subsist with each of the partners continuing with their relationships out of wedlock.

## II. Concept of Marriage

Marriage may be stated to be a voluntary union between two persons to the exclusion of all others. Usually the union is perceived to be between man and woman. But same sex marriages are no strangers.

<b>WESTERN CONCEPT</b>	<b>MUSLIM CONCEPT</b>	<b>HINDUS &amp; BUDDHIST CONCEPT</b>
Contract. Sacrament for the Roman Catholics.	Civil Contract	Sacrament
A monogamous union	Limited or controlled Polygamy	Polygamous prior to 1955 Monogamous after HMA, 1955
Non-dissoluble under Canon Law. Dissoluble under State law-Indian Divorce Act, 1869	Dissoluble under Customary Law & Dissolution of Muslim Marriage, 1939 ; Muslim Women (Protection of Rights on Marriage) Act, 2019	Dissoluble under Hindu Marriage Act, 1955

The union is monogamous for some, controlled and potentially polygamous for others and polyandrous for yet others. When person from these trans-border communities enter the institution of marriage there are cultural challenges. Because each community recognise different grounds of divorce there are

litigational complications. The formal validity of marriage and the material validity of marriage differ from country to country and community to community.

### **A. English Position**

In English law marriage is defined as a voluntary union between a man and a woman to the exclusion of all others. This definition leads to hardship in relation to polygamous marriages.

In *Hyde v. Hyde*<sup>2</sup>, a husband of a potentially polygamous Mormon marriage performed in Utah, petitioned for divorce in an English court. After renouncing his faith, the groom became a dissenting minister at Derby, and the wife remarried. The English court refused to recognise polygamous union and did not make available their matrimonial jurisdiction to the case.

In *Harvie v. Farnie*<sup>3</sup> the Court of Appeal took an extreme view that polygamous marriages could not be recognised for any purpose. According to the judges, the nature and incidence of marriage is determined by *lex loci celebrationis* and the characterisation of marriage whether it is monogamous or polygamous is determined by *lex fori*. Even if there was a possibility of converting a polygamous marriage into a monogamous marriage, due to the potentially polygamy marriage remained a polygamous union and could not thus be recognised.

The English courts did not even recognise those marriages where the personal laws permitted only monogamous marriage but allowed concubines holding them to be polygamous in nature<sup>4</sup>. If the person whose personal laws allowed only monogamous marriage but the person got married in a place where polygamous marriage is prevalent the English courts still did not recognise such a marriage<sup>5</sup>.

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<sup>2</sup> L. R. (1866)1P. M. 130.

<sup>3</sup> L. R. (1880) 6 P & D 35 on appeal (1882) 8 A. C. 43.

<sup>4</sup> *Lee v. Lau*, (1964) 2 All E. R. 248.

<sup>5</sup> *Re Bethelle*, (1887) 38 Ch. D. 220, where a marriage solemnized between a Englishman domiciled in Bechuanaland married a woman belonging to Barlong tribe was not recognised by an English court. However a contrasting view was taken by Lord Denning in *Kenward v. Kenward*, (1951) held that a marriage solemnized in a polygamous form in a country where polygamy is lawful between a domiciled Englishman and a woman

However, a contrasting view was taken by Lord Denning in *Kenward v. Kenward*, (1951) where he held that a marriage solemnized in a polygamous form in a country where polygamy is lawful between a domiciled Englishman and a woman domiciled there belonging to a community that recognizes polygamy should be recognised. After 1972, the English Courts recognise all monogamous marriages<sup>6</sup> and now it is not necessary that the union should be a “permanent union” all that is necessary for recognition now is that when entered into, it must be for an “indefinite duration” even if it is dissoluble in future at the instance of either or both of the parties. It is now a settled principle that whether a marriage is of a definite<sup>7</sup> or indefinite duration, Dissoluble or not it is governed by *lex loci celebrationis*.

### B. Indian Position

In India the institution of marriage is governed by personal laws which vary from sect to sect, religion to religion, hence there is no single or uniform concept of marriage.

RELIGION	CONCEPT
<b>HINDU</b>	Governed by the Hindu Marriage Act, 1955. Monogamous, sacrament with elements of contract. Marriage is dissoluble. Act applies to any two Hindus whether domiciled in India or not, whether Indian nationals or foreigners. May be solemnized by customary rites of either party to the marriage. The Act defines who is a Hindu
<b>Muslim</b>	Ibadat (prayerful submission) and a civil contract whose objective is procreation of children and legalization of children. Written contract is called Nikahnama. Muslims practice limited or controlled polygamy. Marriage may be solemnized between a Muslim and a kitabia. It may be sahih, fasid or kharij. Shias may enter into temporary marriage i. e. muta marriage. Marriage is dissoluble
<b>Christian</b>	Marriage solemnized under Christian Marriage Act, 1872. Marriage may be solemnized by a registrar or a priest

domiciled there belonging to a community that recognises polygamy should be recognised.

<sup>6</sup> Thus Chinese, Japanese, Jewish, Hindu marriages are recognised.

<sup>7</sup> Like mutha marriage among the shia muslims.

	licensed to do so. Marriage with a non Christian is permitted only under the Act. Marriage is dissoluble
<b>Parsi</b>	Monogamous union. A contract. A religious ceremony is also essential called Ashirbad. Regulated by Parsi Marriage and Divorce Act, 1936. Marriage can be performed between two Parsees. A Parsee cannot marry under any law during his life time if he has a spouse living. Marriage is dissoluble
<b>Jew</b>	A contract. A written contract is called Katuba. A religious ceremony is also essential. Marriage is dissoluble.
<b>Secular law</b>	Special Marriage Act, 1954. Any two persons may marry. Marriage is dissoluble.
<b>Foreign Marriage</b>	The Foreign Marriages Act, 1969 facilitates the marriage of an Indian national in a foreign country with another Indian National or a foreigner or a person domiciled in that country. The marriage is a contract, monogamous, registerable under the Act provided the marriage is valid under <i>lex loci celebrationis</i> . Marriage is dissoluble.

Since inter community, inter religious or inter caste marriages are not recognized under the respective personal laws but may be solemnized under the Special Marriage Act, 1954, direct conflict seldom occurs but is not unknown.

### III. Characterisation of Nature of Marriage

#### A. English Position

The most vexed questions are under which law the nature of marriage is to be characterized? Should it be personal laws of either parties, or pre-marriage domicile, or law of matrimonial home, or *lex loci celebrationis*.

It was decided by the English courts that *lex fori* decided the nature of marriage. So if a Muslim married at a registry office, then the marriage would be monogamous<sup>8</sup> and if an English man married in Pakistan then the marriage would be polygamous<sup>9</sup>.

<sup>8</sup> Russ v. Russ (1964) K. B. P. 135.

<sup>9</sup> Re Bethelle, (1887) 38 Ch. D. 220.

The English law has now come to recognise all the marriages both polygamous and monogamous under the Matrimonial Proceedings (Polygamous Marriages) Act, 1972. The Act empowers courts in England, Wales, Northern Ireland, and Scotland to grant matrimonial relief to parties of marriages whose legal system permits polygamy and irrespective of the fact whether the marriage was potentially polygamous or in fact polygamous<sup>10</sup>. And these provisions apply even when there is a spouse living.

It was held that existence of another spouse does not amount to bigamy<sup>11</sup>.

### **B. Indian Position**

The problem of characterisation occurs when one of the spouses converts to another religion. In such a situation, the question is what law applies under such a situation? The law applicable before conversion or the law after conversion?

Initially the court was of the opinion that the law of the religion after conversion applies<sup>12</sup>. However the opinion of the court changed in *Saeeda Khatun v. Ovedia*<sup>13</sup> when the court held that if both the spouses convert then they are governed by the law of the religion to which they are converted. However, if one

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<sup>10</sup> Sections 1, 2, 3 & 4 ; Now corresponds to Section 47, Matrimonial Causes Act, 1973  
Section 1 (1)- A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of marriage by reason only by reason only of that marriage was entered into under a law which permits polygamy. Sections 2 say the same thing in respect Scotland and Section 3 says the same about Northern Ireland.

Section 1 (2)- Defines "Matrimonial Relief" as:

- a. A decree of divorce, nullity of marriage, or judicial separation
- b. A decree under Section 14 of Matrimonial Causes Act, 1965 –Dissolution of marriage on presumption of death.
- c. An order under Section 8(willful neglect to maintain) and Section 14 (Alteration of maintenance agreement) of Matrimonial Proceeding for property Act, 1970.
- d. An order under Acts of 1965, 1970 and Divorce Reforms Act, 1969 with regard to above matters
- e. An order under Matrimonial Proceedings (Magistrates Court) Act, 1960.

All this is now Section 47, Matrimonial Causes Act, 1973.

<sup>11</sup> *R v. Sagoo*, (1975) K. B. P. 885.

<sup>12</sup> *Khambatta v. Khambatta*, AIR 1935 Bom. 5, *Nurjahan v. Tisanco*, (1941) 45 CWN 1047

<sup>13</sup> (1945) 49 CWN 754.

of the spouse convert, then the personal law prior to conversion apply. It is to be noted that all the personal laws allow divorce on the ground of conversion.

Under the Native Convert's Dissolution of Marriage Act, 1886, if one of the native spouse belonging to Hindu or Parsi community converts to Christianity, and on account of this if the other abandons him or deserts him for six months or more, then a decree of divorce can be passed on the petition of the convert-spouse. If the respondent is wife, then the court allows her one year's time to enable her to convert to the religion of the husband or cohabit with her husband. If she fails, the divorce is granted.

#### **IV. Characterisation of Validity of Marriage**

The issue of validity of marriage has two aspects:

1. The parties to the marriage must have capacity to marry. This is called the essential or material validity of marriages
2. Parties must have performed the necessary ceremonies and rites of marriage. This is called the formal validity of marriage

If any of the above requirements is not fulfilled, the marriage is void. The question is by what law the formal and/or material validity is to be characterised? Moreover the same matter may be of formal validity in one country and of material validity in another<sup>14</sup>.

According to Graveson<sup>15</sup>, a functional test must be resorted to which will disclose the reason for a legal system to hold something as material in importance and others as mere formality. These requirements depend on the degree of public or social interest attached to it. Those practices which are considered to be important for maintaining a minimum standard in marital/family relationship is considered to be of material. They can be matters of consanguinity, religion, etc. Matters of less vital social interest would be issues like length of notice before marriage; number of witnesses is formal validity and depends upon the law of the place of celebration.

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<sup>14</sup> Ogden v. Ogden, (1908) L. R. P. 48, where parental consent was characterized as material validity in France but formal validity in England.

<sup>15</sup> Gravson, Conflict of law, p. 262.

Under which law the classification of marriage is to be made. Graveson says that it must be as per the law of domicile of each party to the marriage since material matters are determined according to their personal laws. Cheshire<sup>16</sup> opines that it should be determined by the law of matrimonial home. The English view is where either or both parties are English subjects the characterisation should be according to English law.

Now it is established that the material validity of a marriage in private international law is determined by law of domicile of each party at the time of marriage i. e. by pre marriage domicile and the formal validity of marriage is determined by the *lex loci celebrationis*.

#### **A. Material Validity of Marriage**

##### ***English Law***

As a general rule, capacity to marry is governed by the ante nuptial domicile of each party.

**i. Consent of Parties:** Consent of the parties to the marriage has been characterised as a matter of essential validity and is governed by ante nuptial domicile of each party.

**ii. Non-Age:** Age of marriage differs from country to country. A marriage will be considered valid if the age of consent is valid in the country of one of one of the parties, then the marriage will be considered valid.

**iii. Prohibited Degree:** Performance of marriage within prohibited degree of relationship is governed by the ante nuptial domicile of each party.

##### ***Indian Law***

Capacity is governed by various personal laws prevailing in India.

#### **B. Formal Validity of Marriage**

Formal validity of law is governed by *lex loci celebrationis*.

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<sup>16</sup> Cheshire, Private International Law, P. 277.

### C. Other Challenges

#### *The Challenge of Gay Marriages*

On 2 July 2009<sup>17</sup>, the Delhi High court decriminalised homosexual intercourse within its jurisdiction of the national capital between consenting adults and judged Section 377 of the Indian Penal Code violates the fundamental right to life and liberty and the right to equality as guaranteed by the Constitution of India. Even so, Indian views on sexuality remain widely very conservative, and homosexuality is generally considered to be a taboo. However, this verdict can only be considered as a temporary relief for the gay community in India. The main reason to consider this as temporary is because the then ruling UPA government did not have a strong stand in the issue.

Prime Minister Manmohan Singh said that legalizing homosexuality will not be appreciated in India as we are culturally very different society. Contrastingly the then Health minister under his government, Dr. Anbumani Ramadoss advocated decriminalizing homosexuality but he faced stern opposition from the home ministry. Even now after Delhi high court's verdict no one from the ministry gave direct support to the LGBT community. Today the government is like a cat on a wall on this issue. "The law is settled, either with or without the Navtej Johar case (a reference to the judgment decriminalizing homosexuality), personal laws are settled and marriage, which is contemplated, is between a biological man and biological woman," solicitor general Tushar Mehta told a bench of chief justice DN Patel and justice Jyoti Singh. The bench was also hearing a plea by three persons, Joydeep Sengupta, an OCI (overseas citizen of India), Russell Blaine Stephens, a US citizen, and Mario D'Penha, an Indian citizen and queer rights academic and activist pursuing a PhD at Rutgers University, for allowing a foreign-origin spouse of an OCI cardholder apply for registration regardless of gender or sexual orientation.<sup>18</sup>

Same-sex marriages are not legally recognised in India nor are same-sex couples offered limited rights such as a civil union or a domestic partnership. In 2011,

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<sup>17</sup> Naz Foundation v. Govt of NCT in Delhi and others, WP(C) No.7455/2001, Navtej Singh Johar vs Union of India Ministry of Law and justice on 6 September, 2018.

<sup>18</sup> <https://www.hindustantimes.com/india-news/samesex-marriage-plea-only-marriage-between-man-woman-valid-says-centre-in-delhi-high-court-101635188830742.html>  
Retrieved 10 February 2022.

a Haryana court granted legal recognition to a same-sex marriage involving two women<sup>19</sup> and it will not be long before India will have to recognise same sex marriages. That day the concept of marriage will undergo further transformation. The laws relating to marriage will require further evaluation.

And religion, why do religion come into the picture in a secular country while making law? India has Hindu Marriage Act, 1955; Christian Marriage Act, 1872; and Parsee Marriage and Divorce Act, 1936. And there is also the Special Marriage Act, 1954. As per the current marriage acts a person can get married as per the marriage act of their faith they belong to or under the Special Marriage Act, 1954. There is going to be no change in their marriage law even if a new LGBTQ Marriage Act is introduced. There are many instances when the cultural and religious protocols were broken when it was realized that they were gross mistakes (like polygamy, kulinism, widow remarriage). Now it's again time to make another mistake disappear. Reasons to legalize gay marriage are not limited and the LGBT community should not be marginalized.

In staunchly conservative India, where heterosexual marriage is viewed as a cornerstone of family structure, the thought of a same-sex couple raising a child once seemed unthinkable. But today surrogacy and adoption are encouraged and legally regulated practices. Recognising same sex marriages should not be a problem. For India's gay community, the joy that greeted the court ruling legalizing gay sex is tempered by the fact that, although the law now accepts them, society still does not.

For all the celebrations and talk of an historic milestone, many believe it will take more than a court decision to change public attitudes toward homosexuality, which is largely taboo in India even after the judgment of the apex court. Although the Delhi High Court's verdict has served as a morale booster for men and women who lived in constant fear of being criminalized, they say it is unlikely to encourage those in the closet to come out.

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19 *"In a first, Gurgaon court recognizes lesbian marriage - Times of India". The Times of India. Retrieved 10 February 2022.*

#### **D. The Challenge of “Living Together”**

In a nation that frowns on premarital sex and prefers arranged marriages, more young, unmarried couples are choosing to live together, oftentimes quietly. Though nascent, the “live-in” phenomenon is part of India’s huge social and economic transition and impact of globalisation.

Youngsters are leaving small towns and swarming the booming metropolises in search of employment. This demographic exodus is bringing about changes in social attitudes through its mobility. These young Indians are free not only to choose their careers and how they spend their money, but also to pick whom they love and decide whether to marry or live together.

In the landmark case of *S. Khushboo v. Kanniammal*<sup>20</sup>, the Supreme Court held that a living relationship comes within the ambit of *Right to Life* under Article 21 of the Constitution of India. The Court further held that live-in relationships are permissible and the act of two major living together cannot be considered unlawful or illegal.

In *Indra Sarma v. V.K.V. Sarma*<sup>21</sup>, the Supreme Court laid down the conditions for live-in relationships that can be given the status of marriage. A two-Judge bench of the Supreme Court constituting of K. S. P. Radhakrishnan and Pinaki Chandra Ghose held that “*when the woman is aware of the fact that the man with whom she is in a live-in relationship and who already has a legally wedded wife and two children, is not entitled to various beliefs available to a legally wedded wife and also to those who enter into a relationship in the nature of marriage*” as per provisions of Protection of Women from Domestic Violence Act 2005.

In a landmark judgement of *Dhannu Lal v. Ganeshram*<sup>22</sup>, the Supreme Court decided that couples living in live-in relationships will be presumed legally married. It was also held that the woman in the relationship would be eligible to inherit the property after the death of her partner.

Meanwhile, many of the old mores prevail in rural India. Young couples who fall in love, defying strict caste codes and their parents’ views, often face social

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<sup>20</sup> Criminal appeal no. 913 of 2010 (arising out of slp (crl.) No. 4010 of 2008].

<sup>21</sup> In the supreme court of India criminal appellate jurisdiction criminal appeal no. 2009 of 2013 @ special leave petition (Crl.) No.4895 of 2012).

<sup>22</sup> Civil Appeal No.3410 & 3411 of 2007.

ostracism and even honour killings. Despite the dramatic shift in attitudes among young Indians, their faith in the age-old tradition of arranged marriages endures.

### **V. Postscript**

Families, today, are disrupted by divorce, out-of-wedlock births, the emerging culture of non-marriage, and the increasing absence of fathers from their children. The collapse of marriage is also a contributing factor to world poverty. Modern cultural values such as expressive and utilitarian individualism cannot sustain marriage without a public theology of covenant and subsidiarity that defines marriage not only as a deeply meaningful personal and spiritual relationship but as a public institution. Today the question is what kind of institutional support does marriage needs. Can we do away with the institution of marriage? The 19th-century antidote to the negative impact of the market on family life was the family model of the breadwinning father and domestic and economically dependent mother. A strong antithesis to an unmitigated market economy today, however, cannot be sustained by this family model alone. The women's movement questions the subordination of women which this arrangement implies, and accepts the disruptions that market employment and market-driven consumption have visited on families. Increased divorce, later marriages, more single parenthood, and stepfamilies are seen simply as "family change" and fitting tradeoffs for the increased freedom and autonomy of women. Some Social scientists differ as to the societal options before this dilemma. Some say there is little to do to stem the tide of family disruption. Society must provide social supports for disrupted families. Others call for a return to the 19th-century divided spheres, paternal authority, and power hierarchy. Yet others suggest a middle position of a complex cultural transformation to support marriage and calls for a solution of the tensions between work and family wrought by the forces of modernization. Religion is dispensable for a solution that goes beyond the tendency of modern life to reduce problem-solving to the right set of technical and economic fixes.

## Women Refugees and Their Unrecognised Plights in International Refugee Law Regime: A Critical Analysis

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Tanmoy Roy<sup>2</sup>*

*“We cannot effectively protect refugee women if we are not ready to combat  
gender discrimination globally”*

*..... IDLO Director General Irene Khan<sup>3</sup>*

### Abstract

*Despite being a considerable figure among the worldwide recorded refugees, women refugees appear to be the most neglected and unrecognized groups. The ‘refugee’ definition enumerated in the 1951 Refugee Convention does not explicitly recognise ‘gender’ as a basis for conferring of refugee status. Consequently, ‘persecution’ on the ground of one’s gender is still considered ineligible for refugee status determination. The Regional Refugee Conventions, even though expansive and wide-ranging in nature, also do not seem to be gender conscious. While all refugees face violence during the course of their flights and as a result of their exile, refugee women are additionally susceptible to gender-based violence in addition to the general trauma and torment. Rape, sexual atrocities, female genital surgery, domestic violence, forced impregnation, forced abortion, forced sterilization, unjustified demand of sexual favours and many more have become the intrinsic part of their lives. That apart, discrimination and disparity surround them in every aspect of their life as refugee. It is true that international community and Refugee Status Determination authority (RSD authority) have started adopting some lenient approach towards women victim of persecution. But instead of recognising their*

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<sup>3</sup> Barbara Prammer Symposium on ‘WOMEN, REFUGEES, SOLIDARITY’ addressed by Irene Khan, Director-General, International Development Law Organization, January 18, 2016, Vienna, Austria, (last visited on July 31, 2021), <https://www.idlo.int/news/speeches-and-advocacy/women-refugees-solidarity>.

*rights regime, sympathy and leniency have very little role to play and would not serve the fruitful purpose in the long run. Time has come to introduce gender centric asylum jurisprudence by specifically recognising gender based violence within the ambit of 'persecution'. Thus, it has become the need of the hour that in addition to the enumerated five grounds of persecution, the ground of 'sex' should be explicitly and specifically included in the definition of 1951 Refugee Convention. Beside this, the area of education of women refugees and girl child, the health needs of refugee women, their financial dependence and associated exploitation in the employment sector cause burning sensation that require special emphasis. Through this research paper, attention is also drawn to specify the need for their inclusion in the overall design, implementation of global refugee policy, the national legislation and policy frameworks in this regard and other allied issues.*

**Keywords:** - *Asylum, persecution, honour crime, forced displacement, male chauvinism*

## **I. Introduction**

In today's contemporary world, people are on the move owing to myriad reasons such as armed conflict, internal strife, ethnic cleansing, state repression, human rights violation, mere poverty or hunger and many others leading to persecution.<sup>4</sup> According to the recent data of UNHCR<sup>5</sup>, at the end of 2020 there are total 82.4 million forcibly displaced people worldwide. Among them, 26.4 million are recognized as refugees and 4.1 million people are recorded as asylum seekers.<sup>6</sup> What is more stunning and astonishing is that among these data of worldwide recorded refugees, almost half of them are women.<sup>7</sup> Thus, women and girls constitute half of the world's refugees today. It was reported that despite this, just 4% of project initiatives in UN inter-agency appeals in 2014 were directed

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<sup>4</sup>V. Suryanarayan, *Refugee Dilemma: Sri Lankan Refugees in Tamil Nadu* 14 (Prabhat Prakashan, New Delhi, 1<sup>st</sup> edn., 2019).

<sup>5</sup>UNHCR, "Refugee Data Finder", <https://www.unhcr.org/refugee-statistics/> (last visited on July 22, 2021).

<sup>6</sup> *Ibid.*

<sup>7</sup>UNHCR says, "women represent 51 per cent of populations in refugee camps, worldwide. There are approximately 50 million uprooted people around the world who have sought safety in another country and people displaced within their own country. Between 75 and 80 percent of them are women and children". Originally taken from: Aliva Mohanty, *Women Refugees of India: Risks and Challenges* 28 (Kunal Books, New Delhi, 2018).

towards women and girls, and only 0.4% of total financing to fragile nations went to women's groups or ministries from 2012 to 2013.<sup>8</sup> However, programmes meant to protect and help refugees and migrants frequently overlook and ignore the needs, interests, and concerns of women refugees. History is a witness to the fact that women members of the society are easy prey of victims in almost each and every global crisis despite their important, crucial and caring role in sustaining and nourishing their communities. Now so far as refugees are concerned, it is often said that women refugees constitute a 'doubly-disadvantaged' and 'doubly-vulnerable' category of persons due to their tender and weaker position in case of exploitation and their traumatic refugee status. It is rightly said that "while refugees in general may be exposed to violence associated with exile, refugee women are particularly vulnerable to gender based violence".<sup>9</sup> The basic fact which goes to the root is that women experience and encounter conflict and displacement differently than males and have their own unique needs. For male and female members, the experience and trauma of forced displacement and relocation has varied ramifications. Despite the fact that female and male members of this group usually face the human rights violation of the same connotation, this human rights infraction often take distinct and diverse forms for male and female victims according to their gender roles.<sup>10</sup>

Under the above backdrop, the present authors venture to explore the domain of women refugees in international refugee law regime, recognition of rights of women as refugees in the international arena, role of UNHCR in the recognition and protection of women refugees and their vulnerability and plights in various spheres of their traumatic life. Further, the authors also attempt to suggest several measures to uplift their status so that they can play their due role in concerned policy making and implementation.

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<sup>8</sup>UN Women, "Women Refugees and Migrants", <https://www.unwomen.org/en/news/in-focus/women-refugees-and-migrants> (last visited on July 22, 2021).

<sup>9</sup>Snehal Fadnavis, *Women Refugees in India: Problems & Perspectives* 12 (Dattsons Publications, Nagpur, 1<sup>st</sup> edn., 2007).

<sup>10</sup>ALIVA MOHANTY, *WOMEN REFUGEES OF INDIA: RISKS AND CHALLENGES*, 23 (Kunal Books, New Delhi, 2018).

## II. Women Refugees and International Refugee Law Regime

In ordinary usage, the term ‘refugee’ denotes ‘someone in flight’ in order to escape some unbearable or unendurable conditions or personal circumstances. ‘*Black’s Law Dictionary*’ has defined the term ‘refugee’ as “*a person who flees or is expelled from a country, especially because of persecution, and seeks haven in another country*”.<sup>11</sup> The ‘*Encyclopaedia of social sciences*’ defines a ‘refugee’ as “*an involuntary migrant, a victim of politics, war or national catastrophe*”.<sup>12</sup> In short, it depicts that person “*who is forced to flee his or her home for any reason for which the individual is not responsible, be it persecution, public disorder, civil war, famine, earthquake or environmental degradation*”.<sup>13</sup> Thus in general and ordinary usage, the term ‘refugee’ is gender neutral and have no bearing on one’s gender.

Now so far as international legal instruments are concerned, the main and prominent international instruments pertaining to refugees emerge in the form of “Convention Relating to the Status of Refugees” of 1951<sup>14</sup> and the “Protocol Relating to the Status of Refugees” of 1967<sup>15</sup>. Apart from that, one can find several regional international instruments pertaining to refugees for their protection and recognition in the international arena. However, till date the 1951 Refugee Convention along with 1967 Protocol form the bedrock of international refugee law domain and is construed as the cornerstone of international refugee law regime. The 1951 Convention defines the term ‘refugee’<sup>16</sup> and thereby sets-out the criteria for determining the refugee status of an asylum claimant,

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<sup>11</sup> Bryan A. Garner (ed.), IX *Black’s Law Dictionary*, (Thomson Reuters, U.S.A, 2009).

<sup>12</sup> Dr. N. SUBRAMANYA, HUMAN RIGHTS AND REFUGEES, 1 (APH Publishing Corporation, New Delhi, 2011).

<sup>13</sup> *Supra* note 8 at 6.

<sup>14</sup> Adopted on 28<sup>th</sup> July 1951 by the United Nations under General Assembly resolution 429 (V) of 14<sup>th</sup> December, 1950. In accordance with Article 43 of this Convention, it entered into force on 22<sup>nd</sup> April, 1954.

<sup>15</sup> The Protocol Relating to the Status of Refugees was adopted by the U.N. General Assembly on 31<sup>st</sup> January, 1967 and it entered into force on 4<sup>th</sup> October, 1967.

<sup>16</sup> Article 1A (2) of the Convention Relating to the Status of Refugees, 1951.

enumerates their rights and the corresponding obligations of contracting receiving states.<sup>17</sup>

Subsequently, through 1967 Refugee Protocol the temporal and geographical limitation and barrier of the 1951 Convention got removed and the said 1951 Convention was given a universal coverage and application and the terms “as a result of events occurring before 1<sup>st</sup> January, 1951” was removed from the Convention definition of refugee.

Now if we try to analyse the definition of the 1951 Refugee Convention, then certain characteristics emerge therefrom: -

- a) the person must have a well-founded fear of persecution; and
- b) such persecution must arise on account of one’s race, religion, nationality, membership of a particular social group or political opinion; and
- c) such person must be outside the country of his origin or in case of stateless persons that person must be outside the country of his former habitual residence; and
- d) such person must be unable or unwilling to avail himself of the protection of that country or habitual residence owing to such fear of persecution<sup>18</sup>

Thus, it is evident from the 1951 Refugee Convention that the ground of ‘gender’ is not featured in the enumerated reasons of ‘persecution’ and consequently persecution on the ground of one’s gender is considered ineligible for refugee status determination or conferring refugee status upon the prospective

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<sup>17</sup>According to the definition of the term ‘refugee’ as contained in 1951 Refugee Convention, a person shall be construed as refugee who “as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

<sup>18</sup>V. Vijayakumar, “Refugees and Human Rights: International and National Experiences” in Chiranjivi J. Nirmal (ed.), *Human Rights in India: Historical, Social and Political Perspectives* 177 (Oxford India Paperbacks, 2002).

applicant.<sup>19</sup> It is said that at the time of the passage of Refugee Convention or during its drafting, women's rights were not fully recognised and it was improperly appreciated. Later it came under serious attack from the feminist groups across the world community that the drafters of the Refugee Convention turn a deaf ear to this whole issue. It is true that international instruments pertaining to refugees does not make any distinction between male and female refugees. Even a women victim of persecution is considered fit and eligible to get refugee status if she is able exhibit or establish her fear of being persecuted on the five enumerated grounds of 1951 Convention before the concerned RSD authority. Thus asylum claim of a female applicant have no bearing with her gender.<sup>20</sup> As has already been mentioned that feminists have criticised the 1951 Geneva Convention for failing to include gender as a crucial factor in refugee assessment. A number of subsequent instruments also make it evident that the drafters or plenipotentiaries solely had male victims in their mind. In reality, decades of refugee-related treaty regime have kept their focus only on male counterparts.

According to one U.N Report of 1980, “*women constitute half of the world population, perform nearly two-third of the world’s work, receive one tenth of the world’s income and own less than one hundredth percent of world’s property*”<sup>21</sup>. It was realized that women are subject to discrimination in almost every walks of life.<sup>22</sup> ‘Amnesty International’ aptly expressed this scenario by

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<sup>19</sup> It is a basic fact that “the refugee definition does not specifically refer to gender as a basis for conferring of refugee status”. Originally taken from: Snehal Fadnavis, *Women Refugees in India: Problems & Perspectives* 13 (Dattsons Publications, Nagpur, 1<sup>st</sup> edn., 2007).

<sup>20</sup> B.S. CHIMNI (ED.), *INTERNATIONAL REFUGEE LAW: A READER* 42 (Sage Publications, New Delhi, 2000).

<sup>21</sup> Dr. Sachi Chakrabarty, “Women’s Right to Property in India: An Appraisal with special reference to Matrimonial Property” 1 Cal LT 20 (2013).

<sup>22</sup> Former UN Secretary General, Kofi Annan was of the view that “Violence against women is perhaps the most shameful human rights violation, and it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace”. Amnesty International, “Women’s Rights: Human rights education activities for use in teaching Personal Social and Health Education, Citizenship and English for ages 11 – 18”, available at:

observing that “*women are faceless masses filling backgrounds on the canvas of terror and hardship. Whatever legislation or political effort, gender discrimination and violence in the form of battering, physical, sexual or psychological is an international reality*”<sup>23</sup>. Although Universal Declaration of Human Rights of 1948 had guaranteed universal human rights to all including women without any sort of discrimination and inequality. Article 2 of the UDHR, 1948<sup>24</sup> in clear and explicit tone had recognized this and prohibited any sort of distinction in respect of the enjoyment of rights and freedoms guaranteed under this Declaration. A perusal of the above-mentioned Article of the UDHR would reveal that sex is one of the prohibited ground. But this declaration although of great importance has actually failed to gain ground for women members of the society probably on account of its non-binding and declaratory character. Gradually feminists across the world emphasized on separating women’s rights from universal human rights.<sup>25</sup> Gradually a specific need was realized that women should be singled out as a category or group of people who require particular focus and protection. It is a harsh reality that while refugees in general face prejudice and unbearable or insurmountable torment, women refugees in particular used to bear the additional burden of countless sexual atrocities, deprivation and inequality owing to their gender over extended periods of time from crossing the borders to taking shelter in refugee camps and even in case of repatriation or re-integration process.

After 1951 Convention and its connected 1967 Protocol, the regional refugee law instruments also committed the same omission while expanding the definition of the term ‘refugee’. It is true that the subsequent regional instruments pertaining

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<https://www.amnesty.org/download/Documents/SEC0100112013ENGLISH.PDF> (last visited on July 31, 2021).

<sup>23</sup>Amnesty International Campaign on Women’s Human Rights, 8<sup>th</sup> March, 1995. Originally taken from: Aliva Mohanty, *Women Refugees of India: Risks and Challenges* 36 (Kunal Books, New Delhi, 2018).

<sup>24</sup> Article 2 of the UDHR, 1948 provides that, “everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

<sup>25</sup>Avinash Govindjee & Elijah Adewale Taiwo, “The Protection of Women Refugees under the International Refugee Convention” in Rafiqul Islam & Jahid Hossain Bhuiyan (eds.), *An Introduction to International Refugee Law* 379 (Martinus Nijhoff Publishers, 2013).

to refugees have in fact expanded the definition of the term ‘refugee’ by going beyond the subjective criteria of ‘well-founded fear of persecution’ and thereby put more emphasis on objective standards in the country of origin.

The OAU Convention Governing Specific Aspects of Refugee Problems in Africa of 1969<sup>26</sup>, while accepting the basic 1951 Refugee Convention under the first part, has also expanded scope of the term ‘refugee’ under the second part to those persons who<sup>27</sup>:

*“owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.*<sup>28</sup>

Similarly, the OAS Cartagena Declaration of 1984<sup>29</sup> has re-iterated the same mistake by not recognizing their concerns. Here, the author is not venturing into the disputed question of fact that whether it was deliberate or unintentional. The Cartagena Declaration, recognizing several new facets and contours of refugee status determination, has also widened the scope of the term ‘refugee’ as *“persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts,*

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<sup>26</sup>The OAU Convention was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity on 10<sup>th</sup> September, 1969 at its sixth ordinary session and it came into force on 20<sup>th</sup> June, 1974.

<sup>27</sup>While Article I (1) of OAU Convention incorporates the 1951 Convention definition, paragraph (2) of the said Convention adds an approach more immediately reflecting the social and political realities of contemporary refugee movements. Under this Convention, persons accepted as refugees are those who have been compelled to flee due to external aggression, occupation, foreign domination, or events seriously disturbing public order. Available in: Guy S. Goodwin-Gill, “The International Law of Refugee Protection” in Elena Fiddian-Qasmiyeh, Gil Loescher *et.al.* (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 1<sup>st</sup> ed., 2014).

<sup>28</sup>Article I (2) of OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

<sup>29</sup>The Cartagena Declaration was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama on 22<sup>nd</sup> November, 1984.

*massive violation of human rights or other circumstances which have seriously disturbed public order”.*<sup>30</sup>

Thus, in view of the above, it becomes evident that the international refugee law regime failed miserably to explicitly recognise the category of women as refugees and was unsuccessful in incorporating their trauma and plights and addressing or safeguarding their concerns.

### **III. Recognition of Rights of Women as ‘Refugees’**

The United Nations did not initiate the debate about the necessity for special protection of women refugees until 1985. The year 1985 is marked as a remarkable phenomenal year towards the international protection of women refugees. In that year, an international seminar pertaining to women refugees was organized in Soesterberg. The primary issue involved in this seminar was the deliberation and discussion of sexual atrocities against women refugees and the adoption of pro-asylum policies for their protection and recognition. Several delegates from various European countries and global refugee protection forums attended and participated in the said seminar to explore and scrutinize viable solution for this vulnerable group. Among the several recommendations, one of the prominent recommendation is that governments should recognise persecution based on sex as a criteria of persecution based on ‘membership of a particular social group’.<sup>31</sup>

As per the crux of the seminar, women refugees may be subject to certain categorization which though not mutually exhaustive are merely illustrative. For better appraisal, some of the categorization are reproduced as follows<sup>32</sup>: -

- a) *“women who fear persecution on the same Convention grounds, and in similar circumstances, as men. That is, the risk factor is not their sexual status, per se, but rather their particular identity (i.e. racial, national or*

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<sup>30</sup> *Ibid.*

<sup>31</sup>Persecution owing to one’s ‘membership of a particular social group’ is one of the recognised ground in the Convention Relating to the Status of Refugees, 1951. Thus one becomes eligible for refugee status if he or she is able to exhibit and establish that ground before the Refugee Status Determination (RSD) authority.

<sup>32</sup>Avinash Govindjee & Elijah Adewale Taiwo, “The Protection of Women Refugees under the International Refugee Convention” in Rafiqul Islam & Jahid Hossain Bhuiyan (eds.), *An Introduction to International Refugee Law* 379 (Martinus Nijhoff Publishers, 2013).

*social) or what they believe in, or are perceived to believe in (i.e. religion or political opinion).*

- b) Women who fear persecution solely for reasons pertaining to kinship, i.e. because of the status, activities or views of their spouses, parents, and siblings, or other family members.*
- c) Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons.*
- d) Women who fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin”<sup>33</sup>.*

Since then, a significant corpus of jurisprudence has emerged on the subject, and several governments and international communities have shown their interest in adopting this thought into their protection regime. Another noticeable event of this phase is that apart from the general international human rights law regime, a specific and focused women centric human rights regime gradually emerged in the international arena during this phase. Here the best example would be the adoption of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979.<sup>34</sup> In 1993, the Vienna Conference on Human Rights also recognised women’s rights within the ambit of human rights with the adoption of the slogan that women’s rights are human rights.<sup>35</sup> The Convention on the Elimination of Discrimination Against Women (CEDAW) is sometimes referred to as an international women’s bill of rights. It consists of a Preamble and 30 Articles that describe what constitutes gender discrimination and establishes a national action plan to eradicate it.<sup>36</sup> Through this Convention, a global standard has been sought to be established for promoting gender equality

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<sup>33</sup>*ibid.*

<sup>34</sup>Convention on the Elimination of All Forms of Discrimination against Women was adopted on 18<sup>th</sup> December, 1979 vide General Assembly Resolution No. 34/180 and it entered into force on 3<sup>rd</sup> September, 1981 in accordance with its Article 27(1).

<sup>35</sup>SNEHAL FADNAVIS, WOMEN REFUGEES IN INDIA: PROBLEMS & PERSPECTIVES, 94 (Dattsons Publications, Nagpur, 1<sup>st</sup> edn., 2007).

<sup>36</sup>UN Women, “Convention on the Elimination of All Forms of Discrimination against Women”, <https://www.un.org/womenwatch/daw/cedaw/> (last visited on July 24, 2021).

and thereby eradicating all sorts of gender disparity and discrimination across the globe. This Convention was specific in addressing the grievances of trafficking in women, woman exploitation by the heinous acts of prostitution and other harm that is unique to women. In short, it sought to promote and proliferate the women's rights and give them the positive direction and vibes in all spheres of their neglected life. To keep track of its implementation, a Committee on the Elimination of Discrimination against Women has also been set up.

Recently the said Committee in its General recommendation no. 32 has emphasized on the "*gender-related dimensions of refugee status, asylum, nationality and statelessness of women*".<sup>37</sup> In the said general recommendations, the Committee has inter-alia emphasized on the following naked reality when it recognised that, "*Gender-related forms of persecution are forms of persecution that are directed against a woman because she is a woman or that affect women disproportionately.....*"<sup>38</sup>

The observation of the said Committee in para 13 appears to be most cogent and relevant. The Committee opined that "*..... under article 1A (2) of the 1951 Convention relating to the Status of Refugees the reasons for persecution must be linked to one of the five grounds listed therein: race, religion, nationality,*

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<sup>37</sup>UN Committee on the Elimination of Discrimination Against Women (CEDAW), "General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women", 5 November 2014, CEDAW/C/GC/32, <https://www.refworld.org/docid/54620fb54.html> (last visited on July 24, 2021).

<sup>38</sup>Para 15 of General recommendation no. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women by UN Committee on the Elimination of Discrimination Against Women (CEDAW) further provides that, "They may include the threat of female genital mutilation, forced/early marriage, threat of violence and/or so-called "honour crimes", trafficking in women, acid attacks, rape and other forms of sexual assault, serious forms of domestic violence, the imposition of the death penalty or other physical punishments existing in discriminatory justice systems, forced sterilization, political or religious persecution for holding feminist or other views and the persecutory consequences of failing to conform to gender-prescribed social norms and mores or for claiming their rights under the Convention". <https://www.refworld.org/docid/54620fb54.html> (last visited on July 24, 2021).

*membership of a particular social group or political opinion. Gender-related persecution is absent from the text.”<sup>39</sup>*

In 2015, “Statement of the Committee on the Elimination of Discrimination against Women (CEDAW) on the refugee crises and the protection of women and girls”<sup>40</sup> again re-iterated and re-endorsed this stand when it focused on gender sensitive approach in the asylum process and other allied issues.<sup>41</sup>

That apart, in 1993, the proclamation of “Declaration on the Elimination of Violence against Women”<sup>42</sup> also inter-alia recognised ‘refugee women’ as a special group that are susceptible to violence and states have been called upon to address these issues for the elimination and eradication of violence against

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<sup>39</sup>Para 13 of General recommendation no. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women by UN Committee on the Elimination of Discrimination Against Women (CEDAW) also provides that, “The present general recommendation is intended to ensure that States parties apply a gender perspective when interpreting all five grounds, use gender as a factor in recognizing membership of a particular social group for purposes of granting refugee status under the 1951 Convention and further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers”. <https://www.refworld.org/docid/54620fb54.html> (last visited on July 24, 2021).

<sup>40</sup>Statement of the Committee on the Elimination of Discrimination against Women (CEDAW) on the refugee crises and the protection of women and girls was adopted on 20 November 2015 during its 62<sup>nd</sup> session. [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_STA\\_7845\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_STA_7845_E.pdf) (last visited on July 24, 2021).

<sup>41</sup>Statement of the Committee on the Elimination of Discrimination against Women (CEDAW) on the refugee crises and the protection of women and girls inter-alia provides that, “the Committee also calls on States parties to fully respect the rights of women and girls during the entire asylum-seeking process and to fully integrate a gender-sensitive approach in the implementation of national legislation on asylum, in particular regarding the special claims for asylum that women and girls may have due to their exposure to discrimination and/or violence in their country of origin and/or during their flight. Finally, the Committee calls on the international community to spare no effort to find durable political solutions to current conflicts, which continue to be the main drivers of displacement for women and girls”.

<sup>42</sup>Declaration on the Elimination of Violence against Women was Proclaimed by the General Assembly Resolution No. 48/104 of 20 December 1993, <https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx> (last visited on July 24, 2021).

women. In nature, this Declaration is complementary and supplementary to the CEDAW of 1979.<sup>43</sup>

#### **IV. Women Refugee and Role of UNHCR**

After recognising their trauma and plights in the international refugee domain, the role of United Nations High Commissioner for Refugees (UNHCR) has been phenomenal and worth mentioning for this particular sub-group. Although in the initial phase of its tenure, the role of UNHCR has not been so instrumental and vocal, but particularly from 1985, this organization have started recognising their claims and addressing their grievances and further started to mainstream refugee women in the overall planning and implementation projects pertaining to refugees. It is to be mentioned here that, from 1985 to 1989, the Executive Committee of the UNHCR adopted four specific conclusions raising and addressing their grievances and further suggesting suitable measures for uplifting their status. Then in 1990, the said Executive Committee framed “*UNHCR Policy on Refugee Women*”<sup>44</sup> which had created a remarkable sensation in the international refugee law domain. This Policy accepts this basic fact that men and women are affected differently when they become refugees. The Policy recognised that the role of women refugees should be uplifted above the status of mere beneficiaries who passively receive shelter, food and other material aids in the refugee relief and rehabilitation programmes. Thus this Policy endorses the view that women refugees who have fled persecution must be included in the policy design and implementation of several initiatives in the overall refugee centric plans and programmes. Therefore, the integration and assimilation of women refugees in all phases of refugee programme planning and implementation was realized as the need of the hour. In other words, they should not be put merely at the mercy of their male counterparts.

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<sup>43</sup>Amnesty International, “The Human Rights of Women in the United Nations: Developments 1993 – 1994”, <https://www.amnesty.org/download/Documents/180000/ior510011995en.pdf> (last visited on July 24, 2021).

<sup>44</sup>UN High Commissioner for Refugees (UNHCR), “UNHCR Policy on Refugee Women, 1990”, available at: <https://www.unhcr.org/protection/women/3ba6186810/unhcr-policy-on-refugee-women-1990.html> (last visited on July 25, 2021).

In the broad spectrum, mainstreaming of refugee women appears to be the main goal of a UNHCR programme or project. Its aim and objective is reflected from the following points: -

- a) *achieve greater involvement of refugee women both as participants and beneficiaries in the social and economic activities of the project;*
- b) *increase their status and participation in the community/society;*
- c) *provide a catalyst through which they can have access to better employment, education, services and opportunities in their society;*
- d) *take into account the particular social relationship between the refugee women and their families.*<sup>45</sup>

Thereafter, in 1991, the UNHCR again came up with “*UNHCR Guidelines on the Protection of Refugee Women*”.<sup>46</sup> In fact, this Guideline can be characterized as most extensive and comprehensive one by UNHCR in addressing their concerns and mainstreaming their role and interests. At the very introduction of the said Guideline, the UNHCR had again re-iterated this naked truth when it re-affirmed that in addition to some basic needs that all refugees have “*refugee women and girls have special protection needs that reflect their gender: they need, for example, protection against manipulation, sexual and physical abuse and exploitation, and protection against sexual discrimination in the delivery of goods and services*”.<sup>47</sup>

These Guidelines reinforce the demand for incorporating refugee women's resources and needs into all parts of programming in order to provide equal protection and assistance. It examines and scrutinizes the legal and physical protection requirements of female refugees, after taking note of those spheres that demand special attention and reaction, as well as measures that should be implemented. A prudent perusal of the above-mentioned guideline would reveal that this Guideline was more vocal about refugee women's reproductive health, their education, their role in camp management, food distribution and other gender centric violence.

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<sup>45</sup> *Id.* at 7.

<sup>46</sup>UN High Commissioner for Refugees (UNHCR), “Guidelines on the Protection of Refugee Women”, July 1991, : <https://www.refworld.org/docid/3ae6b3310.html> (last visited on July 25, 2021).

<sup>47</sup> *Ibid.*

According to *Women's Commission for Refugee Women and Children*<sup>48</sup>, through this Guideline, the concept of 'enhanced protection approach' and 'successful assistance efforts' have been put in place for a smooth and flexible working of this domain. The notable examples are reproduced below: -

- i) *"improved capacities for gender-sensitive refugee status determinations;*
- ii) *more vigorous use of national laws for enforcing protection and human rights; and*
- iii) *improved registration mechanisms that allow each individual to obtain his or her own card"*.<sup>49</sup>

Successful assistance efforts include within its ambit

- a) *"increased enrollment of girls in schools;*
- b) *measures to organize refugee women and include them in camp management;*
- c) *direct involvement of women in food distribution;*
- d) *incentives to employ more female staff in health and education programs;*
- e) *wider availability of reproductive health services;*
- f) *safe houses and counseling services for victims of trauma or violence"*.<sup>50</sup>

Another notable attempt by UNHCR in this area is the formulation of certain guidelines to prevent sexual violence against refugees. In 1995, the UNHCR came up with another formidable weapon in its armory in the form of *"Sexual Violence Against Refugees: Guidelines on Prevention and Response"*<sup>51</sup> to

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<sup>48</sup> Being established in 1989 under the auspices of the International Rescue Committee, the Women's Commission for Refugee Women and Children aims to improve and proliferate the lives of refugee women, children, and adolescents through a vigorous program of public education and by acting as a technical resource. Women's Commission for Refugee Women and Children, "UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation" (New York, 2002), <https://www.refworld.org/pdfid/48aa83220.pdf> (last visited on July 25, 2021).

<sup>49</sup>*Id.* at 2.

<sup>50</sup>*Supra* note 46 at 2.

<sup>51</sup>UN High Commissioner for Refugees (UNHCR), "Sexual Violence Against Refugees: Guidelines on Prevention and Response" (Geneva, 1995),

combat this phenomenal global menace. This guideline is significant in the sense that certain harm or injury is ‘either unique to women or befalls women more commonly than men’<sup>52</sup> and such kind of harm requires particular focus of the RSD authority while determining or assessing their claims. It recognizes the basic fact that the subject of sexual assault and atrocities against women refugees is a worldwide issue. It is a violation of their basic and inherent human rights, causing dread in the lives of victims who are already traumatised by their forced displacement and relocation. The above- mentioned UNHCR Guideline give an overview of when and how sexual violence can occur in the setting of refugees, as well as the physical, psychological, and social consequences for individuals who are exposed to such additional trauma.<sup>53</sup> The UNHCR also admits the fact that many occurrences of such nature are kept under the dark for a variety of reasons, including humiliation, social stigma attached to it, and fear of retaliation, according to the research. They stress the need of understanding and awareness at legal level, leadership advice, skill development, and educational rights for women refugees.

## **V. Women Refugee and Their Plights**

Women refugees used to cross borders after being traumatized by various forms of violence in their home country and some of the harms are directly related to their gender and this continue at every level and phases of their refugee status tenure. Because of their oppression and vulnerability on the basis of their gender, women victims feel habituated to bear the brunt of these systematic attacks both in the country of origin as well as in the country of asylum.<sup>54</sup> Some common

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<https://www.unhcr.org/publications/operations/3b9cc26c4/sexual-violence-against-refugees-guidelines-prevention-response-unhcr.html> (last visited on July 26, 2021).

<sup>52</sup>B.S. CHIMNI (ED.), INTERNATIONAL REFUGEE LAW: A READER, 42 (Sage Publications, New Delhi, 2000).

<sup>53</sup>UN High Commissioner for Refugees (UNHCR), Foreword note of Special Rapporteur on violence against women, Commission on Human Rights on “Sexual Violence Against Refugees: Guidelines on Prevention and Response” (Geneva, 1995), <https://www.unhcr.org/publications/operations/3b9cc26c4/sexual-violence-against-refugees-guidelines-prevention-response-unhcr.html> (last visited on July 26, 2021).

<sup>54</sup>According to Snehal Fadnavis, “the path from country of origin to the country of asylum and again to the arrival at refugee camp is paved with threats of sexual violence and exploitation”. Originally taken from: SNEHAL FADNAVIS, WOMEN REFUGEES IN INDIA: PROBLEMS & PERSPECTIVES, 14 (Dattsons Publications, Nagpur, 1<sup>st</sup> edn., 2007).

forms of violence in this area manifest itself in the form of ‘rape’, ‘sexual atrocities’, ‘female genital surgery’, ‘domestic violence’, ‘forced impregnation’, ‘forced abortion’, ‘forced sterilization’, ‘demand of sexual favours’ and many more<sup>55</sup>. We all know that rape and other forms of sexual violence constitutes an attack upon the personal liberty, inherent privacy, basic dignity and the bodily integrity of a woman. Initially, rape was considered a ‘privatised affair’ under refugee law domain, and as such, it was not considered deserving of refugee status, although it was later protected by different international instruments. However, after the growth and evolution of gender asylum jurisprudence, a remarkable shift has been noted in this area. Scholars concerning this field are of the considered view that the concept of ‘persecution’ in the 1951 Refugee Convention is required to be given a broad connotation beyond the set established standard and the RSD authority should recognize the gender centric violence and harm while assessing their claims and determining various forms of persecution.<sup>56</sup> Scholars are also of the opinion that the term ‘membership of a particular social group’ in the said 1951 Convention should be construed in such manner so that women victims who have been targeted for persecution owing to their gender and other related causes can claim the characteristics of a social group and qualify under the present enumerated grounds of persecution.<sup>57</sup>

Now so far as their traumatic experience and exploitation are concerned, the following paragraphs will testify this: -

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<sup>55</sup>According to Aliva Mohanty, “females are subject to widespread sexual abuse. In Bosnia and Rwanda, rape became a deliberate aim of war.....More than 300,000 youngsters, many of them female refugees, are currently serving as child soldiers around the world”. Originally taken from: Aliva Mohanty, *Women Refugees of India: Risks and Challenges* 25 (Kunal Books, New Delhi, 2018).

<sup>56</sup>MANISH CHATURVEDI, *HUMAN RIGHTS OF REFUGEES: ISSUES & CONCERNS IN THE GLOBALISATION ERA* 39 (Swastik Publications, Delhi, 2011).

<sup>57</sup>Scholars connected in this field assert that, “although the refugee definition does not include gender as a ground of persecution for conferring refugee status, the ground ‘social group’ has been interpreted many times to include certain sub-groups of women who share certain specific characteristics of persecution, giving rise to a greater risk of vulnerability as compared to women in that society in general”. Originally taken from: SNEHAL FADNAVIS, *WOMEN REFUGEES IN INDIA: PROBLEMS & PERSPECTIVES*, 13 (Dattsons Publications, Nagpur, 1<sup>st</sup> edn., 2007).

It was reported that women may be forced to barter sexual favours for food and other material help by men who oversee the implementation of refugee aid and assistance programmes in refugee camps and rehabilitation centre. Women may also be subjected to sexual assault by other male refugees in their journey. Apart from that, the local people, military combatants, police and security personnel in the hosting nation have all been accused of abusing their positions. It has also been witnessed that often in the unorganized labour sector in the developing country, these women refugees are the easy prey of their employers or the local managers or contractors and these incidents mainly go unreported because of their illegal entry and consequent fear of deportation.

That apart, forceful female genital surgery (FGS) is another instance of violation of their bodily integrity where, without anesthesia, portions of the female genital organs are removed or two sides of the vulva are sewn together. In the contemporary era, the practice of FGS is considered as a form of torture, inhuman and degrading treatment and a naked violation of one's human dignity. In some countries, FGS has been recognised as persecutory in nature and women who fled from their home countries owing to such fear is considered eligible for refugee status.

In addition to that, domestic violence continues to affect women because male believe that if women members of their family don't obey, they may even beat them up at any time. Arguments between spouses, congested accommodation leaving no space for privacy, a lack of funds, unemployment, and drunkenness are the most common causes of family violence. It is often seen that refugee males are more likely to turn to such kind of violence as a result of their perceived loss of purpose and erosion and degradation of conventional roles, which are central to their masculine identity.<sup>58</sup> This form of violence seems to be more prominent in male dominated patriarchal society.<sup>59</sup> Now there is a widespread

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<sup>58</sup>ALIVA MOHANTY, WOMEN REFUGEES OF INDIA: RISKS AND CHALLENGES 26 (Kunal Books, New Delhi, 2018).

<sup>59</sup>Sheena Kumari, "Burmese Refugee Women in India: Victims and Agents of Empowerment" 4 *Peace Prints* 1 (2012), <http://www.wiscomp.org/peaceprints.htm> (last visited on July 26, 2021).

demand from various refugee law scholars across the globe that the term ‘persecution’ should be construed in the light of domestic or family violence.<sup>60</sup>

Further, health, education and employment needs of refugee women are another area that requires considerable focus. Apart from maternal health issue, they face significant number of psychological, physical and social challenges such as poor health, anxiety, depression, stress-related psychosomatic illnesses, dementia and post-traumatic stress disorders. Beside this, the concern of their malnourished children’s ailments and diseases severely affect the mental health of refugee mother. Thus, physical and mental trauma, sexually transmitted diseases, unwanted pregnancies have become their routine affair. To address this, special emphasis needs to be given on their maternal health services, education on family planning, awareness about sexually transmitted diseases and special rehabilitation programme on disabled and elderly refugee women.<sup>61</sup> That apart, in educational sector, the primary education still seems to be a dream for refugee children specially for refugee girls. At such a tender age, they have to face various barriers and restraints in the form of family responsibilities which eventually causes their poor attendance and simultaneous drop-outs from schools. It has been found that girls constitute a small and negligible portion among the total pupils attending UNHCR aided primary and secondary educational institutions. UNHCR has suggested some measures so that refugee girls can easily attend their schools without any barriers.<sup>62</sup> For the purpose of better understanding, such measures are reproduced below: -

- i) *“schools must make space for girls;*
- ii) *no girl should miss school because the journey to school is too far or too dangerous;*
- iii) *schools must be adapted to girls’ needs;*

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<sup>60</sup>Avinash Govindjee & Elijah Adewale Taiwo, “The Protection of Women Refugees under the International Refugee Convention” in Rafiqul Islam & Jahid Hossain Bhuiyan (eds.), *An Introduction to International Refugee Law* 379 (Martinus Nijhoff Publishers, 2013).

<sup>61</sup>U.N. Economic Commission for Africa, “Draft Report of the Expert Group Meeting on Refugee and Displaced Women and Children”, Vienna, 2-6 July 1990, <https://hdl.handle.net/10855/19717> (last visited on July 26, 2021).

<sup>62</sup>UNHCR, “Her Turn: It’s time to make refugee girls’ education a priority”, <https://www.unhcr.org/herturn/> (last visited on July 26, 2021).

- iv) *there can be no room for gender based bullying, harassment and violence in schools;*
- v) *refugee families need incentives and encouragement to keep girls in school;*
- vi) *refugee pupils need more female teachers;*
- vii) *with some extra help, girls can catch up and power on”.*<sup>63</sup>

In addition to all these, economic dependence of women refugees constitutes another sphere that requires particular focus for their proliferation. In general, in most patriarchal society women are found to be financially dependent upon their male counterparts and women work culture is considerably poor in poor male centric or male dominated countries. Vulnerability of refugee women add more trauma to this. As has already been mentioned that refugee women labour sometimes because of their illiteracy, ignorance and illegality are susceptible to easy bargaining of their employers and their contractors. They mostly find contractual jobs in unorganised sectors at much less wages than the other co-workers who are legal citizens. To make ends meet, many refugee women and their children used to work as maid servants and domestic helps in the homes of affluent and upper-class residents cum citizens in the hosting country.<sup>64</sup> With this, they are often subjected to sexual atrocities by their employers and other local working staff. The naked and bitter truth is that sometimes they have to bear with the undue sexual advancements of their employers as well as their contractors in order to earn bread for their families. That apart, in the matter of allocation and distribution of lands for rehabilitation process, sometimes hosting governments also seem to be biased as it always does not maintain parity. It should be kept in mind that economic empowerment of women refugees typically entails food, nutrition, clothing and schooling for their children. While most illiterate and uneducated male refugees used to spend a considerable portion of their earnings on alcohol or other intoxicating substances and thus leaving no cash for their family.

Lastly, women refugees are often separated from their husbands or partners while in exile. Probably because of the death of their husbands or forced joining of their

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<sup>63</sup>*ibid.*

<sup>64</sup>ALIVA MOHANTY, WOMEN REFUGEES OF INDIA: RISKS AND CHALLENGES, 26 (Kunal Books, New Delhi, 2018).

husbands in armed forces or owing to willful abandonment of them by their husbands, they have to bear the entire burden of caring for their household responsibilities. They are required to perform duties typically performed by male family members, putting their physical and mental well-being in jeopardy and subjecting them to a higher degree of persecution. Another shocking fact is that when durable solutions<sup>65</sup> for refugees come for consideration, refugee women are sometimes overlooked. Many times, just the family's male head of household is questioned about his wish to return home, and the spouse is presumed to follow the family's male head of household. This is nothing but the reflection of 'male chauvinism'.

## VI. Concluding Observations and Recommendations

In conclusion, what seems to be more tragic and pathetic is that "*female refugees may find that in fleeing from persecution and violence, (from their country of origin) they have actually increased their exposure to the threat of sexual abuse*".<sup>66</sup> In this respect, the authors firmly believe that the concerning issue pertaining to refugee women cannot be changed overnight. But we should not keep our eyes closed to this pressing issue. It is true that UNHCR in its later phase of tenure has been particularly vocal and instrumental in recognising their plights and proliferating their status. Various guidelines have been issued by this institution from time to time to recognise their claims and assist them in attaining refugee status to lead at least a basic dignified life in refugee camps. It is also true that international community have also started changing their approach in the matter of women refugees which has, in fact, helped to facilitate greater protection for this vulnerable group. Sceptics also do not claim falsity of the fact that international community and RSD authority have started adopting some lenient approach towards women victim of persecution. But instead of recognising their rights regime, sympathy and leniency have very little role to play and would not serve the fruitful purpose in the long run. The fact is that the source from which everyone derives its strength in this area is still not gender conscious. In view of this, time has come to introduce and recognise the gender

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<sup>65</sup>In International Refugee Law Regime, three durable solutions for refugees are recognised. They are voluntary repatriation, resettlement and local integration.

<sup>66</sup>SNEHAL FADNAVIS, WOMEN REFUGEES IN INDIA: PROBLEMS & PERSPECTIVES, 13 (Dattsons Publications, Nagpur, 1<sup>st</sup> edn., 2007).

centric violence within the ambit of persecution. The authors firmly believe that in addition to the enumerated five grounds of persecution, the ground of 'sex' should be explicitly and specifically included in the 'refugee' definition of 1951 Refugee Convention. The authors also endorse the view that a special grievance redressal committee consisting of women experts should be set up under the aegis of UNHCR in order to assist them from the stage of refugee status determination to every gender centric violence in their refugee tenure.

Beside this, education of women refugees and girl child should be strictly ensured at all levels. It must be kept in mind that their illiteracy, ignorance, lack of awareness about their rights have an important role in suppressing their claims and repressing their grievances. So the absenteeism amongst refugee girls in schools and higher drop-out rates of those girls from schools should be strictly checked and monitored. Thus, unless and until they have been endowed with basic educational awareness, their upliftment will remain a distant dream.

That apart, the health needs of refugee women and girls should be duly emphasized. The lack of access to public healthcare facilities is a serious source of worry, particularly for the women refugees who require routine health monitoring owing to their physical set-up. While refugees have access to public healthcare facilities, hospitals and health centers in almost all developing countries are mostly overburdened with less female medical practitioners. Consequently, this subgroup is unable to get necessary medical care even in basic health care requirements. Beside this, the less number of female medical practitioners in government hospitals and healthcare facilities is a matter which requires considerable focus, as it has been seen that they feel shy and hesitation surrounds them in sharing their physical problems to a male doctor probably owing to their illiteracy and backwardness.

The authors further believe that their financial dependence and associated exploitation in the employment sector is another area of worry. It has been perceived that a considerable source of worry is the scarcity of sustainable financial help for this vulnerable group from the government and other concerned agencies and stakeholders. So, the hosting government and other concerned agencies particularly UNHCR should come up with some financial schemes or other social beneficial initiatives or low interest rate loan facilities for helping them to set up and flourish entrepreneurship activities and self-employment skills. What should specifically be checked is the issue of their low work

participation rate, disbursement of much less wages as compared to other male co-workers and associated sexual exploitation in the employment sector.

Women refugees should also be specifically included in the overall design and implementation of global refugee policy and the national legislations and policy frameworks in this regard. Their representation and stand at all stages of policy framing would make their voices and concerns more clear and firm before the international refugee community. However, the role of men in the process of policy framing cannot be totally ignored. Because it is the men who have to adopt a decisive stand against this menace and torment so that world community can make progress in reality.

Last but not the least, the authors reasonably believe that hosting nations, UNHCR and other concerned stakeholders should specifically emphasize upon their literacy programmes, vocational training, micro-credit projects and should adopt gender balanced approach while providing special employment opportunities for refugees. It should always be kept in mind that this sub-group is a 'doubly-disadvantaged' and 'doubly-vulnerable' category of persons due to their tender and weaker position in case of exploitation and their traumatic refugee status. Thus over-emphasis and considerable attention in this area seems not to be unwarranted.

## **Legitimate Interest test and Party Autonomy: Correcting the discourse on Liquidated Damages within the Indian Contract Act 1872**

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### **Abstract**

*The Indian Contract Act 1872 (the Act) is largely a codification of the principles, fundamental to the English Contract law. Accordingly, party autonomy is securely entrenched amongst the various provisions of the Act. The provision on liquidated damages too continue to retain the spirit of party autonomy. Unfortunately, the Indian Courts have misread the provision on liquidated damages and ignore the theoretical underpinnings on party autonomy. Consequently, the discourse on liquidated damages is in disarray. In contrast the English Contract Law has witnessed tectonic shifts in the theoretical terrain on liquidated damages. The legitimate interest test, as developed by the UK Supreme Court (UKSC), has forced a re-think on the issue of liquidated damages. Importantly the legitimate interest test reinforces the role of party autonomy in ascertaining the validity of the clause on pre-determined damages. This article argues that the Act is no stranger to the legitimate interest test. The provision on liquidated damages is proof of the same. The article concludes that the time has come for the Indian Courts to unapologetically adapt the legitimate interest test and promote party autonomy. For such adaptation will bring about the much needed course correction in the narrative on liquidated damages.*

**Keywords-** Party Autonomy, Legitimate Interest, Indian Contract Act, 1872, English Contract Law

### **I. Rooting for Party Autonomy- An English Norm in the Indian Setting**

Party autonomy is imbedded within the Indian Contract Act 1872 (hereinafter the Act) since inception.<sup>2</sup> The concept was never treated as alien to the Indian setting. This was in accord with the fact that the common law of England was forced

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<sup>2</sup> Atul Chandra Patra, HISTORICAL BACKGROUND OF THE INDIAN CONTRACT ACT, 1872, 4 J. INDIAN L. INST. 373 (1962).

upon the entire Indian subcontinent.<sup>3</sup> The subjugated were bereft of choice and hence had to acclimatize with the intricacies of the English law. The Act thus ended up as largely a codification of the English contract law, interspersed with alterations and additions.<sup>4</sup> For instance the conceptualization of offer and acceptance within the Act mirrors the position under the English law. Chitty defines offer as “willingness to contract on specified terms made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed.”<sup>5</sup> Section 2 (a) of the Act also evokes similar sentiments by insisting that “[w]hen one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.”<sup>6</sup>

These two definitions of offer, though separated by jurisdictions, embody the idea of party autonomy. For the same is hinged on the will of the parties to determine the fate of the transactions. And this umbilical connection between the English contract law and the Act dominates the narrative. Hence both the English contract law and the Act perceives acceptance as an absolute and unqualified assent to the offer. The integration of the party autonomy norm within the Act has however surpassed its English law origins. It is celebrated and used in scenarios not envisioned by the English contract law. For instance, as per the mail box rule under the English law, contract is formed upon posting of the acceptance. The parties are thus bound in a contract, based on the presumption of a deemed consent. This was established in the case of *Adams & Others v. Lindsell & Others*,<sup>7</sup> in the year 1818. The rule dilutes party autonomy by imposing obligations, and is justified on the grounds of expediency. In that case the Court established that

“if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after

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<sup>3</sup> M. P. JAIN, THE LAW OF CONTRACT BEFORE ITS CODIFICATION, 1972 J. INDIAN L. INST. (SPECIAL ISSUE)178

<sup>4</sup> R. N. Gooderson, English Contract Problems in Indian Code and Case Law, 16 CAM. L. J. 1, 67 (1958)

<sup>5</sup> CHITTY, ON CONTRACTS (H.G.Beale et al. eds., 2015)

<sup>6</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 2 (a).

<sup>7</sup> *Adams & Others v. Lindsell & Others* (1818) 106 Eng. Rep. 250 (KB).

they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum.”<sup>8</sup>

Accordingly, the point of contract formation was held to be the posting of the acceptance. The Act has adapted the mail box rule but with modification. Hence the contract is formed when the acceptance is posted but party autonomy is preserved.<sup>9</sup> As a consequence the Act permits the acceptor to change mind and revoke the acceptance later. The only caveat being that the revocation must be successfully communicated before the posted acceptance reaches the offeror.<sup>10</sup> The acceptor is thus conferred with a choice and has the option of either sticking with the acceptance or back out. Such a choice is not available under English law. The Act has thus clearly outshone the English law in celebrating party autonomy. Hence not only has the norm of party autonomy been adopted by the Act, it has been seamlessly adapted to the Indian setting. Another example, that establishes the importance of party autonomy within the Act, is the definition of consideration.

The Act has done away with privity of consideration, thus departing from the English contract law. As per Section 2(d) of the Act, consideration can be provided by the promisee or any other person, at the desire of the promisor.<sup>11</sup> The introduction of ‘any other person’ allows consideration to flow from strangers to the contract. Hence for the promisor it doesn’t matter who is giving the consideration. On the other hand the promisee has choices in terms of complying with the desire of the promisor. For the promisee can, either on her own or through a complete stranger, satisfy the requirement of consideration. The Act though retains the essence of the English law, by insisting that a valid consideration is the one desired by the promisor.<sup>12</sup> Nonetheless by discarding privity of consideration, the Act prioritises party autonomy as a core principle. The Act thus ensures that the choice and will of the parties overrides the binds of the English contract law. Since, as explained in the *Dunlop Case*,<sup>13</sup> under English

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<sup>8</sup> *Id.*

<sup>9</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 4.

<sup>10</sup> *Id.*

<sup>11</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 2 (d).

<sup>12</sup> *Id.*

<sup>13</sup> *Dunlop Pneumatic Tyre Company, Limited v Selfridge and Company, Limited* [1915] A.C. 847 (HL) (appeal taken from Eng.).

law both privity of consideration and privity of contract are unassailable.<sup>14</sup> The provisions dealing with performance of contract further re-emphasise this importance of party autonomy.

Thus whenever disputes relating to non-performance of contract arises, the innocent parties' choice matters. Accordingly, the innocent party can either rescind or keep alive a contract, upon repudiatory breach. Section 39 of the Act thus declares that upon repudiatory breach "...the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."<sup>15</sup> Similarly section 53 of the Act renders a contract voidable at the option of the innocent party upon repudiatory breach.<sup>16</sup> Section 63 is another example of the importance of party autonomy within the Act.<sup>17</sup> As per section 63 a party to the contract can unilaterally "dispense with" performance or "remit" the performance or "extend the time" of performance or "accept any satisfaction" in place of the original performance. And such a dispensation/ remission/ extension/ satisfaction is binding notwithstanding the lack of consideration.<sup>18</sup> This rule is unique to the Act for such a privilege is non-existent under English contract law.<sup>19</sup> The discussion above thus establishes that the Act unabashedly celebrates party autonomy.

This celebration of party autonomy culminates with section 75.<sup>20</sup> As per the said section, upon rescission, a party can claim both damages as well as restitution. This thus provides the innocent party with lot of options. An innocent party can limit her claim, upon proof of repudiatory breach, to restitutory relief.<sup>21</sup> On the other hand the innocent party can claim only damages for such breach, as per the provisions of the Act. The innocent party thus has the autonomy to determine the remedy it wants to seek.<sup>22</sup> The importance of party autonomy within the Act thus seamlessly integrates an English law concept within the Indian setting. The

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<sup>14</sup> *Id.*

<sup>15</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 39.

<sup>16</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 53.

<sup>17</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 63.

<sup>18</sup> *Id.*

<sup>19</sup> *Chhunna Mal Ram Nath vs Mool Chand Ram Bhagat* (1928) 30 BOMLR 837.

<sup>20</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 75.

<sup>21</sup> *Muralidhar Chatterjee vs Internatonal Film Company* (1944) 46 BOMLR 178.

<sup>22</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872), § 75.

interplay of this concept in the context of liquidated damages needs to be now analysed. Specifically, the impact of party autonomy on section 74 needs to be understood. Importantly the said provision needs to be revisited against the backdrop of the relevant judicial decisions. Additionally, a critique of the various Supreme Court's ruling is needed to highlight the interplay of section 74 and party autonomy.

## **II. Section 74 and Liquidated Damages: Interpretative Ennui towards Party Autonomy**

Section 74 of the Act has been rooted in the idea of party autonomy, since its inception. This is evident from the language of the first para of section 74, as it originally stood viz.

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.”<sup>23</sup>

This version of section 74 was the outcome of extensive debates amongst the members of the Third Law Commission.<sup>24</sup> The context of the debate centered on the grant of party autonomy versus curtailment of the same. Initial proposal was for a simpler version on liquidated damages viz.<sup>25</sup>

*“when a contract has been broken, if a sum is named in the contract itself as the amount to be paid in case of such breach, the amount so named shall be paid accordingly.”*<sup>26</sup>

This version was overbearingly in favour of preserving party autonomy and did not moot any interference from the Courts. It however got rejected and the version, as referred to above was incorporated.<sup>27</sup> Over the years, the courts'

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<sup>23</sup> POLLOCK & MULLA, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS 1275 (Nilima Bhabhade, 14th ed. 2014).

<sup>24</sup> JUSTICE M. JAGANNADHA RAO, LIQUIDATED DAMAGES AND PENALTIES: EX ANTE OR EX POST METHODOLOGY, 1 SCC. J-1 (2013).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at J-9

interpretation of section 74, as it then was, has created a web of confused narratives. And these narratives completely missed the central idea of party autonomy. Thus in *Nait Ram*<sup>28</sup>, the Allahabad High Court, declared that

“that the Court are not bound to award the entire amount of damages agreed upon by the parties in anticipation of the breach of contract...The discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation...”<sup>29</sup>

This interpretation given to section 74 is problematic at two levels. Firstly, it assumed as absolute, the power of the Court to interfere with the clauses on liquidated damages. And secondly it failed to notice the importance of party autonomy within the section. Such a problem with interpretation of section 74 was due to the usage of the concept of penalty. And this concept was derived from the English law. The courts did acknowledged that section 74 does away with the distinction between a penalty and liquidated damages.<sup>30</sup> However they ended up declaring all stipulations on damages as penalty. In *H.Mackintosh v C.Crow*<sup>31</sup>, Justice Wilson declared that section 74 “does away with the distinction between a penalty and liquidated damages and this must be borne in mind in dealing with cases decided before the Contract Act...”.<sup>32</sup> Accordingly any sum stipulated in the contract “as the amount to be paid in case of breach, it is to be treated, much as a penalty was before, as the maximum limit of damages.”<sup>33</sup> Consequence of such an interpretation was that the enforcement of such stipulations required a party to prove its reasonability.

And such an imposition was contrary to the language of section 74, as it then was. The subsequent amendment to the section introduced in the year 1899,<sup>34</sup> added to the existing confusion.<sup>35</sup> The language of the first para of section 74 was

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<sup>28</sup> *Nait Ram v. Shib Dat and Ors* (1883) ILR 5 All 238.

<sup>29</sup> *Id.*

<sup>30</sup> *Kalachand Kyal v. Shib Chunder Roy* (1892) ILR 19 Cal 392.

<sup>31</sup> *H. Mackintosh vs C. Crow And Anr.* (1883) ILR 9 Cal 689.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Shivprasad Swaminathan, De-inventing the Wheel: Liquidated Damages, Penalties and the Indian Contract Act, 1872, 2018 CHI. J. COMP. L. 1

amended and it is this version that is currently in force. Post amendment the first para of section 74 states that:

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”<sup>36</sup>

The introduction of the term “penalty” in the section has further diluted the concept of party autonomy. The amendment affirms the pre-dominant view of the courts that all stipulations on damages are penalty. In *A. Muthukrishna Iyer v Sankarlingam Pillai*<sup>37</sup>, Justice Wallis, while referring to the legislative history of section 74 observed that “even stipulations which in England would be regarded as stipulations for liquidated damages and so enforceable according to their terms might in effect be treated as penal...”<sup>38</sup> According to him through the amendment the “[l]egislature uses the word penal in a very wide sense and so as to include stipulations falling within the earlier part of the section for liquidated damages, which according to the English decision are not penal.”<sup>39</sup> Evidently the interpretation of section 74 in both the pre and post amendment scenario has not promoted the concept of party autonomy. And as will be seen hereunder, the Supreme Court of India too has furthered the apathy towards party autonomy.

### **III. Section 74, the Supreme Court of India and A Confused Narrative: Party Autonomy Fizzles Out!**

In *Fateh Chand*,<sup>40</sup> the Supreme Court got the chance to re-assess the interpretation of section 74. Justice Shah reiterated that the “section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of

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<sup>36</sup> POLLOCK & MULLA, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS 1275 (Nilima Bhadbhade, 14th ed. 2014)

<sup>37</sup> *A. Muthukrishna Iyer v. Sankarlingam Pillai* ILR (1913) 36 Mad 229 (India).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* 249

<sup>40</sup> *Fateh Chand v. Balkishan Das* 1964 SCR (1) 515(India).

liquidated damages and stipulations in the nature of penalty.”<sup>41</sup> He then declares that while enforcing the stipulations on damages the courts are duty bound to award reasonable compensation. And in the process the courts cannot “award of compensation when in consequence of the breach no legal injury at all has resulted...”<sup>42</sup> As per Justice Shah legal injury has to be established by assessing the “loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.”<sup>43</sup> Thus as per Justice Shah the stipulation on damages are presumed to be penalty and unreasonable unless proved to the contrary. Such an approach clearly rejects the sanctity of party autonomy.

Post Fateh Chand<sup>44</sup> however the Supreme Court’s narrative on the issue has generated more confusion than clarity. In *Maula Bux v. Union of India*,<sup>45</sup> explaining the scope of section 74, the Supreme Court held that “It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree...”<sup>46</sup> It goes on to lay down that “Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine preestimate may be taken into consideration as the measure of reasonable compensation... Where loss in terms of money can be determined, the party claiming compensation must prove the loss...”<sup>47</sup> One cannot get a more confused narrative than this. At one end the court is proclaiming that stipulations on damages are not dependent on proof of actual loss. Hence such stipulations are genuine, valid and enforceable. On the other hand it insists on proof of actual loss in situations where such loss is determinable. In the process the court fails to lay down a framework to be used for identifying such varied situations.

The next significant decision on section 74 is *ONGC Ltd v. Saw Pipes. Ltd.*<sup>48</sup> A reading of this judgment will firmly establish the apathy of the Supreme Court

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Fateh Chand v. Balkishan Das* 1964 SCR (1) 515(India).

<sup>45</sup> *Maula Bux v. Union Of India* 1970 SCR (1) 928(India).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd* (2003) 5 SCC 705 (India).

towards party autonomy. Further the decision fails to provide any clarity on the scope of section 74. For section 74 is described by the court as one dealing with “penalty stipulated in the contract”.<sup>49</sup> The use of the term penalty disregards the nuances of the language of section 74. Consequently, the court fails to reflect on the extent to which the concept of party autonomy is embedded within section 74. As one reads through this judgment the lack of clarity becomes more pronounced. For the court declares that “[i]n some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties...”.<sup>50</sup> Evidently the confusion created in *Maula Bux*<sup>51</sup> is carried forward in the *ONGC* case.<sup>52</sup>

For if section 74 deals with penalty, it obviously cannot at the same time deal with genuine pre-estimate of loss. Since the latter means that the courts ought to in every case regard the stipulation on damages as valid. On the other hand if such stipulations are by default penalty, then the courts are to award only reasonable compensation subject to proof of actual loss. However in this judgment the court holds that “in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree.”<sup>53</sup> This is reiteration of the *Maula Bux*<sup>54</sup> ratio. The other problem with the judgment in the *ONGC*<sup>55</sup> case is that it has drastically reduced the importance of section 74. One can go to the extent of arguing that section 74 has now to be read as an appendage to section 73.

In explaining the scope of section 74 the court declares that “[s]ection 74 is to be read along with Section 73”<sup>56</sup> and the “[i]f the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract...party who has committed the breach is required to pay such compensation and that is

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Maula Bux v. Union Of India* 1970 SCR (1) 928 (India).

<sup>52</sup> *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd* (2003) 5 SCC 705 (India).

<sup>53</sup> *Id.*

<sup>54</sup> *Maula Bux v. Union of India* 1970 SCR (1) 928 (India).

<sup>55</sup> *Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd* (2003) 5 SCC 705 (India).

<sup>56</sup> *Id.*

what is provided in section 73 of the Contract Act.”<sup>57</sup> Section 73 of the Indian Contract Act deals with situations where there are no stipulation on damages within the contract. In other words the damages are to be ascertained after the breach. They have not been pre-determined or ascertained at the time of formation of contract. Evidently therefor section 73 and section 74 deals with two completely different scenario. Accordingly, they cannot be read together for they are meant to serve two different purposes. Section 73 codifies the English law on damages and requires the parties to establish proof of actual loss. The same is to be done subject to the rules specified therein.

Thus the parties have to either establish that the loss arose naturally from the breach or the parties knew at the time of formation, as likely to result from the breach. Clearly then in the absence of such proof the court cannot award any damages except a nominal one. In contrast section 74 permits and facilitates the parties to pre-estimate the loss at the time of formation of contract. Such pre-estimation are meant to provide them with the damages in the event of a breach. Hence there is no scope of any further proof to be furnished by the parties to the contract except the proof of breach. Supreme Court has itself recognised this distinction in the case of *Chunilal V. Mehta v. The Century Spinning*.<sup>58</sup> Justice Mudholkar, delivering the judgment for the five judge bench, declared that “when parties name a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim an unascertained sum of money as damages.”<sup>59</sup> This is a clear and definite statement highlighting the distinction between ascertained and unascertained damages. Continuing with this line of reasoning Justice Mudholkar holds that the “right to claim liquidated damages is enforceable under section 74... and [w]here the parties have... specified the amount of liquidated damages there can be no presumption that they... intended to... claim instead a sum of money which was not ascertained or ascertainable at the date of the breach.”<sup>60</sup> The Supreme Court ignored its own dictum in *ONGC*<sup>61</sup> by insisting that section 74 has to be read with section 73. In the process

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<sup>57</sup> *Id.*

<sup>58</sup> *Sir Chunilal V. Mehta and Sons, Ltd vs The Century Spinning and Manufacturing CO.* 1962 SCR Supl. (3) 549 (India).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd* (2003) 5 SCC 705 (India).

it blurred the distinction between pre-estimated damages or liquidated damages and unliquidated or unascertained damages.

The contradictions and confusion created through the ONGC decision is starkly clear from a reading of the Supreme Court's judgment in *Steel Authority Of India Ltd.*<sup>62</sup> The Supreme Court, after analyzing the specific facts therein, held that "It is true that Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined. However in the absence of any agreement specifying damages for the breaches alleged by the respondent, Section 74...is not at all attracted".<sup>63</sup> Sadly the ratio of *ONGC*<sup>64</sup> is now firmly entrenched within the Indian jurisprudence. The same is evident from the Supreme Court's judgment in *M/S. Kailash Nath Associates*.<sup>65</sup> In explaining the scope of section 74, the court held that the determination of reasonable compensation under section 74 has to be in accord with the "well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act."<sup>66</sup> Further "Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section."<sup>67</sup> This sums up the current chaos that the Supreme Court has introduced in the narrative on section 74. That has also ensured that the concept of party autonomy has fizzled out from the interpretative framework of section 74.

#### **IV. Resurrecting Party Autonomy and Section 74: Time to Adapt the Legitimate Interest Test?**

It's time that the chaos existing within the interpretative framework of section 74 is resolved. The same needs to be done to resurrect the concept of party autonomy. Further the uncertainty introduced in the discourse on section 74 needs to be sorted out to secure contractual transactions. The essential idea behind facilitating usage of stipulation on damages is allocation of risk arising from the breach. Through such stipulations the parties pre-determine the amount

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<sup>62</sup> *Steel Authority of India Ltd vs Gupta Brother Steel Tubes Ltd* (2009) 10 SCC 63 (India).

<sup>63</sup> *Id.*

<sup>64</sup> *Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd* (2003) 5 SCC 705 (India).

<sup>65</sup> *Kailash Nath Associates v Delhi Development Authority and Another* (2015) 4 SCC 136 (India).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

of risk at the time of formation of contract. Hence uncertainty surrounding the validity of such stipulations undermine the process of formation of contract. For the formation of a valid contract is premised on consensus-ad-idem. There are well defined grounds on which the validity of a contract is challenged. The parties thus have a ready to refer checklist that helps them form valid contracts. This settled process of contract formation is disrupted the moment the grounds determining contractual validity becomes uncertain. Considering that contracts are needed for transaction ranging from consumer to commercial, certainty is absolutely essential.

The certainty, referred to hereinabove, refers to the enforceability of the clauses and the contract. As explained above, the various decision on the scope of section 74 has disrupted this certainty. There are no guidelines to judge whether a stipulation is genuine or a penalty. The only refrain given is that “only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.”<sup>68</sup> And this indicates nothing and clarifies nothing for the contracting parties. The process of clearing the confusion on the issue thus needs to begin by re-reading section 74. The first para of section 74 is the relevant part, which states that

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”<sup>69</sup>

This is the para that has been interpreted in the manner discussed hereinabove. The current interpretative structure of section 74 over-emphasises on the word ‘penalty’, as used therein. Penalty is a term having origins in English law. In English law this term was developed in to an equitable doctrine and applied to assess the validity of defeasible bonds. Over a period of time the common law too started using the doctrine of penalty. Eventually the doctrine came to be used

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<sup>68</sup> Kailash Nath Associates v Delhi Development Authority and Another (2015) 4 SCC 136, 163 (India).

<sup>69</sup> The Indian Contract Act, No. 9 of 1872 INDIA CODE (1872).

by the common law courts to assess the enforceability of stipulation on damages. Accordingly they distinguished between “a provision for the payment of a sum representing a genuine pre-estimate of damages and a penalty clause in which the sum was out of all proportion to any damages liable to be suffered.”<sup>70</sup> This approach of the common law courts thus curtailed all possibilities of preserving party autonomy. The outcome was that all stipulations on damages were to be tested under the penalty rule. Common law courts enforced what they termed as liquidated damages and rendered void stipulations found to be penal. This distinction between liquidated damages and penalty “has remained fundamental to the modern law, as it is currently understood” in English contract law.<sup>71</sup>

Section 74 was drafted and incorporated in the Act, to override this complex history of the penalty rule. As has been mentioned hereinabove, the original version of this section, as proposed by the Third Law Commission stated that

“When a contract has been broken, if a sum is named in the contract itself as the amount to be paid in case of such breach, the amount so named shall be paid accordingly.”<sup>72</sup>

In proposing this version the Third Law Commission justified the same on the ground that it obliterates the complexity under English law. Accordingly, the payment of stipulated sum was to be the only requirement. The Indian law was to have no regard for the distinction between liquidated damages and penalty.<sup>73</sup> This proposal was objected to and the Select Committee ended up drafting and incorporating a completely different version which got codified as section 74.<sup>74</sup> As mentioned hereinabove, section 74, as it originally stood, permitted awarding reasonable compensation. It thus appears that the Select committee favoured “turning all the liquidated damages into penalty”.<sup>75</sup> The 1899 amendment to section 74 has not changed this requirement. Hence what we get from a plain reading of section 74 is that irrespective of the quantum stipulated, only

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<sup>70</sup> Cavendish Square Holding BV v Talal El Makdessi and Another [2015] UKSC 67. (UK).

<sup>71</sup> *Id.*

<sup>72</sup> Justice M. Jagannadha Rao, LIQUIDATED DAMAGES AND PENALTIES: EX ANTE OR EX POST METHODOLOGY, 1 SCC. J-1 (2013).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> ATUL CHANDRA PATRA, HISTORICAL BACKGROUND OF THE INDIAN CONTRACT ACT, 1872, 4 J. INDIAN L. INST. 373 (1962).

reasonable compensation is to be given. The stipulation is to act only as the upper ceiling and the reasonable compensation cannot exceed the ceiling.

The courts, as seen hereinabove, has read the section in keeping with the view point of the Select Committee. Unfortunately, they have till date, not determined the objective parameters to assess reasonable compensation under this section. It is submitted that one can find the clue to assess reasonable compensation within the section itself. And accordingly there is neither a need nor a necessity to refer to section 73 and its jurisprudence. The courts by doing so are missing the point completely. Even if one accepts that the Select Committee did intend to treat all stipulations as penalty, it still does not justify such reference. For the first paragraph of section 74, read holistically can lend itself to mean that the proof of actual loss is not needed. The only thing the courts need to assess is reasonability of the stipulation. And in doing so the burden ought to be placed on the party challenging the validity of such stipulations. If the party so challenging, is not able to discharge the burden of such a challenge, the stipulation ought to be enforced.

As to the assessment criteria to judge the validity of such stipulations, one has to revert to the theory of consensus-ad-idem. Since the stipulations on damages are incorporated at the time of formation of contract, its validity ought to be judged like in case of other clauses. Hence if it's established that the parties have freely consented to such stipulations, the same ought to be held valid. Apart from proof based on the lack of consent or quality of consent, no other proof ought to be entertained. There might however be an argument for applying equitable considerations like the doctrine of unconscionable bargains. However the same should be applied subject to the limits, as explained by the Supreme Court in the Central Inland Water Transport case.<sup>76</sup> As per Justice Madon

“the courts will not enforce... an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power...”. Accordingly he declared that this doctrine will apply “where a man has no choice... but... to accept a set of rules as part of the

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<sup>76</sup> Central Inland Water Transport Corporation Limited and Another v Brojo Nath Ganguly and Another (1986) 3 SCC 156.

contract, however unfair, unreasonable and unconscionable a clause in that contract...”<sup>77</sup>

He then goes on to set the qualification upon the application of this doctrine by stating that “[t]his principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction.”<sup>78</sup> This is an important guideline while considering the validity stipulation on damages. Thus barring contracts involving persons who are economically weak and vulnerable, stipulations on damages in all other contracts are to be enforced. And equitable consideration should have no role to play, except in the situation enumerated above. The point that one is trying to put forth is that the section 74 needs to be given its due without being subservient to the requirements of section 73. The author accepts that the legislative intent was to treat all stipulations referred to under section 74 as penalty. At the same time the rationale behind this intent cannot be ignored. And that was to completely deviate from the English law on the issue. As has been explained in the *Cavendish Square Holdings* case,<sup>79</sup> the penalty rule has led to lot of problems within the English law.

As per Lord Neuberger and Lord Sumption the penalty rule in England “is an ancient, haphazardly constructed edifice which... should simply be demolished, and in the opinion of others should be reconstructed and extended. For many years, the courts have struggled to apply standard tests formulated more than a century ago for relatively simple transactions to altogether more complex situations.”<sup>80</sup> It is this view point that has led the UKSC to revisit and reformulate the approach towards liquidated damages. Accordingly Lord Neuberger and Lord Sumption formulate that the “real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss... A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not... mean that it is penal.”<sup>81</sup> Accordingly they hold that the question to be asked while assessing the validity of a stipulation on

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Cavendish Square Holding BV v Talal El Makdessi and Another* [2015] UKSC 67.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

damages is “whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.”<sup>82</sup>

They further declare that “[i]n a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.”<sup>83</sup> Lord Mance declared that “...that the agreed sum [stipulation on damages] must not have been extravagant, unconscionable or incommensurate with any possible interest in the maintenance of the system, this being for the party in breach to show.”<sup>84</sup> Accordingly he was of the firm view that “[w]hat is necessary in each case is to consider... whether any (and if so what) legitimate business interest is served and protected by the clause...”<sup>85</sup> Lord Hodge too agreed with the legitimate interest test, developed by the other Law Lords, as referred to hereinabove. He accordingly held that “the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party’s interest in the performance of the contract.”<sup>86</sup> Lord Toulson too adopted this line of reasoning as the correct measure to determine the validity of a stipulation on damages. In short all the Law Lords of the UKSC agreed that the only assessment to be made to judge the validity of a stipulation on damages is the legitimate interest of the parties.<sup>87</sup> In the process they ended up re-visiting and reformulating the tests developed by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd*.<sup>88</sup> As per the tests developed by Lord Dunedin ““(a)...the provision would be penal if “the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach”.”<sup>89</sup> Further a stipulation

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Dunlop Pneumatic Tyre Company, Limited v New Garage And Motor Company, Limited* [1914] UKHL 1.

<sup>89</sup> *Id.*

on damages will be penal if “(b)... the breach consisted only in the non-payment of money and it provided for the payment of a larger sum”.<sup>90</sup> A stipulation on damages will also be penal if “(c)... if it was payable in a number of events of varying gravity.”<sup>91</sup> The final test was that “(d)... it would not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss.”<sup>92</sup>

The author herein would submit that the Supreme Court of India could have reformulated its approach decades ago. This is so because of the comparative advantageous position the Supreme Court is in due to the provisions of the Act. Further, as argued above, the legislative intent too was to completely discard the complexities of the penalty rule under English law. Hence the task was clearly cut out for the Supreme Court of India to develop an Indian position on liquidated damages stipulations. Given that there is a well-defined chapter on formation of contract within the Act, section 74 could have been read in light of the same. Further in cases of all disputes relating to formation and performances, the courts do refer to the terms of contract. And such reference is used to deduce the intention of the parties. In determining the validity of stipulation on damages, the approach should not have been any different. The biggest mistake of the Supreme Court of India has been to treat stipulation of damages as akin to un-ascertainable damages. This has resulted into the ensuing confusion. Hence we find that at one hand they are stating that actual loss need not be proven and the stipulation will be enforced. At the other end they are insisting on proof of actual loss as per the norms laid down in section 73. This is fundamentally wrong because the considerations for assessing un-ascertainable damages are played out with reference to the date of breach. Hence the party has to establish the net loss based on the evidence on the date of the breach. This is justified by the rationale that in contract damages are awarded to take the parties to the position in which they would have been had the contract been performed. On the other hand a stipulation on damages is the result of a bargain and is settled in on at the date of formation of contract. Hence the only thing that matters is interpretation of the contract with reference to the intention of the parties. That automatically leads to the ascertainment of the legitimate interest of the parties. Such consideration are taken into account for example to assess whether time is the essence of the

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

contract. Similarly intent and interest of the parties at the time of formation of contract is taken into account to assess the status of a term as a condition or a warranty.

A stipulation on damages should be no different and has to be treated like any other contractual clause. For a stipulation on damages is fundamentally different from the concept of unascertainable/unliquidated damages. The fact that section 74 is clubbed with the other sections on damages in Chapter VI of the Act, it cannot be interpreted in the same manner. Alternatively even if we are to argue that section 74 needs to be read in the same way as section 73, the current interpretative approach of the courts are not justifiable. Section 73 allows an innocent party to claim damages based on two principles. First, a party can claim damages that are natural outcome of the breach and are obvious or foreseeable at the time of the formation of contract. The other is that if the parties are informed and have knowledge about some special circumstances then the innocent party can claim damages for that loss as well. Application of these principles to the interpretational framework of section 74, should lead to a simple conclusion that it satisfies the second principle. For the stipulation on damages automatically establishes knowledge on the part of the parties to the contract. Hence from that perspective also its validity can only be challenged on the usual grounds applied for testing the validity of contractual clauses. The proof of actual loss, as mandated by the Supreme Court in the cases discussed hereinabove is thus patently wrong.

Finally, section 74 cannot be devoid from the considerations applied to the statutory interpretations. Even if one argues that the legislative intent required all stipulation on damages to be treated as penalty, this cannot be treated as an unwavering rule. The section needs to be read dynamically to cater to the ongoing developments in the field of contractual transactions.<sup>93</sup> The Select Committee's reasons for treating all stipulations as penalty were different and are no longer valid in today's world. Considering the complexities of modern contractual transactions, it is neither advisable nor justifiable to apply an arcane approach to section 74. The need of the hour is to suit the legislation to the demands of the

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<sup>93</sup> JUSTICE G.P. SINGH, PRINCIPLES OF STATURY INTERPRETATION (Justice AK Patnaik 14th ed. 2016).

modern times.<sup>94</sup> As has been explained above one has to change the perspective. The law need not be amended for it contains within itself the tools to interpret it dynamically. Considering the Act has witnessed very few amendments in the centuries that it has survived, is evidence of its inherent dynamism. Further over the years Supreme Court too has expanded the ambit of the various provisions of the Act through dynamic interpretations.<sup>95</sup> In doing so court has taken inspiration from the English law. It may sound ironical but English law has given us important insights whenever we are in the danger of rendering the Act otiose. Hence in the light of UKSC's formulation of the legitimate interest test, Supreme Court of India too can adapt the same while interpreting section 74. And that will resurrect the concept of party autonomy and secure its rightful place within section 74.

## V. Conclusion

The party autonomy concept has been one of the greatest import from English contract law within the Act. And it is time that the courts in India give full flow to the concept to clear the confusion on liquidated damages. The language of section 74 is dynamic enough to accommodate the concept of party autonomy. A careful reading of the said section establishes that the concept of party autonomy is embedded with the section. The courts need to only change their perspective to resurrect the concept. Towards this end the legitimate interest test is a useful tool and can help the courts in preserving party autonomy as well as enforcing the stipulation on damages. The UKSC's formulation of the legitimate interest test is a useful reference for the courts to cut through the current chaos. Application of the legitimate interest test will enable the courts to treat the stipulation on damages as akin to any other contractual clause. Hence the validity of such stipulations will be judged based on the principles of consensus ad-idem and valid consent. The current practice to test the validity of such stipulations based on the proof of actual loss needs to be discarded. For though the stipulation is on liquidated damages, nonetheless it is the outcome of a bargain. Being incorporated at the stage of formation of contract it is different from unascertainable damages. Thus the courts need not treat stipulation on liquidated

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<sup>94</sup> WILLIAM N. ESKRIDGE, JR, DYNAMIC STATUTORY INTERPRETATION, 135 U. PA. L. REV. 1479 (1987).

<sup>95</sup> Bhagwandas Goverdhandas Kedia v M/s. Girdharlal Parshottamdas and Co. 1966 AIR 543.

damages at par with unliquidated damages. Such an approach allows the courts to use legitimate interest test to uphold party autonomy and correct the discourse on liquidated damages.

**The Sabarimala Debate:  
An Analysis of the Judgment of Indian Young Lawyers  
Association V. State of Kerala**

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Nivedita Barailly<sup>2</sup>*

**Abstract**

*Religion has always remained one of the most intrinsic elements in an individual's life. The rights to freedom of religion coupled with the right to equality are the monumental foundations of Indian democracy. When on one hand the Supreme Court was confronted to choose between women's rights and religious rights, it inclined towards women's rights in the case of Indian Young Lawyers' Association v. State of Kerala and others. But was this choice made as a matter of public interest and beneficial to the general mass? This paper not only discusses the ongoing Sabarimala debate, that is, whether or not allowing women of menstruating age is a move towards women empowerment and development but also attempts to bring forth the subsequent reaction after the judgment. This research paper also attempts to comprehend whether such a decision of the Supreme Court contravenes the constitutional mandate of secularism.*

**Keywords:** *Sabarimala, secularism, right to freedom, right to religion, women rights and women empowerment*

**I. Introduction**

Sabarimala is a shrine considered to be one of the holiest temples in Hinduism. It is located in Periyar Tiger Reserve in Pathanamthitta district in Kerala, India. The temple is situated on a hilltop named Sabarimala with a unique feature i.e., it is about 3000 feet above sea level. The Sabarimala Sree Dharma Sastha Temple was built for the idolisation of Lord Ayyappa who is believed to be the offspring of Lord Shiva and Goddess Mohini (Lord Vishnu's Female Avatar). The temple welcomes people of all religions. This temple, however, does not remain open throughout the year. It is open for worship only during the three days of

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“Mandalapooja, Makaravilakku and Vishu”. The pilgrims have to observe a period of celibacy which is for 41 days before going to Sabarimala.<sup>3</sup>

Lord Ayyappa was an eternal celibate and since times immemorial women of menstruating age, that is, between 10 to 50, were forbidden from entering the temple. According to the Puranas, Lord Ayyappa was born with a purpose to defeat and kill a female demon. As a child born of Lord Shiva and Lord Vishnu, he was a result of union of forces. After fulfilling his mission of killing the female demon, a beautiful woman emerged from the body. She had been cursed and now was released because of Lord Ayyappa. On being asked to marry her, Lord Ayyappa refused because he had to return to Sabarimala to answer his devotees’ prayers and questions. He promised to marry her when kanni-swamis (first devotees) stop visiting him. She is portrayed as waiting for him in the neighboring shrine near the main temple and is worshipped as Malikapurathama. The women of menstruating age do not enter the temple out of respect for Malikapurathamma and to respect Lord Ayyappa’s celibacy.<sup>4</sup>

This restriction was first challenged in the Kerala High Court in the year 1991 in the case *S. Mahendran v. The Secretary, Travancore Devaswom Board*.<sup>5</sup> However, the High Court upheld the age-old restriction on women of a certain age group from entering the temple. The judgment dated 28 September 2018 by the Supreme Court in the *Indian Young Lawyers’ Association v. State of Kerala*,<sup>6</sup> struck down the said ban on women. The Constitution Bench headed by the then Chief Justice Dipak Misra in a 4:1 verdict said the temple rule violated their right to equality and right to worship and therefore, lifted the said ban. However, Justice Indu Malhotra did not agree with the given judgment and was the lone dissenter in the case. The judgement that has been given is not completely satisfactory on the part of the worshippers and the believers of the said custom. Justice Indu Malhotra is of the view that an age-old custom that is religious in

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<sup>3</sup> GOVERNMENT OF KERALA, SABARIMALA SHREE DHARMA SASTHA TEMPLE <http://www.sabarimala.kerala.gov.in> (last visited Oct. 11, 2021).

<sup>4</sup> M.A Deviah, *Here's why women are barred from Sabarimala; It is not because they are 'unclean'* FIRST POST (Oct 11, 2021, 05:10 PM) <https://www.firstpost.com/india/why-women-are-barred-from-sabarimala-its-not-because-they-are-unclean-2583694.html>

<sup>5</sup> AIR 1993 Ker 42.

<sup>6</sup> (2019) 11 SCC 1; AIR 2018 SC (Supp) 1650; AIROnline 2018 SC 243

nature should not be tampered with and worshipping is a sacred thing between the worshipper and the worshipped.

## **II. An Analysis of the Judgment Allowing Menstruating Women in the Sabarimala Temple**

The Chief Justice of India Hon'ble Dipak Misra, R.F. Nariman, J., A.M. Khanwilkar, J. and D.Y. Chandrachud, J. constituted the majority whereas Indu Malhotra, J. constituted the sole dissenting judgement.

### **A. An Analysis of the Majority Judgment<sup>7</sup>**

#### ***Dipak Misra, CJI and A. M. Khanwilkar, J.***

The judgment on behalf of himself and A. M. Khanwilkar, J., Dipak Misra, CJI expressed that women are in no way inferior to men. There cannot be any religious patriarchy in matters of faith and belief. The duality in religion is what made them question the validity of the said restriction. On one hand, women are revered as goddesses and on the other, severe restrictions are imposed on their right to religion.

It is the need of the hour for society to undergo a reformation and transition from a patriarchal hegemony to giving equal status to women with that of their male counterparts. Religion and faith do not support or encourage discrimination, however, religious practices have perpetuated patriarchal notions and have given superiority to men.

The exclusionary practice of not allowing women of menstruating age, i.e. 10-50 years old, from entering the temple is violative of Article 14 as the exclusion is based on physiological conditions beyond the control of women. In *Deepak Sibal v. Punjab University and another*<sup>8</sup>, the Supreme Court held that exclusionary practice violates the sacrosanct principle of equality of status to women and also equality before law. In *Shayara Bano v. Union of India*<sup>9</sup>, as the giving of triple talaq gave men superiority and was based on physiological factors, neither did it

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<sup>7</sup> WRIT PETITION (CIVIL) NO. 373 OF 2006

<sup>8</sup> (1989) 2 SCC 145 (India).

<sup>9</sup> (2017) 9 SCC 1. (India).

serve any valid object nor satisfied the test of reasonable classification hence the practice was abolished.

In *National Legal Services Authority v. Union of India*<sup>10</sup> and *Justice K.S. Puttaswamy and another v. Union of India and others*<sup>11</sup>, the Supreme Court averred that exclusionary practices against women violates the fundamental right guaranteed under Article 21 of the Constitution, namely right to life and personal liberty.

Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is violative of Article 25(1) of the Constitution, that is, the right to practice, profess and propagate religion. The Rule forbidding the women of menstruating ago from entering the Sabarimala premises is a clear violation of the right of Hindu women to practice their right to religion and therefore, ultra vires the Constitution. Coming to the factual score, the petitioners of the concerned case namely; the Indian Young Lawyers' Association, Bhakti Pasrija, Laxmi Shastri, Prerna Kumari, Alka Sharma and Sudha Paul, contended that the Sabarimala Temple is not a separate religious denomination. Since they conduct 'Puja' which is one of the tenets of Hinduism, the Ayyappans are also Hindus.

In *S.P. Mittal v. Union of India & Ors*<sup>12</sup>, the Supreme Court held that the words 'religious denomination' in Article 26 of the Constitution must take their true meaning from the term 'religion', therefore, the expression 'religious denomination'. Therefore, there has to be a strong connection amongst the members of the denomination. Such denominations must be comprehensively distinct with a particular set of rituals, usages or practices and have their own distinct name and religious institutions. If the attributes vividly reflect that there exists a sect which can be identified as being distinct by its practices and beliefs and has a group of individuals as followers who follow the same faith, it would thus be a 'religious denomination'.

In the Indian context, the concept of essential practices has evolved gradually and considerably and has made possible the courts' intervention in the religious

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<sup>10</sup> (2014) 5 SCC 438(India).

<sup>11</sup> (2017) 10 SCC 1(India).

<sup>12</sup> 1983 AIR 1; 1983 SCR (1) 729. (India).

aspect.<sup>13</sup> The issue of doctrine of essential religious practices was first raised in Shirur Mutt,<sup>14</sup> in the year 1954 wherein, a bench comprising seven judges of the Supreme Court addressed a challenge raised at the Madras Hindu Religious and Charitable Endowments Act 1951. The impugned enactment gave powers of framing and settling any scheme to a statutory commissioner. There existed ample reason to believe that the concerned religious institution was misgoverning funds. The petitioner felt that his right to manage religious affairs was being violated and encroached and as a result violated Article 26(b) of the Constitution.<sup>15</sup> Distinguishing between religious and secular practices the Court held that what constitutes the essential part of a religion is primarily to be ascertained regarding the doctrines of that religion itself.

The legitimate parameter of deciding on religious issues (on violation of civil rights) and duly interfering in religious matters is passably narrow. It is an arduous task to differentiate between religious ritual and what is a right to worship itself.<sup>16</sup> The civil court will not interfere in the matters and questions which are not related to the right to worship per se but to the manner of how the worship should be conducted. In *Bijoe Emmanuel v. State of Kerala*,<sup>17</sup> the Headmistress of a school in Ettumanoor near Kottayamschool, expelled three children, namely Bijoe, Bino Mol and Bindu Emmanuel. The reason for the same was refusal to sing and join along the other students for singing the National Anthem. These kids belonged to Jehovah's Witnesses and had approached the High Court of Kerala through a writ petition to challenge the action of their Headmistress. The children belonging to this sect exercising their right to worship contended that they could only sing non-secular or religious songs.

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<sup>13</sup> Gilles Tarabout, *Ruling on Rituals: Courts of Law and Religious Practices in Contemporary Hinduism*, SOUTH ASIAN MULTIDISCIPLINARY ACADEMIC JOURNAL, (Oct, 11 2021, 5:17 PM)

<https://journals.openedition.org/samaj/4451>.

<sup>14</sup> 1954 SCR 1005.

<sup>15</sup> LEGITQUEST <https://www.legitquest.com/case/indian-young-lawyers-association-v-the-state-of-kerala/105124> (last visited Oct 12, 11:17 AM).

<sup>16</sup> *J. Gopanna v. K. Ramaswami*, AIR 1944 Mad 416.

<sup>17</sup> 1987 AIR 748, 1986 SCR (3) 518. (India).

The petitioners have submitted that even if Sabarimala temple were considered as a religious denomination, their basic tenets are not restricted only to the oath of celibacy for certain period of pilgrimage as all pilgrims are allowed freely in the temple and there is no such practice forbidding them the sight of women during this period.<sup>18</sup> Furthermore, the oath of celibacy cannot be so weak to be broken by a mere sight of women. Therefore, maintaining celibacy is only a ritual that a few Ayyappans follow and a few don't. The devotees of Ayyappa do not go to the Sabarimala Temple only to take the oath of celibacy, they go to receive abundant blessings from their Lord.

This case also discusses about public morality and constitutional morality. The concept of morality should not be looked into with a narrow lens. The term morality in Article 25(1) is not confined to individual perception or subjective morality. The Constitution is adopted and given by the people to themselves, therefore, the concept of morality is public morality and has to be understood as apposite to constitutional morality.

***Justice R.F. Nariman***

Although Justice Nariman had a separate judgment but it is concurring to the judgment delivered by Dipak Misra, CJI on behalf of A.M. Khanwilkar, J and himself. Nariman, J said that the concerned writ petition raises substantial question of fundamental rights under Articles 25 and 28. The complete and indefinite exclusion of women can be said to be violative of Article 25 of the Constitution.

As was held by the Supreme Court in *Ratilal Panachand Gandhi v. State of Bombay and Ors.*<sup>19</sup>, that the freedom of religion under Article 25 of the Constitution means to perform those acts which is in pursuance of the concerned religion and forms an essential practice of the same. However, this right is subject to State regulation to secure order, public health and morals.

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<sup>18</sup> SUPREME COURT OF INDIA,  
[https://main.sci.gov.in/supremecourt/2006/18956/18956\\_2006\\_Judgement\\_28-Sep-2018.pdf](https://main.sci.gov.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf) (last visited Oct. 13 2021).

<sup>19</sup> 1954 SCR 1055 (India).

The term religion as defined by Fields, J. in the American case of *Davis v Beason*<sup>20</sup>, as one's manner in defining his relation with the Creator and having reverence obligations and obedience towards the Will of the Creator. Although, religion can be expressed by outwardly acts, it is highly intrinsic and something that can be considered conducive to their spiritual well-being. Hence, the complete prohibition on women is a hindrance to their right to worship.

In *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*<sup>21</sup>, although the then Chief Justice Sinha dissented from the majority judgment of striking down the Bombay Prevention of Excommunication Act, 1949, his dissenting judgment contained parts that were apposite to the majority judgment. Therefore, it was laid down that the right guaranteed under Article 25 is an individual right distinct from right exercised by a collective body or a religious denomination. Hence, every member of the community, as long as he/she does not hinder the rights of others, can profess, practice and propagate his/ her religion.

***Justice D.Y. Chandrachud***<sup>22</sup>

Justice D.Y. Chandrachud emphasised on the importance of the principles laid down in the Preamble of our Constitution namely, justice, equality, liberty and fraternity. Secularism has always impliedly been a part of our Constitution, however, it was explicitly inserted into the Preamble by the 42<sup>nd</sup> Constitutional Amendment Act, 1976. The custom in question goes against the very ideology of the Constitution framers. As the Constitution recognises religion as intrinsic and gives the right to freedom of religion to its people, it is equally important to ensure the same.

Chandrachud J., also put for that the custom in question is violative of Article 17 of the Indian Constitution. Article 17 abolishes untouchability and its practice in 'any form'. The Constitutional framers have deliberately left the term 'untouchability' undefined. The fundamental reason of abolishing untouchability is to uproot the practice of social ostracisation and to bring equality.

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<sup>20</sup>133 U.S. 333. (USA).

<sup>21</sup> 1962 Supp. (2) SCR 496.

<sup>22</sup> SUPREME COURT OF INDIA,

[https://main.sci.gov.in/supremecourt/2006/18956/18956\\_2006\\_Judgement\\_28-Sep-2018.pdf](https://main.sci.gov.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf) (last visited Oct. 13 2021).

The custom can be seen as one that promotes the notion of purity and pollution and ostracises women because of ‘impurity’ during their menstruation. As the Article mentions “any form”, prohibiting the entry of women into the premises of a temple can also be considered as a form of untouchability. Explanation II of Section 7 of the Protection of Civil Rights Act, 1955 explains untouchability as untouchability or its practice in any form and even if a person tries to justify the practice on historical, religious or philosophical ground, it would be incitement to untouchability.

### **B. Justice Indu Malhotra’s Dissenting Judgment**

Justice Indu Malhotra said the right to equality conflicted with the right to worship of devotees of Lord Ayyappa and the deity of the Sabarimala temple; and that the doctrine of equality cannot override the fundamental right to worship under Article 25 of the Constitution. The issues raised in this case have serious and unprecedented consequences for various religions professed throughout the country. Which has turned out to be true as the nine-judge Bench constituted will also hear the matters of religious practices in connection to women belonging to Islamic and Zoroastrian religions.

#### ***Maintainability of Writ Petition***

Article 32 of the Indian Constitution provides the right to move the Supreme Court for the violation of Fundamental Rights. Therefore, the petition filed by the petitioners of the Sabarimala Temple must have their rights violated. However, the petitioners do not claim that their rights have been violated. She also added that permitting religious PILs will lead to overburden amongst courts and encroaching religious customs or practices in question. Concerning the legal requirement of having locus standi, it became necessary to define who should be considered as a worshipper, that is, the worshippers need to have a personal interest in a given conflict to be allowed to file litigation. It is important for the petitioner to have an interest in the petitioned case or else the petition stands rejected.<sup>23</sup> In *Chockalingam v. Nambi Pandiyan*<sup>24</sup>, it was held that the matters of any temple can be taken to the court by worshippers peculiar to the temple only. The Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, under

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<sup>23</sup> WRIT PETITION (CIVIL) NO. 373 OF 2006.

<sup>24</sup> S.A.(MD).No.1075 of 2009.

clause (15)(b) of Section 6 defines the phrase ‘person having interest’ as one who frequents the temple or any temple services or performance of worship or is entitled to any benefit.

For instance, the Lord Brahma’s temple at Pushkar in Rajasthan dating back to the 14th century is one of the most significant temples for the worship of Lord Brahma. The married men are forbidden from entering the temple. During Kartik Poonima, Kartik religious festival is held annually in Brahma’s reverence.<sup>25</sup>

It is believed that Maa Parvati went to a secluded site amidst an ocean for ‘Tapasya’ or meditation. This ‘Tapasya’ was to get Lord Shiva as her husband. Therefore, only women are allowed in the famous temple of Kanya Kumari of Goddess Bhagati Maa and men are strictly prohibited there. In this temple, Kanya Maa Bhagwati Durga is worshipped by women only.

A Mata temple at Muzaffarpur in Bihar during the special period only women devotees are allowed to enter the temple, not even the Pujari of the temple is allowed to enter the premises.

#### ***Applicability of Article 14 of the Constitution of India***

Indu Malhotra J. further pointed out that Article 14 comes into force when situations are similarly placed, i.e. by persons either belonging to the same religion, sect or faith. The petitioners are not the devotees of Lord Ayyappa and are not aggrieved by the said custom. The right of an individual to worship is protected under Article 25(1) of the Constitution.

A restriction imposed by reason of a statute, must be upheld in the event it is found that the person to whom the same applies, forms a separate and distinct class and that such classification is a reasonable one based on intelligible differentia having sufficient nexus with the object to be achieved.<sup>26</sup> Keeping this in mind, it is safe to say that the Kerala Hindu Places of Worship Act is valid and owing to long usage of custom the restriction imposed on women is also valid. If a special law can be passed for Shri Jagannath Temple for holding a unique

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<sup>25</sup> Editorial “Temples or Rituals in India Where Men are Not Allowed”, *The Fresh Press Journal*, Apr. 26, 2016.

<sup>26</sup> John Vallamattom v. Union of India, (2003) 6 SCC 611; AIR 2003 SC 2902. (India).

position among the Hindu temples,<sup>27</sup> it becomes important to recognise the uniqueness of Sabarimala temple also and respect the deity's celibacy.

Article 14 can not be the sole touchstone to test religious customs and practices and Article 24 gives the right to profess and propagate their religion. Equality in matters of religion must be perceived in the milieu of the worshippers of the same faith.

***Article 17: Whether applicable or not?***

The petitioners contended that the said custom is a form of 'Untouchability' under Article 17 of the Constitution and is in this way a culpable offence. Be that as it may, all types of prohibition are not under untouchability. Article 17 specifically relates to class based ostracisation. The impugned custom is predicated upon the verifiable root and the convictions and practices of the Sabarimala Temple. In the current case, women of the any age group are allowed entry into every other temple of Lord Ayyappa where he has not shown Himself as an abstinent or a celibate. The limitation on the passage of women in this Temple is because of the novel character of the God and not founded on any social avoidance. The comparison between the Dalits and women of impermissible age limit is misjudged and impractical.

During the constitutional debates, Mr V.I. Muniswamy Pillai had stated that under caste distinction they suffer tyrannically at the hands of so-called higher caste Hindus. All those people who were not of higher class like that of landlords were barely treated as human beings. He believed that by the adoption of the untouchability clause, many a Hindu who is a Harijan will have a place in society.<sup>28</sup>

Dr Mono Mohan Das while accepting the meaning of untouchability under our Constitution or the then Draft Constitution quoted Gandhi. Gandhiji said that he did not want to be reborn but if he would be born again then he preferred to be born as a Harijan or an untouchable so that he can lead a life of constant battle against persecution and insults that have been loaded upon these classes of individuals since as long as memory serves.

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<sup>27</sup> Bira Kishore Das v. State of Orissa, AIR 1964 SC 1501; (1964) 7 SCR 32. (India).

<sup>28</sup> CASEMINE, <https://www.casemine.com/judgement/in/5baf12129eff430ce6534b78> (last visited Nov 13, 2021).

In *Sri Venkataramana Devaru & Ors. v. State of Mysore & Ors.*,<sup>29</sup> the Supreme Court observed that one of the biggest problems faced by the people trying to eliminate religious evils is superstition and lack of acceptance living amongst all other communities. Therefore, the social reformers attempted to eliminate this social evil which impelled the enactment of Article 17, which abolished untouchability and forbade its practice in any form and also made it a punishable offence. Furthermore, not a single precedent exists in a manner brought forth by the petitioners. It is of significance to mention that this submission was rejected by the Counsel of the State of Kerala.

### **III. Reactions to the Sabarimala verdict dated 28.09.18**

An online survey was conducted by the author amongst the advocates and non-advocates from Kerala<sup>30</sup> for a better and a closer understanding of the impact of the judgment.

#### ***Reaction to the Judgment by the Advocates***

The majority (56%) supported Justice Indu Malhotra's dissent and were of the opinion that the followers have severely opposed to the judgment as it was against their belief and customary practice. They also opined that if the society needs to change certain traditions it must be implemented judiciously and not forcibly. Furthermore, they were of the opinion that the Supreme Court should not have indulged in sacrosanct religious affairs.

As far as the non-followers are concerned; their view is totally opposite to that of the followers. The non-followers supported the judgment as they viewed it in a more pragmatic sense and believed that lifting such ban would prove beneficial to women empowerment and granting equality to women in matters of religion.

As far as the Kerala Government's response was concerned, it was found that they had a divided opinion. One half believed that the government welcomed the judgment at first and supported the women's right to enter the temple but after the continuous riots and strikes by the people, the government took a different stand. The other half opined that the government advocated pseudo-feminism by

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<sup>29</sup> 1958 AIR 255, 1958 SCR 895. (India).

<sup>30</sup> The platform used for the survey was Google Forms.

promoting, volunteering and actively encouraging women to enter the temple premises.

The majority (56%) believed that the judiciary or the government can indulge on a matter that is predominantly a matter of faith and religion, however, to indulge cautiously and without hampering our constitutional mandate of secularism.

#### ***Reaction to the Judgment by the Non-Advocates***

The majority (64%) of the non-advocates viewed it as a step towards achieving gender equality. As a resident of Kerala, 55% found the judgment to be reasonable. However, 55% are of the view that the judgment did not sit very well with the women from Kerala in particular.

The majority (70%) do not view the lifting of such a ban as an interference on customary practices and neither an anti-secular judgment. Rather they are of the opinion that lifting of such a ban determines secularism for the as the custom was unreasonable and illogical.

The majority (73%) believed that the verdict will make Hinduism all-inclusive and will not reduce Sabarimala to a mere tourist spot. Rather, the verdict have a positive impact on eliminating discriminatory customary practices.

#### **IV. Post Judgment Developments**

On November 14, 2019 the Bench with a majority of 3:2 referred the case to a larger Bench. Justices Nariman and Chandrachud constituted the dissenting judgment dismissing all the review pleas. Chief Justice Ranjan Gogoi read the verdict on behalf of himself and Justices AM Khanwilkar and Indu Malhotra; he said the larger bench would decide all such religious issues relating to Sabarimala, the entry of women in mosques and the practice of female genital mutilation in the Dawood Bohra community.<sup>31</sup>

The 9-judge bench constituted by the Supreme Court headed by the then Chief Justice S.A. Bobde commenced the hearing on the aforementioned issues on

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<sup>31</sup> MURALI KRISHNAN, *Sabarimala Review: Majority Judgment explained*, BAR AND BENCH (Nov 14, 2021, 4:30 PM )<https://www.barandbench.com/columns/sabarimala-review-majority-judgment-explained>.

February 06, 2020.<sup>32</sup> The 9-Judge Constitution Bench thus constituted comprises the then Chief Justice of India S.A. Bobde and Justices R Banumathi, Ashok Bhushan, L Nageswara Rao, Mohan M Shantanagoudar, S Abdul Nazeer, R Subhash Reddy, BR Gavai, and Surya Kant and shall cater to seven questions.<sup>33</sup>

The questions are as follows<sup>34</sup>:

1. The interrelation between Articles 14, 25 and 26, i.e., right to equality, the right to freedom of religion and the right to manage religious affairs respectively.
2. The meaning and the intent of the words 'public order, morality and health' occurring in Article 25(1) of the Constitution.
3. The expression 'morality' or 'constitutional morality' has not been defined in the Constitution.
4. The extent to which the court can intervene in deciding whether a particular religious practice is essential to the religion or not, or should that be left exclusively to be determined by the head of the section of the religious group.
5. What is the meaning of the expression 'sections of Hindus' appearing in Article 25(2)(b) of the Constitution?
6. Whether the "essential religious practices" of a religious denomination, or even a section thereof are afforded constitutional protection under Article 26?
7. What would be the permissible extent of judicial recognition to PILs in religious affairs by people not belonging to the concerned religious denomination?

At the outset, a core committee member of the Sabarimala Temple urged the Court to hear and decide the review petition in light of submissions made by the head of the committee. However, CJI Bobde responded:

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<sup>32</sup> THE WIRE, <https://thewire.in/law/sabarimala-verdict-supreme-court> (last cosine Nov. 13, 2021).

<sup>33</sup> BAR AND BENCH, <https://www.barandbench.com/news/9-judge-bench-reference-in-sabarimala-review-lawyers-to-meet-on-jan-17-to-chart-out-course-of-hearing> (last visited Nov 17, 2021).

<sup>34</sup> *Supra*

“We are not hearing the review petition, are only hearing the 7 points as mentioned in the reference.”<sup>35</sup>

Therefore, at present the review petition for the Sabarimala judgment has been kept aside and matters of public importance in terms of elision is in the forefront.

## V. Conclusion

This research attempted to provide an in-depth analysis of the Indian Young Lawyers Association v. State of Kerala<sup>36</sup> case and assess the Apex Court in matters of religious interference.

This assessment has been made on account of the history of the Sabarimala Temple and the present scenario of the devotees of the Temple. The worshippers of Lord Ayyappa of the Sabarimala Temple or the ‘Ayyappans’ as they would prefer to call themselves, vehemently believe that their idol is a celibate and have been upholding the custom of barring women of child-bearing years to enter the Temple. The Supreme Court on September 28, 2018, held that the aforementioned custom as protected under Rule 3(b) of the Kerala Hindu Places of Worship Rules, 1965 is unconstitutional as it violates Articles 14, 15, 25 and 51A(e) of the Constitution of India and ordered to pass further directions for the safety of women pilgrims.

The language of Rule 3(b) of the 1965 Rules, that protects the custom is very ambiguous. It states women are absolutely barred from entering a place of public worship at ‘such time’ are not allowed to enter ‘by custom’, shall not enter the premises of the Temple. It does not explicitly clarify what ‘such time’ and ‘by custom’ means. The terms ‘by custom’ indicate that in the Hindu religion women are forbidden to enter into places of worship during ‘such time’. The case refers that women from 10 to 50 years of age are forbidden from entering the premises of the Sabarimala Temple. However, female anatomy cannot assure menarche and menopause at that time span. It is not possible to assume menstruating women belong to a certain age. It may happen that a girl child of 8 years and a woman of 55 years is menstruating. It may also happen that a girl child of 15

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<sup>35</sup> *Supra*

<sup>36</sup> (2019) 11 SCC 1; AIR 2018 SC (Supp) 1650; AIROnline 2018 SC 243

years of age has not begun menarche. Therefore, whether 'such time' means 10-50 years or any time a female begins menstruating cannot be confirmed. As wrong as it is to assume menstruation, it would be equally wrong to ask women to confirm the same. Therefore, there is no straitjacket formula to determine menstruating women.

Custom is very intrinsic to every individual. It is something that has been practised for a very long time with tremendous reverence. However, customs can have both positive and negative impacts on society. For example, the Hindu custom that dictated widow burning or Sati had a very degrading and inhuman standpoint. Therefore, it had to be abolished. There are other customs which hold a lot of spiritual value in the lives of the people, for example, the Hindu custom of saptapadi or seven circles of vows of marriage. This custom is an essential religious practice and does not adversely harm any person or their rights whatsoever. Therefore, it becomes utterly important for the judiciary to harmonise contradicting customs, protect the citizens from any existing social evils and also equally important to respect the citizens' customs.

The problem began when the aforementioned judgment was not accepted by the mass followers and protests broke out when women tried to enter the premises. The devotees have been aggrieved by the judgment, however, the petitioners were not aggrieved by the custom. In the tussle of collective customary rights and individual rights, it is usually the former that prevails. However, in this case, the individual rights of the women to worship has been granted and the right to worship of the devotees based on collective customary practice has been denied.

Lord Ayyappa has manifested himself in several forms and is worshipped in those forms in various temples. Women are prohibited entry only in one Temple where he is depicted as an eternal celibate and are allowed to worship him in other temples in other forms. On one hand, it can be contended that the Supreme Court made this judgment in order to change people's perspective towards menstruation and the attached stigma, which can also be termed as judicial activism. Whereas, on the other hand, the Supreme Court forcing the devotees to let women enter the premises can be seen as a sign of judicial overreach. It is an arduous task to define the line between judicial activism and judicial overreach. Judicial activism means to render justice by the judiciary by unprecedented measures for e.g. Public Interest Litigation and suo moto cognizance and judicial

overreach is when judicial activism crosses its limits. This case is a classic example of both judicial activism and judicial overreach wherein one half of the population, that is to say, the petitioners and the supporters of the judgment strongly believe that it is judicial activism. Whereas, the other half of the population, including the devotees and the supporters of the custom, believe that it is judicial overreach.

The question that arises in this case is whether the rights arising out of a customary practice can supersede individual rights. The judgment explicitly holds the statement untrue and states that individual rights to worship supersedes collective customary rights. However, this judgment is not exhaustive and it depends upon every case as to which one of the rights is more important to meet the ends of justice. But, this judgment has received its fair share of criticism and rejection.

This judgment, however, has been welcomed by those wanting to end the stigma attached to menstruation, as it is a natural physiological phenomenon it should not be a ground of discrimination in matters of the right to worship. Both men and women have equal freedom of the right to worship.

As Indu Malhotra J. said in the 2018 judgment that allowing women to enter into Sabarimala premises will lead to more serious ramifications. The unacceptance of this judgment led to a lot of review petitions and finally on November 14, 2019, the Supreme Court referred this case to a larger Bench, now comprising nine judges. This case has opened up a floodgate of unanswered religious questions, therefore, the Bench will also take into account matters concerning essential religious practices of Zoroastrian, popularly known as Parsis in India, Dawoodi Bohra and Islamic religions.

It can be said that customs should be made very clear and unambiguous so that neither the judiciary nor the followers of the concerned custom have any problem regarding its practice or malpractice. Individual and collective rights are two distinct types of rights which more often than not, will be in conflict with one another. Hence, it is the task in the hands of the judiciary to harmonise these two contradictory rights in a manner that does not adversely affect the other. Every case has its unique characteristics and with the expertise of the judges and advocates, it is possible to strike a balance between the two.

## **Human Rights in Abeyance in the Trade of Trafficking Human Beings: A Focus on the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018**

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### **Abstract**

*Trafficking in human beings is considered to be a sophisticated and lucrative business. It has been identified as one of the fastest growing criminal industry in the world. It is a well-established international phenomenon of recent times and among the organized crimes, trafficking stands as the third largest category in terms of profit making after drug and arms smuggling. Human trafficking represents an estimated \$31.6 billion of international trade. Trafficking in persons is a serious crime and a grave violation of human rights. Every year, thousands of men, women and children fall into the hands of traffickers, in their own countries and abroad. Almost every country in the world is affected by this menace, whether as a country of origin, transit or destination for victims. Trafficking in human beings has been considered as modern day slavery. Human beings are mostly trafficked for commercial sexual exploitation. However, included in the larger issue are the other dimensions of human trafficking, viz. forced labour, begging, organ trade, forced marriage, illegal adoption, surrogacy and camel jockeying. This research paper would examine relevant international and national documents such as, the United Nations Trafficking Protocol, the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Criminal Law Amendment Act (2013) and recent Trafficking in persons (Prevention, Protection and rehabilitation) Bill of 2018. An attempt would also be made to provide an in-depth study of its concept, various emerging dimensions, causative factors, implications at the national and international levels.*

**Keywords:** *Human trafficking, human rights, commercial sexual exploitation, slavery, organised crime, Criminal Law (Amendment) Act, 2013, Trafficking in Persons Bill, 2018.*

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## I. Introduction

Trafficking is a term used to describe the illegal trade across borders of goods - especially contraband, such as drugs for profit. Over the last few decades, the concept has been expanded to cover the illegal transport of human beings, in particular women and children, for the purpose of selling them or exploiting their labour.<sup>4</sup> Trafficking in human beings is a highly lucrative industry. It has been identified as the fastest growing criminal industry in the world. It is a well-established international phenomenon of recent times. Among the organized crimes, trafficking in human beings stands as the third largest category in terms of profit after drugs and arms smuggling.<sup>5</sup> Human trafficking is a multidimensional form of exploitation which violates basic and inalienable rights of the trafficked victims and their dependents.

One of the fastest growing areas of international criminal activity, trafficking in persons especially women and children has become a serious concern almost for all countries, regardless of whether they are countries of origin, transit or destination. It is a growing phenomenon involving transnational organized crime syndicates. Women and children have been trafficked for commercial sexual exploitation, forced marriages, illegal adoptions, organ trade, sex tourism and pornography, as domestic workers, labourers in sweat shops and on construction sites, as beggars, and for camel jockeys. The increasing use of new information technology, in particular, the internet, has altogether added a new dimension to the problem faced. Poverty and economic deprivation - the gap between the rich and the poor within countries and between different regions has especially made women more vulnerable to human trafficking. Lured by the hope of an improvement in their economic circumstances, they are often unwittingly duped and coerced into exploitative slave like situations. Trafficking, therefore, is regarded as a contemporary form of slavery and a gross violation of basic human rights of trafficked persons.<sup>6</sup>

Human trafficking is a highly complex process involving many actors-victims, survivors, their families, communities, and third parties that recruit, transport,

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<sup>4</sup>For details see: <http://asiasociety.org/policy/social-issues/human-rights/trafficking-children-prostitution-and-unicef-response>, (Accessed on 01.03.2020).

<sup>5</sup>Aparna Srivastava, *Human Trafficking with Special Reference to Delhi*, A William Carey Study and Research Centre and Joint Women's Programme Publication, (2006), p.1.

<sup>6</sup>Gunjan Kinnu, *From Bondage to Freedom: An Analysis of International Legal Regime on Human Trafficking*, National Human Rights Commission Publication, (2006), p.1.

harbour, and use the labour of trafficked victims. Given its complex nature it has generally been found that trafficking is essentially a gender and age specific phenomenon affecting mostly women and children rather than men. There are undoubtedly instances of trafficking of men as well. However, trafficking in men in no way approximates the dimensions of trafficking in women and children. Men are generally smuggled or illegally transported, whereas, women and children are trafficked. Further trafficking has to be seen as part of the process of international migration as trafficking involves movement of people. Lopsided globalization of the late twentieth century has added to the problem by facing the movement of capital but restricting the movement of labour, by following respective migration policies. This has created extensive opportunities for illegal migrations, networks and trafficking to flourish. Trafficking also poses serious public health concerns. The victims of trafficking are most vulnerable to HIV/AIDS leading many organizations to address human trafficking issue while working on prevention of HIV/AIDS.<sup>7</sup>

Traffickers and exploiters do not use a uniform model of recruitment process of trafficking victims, rather it depends upon many factors. It has been seen that in majority of the cases, traffickers lure victims by making specific fake promises. In other cases, consent of the trafficking victim is either obtained from parents or force/deception is used. Research conducted all over the world about process of trafficking in human beings shows that traffickers can be relatives of the victim, friends, well known persons or professional recruiters who make promises of well off jobs, modelling, etc. Further there are also cases in which families are known to have sold their children.

Most of the women trafficked for their commercial sexual exploitation declare that they did not know the real activity they had been coerced to perform because traffickers had assured them that they would find employment as waitresses, or domestic helpers. There are reports that victims knew the activity they were going to perform, even if they could not imagine the slavery like situation they would be subjected to. However, it is worth noting that, according to the definition of United Nations Trafficking Protocol, the consent of the adult victim

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<sup>7</sup>Jyoti Sanghera, *Trafficking of Women and Children in South Asia: Taking Stock and Moving Ahead*, Project Sponsored by the UNICEF and Save the Children Alliance, New Delhi, (1999), p.7.

is irrelevant if the trafficker used at least one of the improper means listed within it and it is always irrelevant in the case of children<sup>8</sup>

When the victims are very young and they have to be transnationally trafficked, their documents are falsified and sometimes such children are falsely presented at the border as belonging to the traffickers/exploiters. In the case of adolescents, the falsified documents necessary to pass through an international border may hide their nationality and age. There is evidence that in some cases these documents are obtained by paying bribes to corrupt police or diplomatic officials. In other cases, there is no need to falsify the documents: the victims may be taken from one country to another by crossing an unchecked border in the mountains, or travelling by sea. There are also cases in which trafficking victims are not illegal immigrants and they obtain visas to work legally in the country of destination. The two most common examples are the cases of visas granted by some States to artists and dancers or to domestic helpers, including those accompanying diplomatic officials abroad. Notwithstanding their legal status in the country of destination, these people may also find themselves in situations of vulnerability and exploitation because their visas depend on their continuation of an employment contract with their employer. Other similar cases of unlawfully resident trafficked victims may be those persons entitled to stay in the country of destination as tourists or as wives/ husbands of a citizen<sup>9</sup>

It may be noted that apart from international trafficking there is internal trafficking (trafficking within the country) on a large scale. People are easily transported from one State to another State or from one place to another place in the same state with no need to falsify documents and the fear of checking at borders.

## **II. Magnitude of the Problem of Human Trafficking: International Estimates**

As of now, there are no reliable estimates on trafficking in human beings. The difficulty of coming up with accurate figures related to trafficking stems from two inter-related factors:

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<sup>8</sup> SILVIA SCARPA, *TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY*, Oxford University Press, (2008), at p. 13.

<sup>9</sup> *Id.* at 17 & 18.

- Trafficking as a process is largely hidden and has become an organized crime.
- There is a nexus of the criminal syndicate with those in power.<sup>10</sup>

Nevertheless, some estimates can be made on the dimensions of the problem. The United States of America, State Department estimates that approximately 800,000 people are trafficked across national borders annually, approximately 640,000 (80%) of whom are women and girls.<sup>11</sup> In contrast, the UN estimates that 700,000 to 2 million girls and women are trafficked across national borders annually.<sup>12</sup> The largest numbers of victims are from Asia, with over 2,25,000 victims each year from the South East and over 1, 50,000 from South Asia. The former Soviet Union is now believed to be the largest new source of trafficking for prostitution and sex industry with over 100,000 trafficked each year from that region. An additional 75,000 or more are trafficked from Eastern Europe. Over 1, 00,000 are from trafficked from Latin America and the Caribbean, & over 50,000 victims are trafficked from Africa. Most of the victims are sent to Asia, the Middle East, Western Europe and North America.<sup>13</sup>

### **III. The International Legal Framework on Human Trafficking**

At the International level the only specific United Nations document addressing this problem in the beginning was the Convention of 1949.<sup>14</sup> This convention was ratified by only 60 countries and remains largely unused and moribund. Other countries that have legalized or regulated prostitution are not supportive of the convention, which is perceived to be abolitionist in orientation. Moreover, the convention does not have a monitoring body that can mandate countries to respect on development and progress in combating prostitution and trafficking.

In the year 1994 UN General Assembly after considering the failure of Convention on the Suppression of Traffic of Persons and the Exploitation for Prostitution of Others, 1949 tried to broaden the scope of trafficking and include

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<sup>10</sup>*Supra* note 4 at p. 3

<sup>11</sup>MARY CRAWFORD, *SEX TRAFFICKING IN SOUTH ASIA*, ROUTLEDGE, New York, (2010), p. 5

<sup>12</sup>*Ibid.*

<sup>13</sup> *Supra* note 4.

<sup>14</sup> Convention on the Suppression of Traffic of Persons and the Exploitation for Prostitution of Others, 1949.

within it the impact of economic liberalization and globalization. Thus defined Trafficking as:

*“The illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the traffickers, such as forced domestic labour, false marriages, clandestine employment and false adoption”.*

This step of U.N. General Assembly has its own limitations. Firstly, it is econometric-mainly emphasizing on the role of the market and its relationship with the push and pull factor of trafficking; secondly it associates trafficking with only the visible part of the crime i.e. forced prostitution, coerced labour etc. Trafficking has a whole sphere of activity which is largely invisible and which is thriving unmitigated. The relationship between undocumented migration and trafficking, the influence of the patriarchal order of society, the subtle forms of domestic trafficking and the power inequalities in societies are not explicitly explained in this definition.

The third and most important step in this area is the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000). This Protocol dubbed trafficking as modern day slavery. Protocol defines Trafficking as:-

*“The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum the exploitation of the prostitution of other or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>15</sup>*

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<sup>15</sup> The U.N. Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, 2000, Article 3(a)

Definition under this Convention addresses the issue of '*consent*' by saying that in case any of the above methods are used then the so-called consent of the victim becomes irrelevant. This definition focuses on inequalities of power and examines closely the position of vulnerability of women against men, the poor against the rich, and the child against the adult – especially the child against the adult.

Apart from the Conventions and Protocols mentioned, there are a other international documents, which have defined trafficking and have imposed a legal obligation on all their member countries to provide protection against trafficking. These are:-

- UN Convention on the Rights of the Child (1989).
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institution and Practices Similar to Slavery (1957).
- International Covenant on Economic, Social and Cultural Rights (1966).
- International Covenant on Civil and Political Rights (1966).
- The Convention on the Elimination of All Forms of Discrimination against Women, 1979

These covenants have been supplemented and their guiding spirit of dignity and respect for children's right has been reinforced by numerous declarations adopted in international conferences such as:

- The Stockholm Congress on Commercial Sexual Exploitation of Children held in August, 1996.
- World Summit for Children and the World Declaration on the Survival, Protection and Developed of Children, 1990.
- The Beijing Declaration and the Platform for Action of the Fourth World Congress on Women held in Beijing (1995).
- The International Conference on Population and Development, Cairo, 1994.
- The World Conference on Human Rights, Vienna, 1993.
- The SAARC Summits, 1991, 1996 & 2002 have also convened conferences on trafficking.

#### **IV. Magnitude of the Problem: National Estimates**

The clandestine nature of human trafficking makes it very difficult to measure the actual magnitude of the problem. Though there are a number of studies and reports on trafficking in women and children but there are no reliable estimates

of the extent and magnitude of trafficking. Roughly in India there are an estimated 2.3 million women and girl children in prostitution, a quarter of whom are minors and there are over 1200 red light areas all over India. More than 50,000 people mostly women and girl children have been trafficked to India. Every year 5000 to 11,000 Nepali women and girls are trafficked to India. Over the last ten years, it is estimated that over 30,000 women and girls have been trafficked from Bangladesh to India. Most victims of trafficking in India come from Andhra Pradesh, Karnataka and Uttar Pradesh, Odisha, Gujarat and Rajasthan which have become a source area today. Further 60% - 80% of these victims suffer from life threatening diseases with an increasing incidence of HIV/AIDS.<sup>16</sup>

According to the National Crime Records Bureau, 8,132 human trafficking cases were reported in India in 2016 under the Indian Penal Code, 1860. In the same year, 23,117 trafficking victims were rescued. Of these, the highest number of persons were trafficked for forced labour (45.5%), followed by prostitution (21.5%).

#### **V. The National Legal Framework on Human Trafficking**

At the national level our *Suprema Lex* i.e. the Constitution of India has recognised the right to freedom from forced labour and trafficking as a fundamental right. Under Article 23(1): "Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

Besides Article 23 there are other important provisions of the Constitution of India which are relevant for the purpose of this study on human trafficking.

These include:

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|-----------------------|---|
| <b>Article 14</b>     | provides for equality in general.   |
| <b>Article 15(1)</b>  | prohibits discrimination on the grounds of religious race, caste, sex or place of birth, or of any of them.   |
| <b>Article 15 (3)</b> | provides for special protective discrimination <b>in</b> favour of women and child relieving them from the moribund of formal equality. It states that, nothing in this article shall prevent the state from making any law for the protection of women and childre |

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<sup>16</sup> ROMA DEBABRATA, ANALYSING THE DIMENSIONS: TRAFFICKING AND HIV/AIDS IN SOUTH ASIA, STOP (NGO) Publication, New Delhi, (2002), p. 3

- Article 16 (1)** covers equality of opportunity in matters of public employment.
- Article 21** provides right to life and personal liberty to all citizens.
- Article 24** prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age.
- Article 38 (1)** enjoins the State to secure and protect as effectively as it may a social order in which justice – social, economic and political shall inform all the institutions of national life. It emphasises on the necessity of providing opportunities to enhance equality.
- Article 39** the State should direct its policy towards securing, among other things, a right to adequate means of livelihood for men and women equally and equal pay for equal work their age or strength.
- Article 39 (f)** provides that the children should be given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity of existence.
- Article 42** protects against inhumane working conditions.
- Article 45** makes provision for free and compulsory education for children, which is now well settled as a fundamental right to the children.
- Article 46** directs the State to promote the educational and economic interest of women and weaker sections of the society and directs the state to protect them from social injustice and all forms of exploitation.

In India trafficking has been an area of concern since the early 20<sup>th</sup> century. But more recently, after the Delhi gang rape (Nirbhaya) there has been a widening of the focus on the gender related issues which in turn gave way to the appointment of the Justice Verma Committee. The Verma Committee submitted its reports within a short possible time of one month. Following the Verma Committee recommendations, the President of India passed an Ordinance which was followed by the enactment of the Criminal law (Amendment) Act, 2013.<sup>17</sup>

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<sup>17</sup>The Criminal Law (Amendment) Act, 2013 came into effect from February 3<sup>rd</sup>, 2013.

By this amendment, Section 370 of the Indian Penal Code was substituted by Sections 370 and 370(A). These amended sections of the Indian Penal Code provide:

**370. (1)** Whoever, for the purpose of exploitation, (a) recruits, (b) transports,

(c) harbours, (d) transfers, or (e) receives, a person or persons, by—

*Firstly.* — using threats, or

*Secondly.* — using force, or any other form of coercion, or

*Thirdly.* — by abduction, or

*Fourthly.* — by practising fraud, or deception, or

*Fifthly.* — by abuse of power, or

*Sixthly.*— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, **commits the offence of trafficking.**

*Explanation 1.*— The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs

*Explanation 2.* — The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

**370A. (1)** Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.

(2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.

#### **A. Immoral Traffic (Prevention) Act, 1956<sup>18</sup>**

The Immoral Traffic (prevention) Act, 1956 is a very comprehensive and detailed legislation which gives power and strength to the law enforcement and justice delivery agencies to combat and prevent trafficking in human beings. Since its enactment in 1956, the legislation has been amended twice, in 1978 and 1986. Immoral Traffic (Prevention), 1956 Act has faced lot of criticism for not addressing the issue of human trafficking in a holistic manner.

The Immoral Traffic (Prevention) Act, 1956 is the only central legislation that deals with the trafficking in persons, but unfortunately fails to lay down a meaningful definition of the human trafficking. Even the Immoral Traffic (Prevention) Amendment Bill, 2006 which was discussed for long does not define human trafficking in consonance with the definition given under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

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<sup>18</sup>The Immoral Traffic (Prevention) Act, 1956 came into force on May 1<sup>st</sup>, 1958.

Women and Children.<sup>19</sup> Further, the Bill considers human trafficking can only be for the purpose of commercial sexual exploitation. It does not cover other forms of human trafficking like organ trade, forced labour, begging etc.

Section 7 of the Act criminalises prostitution in the vicinity of public places also Act imposes a higher penalty if a minor is involved.<sup>20</sup> The amendment to the Act increases the penalty if the offence is committed against a person below the age of eighteen years. This seems on the face of it a welcome step. However, the failure is that it does not provide any provision for the protection of children trafficked for prostitution.

Further ITP Act, states soliciting an act of prostitution is an offence. Under this provision majority of the women are arrested for soliciting customers, since the real culprits and traffickers are seldom identified and arrested. The lacunae in the act is that the prosecution requires such culprits must be testified by the sex workers but it seems impossible as the livelihood of these sex workers is dependent on these third parties. Therefore they are unlikely to testify against them. Both the amendments to the ITP Act do not address this issue.<sup>21</sup>

Under section 10(b) of the Act if a woman is held for any offence under Section 7 and Section 8, she may be sent to the corrective institution for not less than two years and not less than five years. This maximum stay of females offenders in corrective institutions further criminalises prostitutes.<sup>22</sup>

Further, Immoral Traffic (Prevention) Act does not make any provisions for the care and protection of the victims of human trafficking. Many NGO's and Civil Society Groups have turned to the court for addressing this issue and seeking

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<sup>19</sup>The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000 defines 'Human trafficking' as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include at a minimum the exploitation of the prostitution of other or other forms of sexual exploitation, forced labour or services, slavery or practices, similar to slavery, servitude or the removal of organs".

<sup>20</sup>The Immoral Traffic (Prevention) Act, 1956, Section 7-A.

<sup>21</sup>*Id.* Section 8.

<sup>22</sup>*Id.* Section 10-B.

guidelines from the court regarding the victim protection by safeguarding the rights of the trafficked victims who more often are exploited by the traffickers in spite of being in the police custody.<sup>23</sup>

It is a clear and an unambiguous fact that the number of sex workers arrested under the Immoral Traffic (Prevention) Act are significantly higher than the number of traffickers, pimps and brothel keepers. Thus, it is clear that the Act is enforced only against sex workers. The rehabilitation and correction institutes are not very well equipped to deal with the sheer number of women convicted under the various provisions of the Act. The vocational training given to such victims is largely inadequate. The system in our country fails to provide any practical skills needed in today's complex world.<sup>24</sup> This becomes a vicious circle wherein the victim is seldom rehabilitated.

The Amendments made to the Immoral Traffic (Prevention) Act, 1956 in 1978 and 1986 have not changed the character of the Act. The Act still remains punitive instead of being protective. In most of the provisions penalties have been increased. Still the legal status of sex workers remains uncertain. The role of NGO's should have been considered in the Act for the proper protection and rehabilitation of the sex offenders. Thus, the Immoral Traffic (Prevention) Act remains an adversary for the victims of the human trafficking.<sup>25</sup>

### **B. The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018**

Recently, in order to take away the loopholes in the existing law on human trafficking Lok Sabha passed a bill namely the trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018. It provides for the prevention, rescue, and rehabilitation of trafficked persons. The Bill is pending before the Raja Sabha. The Bill provides for the investigation of trafficking cases, and rescue and rehabilitation of trafficked victims. It includes trafficking for the purposes of sexual exploitation, slavery, or forced removal of organs. In addition, the law also considers trafficking for certain purposes, such as for begging or for

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<sup>23</sup> A number of Public Interest Litigations have been filed in the Hon'ble Supreme Court of India in this regard.

<sup>24</sup> *Trafficking and the Law*, Human Rights Law Network, New Delhi (2011), p. 62

<sup>25</sup> *ibid.*

inducing early sexual maturity, to be an aggravated form of trafficking. These forms of trafficking attract a higher punishment. In order to punish trafficking, the Bill provides for the setting up of investigation and rehabilitation authorities at the district, state and national level. The primary investigation responsibility lies with anti-trafficking police officers and anti-trafficking units constituted at the district level. The authority at the national level can take over investigation of cases referred to it by two or more states. The Bill also provides for the setting up of Protection Homes and Rehabilitation Homes to provide care and rehabilitation to the victims. The Bill supplements the rehabilitation efforts through a Rehabilitation Fund, which will be used to set up the Protection and Rehabilitation Homes. Special Courts will be designated in every district to complete trial of trafficking cases within a year. On the face of it, the bill seems a welcome step to curb the menace of trafficking in human beings. However, there are many loopholes in the Bill. For instance, the Bill provides immunity to a victim who commits an offence punishable with death, life imprisonment or imprisonment for 10 years or more. Immunity to victims is enviable to ensure that they are not prosecuted for committing crimes which are a direct consequence of them being trafficked. However, the Bill provides immunity only for grave crimes. For instance, a trafficked victim who commits murder under coercion of her/his traffickers may be able to claim immunity from being tried for murder. However, if a trafficked victim commits any non serious offence under coercion of his/her traffickers, she/he will not be able to claim immunity.<sup>26</sup> Another flaw in the Bill is that it defines victims as the one who is rescued by the police, but it silent if such a victim is rescued by NGOs, family or otherwise. Can such a victim comes under the domain of the new law? Therefore, it becomes imperative to address the loopholes in the Bill before it is passed by Rajya Sabha and also one thing needs to be kept in mind that we have plethora of laws that prove dead letter for want of implementation in letter and spirit.

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<sup>26</sup> Roshini Sinha, Examining the Anti-Trafficking Bill, 2018, Available at: <https://www.prsindia.org/theprsblog/relaxation-labour-laws-across-states> (Last modified on 09.05.2020)

## VI. The Causes and Contributory Factors of Human Trafficking

The causes and contributory factors of trafficking in human beings are many and complex.<sup>27</sup> As acknowledged by the United Nations Secretary General in its 2002 Report on Traffic in Women and Girls:

*“The growth in trafficking reflects not just an increase in push factors from countries of origin, but also the strong pull of unmet labour demands, particularly in the informal sector. There is clearly a need to address those demand factors in countries of destination which make trafficking so profitable in the first place.”*

In each country, causes of trafficking in human beings can be different. A country may be suffering from the brutalities of a civil war. Therefore, there is lack of a stable environment in such places. Young children in such a situation are often kidnapped and forced to fight. In another country, women might suffer from lack of civil rights. Young girls might be sold into slavery, often as prostitutes. In yet another country, there might be greater need for cheap labour. Nations like these need a lot of workers but do not want to pay them a fair wage, children might be forced into labour. Where organised crime (crime mobs, like the Mafia) is very strong, government officials might not be able to stop well-armed and well-funded traffickers from kidnapping people and taking them out of the country.<sup>28</sup>

In order to curb the menace of human trafficking holistically, it is important to have a complete understanding of the various contributory causes and factors responsible for trafficking in human beings. These factors need to be seen at global, regional and local levels as interlinked push and pull factors. Various such causes and contributory factors are generalised below:

### A. Economic Factors

Economic determinism is a pivotal factor in trafficking in human beings. Both the rich and the poor want the good things of life. The rich want to get richer, and the poor do not want to go to prison. Both are pursuing wealth through various means, but some want to get wealthy by all means.<sup>29</sup> With economic liberalization and rapid globalization, price competition is increasing the demand for cheap labour required for keeping the cost of production low. This has caused

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<sup>27</sup>*Supra* note 7 at 12.

<sup>28</sup>Joyce Hart, *Human Trafficking*, The Rosen Publishing Group, New York, (2009), p.15.

<sup>29</sup>Obi N.I. Ebbe and Dilip K. Dass, *Global Trafficking in Women and Children*, CRC Press, New York, (2008), p. 3.

a rapid growth of the informal labour sectors such as street vending and of unregulated work in factories. In most instances, workers have become more vulnerable and subject to abusive working conditions, because these marginalized and unregulated areas of work are not visible and thus are not subject to labour laws and regulations. These contributory factors are on the pull side.<sup>30</sup>

On the push side, rapid globalisation results in breaking down the traditional family structure. Each member of the family has become a separate and independent unit of labour to be plugged into the modern labour market. Further, structural economic changes like break down of rural economy, natural disasters, agro-climatic variation and shrinking employment opportunities drive poor communities with no economic alternatives to leave for areas where their chances might be improved. These migrants are generally at a high risk of being trafficked.<sup>31</sup>

### **B. Gender Discrimination**

The unfavourable and discriminatory conditions prevalent both in the family and in the society, mostly for women expose them to traffickers. The girls when considered a burden in the family are neglected, they consequently fall an easy prey to move out to insecure situations. The trafficking agents promise them a job and take them to the urban areas where till the time they realize that real truth of their job, it is too late for them to escape from the hell they are trapped into.<sup>32</sup>

### **C. Problem of Migration**

It is said that "traffickers fish in the stream of migration". Therefore, the entire spectrum of migrants, involuntary restless refugees, internally displaced persons, illegal migrants etc. are at high risk of being trafficked, particularly women and children. There is an increasing presence of women and children in contemporary migration because of the societal and family burden on them. With the increasing responsibility to look after their families, women move out to look for work opportunities. However, due to the lack of education and job opportunities these

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Supra* note 5 at 17.

<sup>32</sup> Prof. Gur Iqbal Singh Sandhu, Human trafficking as Transnational Organized Crime: Problem Perspective, *Panjab University Law Review*, (2009), p. 9.

women are pulled into the sex industry, domestic work and fake marriage market. This leads to what is called feminization of migration.<sup>33</sup>

#### **D. Developmental Issues**

Lopsided developmental policies created a divide between the developed and developing world, a divide that is replicated at local, regional, national and global levels. Increasing number of people from the less developed parts become a commodity for consumption for the developed part. The underdeveloped part serves as a supply zone and developed as a demand zone. Further, the promotion of sex tourism as a developed strategy is also a contributing factor to trafficking for the purpose of prostitution. There is a connection between the influx of relatively wealthy foreigners seeking sex with women from developing countries and the movement of women into the sex industry to meet that demand. Therefore, trafficking in women and children is clearly both a human rights and a developmental issue.<sup>34</sup>

#### **E. Armed Conflicts and Insurgency**

The concrete forms of trafficking in persons during conflict may vary according to the conflict region, the specific economic and political context and the military and civil actors involved. What is common is the extreme vulnerability of women and children living in war territories of being trafficked, in particular when the general level of violence against women is high. Forcibly displaced women and children are particularly in danger of being trafficked. During the times of armed conflict women and girls are often abducted and enslaved by government or rebel forces. They are held as military sexual slaves, to perform forced labour, or as forced combatants. Abducted women face huge social, health and economic problems after their escape or release from the camps. Further, national and international post-conflict recovery, reconciliation and reconstruction programmes have failed to pay attention to the particular situation of abducted and enslaved women during war.<sup>35</sup>

During armed conflicts, cross border trafficking of women is prevalent, yet data on this phenomenon is very limited. War-torn countries may in particular be areas

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<sup>33</sup>*Supra* note 5 at 18.

<sup>34</sup>*Ibid.*

<sup>35</sup>For details see:

[http://www.ungift.org/doc/knowledgehub/resourcecentre/NGO\\_GTZ\\_Armed\\_conflict\\_and\\_trafficking\\_in\\_women.pdf](http://www.ungift.org/doc/knowledgehub/resourcecentre/NGO_GTZ_Armed_conflict_and_trafficking_in_women.pdf) (Accessed on 15.03.2020).

of origin and transit for trafficking. Impunity, lawlessness, dysfunctional State institutions and border controls as well as the generally high level of violence during wars are highly conducive factors to the trafficking of women and girls through and from war zones. War lords who profit from war-related economic trafficking activities, e.g. in small arms and drugs, may expand to trafficking in women. The destruction of livelihood in communities and families put women at risk of being trafficked. Women and girls who are forced to leave their homes and become internally displaced or refugees are in particular vulnerable to being trafficked.<sup>36</sup>

#### **F. Religious and Cultural Vulnerability**

Religious, cultural and traditional practices contribute in determining a specific vulnerability to trafficking in human beings as well. Dedication of young girls to temples or to Gods or Goddesses has been practiced in many parts of this subcontinent for centuries. This system is known by many names such as Venkatasani, Jogini, Nailis, Muralis, Theradiyan and is prevalent in temple towns. It requires dedication of young girls to deities such as Yellamma, Meenakshi, Jagannath and Hanuman. These girls are then trafficked by temple priests and others into prostitution. Besides the Devdasi system in Karnataka and Maharashtra and the Jogin system in Andhra Pradesh, temple prostitution is reportedly practiced in other parts of the country too, such as Uttar Pradesh and Odisha. For initiation into becoming a Devadasi between the age of five to nine years, from poor, lower caste homes, they go through an initiation rite at the local temple during full moon day where they are married to the presiding deity, Goddess Yellamma by the tali rite. She is then branded with a hot iron on both shoulders and breasts. She is suctioned for her virginity and the deflowering ceremony known as Udilumbuvadhu becomes the privilege of the highest bidder. The market value of a girl falls after she attains puberty when she has no resource other than prostitution.<sup>37</sup> The situation is not very different with the girls initiated into other forms of dedication to temples of Gods or Goddess.

#### **G. Information Technology**

Modern information technologies particularly the internet, have been increasingly used to market women and children for the purposes of pornography, prostitution and fake matrimony. This ever-transforming technology has added new features to globalized communication, replete with

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<sup>36</sup>*ibid.*

<sup>37</sup>*Supra* note 4 at 35.

moving images of exploitation. To state in simplified terms, the impetus in technology and commerce has provided an unexampled opening for human trafficking.<sup>38</sup>

#### **H. Authority Complicity**

It has been seen that officials accept bribes from traffickers in return for allowing traffickers to cross-borders. Also in some cases officials may be directly involved in the problem. Likewise a lackadaisical approach of law enforcement agencies to implement anti-trafficking laws and a low conviction rate in offences against women and children are other factors contributing to trafficking in women and children.<sup>39</sup> According to Ms. Radhika Coomaraswamy, the United Nations Rapporteur on Violence against Women, trafficked persons have reported high levels of government officials complicity and participation.<sup>40</sup>

#### **I. Vulnerability to Growth in Tourism**

Globalisation, tourism industry has grown worldwide and especially in developing countries. Children irrespective of caste, class or even sex are vulnerable to sexual exploitation by tourists who lure them with small toys and other fancy gifts. Tourists come to the developing countries from different parts of the world for easy and cheap sexual gratification especially with children. American men along with Europeans are reportedly, the most notorious sex tourists in Central America, south East Asia. Not only is it the perverse psyche that makes them use children as commodities of sex, but they also believe in a myth that sex with the virgin girl will cure AIDS.<sup>41</sup>

#### **J. Inter-Country Adoption**

With birth rates falling in many of the developed countries, adoption from developing countries with higher fertility rates is very common. The need for children has put pressure on birth countries to respond quickly to the growing demand often without having the necessary infrastructure and mechanism to proceed properly. This situation has led to abuses and creation of an international

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<sup>38</sup>Dr. Sangita Bhalla, Global Fight against Human Trafficking: With Special Reference to India, *Panjab University Law Review*, (2007), p.14.

<sup>39</sup> Prof. Kamaljeet Singh, Trafficking of Women and Children in India: A Human Rights Perspective, *Panjab University Law Review*, (2007), p. 260.

<sup>40</sup> *Supra* note 5 at 20.

<sup>41</sup>*Supra* note 5 at 21.

market for adoptable children, which in turn gives boost to the trafficking Industry.<sup>42</sup>

### **K. Inadequate education**

According to the researcher in most of the cases uneducated and less educated people fall easily in the trap of traffickers. Traffickers also believe that it is easy to convince uneducated people than the educated, as in their case they do not have to use force or deceit.

## **VII. Forms of Human Trafficking**

Victims of human trafficking are subjected to various forms of abuses and exploitations that are most often based on their gender and age. Consequently girls and women are mostly trafficked for commercial sexual exploitation, fake/forced marriages and as domestic helpers. Young children are trafficked for illegal adoption or for camel races and mostly men are mostly trafficked for drug peddling and illegal organ transplantation.

The following sub topics will discuss the most common forms and dimensions of trafficking in persons viz, Commercial sexual exploitations, forced marriages, bonded labour, organ trade, slavery, street begging, illegal adoption, pornography, camel races and sports events.

### **A. Commercial Sexual Exploitation**

Trafficking in persons for the purpose of sexual exploitation can be related to commercial and non-commercial purposes. The former includes at a minimum the exploitation of trafficked victims through forced prostitution, pornography, paedopornography in the case of children, strip dancing and any activity mainly comprising early and forced marriages and mail-order brides.<sup>43</sup>

Exploitation of victims of human trafficking for commercial sexual exploitation is one of the largest organised crimes. Thousands of young girls are lured by false promise of marriage; good career etc. and then forced into prostitution. They are not in a position to return from the whirl pool that they are pushed into. They face tremendous abuse, disease, physical and mental trauma at the hands of the brothel owners and touts.<sup>44</sup> Sexual exploitation is a special category of human

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<sup>42</sup>Gaurav Jain v. Union of India & Ors, AIR 1990 SC 292.

<sup>43</sup>*Supra* note 27 at 22.

<sup>44</sup>Dr. Sunita Siwach, Human Trafficking: Its Causes and Prevention, *The Indian Police Journal*, Vol. LIII No. 3, July-September 2006, p. 55.

trafficking. In this case the traffickers make money every time from their victims, who are mostly women and children, who are forced to have sex. Customers buy these victims for an hour or so. Sometimes, the victims are made to have sex several times a day.<sup>45</sup>

In the process of human trafficking for sexual exploitation, individuals are victimised through forced participation in the sex industry. Sex Trafficking is not simply pornography or prostitution. It involves traffickers, victims and clients. For clarity, the United Nations has recognised the distinction between sex trafficking and prostitution and advanced the notion of participant victim by their extension of the definition of sex trafficking to include payments or benefits to a person with control over another person for the purpose of exploitation. In this criminal activity of sexual exploitation, the trafficker controls both the sexual exploitation of his ex-worker, his worker's decision to work or not to work and his worker's location for work. Across the globe, sex trafficking is not limited to prostitution. Victims of sex trafficking are forced in to a variety of sexual exploitations including prostitution, pornography, bride trafficking, and sex tourism.<sup>46</sup>

Among the Asian countries trafficking in women and children is highly prevalent in India, Nepal and Bangladesh. India is a major destination and transit place for trafficking victims from Nepal and Bangladesh. Trafficking of women and young children from these two countries is because of the liberal passport policy. Since there is an open border between Nepal and India, the people from Nepal do not need any passport or visa to migrate to India. This gives an opportunity to traffickers to exploit the victims easily.

### **B. Forced Marriages**

The legal age of marriage in India is 18 and 21 for girls and boys respectively. However, the legal age notwithstanding, child marriages continue in rural areas of States like Rajasthan, Utter Pradesh, Maharashtra, Chhattisgarh and even Kerala, the most literate State. A recent survey conducted by the Ministry of Health and Family Welfare in Kerala found that nearly 69 percent of the girls got married before 18 years of age. Trafficking of children for marriage is both an inter-country and an intra-country phenomenon. There is a thin line that divides the illegal act of child marriage and child trafficking. What complicates the

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<sup>45</sup>*Supra* note 27 at 11.

<sup>46</sup> MARY C. BURKE, HUMAN TRAFFICKING: INTERDISCIPLINARY PERSPECTIVES, Routledge (2013), p. 135.

situation further is that under the Child Marriage act, 1929 the child marriage continues to be legal. This kind of marriage is not always meant for a proper marriage. It may be a means to get young girls into prostitution or bonded or forced labour. Organizations working in the Balasore district of Odisha have reported an increasing trend of girls belonging to poor families being lured by middlemen to Western Uttar Pradesh with the promises of a good dowry free marriage. Invariably the aspiring grooms are already married or old. These girls are forced to work as agricultural labourers during the day and cater sexually not only to their husbands but to others too at night.<sup>47</sup>

### **C. Bonded and Forced Labour**

The trafficking of children, women, girls and men for bonded and forced labour is one of the fastest growing problems. Trafficking of human beings for forced and bonded labour at times is camouflaged under the pretext of helping the innocent children. Bonded labour is the most widely used method of enslaving people around the world. A person becomes a bonded labourer when their labour is demanded as a means of repayment for a loan. The person is then tricked or trapped into working for very little or no pay, often for seven days a week. The value of their work becomes invariably greater than the original sum of money borrowed. Often the debts are passed on to the future generations. Bonded labourers are forced to work to repay debts their employer say they owe, and they are not allowed to work for anyone else. Various forms of force are used to ensure they do not leave. In many cases they are kept under surveillance, sometimes even under lock and key. Poverty and threats of violence force many bonded labourers to stay with their masters, since they would not otherwise be able to eat or have a place to sleep. The debts play an important element in human trafficking. People who are offered a job abroad often have to borrow big sums of money to pay the traffickers to cover the costs of their journey and a fee for finding a job, often borrowing money against their family house or business. However, when they reach their destination it turns out that the promised job doesn't exist and they cannot leave anyway until the debt is paid off. This is propounded by the threats against the victims' family back at home.<sup>48</sup>

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<sup>47</sup>*Supra* note 4 at 34.

<sup>48</sup> [http://www.antislavery.org/english/slavery\\_today/bonded\\_labour.aspx](http://www.antislavery.org/english/slavery_today/bonded_labour.aspx), (Mar. 20, 2020).

#### **D. Organ Trade**

Every year more than 114,000 organ transplants are reportedly performed around the world. These surgeries satisfy less than an estimated 10% of the global need for organs like livers, kidneys, hearts, lungs, and pancreas. It has been seen that the shortage of human organs coupled with the desperation experienced by the patients in need of transplants has created an illicit market for organs.<sup>49</sup>

To accomplish the need of requisite human organs for transplantation on the recipients, voluntary donors were required to part with their organs. Since very few voluntary or relative donors were available, it gave birth to the most gruesome practice of trafficking in human organs like spare parts. Under medical science some of the organs existing in pairs are spare organs and therefore their removal does not cause any infirmity to the man. This factor has largely contributed to the sale of organs. This vile, deplorable and ethically reprehensible development has created organ bazaars and people have started indulging in the prostitution of the human body. Transplant surgery has turned into a commercial exercise i.e. trafficking in organs with price tags fixed to various parts of the human body. This immoral trafficking has spread its bloody tentacles to metropolitan cities assuming menacing proportions. Hunger stricken people in a poverty ridden society are allured by the attractive incentives and handsome price tags to the body parts like kidneys, lungs, liver, eyes, pancreas etc. which are sold them to the paymasters. It is in fact an exploitative business of transferring health of the poor to the rich, defying the cardinal principle of equality, humanity and morality. This shady business is controlled by a well knit network of touts, hospitals and donors, clandestinely performing such operations.<sup>50</sup>

#### **E. Street Begging**

The phenomenon of street begging is not always linked to trafficking of human beings. Therefore, street begging can be categorised between the practice in which the whole family is involved because of extreme poverty and forced begging which take place because of trafficking. In trafficking of human beings for street begging mostly young children and disabled persons are engaged. Street begging is prevalent all over the globe. Minors, disabled persons, and

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<sup>49</sup> Trafficking in Persons Report- 2014, Department of State U.S.A. For details see: <http://www.state.gov/documents/organization/226844.pdf>, (Mar. 21, 2020).

<sup>50</sup>*Id.*

mothers with children are seen outside malls, traffic lights, stores and religious places, begging.<sup>51</sup>

Forced child begging constitutes a gross violation of children's rights and requires urgent action on the part of governments and others with a duty to protect children's rights. Forced child begging by third parties is grossly harmful, but forced child begging by parents is devastating and should not be ignored despite the particular challenges associated with addressing this menace.

### **F. Pornography**

Authors discussions with NGO's working on issues of human trafficking reveals that women and children who are being sexually exploited and trafficked are also being used for the production of porn movies. Sometimes acts of commercial sexual exploitation are filmed without the consent of the victim and distributed. On other occasions women and girls are trafficked for the sole purpose of porn production. This rise of internet accessibility has resulted in the high prevalence of child pornography.

The reason why we do not hear much about the horror tales of sex trafficking within the porn industries is because it is a large part of our entertainment and remains clandestine behind closed doors. It is not right to say that every person involved in the porn industry is a victim of human trafficking but certainly there are cases in which persons involved are victims of sex trafficking. The pornography industry rakes in \$97 billion per year and is a driving force behind sex trafficking. Porn coarsens and sexualizes our popular culture and to put it mildly stimulates the demand side of the commercial sex equation, with results that are often harmful to relationships, families, health and careers, and sometimes end in criminal acts including murder. What was once called soft-core pornography is now part of the mainstream, and the porn industry is portraying increasing violent acts (hardcore) of harm against women. Prostituted women report that they are often asked to perform degrading and painful sex acts which the man has seen in porn and which his wife or girlfriend refuses to perform. This demand for pornified sex fuels the trafficking in women and young teen girls. Brothel operators and pimps meet the porn-driven demand with a supply of

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<sup>51</sup> [http://www.ecpat.org.uk/sites/default/files/begging\\_organised\\_crime\\_briefing.pdf](http://www.ecpat.org.uk/sites/default/files/begging_organised_crime_briefing.pdf), (Mar. 24, 2020)

vulnerable women who are seduced, tricked, drugged, kidnapped, abducted, or stolen from their families, and forced into commercial sexual exploitation.<sup>52</sup>

### **G. Illegal Adoption**

Trafficking of children for inter-country and intra-country adoption is another ill-omened game of traffickers. The need arises when biological parents are unable to take care of their child or where the child is without parents. Generally, Indians prefer a boy child in adoption rather than a girl child. In contrast developed countries have less number of children available for adoption, thus, there is a great demand of inter-country adoption of Indian children and this has prompted many individuals and organisations to traffic children.

According to the United Nations Trafficking Protocol<sup>53</sup> only those adoptions fall with the definitions of trafficking in persons in which the child is exploited after adoption. Exploitation can take place in any form like forced begging, petty thefts, future forced marriages, forced labour, sexual exploitation etc.

### **H. Camel Races**

It has been widely accepted now that children from various countries are misused in camel races and as camel jockeys. Mostly Children from India, Pakistan, Bangladesh and Sudan are trafficked to Gulf countries for the purpose of camel jockeys. This practice is very dangerous as they can cause serious injury or even death to the child. In this type of exploitation, the child because of his light weight is tied to the back of the camel so that they do not jump off during races. It has been seen that the child most often falls from the camel and is trampled to death by other camels on the track.<sup>54</sup>

### **I. Sports Events**

Sporting events like the Olympics, World Cups etc. provide both an opportunity to raise the awareness about the trafficking in human beings as well as a big challenge to identify victims of trafficking and punish traffickers who take undue advantage of these events. It has been seen that major sporting events often entail massive capital improvement and infra-structure projects, creating a huge

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<sup>52</sup>For details see: <http://embracedignity.org/?page=trffckng>, (Accesses on 30.03.2020)

<sup>53</sup> U.N. Procotol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000.

<sup>54</sup> SANKAR SEN, TRAFFICKING IN WOMEN AND CHILDREN IN INDIA, Orient Longman Pvt. Ltd. (2005), p. 35.

demand for cost-effective labour and materials. The governments and NGO's can take steps to prevent this significant increase in construction from being accompanied by an increase in forced labour. The governments of hosting events must ensure labour laws meet international standards, regulate labour recruitment agencies, and frequently inspect construction projects for checking the violation of labour laws.<sup>55</sup>

### VIII. Human Trafficking: Implications

Trafficking in human beings today is a global phenomenon, affecting men, women and children in over 130 countries of the world. Trafficking is a heinous crime against individuals in particular and humanity in general. As such, the consequences are most directly felt by trafficked victims. Trafficking activities contravene fundamental human rights, denying people the basic and broadly accepted individual freedoms. Trafficking also has broad economic, social and cultural consequences. As a criminal act, trafficking violates the rule of law, threatening national jurisdictions and international law. Further, trafficking in persons redirects the benefits of migration from migrants, their families, community and government or other potential legitimate employers to the traffickers and their associates. Difficult as it is to measure accurately the scope of human trafficking, it is equally difficult to measure its impact. The dynamics of the trade are constantly evolving and a range of national perspectives exist. Available statistics are dependent upon a variety of sources, methodologies and definitions. Because trafficking is an underground activity, its consequences are also hidden and adequate indicators have yet to be developed that will allow the anti-trafficking community to successfully measure the impact of this crime.<sup>56</sup>

The effects of trafficking have an impact on individuals in all areas of their lives. Victims of human trafficking often experience abuse, exploitation, poverty and poor health prior to being trafficked. These conditions are only exacerbated by their experiences as victims of crime. Each stage of the trafficking process can involve physical, sexual and psychological abuse and violence, deprivation and torture, the forced use of substances, manipulation, economic exploitation and abusive working and living conditions. What differentiates the consequences of

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<sup>55</sup> Trafficking in Persons Report-2014, for details see: <http://www.state.gov/documents/organization/226844.pdf>, (Apr. 01, 2020)

<sup>56</sup>Judith Dixon, *The Impact of Trafficking in Person, An Introduction to Human Trafficking: Vulnerability, Impact and Action* United Nations Office on Drugs and Crime, Vienna (2008), p. 81

trafficking from the effects of singular traumatic events is that trafficking usually involves prolonged and repeated trauma.<sup>57</sup>

The effects on the health of the human trafficking victims mostly depend upon the type of exploitation they are subjected to. In case of sexual abuse, victims in most of the cases are exposed to sexually transmitted diseases, like HIV/AIDS, pregnancy and other reproductive illnesses. Victims in this form of trafficking suffer from depression and other mental trauma as well. Social stigma of prostitution makes it very hard for victims to return to their native families and communities.<sup>58</sup>

The impact of trafficking on the victims of organ trade is equally disturbing. Usually victims do not receive proper and necessary medical care after the removal of organs. Thus, they get various kinds of infections and even die. Finally, the problem of human trafficking has both short and long-term effects not only on the physical and mental health of the victims but it also destroys human resources and can affect the economic and developmental growth of the community.<sup>59</sup>

The effect and impact of human trafficking, thus not only extends to the hopeless and helpless victims but to the whole society in general. The crime of human trafficking which is considered as a contemporary form of modern slavery goes against the basic tenets of humanity. The barbaric sale and purchase of human beings for commercial sexual abuse, forced labour, organ trade, forced marriages and begging is a direct blot and insult to the human conscience and civilisation.

### **IX. Judicial Response to the Problem of Human Trafficking**

Judicial activism has prominently changed the legal system in India for the better protection of human rights especially of women and children through pro-active and vibrant judiciary very much instrumental in bringing a paradigm shift in justice delivery system. Whenever the legislature and executive have failed in carrying out their duties, the judiciary has actively intervened in liberally interpreting the fundamental rights of the citizens as well as non-citizens. On the issue of human trafficking i.e. commercial sexual exploitation, child labour, bonded labour, fake inter-country adoptions etc. The Indian judiciary has played

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<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

an active role. Judicial activism in this area is evident from the various important judgements of the Supreme Court and various other High Courts.

The Constitution of India provides a long list of fundamental rights to its citizens. Article 23 of Constitution expressly prohibits traffic in human beings and forced labour. Article 21 guarantees right to life and personal liberty and dignity. Further, the Directive Principles of State Policy under Articles 39, and 43 are also important and relevant for the protection of the rights of victims of human trafficking.<sup>60</sup> Under Article 32 of the Constitution there is a clear mandate to move to the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights.

Here the author would like to submit that an important issue like human trafficking is marked by clear judicial inaction. Although the Indian Judiciary has

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<sup>60</sup> Article 39 of the Indian Constitution 1950, provides, principles of policy to be followed by the state are :

The State shall, in particular, direct its policy towards securing:

- a) that the citizen, men and women equally, have the right to an adequate means of livelihood;
- b) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good;
- c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
- d) that there is equal pay for equal work for both men and women;
- e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39A provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Article 43 Provides that the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

played an active role in many areas, but this area of human rights jurisprudence remains neglected. However, we cannot blame the judiciary solely for this neglect. There are many reasons: Firstly, cases of human trafficking rarely come before the courts due to the under reporting of such cases. Secondly, the existing law is such that it gives too much time and space to the offenders to escape punishment. Thirdly, the police inaction in collecting relevant evidence and information and proving the guilt of the offender is shocking.

Human trafficking is an issue which cannot be isolated from other issues. There is a direct and a visible link between a variety of issues like right to education, right to live with human dignity, right to employment, right to health, right to food and child protection rights. Further, unfortunately all these rights are linked to the issue of trafficking in human beings. Also judicial response to these does not show an encouraging picture. Even though courts have delivered few judgements, there is still a lot of scope for active judicial intervention. Cases of human trafficking should not be studied in isolation but should be understood in the present social context. Various judgements on different forms of human trafficking are analysed hereunder:

In *Dr. Upendra Baxi v. State of U.P.*<sup>61</sup> Supreme Court has held that women and girls rescued from brothels or otherwise should be sent to protective homes and housed under living conditions. Such rescued victims should be medically examined and treated with utmost care.

The Supreme Court in two important landmark judgements touched upon the issue of human trafficking in detail. The first one is *Vishal Jeet v. Union of India*<sup>62</sup> and the second one is *Guarav Jain v. Union of India*<sup>63</sup>. In *Vishal Jeet's* case Supreme Court directed the government to ensure care, protection, treatment, and rehabilitation of the victims of commercial sexual exploitation and gave direction for the setting up of an advisory committee. The court also directed the appointment of trained personnel for rehabilitation homes. The central government was also directed to look into the inadequacies in the existing laws and institutions relating to the problem of human trafficking. In this case, the Supreme Court issued the following directions:

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<sup>61</sup>AIR 1959 All. 57.

<sup>62</sup>AIR 1990 SC 1412.

<sup>63</sup>AIR 1998 SC 2848.

1. Central government and respective state governments should direct their law enforcement agencies to take strict action with the aim of ending child prostitution.<sup>64</sup>
2. A separate Advisory Committee should be formed in different zones consisting of the Secretary of the Welfare Development, the Secretary of Law Department, Sociologists, Criminologist, members of Women's Organisations, members of the Indian Council of Child Welfare and members of Social Organisations etc. whose main function will be to suggest measures to end child prostitution and to implement various programmes for the care, protection and rehabilitation of such young children.<sup>65</sup>
3. The Union and State Governments should take active steps for the adequate rehabilitation homes, manned by well trained personnel.<sup>66</sup>

In this case the court further gave directions to the Union and States to check and end the system of Devadasi.<sup>67</sup>

In *Gaurav Jain's*<sup>68</sup> case apex court gave a direction for the improvement of the conditions of commercial sex workers and the plight of their children. The court directed that the children of prostitutes should not be segregated by locating them in a separate schools and providing them separate hostel. They should be allowed to mingle with other children and with the society at large. The Court further constituted a Committee under the headship of Mr. V.C. Mahajan (Senior Advocate) to submit a detailed report for appropriate action. The Mahajan Committee submitted a detailed report along with well formulated guidelines addressing the issue of the plight of children in prostitution. The Mahajan Committee in its report found that a large number of persons involved in prostitution were children. As a result of this detailed report, the Supreme Court, enhanced the scope of the petition and passed a detailed direction with respect to the treatment of such children during the trial period.

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<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup> *Id.*

<sup>68</sup>AIR 1998 SC 2848.

In an important Public Interest Litigation *Prerna v. Union of India*,<sup>69</sup> broad guidelines were sought for the implementation of the Immoral Traffic (Prevention) Act 1956 from the court. Some of these important guidelines included are:

1. Establishment of a National Nodal Agency to monitor cases of human trafficking and missing persons.<sup>70</sup>
2. Establishment of an Advisory Body in every State and Union Territory.<sup>71</sup>
3. A general notification specifying special police officers under Section 13 of the ITP Act.<sup>72</sup>
4. Directing the district magistrates to pay attention to the cases of human trafficking.<sup>73</sup>
5. Training of police officers and a plan of action to be drafted to tackle sex tourism and international human trafficking.<sup>74</sup>

The Supreme Court of India in a very important case of *Lakshmi Kant Pandey v. Union of India*<sup>75</sup> gave directions to ensure that children should not be abused and exploited under the guise of adoption. The court ordered that a proper procedure should be followed in the matter of adoption. The welfare of the child should be given paramount consideration. The court in this case also gave several directions regarding inter-country adoptions. The court further emphasised that prior to entering into an inter-country adoption, every possible effort should be made to give child for adoption within our own country. Moreover, if the need arises an application from a foreigner desiring to adopt a child should be properly scrutinised and every such application should be routed through a child welfare agency recognised by the government of the country.

In another important case of *People's Union of Civil Liberties v. Union of India*<sup>76</sup> it was brought to the notice of the court that children below the age of fifteen years were trafficked and forced to work as bonded labourers. The court while

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<sup>69</sup> 2003 (2) MHLJ 105.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> AIR 1984 SC 469.

<sup>76</sup> (1998) 8 SCC 485.

sharply condemn the practice, directed the State to pay a reasonable amount of compensation to the respective parents of these children.

In the case of *Bandhua Mukti Morcha v. Union of India*,<sup>77</sup> a writ petition under Article 32 of the constitution was filed by way of a public interest litigation seeking issue of a writ of mandamus directing the government to take measures to stop employment of children in carpet industry in the state of Uttar Pradesh. The court accordingly appointed a committee under the headship of Shri J.P. Vergese to look into the exploitation of the children. In furtherance thereof, a comprehensive report was submitted. The report of the committee discloses the enormity of the problem of exploitation to which the children were subjected. The children 5 to 15 years old having been kidnapped from the villages for being engaged in carpet weaving centres. They were forced to work all day. Virtually, they were treated as slaves and were subject to physical torture. The Court gave instructions to the State for their housing, supply of water, schooling and hospital facilities.

In another important case of *Public Union for Civil Liberties v. State of Tamil Nadu and Others*<sup>78</sup> the main issue in the petition was the protection and rehabilitation of migrant workers. The petition was filed to bring to the notice of the Court the plight of the Tamil migrant workers who were subjected to various forms of exploitations in Madhya Pradesh. The Supreme Court gave directions to the National Human Rights Commission to undertake suitable measures to solve the menace of bonded labour and also to address the issue of their rehabilitation. It was also held that the services of NGO's and other social organisations could be utilized for their rehabilitation.

In *State of Maharashtra and Anr v. Mohd Sajid Husain Mohd. S. Husain*<sup>79</sup> an appeal was directed against a judgement passed by the High Court of Bombay (Aurangabad Division) granting anticipatory bail to the respondents for the commission of an offence punishable under Section 376 of the IPC and under Section 5 of the Immoral Traffic (Prevention) Act, 1956. The Apex court said that the High court ought not to have granted an anticipatory bail to the respondents. The Court accordingly set aside the judgement and directed

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<sup>77</sup>(1997) 10 SC 549.

<sup>78</sup>(2004) 12 SCC 381.

<sup>79</sup>Appeal (crl.) 1402-1409 of 2007.

respondents to surrender before the Chief Judicial Magistrate and move on an application for regular bail.

In *Public at Large v. State of Maharashtra*<sup>80</sup>, judicial intervention was brought about the rescue, repatriation and rehabilitation of 487 minor girls. The High court of Bombay order led to prompt care and attention being given to the rescued victims and to the setting up of an advisory committee, networking among the various departments of the government and the repatriation of persons trafficked from various states in India as well as neighbouring countries like Nepal and Bangladesh.

#### **X. Concluding Remarks**

Undoubtedly, many active steps have been taken over the past few years at the international, regional and national levels for the protection of the vulnerable sections of society and for the eradication of trafficking in human beings. Nonetheless much work still remains to be done to reach the final goal whereby this menace of human trafficking will be eradicated forever from this planet.

Human trafficking is a form of modern day slavery and it requires a holistic and multi-sectoral approach to address the different dimensions of the issue. It is an issue that violates the basic fundamental rights and dignity of the victims and therefore it essentially requires human rights approach while working on its eradication. The problems inherent in developing and applying rights based approach to human trafficking needs to be addressed openly and honestly. The significant obstacle is presented by the fact that international, regional and national legal instruments on trafficking in human beings do not deal with the problem in any concrete and reliable way. Therefore, it becomes an ultimate responsibility of every state to take appropriate action against violators and afford remedies and reparation to those who have been injured.

Ultimately, it is the collective effort which is required on the part of the different agencies existing in a democratic system, which will help to reduce if not eliminate this evil. Since it is a social problem as well, there is focussed need to bring about social awareness with the help of different sections of the society. A targeted effort will be instrumental in the eradication of this menace.

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<sup>80</sup>1997 (4) Bom. CP 171.

## The Need for Scientific Analysis of the Theory of Interest in Consideration of Bail

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Sumita Gope<sup>2</sup>

### Abstract

*The concepts of crime and society are correlated. It must be noted that the notion of crime encompasses the concept of bail or provisional release. When a person is suspected of committing a crime and is detained by the court, she/he may be released on bail. However, the grant or denial of bail hinges on the equilibrium required between conflicting interests, that is the need for an individual's personal liberty and the interest of society.*

*Historically, the concept of bail and interest emerges from the clash between the state's power to restrict or deprive the liberty of a man — who may have allegedly committed a crime — and the presumption of innocence or guilt in their favour. In this regard, there have been a number of international as well as national cases, which contend that there should be an appropriate balance between preserving the right to liberty of the individual and the interest of the state in granting bail or provisional release. Hence, the law relating to bail is meant to balance these two conflicting interests viz. the presumption of innocence of the accused and the need to protect the society from the acts of those committing crimes.*

*Further, the law of bail is instituted under the right to personal liberty, under Article 21 of the Indian Constitution. This provides for a legal procedure that is guided by the tenets of natural justice. Therefore, the law relating to bail needs to be interpreted in synthesis with constitutional goals and mandates. In a constitutionally controlled criminal justice system, criminal jurisprudence has sought a balance between the liberty of the accused and the collective interest of the society. In this respect, this paper is an endeavour to study the need for a scientific analysis of the theory of interest in consideration of bail.*

**Keywords:** *interest theory, bail, jurisprudence, personal liberty, society*

### I. Introduction

The public perception of crime is constantly shifting. This perception principally hinges on societal advancement, which in turn rests on the intrinsic ethics and benefits that dictate people's mutual beliefs. The notion of crime encompasses

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the idea of it being a public wrong as opposed to being a private one, with the consequent intervention between the criminal and incapacitated party by an agency in lieu of the community as a whole. Thus, crime can be described as committing an act that is allegedly considered to be socially harmful, or treacherous, and the purpose of classifying a specific act as a crime depends on the civic injury that would result from its recurrent participation. Therefore, the agency of society takes steps towards its prevention by recommending an appropriate punishment for those committing such crimes.

The word 'crime' is derived from the Latin word *crīmen* that means 'charge' or 'offence'. Fundamentally, crime is a community fact; it is defined by the Waverly Encyclopedia as "An act forbidden by law and for performing which the perpetrator is liable to punishment".<sup>3</sup> Although the term 'bail' is not defined in the Criminal Procedure Code, it is used several times in the Criminal Procedure Code, and remains a pivotal concept of the criminal justice system in India. Further, it must be noted that the concept of bail<sup>4</sup> is in consonance with the fundamental principles enshrined in Part III and IV of the Constitution of India and the protection of Human Rights as prescribed under various international treaties and covenants. The Supreme Court of India defines bail as "a technique which is evolved for effecting the synthesis of two basic concepts of human value, viz., the right of an accused to enjoy his personal freedom and the public's interest on which a person's release is conditioned on the surety to produce the accused person in the court to stand the trial."<sup>5</sup>

When an individual is arraigned of or suspected of committing felony and the person is incarcerated or detained by the court, he *may* be released on bail. The use of the word 'may' here clearly indicates that the police officer or the court reserves discretion in granting bail. However, it must also be understood that bail in criminal proceedings has two aspects. This means that bail may be granted: (a) in connection with the proceedings for an offence, to a person charged with or convicted of the offence; (b) in connection with an offence, to a person who is under arrest for the offence or for whose arrest a warrant has been issued. Hence, the concept of bail signifies a form of pre-trial release or the removal of restrictive

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<sup>3</sup>DR SHIVANI VERMA, CRIMINOLOGY, PENOLOGY AND VICTIMOLOGY 15 (University Book House (P) Ltd. 2019).

<sup>4</sup>V K DEWAN, SUPREME COURT ON BAILS 29 (Asia Law House 2019).

<sup>5</sup>Kamalpati v. State of West Bengal, AIR 1979 SC 777 (India).

and punitive consequences of the pre-trial detention of an accused.<sup>6</sup> The provisions relating to the grant of bail are enshrined in Chapter XXXIII under sections 436—450 of the Criminal Procedure Code.

Typically, offences are classified into bailable and non-bailable, as well as cognizable and non-cognizable offences. Cognizable offences are those offences that can be investigated by the police without seeking permission from a magistrate. On the other hand, non-cognizable offences are those cases in which the police have no authority investigate the offence without the order of the magistrate.

The officer-in-charge at a police station or magistrate, and even the Sessions Court and High Court, are all empowered under the Criminal Procedure Code to deal with bail; impose conditions on granting bail; and cancel bail as well as anticipatory bail. Here, it is important to briefly discuss the concept of an ‘anticipatory bail’. It is a comparatively new concept as a result of the extension of the usage of the bail mechanism.<sup>7</sup> The provision deals with a situation where a person has a reasonable apprehension that she/he may be arrested on an accusation of having committed a non-bailable offence. Such a person can move an application in an appropriate court, which may grant her/him an anticipatory bail.

The Code of Criminal Procedure 1898 originally did not have any provision corresponding to anticipatory bail. The history of this provision can be traced back to the event when the Joint Select Committee of Parliament suggested that bail should be made available in anticipation of an arrest, such as in case of frivolous proceedings, so that the liberty of an individual may not be unnecessarily put on the line. Subsequently, the Law Commission was inspired to take up the suggestion, which resulted in the drafting of a provision to provide bail in anticipation of an arrest. It was ultimately enacted as Section 438 of the Code of Criminal Procedure 1973.<sup>8</sup>

It is obligatory on part of the court to consider whether or not there is judicious ground for accepting it as accurate that the accused has committed an offence with which he is charged. With respect to the question of conceding bail, the

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<sup>6</sup>ADV. NAVEEN RAO, BAIL OR JAIL 2 (Prowess Publishing 2019)

<sup>7</sup>KANTI MANI, LAW RELATING TO ANTICIPATORY BAIL 9-10 (Kamal Publishers).

<sup>8</sup>THE LAW COMMISSION OF INDIA, 48<sup>TH</sup> REPORT para 31 (1972).

available materials with the court are the charges levelled against the person; attendant facts, including the police report; facts quantified in the bail petition; and the grounds for opposing the grant of the petition. Although the grant of bail is a discretionary order, the situation calls for exercising such discretion in a judicious manner and not as a matter of sequence. An order for granting bail devoid of a cogent reason cannot be sustained. As a matter of course, the grant of bail is reliant upon the contextual facts of the substance being dealt with by the court; however, facts tend to fluctuate from case to case. While the placement of the accused in the society may be considered, it can be observed that this aspect by itself cannot be a guiding factor in the matter of granting bail. In fact, their placement in society ought to be coupled with other circumstances warranting the grant of bail. Above all, it is the nature of the offence that remains a primary consideration for the grant of bail — the more heinous the crime, the greater the chances of the bail being denied.<sup>9</sup>

It is a well-known fact that bail is a right, and jail is an exception. Whether it is during the pre-trial or post-conviction phase, bail jurisprudence remains a blurred area in the criminal justice system.<sup>10</sup> Here, it serves well to refer to Interest Theory that was first proposed by Jeremy Bentham. Although Bentham was rather critical of the idea of moral rights, he voted that rights could be useful in legal systems. He put forward the thought that when a person has a right to something, it entails that it is in her/his interest, or is to her/his benefit; hence another person has a duty towards the right-holder. In the same way, when someone violates the right of a person by not doing her/his duty to provide what the right entails to the other person, then it is deemed that she/he is acting in her/his own interest. Further, a person has a right to something against a second person, when the second person is bound by legal duty to provide something to the other person. Thus, by extension of this understanding, the bail mechanism can be explained using Bentham's Interest Theory, in that the right to bail is legally required to provide if a person has the opportunity to get bail.<sup>11</sup>

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<sup>9</sup> S. K MISRA, LAW OF CRIMINAL PROCEDURE CODE IN INDIA 401 (Allahabad Law Agency 2019).

<sup>10</sup> R K NAROOA (et. al.), LAW OF BAIL vii (Oak Bridge Publishing Pvt. Ltd. 2020).

<sup>11</sup> Rowan Cruft, *Rights: Beyond Interest Theory And Will Theory?*, 23 LAW PHILOS., 347-397 (2004).

That said, there are questions of great importance to the community concerning the balance between an individual's personal liberty and the interest of the society. It is worthwhile to consider that the society enjoys immense curiosity in the grant or refusal of bail because every criminal offence is thought to be felony against the State. Therefore, the order of granting or refusing bail must reflect perfect equilibrium between the conflicting interests, namely, the sanctity of individual liberty and the interest of the society. The law of bail merges two conflicting interests, that is the need to protect the society from the threat posed by those committing crimes and the possibility of committing the same crime when they are released on bail, as well as adherence to the vital principle of criminal jurisprudence regarding the presumption of innocence in favour of the accused, based on conjecture, until she/he is proven guilty and the inviolability of individual liberty.<sup>12</sup>

## II. Evolution of the Concept of Law of Bail

The history of bail can be traced back to the English Common Law. As far back as in 1689, while debating the landmark Bill of Rights, the English Parliament held that a bail must be reasonable — a principle that was later integrated into the Eighth Amendment to the United States Constitution.<sup>13</sup> The Eighth Amendment states that, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>14</sup> The essence of the amendment being that the federal government is prohibited from imposing harsh penalties or punishments on a person accused of committing a crime, irrespective of it being “the price for obtaining pretrial release or as punishment for crime after conviction.”<sup>15</sup>

While chronicling the historical journey of bail jurisprudence in India, it is observed that it was during the tenure of Lord Warren Hastings — the Governor of Bengal from 1773 to 1785 — that major changes were brought to the Indian legal system, which was in shambles at the time. Lord Hastings's interventions in introducing various reforms helped in engineering crucial developments in

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<sup>12</sup> Siddharam Satlingappa Mhetre v. State of Maharashtra, LNIND 2010 SC1174 (India).

<sup>13</sup> Caleb Foote, *The Coming Constitution Crisis in Bail*, 113 U. PA. L. REV., 968 (1965).

<sup>14</sup> NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org> (last visited Sep. 17, 2021).

<sup>15</sup> *Id.*

civil and criminal justice. The *Saddar Diwani Adalat* was instituted as the Supreme Court of Revenue in British India to try civil matters. In addition, the *Saddar Nizami Adalat*, or courts of criminal justice, was created to try *foujdari* in the country. In this system, two forms of bail were practised. One form was the *muchalka* — a personal bond whereby the accused was released on her/his recognizance, subject to such penal provisions as directed by the magistrate. The other was *zamanat* wherein a surety (*zamin*) or sureties would have to undertake to produce the accused on the days and dates desired by the magistrate and the police, failing which the surety would be forfeited.

Another landmark moment in the history of bail jurisprudence was when the British Government was transferred the direct rule and sovereignty over the territory of India from the East India Company through the Government of India Act, 1858. During this time, three major acts were introduced to define criminal law in India. These were the India Penal Code, 1860; the Indian Evidence Act, 1872; and the Code of Criminal Procedure, 1882.<sup>16</sup> However, after the culmination of the First World War in 1918, a new bill was prepared in 1921 with the idea of reforming the law to ensure there is a uniform law of criminal procedure across the territory of India. The bill was presented to the Select Committee of the British Parliament for review. It may be noted here that the original proposal was that an undertrial prisoner should be released on bail if the trial is not concluded within six weeks from the date of his appearance before the magistrate. However, when the subject was reviewed by the Select Committee, it was considered that the period should be increased to two months and that it should be counted from the first date that is fixed for taking evidence in the case.

The Select Committee suggested certain amendments that helped in cultivating an advanced understanding of the concept as well as scope of bail law under the Indian Law. This set the ball rolling for further contemplation on this subject. The Law Commission of India in its 41<sup>st</sup> Report considered the provisions relating to bail listed under the old Code of Criminal Procedure, 1898.<sup>17</sup> The recommendations proposed by the Law Commission in this report were duly considered by the Parliament at the time, and were incorporated into the new

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<sup>16</sup>MADABHUSHI SRIDHAR, LAW OF FIR ARREST & BAIL 289 (Asia Law House 2020).

<sup>17</sup>THE LAW COMMISSION OF INDIA, 41<sup>st</sup> LAW COMMISSION REPORT para 39.5 and 39.7 (1969).

Code of Criminal Procedure, 1973, which replaced the old code. The principles outlined by the Commission were: (a) bail is a matter of right, if the offence is bailable; (b) bail is a matter of discretion, if the offence is non-bailable; (c) bail is not to be granted if the offence is punishable with death or imprisonment for life, however, the court reserves its discretion, albeit in limited cases, to order the release of a person; and (d) in relation to such offences, that is those punishable by death or imprisonment for life, the Sessions as well as the High Court should enjoy a wider discretion in the matter of granting bail.

The most significant reform that was introduced in the new Code of Criminal Procedure, 1973 was that it recognized and provided a legal basis for the grant of bail to a person — even before his arrest — who might be apprehensive and have grounds to believe that the law enforcement official could seek to interfere with her/his liberty. Here, it is important to note that while the Code of Criminal Procedure, 1973 did not define the word ‘bail’, but it defined the concepts of ‘bailable offence’ and ‘non-bailable offence’ under Section 2 (a).<sup>18</sup> Keeping this in view, the legislative, judiciary, and the enforcement machinery has attempted to strike a balance between the interests of the society and the need to protect the personal liberty of an individual or a group of individuals who are accused of committing a crime.<sup>19</sup>

The idea at the core of the concept of bail and interest is the clash between the State’s power to restrict and deprive the liberty of a man who may have allegedly committed a crime and the presumption of innocence or guilt in her/his favour. In the year 2000, the Supreme Court elaborated on the concept of bail in context of the case of Sunil Fulchand Shah v. Union of India.<sup>20</sup> The factors to be borne in mind while considering an application for bail are whether there is any *prima facie*, or reasonable grounds, to believe that the accused has committed the offence; the nature and gravity of the accusation; the severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing, if released on bail; the character, comportment, means, and position of the accused; the likelihood of the offence being repeated; a genuine apprehension of the

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<sup>18</sup>DISTRICTS ECOURTS, <https://districts.ecourts.gov.in> (last visited Sep. 17, 2021).

<sup>19</sup>R K NAROOOLA (et. al.), LAW OF BAIL xxiii-xxiv (Oak Bridge Publishing Pvt. Ltd. 2020).

<sup>20</sup>AIR 2000 SC 1023: 2000 AIR SCW 582: 2000 CrLJ 1444 (India).

witness being persuaded otherwise; and the danger, of course, of justice being thwarted by the grant of bail.

The bail system as it functions today is a source of great adversity to the poor. This is because the system is discriminatory when we examine from the perspective of the socio-economic standing of the accused. In a country where a significant part of the population lives in abject poverty, the concept of bail poses deep questions about whether the law of bail upholds the right to life and personal liberty. This is because with most poverty-stricken families subsisting on low wages and fragmented land holdings, it is extremely difficult for the members of the family to secure bail in the event a person from such a family is arrested for the commission of a crime. As a result, what follows is scores of undertrials languishing in Indian jails for want of justice when they could have been out on bail.

In this way, the bail system has often been deemed as unfair and biased against the poor owing to their limited financial capacity to even afford bail. Hence, if we want to eradicate the negative effects of unequal access to the fundamental right to personal liberty and pledge a fair and just handling of the administration of justice to the poor, it is imperative for the bail system to be methodically transformed. Such transformation of the criminal justice system will make it possible for the underprivileged to acquire pre-trial release — as easily as the privileged class — without jeopardizing the interest of justice.

### **III. The Concept of Bail from the Perspective of Human Rights**

The aim of justice rests on the core idea of a fair trial. With the concept of fair trial at the heart of an efficient justice system, there is an important aspect in its ambit that needs to be considered — that is the fair representation of parties in the trial. Hence, the presumption of innocence of the accused till proven guilty should be essentially taken into consideration. The safeguard of personal liberty should not be eclipsed by the veil of wrong assumptions. In fact, the international criminal justice system also focuses on the granting of bail as an essential requirement in the process of criminal justice, from the perspective of human rights. This can be attributed to the fact that provisional release and release during breaks from trial has become increasingly common in international criminal

tribunals. Further, these tribunals have laid stress on human rights jurisprudence for justifying the reasonableness of the period of detention.<sup>21</sup>

Detention prior to conviction is a serious infringement of the rights of a defendant and has many repercussions in real life. Further, detention obstructs human rights as well as to be presumed innocent, to liberty, and to ensure a fair and speedy trial. As one of the Judges of the Supreme Court of Canada mentioned, when bail is denied to an individual who is merely accused of a criminal offence, it is the presumption of innocence that is necessarily infringed upon in such a situation.

Generally, when the defendant poses no risk of flight or danger to the community, she/he should be released on bail during the trial in such a situation. Keeping in view the International Convention on Civil and Political Rights (ICCPR), the European Court of Human Rights (ECtHR) expressed the normative as well as functional reasons in context of the need for a more transparent and protective provisional release regime centered on human rights.<sup>22</sup> Therefore, it is incumbent upon the solicitors of the rights of the accused to pursue the purpose of international criminal laws in such proceedings, and this should include the right to provisional release or the right to bail.<sup>23</sup> German scholar and Chair for Criminal Law, Criminal Procedure, and International Law at the Friedrich-Alexander-University Erlangen-Nuremberg, Christoph Safferling stated that human rights can only be protected by means of human rights. If human rights are to be protected via criminal prosecution, the applied justice system itself must be totally compatible with human rights. Inculcating a high regard for human rights also bodes well for transitional justice by providing a boost to actual fairness and promoting respect for the rule of law. What Safferling intends to convey with this that the justice system cannot be tangential to the idea of human rights because at the end of the day, the court of law seeks to protect and promote

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<sup>21</sup>James Miernik & Rosa Aloisi, *Is Justice Delayed at the International Criminal Tribunal*, 91 JUDICATURE 276-281 (2008).

<sup>22</sup>Mark Findlay, *Internationalized Criminal Trial and Access to Justice*, 2 INT'L CRIM. L. REV., 237-38 (2002).

<sup>23</sup>Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trails and the Province of International Criminal Justice*, 20 DUKE J. COMP & INT'L.L., 247-67 (2010).

human rights. Hence, “A human rights enforcement system that is itself not compatible with human rights loses a great deal of impact and persuasiveness.”<sup>24</sup>

The international human rights law does not recognize the right to bail or provisional release pending trial. Rather, it recognizes the right to have a court decide the lawfulness of a defendant’s detention right after her/his arrest.<sup>25</sup> The decision about the defendant’s detention or release brings to fore a key question about the relationship between criminal law and human rights law. Based on the various international as well as domestic cases of criminal law, it can be contended that the emphasis on the human rights perspective binds the international as well as domestic courts in a way to uphold the objective of promoting respect for human rights and the rule of law.

All major international human rights instruments as well as the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal Rwanda (ICTR), and International Criminal Court (ICC) proclaim the presumption of innocence. For example, Article 6(2) of the European Convention on Human Rights (ECHR) expresses the presumption of innocence as, “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” Further, it must also be noted that in the *Manual on International Criminal Defence* published by the UNICRI (United Nations Interregional Crime and Justice Research Institute), ADC-ICTY (Association of Defence Counsel practising before the International Courts and Tribunals), ODIHR OSCE (OSCE Office for Democratic Institutions and Human Rights), it was observed that the concept of presumption of innocence and the burden of proof are two of the most vital and “pervasive principles” that are at the core of all criminal justice proceedings. The observation is summed up with

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<sup>24</sup> Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1, 11 (2010), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1601&context=aulr&httpsredir=1&referer=>

<sup>25</sup>The ICCPR provides, “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceeding before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

the thought that the burden of furnishing proof lies with the Prosecution, “and is a burden which never shifts to the accused.”<sup>26</sup>

This is echoed by the European Court of Human Rights (ECtHR) that has clearly stated that the burden of proof must be on prosecution, and not defense, in order to establish a solid ground for detention. In such matters, shifting the burden of proof onto the detained person is tantamount to overturning the rule of Article 5 of the European Convention on Human Rights (ECHR) — a provision that makes detention an exceptional departure from the person’s right to liberty and one that is only permissible in exhaustively and strictly defined cases.<sup>27</sup>

In context of a decision relating to a provisional release, domestic jurisdiction requires a balance to be established between the right of the individual as well as the right to liberty and the interest of the state. Upon examining the case of *Schiesser v. Switzerland*,<sup>28</sup> we find that the ECtHR held the opinion that to comport with Article 5(3), the law official determining the release or detention of the accused must review the circumstances militating for or against detention and decide — by referring to legal criteria — whether there are reasons to justify detention or order for release.

Likewise, in upholding the provision reserved under the Bail Reform Act, which allows for detention based on danger to the community, the United States Supreme Court found it significant that the provisions did not give the judicial officer unbridled discretion in making the decision for detention, since Congress had specified the considerations relevant to that decision. On the other hand, the Supreme Court of Canada struck down provisional release that gave courts excessive discretion. This was centered on the belief that any bail provision that confers open-ended judicial discretion to refuse bail should be deemed unconstitutional. Further, it was substantiated that the fundamental principle of justice demands that an individual cannot be detained by virtue of a vague legal provision.

Finally, this was corroborated by the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights

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<sup>26</sup>UNICRI ET. AL., MANUAL ON INTERNATIONAL CRIMINAL DEFENCE ADC-ICTY DEVELOPED PRACTICES 5 (UNICRI, 2011).

<sup>27</sup>*Ilijkov v. Bulgaria*, 2001 – IV Eur. Ct. H. 85(2001).

<sup>28</sup>34 Eur.Ct.HR (Series A) at 14,31 (1979).

(ECHR), both of which provide that those who have been unlawfully arrested or detained have an enforceable right to compensation.

#### **IV. Need for Viewing the Law of Bail through the Lens of Theory of Interest**

When we look into the analysis presented by Rudolph von Ihering, we find that the real force that moves man to action is interest. According to Ihering, action without interest is an absurdity because it is not practical. Further, Montesquieu opines that “law in general is human reason ...” and the scope of reason, with its diversity of conditions, is generally responsible for making man perform certain actions in life. Taking this thought further, it can be said that in any culture, it is only the legally protected interests that define the sphere of existing law. When the concept of interest came into being — that is the way people think when it comes to the realities of living — there emerged the discipline of law as it exists today, with a modern outlook. As a result, the progress and development of human beings was recognized as the principal goal of law. Hence, human progress came to be regarded as the goal of law.<sup>29</sup>

When the *Jurisprudence of Interests* was published, as part of the 20th Century Legal Philosophy Series, it chronicled the progress that had been made in legal theory since the turn of the century.<sup>30</sup> In his *Survey of Interests*, Roscoe Pound noted that the theory of interest lucidly details that social interest has had a notable shift of outlook across the world. Earlier, the concept of interest was seen as an undertaking of the legal order, which required adjusting of the exercise of free wills to one of satisfying wants, of which free exercise of the will is but one.<sup>31</sup> Now, in the present scenario, the theory of interest mainly consists of claims, demands, or desires, which human beings — either singly or in a group or in associations or relations — seek to satisfy. Further, it must be taken into account that it also requires the adjustment of relations and the ordering of conduct through the force of a politically organized society.

Moreover, according to Pound, there needs to be an alignment of competing interests and values without which there cannot be any fruitful development in the concept of public policy, which is vital for the healthy development of the society. In this regard, it can be said that the *Jurisprudence of Interests* is “a

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<sup>29</sup>Philipp Heck, *Philosophy of Law* 4 (1921).

<sup>30</sup>Herbert D. Laube, *Jurisprudence of Interests*, 34 CORNELL L. REV. 291 (1949).

<sup>31</sup>Roscoe Pound, *A Survey of Social Interests*, 57 HARV.L.REV.1 (1943)

method of legal science” and, therefore, of rational thought. Taking the point further on the idea of rational thought, Philipp Heck said that it is the jurist and judges who should evaluate and balance the interest involved. This means that a method ought to be outlined to legislators or the judge, according to which she/he should evaluate and draw the standards, which would further help with the evaluation.

As we dig deeper into the philosophy of law, we understand that jurisprudence of interests is a doctrine of legal philosophy, dating from the early 20<sup>th</sup> century. It explains that a written law must be interpreted in order to reflect the interest it seeks to promote. With this, the concept of jurisprudence of interests also accorded Legal positivism has progressed to the stage of jurisprudence of interests from that of jurisprudence of concepts. It is understood that when it comes to the jurisprudence of interests, law is essentially interpreted in terms of the purpose that it seeks to accomplish. This doctrine is typified by the idea of obedience to law, and subsumption as the resolution of conflict of interest in the concrete and in the abstract, whereby the interests necessary in society — as materialized in that law — should prevail.<sup>32</sup>

Since the law operates by means of general rules, it is essential for specific individual interests or demands to be generalized before they can be recognized as legal rights. Further from here, when these interests or demands are generalized, they transform to become the social interest in an individual’s life. Thus, for example, the non-discriminatory treatment in granting bail to an accused — who is under a cloud of doubt and mistrust — becomes a recognized legal right subsumed under the social interest of an individual’s demand for fair opportunity in the representation of his case during the trial. This results in the balancing of the social interest in general security and in an individual’s life. That said, the police officers, prosecutors, and judges must choose to sacrifice one’s interest at the expense of another. It is also true that any rational justification for their decision must be made in terms of an ideal with more substance than the principle of “satisfy as many desires as possible”. However, there are many cases in which a compromise can be worked out between conflicting demands, where

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<sup>32</sup>[en.wikipedia.org/wiki/jurisprudence\\_of\\_interest](https://en.wikipedia.org/wiki/jurisprudence_of_interest) (last visited 28 Jul. 2021 at 15.18pm).

each demand is partially fulfilled, as a result of which there is balance or harmony of interests.<sup>33</sup>

To conclude, it can be observed that Pound's theory of interest is typified by a tension between the idea of human development and the necessity for taking public opinion into account. In criminal justice administration, human development is expressed as a recommendation for preventive justice, which also includes the grant of bail and public opinion as a demand for an effective administrative organization.<sup>34</sup>

### **V. Examining the Law of Bail in the Juvenile Justice System**

When we examine the law of bail in context of the Juvenile Justice System, we find that the principle of 'Best Interest' has been laid down as one of the fundamental principles under rule 3 of the Juvenile Justice (Care and Protection of Children) Rule 2007. According to this, the principle of best interest of the juvenile in conflict with law will be of primary consideration in all decisions taken within the context of administration of juvenile justice.<sup>35</sup> It is further mentioned that juveniles who are detained, under arrest, or awaiting trial ("untried") are to be presumed innocent until proven guilty and should be treated as such. Further, it demands that detention before trial shall be avoided to the extent possible and limited to exceptional.

### **VI. The Accusatorial System and Right to Bail**

The grant or refusal of bail is a very delicate issue and certainly needs a serious examination when the court decides against the accused person. Even the Code of Criminal Procedure, 1973 speaks in favour of the grant of bail because the liberty of a person is of great importance. Moreover, it is the fundamental right of every citizen and is guaranteed under the Constitution of India. Now, based on the provisions under law and the judgments delivered by various High Courts and also the Supreme Court of India, the consensus arrived at is that keeping in view the interest of the society, and as per the theory of interest, the inclination

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<sup>33</sup>Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV., 76-92 (1928).

<sup>34</sup>BENJAMIN N. CARDOZO, *THE GROWTH OF LAW* 60 (Yale University Press 1924).

<sup>35</sup>DR. SHIVANI VERMA, *CRIMINOLOGY, PENOLOGY AND VICTIMOLOGY* 530-531 (University Book House (P) Ltd. 2019).

of the order should be in favour of bail and not jail. The core thought behind setting the accused at liberty is simply that her/his fundamental right to life and liberty should not be unnecessarily curtailed.

The idea of law stems from the need to punish for deviance, transgressions, and violations. That said an individual's personal liberty as well as security and order in society remain paramount considerations. Therefore, a case that involves the misuse of liberty — which is established by the test of balance of probabilities — and if there exists reasonable apprehension of the accused interfering with the process of justice, only then the cancellation of bail will be considered. This is also because cancellation of bail is considered to be a draconian order compared to that of the rejection of bail. The grounds for cancellation of bail in situations, where, "... (a) the accused misuses his liberty by indulging in similar criminal activity, (b) interferes with the course of the investigation, (c) attempts to tamper with evidence or witnesses, (d) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (e) there is likelihood of his fleeing to another country, (f) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (g) attempts to place himself beyond the reach of surety, etc."<sup>36</sup> If the courts are satisfied that the accused person will participate in the trial and will not abscond or tamper with the evidence, the bail will invariably be granted by the court.<sup>37</sup>

When we examine the case of *Surinder Singh @ Shingara Singh v. State of Punjab*,<sup>38</sup> the court held that in discretionary matters, such as grants or refusal of bail, it would be impossible to lay down any invariable rule or evolve a one-size-fits-all formula. Therefore, the court must exercise its discretion while duly regarding the relevant facts and circumstances, which includes the interest of the individual and also of the society at large.

In *Kalpesh Dineshchandra Jariwala v. State of Gujarat*,<sup>39</sup> the court sought to achieve an appropriate balance between the personal liberty of the petitioner as well as the interest of the society. In the case, it was admitted by the petitioner

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<sup>36</sup>VK DEWAN, SUPREME COURT ON BAILS 593 (Asia Law House 2019).

<sup>37</sup>JANAK JAI RAJ, BAIL LAW AND PROCEDURES, WITH TIPS TO AVOID POLICE HARASSMENT 12-13 (Lexis Nexis Universal Law Publishing 2019).

<sup>38</sup>(2005) 7 SCC 387; 2005 CrLJ 4119; AIR 2005 SC 3669 (India).

<sup>39</sup>*Kalpesh Dineshchandra Jariwala v. State of Gujarat*, 2003 CriLJ 2401, (2003) 1 GLR 706

that all 12 transactions were relating to the petitioner, his family and relatives, with the total amount coming to Rs. 2.70 crores. After the petitioner handed over his properties worth Rs. 2.11 crores, as well as paid cash totaling Rs. 30 lakhs, the court had effectively recovered Rs. 2.40 crores from the petitioner. Therefore, it was understood that the principal amount of the Bank that was due to be recovered from the petitioner had been retrieved — and this was in accordance with the settlement and consent award passed by the Board of Nominees Court. This event satisfied the public at large because the Bank had recovered the amount that was necessary to repay depositors and maintain the statutory liquidity of the banking institution. As a result, it was observed that a clear balance had been achieved between the personal liberty of the petitioner and the interest of the society. With no further apprehension on the part of the prosecution, it was ordered that the petitioner be released on regular bail and not be detained in jail any further.

Another notable aspect of the aforementioned case was that it was observed that there were thousands of cases pending in Surat Court, and these were not going to be decided until some time back then. Therefore, it was ruled by the court that in the event that bail is not granted to Shri Chudawala — one of the accused in the case — it would entail subjecting him to pre-trial punishment. In such a situation, the paramount principle upheld by the court was that of enforcing the idea of protecting the personal liberty of the accused and granting them bail.<sup>40</sup>

However, when we consider the case of *State of Madhya Pradesh v. Kajad*,<sup>41</sup> we find that Section 34 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 was in question. In this case, the court observed that a person who is accused of an offence, which is punishable for a term of imprisonment of five years or more, will generally not be released on bail. The negation of bail is the rule and its grant is an exception under section 37 (1) (b) (ii) of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985. This is because offences committed under the Narcotic Drugs and Psychotropic Substances (NDPS) Act is against the interest of the society; hence a liberal approach in the matter of bail under the Narcotic Drugs and Psychotropic Substances (NDPS) Act is thought to be uncalled for.

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<sup>40</sup>V.K. DEWAN, SUPREME COURT ON BAILS 596 (Asia Law House 2019).

<sup>41</sup>2017 SCC 673: AIR 2001 SC 3317: 2001 CrLJ 4240.

Again, in the case of *State of Maharashtra v. Bharat Shanti Lal Shah*,<sup>42</sup> the court observed that the objective of Maharashtra Control of Organised Crime Act (MCOCA) is to prevent organized crime, and, therefore, there is reason to deny the consideration of grant of bail if the accused has committed a similar offence once again after being released on bail. However, the same consideration cannot be extended to a person who commits an offence under some other Act. This is owing to the reason that the interest of the person committing an offence under the Maharashtra Control of Organised Crime Act (MCOCA) is different from the interest of the person committing an offence under any other Act.

However, the cancellation of bail is a difficult ground for the justice system to navigate. In *Aslam Babalal Desai v. State of Maharashtra*, it was ruled that even though the rejection of bail stands as a valid provision in the law of bail, the cancellation of bail should not be casually evoked because it directly interferes with the right to liberty of an individual.<sup>43</sup> Keeping this in view, the right to life and liberty has been upheld by the court as long as there has been no evidence found against the misuse of liberty. Even in cases where an opposing party might bring up the misuse of liberty granted to the other party, these grounds are not accepted towards the cancellation of the bail order. For the court to take an accused into custody who has already been enlarged on bail is an action of an extraordinary nature, and hence can only be carried out in exceptional circumstances.

In *Rankanidhi Panda v. State of Orissa*<sup>44</sup>, it was weighed in by the court that the materials presented were not sufficient to rule in favour of misuse of liberty granted to the other party. In fact, in such a scenario, even the aspect of questioning the legality of the bail granted by the police to the opposite parties during investigation cannot be of any use to the petitioner. This is because at this stage the case was already in the Court of Session and the opposite party had been granted bail by the Court. An extension of this situation is one where the application for the cancellation of bail comes after three months of having granted the order for bail. In such a case, it was ruled by the court that with the

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<sup>42</sup>(2008) 13 SCC 5: AIR 2009 SC (Supp) 1135: 2008 AIR SCW 6431.

<sup>43</sup>V K DEWAN, SUPREME COURT ON BAILS 594 (Asia Law House 2019).

<sup>44</sup>*Rankanidhi Panda v. State of Orissa*, 1997 II OLR 34 (India).

opposite party having been granted personal liberty for about eight months, the court did not feel inclined to cancel the bail.<sup>45</sup>

Having examined the cases outlined above, there is an important observation that can be made here. A crucial issue relating to bail is that of the bail application required to be disposed the same day. In *Mahendra Pal Singh v. State of Uttar Pradesh*,<sup>46</sup> the court held that the magistrate should dispose of the application the same day and in special cases on the next day. Keeping in view the interest of the individual as well as society, courts have often made the observation in their judgments that the bail applications should be normally heard on the same day, as it involves the life and liberty of the accused who is presumed innocent until proven guilty. Courts should take into account the question of personal liberty of the accused, an issue that has been put on the highest pedestal in the Constitution of India.

### **VII. The Importance of Life and Personal Liberty with Regard to Bail**

The most critical aspect of criminal practices and law in India is the question of bail. This largely stems from the extensive delays in the completion of the judicial process, right from the time of the initial arrest to the ultimate decision in the matter. The concept of bail as the rule and its refusal as an exception has gained acceptance and judicial approval in India for this additional reason; however, in practice, it appears that bail is not easily available in the country.

Time and again, it has been emphasized that the broad principle and the philosophy guiding the grant or refusal of bail is the apparent conflict of interest of an accused under custody, or likely custody, and the interest of the society in terms of safety and its concern for the maintenance of law and order. In India, this has an additional connotation — in view of the fact that the completion of the investigation, trials, and then the hearing of appeals goes on for years on end, this lays solid ground and sound reasoning for the grant of bail.

Another important aspect of bail in India is that of bail pending trial, and bail pending an appeal. The first aspect is of utmost importance because around 70% of the prisoners in jail are under trials, some with petty offences alleged against

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<sup>45</sup>*State of Orissa v. Jagannath Patel*, 1992 CriLJ 1818 (India).

<sup>46</sup>1990 ACC 18.

them and often unable or unwilling to post appeal.<sup>47</sup> This begins at the appellate stage, when the case comes on record, and the prosecution having been believed, the accused is sent to jail. Therefore, a convict in custody must seek his bail from the appellate court. However, in case of serious offences, courts are wary of granting bail. But in case of lesser offences, the accused is ultimately bailed out. The difficulty arises, however, when the appeals are long delayed — sometimes for decades — and the convicts continue to languish in jail. At the end of the day, there is no particular guideline and no definite precedent that can bind a judge to the decision that he makes with regards to granting or refusing bail. It is largely a matter depending on the predilection of the judge, with the most significant principle being the background of the judge. Therefore, it can be concluded that the lack of consistency in bail jurisprudence is the most vexing question before judges and lawyers alike. Further, it cannot be emphasized enough that bail jurisprudence is a basic but highly important structure of criminal jurisprudence.<sup>48</sup>

### **VIII. Conclusion**

Thus, the constitutional jurisprudence of bail — under the umbrella of the right of personal liberty under Article 21 of the Constitution — provides a procedure established by law, which is just, fair, and reasonable, and is in line with the tenets of natural justice. This means that the law relating to bail cannot be read in isolation; it should, in fact, be read in line with the theory of interest along with the constitutional goals and mandates. A vital and perplexing facet of the issue of bail is the question of situations wherein bail should be granted and then those where it should be denied.

The word ‘bail’ conjures up images of grief-stricken people languishing in unhygienic and unsanitary conditions in Indian jails. The reality is far more serious and challenging, both for courts and the law and order machinery on the whole. The solution to this situation demands for the implementation of legal provisions guided by the theory of interest in enabling decision-making with regard to the granting of bail.

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<sup>47</sup>Hussainara Khatoon & ORS. v. Home Secretary, State of Bihar, 1979 AIR 1369, 1979 SCR (3) 532.

<sup>48</sup>SALMAN KHURSHID, ET. AL., TAKING BAIL SERIOUSLY THE STATE OF BAIL JURISPRUDENCE IN INDIA 53 (Lexis Nexis 2020).

Following the observations made in this paper, it appears that the journey of the law of bail in India remains 'antiquated' in nature. It is oppressive and weighed against the poor and weak. It is important to note that the Supreme Court in its diagnosis found that one of the root causes of long pre-trial incarceration is the unsatisfactory and irrational rules for bail, which merely insist on the financial security of the accused and their sureties. As a result, many of the under trials are unable to provide any financial security owing to them being poor with little or no access to financial resources. Consequently, they suffer in prison for long time periods while awaiting their trial.

In recent times, there has been growing discontent among the different sections of the public towards the system of grant of bail. Although it is a uniform and reasonable provision in theory, it does not prove to be so in practice; rather, it has a crude effect on under trials. Hence, the system of grant of bail has come under severe criticism from the society in general. Therefore, the bail system as it is practised in India needs to be studied in greater detail and a major revamp needs to be brought in to reform the system. This can only be possible when a specific act is legislated while keeping in mind the balance of interest of the individual and the interest of the society.

## **Rights of Minorities in India and Pakistan: A Comparative Study**

*Dr. Rakesh Mandal<sup>1</sup>*

### **Abstract**

*At the verge of the independence, two separate dominions were established by the British Government on the basis of religion. Although two major communities are divided on religion, a large numbers of minorities are living at either nation. Pakistan constitutionally declared as Islamic Nation whereas India declared herself as secular nation. However, Muhammad Jinnah had guaranteed that minorities are free to profess and practice their religions and develop their cultures. Consequently, the Constitution of Pakistan guaranteed some basic rights and fundamental freedoms under the Constitution. Unfortunately, these constitutional guarantees were not implemented in reality inspite of Jinnah's assurance. Presently, Pakistan is one of the most hostile states for the minorities in the world. The reasons behind that after 1977 Pakistan became more orthodox and tried to Islamized the entire nation and political campaigned was focused on religious hatred.*

*This paper endeavors to comparatively analyze the status of minorities in India and Pakistan and their respective constitutional safeguards. It further focused on Constitutionalism which is original and real sprite of the nation towards execution of noble ideas on ground reality. Therefore, written constitution has a very little impact, it is the constitutionalism or the sprite and willingness of the political parties and people who govern the state and execute the rights in reality.*

**Key words:** *Minority Rights, Constitutionalism, Human Rights, Constituent Assembly Debate*

### **I. Introduction**

In 1947, on the basis of the religion the unified British colony, India has been divided as Union of India and Pakistan. The partition of India was merely a political decision which was not supported by the public opinion. No public opinion was taken before creation of Pakistan. Until 1947, the two major

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religious communities Hindu and Muslim were living in undivided India with complete harmony. This religious harmony and tolerance had been historically witnessed at the time of the Partition of Bengal. In 1905 both the community fought together to unsettle the settled British policy of Partition. The Partition of Bengal which was recommended by the Morley Minto Reform Act, 1905. Finally, the decision of the partition was withdrawn by the British Government in 1913 due to the immense public movement and agitation.<sup>2</sup>

It is quite surprising that the two religious communities with strong co-operation who have successfully fought against British Raj had changed their motives and claimed for two separate nations after 40 years. The reason behind this change there was only one person i.e. Muhammad Ali Jinnah (1876-1948). He started his political career in the year 1913. Jinnah was an English educated lawyer who joined the Indian National Congress in 1913. At that time the political stand of the Muslim League was parallel running with the Hindu community with complete harmony and co-operation. After Jinnah was elected as the President of the Muslim League in 1916, gradually, the claims of a separate Muslim State became the prime agenda of the League.<sup>3</sup> Although the two religious communities Hindu and Muslim had fought together for independence, they became divergent on the demand of separate statehood for Muslims. In October, 1916 for the first time the Muslim League presented a reform memorandum which claimed for separate electorates for Hindus and Muslims and they claimed to have one-third representation of Muslims in the Central Government. The National Congress had accepted the demand on the basis of proportionate representation of the minority communities and the same has been ratified in Lucknow in 1916.<sup>4</sup> However, at the end of 1927, the National Congress Party has claimed for complete independence from Britain. On 28<sup>th</sup> August, 1928 Motilal Nehru as the President of the Congress Party has presented the Nehru Report in the Central Assembly. The Nehru Report has rejected the policy of separate electorate for the Muslims and also eliminated any weightage given to minority communities and making Hindi as

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<sup>2</sup> BIPAN CHANDRA & MRIDULA MUKERJEE et al., INDIA'S STRUGGLE FOR INDEPENDENCE, 133-134, (Penguin Books 2016).

<sup>3</sup> JUDITH E. WALSH, A BRIEF HISTORY OF INDIA, 178-179, (Infobase Publishing House 2006).

<sup>4</sup> JAMES WYNBRANDT, A BRIEF HISTORY OF PAKISTAN, 30-33, (Infobase Publishing House, New York, 2009).

national language. Moreover, it claimed for reducing Muslim representation in the Central Assembly from the one third to one-quarter. The Muslim Community refused to accept the report and attempt to find out an alternative path. In the reaction to the Nehru Report, Muhammad Ali Jinnah drafted his fourteen point's agendas in 1929 which became the core demands of the Muslim communities for the future course of the Muslim community. The main objections framed by the Jinnah as well as Muslim League were mainly two folds. *Firstly*, they claimed the separate electorates and weightage as per the Congress-Muslim League agreement in Lucknow Pact provided these to the Muslim Community were rejected.<sup>5</sup> *Secondly*, they claimed that the residuary powers would be prevailed to the provinces because the Muslim community realized that they would be a majority in the provinces of North-East and North-West of India and hence would control their provincial legislatures and they could able to preserve their minority interest. Addressing before a huge crowd, at the Lahore Resolution in March 1940 Jinnah told, "*Muslims are not a minority as it is commonly known and understand...Muslims are a nation according to any definition of a nation, and they must have their homelands, their territory and their state.*" As a result of continuous agitations for the separate Muslim state led by Jinnah the British Parliament decided to create two separate dominions i.e. India and Pakistan. On the 18<sup>th</sup> July, 1947 the British Parliament passed the Indian Independence Act, 1947 which provided the foundation for establishment of Pakistan and India as two dominions the British Commonwealth. Thus, due to the religious provocation and on the basis of the ideology of two nation's theory the new nation Pakistan came into existence. However, the demography of the newly established Pakistan certainly not homogeneous and huge numbers of non-Muslim communities was residing in Pakistan at that time. Jinnah and his modernist Muslim colleagues believed that they would able to improve the social-economic conditions of both Muslims and Non-Muslims equally without being a secular state.<sup>6</sup> On 11<sup>th</sup> August 1947, in his quoted speech to the first Constituent Assembly of Pakistan, Jinnah addressed the minority communities as "*...you are free; you are free to go to your temples, you are free to go your*

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<sup>5</sup> *Id.* at 34.

<sup>6</sup> The Report on Religious Minorities in Pakistan, (Minority Rights Group International), at 6-7.

*mosques or to any other places of worship in the state of Pakistan that has nothing to do with the business of the State.*<sup>7</sup>

## **II. The Protection of Minorities in Indian Legal Framework**

In respect of religion, among the South Asian nations India is the most diverse. It is the peaceful abode of religious majority and minorities. Virtually, all the major religions in the world are residing in India. The majority community is Hindu with 79.8% of the total population and all other religious communities together constitute 20% and are collectively considered as minorities.<sup>8</sup> Among those minorities Islam is the largest minority group with 14% of the total population and followed by Christianity (2.3%), Sikh (1.72%), Buddhism (0.70%), Jain (0.37%) and others (0.9%).<sup>9</sup> The Islam is the largest religious minority constituting above 14% of the total population of the nation and scattered all over the country.<sup>10</sup>

Since the ancient times India is a place of religious tolerance and pluralism. Therefore, the framers of the Indian constitution were well aware of that and thus they introduced the concept of secularism by the Constitution of India, 1950. The Constitution declares that there shall be no state religion. Religious tolerance and equal treatment of all religious communities are the essential parts of secularism. Secularism in India does not mean anti-religion. It respects all religions and faiths but does not identify itself with any particular religion. There is no state religion and all religious groups enjoy the same constitutional protection without any favour or discrimination.<sup>11</sup>

Article 25(1) guarantees to every person the freedom of conscience and the right freely to profess, practice and propagate religion. It should be noted that this right is not confined only to the citizens; any person is entitled to get it even foreigners. However, it is clear that the rights conferred on the persons and religious denominations by Article 25 are not absolute. Their exercise is subject to

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<sup>7</sup> IAN TALBOT, *FREEDOM'S CRY* 30-35 (Oxford University Press 1996).

<sup>8</sup> Census of India Report, 2011.

<sup>9</sup> *Id.*

<sup>10</sup> Editorial, *Religious Communities Census 2011: What the numbers say*, *The Hindu*, Apr 26, 2016, at 12.

<sup>11</sup> S. RADHAKRISHNAN, *EAST AND WEST: SOME REFLECTIONS* 40-41 (George Allen and Unwin Ltd, London, 1955).

maintenance of public order, health and morality. This guarantee under the Constitution of India, not only protects the freedom of religious opinion, but it protects also acts done in pursuance of religion.<sup>12</sup>

Articles 25 to 28 of the Indian Constitution confer certain rights relating to freedom of religion not only on the citizens but also on the all person in India. These constitutional provisions guarantee religious freedom not only to the individuals but also to religious groups.

Further, Article 26 lays down that every religious denomination or a section thereof has the rights to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion. However, this right is subject to public order, morality and health.<sup>13</sup>

Article 25 and 26 are general in character its grant the religious freedom to minority as well as majority religion. To say more precisely, these Articles do not intend to deny the same rights to the Hindu majority. Therefore, protection under Article 25 and 26 is available to Hindus as well.<sup>14</sup>

Whereas Article 25 and Article 26 are general in character Articles 29 and 30 are specific to the protection of the minorities. Under Indian Constitution Articles 29 and 30 protect and guarantee certain cultural and educational rights to various cultural, religious and linguistic minorities reside in India. According to Article 29(1) , any section of the citizen residing in the territory of India or in any part thereof having a distinct language, scripts or culture of its own shall have the right to conserve the same. Therefore, this constitutional right is conserved for “any section of the citizen” irrespective of their minority status. In order to invoke the Article 29(1), all that is essential that a section of citizens, residing in India should have a distinct language, script and culture of its own. If they possess these conditions they have the right “to conserve the same”.<sup>15</sup>

Under Article 30(1) two rights are provided to the linguistic or religious minorities, they are as followings: -

- a) The right to establish, and

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<sup>12</sup> Sri Lakshmana Yatendru v. State of Andhra Pradesh, A.I.R. 1966 S.C. 1414, (India).

<sup>13</sup> INDIA CONST. art. 26.

<sup>14</sup> M.P. JAIN, INDIAN CONSTITUTION 1216 (5eds. Wadhwa, Nagpur 2005).

<sup>15</sup> M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1221-1224 (5eds. Wadhwa 2005).

b) The right to administer educational institutes of their choice.

The benefit of the Article 30(1) extends only to linguistic or religious minorities and not to any other section of the citizens. This is the major difference between Article 29(1) and Article 30(1).

However, the term “Minority” itself has not been defined in the Indian Constitution. The expression “minorities” in Article 30 also remains undefined. Though the Supreme Court in *Re Kerala Educational Bill Case*<sup>16</sup> has observed that this term is not defined in the Constitution, normally it refers to any community which is numerically less than 50 per cent of the population of a particular State as a whole therefore when a law about which the question of minority right is to be determined is a state law.<sup>17</sup>

A minority could not also be determined in relation to the entire population of the country. If the law that is questioned under Article 30(1) is a state law, the “minorities” must be determined in relation to the population of the State.<sup>18</sup> In *D.A.V College v. State of Punjab*<sup>19</sup>, the Supreme Court rejected the contention of the State of Punjab that a religious or linguistic minority should be a minority in relation to the entire population of India.

In *State of Bombay v. Bombay Educational Society*<sup>20</sup>, the Supreme Court observed that the Anglo-Indians constitute a religious as well as a linguistic minority. They thus enjoy the right to conserve their language, script and culture under Article 30(1). The theosophical society is not a religious minority.<sup>21</sup>

### III. The Protection of Minorities under Pakistani Legal Framework

Pakistan generally conceived as a homogenous Muslim nation as 90 per cent of its 142 million inhabitants are Muslim.<sup>22</sup> Officially, Pakistan does not recognize the existence of any ethnic and linguistic minorities and declared it as purely Islamic and Urdu speaking state.<sup>23</sup> However, various studies reveal that Pakistan

<sup>16</sup> 1959 1 SCR 995 (India).

<sup>17</sup> *Re Kerala Education Bill Case*, A.I.R. 1958 SC 956 (India).

<sup>18</sup> *D.A.V. College v. State of Punjab*, A.I.R. 1971 SC 1731 (India).

<sup>19</sup> *Id.*

<sup>20</sup> AIR 1954 SC 561 (India).

<sup>21</sup> *Choudhary Janki Prashad v. State of Bihar*, A.I.R. 1974 Pat 187 (India).

<sup>22</sup> Census of Pakistan, 2017.

<sup>23</sup> PAKISTAN CONST. Art. 251 cl. 1.

has ethnic, linguistic and religious minorities and highlights its rich cultural diversity. As per the Fourth Periodic Report of Pakistan to the Committee on the Elimination of All Forms of Racial Discrimination: “In Pakistan there were no racial or ethnic minorities but only religious minorities”.<sup>24</sup>

Although Pakistan declares itself as homogenous society, there are almost five major ethno-regional communities in Pakistan: Baloch, *Muhajir*, Panjabis, Pushtuns and Sindhis as well as several smaller ethnic groups. There are also religious non-Muslim groups such as Ahamadis, Christians, Hindu, Kalasha, Parsis and Sikhs and Shia Muslim sects including Ismailis and Bohras.<sup>25</sup>

The Constitution of Pakistan declares Islam as the state religion. However, one of the basic principles proclaimed in the ‘Objective Resolution’ says, “*Adequate provision should be made for the minorities to freely profess and practice their religions and develop their cultures*”.<sup>26</sup> Further, the Constitution of Pakistan, 1973 states, “all citizens are equal before law and are entitled to equal protection of law”<sup>27</sup> and Article 20 states “every citizen shall have the right to profess, practice and propagate his religion and every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.”<sup>28</sup> Part II of the Constitution deals with the fundamental rights guaranteed to every person within the territory of state. It guarantees the freedom of association,<sup>29</sup> the freedom of speech,<sup>30</sup> the freedom to profess religion and to manage religious institutions,<sup>31</sup> safeguard against taxation for purposes of any particular religion,<sup>32</sup> safeguard as to educational institutions in respect of

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<sup>24</sup> Twentieth Periodic Report of Pakistan to the UN Committee on the Elimination of Racial Discrimination, CERD/C/PAK/20, March 19, 2008, Paragraph. 93.

<sup>25</sup> Dr. Iftikar H. Malik, *A Report on Religious Minorities in Pakistan*, 3-5 Minority Rights Group International, (Aug, 2002).

<sup>26</sup> Md. Nazeer Khel, *Status of Non- Muslim Minorities in Pakistan*, 23, (1), Islamic Studies, 45-54 (Spring, 1984); also see, Tayyab Mahmud, *Freedom of Religion and Religious Minorities in Pakistan: A study of Judicial Practice*, 19 (1) I, FILJ 40-44, (1995).

<sup>27</sup> PAKISTAN CONST. Art. 25.

<sup>28</sup> PAKISTAN CONST. Art. 20 (a) & 20 (b).

<sup>29</sup> PAKISTAN CONST. Art. 17.

<sup>30</sup> PAKISTAN CONST. Art. 19.

<sup>31</sup> PAKISTAN CONST. Art. 20.

<sup>32</sup> PAKISTAN CONST. Art. 21.

religion,<sup>33</sup> equality before law,<sup>34</sup> non-discrimination on the basis of religion, race, caste, sex, residence etc. in access to public places and services,<sup>35</sup> and preservation of language, script and culture.<sup>36</sup> Moreover, the Constitution provides that the State shall safeguard the legitimate rights and interests of minorities, including their due representation in the federal and provincial services.<sup>37</sup>

Although the term ‘minorities’<sup>38</sup> has been referred several times in the Constitution, no definition of whatsoever has been provided.<sup>39</sup> Although Pakistan has Muslim majority at present day, historically it was a centre of Hinduism, Buddhism and Sikhism. After the partition demographic and religious position of that region has been substantially changed.<sup>40</sup>

According to the official statistics of Pakistan, religious minorities constitute about 3.72 per cent of total population.<sup>41</sup> Among the religious minorities, the Hindus constitute 1.9 per cent, the Christians constitute 1.6 %, the *Ahmadis* constitute 0.1% and Parsis, Buddhists, Sikhs, Baharis together constitute 0.12% of the total population of Pakistan.<sup>42</sup>

Although the protection is given under the Constitution of Pakistan, the ground level reality is quite different. Due to the reluctance by the subsequent political leaders, the Constitutional rights to the minorities are merely lip service. The situations of minorities are very miserable and they are suffering with the forcible

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<sup>33</sup>PAKISTAN CONST. Art. 22.

<sup>34</sup> PAKISTAN CONST. Art. 25.

<sup>35</sup> PAKISTAN CONST. Art. 26.

<sup>36</sup> PAKISTAN CONST. Art. 28.

<sup>37</sup> PAKISTAN CONST. Art. 36.

<sup>38</sup> PAKISTAN CONST. the Preamble, art. 2(a) & 2(a), and 36.

<sup>39</sup> JAVAID REHMAN, *THE WEAKNESSES IN THE INTERNATIONAL PROTECTION OF MINORITY RIGHTS*, 136, (Hague, Kluwer Law International, 2000).

<sup>40</sup> Tariq Rahman, *Pakistan's Policies and Practices towards the religious minorities*, 3(2) SAHC 303-305, (April, 2012).

<sup>41</sup> Twentieth Periodic Report of Pakistan to the UN Committee on the Elimination of Racial Discrimination, CERD/C/PAK/20, 19 March 2008, Paragraph. 93.

<sup>42</sup> The Census of Pakistan, 2017.

conversions<sup>43</sup>, religious discrimination and mob violence etc.<sup>44</sup> Today, Pakistan is a hostile state for the all religious minorities but the vision of Pakistan at the time of its formation was very different from what Pakistan has become. Later on the fundamentalist Islamic leaders, the military and civil bureaucracy and political parties began to define the nature of Pakistan and re-interpret the Islam according to their own vested interest.<sup>45</sup> Under the influence of military and reactionary religious parties, Pakistan shifted from supporting paradigm of equal rights for all citizens to defining citizenship on demand of majoritarian Islamic population.<sup>46</sup> Entire legal system of Pakistan is bias towards the religion. For example, according to the Constitution a non-Muslim is disqualified to adorn the post of the President of Pakistan and also Prime Minister of Pakistan.<sup>47</sup> Further, Article 260 of the Constitution of Pakistan, 1973 declared Ahmadi's as non-Muslims and offered an exclusive definition of Islam.<sup>48</sup> Ahmadi's are the most oppressed of the religious minorities in Pakistan. By the amendment<sup>49</sup> of the Constitution the Ahmadi Community among some other communities has been excluded from the Muslim religion. It is quite obvious that the amendment was done on the influence of Muslim fundamentalist parties.<sup>50</sup> Unlike, the Indian Supreme Court, the Supreme Court of Pakistan has failed to protect the minority rights. Under the regime of General Muhammad Zia-ul-Haq, the President of Pakistan the Ordinance XX has been passed which has which effectively prohibited *Ahmmadis* from practicing and profession their faith and beliefs.<sup>51</sup>

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<sup>43</sup> Hamza Ameer, *Hindu Girl Abducted, forcibly married off to Muslim man in Pakistan*, India Today, Islamabad, January 24, 2019, at 24.

<sup>44</sup> M.G. CHITKARA, HUMAN RIGHTS IN PAKISTAN 88-90, (A.P.H. Publishing Corporation, New Delhi, 1997).

<sup>45</sup> Muhammad Riaz & M. Wakil Khan, *Structural Violence and Christian Minority in Pakistan: The Monolithic Image to be Blamed*, X (4), The Dialogue, 340-345 (October, 2015).

<sup>46</sup> Dr. Abdul Majid, *Religious Minorities in Pakistan*, 27 (1), JPUHS, 2-5, (January, 2014).

<sup>47</sup> INDIA CONST. art. 41.

<sup>48</sup> Iftikhar H. Malik, *A Report on Religious Minorities in Pakistan*, Minority Rights Group International 17, (2002).

<sup>49</sup> The Constitution (Second Amendment) Act, 1974.

<sup>50</sup> ADIL HUSSAIN KHAN, FROM SUFISM TO AHMADIYYA: A MUSLIM MINORITY MOVEMENT IN SOUTH ASIA, 91-93, Indiana University Press, (2015).

<sup>51</sup> Mujibur Rehman v. Federal Government of Pakistan, PLD 1985 FSC 8 Also see, Capt. (Retd.) Abdul Wajid v. Federal Government of Pakistan, PLD 1988 SC 167 (Pakistan).

Further, on the pretext of preventing 'anti-Islamic activities', the ordinance has forbidden 'Ahmadis' to be called themselves as Muslim or practice the Islamic customs and usages. This prohibition excludes them from practicing any Islamic creed publicly or entered into their places of worship i.e. mosques. *Ahamadis* in Pakistan are also prohibited by law from worshipping or practice their own religious creed and they have prohibited using traditional Islamic greetings in public, publicly quoting from the Quran, publishing and distributing their own religious materials. Such acts are punishable by imprisonment up to three years as per the Ordinance XX. In the case of *Zaheeruddin v. The State*<sup>52</sup>, a statute prescribing punishment for public practice of their religion by *Ahmadiya* community was challenged as opposed to fundamental right to freedom of religion. However, the Supreme Court of Pakistan upheld the impugned penal provisions and further restricted the *Ahmadiya* community to practice freely their own religion. Therefore, legislature and judiciary have jointly contributed to the continuous persecution of the *Ahmadiya* community.

In this respect law relating to blasphemy in Pakistan must be mentioned. The blasphemy law in Pakistan is most detrimental to interest of minorities. The Penal Code of Pakistan, 1860 states the blasphemy as punishable offences up to death.<sup>53</sup> It is obvious that behind the rigid and harsh penalty was made against the offence of blasphemy is only to discriminate and persecute minorities.<sup>54</sup>

After 1977 the Pakistan Government became more orthodox and tried to islamization of the entire country that makes the Christians and others minorities of Pakistan more vulnerable.<sup>55</sup> The conditions of Christian were also vulnerable under the islamization of the state power. In the *Ayub Masih v. The State*<sup>56</sup>, a Christian, was convicted for blasphemy and sentenced to death in 1998. Even his property and land were also seized. However, later on his advocate was able to prove that he was not directly involved in offence of blasphemy and he was acquitted accordingly. The most recently the evil of Pakistani blasphemy law

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<sup>52</sup> 1993 SCMR 1718, See also, Khurshid Ahmad v. The State, PLD 1992 Lahore (Pakistan).

<sup>53</sup> Section 295C of the Penal Code of Pakistan, 1860 states that whoever use of derogatory remarks against the Holy prophet shall be punished with death.

<sup>54</sup> Kaleem John, *Christians and the Blasphemy Laws in Pakistan*, 17 (1), Transformation, 20-23, (January, 2000).

<sup>55</sup> *Id.* at 24.

<sup>56</sup> PLD 2002 SC 1048 (Pakistan).

came into global scenario in *Asia Bibi Case*<sup>57</sup>. In this case a Christian woman, Asia Bibi, was convicted on the offence of blasphemy by the District Court and sentenced to death by hanging in 2010. The accused Asia Noreen was a catholic Christian living in a small village of Sheikhpura district of Punjab, Asia was the only Christian in the said village. However, on 31<sup>st</sup> October 2018, the Supreme Court of Pakistan acquitted Asia Bibi on the ground of insufficiency of evidence and false statements of witnesses.

As such laws are misused by the Muslim fundamentalist against the religious minorities; they are concerned about their future in Pakistan. Even the Supreme Court of Pakistan itself remarks, “it is unfortunate fact which cannot be disputed that in many cases registered in respect of the offences of blasphemy false allegations are leveled for extraneous purposes and in the absence of adequate safeguards against misapplication or misuse of such law by motivated persons the persons falsely accused of commission of that offence suffer beyond proportion or repair.”<sup>58</sup>

#### **IV. The Comparative Analysis**

The above discussion shows that the statuses of the minorities in two nations are completely different. If we analysis the reasons for such diverse situations between the two countries, we shall find out some specific reasons. *Firstly*, according to the Constitution of the Pakistan it is a theocratic state whereas India is a Secular nation as declared by its Constitution. The preamble of the Constitution of Pakistan, 1973 states that the “*sovereign over the entire universe belongs to almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by him.*”<sup>59</sup> Further, the Constitution declares that Islam shall be the state religion of Pakistan.<sup>60</sup> On the contrary, as per the Constitution of India, 1950, India is a secular nation and all sources of

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<sup>57</sup> Asia Bibi v. The State, the Supreme Court, Criminal Appeal No. 39-L of 2015 (Pakistan).

<sup>58</sup> The Supreme Court of Pakistan, The State v. Muhammad Qadri. Criminal Appeals No. 210 and 211 of 2015 (Pakistan).

<sup>59</sup> PAKISTAN CONST, the Preamble.

<sup>60</sup> PAKISTAN CONST, Art. 2.

power of sovereign come from the people of India.<sup>61</sup> Its preamble reaffirms that India is a “sovereign, Socialist, Secular<sup>62</sup>, Democratic, Republic”.<sup>63</sup>

*Secondly*, although Pakistan is a theocratic and Islamic state, its constitution protects the rights of minorities in explicit forms. The Constitution of Pakistan, 1973 ensures that adequate provision shall be made for the minorities freely to profess and practice their religion and develop their cultures.<sup>64</sup> Likewise, Constitution of India, 1950 has provided right to freedom of Religion in more explicit manners. To say more precisely, Indian Constitution ensures freedom of conscience and free profession, practice and propagation of religion.<sup>65</sup> Further, constitution ensures freedom to manage religious affairs such as to establish and maintain institutions for religious and charitable purposes.<sup>66</sup> Moreover, Article 29 and Article 30 assure specific rights of the minority communities for preservation of their cultural and educational rights.<sup>67</sup> This specific rights of the minorities are absent under the Constitution of Pakistan, 1973 and no specific rights are provided to the religious minority regarding their cultural rights.

*Thirdly*, the divergent status of the minority in India and Pakistan is mostly due to the different approaches of the two governments. The Government of Pakistan has failed to initiate inclusive actions for the minorities in order to include them in the mainstream of society. Due to lack of Government’s affirmative action’s, Pakistan becomes a country of the worst persecution and discrimination of religious minorities.<sup>68</sup> The Pakistan’s government has forcefully conversion during regime of Zia-ul-Haq in 1977-1988. After the independence some secular and pluralistic movement was started in Pakistan but that was nib in the bud by the military General Zia-ul-Haq in 1977. He changes the school curriculum to impart Islamic ideologies to young minds of the students. In public meeting Zia-

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<sup>61</sup> INDIA CONST. the Preamble.

<sup>62</sup> The word secular was not initially enumerated in the original constitution thought it was impliedly exist in the operative parts of the constitution. Subsequently, in 42<sup>nd</sup> Amendment, 1976 it was inserted in explicit form.

<sup>63</sup> INDIA CONST. the Preamble.

<sup>64</sup> PAKISTAN CONST, Art.20.

<sup>65</sup> PAKISTAN CONST, Art.25.

<sup>66</sup> PAKISTAN CONST, Art.26.

<sup>67</sup> PAKISTAN CONST, Art.29 & 30.

<sup>68</sup> MADIHA AFZAL, PAKISTAN UNDER SIEGE EXTREMISM, SOCIETY AND THE STATE, 11-13, (Brookings Institution Press, 2018)

ul-Haq said “*I have mentioned it previously that this country had not only been created in the name of Islam but could survive only in the name of Islam.*”<sup>69</sup> On the contrary, since the independence India has imparted secular education in its school curricula not only that attending the religious instructions or religious worship in any educational institutions which is receiving aid out of state funds is not mandatory.<sup>70</sup> Moreover, no one is compelled to sing the national anthem if it is against their religious belief.<sup>71</sup> In order to study the situation of Muslim minorities, the UPA Government has introduced Sachar Commission in 2005 and the commission submitted their report in 2006. Subsequently, Justice Ranganath Mishra Commission was appointed for identifying criteria for socially and economically backward classes among the religious and linguistic minorities.

Various affirmative actions have been introduced by the government of India to ameliorate the position of the minorities. In India special privileges on the basis of religion, race, caste, sex and place of birth is not permissible.<sup>72</sup> However, subsequent amendment allows the state to make special arrangement for the educationally and socially backward classes of citizen.<sup>73</sup> Thereafter, in India Schedule Caste, Schedule Tribes and other socially and educationally Backward Classes of peoples are given the reservation to government service and admission to the educational institutions.<sup>74</sup> In the Sachar Commission Report reveals that situation of Muslim is even more vulnerable than the Schedule Caste and Schedule Tribes.<sup>75</sup> Although Muslim community constitutes 14% of the Indian population, they comprise 2.5% of the Indian bureaucracy.<sup>76</sup>

## V. Conclusion

Since the ancient times India is a place of religious tolerance and harmony. In the Mughal era also some of the Muslim ruler has shown apathy and tolerance to its

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<sup>69</sup> Jamal Shah, *Zia-ul-Haque and Proliferation of Religion in Pakistan* 3 IJBS 310-311 (Nov, 2012).

<sup>70</sup> INDIA CONST. art.28.

<sup>71</sup> *Bijoe Emmanuel v. State of Kerala*, A.I.R. 1986 Ker 32(India).

<sup>72</sup> INDIA CONST. Art.15.

<sup>73</sup> First Amendment of Constitution, 1951, Sec. 2 ( w.e.f. 18.06.1951)

<sup>74</sup> INDIA CONST. Art.15(4).

<sup>75</sup> The Sachar Commission Report, 2006.

<sup>76</sup> *Id.* at 17.

non-Muslim subjects. To say in precisely, Mughal Emperor Akbar followed the policy of religious tolerance and secularism during his regime.

Unfortunately, after the independence of the India the nation has been divided in two separate dominations. Pakistan a separate country emerged in the name of Islam, has witnessed some of the worst persecution and discrimination of religious minorities inspite of the assurance by the father of Nation of Pakistan Muhammad Ali Jinnah for the freedom of the minorities in his objective resolution. Subsequent political leaders of the Pakistan have failed to carry forward the assurance propagated by Jinnah.

Pakistan is a country which has been directly ruled for almost half of its history by its military elites.<sup>77</sup> During their rule they use religion for the political interest and provided opportunities to the reactionary forces to increase hatred against minorities and other non-Muslim communities and derailed the civil society from constructive or progressive ideas.<sup>78</sup> The Ultra-Islamic political agenda of Pakistan's militant Islamic outfits have made life miserable for the minorities, who are often subjected to physical assault, humiliation, forcible conversion and persecution.<sup>79</sup>

The recent demographic situations of Pakistan have reveals the truth. In 1947 there was 23% of the minorities of the total population whereas now it is merely 3-4% of the total population in 2012. Some eminent political scholar blamed successive Pakistani Governments for 'slow genocide' against the religious minorities.<sup>80</sup>

Interestingly, both the countries had guaranteed some basic rights to the minorities under their constitutional framework, but in Pakistan these rights are not implemented in reality. Under the military regime and Islamic outfit of subsequent governments these minority rights are became lip service.<sup>81</sup>

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<sup>77</sup> JAMES WYNBRANDT, A BRIEF HISTORY OF PAKISTAN, 183-185, (Infobase Publishing House, New York, 2009).

<sup>78</sup> *Id*, at 191.

<sup>79</sup> Muhammad Riaz & M. Wakil Khan, *Structural Violence and Christian Minority in Pakistan: The Monolithic Image to be Blamed*, X (4), *The Dialogue*, 338-339, (Oct, 2015).

<sup>80</sup> FARAHNAZ ISPAHANI, PURIFYING THE LAND OF THE PURE: A HISTORY OF PAKISTAN'S RELIGIOUS MINORITIES, 93-98, (Oxford University Press, 2017).

<sup>81</sup> Afshan Jafar, *Women, Islam, and the state in Pakistan* 22, *Gend. Issue*, 35-55, (2005).

Therefore, whenever the idea of constitutionalism is lacking the rights and freedoms of minorities are also lacking behinds. Dr. Ambedkar has rightly remarked on the floor of Constituent Assembly that however good a constitution may be, it is sure to turn out bad because those who are called to work on it.<sup>82</sup> Thus, the spirit of the nation and constitutionalism is the prime factors which ensure minority rights.

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<sup>82</sup> D.R. AHIR, SELECTED SPEECH OF DR. B.R. AMBEDKAR (1927-1956) 56, (Blumoon Books, 1997).

## **Trans- Rights Are Human Rights: An Evaluation of Law on the Protection of Transgender Rights in India**

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### **Abstract:**

*2014 is a year to be remembered in the history of India in terms of Transgender Rights, followed by its fruit in the year 2019. The Judiciary in recognizing the status of Transgender Persons in the country, identified them as the 'third gender' in the NALSA Judgment (2014). Following cue, the Indian Parliament passed The Transgender Persons (Protection of Rights) Act, 2019. At the international level too, the efforts of respecting, safeguarding, protecting and fulfilling the rights of Transgender has been witnessed constantly through strong recommendations and comments of the United Nations Charter and Treaty based bodies. The promulgation of the Act of 2019 in India was a celebrated event as many believed, that it marked an end to the age long marginalization and discrimination faced by the Transgender Community. A cursory glance at the legislation would give many, hopes in that regard. However, it was and is still met with opposition from the Transgender Activists leading to the struggle of the community to continue. What makes this legislation an issue of debate? It is questioned on the basis of the very definition of the term 'Transgender'. It rejects some of the most important points of the NALSA guidelines. It is almost completely silent on civil and political rights and most importantly it lacks the voice of Trans-genders themselves for whom the law is made. This however does not mean that it is a failed legislation. It is certainly an effort worth appreciating as it opened doors for prohibition of discrimination and providing social welfare measures for the community. This paper, seeks to address some of the limitations and gaps of the legislation. In doing so, it also tries to understand the concept of trans-genders, the historical background in India, forms of discrimination faced by the community, international human rights laws provisions on their rights and the role of judiciary in promoting the rights of the community.*

**Keywords:** *Trans-genders, Transgender Persons (Protection of Rights) Act, 2019, United Nations, human rights, discrimination, identity.*

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## I. Introduction

“I respect culture, tradition and religion, but they can never justify the denial of basic rights. My promise to the lesbian, homosexual, bisexual and transgender members of the human family is this: I’m with you.”

-Former UN Secretary General Ban Ki-moon

The statement made by the then United Nations Secretary General in the year 2013, was an event that left a mark on the history of Gender Justice within the International legal sphere. It recognized, inter alia, that Trans-genders’ rights are human rights. In the absence of a separate treaty for the rights of the LGBT Community<sup>3</sup>, the efforts of the charter and treaty based bodies evidenced by various reports and commentaries, revealed the will of the United Nations in respecting, safeguarding, protecting and fulfilling the rights of the Transgender Persons. Despite the presence of a large population of Trans-genders today and the cultural, religious and social history highlighting the existence of the community, facts shows that they are one of the most marginalized section of the society facing an immense challenge to merge within the general category of Gender. Transphobia and Homophobia is very much prevalent across the world leading to discriminatory and derogatory actions and laws against community. It is surprising to see that although the United Nations through its monitoring and enforcing mechanisms have time and again recommended the state parties to repeal or reform national discriminatory criminal laws, and yet a large number of states, 69 to be precise, are far from fulfilling it, leading to, in many occasions state-sponsored violence against them.

Understanding the fact that the community experience discrimination in every sphere and one of the major reason being the lack of identity, India in the year

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<sup>3</sup> In fact, the term gender was seldom used even in the basic principle provision of non-discrimination. The term used was Sex, thereby negating any scope for the non-binary. For example, the Universal Declaration of Human Rights (UDHR) under Article 2 provides for non-discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Similar is the case under the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR). The term gender does not find place in these core human rights treaties.

2014 took a huge leap towards protecting the rights of trans-genders by recognizing them as ‘third gender’. NALSA Judgment<sup>4</sup> was certainly path breaking. In India, prior to 2019, rights of the community emanate not only from the Indian Constitution but also from the core human rights legal instruments such as the Universal Declaration of Human Rights (hereinafter, UDHR), International Covenant on Civil and Political Rights (hereinafter, ICCPR), International Covenant on Economic Social and Cultural Rights (hereinafter, ICESCR) etc. However, considering the unique features and issues experienced by the community, a special legislation to protect their rights was necessary.

One of the many fruits of the NALSA Judgment was the immediate proposal of a bill on Transgender Rights, which after long history became a reality in the year 2019 as “Transgender Persons (Protection of Rights) Act”. It is an enabling and empowering legislation but not free from criticisms. From the very moment the right came into existence, there were criticisms by the Transgender Community themselves. This paper seeks to evaluate the law by also studying and understanding the vulnerability of the community and existing legal protection other than the legislation.

## **II. Who are Trans-genders?**

The term transgender, in its legal and formal sense is relatively new. This however does not mean that they were non-existent in the Indian society & culture. The discussion on transgender in Indian history (in the paper itself) will reveal the fact that they have always been in existence with different names such as hijras, Kinnars, Jogappa etc.

As defined by the United Nations Free and Equal, which is a United Nations campaign launched by the Office of the High Commissioner for Human Rights (hereinafter, OHCHR) in 2013 with the aim of promoting equal rights and fair treatment of LGBTQ people:

“Transgender (sometimes shortened to “trans”) is an umbrella term used to describe a wide range of identities whose appearance and characteristics are perceived as gender atypical—including

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<sup>4</sup> National Legal Services Authority versus Union of India and others, AIR 2014 SC 1863

transsexual people, cross-dressers (sometimes referred to as “transvestites”), and people who identify as third gender. Transwomen identify as women but were classified as males when they were born, transmen identify as men but were classified female when they were born, while other trans people don’t identify with the gender-binary at all. Some transgender people seek surgery or take hormones to bring their body into alignment with their gender identity; others do not.”<sup>5</sup>

The term is explained in the simplest form by the National Centre for Transgender Equality of the United States of America as:

“a transgender girl or woman is a girl or woman whose sex assigned at birth was male, but who understands herself as female. A transgender boy or man is a boy or man whose sex assigned at birth was female, but who understands himself to be male. Some transgender people identify as neither male nor female, or as a combination of/among a spectrum of male and female. There are many terms that people who do not identify as male or female use to describe their gender identity, like androgynous, non-binary or genderqueer. The opposite of ‘transgender’ is ‘cisgender’, which describes people whose gender identity matches their assigned sex at birth.”<sup>6</sup>

Diverting from the term in discussion, there are two terms that needs to be noted, Gender and Sex. Sex is related to the reproducing organ of the individual whereas Gender can be a self-identification and is often understood as a social construct. The UNESCO Gender Mainstreaming Implementation Framework, 2003 defines Gender as:

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<sup>5</sup> *Free & Equal United Nations, Definitions* (Dec. 12, 2022, 06:05pm) <https://www.unfe.org/definitions/>.

<sup>6</sup> *Legal Information Institute, Transgender*, (Dec. 8, 2022, 08:45pm) <https://www.law.cornell.edu/wex/transgender>; *See also, Frequently Asked Questions About Transgender People*, (Dec. 10, 2022, 3:36pm) <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>

“Gender refers to the roles and responsibilities of men and women that are created in our families, our societies and our cultures. The concept of gender also includes the expectations held about the characteristics, aptitudes and likely behaviours of both women and men (femininity and masculinity). Gender roles and expectations are learned. They can change over time and they vary within and between cultures. Systems of social differentiation such as political status, class, ethnicity, physical and mental disability, age and more, modify gender roles. The concept of gender is vital because, applied to social analysis, it reveals how women’s subordination (or men’s domination) is socially constructed. As such, the subordination can be changed or ended. It is not biologically predetermined nor is it fixed forever.”<sup>7</sup>

In India, for the purpose of the enforcement of the legislation<sup>8</sup>, the term transgender includes “intersex, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”<sup>9</sup> which will be analysed at a later stage.

Hence, Trans-genders differ from cis gender who identify themselves with the gender assigned at birth as male or female.

### III. Trans-genders in History

In India, the Trans-genders have had a long past known by different names<sup>10</sup> depending on the society they belong to. Stories of Hijras are witnessed also in

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<sup>7</sup> *Unesco’s Gender Mainstreaming Implementation Framework (Gmif) For 2002-2007*, 17, (Jan. 16, 2022, 5:16pm) <https://tinyurl.com/yck7bbwf>

<sup>8</sup> The Transgender Persons (Protection of Rights) Act, 2019, No. 24, Acts of Parliament, 1949 (India)

<sup>9</sup> *Id.* §2 (k): “Transgender person means “a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio- cultural identities as kinner, hijra, aravani and jogta.”

<sup>10</sup> shiv-shaktis, Aravani, Jogappa, hijra, Aruvani, kinnar or kinner etc.

ancient epics such as the Ramayana<sup>11</sup>, Mahabharata, Jain texts etc. Although facts show that the community are discriminated in contemporary times, a look at the ancient India reflects a more tolerance and respectful position for the members of the community.

In NALSA judgment<sup>12</sup> too, the Apex Court reiterated the existence and better position of the community in ancient times. It was observed that during the Mughal period, the community worked even in the commanding judicatures of the Ottoman empires prevalent in the Islamic world and during the period along with high ranks in the Islamic religious institutions. They also held good positions such as political advisors, administrators etc.<sup>13</sup>

It is during the British period, that the status of the trans-genders deteriorated. Some of the prevalent situation during the period that lead to such a conclusion are the fact that they were recognized as criminal caste<sup>14</sup> and denied their civil rights. The Indian Penal Code, 1860, also came into effect during the period which introduced Section 377 that deals with unnatural offences. Such status of discrimination of the trans-genders continued even in the independent India.

In modern India, the community is discriminated, harassed, disrespected and marginalized. A landmark judgment by the Supreme Court in the year 2014<sup>15</sup> is what ushered the civil and political rights of the transgender community represented by K.S. Radhakrishnan J and Dr. A.K. Sikri J. It was through this judgment that the community is now accepted as the “Third Gender.” From here, there was no turning back in terms of recognition of the rights of the community by the judiciary. The Supreme Court’s decision in the Puttuswamy case<sup>16</sup> and

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<sup>11</sup> the story of the Hijras not returning to the city and the decision to stay with Lord Rama while they were leaving for “Banwas” is a famous incident upon which Ram sanctioned them with power to confer blessings on childbirth, marriage etc.

<sup>12</sup> *Supra note* at 4.

<sup>13</sup> M. Michelraj, *Historical Evolution of Transgender Community in India*, 4(1) ARSS. 17-19.

<sup>14</sup> criminalized by passing the Criminal Tribes Act, 1871, Act No. XXVII of 1871 (India) (later repealed) under which certain acts of the members of the community were criminalized.

<sup>15</sup> *Supra note*, 4

<sup>16</sup> K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1

Navtej Singh Johar<sup>17</sup> case are evidence to this. The Transgender Act, 2019 is now the landmark event that will remain in the discussion of transgender rights in the country, that has been passed which recognizes certain rights of the community.

#### **IV. A Look at the Vulnerabilities**

Before we dwell into the discussion of discrimination against the community, it is important to note that the 2011 Census for the very first time officially included 'other' in collecting the data on sex of an individual. This revealed that the total population of Trans-genders in the country is around 4.88 Lakhs.<sup>18</sup> Despite such a large number of population, there are a lot many forms of human rights violations that the community faces in their day to day lives. A few of which are discussed in brief. Various charter based and treaty based bodies<sup>19</sup> have recognized the marginalization, discrimination and violence faced by the community in the society. This community, for example have faced a lot of aggressive abuse, psychological bullying in schools and at workplaces also leading to, more often than not, physical assault, beatings, torture, kidnapping and in many occasions it can be as fatal as targeted killings.

One of the form of violation of rights of the community is the existence of discriminatory criminal laws that are seen in many countries.<sup>20</sup> Despite constant recommendation of the Human Rights Committee and Human Rights Council on reforming and repealing Criminal laws in this regard, many countries still practice criminalization of the community or certain activities, of the community. These discriminatory laws are what we can term as state sponsored discrimination against the community. They are used to harass and punish the members of the communities. It includes laws criminalizing consensual same sex relationships or laws that violate the right to privacy of such community or laws that violate their freedoms. Although it is heartening to see that many members

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<sup>17</sup> Navtej Singh Johar v. Union of India, AIR 2018 SC 4321

<sup>18</sup> *Transgender in India* (Dec. 20, 2022, 11:18am) <https://tinyurl.com/5bwwdmav>.

<sup>19</sup> Such as Human Rights Council, Human Rights Committee, the OHCHR etc.

<sup>20</sup> A recent BBC News report provides for a starking number of 69 countries that still criminalises homosexuality., *Homosexuality: The Countries Where It Is Illegal To Be Gay* (Dec. 28, 2021 02:25pm) <https://www.bbc.com/news/world-43822234>

of the LGBT Community holds respectable position today<sup>21</sup> they however, also face discrimination in employment. There are still many employment opportunities in which they face discrimination. In fact, a study by the National Human Rights Commission on the human rights of Trans-genders in 2018<sup>22</sup> shows that 92% of the Transgender persons are deprived of their rights to work and participate in any form of economic activity despite having the skills and required qualification to do so. Further, in Education, what is commonly seen is psychological bullying. The environment in the school is not sensitive enough to the rights and identity of the community. The same NHRC report shows that “52% trans-genders were harassed by their classmates and 15% by even teachers, a reason due to which they don’t continue their study.”<sup>23</sup>

With regard to Marriage, despite the Decriminalisation of consensual same sex relationship in India as well as the promulgation of a special law for the protection of rights of the trans-genders, the non-reforming of the existing personal laws and the non-existence of provisions for civil and political rights under the new legislation has led to a lot many discriminations against the members of the community. If we truly want to progressively realize the rights of the community, then it is not just the criminal law that has to witness transformation. We still find many legislations using common gender terms such as ‘He’ or ‘She’ or ‘Man’ or ‘Woman’.

The impact of above mentioned forms of discrimination is that it leads to school-dropouts, homelessness, isolation, have low self-esteem leading to suicide,<sup>24</sup> fear

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<sup>21</sup> Some examples are: Joyita Mondal of West Bengal who is the “first Bengali Transwoman member of a Judicial panel of a civil court”, Padmini Prakash an Assistant Professor at a college in Coimbatore, Monica Das who was a presiding Officer of a polling station in Bihar in the year 2020 and many more.

<sup>22</sup> Neeraj Chauhan, “Left alone: Just 2% of trans people stay with parents”, *Times of India*, (August 13, 2018), (Dec. 12, 2021 01:15am) <https://timesofindia.indiatimes.com/india/left-alone-just-2-of-trans-people-stay-with-parents/articleshow/65380226.cms>.

<sup>23</sup> *Id.*

<sup>24</sup> Studies in America in the year 2015 and 2018 reveals a great number of surveyed transgender person who have thought of suicide or attempt to commit suicide. *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescent* (Jan. 05, 2022 3:35pm) [https://www.hrc.org/news/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen\\_](https://www.hrc.org/news/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen_) & *Suicide Thoughts And Attempts Among*

to come-out, cyber-bullying, rejection from religion, migration for acceptance.

As mentioned earlier, comments of various treaty bodies also recognize targeted killings and non-fatal attacks against the members of the community. For example, the concluding observations of the Human Rights Committee on El Salvador<sup>25</sup> in the year 2003, The Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions in the year 2000,<sup>26</sup> Report of the Special Representative of the Secretary-General on human rights defenders,<sup>27</sup> and many more.

We conclude the discussion on Discrimination with a statement by the Special Representative of the Secretary- General on human rights defenders<sup>28</sup> in the year 2007

“In numerous cases from all regions, police or government officials are the alleged perpetrators of violence and threats against defenders of [lesbian, gay, bisexual, transgender and intersex (LGBTI)] rights. In several of these cases, the authorities have prohibited demonstrations, conferences and meetings, denied registration of organizations working for LGBTI rights and police officers have, allegedly, beaten up or even sexually abused these defenders of LGBTI rights. The authorities have generally attempted to justify action against these defenders by arguing that ‘the public’ does not want these demonstrations to take place, or these organizations to be registered, or that ‘the people’ do not want LGBTI people in their community. The Special Representative recalls articles 2 and 12 of

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*Transgender Adults*, (Jan. 05, 2022 4:10pm)  
<https://williamsinstitute.law.ucla.edu/publications/suicidality-transgender-adults/>.

<sup>25</sup> Concluding Observations of the Human Rights Committee, El Salvador, CCPR/CO/78/SLV Para 16, August 22, 2003.

<sup>26</sup> Report of the special rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1999/35, E/CN.4/2000/3 Para 116, January 25, 2000.

<sup>27</sup> Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, A/HRC/4/37 Para. 96, January 24, 2007.

<sup>28</sup> *Report of The Special Representative of The Secretary-General On The Situation Of Human Rights Defenders* (Jan. 05, 2022 4:35pm)  
<https://digitallibrary.un.org/record/618197?ln=en>.

the Declaration on Human Rights Defenders to remind States of their responsibility for protecting defenders against violence and threats.”

## V. International Human Rights Laws and Trans-genders

The terms “sexual orientation” and “gender identity” were rarely used in formal meetings. The same is true also in casual conversations let alone formal discussions. It is only recently that debates are unfolding in the United Nations Charter or treaty based bodies. The Human Rights Council (hereinafter, HRC) today have focused discussions on discriminatory laws and practices at the national level and on the obligations of states under international human rights laws to address these through legislative and other measures. One of the landmark event on recognizing the community and on issue of human rights, sexual orientation and gender identity was on June 2011 when the HRC adopted a resolution which received quite a support from the members of the Council. It is considered that this resolution was what paved the way for the first official united nations report<sup>29</sup> on the subject prepared by the OHCHR. The report included a set of recommendations addressed to the states for strengthening protection of human rights of the LGBT Community. The findings of the report formed the basis of panel discussion that took place at the Council on 7<sup>th</sup> March 2012.<sup>30</sup>

The then UN Secretary stated that violence and discrimination against the members of the community is a “monumental tragedy for those concerned and a stain on our collective conscience”. He also stated that such violence and discrimination is also against the existing international human rights law.<sup>31</sup>

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<sup>29</sup> Human rights, sexual orientation and gender identity, Resolution adopted by the Human Rights Council, A/HRC/RES/17/19, July 14, 2011. Thereafter, the Human Rights Council came up with many more resolutions on the issue such as on 19 July 2019- A/HRC/RES/41/18, 21 March 2019) - A/HRC/RES/40/5, 30 June 2016) - A/HRC/RES/32/2 and 26 September 2014) - A/HRC/RES/27/32.

<sup>30</sup> *Historic UN Panel on Sexual Orientation and Gender Identity (March 2012)* (Dec. 19, 2021, 10:55 am) <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/historic-un-panel-sexual-orientation-and-gender-identity-march-2012>.

<sup>31</sup> *BORN FREE AND EQUAL Sexual Orientation and Gender Identity in International Human Rights Law*, UN OHCHR, HR/PUB/12/06, 10, (Jan. 12, 2022 8:15pm)

Despite the absence of special treaty on the subject, the responsibility of protecting, preventing, repealing, safeguarding and prohibiting is well founded within the very existing international legal norms.

One of the core principle under any International human rights instruments is the principle of non-discrimination through which the community cannot be discriminated in their enjoyment of rights set out in the treaties, because of their gender identity.

A glance at the recommendations of the OHCHR and HRC reveals that the states must ensure the above mentioned five responsibilities for the protection of rights of the community.

Firstly, the states are to protect the Trans-genders from homophobic and transphobic violence. This can be ensured by for example, including sexual orientation and gender identity as protected characteristics in hate crime laws; establishing effective remedial measures for recording and reporting such violence; ensuring effective investigation and prosecution of perpetrators of such violence; recognizing persecution on account of sexual orientation or gender identity as a valid basis for an asylum claim. When it comes to protecting, we can turn our attention towards right to life, liberty and security of person under Article 3<sup>32</sup> of the UDHR and Article 6<sup>33</sup> & 9<sup>34</sup> of the ICCPR. The principle of non-refoulment under Article 33(1)<sup>35</sup> of the Convention relating to the status of refugees, 1950 may also be considered.

Secondly, the states are to prevent torture and cruel, inhuman and degrading

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[https://www.ohchr.org/sites/default/files/Documents/Publications/Born\\_Free\\_and\\_Equal\\_WEB.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Born_Free_and_Equal_WEB.pdf).

<sup>32</sup> "Everyone has the right to life, liberty and the security of person."

<sup>33</sup> art. 6(1) "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

<sup>34</sup> art. 9(1) "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

<sup>35</sup> "No Contracting State shall expel or return ("refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

treatment of the members of the community during detention. This can be achieved by prohibiting and punishing such acts and ensuring redressal in case of violation; effectively investigating all such state sponsored violation of their rights; providing appropriate training the criminal justice functionaries and proper monitoring of such detention places. The existing provisions on this are Article 5<sup>36</sup> of the UDHR, Article 7<sup>37</sup> of the ICCPR and several provisions under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Thirdly, states are to repeal laws criminalizing homosexuality ensuring that persons are not arrested on the basis of sexual orientation or gender identity and are not subjected to baseless and degrading examinations intended to determine their sexual orientation. Human Rights Committee also in several occasions revealed its seriousness on the issue. For example, in its concluding observation on Togo,<sup>38</sup> the committee recommended decriminalizing consensual sexual relations between adults and asked the state to take necessary steps to end such stigmatization and prejudices. In one case in the year 1994, which is considered to be the first case relating to homosexuality, the Human Rights Committee found that it was “undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’ under Article 17 of the ICCPR. Hence the mere existence of criminal law making it an offence continuously and directly interfered with the author’s privacy.”<sup>39</sup> Since then, there was no turning back and UN Human Rights Treaty Bodies repeatedly urged states to repeal laws criminalizing homosexuality.

Fourthly, states are to prohibit discrimination on the basis of sexual orientation and gender identity. This can be done by making sure the laws in place includes expressly sexual orientation and gender identity as prohibited grounds of

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<sup>36</sup> “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

<sup>37</sup> “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

<sup>38</sup> Concluding observations of the Human Rights Committee, CCPR/C/TGO/CO/4, Para 14, April 18, 2011.

<sup>39</sup> Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

discrimination. As far as prohibiting is concerned, we can turn to Article 2<sup>40</sup> & 7<sup>41</sup> of the UDHR, Article 2 (1)<sup>42</sup> and Article 26<sup>43</sup> of the ICCPR, Article 2<sup>44</sup> of the ICESCR and Article 2 of the Convention on the Rights of Child (CRC).

Fifthly, states are to Safeguard freedoms of the community, which includes freedom of expression, association and peacefully with of course with permitted limitations which are not arbitrarily used against the community.

The existing core human rights treaties also speak of right to be recognized as a person before the law, which is relevant in this discourse. This is provided under Article 6<sup>45</sup> of the UDHR and Article 16<sup>46</sup> and 17<sup>47</sup> of the ICCPR.

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<sup>40</sup> “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

<sup>41</sup> “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

<sup>42</sup> “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>43</sup> “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>44</sup> art. 2(2): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>45</sup> “Everyone has the right to recognition everywhere as a person before the law.”

<sup>46</sup> “Everyone shall have the right to recognition everywhere as a person before the law.”

<sup>47</sup> art. 17 (2): “Everyone has the right to the protection of the law against such interference or attacks.”

Other than the above, while giving its observation in NALSA Judgment, the court was also influenced by the Yogyakarta principles.<sup>48</sup>

Hence, it can be seen that the United Nations have always taken active role in protecting the rights of minorities including the third genders. Over the years, we witness several treaties that protect the interests of vulnerable section of the society. As India is a party to most of the core human rights treaties, it has an obligation in respecting and fulfilling the principles set forth which has certainly contributed in the progress and development of the community.

## VI. From the Lens of Judiciary

With legalization of homosexuality or consensual sex between adults through the Navtej Singh Johar case<sup>49</sup>, there arise changes to their legal status and to their rights. Other than India, many countries have legalized homosexuality.<sup>50</sup> Around 69 countries has however, not decriminalized homosexuality as yet.<sup>51</sup> Section 377 of the Indian Penal Code (IPC) is what created an impediment for the full enjoyment of basic human rights of the members of LGBT community and hence the above mentioned judgment is a landmark in the history of gender justice. The journey of such a progressive realization in India has however started long before 2018. Apart from sexual orientation, the gender identity of the third gender has also been recognized by the Judiciary leading to the legislation of 2019 that is in place today.

The start of the journey dates back to the year 1994 when AIDS Bhedbhav Virodhi Andolan filed a petition questioning Section 377 of the Indian Penal

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<sup>48</sup> *Principles on the application of international human rights law in relation to sexual orientation and gender identity* (Dec. 18, 2021 3:21pm) <https://www.refworld.org/pdfid/48244e602.pdf>

<sup>49</sup> *Supra note 17*

<sup>50</sup> Anuradha Parasar, *Homosexuality in India – The invisible conflict* (Oct. 29, 2021 2:00pm)

<http://www.delhihighcourt.nic.in/library/articles/legal%20education/Homosexuality%20in%20India%20%20The%20invisible%20conflict.pdf>

<sup>51</sup> Ananya Das, *Analysis of LGBT rights in India*, 1 *IJERND* 10-13 (2018)

Code (IPC).<sup>52</sup> The matter was triggered when the police authorities' prohibited condom distribution in prison. The petition was however dismissed.

Later, in the year 2001, Naz Foundation filed a PIL challenging Section 377 of the IPC again at the Delhi High Court.<sup>53</sup> The organization questioned the constitutional validity of the Section claiming that the section was in violation of fundamental rights under Part III of the Indian Constitution, particularly Articles 14, 15, 19 and 21. "The petitioners also limited their plea stating that Sec 377 of IPC can be entertained only to penile non-vaginismus intercourse without consent and gavel non-vaginismus intercourse where minors are involved but should not apply to consenting adults."<sup>54</sup> Amongst other things, while interpreting Article 15 of the Constitution, the court observed that not only does it forbid discrimination on the basis of caste, creed, race etc. but also sex within the purview of which oppression on the basis of sex is also prohibited, thus showing the wider interpretation of the term 'sex'. The Court also reminded that societal perception should not be the justification for treating the community differently or isolating or boycotting the community. The Delhi High Court therefore held in the year 2009 that "Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution."<sup>55</sup>

The above judgment was superseded in the year 2013 through an appeal in Suresh Kumar Koushal v. Naz Foundation<sup>56</sup> by the Apex Court. The argument was that Section 377 is not violative of right to privacy and dignity set forth under Article 21 and that right to privacy does not allow a person to do anything in private which is an offence as stated under Sec 377 or any other section.<sup>57</sup> The case was dealt by a division bench of the Supreme Court. The appeal was allowed by the bench and it declared the decision of Delhi High Court legally unsustainable.<sup>58</sup>

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<sup>52</sup> Dr. Janak Raj Jai. *Landmark Judgment on Homosexuality* (Jan. 23, 2022 7:15 pm) <https://www.aironline.in/legal-articles/Landmark%20Judgment%20on%20Homosexuality>

<sup>53</sup> 160 Delhi Law Times, 277

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Civil Appeal No 10972 of 2013

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

The Supreme Court left the decision with the legislature whether to keep it in the law book or to alter the same to authorize permissible sensual venture between homophile in private.<sup>59</sup> After analyzing all arguments, the judgment was given in favor of the appellant superseding the judgment given by the Delhi HC in Naz Foundation case.

Recognition of the Transgender as a third gender that was a landmark decision in the history of gender discourse was through National Legal Services Authority vs. Union of India and others<sup>60</sup> in the year 2014. In this case the apex court did not deal with the constitutional validity of Sec 377 as it was already settled in the Suresh Koushal case. As mentioned earlier, in dealing with the case, the court referred to the Yogyakarta principles.<sup>61</sup> The court referred to the various principles such as “omnipresent benefit of Human Rights, impartiality, anti-discriminatory, identification before the law, the right to life etc. and various other International Conventions.” The court held that India should follow those conventions and principles complying with the various fundamental rights as provided under the Constitution. This judgment was a turning point and a ray of hope for the members of the community as through it, certain upcoming probability arose for community as the bench held in various points that on the reason of sensuous inclination as well as gender recognition no discrimination shall be made to anyone as it would be violative of fundamental rights enshrined under the constitution. The bench once again just as in the case of Naz Foundation observed that, “discrimination on the ground of ‘sex’ under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression ‘sex’ used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.”<sup>62</sup> Referring to Art 19(1) (a) of the Constitution, the court also held that all citizens shall have freedom of raising their voice and articulation which includes within its ambit the pronouncement of self-

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<sup>59</sup> Oindrilla Mukherjee, *Suresh Kumar Kaushal vs. Naz Foundation: A Critical Analysis* (Nov. 8, 2021 11:25pm)

<https://www.lawctopus.com/academike/suresh-kumar-koushal-vs-naz-foundation-critical-analysis/>

<sup>60</sup> *Supra note*, 4

<sup>61</sup> *Supra note*, 48

<sup>62</sup> *Supra note* at 4.

recognized gender.<sup>63</sup>

Although the entire judgment focused only on the trans-genders, the announcement that no discrimination should be done on the reason of sexual orientation and gender identity paved way for the entire LGBT community.<sup>64</sup> A paragraph of the judgment on this, is worth noting-

“107. At the outset, it may be clarified that the term ‘transgender’ is used in a wider sense, in the present age. Even Gays, Lesbians, bisexuals are included by the descriptor ‘transgender’. Etymologically, the term ‘transgender’ is derived from two words, namely ‘trans’ and ‘gender’. Former is a Latin word which means ‘across’ or ‘beyond’. The grammatical meaning of ‘transgender’, therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender.”

Remarkably, the apex court in this case upheld that the right to one’s gender specification and sexual orientation is included under the rights to life under Article 21 of the Constitution of India. The judgment of this case was therefore a turning point for the members of the community, especially the trans-genders who by this judgment are recognized as the ‘third gender’ in India.

The right to privacy as a fundamental right of the individuals of the community was re-confirmed by the nine-judge bench in the year 2017 in *K.S. Puttuswamy v. Union of India*.<sup>65</sup> In this case, Right to Privacy was held to include the right to have intimate relations with own individual preference. It was stated as follows:

“Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the

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<sup>63</sup> *Id.*

<sup>64</sup> Danish Sheikh, The Supreme Court judgement on Transgender Rights (*NALSA v. Union of India*), (Nov. 16, 2021 6:35pm) [orinam.net/content/wp-content/uploads/2014/04/nalsa\\_summary\\_danish.pdf](http://orinam.net/content/wp-content/uploads/2014/04/nalsa_summary_danish.pdf).

<sup>65</sup> *Supra note 16.*

home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.”<sup>66</sup>

This judgment overruled its previous judgments in the cases of *M.P. Sharma v Satish Chandra, District Magistrate Delhi* (1954) and *Kharak Singh v State of Uttar Pradesh* (1962). It was also observed that the right to privacy also includes the right of sensuous inclination as well as gender recognition and it’s a natural inalienable right.

Finally, through the *Navtej Singh Johar vs Union of India*,<sup>67</sup> the constitutional validity of Sec 377 was once again questioned. The Section is violative of Art. 14, Art.15(1), Art. 19(1)(a) and Art.21 of the Indian Constitution, it was argued. It was highlighted by the petitioners that the LGBT Community comprises of around 7 to 8% of the Indian population and hence requires protection and safeguarding of their rights, recognizing the discrimination against the community. The five judge constitutional bench observed the opinion of the court in *Puttaswamy* case. It was declared that the Section is unconstitutional as even consensual sexual activities of adults in private is being criminalized. It also observed that the members of the community deserve respect of their fundamental human rights like every other individual. The judgment given in *Suresh Koushal Case*<sup>68</sup> thus was overruled by the judgment in the aforesaid case. The Section however will continue to govern activities of lustful lovemaking

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<sup>66</sup> *Id.*

<sup>67</sup> *Supra note* at 17.

<sup>68</sup> *Supra note* at 56.

against minors and every activities of flagitiousness will be covered.<sup>69</sup>

Despite consensual sexual activities being legalized in the country, we certainly have a long way to go as their status and legal rights under various other laws is yet not certain. In the absence of a special law for the community other than the Trans-genders, there is a lack of clarity on their legal status. Today, there are diverse opinion on whether there is a need for a special legislation of the other minority communities relating to sexual orientation or the existing legal protection<sup>70</sup> is broad enough or with minor amendments able, to include the individuals identifying themselves as part of such a community.

### **VII. The Becoming of an Act that Changed the Discourse on Transgender Rights**

The concerns of the trans-genders is different from that of the lesbians, Gay and Bisexual. Hence, not intermixing the issue was a deliberate act while preparing the Bill. While the Trans-genders suffer from the issue of lack of one's identification, the problems of the Lesbians, Gays and Bisexuals are basically related to the acceptance of their sexual orientation by the social and legal community.<sup>71</sup> To address the issue of social exclusion, discrimination and marginalization of the trans-genders, The Transgender Peoples (Protection of Rights) Act, 2019 was introduced.

This legislation had its own ups and downs before we could have it in the form that we have today (although the legislation till date is not free from loopholes). Prior to passing and receiving the President's assent, it was criticized and amended from time to time. It took almost 5years for final passing of the Act.

Chronologically, it was on the 17<sup>th</sup> of December 2014, after the NALSA Judgment that the Bill was introduced. Then, it was known as "The Rights of Transgender Persons Bill, 2014." Some of the lacunas and loopholes that the Bill had was that it comprehensively reflect the existing literature over the rights of transgender, the Bill also didn't included the intersex people, no separate chapter

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<sup>69</sup> *Supra note* at 17.

<sup>70</sup> Especially under the Constitution of India.

<sup>71</sup> Rebecca Furtado, *Overview and Critical Analysis of the Transgender Persons Bill, 2014*, (June 1, 2021 4:30pm)  
<https://blog.ipleaders.in/overview-critical-analysis-transgender-persons-bill-2014/>.

on healthcare etc.<sup>72</sup> Hence, in the year 2016, it was re-introduced as the Transgender Persons (Protection of Rights) Bill, 2016. This Bill however, apart from many other problems, did not include within the reservation provision as recommended by the Supreme Court in the NALSA judgment. Also, there was no mechanism of grievance redressal specified etc. Hence, it was later re-introduced and moved by the 17<sup>th</sup> Lok Sabha on 5th August, 2019 and later it was moved by the Rajya Sabha on 26th November, 2019.

### **VIII. The Transgender Persons (Protection of Rights) Act, 2019: A Critique**

The Act aims at protecting the basic rights of the Trans community. As mentioned earlier, the statement of objects and reasons for the promulgation of the law projects the marginalization and the problems faced by the community in the society. This is experienced despite the community being protected under Articles 14, 15, 16 and 19 of the Indian Constitution. Hence it tries to resolve all issues faced by the members of the community.

The Act defines<sup>73</sup> important terms such as inclusive education, person with intersex variations, Transgender Persons etc. It deals with prohibition against discrimination<sup>74</sup> which includes discrimination by person or establishments, the grounds for which are also mentioned within the provision. The individuals have a right to self-perceived gender identity<sup>75</sup> under the Act. However, for certificate of identity, the transgender person is to apply to the District Magistrate<sup>76</sup> for issuing of such a certificate.<sup>77</sup> The procedure for change in gender in the

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<sup>72</sup> *Id.*

<sup>73</sup> The Transgender Persons (Protection of Rights) Act, 2019, §2, No. 24, Acts of Parliament, 1949 (India).

<sup>74</sup> The Transgender Persons (Protection of Rights) Act, 2019, §3, No. 24, Acts of Parliament, 1949 (India).

<sup>75</sup> The Transgender Persons (Protection of Rights) Act, 2019, §4, No. 24, Acts of Parliament, 1949 (India).

<sup>76</sup> The Transgender Persons (Protection of Rights) Act, 2019, §5, No. 24, Acts of Parliament, 1949 (India).

<sup>77</sup> The Transgender Persons (Protection of Rights) Act, 2019, §6, No. 24, Acts of Parliament, 1949 (India).

certificate is detailed out in the Act.<sup>78</sup> The appropriate government has an obligation under Section 8 of the Act. Section 9-12 deals with obligations of establishments.<sup>79</sup> Section 13-15 deals with education, social security and health of transgender person. The Act establishes a monitoring and enforcement mechanisms in the form of National Council of Transgender Persons under Section 16. This is a positive step seen within the Act wherein five members of the Transgender community are to be part of the council. Plus, experts on the issue of transgender is also included to fulfill the power and functions set forth under Section 17 of the Act. If we browse through the official website of the Ministry of Social Justice and Welfare also, we will see that efforts have been made to make the process of application easier as well as measures such as scholarship for education accessible. Finally, the Act recognizes certain offences against transgender persons and provides for its punishment under Section 18. After an analysis of the Act, it is found that the rights recognized under the legislation are what are generally available to all persons or citizens under the Indian Constitution. Such as, Right against discrimination, Right to Residence, Right against denial of service, Right against unfair treatment, Right to Education, Right against discrimination in Employment or occupation, Right to medical and healthcare facilities, Right to purchase, inhabit, hire or to live in any property, Right to movement, Right of Opportunities to work in public or private office, Right to have access to enjoyment of good, facilities and other opportunities and Right to have access to Government as well as private establishment.

A cursory glance of the above salient feature would lead to appreciation of the law. Instead, it was and is met with opposition from the Transgender Activists. The problem started right at the initial stage of the drafting of the law due to the lack of enough representation of the members of the community. The following points can be highlighted in critically analyzing the law:

#### **A. The Absence of Civil and Political Rights**

Although Section 13-15 provides for basic economic, social and cultural rights

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<sup>78</sup> The Transgender Persons (Protection of Rights) Act, 2019, §7, No. 24, Acts of Parliament, 1949 (India).

<sup>79</sup> Such as non-discrimination in employment, grievance redressal mechanism, right of residence etc.

of the community that too in very narrowly, the Act is almost completely silent on civil and political rights such as marriage, adoption, reservation in public education and jobs. Hence neglecting the guidelines of NALSA Judgment. These rights, as is understood, is necessary for the personal development of an individual as well as recognizing the relevance of choice.

### **B. The Problematic Definition of Transgender**

An all-inclusive definition such as what is seen under Section 2 (k)<sup>80</sup> of the Act is problematic. It includes within its ambit terms such as trans-woman, trans-man, person with intersex variation, gender-queer. Not just that, social-cultural identities such as hijras, kinner, aravani and jogta is also included under the definition which has history, issues and context of its own. Other than intersex, the other terms mentioned above is not exclusively defined leading to ambiguity in the application of law. Also, intersex may not necessarily identify themselves as a transgender but as a cis gender. Hence, the issues faced by each of these persons may differ from each other.

### **C. Certification by the District Magistrate**

As mentioned earlier, on the one hand a provision recognizes self-perceived gender identity, while the other provides for applying for certificate of identity, making the former a vague principle. The latter provision is also silent on the kind of documents needed for such certification hence giving broad discretion to the District Magistrate. There are also no guidelines on how the District Magistrate would judge the correctness of the application and decide whether to issue the gender certificate or not.

### **D. Appropriate Welfare Measures by Government**

While Section 8 lists out on the various obligations of the government on rehabilitation, rescue, protection, involvement in cultural and recreational activities etc. for the improvement of the status of the Transgender community, but it is silent on Reservation for the community in employment or education. This is a necessary measure given the fact the members of the community have since for long experienced discrimination and marginalization due to societal prejudices and opinions.

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<sup>80</sup> *Supra note at 9.*

### **E. Criminalising Certain Acts and Penalties**

The Act makes certain acts or omission punishable under Section 18. Some examples of offences are forced or bonded labour, denial of use of public places and right to use, removal from household forcefully and from village, and abuse such as bodily, sensual, hectoring, psychic etc. The penalty for such offences, as mentioned under the law is between six months and two years' imprisonment, along with fine. Relatively, sexual offences against a woman under the IPC deserves much harsher punishment than the same act committed against an individual belonging to an LGBT community, which may go to the extent of life imprisonment or even death penalty after the recent amendments.

### **IX. Conclusion and Way Forward**

In light of the above study, it can be concluded, that similar to many other human rights issues, the Indian Judiciary has always been a flag bearer of progressive realization of basic human rights of the vulnerable section of the society. The Guidelines set forth by the Supreme Court in NALSA Judgment is also relatively accepted positively when compared to the Act of 2019. This new law, that is too recent to be studied in terms of enforcement and implementation, is without a doubt worthy of applaud. This however does not mean that we become naïve of the fact that there are gaps and lacunas in the legislation that requires immediate addressing. There is certainly a need to harmonize the law with other personal laws, social welfare legislations including maternity benefits, law on surrogacy and criminal laws if it is to achieve the goal of full enjoyment of basic rights by the community. This will make sure that the gaps in protecting the civil and political rights that is silent in the legislation will be dealt with. There is a need of sensitizing the members of the community on the existence of such rights set forth in the law and the social welfare measures that the appropriate government is obligated to provide under the Act. Sensitization and training is also required to be given to the District Magistrate who has been given one of the most important and questionable power of issuing certificate identifying the gender of Transgender persons. It is true that one of the major criticisms against the law has been that the LGBT Movement should have been involved closely in the drafting process of the legal instrument. Hence, the possibility of making sure that the community has enough representation in decision making that directly impact their lives in the future must be considered.

**Actors and Accolades:  
Examining the Rights of Actors in Films in India from a  
Copyright Perspective**

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Tania Sebastian<sup>2</sup>*

***Abstract***

*Recognition and protection of cinematograph film under the Indian Copyright Act, 1957 (hereinafter “The Act”) does not address the concerns of Actors. The practical collaboration in a film of producers, directors, scriptwriters, actors, music composers and others stands undermined in the case of actors. This is so as the current copyright regime in India emphasises only on the rights of producers and neglects the rights of others, specially actors. The inclusion of actors in the definition of performers does not confer rights related to copyright as these rights of copyright and related rights (including performers rights) are related but different. Though introduced in 1994, the rights of performers were limited in scope. With the intention of strengthening the Rights of Performers, Amendments were made in the Act in 2012. However, all the amendments were not applicable to the actors in films as they retained the earlier provision relating to performances in films, which stated “that once a performer (actor) has, by written agreement, consented to the incorporation of her performance in a cinematograph film she shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer’s right in the same film.” The rights of the actors were hence retained with and transferred to the producer. Solace is found in the proviso to section 38A (2) of The Act which states that “notwithstanding anything contained in this sub-section, the performer shall be entitled for royalties in case of making of the performances for commercial use.” This is unexplored in the Indian Courts and thereby, the current provisions do not seem to offer much assistance to actors working in films.*

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*There are also the serious allegations of exploitation of actors, especially those who are not famous. As the largest movie industry in the world, performers in the Indian movie industry receive accolades the world over, however, they continue to work without adequate statutory protection. Limited scholarly work in this area has propelled the need to address all the concerns that actors of films in India face vis-à-vis copyright law in this paper. The paper will include comparative studies with the rights of actors of films in three jurisdictions, France, UK and USA. Accordingly, suggestions will be provided to strengthen the rights of actors of films in India.*

**Keywords-** *Cinematograph, Rights of Action in films, Performer's Right, Indian legal framework*

## **I. Introduction**

Cinematograph film is one of the subject matters recognised and protected under the Indian Copyright Act, 1957 (The Act). A film is a work of collaboration wherein producers, directors, scriptwriters, actors, music composers and others contribute to create. However, the current copyright regime in India emphasises only on the rights of producers and neglects the rights of others, specially actors, who are as involved in the film making process. Even though actors of cinematograph films comes within the definition of Performers provided under The Act the rights granted to actors are related to copyright, but different.

The rights of performers were for the first time introduced in the Indian legislation in 1994. However, the rights were very limited in scope. With the intention of strengthening the rights of performers, certain important amendments were made in 2012. However, the amendment did not make changes that applicable to the actors as the earlier provision relating to performances in films was retained, which stated that once a performer (actor) has, "by written agreement, consented to the incorporation of his performance in a cinematograph film he/ she shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film." As a result, this provision transfers all the rights of the actor to the producer. The only ray of light perhaps was the new provision in the form of proviso to section 38A (2) which stated that "notwithstanding anything contained in this sub-section, the performer shall be entitled for royalties in case of making of the

performances for commercial use.” In spite of the aforementioned provision, there are reports which state that the current provisions do not seem to offer much assistance to actors working in films.<sup>3</sup> There are serious allegations of exploitation of actors, especially those who are not have enough bargaining power as they are have not achieved stardom.

This paper will be an attempt to address all the concerns that actors of films in India face vis-à-vis copyright law. The paper will include comparative studies with the rights of actors of films in three jurisdictions, ie, France, UK and USA. Accordingly, suggestions will be provided to strengthen the rights of actors of films in India.

## **II. International Conventions and Treaties on Actor’s Rights (Fixed in Audio Visual Work)**

### **A. Rome Convention, 1961**

The first international convention to address the rights of performers (including actors) was the Rome Convention of 1961 (The Convention). Article 3 (a) of The Convention defines performers as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.” The rights granted to the performers, under Article 7 is for minimum protection of performers including preventing parties without consent the “(i) broadcasting and the communication to the public their performances (an exception is when the performance is broadcast or communicated to the public that is already a broadcast performance or is made from a fixation) (ii) fixation of their unfixed performance (iii) reproduction of the fixation of their performance if the original fixation was without their permission; or the purpose for which it was made was entirely different from which the consent was taken or if the original fixation was for fair use and permitted use as given under Article 15 of The Convention, but subsequently reproduced for other purposes.”<sup>4</sup>

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<sup>3</sup> Copyright Amendments, 2012: A Fair Balance?, Conference Report, NUJS-CUSAT Conference, NUJS, Kolkata, November 27-28 2012) p. 10, is <https://nujs.edu/downloads/nujs-cusat-conference-2012.pdf>

<sup>4</sup> For more details, see, Summary of the Rome Convention for the Protection of Performer, Producers of Phonograms and Broadcasting Organization, 1961, is 230

However, Article 19 of The Convention comes as a huge disappointment for actors of audio-visual works as it states that irrespective of what The Convention states, if the performer consents to the inclusion of their performance in a visual or audio-visual fixation, then the rights given under Article 7 will have no application.<sup>5</sup>

### **B. WIPO Performers and Phonograms Treaty, 1996**

After 1961, the next convention that addressed performers rights is the WIPO Performers and Phonograms Treaty, 1996 (WPPT). WPPT deals with some important provisions, such as Article 5 that addresses the moral rights of performers. These moral rights so granted are right to paternity and right to integrity. However, Article 5 does not mention audio visual performances, rather it talks about live aural performances or performances fixed in phonograms.

Other provisions of WPPT include economic rights granted to the performers for their performances fixed in phonograms and includes right of reproduction, right of reproduction, right of distribution, right of rental and right of making available. Regrettably, it is stated clearly in the provisions that these rights are limited to performances fixed in phonograms and does not extend to audio-visual fixations such as movies.<sup>6</sup>

### **C. Beijing Treaty on Audio-Visual Performances, 2012**

The importance of the Beijing Treaty on Audio-Visual Performances, 2012 (The Beijing Treaty) is perhaps the inclusion of a provision that address the moral rights of a performer of a live performance or performance in audio visual, wherein they shall retain their moral right to paternity in the work, and against distortion even after transfer of their economic rights. There are quite a few rights

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[https://www.wipo.int/treaties/en/ip/rome/summary\\_rome.html#:~:text=Resources,Su mmary%20of%20the%20Rome%20Convention%20for%20the%20Protection%20of%20 Performers,in%20broadcasts%20for%20broadcasting%20organizations.](https://www.wipo.int/treaties/en/ip/rome/summary_rome.html#:~:text=Resources,Su mmary%20of%20the%20Rome%20Convention%20for%20the%20Protection%20of%20 Performers,in%20broadcasts%20for%20broadcasting%20organizations.)

<sup>5</sup> Full text of the Rome Convention, 1961 (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on October 26, 1961), (Mar. 19, 2021) <https://www.wipo.int/treaties/en/ip/rome/>

<sup>6</sup> Full text of the WIPO Performers and Phonograms Treaty, 1996, is <https://www.wipo.int/treaties/en/ip/wppt/>, And Summary of the WIPO Performers and Phonograms Treaty, 1996, [https://www.wipo.int/treaties/en/ip/wppt/summary\\_wppt.html](https://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html)

granted to the performer of audio visual works from Article 7 to Article 11 under The Beijing Treaty, which includes reproduction, distribution and rental rights, right of making available, broadcasting and communication rights.<sup>7</sup>

Article 12, however, dilutes the rights of the performer to an extent by stating that a member state may include a provision in their law whereby if a performer consents to fix their performance in an audio visual work, the rights from Articles 7 to 11 could be transferred to the producer of the audio-visual work. The saving grace is that The Beijing Treaty states that such transfer has to be in the form of a contract by both parties or by their authorized representatives.

Article 12(3) of The Beijing Treaty redeems the rights of performers by stating that irrespective of such transfer of rights under Article 12,<sup>8</sup> “the national law or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance,” including right of making available, broadcasting and communication rights of their performance.

### **III. Treatment of Performers and their Rights: National treatment in USA, UK and France**

Actors and the producer’s legal relationship varies as per different legal systems. In countries which follows the copyright system, it is the producer who has the rights. However, in countries that follows the author’s rights system, it is the actor as the creator of his work, who gets the right. Authors right system are

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<sup>7</sup> Full Text Of The Beijing Treaty On Audio-visual Performances, 2012, (Mar. 19, 2021) <https://www.wipo.int/treaties/en/ip/beijing/>

<sup>8</sup> Article 12 (1) states that: “A contracting party may provide in its national law that once a performer has consented to fixation of his or her performance in an audio-visual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this treaty shall be owned or exercised by or transferred to the producer of such audio-visual fixation subject to any contract to the contrary between the performer and the producer of the audio-visual fixation as determined by the national law. (2) a contracting party may require with respect to audio-visual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contract or by their duly authorized representatives. (3) independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this treaty including as regards Articles 10 and 11.”

followed mostly in civil law countries. The main belief of the authors right system is that since creations can emanate only from the human mind, hence only a natural person can be a copyright author as opposed to copyright system which was followed mainly in common law countries which believes that anyone who can invest for the created works can be copyright author including legal persons other than natural persons.<sup>9</sup> It is a natural corollary that authors rights system supports moral rights whereas copyright system frowns upon moral rights. In many countries today, a hybrid system is followed which is a blend of authors rights as well copyright system. These countries give copyright ownership to legal persons as well provides for moral rights to copyright authors. However, it is important to note that the contract is the most important document to determine the relationship between actor and producers irrespective of the legal system they follow.<sup>10</sup> Keeping in mind the aforesaid legal positions, the countries that are looked into in this paper are United State of America (USA) which follows the system of work for hire, France (author's rights) and United Kingdom (hybrid system).

#### **A. The American Position**

Sections 1101 and 114 of the Copyright Act, 1976 are the provisions that deals with performers' creative rights in US. Section 1101 allows performers engaged in a live musical performance to ask for remedies for copyright infringement against any person who, without their consent, "(1) makes an aural or audio-visual recording of the performance, (2) communicates to the public the sounds, or sounds and images, of the performance, or (3) traffics in unauthorized recordings of the performance." This provision does not exactly deal with actors whose work is included in audio-visual works. Section 114 addresses statutory license for digital music transmissions that is linked to sound recordings, and establishes a limited right to public performance royalties for sound recording artists, again not related to actors.

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<sup>9</sup> LIONEL BENTLY AND BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 32 (Oup, New York: 2009).

<sup>10</sup> Katherine Sand, *Managing Performer's Rights: The Role of Contracts*, WIPO MAGAZINE (August 2012), (Mar. 19, 2021), [https://www.wipo.int/wipo\\_magazine/en/2012/04/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2012/04/article_0002.html).

Except these two provisions, the copyright law does not deal with the rights of performers. Hence, for the protection of rights contracts are indispensable.<sup>11</sup> However, in most cases the actors are at a lower bargaining position, beyond the collective bargaining agreement's provisions and are barely able to get anything more than the minimums guaranteed by collective bargaining agreements.<sup>12</sup> If the actors are not part of such groups, the minimum protection is also not available.<sup>13</sup>

USA has signed The Beijing Convention on audio-visual performances. The Beijing Convention mandates moral rights to audio-visual performers and royalty rights even after transfer of economic rights. These rights, unlike other rights of audio visual performers cannot be transferred to producers. Till date, however, US laws have not complied with the provisions and it will be interesting to keep track of USA's future course of action.

#### **B. Position in United Kingdom**

The Copyright, Designs and Patents Act, 1988 (CDPA) in the UK included rights of performers as mentioned in the Rome Convention, 1967. Since the Rome Convention did not include performances relating to audio-visual works, CDPA also did not recognise works of audio-visual performers. Subsequently, UK signed The Beijing Convention and hence is under an obligation to recognise the rights of actors in audio-visual works that should in effect lead to the amendment of the definition of performer and ensure moral rights of paternity and against distortion, if not the other economic rights for audio-visual performances (refer to the discussion of the Beijing Treaty included in Part I).

CDPA lists out rights of performers in the form of proprietary, non-proprietary and moral rights to the performers. Proprietary rights are fully transferable, while

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<sup>11</sup> *Id.*

<sup>12</sup> Mary La France, *Are we Serious about Performer's Rights?*, 5(1) SCHOLARLY WORKS 1180 (2015).

<sup>13</sup> *Id.*

non-proprietary<sup>14</sup>/quasi proprietary<sup>15</sup> rights are not. Also, two moral rights, ie, right to be identified as a performer and right to object to derogatory treatment of the work are included in the CDPA. These moral rights though nonassignable,<sup>16</sup> can be waived.<sup>17</sup>

The property rights under CDPA can be broadly divided into four, reproduction right (section 182A), distribution right (section 182B), rental right and lending right (section 182C) and making available right (section 182CA). Section 182A states that anyone who makes a copy of a recording which includes the performance of the performer without his/ her consent is infringing the rights of the performer. Section 182B makes issuing copies of the recording of the performance without consent an infringing act. Section 182C provides that if anyone rents or lends to the public any copies of the recording of the performance, then will be considered to be an infringement. Under section 182 CDPA, the right of making available is infringed if a person without the consent of the performer makes available to the public a recording of the performance of

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<sup>14</sup> Initially performers' rights could not be assigned and were not granted property status. See, generally, Jayadevan S. Nair, *Performer's Rights in India: A Study with Special Reference to the Audiovisual Industry*, (2005), <https://shodhganga.inflibnet.ac.in/handle/10603/68019>

<sup>15</sup> WILLIAM CORNISH, DAVID LLEWELYN AND TANYA APLIN, *INTELLECTUAL PROPERTY 586* (Sweet & Maxwell, London: 2010).

<sup>16</sup> 205 L CDPA states as follows: "Moral rights not assignable the rights conferred by this chapter are not assignable."

<sup>17</sup> 205 J CDPA states as follows: "Consent and waiver of rights (1) it is not an infringement of the rights conferred by this chapter to do any act to which consent has been given by or on behalf of the person entitled to the right. (2) any of those rights may be waived by instrument in writing signed by or on behalf of the person giving up the right. (3) a waiver— (a) may relate to a specific performance, to performances of a specified description or to performances generally, and may relate to existing or future performances, and (b) may be conditional or unconditional and may be expressed to be subject to revocation, and if made in favour of the owner or prospective owner of a performer's property rights in the performance or performances to which it relates, it shall be presumed to extend to his licensees and successors in title unless a contrary intention is expressed. (4) nothing in this chapter shall be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to either of the rights conferred by this chapter."

the performer who may access the recording from any place or time chosen by them.

The non-proprietary rights are right of fixation and broadcast of a live performance, public performance and broadcasting by means of recording made without consent and dealing in illicit recording. Section 182, CDPA states that if without the consent of the performer, anyone makes a whole or substantial recording of a live performance, or do a live broadcast or makes a whole or substantial recording of the broadcast of the live performance, it will be held to be infringement of the performer's rights. Under section 183, CDPA, if any recording is made of a performance of a performer without his/ her consent and the same is shown or played in the public or communicated to the public, it becomes an infringement. Under section 184, CDPA, it is considered to be an infringement if a person imports into UK any performance which was an illicit recording. It is also applicable in cases if someone sells, gives on hire, offers for sale or hire any such illicit recording.

Section 191 F, CDPA, provides for rental rights of performers. There is presumption of transfer of the rental right where there is a film production agreement, unless there is an agreement to the contrary. However, the next provision, that is, section 191 G, CDPA, provides that in case a performer transfers "his/ her rental right concerning a sound recording or a film to the producer of the sound recording or film, he/ she still retains the right of equitable remuneration for the rental rights." This right is unassignable except to a collecting society for the purpose of enabling it to enforce the right on his/ her behalf.

### ***Moral Rights of Actors***

The CDPA recognises two moral rights, the first one is right to be identified as an author (right of paternity). Section 205C, CDPA, states that "whenever a person (a) produces or puts on a qualifying performance that is given in public, (b) broadcasts live a qualifying performance, (c) communicates to the public a sound recording of a qualifying performance, or (d) issues to the public copies of such a recording, the performer has the right to be identified as such. So, clauses (a) and (b) clearly states that it is performance in public and (c) and (d) are related

to sound recording.” Hence moral right to paternity is not extended to performers in films, that is, actors.<sup>18</sup>

The second moral right included in the CDPA is the right to integrity. It is only granted to a performance that is live broadcast or performed in public or communicated to the public by means of a sound recording,<sup>19</sup> again this moral right is not granted to actors.

### ***Copyright Societies and Other Collective Bodies for Performers in the United Kingdom***

Collective bodies play an important part in strengthening the rights of the performers in the UK. The trade union for actors in the UK is titled Equity. Equity, initially, was a union for stage actors before incorporating other actors, singers, dancers, stunt performers, circus artist etc. Equity formulates minimum terms of employment in the form of collective bargaining agreements which the producer has to include in the contract that they enter into with the actors. These agreements try to lay down certain provisions to regulate the working relationship between producers on one hand, and the actor and performers on the other hand.

Copyright societies for actors in the UK, the British Equity Collecting Society (BECS) was established in 1988 and is the only collective management organisation for performers in audio-visual works in the UK. The important task of BECS is to collect remuneration as per the Memorandum and Articles of Association of the society on behalf of its members. This entails collection of any income or remuneration payable to the performer for any rental of a sound

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<sup>18</sup> Jayadevan S. Nair, *Supra* note 12 at 67. See also, Squire Sanders, *Performance Rights*, 2012, [https://www.squirepattonboggs.com/~media/files/insights/publications/2012/10/performance\\_rights/files/performance-rights-practice-note/fileattachment/performance-rights-practice-note.pdf](https://www.squirepattonboggs.com/~media/files/insights/publications/2012/10/performance_rights/files/performance-rights-practice-note/fileattachment/performance-rights-practice-note.pdf).

<sup>19</sup> 205 F, CDPA states as follows: “Right to object to derogatory treatment of performance (1) the performer of a qualifying performance has a right which is infringed if— (a) the performance is broadcast live, or (b) by means of a sound recording the performance is played in public or communicated to the public, with any distortion, mutilation or other modification that is prejudicial to the reputation of the performer. (2) this section has effect subject to Section 205G (exceptions to right).”

recording or film by way of exercise of rental rights or right to equitable remuneration for the rental rights. Internationally, the main right types BECS collects are rental<sup>20</sup> and lending rights,<sup>21</sup> public performance rights,<sup>22</sup> right to make available,<sup>23</sup> private copying<sup>24</sup> and cable re-transmission rights.<sup>25</sup>

### C. Position in France

The Copyright Law in France is based on natural law wherein a person's creation is an extension of his/ her personality. In France, the Intellectual Property Code (IP Code- (*Code de la propriété intellectuelle*, 1985) deals with rights of actors and considers actors as an employee and ensures that their rights do not stand in the way of exploitation of the any rights owned by others.

The peculiarity of the protection under French laws is that it not only the IP Law (Copyright) that entails protection of the actor and performer for his/her work but also the labour code and contract. This provides comprehensive protection to the actor. This also entails the protection granted to every contributor to a work, including an actor and performer. A combination of these laws make the French system of protection the most progressive of protection accorded to performers, however glitches remain in terms of treatment of extras, etc.

Moving on to the statues, the copyright law, the French Author's Rights Law, 1985 contributes to regulation of performers' rights in audiovisual productions.

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<sup>20</sup> This can be explained as something similar to lending, with the user renting the fixation paying a fee to the rental entity.

<sup>21</sup> Lending rights allow payments to be received from the government to compensate for the free loan of their copyrighted works. This can be an educational establishments, libraries or archives.

<sup>22</sup> When audio-visual works are used in public places, it comes within the category of public performance.

<sup>23</sup> This right is an exclusive right for performers to authorise or prohibit the dissemination of their work through interactive networks such as the internet. For more details, See, British Equity Collecting Society Limited, <https://becs.org.uk/payments/>

<sup>24</sup> This levy is a form of reimbursement for private use (through, for example, TV) of an original lawful version of a work from the general public, and has to be paid by the sector that imports, manufactures and sells products that are then used for private copying. See, British Equity Collecting Society Limited, <https://becs.org.uk/payments/>

<sup>25</sup> Cable re-transmission means simultaneous, unaltered re-transmission of a primary broadcast intended for reception by the public in a closed cable network system by a party other than the primary broadcasting organisation.

This law enables extensive rights to performers that would authorize them to use the audio-visual works that contain their performance. Further, the IP Code regulates actors and performers rights. This IP Code protects the performers who are defined under Article L. 212-1, as persons who “act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts by related rights.” The IP Code under Article L. 311-7 states that the division for remuneration is “50% to authors, 25% to performers and 25 % to phonogram producers” when it came to private copying in the audio sector, and for videograms it is equal distribution between the three parties.<sup>26</sup> This division should be used as inspiration to other regimes that struggle to come up with an equitable distribution of remuneration for performers. This is also included under Article L.762-1 of the Labor Code. The Labor Code provides actors and performers with exclusive rights, with performers considered as employees. This means that they are treated as salaried persons.

Articles L. 762-1 and 762-2 of the Labor Code subject to Article L. 216-6 of the Labor Code compliment authorization and remuneration of performer by stating that:

*“[t]he performer’s written authorization shall be required for fixation of his performance, its reproduction and communication to the public as also for any separate use of the sounds or images of his performance where both the sounds and images have been fixed.”<sup>27</sup>*

The nature of protection under Article L.762-1 of the Labor Code also needs to be in the written form. Also, when there are several artists employed for the same performance, protection can be accorded through a single contract. Other than as an employee, there is also the flexibility of actors to work as independent

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<sup>26</sup> Law on The Intellectual Property Code (No. 92-597 of July 1, 1992 as last amended by laws 94-361 of May 10, 1994 and 95-4 Of January 3, 1995), [https://internet-law.ru/law/int/nation\\_cleo/france/fr003en.pdf](https://internet-law.ru/law/int/nation_cleo/france/fr003en.pdf). This article states as follows: the remuneration for private copying of phonograms shall belong in half to the authors within the meaning of this code, in quarter to the performers and in quarter to the producers. the remuneration for private copying of videograms shall belong in equal parts to the authors within the meaning of this code, the performers and the producers.

<sup>27</sup>Article L. 212-3.

contractors. Commentators reveal that such a practice is nevertheless rare, if not non-existent.<sup>28</sup>

### ***Performance Rights Recognised in Two Stages***

The rights of the performers in France is based on two stages, one is during the performance of the work and the second stage begins after the performance of the work. Article L212-3 of the IP Code of France states that the “performer’s written authorization shall be required for fixation of his/ her performance, its reproduction and communication to the public as also for any separate use of the sounds or images of his/ her performance where both the sounds and images have been fixed.” Oral agreement is not accepted. Such extensive rights is not seen in any other regime.

After the performance is done, the performing artist may still receive remuneration or royalties, under Article L212-3, paragraph 2 of the IP Code of France which states that any authorisation to use the performance, and the resultant remuneration resulting from the performance shall be governed by Articles L762-1 and L762-2 of the Labour Code, subject to Article L212-6 of the IP Code. Article L762-1 of the French Labour Code provides that “all contracts made with an entertainment artist for artistic production that are remunerated are considered to be an employment contract.” This gives the performers the status of an employee. Article L762-2 of the French Labour Code clearly provides that “the remuneration due to the performing artist as a result of the sale or the exploitation of the recording of his/ her interpretation, execution or presentation by the employer, or any other user, is not considered as a salary if the presence of the entertainment artist is no longer needed to exploit the said recordings,” in the case of post-performance exploitation.<sup>29</sup> This Article reflects the fact that remuneration is based on the sale or exploitation of reproductions of the performing artist’s interpretation rather than on the salary received for work. Contrary to the belief that since remuneration after performance will not be

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<sup>28</sup> Memorandum of the *Syndicat Français Des Artistes-Interprètes*, February 2003, as cited in Ms. Marjut Salokanne, *Ad Hoc Informal Meeting On The Protection Of Audiovisual Performances*, Geneva, November 6 And 7, 2003, Study on Audiovisual Performers’ Contracts and Remuneration Practices in France and Germany, WIPO, [https://www.wipo.int/edocs/mdocs/copyright/en/avp\\_im\\_03/avp\\_im\\_03\\_1\\_rev\\_1.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_1_rev_1.pdf)

<sup>29</sup> Tony A. Kenneybrew, *Employing The Performing Artist In France*, 13(2) TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 249 (2006).

considered salary, the performing artist still has a host of rights (employee, royalty, and moral) post-performance. When the performing artist's contract includes royalties,<sup>30</sup> a portion of the sales of the recordings is deemed equal to a salary, which results into payment toward the entertainment artist's retirement, health benefits, and employment benefits. There is a lot of scope of negotiation between employer and performer as to royalty rights and performer can even relinquish it under the law.<sup>31</sup>

Article L212-3, paragraph 2 of the French IP Code provides that the remuneration for the performance shall be given under the Labour Code but will be subject to Article L212-6 of the IP Code. Article L212-6 of the IP Code provides that Article L762-2 of the Labour Code shall only “apply to that part of the remuneration paid in accordance with the contract that exceeds the bases laid down in the collective agreement or specific agreement.”

A combination of reading of IP Code and Labour code entails the conclusion that in case of assignment of the rights of the performer also, there is surety that performer receives fair compensation for all further uses of his/ her fixed performance. This means that a separate remuneration for each mode of exploitation of the work needs mention in the contract between the performer and the producer with individual (contract) or in collectively (agreement). Protection is nevertheless guaranteed even in the absence of a contract or an agreement with remuneration being then being based on the existing tariff structure of the sector specific agreements between organizations (employees and employers). It is important to note here that these collective bargaining agreements related to performers right in film production and television has been made mandatory by the Ministry of Culture. These collective bargaining administrative agreements come in two forms, the collective bargaining agreements negotiated by performers' and producers' trade unions, and collective administration of certain rights and remunerations by performers' collecting societies.

On the practical side of law, the French system ensures that each performing artist concludes a written contract with the producer, in which remuneration for

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<sup>30</sup> In such situation, it might be stated that Article L212-3 of the French IP Code contradicts Articles L762-2 of the French Labour Code by stating that a percentage of the royalties is considered a salary.

<sup>31</sup> Tony A. Kenneybrew, *Supra* Note 29, *Id.*

each mode of exploitation is stipulated, and can be done by reference to applicable collective bargaining agreements. This is irrespective of whether the performers are permanent or freelancer - the collective bargaining agreement is obligatory and they also apply to performers who are not parties to the agreements. These agreements contain provisions for remuneration with an initial minimum amount of salary. This remuneration is regarded as a supplement to salary and thus gives rise to social security benefits for performers. The agreement has extended application and covers thus the whole sector, regardless of whether the individual performers or producers are represented by the contracting parties. It is here that the role of collecting societies like ADAMI (Collective management organization for the rights of performers)<sup>32</sup> are involved. The most recent application form for Author-Composer mentions a category of “Split of Public Performance Rights and Mechanical Reproduction Rights” that also mentions that “ In cases where there are multiple rights holders within one or more category (author, composer, adapter, arranger, publisher) with the option being available from 1st January 2019 and shall apply to works registered after that date and exclusively to them.”<sup>33</sup> There is the added issue of whether or not the remuneration received post performance is part of the wage or has to be listed otherwise. The law and the societies are clear on this point too in the event that three conditions are met and includes the following: “there must a recording of a performer’s performance; the remuneration must be paid relative to the sale or exploitation of the recording, and the physical presence of the performer is not required for the exploitation of the recording.”<sup>34</sup> The provisions, contracts and assessments of France and the under the French law provide an understanding that a complete protection of the performer in terms of remuneration and exploitation of his/ her work in multiple forms resulting in generation of revenue should also be traced back to and enrich the performer in monetary form. The remuneration is inalienable, and cannot be assigned to another party by virtue of a contract.

The French societies also look at other ways that the performers talent can be exploited as in the case of cable re-transmission of a work. This results in

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<sup>32</sup> Website of ADAMI, available at: <https://www.adami.fr/en/> . (Mar. 19, 2021)

<sup>33</sup> Document (Mar. 19, 2021) <https://createurs-editeurs.sacem.fr/en/brochures-documents/membership-application-publisher-split-contributions>

<sup>34</sup> P. GAVALDA AND N. PIKOWSKI (eds.), *DROIT DE L'AUDIO-VISUEL* (LAMY, 1995).

performers being compensated for cable re-transmission of their performances under collective bargaining agreements as a percentage of the revenues from its exploitation.

#### **IV. Position in India: India Copyright Act, 1957 and Amendments in 1994 and 2012**

India became a signatory to the Rome Convention way back in 1961, but included rights of performers only by an amendment in 1994. The position on performer's rights was made clear in 1977 in the decision of *Dev Anand v. Fortune Films*,<sup>35</sup> with the court holding that an actor in a film has no rights over his performance in the film, a position taken before the 1994 amendments.<sup>36</sup> The Bombay High Court further said that as per the law, the performer is not an author. However, what makes the case interesting is the contractual terms between the performer and the producer. Dev Anand, a superstar of his times, had good bargaining power and hence secured his rights as a performer through a contract with the producer. The contract stated that “..that your [Dev Anand] work in our above picture on completion will belong to you [Dev Anand] absolutely and the copyright therein shall vest in you [Dev Anand] and we will not be entitled to exhibit the said picture until full payments as per clause 6 above are secured to you by way of annuity policies of LIC..”<sup>37</sup> However, this case opened the loophole in the law. The court held that performance of a performer was not copyrighted work, but this case showed that there was a need for separate rights of a performer.<sup>38</sup>

##### **A. 1994 Amendments to the Copyright Act, 1957**

In 1994, India, complying the mandate under the Rome Convention, the amendments in The Act for the first time granted rights to the performers. Section

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<sup>35</sup> AIR 1979 Bom 17.

<sup>36</sup> Banana IP Reporter, *Performer's Rights under Indian Copyright Law*, 9<sup>th</sup> November, 2015, <https://www.bananaip.com/ip-news-center/performers-rights-under-indian-copyright-law-part-ii/>

<sup>37</sup> *Supra* note 33 at para 7.

<sup>38</sup> Jagdish Sagar, *Entertainment Media and IP Rights: An Indian Perspective*, in S. K. Verma and Raman Mittal, *INTELLECTUAL PROPERTY RIGHTS: A GLOBAL VISION 210* (INDIAN LAW INSTITUTE, NEW DELHI: 2004).

38 was incorporated to grant performer's rights for fifty years. The economic rights granted to the performer was that during the subsistence of the performer's rights, without the consent of the performer, a few acts would be considered infringement. These acts are found under Section 38 A and included:

- (i) "making a sound or visual recording of the performance;
- (ii) reproducing the sound or visual recording:
  - (a) without the consent of the performer,
  - (b) for purposes different from which the performer gave his consent, or
  - (c) reproduction made for a purposes different from those which fell under the exception/ fair use under section 39;
- (iii) broadcasting the performance. The exceptions to such use was when the broadcast falls under fair use or exceptions under section 39 or is a re-broadcast of the broadcast which did not infringe the performer's rights
- (iv) Communication to the public other than by broadcast, except where the communication to the public is made from a sound recording or a visual recording or a broadcast."

### **B. Performance included in Cinematograph Films**

Aligning The Copyright Act, 1948 to the Rome Convention, 1961 resulted in no obligation on the part of India to bring in extensive provisions for the rights of actors in films. Therefore, although performers rights were included in the Act, section 38(4) reiterated article 19 of the Rome Convention by stating that in cases of performances by a performer included in films, the rights shall not be granted to the performer. Hence the performer's rights in India too did not give adequate protection to actors.

### **C. 2012 Amendments to the Copyright Act, 1948**

After 1994, the next legislative change with regard to performer was brought about through the Copyright Amendment Act, 2012. The substantial changes that has been made to performer's rights were through an amendment in Section 38 of the Act. The economic rights previously included in Section 38 were transferred, with changes, into the new Section 38A. Section 38B was another new provision added to the Act.

The legislators inserted certain new rights in Section 38A, not previously part of section 38, which included rental rights for the performers<sup>39</sup> and issuance of copies that are not already in circulation. The other rights which were retained includes authorising the making of sound recording or a visual recording of the performance, reproduction of the sound or visual recording in any material form including the storing of it in any medium by electronic or any other means; communication of it to the public; to broadcast or communicate the performance to the public except where the performance is already broadcast.

#### **D. Rights of Performers in Cinematograph Films**

##### *Definition of performer changed*

The existing definition of performer (post 2012) “includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.” The 2012 amendment changed the definition of performer by stating that ‘extras’ in films, *i.e.*, persons whose performance is casual or incidental in nature and is not given acknowledgment in the credits of the film will not be performer. However, such ‘extras’ will have one right, *i.e.*, to restrain or claim damage in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

##### *Changes in the economic rights of performers in films*

The new amendments of 2012 were again a disappointment for the performers in films except one proviso which gave the right to retain royalty. Section 38A (2) stated that “once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer’s right in the same film.”

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<sup>39</sup> Section 38(1) states that “without prejudice to the rights conferred on authors, the performer’s right which is an exclusive right subject to the provisions of this act to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof, namely:— (a) to make a sound recording or a visual recording of the performance, including— (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording.”

The proviso to section 38A (2) however gives some relief to such performers by stating that the performer in films “shall be entitled for royalties in case of making of the performances for commercial use.”

### ***Moral Rights of performers***

Section 38B recognised two moral rights of the performer, the right to paternity<sup>40</sup> and the right against distortion.<sup>41</sup> However, it was clarified that removing any portion for editing or to fit the recording within a limited duration, or any other modification which is required entirely for technical purposes shall not be considered derogatory to the reputation of the performer.

The Indian legal position on actor’s rights still remains uncertain with no judicial precedent. Our discussion in this part hence will centre around the case of *Manisha Koirala v. Shashilal Nair*<sup>42</sup> decided in 2003 much before the moral rights provisions were inserted in the Act. We shall examine if the decision would have been different in the post 2012 scenario, considering that more rights are available to the performer. As mentioned earlier, the *Dev Anand* case was the first ever case which discussed an actor’s (performer) rights in India. However, as stated earlier, the court did not provide any relief as the provision on performer’s rights was enacted then in 1979.

In the *Manisha Koirala* case, in which the Bombay High Court examined the conflict that arose between the plaintiff, Manisha Koirala, a renowned Bollywood actress and the defendant, Shahilal Nair, who was the producer of a movie in which she played the lead role. Four scenes of four minutes that used a body double for her was not agreeable by Koirala. She was skeptical that even though a body double was used (with the knowledge of Koirala) that these scenes would portray her in a bad light among audiences. She had also not taken remuneration for the movie and was doing it for free. She argued that she had a right to portrayal on screen and it can be exercised with her unconditional consent only. She further argued that the present rendition was an act of violation of her

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<sup>40</sup> Section 38 B states that “to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance.”

<sup>41</sup> “(B) to restrain or claim damage in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.”

<sup>42</sup> 2003 (2) Bom. CR 136 (India).

privacy as it would land her in embarrassing position in her peer group and will cause damage to her reputation, that can never be compensated monetarily. In his defence, Nair argued that the Indian Censor Board have given a "A" Certificate without any cuts to the film which suggests that there are no such objectionable scenes as claimed by Koirala. Nair further mentioned that Koirala had always known that there will be provocative scenes as they were part of the storyline of the film. Nair highlighted that when Koirala declined to perform the scenes, with her consent a body double was arranged for those scenes. Nair even contemplated dropping Koirala from the film, however, it was Koirala who insisted on the body double and asked Nair to continue the shooting.

The court observed that there is no material to hold that as per the term of the contract, she had imposed certain conditions, which had been agreed to. This would mean that there was no proof of an agreement between Koirala and Nair to put alternate shots in place of the body double. The court accordingly held that Koirala has failed to discharge that burden for the Court to arrive at a conclusion that there was a contract and that Nair had breached the said contract. Further the case of Nair was that the four shots which were objected have been replaced by the alternates as requested by Koirala and hence the court did not grant the relief as pleaded by Koirala. It is important to note that the court while giving the decision made the following observations, "once the plaintiff [Koirala] had agreed to act in the film it is not possible thereafter to contend that certain scenes filmed are defamatory to the plaintiff's [Koirala's] character and reputation...once the scenes are integral it must be assumed that the plaintiff [Koirala] was aware that this would form part of the film." These observations need to be re-examined after the 2012 amendments to the Indian Copyright Act. Post 2012, with more rights available to the performer, this case could not have been decided especially in light of absence of proving the contract and the right of acquiescence. However, with the insertion of the provision of moral rights of actors, specifically right to integrity in section 38B(b),<sup>43</sup> this case could have taken a turn with the actress arguing (in case) that she would be attaching moral rights on a performance that she was not pleased with, even in the absence of a contract and as a result of her bringing the case before the court and that the changes brought about by the producer and director duo are a "distortion,

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<sup>43</sup> "To restrain or claim damage in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation."

mutilation or other modification of his performance that would be prejudicial to his reputation.”

The 2012 amendments specifically inserted section 38B titled Moral Rights of Performer. The actor did not speak anything offensive against any religion during her performance, neither did she conscientiously decided to be a part of a project which was aimed to hurt the religious sentiments of a particular religion. Her work was distorted, modified with *mala fide* motive and ‘it was prejudicial to the reputation’ of the actor. Hence, post 2012 amendments, under similar circumstances, relief should be granted to the actor.

## V. Possible Solutions

In spite of the amendments that have been inserted in the Copyright Act, 1957, the rights of the actors are still vulnerable, especially for the ones who do not fall in the superstar or top category of actors. There are limited rights accorded to these actors. In order to strengthen their position, a few areas have to be emphasised upon.

The weak provisions for the protection of the rights of the actor in India can be remedied by the use of contracts regulating the relationship between performer and producer. More so as the actors are not paid the sum promised.<sup>44</sup> In many regimes, the collective bodies or association emphasize on payment based on instalments for better protection, so that actors can enjoy any economic or social security.

### A. Remuneration

Usually in countries where collective agreements of unions and guilds exists, that organization negotiates a minimum fee. Over and above that, individual negotiations by performers or their representatives determine the fee. Over the years, other provisions have emerged including additional fees for extra services such as for extra work beyond specified hours, compensation for time to travel to locations, appearances, costume fittings, etc.

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<sup>44</sup> Jayadevan S. Nair, *Supra* note 12 at 510.

## **B. Contract as a means of Transferring Rights**

In a report of WIPO,<sup>45</sup> it was stated that contracts for transferring the rights of the actors is essential irrespective of the country concerned. In countries where there is no presumption of transfer of rights of actors to producers, it is very important that there should be a clear contract. Even in systems where there is a presumption that the rights will be transferred to, such transfers can be made by a written contract. India, which has a presumptive system as stated in section 38A. Contracts are also necessary in a situation in which there is an agreement between the performer's guild or union and the producer. In practice, this kind of agreement requires the producer to refer back to the union in a case where new rights are created. Also, it is important to have contracts in countries where performers do not have neighbouring or related rights but are employees or independent contractors.

## **C. Secondary uses of Actor's Performance and Compensation**

Secondary uses can include reuse of the performance in new works. It includes subsequent productions/ advertisements for products other than for the audio-visual work itself. Secondary fees are known as residuals, royalties or simply secondary fees and is different from payments collected from rights of remuneration or compulsory collective license. These fees are arranged and calculated in different ways in different countries. The secondary payments are derived at times from the transfer of exclusive rights or sometimes as a result of labour negotiations or sometimes from a combination of the two systems. In other countries, secondary payments are derived from labour agreement and they form part of the salary of the actor.<sup>46</sup> This system also has its advantages for securing social security benefits which neighbouring rights does not fetch.

The compensation for secondary use and fees are at times derived directly from producers, sometimes through the unions or guilds and, in other cases, it is derived through a collective society.<sup>47</sup> The percentage and conditions differ accordingly.

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<sup>45</sup> Katherine Sand, *Supra* note 8, *Id.*

<sup>46</sup> *Id.*, 17.

<sup>47</sup> *Id.*

There is a need to scrutinize the payments to be made for secondary and later uses of the performances. This can be achieved through arbitration mechanisms and making the future payments obligatory are also important provisions of the contract. Many a times the associations and guilds try to have agreements with distributors, producers and other future owners for ensuring that they fulfil their responsibilities, make proper payments and also to scrutinize and audit the payment and the distribution process.

#### **D. Credits**

Credit is the recognition or inclusion of one's name in connection with the role that the performer portrays. Placement of credit also looks into its placement (for example, at the start of the film or the end of the film, the order of names in credits, etc.)

In India, name of performers that do not appear in the credits do not have any rights,<sup>48</sup> with only partial moral rights guaranteed under the law.<sup>49</sup> Hence, a key contractual provision is the inclusion of the names in the credit list.

#### **E. Moral Rights**

Although the Beijing Convention made it obligatory to its member states to grant moral rights to performers in audio visual works, some countries have still not ratified it. Nevertheless, inclusion of moral rights by virtue of a contract is a good route forward for adequate protection of performers.

#### **F. Other Provisions**

Although unrelated to copyright, some other provisions which should be a part of the actor's contract including health and other safety measures, working conditions and insurance for protecting performers during employment. In India, these basic rights are also not available to actors. For instance, an actor from Kerala, Jayan died during the shooting of his film *Kollilakkaml*. Unfortunately he was not covered under any insurance.<sup>50</sup>

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<sup>48</sup> Proviso to S. 2(1) (Qq).

<sup>49</sup> Section 38B (B).

<sup>50</sup> Cris, Remembering Malayalam Superstar Jaya, 40 Years After his Death, <https://www.thenewsminute.com/article/remembering-malayalam-superstar-jayan-40-years-after-his-death-137720>.

## **VI. Conclusion: Incorporation of Collective Bargaining in India**

The importance of the contractual terms to more or less decides the rights of the performer is stressed on as most actors have weak bargaining power *vis-à-vis* the producers. It lands the actors with bare minimum rights that are a result of the collective bargaining agreements.

Remuneration has been one of the big problems for actors. This initial fee is generally negotiated by the actors themselves and in situations where a collective organisation or guild collective agreement exists, it is the collective body that negotiates the minimum fee. Depending on the stature, performers including actors can negotiate a higher fee than that. As seen earlier, additional compensation for additional services and requirements are also results of the collective bargaining. Hence, it is generally considered as a wise decision for actors to be affiliated to the collective bodies.

The secondary fees, that is, residual rights or royalty rights are also results of collective bargaining process.<sup>51</sup> Moreover, there are other allegations that the producers exploits their employees and the female employees, are specially at the receiving end without provided with basic amenities during their shootings, such as minimum basic facilities, like, drinking water, food and proper toilets.<sup>52</sup> Collective bodies have in many cases fought for such amenities to actors.

There are countries where collective bargaining is prohibited or it may not exist, in those countries there are guidelines that have been adopted on rules of best practices. They are helpful in assisting the actors to negotiate the terms of contract. Also, these collective bodies can be important for settling disputes. It is definitely not easy for actors to get legal recourse and it may end up in long legal disputes. In such situations these bodies can be effective in providing legal recourse.

Hence, in India, it is important that the collective bodies need to be more proactive and work for their collective welfare. The CCI decision in the case of

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<sup>51</sup> For example, In USA, residual payments are the result of collective bargaining agreements, some of those contractual rights, such as the right to receive residual payments, arise from collective bargaining agreements in the case of unionized performers.

<sup>52</sup> Vipul Shah Case, *infra* note 52.

Vipul A. Shah v. All India Film Company Federation (Vipul Shah case)<sup>53</sup> is positive in this front. In the instant case, the informant, producer cum director of Film Industry in Mumbai (Bollywood) brought a complaint of anti-competitive agreement against 28 collective bodies (25 of whose members' work in different capacities in the film industry and 3 were producer's associations before the Competition Commission of India (CCI). One of the allegation was that the collective bodies made unreasonable demand including unreasonable monetary demand. The CCI noted that increment and wages being conditions of employment/ labour fall within the domain of collective bodies, along with words of caution regarding its over-reach.

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<sup>53</sup> Competition Commission of India, Case No. 19 Of 2014.

## **Artificial Intelligence, Big Data and Health Privacy: Need for Democratization and Regulation in Health Data Processing System**

*Tridipa Sehanobis<sup>1</sup>*

### **Abstract**

*The paper seeks to depict the present status of Artificial Intelligence (“AI”) in the healthcare system of India and its issues relating to data privacy. AI is being a major contributor to health and medical domain not only increase its efficiency but also to gain economic firmness in these sectors in India. Owing to this, comes deep concern on its regulation and law limits while using the personal data of the patients for any other purposes than treatment. The use of AI which entails constant exchange of information and data between the patient and the AI service providers, raises serious concern for data privacy, as they are using the sensitive personal data of the individuals for other purposes like prospective trainings, creating algorithms, advertisement, etc. Hence, with big datasets there is associated serious threat and challenges to the privacy of the individuals, which is required to be addressed. This is possible with the foremost step of the democratization of health data and healthcare where individual will have better access to his/her health information and therefore manage their own health. This can further be implemented through the usage of AI-based technologies, like wearable bands, glucometers, etc. following a due process. Again, the operators of these devices should be strictly regulated through certain regulation and legislation such as Data Protection Bill, which safeguards the privacy of the data owners. The legislature should ensure the passage of the laws following due process, discussion and participation of the people to ensure inclusivity and safeguard the interest of each individual. The paper tries to suggest measures to make use of AI in healthcare ecosystem in a regulated manner so that its use is more of importance than of controversy.*

**Keywords:** *Big Dataset, Sensitive Personal Data, Health Data Privacy, Artificial Intelligence, Surveillance Capitalism, Democratization, Due Process*

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## I. Introduction

“The Fourth Industrial Revolution, finally, will change not only what we do but also who we are. It will affect our identity and all the issues associated with it: our sense of privacy, our notions of ownership, our consumption patterns, the time we devote to work and leisure, and how we develop our careers, cultivate our skills, meet people, and nurture relationships.”<sup>2</sup>

-Klaus Schwab

With the developments in Artificial intelligence our world has drastically transformed in every aspect. John McCarthy, first devised the term “Artificial Intelligence” (“AI”) and defined it as, the “science and engineering of making intelligent machines.”<sup>3</sup> AI can also be described as when a machine that retains the capacity of aptitude as that of a human. These AI technologies require a collection of huge data and information related to the specific subject, it is working on, so as to build up the requisite ability of decision making. On the other hand, it is to be remembered that, the software developers who develop the AI, possess the control over these mechanisms, the data stored in them, including its action and reaction.

In the present-day digitalized world, the dependence on technology is inevitable, that leads to stockpiling of massive personal data termed as ‘digital data’, which in turn is used by the AI device for upgrading the standard of living. Consequently, all our personal data ranging from our preferences, to daily personal interactions, to medical reports, to specific symptoms and habits, etc. are gathered, stored, treated, and profiled by AI technologies, which are then used for various purposes such as for certain commercial, development, training and advertisement drives. This particular process of gathering data and its subsequent usage overruns the individual's privacy, confidentiality and informed consent. The application of the system of AI in healthcare sector is though undoubtedly helpful and largely contributing to serve the people thereby adding up to the strength of doctors; but its application has also been a serious threat to the individual's privacy.

AI in health care system largely relies on the individuals' health information, which they have shared voluntarily or involuntarily with the health care agencies

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<sup>2</sup> J. J. Peila, Supporting Student Transitions: Integrating Life Design, Career Construction, Happenstance, and Hope, 30 S. Afr. J. High. Educ., 54, 55 (2016).

<sup>3</sup> John McCarthy, What Is Artificial Intelligence? Stanford University, (Jul. 19, 2020, 09:20 PM), <http://www-formal.stanford.edu/jmc/whatisai.pdf>.

including doctors, hospitals, clinics, laboratories, etc. All these agencies carry out their functions with the help of new media technologies. They have created their own databases in order to store the patients' information. The computer network and internet communication technologies also allow the patients to access their health reports at any place in the world. Patients using the new media devices may interact with the foreign doctors, and share their test reports. In the realm of new digital era the labs of diagnosis and prognosis have become extremely efficient, helping the patients to opt for proper treatments. Besides, the contemporary AI enabled wearable fitness bands and mobile applications have added up to the potentiality of the digitalized world to make paths in diagnosis and prognosis. The individuals use health apps and wear the trendy fitness bands that measure their heart beats, calories, location, and physical activities and so on. Everything is being stored online forming hefty database of the same. In this way AI has an unprecedented access to all these databases.

However, it cannot be forgotten that the information related to the individuals' health though shared voluntarily is sensitive in nature, for the techniques of medical tests are capable in discovering the present and future diseases, and of tracing the genetic traits attached with the particular race, caste, ethnicity or religion. For example, the Artificial Intelligence may predict that a person has Parkinson's disease based on the data stored on the computer network and if this data is shared or used for some unauthorized purpose, it would lead to severe breach of his or her privacy. The concerned individual has every right to prohibit the AI agents from disclosing such information to anyone. Individuals do have reasonable expectation of privacy that their shared information should be kept confidential for various reasons.

## **II. Importance of Health Privacy**

The healthcare data of the patients includes a number of sensitive information ranging from his/her age to sleeping habits to personal food habits or addictions to sexual life to symptoms of peculiar diseases and so on. These data along with it carry the personal identifiable of the patients as well. Now these information of different patients are stored and maintained in digitalized mode for efficient management and prompt retrieval of the dataset thereby to enhance the healthcare delivery. Healthcare data can be used by and shared with different stakeholders of the healthcare system for providing effective treatment, such as:

- It can be shared with the clinical co-workers by the concerned doctor to provide the required standard of care and to ensure clinical or medical care coverage
- It can be used by the laboratories and scanning/x-ray centers so as to decide if the results relating to the condition of the patient are within the standard parameters or not and for research and clinical trials as well.
- The Medicine companies may also require the patient's health dataset for clinical trials or for discovery of required essential drugs.
- Even the medical insurance firms need the access to such data to verify whether the details given the customer were correctly stated or not based on which the level of insurance coverage has been offered and whether the company may suffer any loss for the said customer or not.

Based on all these purposes the healthcare dataset of the individuals moves from one place to another and different stakeholder have access to this information. However, it is to be remembered that personal identifiable data should be preserved adopting highest security and confidential standards because healthcare data being the personal sensitive data of the individuals are subject to privacy and security regulations.

#### **A. Privacy Values**

'Privacy' is experienced on a subjective level and commonly perceived differently by different people.<sup>4</sup> In contemporary times, the word is used to indicate different, but intersecting, concepts viz., the right to bodily integrity or right to be free from invasive search or reconnaissance, right to human dignity, right to personality and self-development and so on. The concept of 'privacy' is wide and connotes within its ambit right to have control over the bodily and psychological conditions. Nobody has right to intrude into one's mind or psychological thoughts and conditions and all the data relating to it belongs to the person alone. Constitutionalism provides protection against such intrusion even if the intruder has the technological capability to read the minds of the individuals.

Collste contends that the notion of 'privacy' is basically grounded on three universal fundamental ideals viz., 'autonomy', 'freedom', and 'personal

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<sup>4</sup> William W. Lowrance, Privacy and health research: A report to the U.S. Secretary of Health and Human Services. 1997, (Jan 18, 2021, 3:31 PM), <http://aspe.hhs.gov/DATACNCL/PHR.htm>.

relationships'.<sup>5</sup> Accordingly, respecting these fundamental values will itself amount to respect for 'privacy', as privacy is an essential pre-requisite for realizing those values. Even though cultural and social norms of individuals may differ with regard to the extent to which privacy has to be protected in order to achieve those fundamental values, but such changes do not reflect a profound ethnic variance in the notion of 'privacy' in itself.

### **B. Importance of Health Privacy to Enjoy One's Right to Personality**

The paradigm of privacy is utterly broad and it rightly determines the question as to who would have access to personal information of an individual and under what circumstances. As far as health data privacy is concerned, it includes the aspect of gathering, storing, and using of personal information of the individuals and scrutinizes if such information could be collected primarily and also to examine the justification based on which information gathered for one purpose can be handed down for another purpose. Maintaining and safeguarding the privacy of the patients is regarded as the foremost principle in the ethical and just medical care and research. A higher degree of privacy protection is expected when it comes to health data as it includes, various sensitive information relating to the individual that is essential to one's personal development. Health data as mentioned above contains various facets of the individual life ranging from age to sexuality to major abnormalities and diseases and so on.

For whatsoever purpose the health data of an individual is to be used, be it for improvement of the diagnostic methods, discovering new methods of treatment or for medical research or other legalized purpose, taking its due care and caution while using it is indispensable. If such data is not handled with due care and protection, it can inexorably cause major damage to the individual personality among everyone because slip of any such data, to an inappropriate person or for any un-consented secondary purpose can unwarrantedly cause harm to the individual's human dignity, self-confidence, and personality to a great extent. Such data may have adversarial repercussions on that individual's reputation, reliability, confidence in his or her workplace or family or in the society as a whole. For example, if an employed individual has severe heart disease for which he may at any time be in a serious condition (life-threatening), he may not be preferred to hold any higher position in office on basis of such information. As

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<sup>5</sup> Goran Collste, Global ICT-ethics: The Case of Privacy, 6 JICES., 76, 79, (2008).

this information raises question on his efficiency which is crucial with respect to a higher position.

### **C. Role of AI in Improving Healthcare Delivery by Using Personal Health Data**

Deep learning, a subcategory of machine learning related to the domain of AI, is remarkably known for its adeptness in training potent algorithms for the grouping of medical pictures and other high-dimensional data.<sup>6</sup> Altogether, these methods may provide for various benefits for patients, who are consumers, which include automatic screening and prioritizing of disease and effective treatment plans. For instance, AI supports in detection of diabetic retinopathy, retinopathy of prematurity, and glaucoma which could advance early discovery and treatment.<sup>7</sup> Besides, AI is used for prediction of future diseases and its possibilities, such as, critical kidney injury to age-related macular strength deterioration and diabetic retinopathy; in the future, such predictive AI would result for betterment in precautionary treatment plans.<sup>8</sup> At the same time, AI can facilitate health research by effectively managing dataset of the individual for diagnosis of the disease. This paves the way to figure out the pattern of the diseases and to trace the symptoms, based on which the medical research can effectively take place. This further benefits the individuals, such as, it enables access to new treatments, improved diagnostic methods, and more active ways to avert diseases and deliver proper care and remedy.

#### ***Public Use***

Big data empowers more accurate and efficient assessments of health care quality and efficacy, which can promote treatment optimization. Big data can help to improve the quality of service delivered by the hospitals,<sup>9</sup> to formulate scientific

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<sup>6</sup> Yuka Kihara et. al., Estimating Retinal Sensitivity Using Optical Coherence Tomography with Deep-Learning Algorithms in Macular Telangiectasia Type 2, *Jama Network Open*, (Jul. 19, 2020, 09:50 PM), doi:10.1001/jamanetworkopen.2018.8029.

<sup>7</sup> Hanruo Liu, et. al., Development and Validation of a Deep Learning System to Detect Glaucomatous Optic Neuropathy Using Fundus Photographs, *JAMA Ophthalmol*, 135, 1355 (2019).

<sup>8</sup> Filippo Arcadu, et.al., Deep Learning Algorithm Predicts Diabetic Retinopathy Progression in Individual Patients, *NPJ Digit Med*, 92, 95 (2019).

<sup>9</sup> Hospital Inpatient Quality Reporting Program, Centers for Medicare and Medicaid Services, (Apr. 30, 2021, 05:15 PM) <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/HospitalRHQDAPU.html>.

hypotheses,<sup>10</sup> to compare the usefulness and success of different involvements, and to monitor drug and device safety. The AI is benefiting health care sector by executing cognitive technology to unwind a huge amount of medical record and to facilitate in effective diagnosis. For example, Nuance, a product service provider, uses AI and machine learning for predicting the intent of particular individual. Its products are used in the healthcare sectors, which basically helps in storing, collecting and reformatting data for enabling consistent and faster access to all medical data of the patients, and to learn the behavioral pattern of the patients, in order to analyze or diagnose more efficiently.

The Indian Government is remarkably heading towards digitalizing the healthcare environment in India basically through the deployment of the AI-technologies. In the National Health Policy (2017) the government first codified the shift of the pen-paper based functioning of healthcare system to digitalization. Moreover, the National Digital Health Blueprint (NDHB 2019) advances this prophecy to recognize constituent elements that influence technological foundational en-routing for capacious technological development for diverse purposes and depend in a most elementary way on high data integrity of the health.<sup>11</sup>The government has already made ways in digitalizing the medical records of the patients through the system of Electronic Health Record (EHR). However, the EHR system lacks behind somehow in public health organizations for its high rate in its application and for extraordinary burden on clinicians owed to cumbersome input and maintenance actions.<sup>12</sup> However, in 2019 the Health Minister of India had promised to prioritize AI in the healthcare to address such gaps.

Where doctor-patient ratio stands to 1:10,189, call for technological application is inevitable to meet efficient healthcare delivery. For instance, an AI-based breast cancer detecting device that uses a non-invasive, economic resolution

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<sup>10</sup>Issac S. Kohane, Using Electronic Health Records to Drive Discovery in Disease Genomics, 12 Nat Rev Genet. 417, 421 (2011).

<sup>11</sup> Final Report on National Digital Health Blueprint (NDHB), Ministry of Health and Family Welfare (MoHFW), Government of India, October 2019 (May 23, 2021, 05:15 PM), <https://main.mohfw.gov.in/newshighlights/final-report-national-digital-health-blueprint-ndhb>.

<sup>12</sup> Rashmi Mabiyan, India Bullish on AI in Healthcare without Electronic Health Records, EHealthWorld, (May 24, 2021, 08:10 AM), <https://health.economicstimes.indiatimes.com/news/health-it/india-bullish-on-ai-in-healthcare-without-ehr/73118990>.

based on heat-mapping for primary recognition of breast cancer has been able to notice breast cancer up to five years earlier than a mammography with reduced reliance on trained technicians.<sup>13</sup> Following such benefits and efficiency that would arise from these AI-technologies various states in India have undertaken to embrace this wide implementation of it in the healthcare ecosystem. The state of Telangana for instance, has stated 2020 as the 'year of AI', with the objective of promoting AI-enabled inventions across e-governance, cultivation, healthcare and education.<sup>14</sup> Some of the ingenuities assumed by the central government to ensure the application of AI technologies in public health sector are: Imaging Biobank for Cancer by a collaborative effort of the NITI Aayog and Department of Bio-Technology (DBT). This targets to form a database of cancer associated radiology and pathology images of more than 20,000 profiles of cancer patients focusing on major cancers predominant in India.<sup>15</sup> This will form an extensive database of the cancer patients including their patterns, habits, and peculiar symptoms which data will further stored and processed for future analysis and treatment purpose.

### ***Private Use***

The private healthcare sector in India has also widely deployed AI, to advance the proficiency of the healthcare delivery system and to serve its patients more proficiently. For example, IBM Watson is installed in Manipal Hospitals for diagnosis and treatment of various kinds of cancers. IBM Watson for Oncology combines deep proficiency of the leading oncologists in cancer care with the IBM Watson's speed to help the clinicians, for considering the individualized cancer treatments for their patients.<sup>16</sup> Currently, the Aravind Eye Care Systems is working in collaboration with Google Brain, which formerly helped Google to

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<sup>13</sup> Sudip Bhattacharya et al., Artificial intelligence enabled healthcare: A Hype, Hope or Harm, 8(11) J Family Med Prim Care, 3461, 3462 (2019).

<sup>14</sup> AI Technology to Bloom in Telangana, The Hindu, (Apr. 09, 2021, 05:34 PM), <https://www.thehindu.com/news/cities/Hyderabad/ai-technology-to-bloom-in-telangana/article30464412.ece>.

<sup>15</sup> Health Ministry to use Artificial Intelligence in safe way in public health, The Economic Times, (Apr. 11, 2021, 04:30 PM), <https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/health-ministry-to-use-artificial-intelligence-in-safe-way-in-public-health/articleshow/70189259.cms?from=mdr>.

<sup>16</sup> Artificial Intelligence in Medicine, IBM Watson Health, (Apr. 10, 2020, 06:30 PM) <https://www.ibm.com/watson-health/learn/artificial-intelligence-medicine>.

produce its retinal screening system by contribution of images which in turn aided in training process of its image analyzing algorithms.

Apart from the superior companies, like Google and IBM, India has hosted many startup companies as well that focus being on AI mainly to detect disease. For instance, Niramai Health Analytix implements thermal analytics for detection of breast cancer at initial stage, while Advenio Tecnosys discovers TB from chest x-rays images and severe contagions from ultrasound images.<sup>17</sup> Again, BeatO, a startup established in India in 2015, launched an app enabled with glucometer, that can be plugged into a smartphone for screening and to keep the reading saved in the app. This can be retrieved at any time for further assistance and meeting any emergency situation.

Most importantly, the wearable fitness equipment which are most popular among the masses nowadays, are storing up huge amount of personal data on daily basis in lieu of various social and medical benefits. Wearable fitness devices largely embrace a wide variety of technologies including mobile health (mHealth) technology.<sup>18</sup> By and large the MHealth technologies have the competence “to improve the quality of health care and reduce medical errors; to reduce the cost of health care; and to increase access to care by democratizing and demystifying medicine.”<sup>19</sup> Medical device startup named ten3T produces medical wearable devices, and its invention was Cicer, a palm-sized patch sticker with multiple embedded sensors.<sup>20</sup> These devices keep track of the day to day activities of the individuals, storing all the data time to time which retrievable at any time later for keeping record of the health trends. This data can inform doctors of associative health pattern, for instance, the correlation among exercise and pattern of sleeping habit, and association between particular place and the existence of weight-related diseases, on a local or national scale.<sup>21</sup>

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<sup>17</sup> Artificial Intelligence in the Healthcare Industry in India, cis-india.org, (Jul. 25, 2020, 07:54 PM), <https://cis-india.org/internet-governance/ai-and-healthcare-report>.

<sup>18</sup> Mhealth: New Horizons For Health Through Mobile Technologies, WHO, 3 Global Observatory For Ehealth Series, (Mar. 11, 2021, 07:32 AM) [http://www.who.int/goe/publications/goe\\_mhealth\\_web.pdf](http://www.who.int/goe/publications/goe_mhealth_web.pdf).

<sup>19</sup> Nathan Cortez, *The Mobile Health Revolution?*, 47 U.C. DAVIS L. REV. 1173, 1176 (2014).

<sup>20</sup> Artificial Intelligence in the Healthcare Industry in India, cis-india.org, (Jul. 25, 2020, 07:54 PM), <https://cis-india.org/internet-governance/ai-and-healthcare-report..>

<sup>21</sup> Dolezal BA et al., *Interrelationship between Sleep and Exercise: A Systematic Review*, 2017 *Adv Prev Med*, (2017).

These technologies aid in the early discovery and prevention of health issues while transportation, and even at home as well. Similarly, with the usage of wearable fitness devices the costs of health care may also be reduced as the use of such technologies certainly reduce the number of visits to doctors. The blend of big database and AI thus provides many prospective benefits for healthcare systems that increase efficiency with less expenditure.

### **III. Threats of Artificial Big Data on Health Privacy**

The gradual emergence of erudite AI system and the collaboration of many knowhows like the AI, the Internet of Things (IoT), and the Internet of Living Things (IoLT) acts as a stern risk to our privacy. Though there are ample of benefits derived out of the implementation of AI in the healthcare sector, number of ethical issues emerges out of it due to lack of regulation regarding its usage and control. One of the concerns is that of data privacy issues, which arises with the implementation of AI. This leads to trepidations regarding the steadiness between inventions and privacy and the need for effective protection of data privacy mechanism that can be developed sideways with AI implementation.

As it is known that for the purpose of machine learning and deep learning, a huge amount of data is required to accomplish its necessity for advancement and testing- this may be perceived as one of the major drawback of AI mechanism. Furthermore, with the help of AI-enabled healthcare devices the government, the corporates and the individuals are able to make use of the personal data processed and stored by these technologies to show the statistical inferences,<sup>22</sup> such as physical traits, race, credit merits, insurance risk, employment or academic ability and so on. Although apparently, it is the anonymized data of the patients that are used for technological development, but there exist certain risk. The value of generosity entails that healthcare service providers “do no harm”; however, violation of patient’s privacy can result into serious damages and can also cause unintentional results, which can possibly have a negative impact on one's occupation or insurance coverage<sup>23</sup> and may also permit cyber attackers to get Social Security figures and individual economic data.<sup>24</sup>

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<sup>22</sup> Nicolas P. Terry, Big Data Proxies and Health Privacy Exceptionalism, 24 Health Matrix 65, 77 (2014).

<sup>23</sup> Price WN, et. al., Privacy In The Age Of Medical Big Data, 25Nat Med., 37(2019)

<sup>24</sup> M Shi, et. al., A Privacy Protection Method For Health Care Big Data Management Based On Risk Access Control, 23Health Care Manag Sci., 1, 9 (2019).

Increasingly, generating anonymous data and removing identifiable information from big database can be a formidable job. Rather, it is very natural that, even with utmost rigorous labors, there will be at least a potential threat of re-identification.<sup>25</sup> This risk is very much associated with ophthalmology. But that is not the only area, because it is now possible to implement facial identification software system to three-dimensional reformation of computed imaging of the head. Moreover, specific characteristic from the periocular region is used to recognize the patients' age by means of machine learning algorithms.<sup>26</sup> From fundus images even, gender, age, and cardiovascular risk factors can be recognized.<sup>27</sup> The data which is not even a medical image have the potential to recognize individual by its connection with other information as the patients' data adds on over time.

So, in the rung of advancement, we are losing our privacy to a large extent, remedying which is a mere attempt. As rightly explained by Christina P. Moniodis that,

“The creation of new knowledge complicates data privacy law as it involves information the individual did not possess and could not disclose, knowingly or otherwise. In addition, as our state becomes an ‘information state’ through increasing reliance on information – such that information is described as the ‘lifeblood’ that sustains political, social, and business decisions. It becomes impossible to conceptualize all of the possible uses of information and resulting harms. Such a situation poses a challenge for courts who are effectively asked to anticipate and remedy invisible, evolving harms.”<sup>28</sup>

In spite of certain privacy and security concerns attached with the implementation of AI, countries and governments around the world are evolving and innovating AI technologies and investing for its development. In 2018, India

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<sup>25</sup> Luc Rocher, et.al., Estimating The Success Of Re-Identifications In Incomplete Datasets Using Generative Models, 10 Nat Commun., 3069 (2019).

<sup>26</sup> Kishore Kumar Kamarajugadda and Trinatha R. Polipalli, Extract Features from Periocular Region To Identify The Age Using Machine Learning Algorithms, 43 J Med Syst., 196, 197 (2019).

<sup>27</sup> Ryan Poplin, et. al., Prediction of Cardiovascular Risk Factors From Retinal Fundus Photographs Via Deep Learning 2 Nat Biomed Eng., 158, 160 (2018).

<sup>28</sup> Christina P. Moniodis, Moving from Nixon to NASA: Privacy 's Second Strand- A Right to Informational Privacy, 15 (1) Yale Journal of Law and Technology, 141,153 (2012).

has actively recognized the use of AI expertise in various fields from healthcare to crime prediction to education, by the National Strategy for Artificial Intelligence that authorized NITI Aayog to launch national program on AI<sup>29</sup> and the Report of the AI Task Force. The usage AI mechanism is entangled with every aspect of human life ranging from its finance, physical traits, genome, faces, emotions, environment, culture and religion as well, which adds up to the issue of data protection and privacy concern.

#### **A. Abuse of Health Data by Totalitarian Governments**

The data protection serves many personal, psychological and social functions of right to privacy. An individual seeks protection to his or her health information when there is an apprehension that the information can be made subject of his or her discrimination, embarrassment or harassment. The exploiters of the health information could be anyone. It may be close on or foe. The disclosure of the information can appease those who have curiosity to know everything about others and to make idle gossips. Moreover, the health information can also be abused by the totalitarian regimes like Nazi regime. Adolf Hitler's idea to create pure race is a serious violation of the inclusive societies. The arrogant rulers have their own definition about healthy or unhealthy persons; consider the unhealthy ones as a liability on the so-called perfect society. The autocratic governments do discriminate their citizenry on the basis of race, gender, sexual orientation, etc.

Several governments have been benefitted by the advancement of AI, improved IoT and IoLT. For example, the use of Portable genome sequencer MinION and Metrichor which uses AI technology in epidemiology<sup>30</sup>, aids in predicting the risk of diseases. Another instance is, Sequenom Inc., using AI, that interprets genetic code into pertinent data. Government and other regulatory bodies, on the basis of these data generated by AI make learned decision to tackle and control the spread of maladies and to avert epidemics.

But what if the government itself has a distorted motive to accomplish by these data. Incident like prosecution of religious minorities is widely practiced worldwide, particularly in Africa and Asia. They are subject to ethnic cleansing in their regions. Their identities are now stateless persons or refugees. Social

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<sup>29</sup> National Strategy on Artificial Intelligence, NITI Aayog, (Jul. 24, 2020, 08:44 PM), <https://niti.gov.in/national-strategy-artificial-intelligence>.

<sup>30</sup> HengyunLu, et.al., Oxford NanoporeMinION Sequencing and Genome Assembly, Science Direct (Jul. 23, 2020, 03:45 PM), <https://doi.org/10.1016/j.gpb.2016.05.004>.

taboos are lynching the individuals having sexual orientation which is not in consonance with the majority opinion. It is apt to mention the fact that the unprecedented capabilities of the new media technologies and AI mechanism can disclose all these factors to such types of governments. By relating the genetic traits and other physical traits with the help of artificial intelligence, the discriminatory governments may achieve their political gains. In *K.S. Puttaswamy v. Union of India*,<sup>31</sup> the court explicitly held that the ambit of data protection safeguards 'principle of non-discrimination' thereby ensuring that the pooling of data should be in such manner as not to show prejudice on the ground of race, or ethnic origin, or political affiliation, or spiritual views, or heredity or health status or sexual orientation.

### **B. Surveillance Capitalism by Big Corporates**

Increasingly, the private companies are deeply interested in the individuals' health information. A rising number of employers by means of fitness devices encourage corporate wellness so as to "create [a] culture of well-being", "improve participant health status", "increase employee productivity," and "boost acquisition and retention."<sup>32</sup> Big data on health information has the potential to empower the controllers to act in biasness. This notion can be best explained by the concept of "Surveillance Capitalism. According to Sushna Zuboff "Surveillance capitalism unilaterally claims human experience as free raw material for translation into behavioural data. Although some of these data are applied to service improvement, the rest are declared as a proprietary behavioural surplus, fed into advanced manufacturing processes known as 'machine intelligence', and fabricated into prediction products that anticipate what you will do now, soon, and later. Finally, these prediction products are traded in a new kind of marketplace that I call behavioural futures markets."<sup>33</sup> 'Surveillance capitalists have grown-up enormously rich by these trading processes, as many corporates are keen to lay bets on our future consumer behaviors.

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<sup>31</sup> *K.S. Puttaswamy v. U.O.I.*, AIR 4161 (SC: 2017).

<sup>32</sup> Howell, Kathryn et al., 7 Reasons to Invest in Well-Being, 2015 *Psychology of Violence* (2015).

<sup>33</sup> John Naughton, The Goal is to Automate Us: Welcome to the Age Of Surveillance Capitalism, *The Guardian*, (Jul. 25, 2020, 08:54 AM) <https://www.theguardian.com/technology/2019/jan/20/shoshana-zuboff-age-of-surveillance-capitalism-google-facebook>.

In surveillance capitalism, the commodities for sell are the personal data of the individuals or the consumers, and the generation and production of this information is made by mass surveillance on internet. The consumers' behaviors are learned and thoroughly analyzed by such surveillance and stored specifically to influence our further behavior. Here the role of frightful five those are, Google, Facebook, Amazon, Microsoft, Apple, is noteworthy. They shop our behavior and experiences with the help of technological advancement like AI. Thereafter, they encash by selling these personal data of the consumer to third-party companies. Such data can be major factor for making wealth by attacking the consumer with advertisements, or for taking major decision which can be detrimental to the interest of the consumer thereby infringing his or her privacy. For example, now-a-days whenever we are facing trouble with our health, there is a tendency to search for the remedy at hand. Hence, we search in the internet using our browsers in phone or laptop or sometimes by surfing different social media sites. The search history saves our behavior and our concerns which is used by the different browser and social media companies as commodity. Subsequently, whenever we get back to those sites, we are attacked with the remedies that we were looking for, even in those sites where we did not search for such remedy for our health. This is the simple example we encounter every day. This activity reveals that our personal concerns are circulated internally within different companies which get to know our health conditions and information. These sensitive information are further transferred to other third-party companies as assets detrimental to our interests.

Similarly, when we use fitness bands, they keep track of our health status and accumulates all such data to be used as wealth. Even small companies are enchasing on the personal data by such operation. The third party brokers are selling our personal information to the big corporates, thus leading to the accumulation of wealth (personal data) in the hand of online companies.

Pharmaceuticals using the artificial intelligence may colonize the health by inventing addictive and de-addictive features of a medicine knowing the preferences and behavior of the consumers by medical diagnosis and online surveillance made by different corporates. Life insurance companies may manipulate the agreements with their clients, and decide the policy unilaterally, by buying personal data of the consumer from other companies. It would be against the social security measures, which are promised under the principles of constitutionalism. This hampers the bargaining power of the patients and the consumers.

Where health information is a valuable asset and wealth for the healthcare service providers, who are abusing it for commercial purposes, hacking of the medical databases gets flourished. Hackers are in the business to track medical history of the individuals including HIV reports. Such an incident took place in 2016, when the hacking of a Mumbai-based diagnostic and test center database led to the disclosure of medical reports (including HIV reports) of about 35,000 patients.<sup>34</sup> This particular database possessed information of patients across India, and many were uninformed that their particulars have been uncovered. Again in *K.S. Puttaswamy v. Union of India*,<sup>35</sup> the court was of the view that sharing of medical information of an individual without his approval leads to a breach of privacy.

Advertisement, management and sale of the products and services provided by such health care agents depend upon the medical tracks of the individuals. Health related fears and anxieties can be created through the abuses of artificial intelligence. Consumer behavioral patterns let the data controllers to make the opinion among masses. Rumors or fake news make money for the wrongdoers.

#### **IV. Legal Framework Relating to Data Privacy Issues**

In order to evade above mentioned wrongdoings, it is necessary that the health related data must be protected from the unauthorized accesses. Right to privacy is a one of the basic rights legally recognized under various international human rights documents. It is also recognized as a part of fundamental right to life and personal liberty under Indian Constitution. Besides, there are number of other laws aiming to recognize and protect the arena individual privacy.

##### **A. International Conventions**

At international level, both Universal Declaration on Human Rights<sup>36</sup> and the European Convention on Human Right<sup>37</sup>s recognizes the enforcement of the fundamental right to privacy, reputation, dignity and self-respect. The International Covenant on Civil and Political Rights provides protection to the individuals against unwarranted interference with their privacy.

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<sup>34</sup> How is Data Transforming Healthcare in India?, Znetlive Blog, (Jul. 19, 2020, 07:30 AM) <https://www.znetlive.com/blog/data-transforming-healthcare-india/>.

<sup>35</sup> *K.S. Puttaswamy v. U.O.I*, AIR 4161 (SC: 2017).

<sup>36</sup> UDHR, art. 12.

<sup>37</sup> ECHR, art. 8.

## **B. Right to Privacy under the Indian Constitution**

Article 21 of the Indian Constitution provides for “Right to Life and Personal Liberty” and the Indian Judiciary has implicitly included Right to Privacy under this right. In *K.S. Puttaswamy v. Union of India*,<sup>38</sup> the Supreme Court, recognized the right to privacy as a fundamental right under article 21 of the Indian Constitution. The Court categorically held that,

“Data such as medical information would be a category to which a reasonable expectation of privacy attaches. There may be other data which falls outside the reasonable expectation paradigm. Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual. This is evident from the emphasis in the European data protection regime on the centrality of consent. Related to the issue of consent is the requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use.”

On this ground the court observed that in formulating a data protection regime the State must consider harmonizing the privacy principles along with the other values of data protection keeping in mind the legitimate concerns of the State. During the course of its hearing it was informed by the Ministry of Electronics and Information Technology that they formed a Committee of Experts to identify the major areas of issue relating to data privacy and also to come up with draft legislation. Resultantly the Personal Data Protection Bill, 2018 was tabled in Parliament.

## **C. Personal Data Protection Bill, 2018 (PDP Bill)**

The ministry came up with the Personal Data Protection Bill, 2018 (PDP Bill). It provides for the constitution of a Data Protection Authority in the country. The authority would have power to issue appropriate directions to the data fiduciary and can conduct inquiries with regard to any case of breach of data privacy the data fiduciary.<sup>39</sup> The Bill is made in lines with General Data Protection Regulation (GDPR) and legalizes the handling of personal information of citizens by the government, incorporated companies in India, and foreign companies that are using the personal data of customers in India only on certain

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<sup>38</sup> *K.S. Puttaswamy v. U.O.I*, AIR, 4161 (SC: 2017)

<sup>39</sup> The Personal Data Protection Bill, Ministry of Electronics and Information Technology, MEITY, GOI, ss. 62 and 64, (2018).

grounds explicitly mentioned in the Bill. In essence, the data principals demand that the data controllers should be made responsible for protecting the information of the data subjects. Apart from the obligation that the data of the individuals are collected legally, the collector of such data must also guarantee that personal data of the individuals are not misused or exploited.

Processing of sensitive information is prohibited. Data controllers cannot collect information more than its requirement. The information can be used for the authorized purposes only. While doing so, it is mandatory to take the explicit consent of the data subjects. The Data Protection Bill would be applied on both public and private entities. But the sensitive information collected for the purposes of security of state or preventing commission of crime falls under the exception clause.

Furthermore, the Bill provides for “Right to be Forgotten”, which is made available to the data subject, giving him a right to restrict or prevent continuing the data controller from disclosure of his or her personal information.<sup>40</sup> The information should be removed once the purpose is achieved. Recently, in the case of Zulfiqar Ahman Khan v. Quintillion Business Media Pvt. Ltd.<sup>41</sup> (2019), the Delhi High Court held right to be forgotten as an inherent part of right to privacy under article 21 of the constitution.

#### **D. Digital Information Security in Healthcare Act**

The draft of the Digital Information Security in Healthcare Act (“DISHA”) notified by the Ministry of Health & Family welfare in 2018 for public consultation<sup>42</sup>, was a big step toward health data protection regulation. This draft Act based the data protection regime on a strict consent mechanism in every stage of data collection and processing. This draft Act is a special law to regulate the area of health data. The remarkable attempt of DISHA is to put a complete ban on the commercialization of the health data. Section 29 (5) of DISHA runs as:

“Digital health data, whether identifiable or anonymized, shall not be accessed, used or disclosed to any person for a commercial purpose and in no circumstances be accessed, used or disclosed to

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<sup>40</sup> *Id.* at s.27.

<sup>41</sup> Z.A. Khan v. Quintillion Business Media Pvt. Ltd., 175 DRJ, 660, (DHC:2019).

<sup>42</sup> Digital Information Security in Healthcare Act, F.No Z-18015/23|2017-eGov, Ministry of Health and Family Welfare, GOI, (May 02, 2021, 3:15 PM), [https://www.nhp.gov.in/NHPfiles/R\\_4179\\_1521627488625\\_0.pdf](https://www.nhp.gov.in/NHPfiles/R_4179_1521627488625_0.pdf)

insurance companies, employers, human resource consultants and pharmaceutical companies, or any other entity as may be specified by the Central Government.”

This is a major quantum leap towards the protection of the medical data regime. Moreover, the draft act also aims to address the concerns associated with the data collection by the healthcare applications and wearable devices which comes under the purview of other entities under this act. The above referred provision of DISHA also applies to them. According this draft act the data collectors are under strict obligation to obtain the consent of the data owner explicitly for every use of the identifiable data for the prescribed used.<sup>43</sup> It is to be noted that the users are at liberty to refuse the consent for data generation, collection or processing at any stage he or she wishes.<sup>44</sup> The Act envisions a holistic approach towards data protection seeking to safeguard the data owner’s (principal’s) the right to privacy, confidentiality, and security of their digital health data, which may be collected, stored and transmitted according to the provisions of this Act.<sup>45</sup>

Interestingly, if both the PDP Bill and DISHA are passed as an Act, it will definitely form a strong data protection regime in India, including the governance of the digital health data. However, a thin line of difference between both the above-mentioned act has been noticed with regard to the consent mechanism. The PDP Bill seeks the requirement of obtaining consent before using this health data by the entity i.e., only at one stage. On the other hand, the DISHA provides stricter provisions and requires obtaining of the consent of the data owner at every stage of data collection from generating to processing to transmission to that of its storage. Nonetheless, the conflicting view can be resolved by giving way to the special act DISHA over the general one PDP Bill, as the DISHA exclusively deals with the regime of Health Data Protection.

But the major concern here is both the act are yet to be passed by the Parliament. So, at present they are not at operation. Nevertheless, there are various existing provisions of laws and rules that deal with the data protection and privacy concerns of personal data. The relevant existing laws are discussed below:

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<sup>43</sup> Digital Information Security in Healthcare Act, e-Gov, MHFW, GOI, s. 30 (2) and 29 (2017).

<sup>44</sup> id. At s.28 (2).

<sup>45</sup> id. At s.28 (1).

**E. The Consumer Protection Act, 2019:**

The issue relating to sharing of personal data without informed consensus of the data principal can be addressed under the provision of this Consumer Protection Act, 2019. The Act makes a provision of “unfair contract” means any contract that takes place between a manufacturer or service provider or trader on one side and the consumer on the other side, which contains such terms and conditions that will have serious impact on the rights of such consumer. Such contract may include, authorizing one party to assign the contract to the disadvantage of the consumer, lacking his consent; or imposing on the consumer any arbitrary charge, responsibility or condition which is prejudicial to the consumer.<sup>46</sup> Thus the contract that the various corporates, having the control over that data of the individuals, make with other companies, to share such personal information without informed consent, acts in detriment to the interest of the individual consumer. Therefore, this can be categorized under “unfair contract” under this act.

**F. Information Technology Act, 2000**

In explicit sense, it is only the Information Technology Act, 2000 that provides for the matters connecting to data privacy, payment of compensation and imprisonment in case of unauthorized exposure and ill use of personal data and breach of agreed terms with regard to personal data. The act provides that a body corporate should be very careful, which is in possession of, and dealing or handling any sensitive personal data or information, otherwise any negligence if observed in its part in implementing and maintaining reasonable security practices resulting in wrongful loss or wrongful gain to any person, would make that corporate liable to pay damages to the person so affected.<sup>47</sup> The IT Amendment Act, 2008 inserted a provision which provides that if any person or intermediary has obtained access to personal information of an individual while providing service, and thereafter if the former discloses the information of the latter, contrary to the contractual term, with an intention to cause wrongful loss or gain, the person so unauthorizedly disclosing the data will be liable for imprisonment for maximum three years or fine up to 5 lakhs rupees or both.<sup>48</sup>

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<sup>46</sup>The Consumer Protection Act, The Gazette of India, s. 2(46) (2019).

<sup>47</sup>The Information Technology Act, The Gazette of India, s. 43A (2000).

<sup>48</sup> *Id.* At s. 72A (2000).

### **G. Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011**

Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 provide for formulating policy with regard to the privacy and disclosure of personal and sensitive data. According to the rules the body corporate which is collecting, receiving, possessing, storing, or handling data of the individuals, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information thereby to ensure that the same are accessible by the data providers. Such policy shall be made available on the website of body corporate or any person on its behalf.<sup>49</sup>

Rule 3 categorize certain data as Sensitive Personal Data which also includes physical, physiological and mental health condition; sexual orientation; medical records and history; biometric information, etc. The rule obliges the body corporate to secure consent from the individuals providing the sensitive personal data with respect to its usage, before collection of such information. Even the disclosure of sensitive personal data or information by body corporate to any third party is not allowed without prior permission of the data, unless such disclosure has been agreed to in the contract.<sup>50</sup>

### **H. The National Medical Commission Act, 2019 and The Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 (“MCI Code”)**

Health information needs to be kept confidential under the Medical Codes. The idea of confidentiality of the health information is ayurvedic in nature. Hippocratic Oath too binds the doctors or health care service providers to keep the secrets of their patients. In India, Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 provide that the physicians shall never reveal any confidential or domestic matter of his patients that entrusted to him by the latter during medical treatment or consultation unless required by the laws of the State. The code also requires efforts to computerize medical records for easy retrieval of them. Alongside, the National Medical

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<sup>49</sup>Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, Ministry of Communications and Information Technology, r.4 (2011).

<sup>50</sup> *Id.* at r. 3.

Commission Act, 2019 provides that the Central Government shall constitute certain Autonomous Boards, under the overall supervision of the National Medical Commission, to perform the functions assigned to such Boards. One of such Autonomous Boards is the Ethics and Medical Registration Board which has main function to regulate professional conduct and promote medical ethics.

#### **I. Electronic Health Records Standards, 2016 (EHR Standards)**

Electronic Health Records Standards, 2016 prescribes privacy standards relating to the collected health records from patient. This includes records from medical organizations also from medical equipment. The government has laid down standards for data protection realizing the need for it and made provisions relating to data capture, storage, recovery, exchange and analytics, and also includes, medical codes. The standards emphasize on the data ownership. It says that the patients are the real owners and deciders of their health data. Patients can access their health data. If the medical organizations having control over health data want to share that information with third party, the explicit consent of the patient is required. Healthcare service providers are made responsible for providing security to the health data. Encryption technology needs to be installed in order to secure the electronic information. Any information which discloses the identity of the patient should be strictly protected. Health data should be removed after achieving the intended purposes. Use of artificial intelligence in health care services by doctors, hospitals, pharmaceuticals, etc. is also subject to the above mentioned statutes.

#### **V. Critical Evaluation**

A major concern in privacy analysis is whether the individual has approved specific uses of his or her personal data.<sup>51</sup>The implementation of AI technologies in the healthcare systems has become evidently complex as this mechanism requires a huge amount of data for its functioning and those data is being stockpiled and handled by the data controller. Further present the treatment of the patient is highly dependent on the proficiency of persons from number of organizations and groups, which denotes the sharing of these health data with all of them as also discussed above. There is a high probability and prevalence of

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<sup>51</sup> Legal frameworks for eHealth, WHO Global Observatory for eHealth series - Volume 5, (May 11, 2021, 08:40 AM) [https://apps.who.int/iris/bitstream/handle/10665/44807/9789241503143\\_eng.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/44807/9789241503143_eng.pdf?sequence=1&isAllowed=y) .

unqualified misuse of these personal health data by the data controller, by the government and other stakeholders. Now the fundamental questions are that: Whether the existing legal framework in India is sufficient enough to permit the health data of the individuals to flow suitably in this new edifice of healthcare system? Is the degree of privacy protection in healthcare ecosystem in India is adequate to accommodate the faith of the patient to share his or her personal sensitive data?

Analyzing the ongoing complex healthcare ecosystem based on complied dataset of the individuals and the existing legal framework, it is evidently clear that there exists a lot of loopholes and dangers that pose threat to the individual privacy. Following components are missing in existing framework:

**A. Government's Access to Health Data, Due Process and the Actuarial Justice System**

Health data is personal and sensitive information. For lawful purposes, both public and private bodies may have an access to an individual's health information. Access to health data stored on the intermediaries' databases is also allowed to the lawful enforcement agencies for the prevention of crime; for the investigation of crime; for the identification of suspect, etc; for the medical emergency; and for executing health schemes and policies. Since every access is an interference with an individual's right to privacy, which is fundamental right under Article 21 of the Indian Constitution, it is essential that the access must be in accordance with the due process of law. Due process further demands the fulfilment of the principles of proportionality, transparency, accountability and good governance.<sup>52</sup> Principles of checks and balances require that independent oversight mechanism to monitor the government's access and processing of health data should be established.<sup>53</sup>

The rise of Preventive State tends to use Big Health Data Analytics for fulfilling the purposes of the actuarial justice system. It seriously affects the vulnerable identities. People get discriminated on the basis of race, caste, ethnicity, religion, colour, body, and so on and so forth. Preventive justice cannot undermine the spirit of criminal justice jurisprudence.

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<sup>52</sup> K.S. Puttaswamy v. Union of India, 10 SCC 1, 188 (SC:2017).

<sup>53</sup> Institute of Medicine (US) Committee on Assuring the Health of the Public in the 21st Century, The Future of the Public's Health in the 21st Century, NCBI (May 10, 2021, 10:32 AM), <https://www.ncbi.nlm.nih.gov/books/NBK221231/>.

## **B. Right to have Informed Consent and Right to Access to Health Information**

As in machine learning, where the medical information is used to train and develop algorithms, a question of informed consent raises. Many patients though do not oppose using their data to advance health care delivery and research, but they should be asked to for prior permission before using those. Furthermore, even if consent is taken from the patients for using their sensitive health data for their treatment, it raises serious challenges in the prospective use. It would not amount to a truly informed consent, if patients are requested to sign up an extensive terms and conditions form before each episode of treatment or to approve the future uses of their personal medical information of which they are not at all “informed.”

If the patients are not capable to participate in the decision-making processes relating to his or her health information, the hospital or doctors could misuse the consent given by the patients. This issue was particularly recognized by the Supreme Court in *Samira Kohli v. Dr. Prabha Manchanda*, where it observed that a huge number of patients in India fall under the BPL category who do have access to prepared medical care, and thus having no choice except to avail the accessible treatment without query.

In India, the large population is uninformed about the processing of their health information. Poverty, illiteracy, poor accessibilities to the health services, lack of infrastructure, etc. created the digital divide among the citizens in the new media world. Unawareness and uninformed consent does not let the individual to act autonomously. It also affects the psychological well-being of the individual. The overall effect of the unawareness and uninformed consent would defect the public functions of the health services in India. According to the PwC Health Research Institute Analysis (2018), only 55% of healthcare providers said they implemented security controls, while 37% didn't even think to perform a risk assessment on their medical devices.<sup>54</sup>

Right to access the health data empowers the data subject to participate in the respective decision-making processes. It allows the individual to correct

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<sup>54</sup> PwC Health Research Institute, *Global Top Health Industry Issues: Defining the Healthcare Of The Future*, PwC, (May 13, 2021, 10:32 AM), <https://www.pwc.com/gx/en/healthcare/pdf/global-top-health-industry-issues-2018-pwc.pdf>.

and update his or her health information. Automatic processing of incomplete or wrong information may subject the concerned individual to mental agony or harassment caused by the police powers of the State. It is arbitrary exercise of powers. For example, quarantine powers, which are police powers of the State during the pandemic period, can be abused due to the incorrect information. Right to update the health information prevents such kind of injustices.

### **C. Reasonable Expectation of Privacy**

An individual has reasonable expectation of privacy in his or her health information given either to public or private entity. The individual does not want that his or her health information should be subjected to public humiliation or harassment. If the health data controllers fail to protect the confidentiality of an individual's information, it causes his or her both material and non-material loss, which include emotional and psychological distress.

### **D. Conflict between the Laws**

There are certain laws like the Aadhar Act, 2017 which provides for the mandatory biometric data of the individuals to create the unique identification number of each individual. This very Aadhar card is the being made the license to various basic facilities to citizens, as the Public Distribution system, opening of bank account, etc. India's "Aadhaar" system with a centralized database, aims to deliver services by reducing frauds and increasing competences.<sup>55</sup> In one hand, the legislature through such law is authorizing the government to ask for the biometric data of the individual, where individual has no other option than to surrender to such rules to access the basic facilities. Whereas, on the other hand it has made laws and rules (IT Rules, EHR Standards) which provides that the individual can only be the owner of his data and without his consent no personal data can be shared with third party. So, the former and the latter rules create a deadlock. The beneficiaries of the latter rules are made obligatory by the former rule to provide their personal data. Moreover, the Aadhaar system also signifies

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<sup>55</sup> Pam Dixon, A Failure to "Do No Harm" -- India's Aadhaar biometric ID program and its inability to protect privacy in relation to measures in Europe and the U.S., (May. 12, 2021, 04:54 PM) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5741784/>.

extensive digital biometric identity structure organized during its initial years without direct legislative privacy, or ethical limits.<sup>56</sup>

## **VI. Conclusion and Way Forward**

The issue that relates AI and data protection, particularly in healthcare sector is a key problem that needs to be addressed. It is expected that within 5 years AI is to overtake the human intelligence.<sup>57</sup> So there is an urgent need to enact laws to regulate its functioning. Express statutes are not exhaustive in nature and though seek to provide for data protection, its implementation have to be ensured. In order to cope up with the problems created due to AI, the jurisprudential concept of right to privacy would always be helpful. Issues which are not yet explored can be answered with the functions of right to privacy. Right to refuse medical treatment, right to be notified about the privacy violations, right to compensation, etc. are part of right to privacy.

Right to privacy is enforceable against the private actors as well. As discussed above, healthcare service providers using artificial intelligence has the potential to affect the individuals' right to privacy. Also, the passage of the PDP Bill, 2018 can be considered as a desirable step in this regard which would exhaustively deals with data protection and categorize health data as sensitive personal data and processing of it is subject only to certain grounds such as, explicit consent, or in compliance with law or order of the court, or for certain function of the state, or for any prompt action. However, it is suggested that the DPA set by the PDP Bill must be an independent authority to effectively ensure the goal of data protection. These provisions are certainly for the improvement of delivery of healthcare, though its efficacy is yet to be perceived.

### **a. Proportionate use of Preventive System by State, Due Process and Democratization of Health Data**

In case where an individual's health information is identifiable and subject to the police powers of the State, both ex-ante and ex-post judicial review should be

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<sup>56</sup> *Ib.*

<sup>57</sup> Elon Musk Thinks that Artificial Intelligence Will Be 'Vastly Smarter' Than Humans in 5 Years, News 18, (May. 20, 2021, 04:54 PM) <https://www.news18.com/news/buzz/elon-musk-thinks-that-artificial-intelligence-will-be-vastly-smarter-than-humans-in-5-years-741359.html#:~:text=Tesla%20and%20SpaceX%20CEO%20Elon,would%20overtake%20us%20by%202025.&text=He%20even%20described%20AI%20as,very%20careful%20about%20artificial%20intelligence.>

applied, which is a part of the quality rule of law. It limits the clandestine powers of the executive to access the health data by the use of the means of artificial intelligence.

Preventive justice as discussed above cannot be applied in isolation. It is also bound to follow the just, fair, and reasonable due process of law as is read into Article 21 of our constitution. Reviewing bodies that monitor preventive powers of the State should be independent in nature, and the victims of the unconstitutional uses of the health data must be notified about their right to remedy and compensation by the oversight body.

The current unprecedented capabilities of the artificial intelligence in health care services, which enable the government and non-government bodies to conduct mass surveillance over the health status of the whole population, are needed to be regulated by the constitutional democracy. Democratization of the Big Health Data may serve the purpose which entails participation of the people. It ensures a world where patients will be armed with data, technological skills, and access to expertise knowledge. Therefore, they can take charge of their own well-being and be able to manage their own health. Democratization can also be assured by the enablement of the AI-based technologies like the wearable devices (fitness bands), glucometer (accu-check). In this respect it should also be remembered that, the laws and policies in relation to the Big Health Data cannot be passed hurriedly and without debates and discussions. Inclusive democracy decides the requirement, extent and scope of the collection of health data for constitutional purposes. Also, bypassing the standards of inclusiveness is an excessive delegation of the legislative powers of the Parliament.

Health data should be protected against all sorts of unauthorized accesses. For the purposes of providing security, it is necessary to conduct risk or impact assessments of the collection and processing of the health data. Adequate safeguards, including administrative, physical, and technical, should protect the confidentiality and integrity of the health information system. Anonymity of the health data prevents the abuse of the vulnerable identities. It removes the personally identifiable information from the health data, and makes the information anonymous. Further, collection of identifiable information should be minimum and compatible with the purpose. Even the de-identified information should be regulated. For the artificial intelligence technology is smart enough to make it personally identifiable. Once the purpose of collection and processing is achieved, the retention of the health data becomes unjustified and unreasonable. The data controllers cannot retain it without explicit consent of the data subject.

The data subjects have right to erase their health data. Recently, the Delhi High Court recognized the right to be forgotten in an interim order and directed Google and Indian Kanoon to take down a judgment relating to an American citizen of Indian origin.<sup>58</sup> So this right to be forgotten/right to erasure can also be exercised for the protection of the personal health data carrying varying identifying characteristics of the individual.

Moreover, the recent Consumer Protection Act has also tried its best to secure the interest of the consumers i.e., the individuals relating to their personal data, but how far it will be implemented is a big question. As many of the consumer are unaware as to how and where their data are used by the data fiduciaries. So firstly, the individual consumers or the patients should be made mindful about their rights and possibility of data breach by the data fiduciaries, so that they remain alert and active enough to enforce their rights.

It is high time that the judicial system needs to adopt a standard for AI and develop the jurisprudence in this regard, where the manufacturers and developers agree to abide by general ethical guidelines, such as by way of adopting a mechanical standard enshrined in any international instrument. And this standard may be applied when there are chances of foreseeability that the data and algorithms can cause substantial injury and damage to the interest of the consumer or the customer on whom is it applied. Weak regulation and enforcement structure will certainly create low right environment. There is also a need to bring forth transparency or accountability in the operation of AI.

Without access to justice, right to remedy and compensation is ineffectual. Therefore, it is necessary that the victim of the unlawful processing of the health data should have access to an independent tribunal or court. The victim should be remedied for all damages This tribunal or court must have sufficient powers to redress the grievances.

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<sup>58</sup> Apoorva Mandhani, Do you have a 'right to be forgotten'? Here's what it means and how Indian courts view it, The Print, (May 14, 2021, 09:50 AM) <https://theprint.in/judiciary/do-you-have-a-right-to-be-forgotten-heres-what-it-means-and-how-indian-courts-view-it/666226/>.

## Protection against Self-Incrimination – Principles and Practice - A Comparative Analysis

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### Abstract

*Application of the rule against self-incrimination is one of the important rights recognized under Article 20(3) in Part III of the Constitution of India. The Supreme Court of India applied this principle in its full force and effect in M.P. Sharma v Satish Chandra.<sup>3</sup> However, in some of the later judgments, application of this protection was diluted. The rationale of the judgments for not recognizing this constitutional protection in the later judgments is not convincing. Such a rationale is also contradictory to the principles enunciated by the Supreme Court in other judgments dealing with the rights and liberties of an individual. In United Kingdom, despite the strong demand for dilution or abandoning this protection, the courts have consistently upheld this protection. In United States of America also, this protection is recognized as one of the fine principle developed by the civilized society. Compelling an individual to be a witness against himself demean the dignity of the individual and such compulsion and reliance on it by the courts would have the effect of dispensing with the proof otherwise required for determining the guilt of an accused. In some of the later cases, the Supreme Court of India has recognized the importance of this protection and applied it. Tracing the history of this protection and its application in United Kingdom and United States America would help understanding the underlying principles for this protection. Comparison of the Indian experience with other jurisdiction would provide an opportunity for introspection and consider remedial measures.*

**Keywords:** *self-incrimination, article 20(3), Constitution of India, Fifth Amendment, star chambers, ex-officio oaths, Miranda, Lilburn.*

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<sup>3</sup> AIR 1954 SC 300 (India).

## I. Introduction

The rule against self-incrimination is one of the most discussed topics encompassing criminal law and constitutional law. One could not help but wonder about the reason for this simple principle generating so much discussion among judges and scholars. The division among supporters of this principle and its opponents is sharp. The supporters of this principle hail it as one of the finest developments of the civilized society and the opponents dub it as a historical relic impeding the administration of justice.<sup>4</sup> From being a Common Law principle evolved by the English Courts to protect its citizens from *ex-officio* oaths administered by the ecclesiastical courts, this protection has been elevated and recognized as a constitutional right in the United States of America and India. The reason for development of this protection and the importance given to this right in the Constitutional documents of two of the biggest democracies in the free world have not dissuaded its opponents from asking for its abandonment.<sup>5</sup> In its celebrated judgment in *Miranda v Arizona*,<sup>6</sup> a sharply divided the United States Supreme Court, passionately arguing for and against this principle, has severely restricted the right of the law enforcement authorities to extract inculpatory statements. In *M.P. Sharma v. Satish Chandra*,<sup>7</sup> the Supreme Court

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<sup>4</sup> In several judgments, the United States Supreme Court has emphasized the importance of the privilege against self-incrimination. After discussing earlier judgments, the United States Supreme Court held that the privilege of self-incrimination "*reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.*" *Murphy v Waterfront Comm'n*, 378 U.S. 52 (1964). The United States Supreme Court rejected the contention that this privilege should be treated as a relic and observed that protection against self-incrimination is a "*privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions.*" *Quinn v United States*, 349 U.S. 155, 162 (1955). The Australian High Court also expressed a similar view in *Hugh Nairn Reid v Stanley Joseph Howard* [1955] HCA 40 (Austl.).

<sup>5</sup> "the roster of scholars and judges with reservations about expanding the Fifth Amendment privilege reads like an honor roll of the legal profession" *Lakeside v Oregon*, 435 U.S. 333 (1978). See also David Dolinko, *Is There a Rationale for the Privilege against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986).

<sup>6</sup> 384 U.S. 436 (1966).

<sup>7</sup> AIR 1954 SC 300 (India). See also *Nandini Sathpathy v. P.L.Dani*, 1978 (2) SCC 424 (India).

of India has held that this protection is also available during the pre-trial investigation process. However, in some later judgments, this protection against self-incrimination is diluted despite it being recognized as a fundamental right independently, and also as part of Article 21 of the Constitution of India.<sup>8</sup> The judgments and discussions on this subject show various parameters basis which the privilege can be denied. The courts have generally allowed the application of this privilege in criminal proceedings and denied its application in quasi-judicial and departmental proceedings. This article discusses the principle of protection against self-incrimination and its practice in the United States of America, United Kingdom and India.

## II. Origin of the Privilege Against Self-incrimination

The privilege against self-incrimination plays a major role in differentiating between the accusatory and inquisitorial criminal system.<sup>9</sup> This privilege is expressed by the Latin maxim *nemo tenetur prodere seipsum*.<sup>10</sup> Under Common Law, the accused was not competent to give evidence for the prosecution.<sup>11</sup> Later, this changed, and an accused could elect to waive this right and choose to give evidence.<sup>12</sup> It is generally accepted that the practice adopted by the Star

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<sup>8</sup> INDIA. CONST. art. 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

<sup>9</sup> The difference between these systems is explained by Frankfurter, J., as follows "Ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by its own coercion prove its charge against an accused out of his own mouth." *Rogers v Richmond*, 365 U.S. 534 (1961).

<sup>10</sup> No man is bound to accuse himself.

<sup>11</sup> Richard Glover, *Murphy On Evidence*, 558 (13<sup>th</sup> ed. 2013). The purpose of this protection is to avoid any adverse inference being drawn by his refusal to give evidence.

<sup>12</sup> [In terms of the Criminal Evidence Act, 1898 61 & 62 VICT. CH. 36 (Gr. Brit), the accused is competent to give evidence. Though the accused is now competent to give evidence, the Common Law rule that the accused is not a competent witness for the prosecution still continues. *Id.* Section 19(b) of the Criminal Evidence Act, 1898 61 & 62 VICT. CH. 36 (Gr. Brit) provided that the prosecution was not permitted to comment on the failure of the accused to give evidence. Section 19(1)(b) has been repealed by the Criminal Justice and Public Order Act, 1994(Gr. Brit). In the United States, many States had provisions that permitted the prosecution to make a comment. In 1965, the United States Supreme Court held that "comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice"" and further held that "It is a penalty imposed by courts for

Chambers in examining the accused after administering oath led to the development of the privilege against self-incrimination.<sup>13</sup> The oaths administered by the Star Chambers resulted in “cruel trilemma” of (a) refusing to take oath, which would amount to contempt; (b) taking the oath and telling the truth and if it was found to be heretical, face death penalty or (c) taking the oath and telling a lie which was punishable with death, to the people who were administered with the oath.<sup>14</sup> These proceedings were increasingly challenged before the Common Law courts which issued writs of Prohibition and Habeas Corpus to the Star Chamber from proceeding on the basis of the *ex-officio oaths*. Finally, the Parliament intervened and the Star Chamber was abolished and the practice of administering *ex-officio oaths* was abandoned.<sup>15</sup> The rule against self-incrimination is part of the Common Law.<sup>16</sup> Though it is considered as one of the important milestones in the recognition of the rights of the individual, the recent trend shows the tendency of the United Kingdom Parliament to restrict this rule by limiting its application to some areas. In the United States, till the Fifth Amendment, the rule against self-incrimination was originally administered based on Common Law principles. The Fifth Amendment elevated the status of rule-against self-incrimination from a Common Law doctrine to a constitutional protection, thus keeping it away from the reach of the legislature and the executive. The importance of this rule is aptly stated by the United States Supreme Court in *Brown v Walker*<sup>17</sup> as “So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused

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*exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.*” *Griffin v California*, 380 U.S. 609 (1965).

<sup>13</sup> Richard. H. Helmbolz, *Origins of the Privilege against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. Rev. 962 (1990).

<sup>14</sup> Steven M. Salky, *The Privilege of Silence: Fifth Amendment Protections Against Self-incrimination*, (2<sup>nd</sup> ed. 2009). See also *Murphy*, note 21.

<sup>15</sup> Helmbolz., *supra* note 10, at 966.

<sup>16</sup> “a defendant’s fault was not to be wrung out of himself, but rather to be discovered by other means and other men.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*293 The privilege against self-incrimination is “a basic and substantive common law right, and not just a rule of evidence”, *Reid v Howard*, [1995] HCA 40 (Austl).

<sup>17</sup> 161 U.S. 591, 597 (1896).

person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.” Levy describes this privilege as, “*In the broadest sense it was a protection not of the guilty, or of the innocent, but of freedom of expression, of political liberty, of the right to worship as one pleased.*”<sup>18</sup> After India obtained independence, the framers of the Constitution had the benefit of considering our own country’s suffering under the foreign rule in addition to the experiences in England and America. The application of the principles of Common Law, and certain statutory provisions in the extant Indian Evidence Act and the Code of Criminal Procedure, were found not sufficient to protect the freedom earned. The framers also had the advantage of considering the Fifth Amendment in America. They embodied this protection in Part III of the Constitution of India under ‘Fundamental Rights’. Certain fundamental rights listed in Article 19 of the Constitution of India are subject to restrictions contained in the same Article. However, Article 14 (right to equality), Article 20 (double jeopardy, self-incrimination) and Article 21 (personal liberty) are kept away from any form of restriction by any organ of the State, clearly signifying the importance attached to these rights.

### III. Position in America

The Common Law principles apply in United States of America. The courts in the United States of America originally applied the rule against self-incrimination as a Common Law principle. Subsequently, protection against self-incrimination was guaranteed under the Fifth Amendment. While implementing this protection, the courts are often confronted with two conflicting objectives viz., the protection of individual rights and the perceived social benefits. The issue of jurisdiction of the law enforcing authorities in the States and the Federal Government added complexity to this issue.<sup>19</sup> Frankfurter’s proclamation that

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<sup>18</sup> L. Levy, *Origins of the Fifth Amendment*, 332 (2<sup>nd</sup> ed. 1986).

<sup>19</sup> Originally the United States Supreme Court held that the Fifth Amendment does not protect a witness from testifying in a State prosecution. See e.g., *Brown v Walker*, 161 U.S. 591 (1895). This position was regularly applied for a long period of time. See e.g., *Feldman v U.S.* 322 (1943). In State cases, the courts have applied the due process rule under the Fourteenth Amendment to provide relief to the defendants. See e.g., *Mooney v Hologan*, 294 U.S. 103 (1935). Later, the court held that “*The Fourteenth Amendment*

"ours is an accusatorial, and not an inquisitorial system..."<sup>20</sup> remained, for a long time a desire of the court. Despite all the safeguards in Common Law and the Constitutional protections, a *de facto* inquisitorial system was prevailing,<sup>21</sup> and the courts applied the involuntariness test<sup>22</sup> to determine if the incriminating statement obtained from the defendant was obtained by coercion. The application of the involuntariness test only resulted in judicial approval of the custodial interrogation techniques. The police brutalities to obtain confession forced the court to observe that the transcript of the proceedings show that the treatment meted out to the hapless prisoners "reads more like pages torn from some medieval account than a record made within the confines of a modern civilization".<sup>23</sup> Most of these issues were settled by the United States Supreme Court in *Murphy v Waterfront Commission*.<sup>24</sup> Prior to *Murphy*, in *Ullmann v United States*,<sup>25</sup> the Supreme Court had held that the protection against self-

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secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement -- the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty" *Malloy v Hogan*, 378 U.S. 1 (1964).

<sup>20</sup> *Supra* note 6.

<sup>21</sup>Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later- Some Comments on a Remarkable Article*, 73 Mich. L. Rev. 15, 22. (1974).

<sup>22</sup> Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel*, 66 COLUM L.REV.62, 73 (1966), quoted with approval in *Miranda*, See Kamisar, *id.*, [T]he concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice

<sup>23</sup>*Brown v Mississippi*, 297 U.S. 278 (1936).

<sup>24</sup> 378 U.S. 52 (1964).

<sup>25</sup> 350 U.S. 422 (1955).

This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The Founders of the Nation were not naïve or disregardful of the interest of justice ... They made a judgment, and expressed it in our fundamental law, that it were better for occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enclosed disclosures by the accused. The privilege against self-incrimination serves as a protection to the

incrimination, “registers an important advance in the development of our liberty – one of the great landmarks in man’s struggle to make himself civilized.” In *Quinn v United States*,<sup>26</sup> the court explained that this rule shows “our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection of the innocent.” In *Murphy*, the petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission concerning a stoppage of work. The petitioners contended that answering the questions posed to them before the Commission would incriminate them. The petitioners were granted immunity under the state laws. The petitioners still refused contending that the protection does not grant extend to federal prosecution. The petitioners were held for contempt, civil as well as criminal, for their refusal. The New Jersey Supreme Court exonerated the petitioners from the criminal contempt but they were held liable for the civil contempt. The case travelled to the United States Supreme Court.

The contentions made before the United States. Supreme Court in *Murphy* explain the arduous journey of this principle in America. The court was asked to adhere to the established rule – (a) Federal Government could compel a witness to give testimony which might incriminate him under State law<sup>27</sup>; (b) a State could compel a witness to give testimony which might incriminate him under the federal law<sup>28</sup> and (c) a testimony compelled by a State could be introduced into evidence in the federal courts.<sup>29</sup>

Finally, in *Murphy* the court rejected the principles laid out in *United States v Murdock*<sup>30</sup> holding that *Murdock* did not consider the relevant authorities, and *Feldman v United States*<sup>31</sup> and *Knapp v Schweitzer*,<sup>32</sup> have since been rejected in the subsequent judgments. It held that “the constitutional privilege against self-

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innocent as well as to the guilty, and we have been admonished that it should be given the liberal application.

Frankfurter, J., in *Ullman* 426

<sup>26</sup> 349 U.S. 155 (1955).

<sup>27</sup> *United States v Murdock*, 284 U.S. 141 (1933).

<sup>28</sup> *Knapp v Schweitzer*, 357 U.S. 371 (1958).

<sup>29</sup> *Feldman v United States*, 322 U.S. 487 (1944).

<sup>30</sup> See Note 24.

<sup>31</sup> See Note 26.

<sup>32</sup> 357 U.S. 371

*incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.*" The Government cited two English cases<sup>33</sup> to justify the contention that the statements made before the State authorities could be used in Federal proceedings. The court rejected the contentions and held that, "*there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to testimony which could be used to convict him of a crime in another jurisdiction.*"<sup>34</sup> Shortly thereafter, the protection against self-incrimination again considered by the United States Supreme Court in *Miranda*. The majority in *Miranda*, invoked the dictum of Marshall, C.J., in *Cohen v Virginia*<sup>35</sup> that "*No person .... shall be compelled in any criminal case to be a witness against himself*"<sup>36</sup> and certain other rights in the Constitution were protected "*for ages to come, and .... designed to approach immortality as nearly as human institutions can approach it.*"<sup>37</sup> The Majority emphasized that they were not making an innovation in American jurisprudence but only applying the long cherished principles. Harlan, J., (with whom Stewart and White, JJ joined) in the Minority strongly disagreed with this view and held that the Majority opinion "*reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station.*" Harlan, J., also held that "*Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved*" and quoted Wigmore<sup>38</sup> that "*the history of the two principles is wide apart, differing by one hundred years in origin, and delivered through separate lines of precedents....*"<sup>39</sup> The opinion of the minority

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<sup>33</sup> *East India Co. v. Campbell*, 1 Ves.Sen. 246, 27 Eng.Rep.2010 and *King of the Two Sicilies v. Wilcox*, 1 Sim (N.S.) 301, 61 Eng.Rep.116. In these cases, the issue involved was whether the privilege against self-incrimination is available if the statement made could implicate the defendant in some other jurisdiction. The courts held that even in such cases, the privilege would be available.

<sup>34</sup> *Murphy*, *supra* note 21 at 77.

<sup>35</sup> 19 U.S. (6 Wheat.) 264, 387 (1821).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Wigmore on Evidence, § 2266, at 401 (McNaughton rev.1961).

<sup>39</sup> The minority referred to the exclusionary rule under which the court has the discretion to exclude certain evidence including evidence collected through illegal

underscores the difference between a common law principle that could be varied by the courts or a statutory protection, and a constitutional guarantee which is outside the competence of the legislature.

In *Miranda*, four cases were heard together. (a) In *Miranda v Arizona*<sup>40</sup>, Miranda was arrested, interrogated and a confession was taken from him. He was not advised that he could have his attorney at the time of his questioning. The statement obtained from him stated that it was made voluntarily and without any threat. The trial court convicted him. The Arizona Supreme Court affirmed the conviction. (b) In *Vignera v New York*<sup>41</sup>, Vignera was arrested in connection with a robbery and he orally admitted to the crime. The transcript of the statement did not show any warning was given to him. He was found guilty. (c) In *Westover v United States*<sup>42</sup>, Westover was arrested by the state police in a robbery case. After his arrest, the police were informed that he was wanted by the Federal Bureau of Investigations (FBI) in connection with a criminal case in California. The State police interrogated him first and thereafter the FBI interrogated him. After interrogation by the FBI, Westover signed two confession statements admitting to both the charges. The statements signed by him recorded that he was informed that he did not have to make a statement and he has the right to have an attorney. He was convicted. The court noticed that Westover was in police custody for over 14 hours and endured a lengthy interrogation. (d) In *People v Stewart*<sup>43</sup>, Stewart was arrested by the police from his residence in connection with series of purse snatching incidents. With his permission, the police searched his house and found certain items linked to robbery victims. Stewart, his wife and three persons who were visiting him were arrested. Stewart was interrogated nine times during his five days custody. On the ninth occasion he admitted to the crime. He was produced before the Magistrate. His wife and other arrested persons were released as police did not have any materials to connect them to the offence. There was no evidence that Stewart was advised either of his right to remain silent or his right to have a counsel. The jury found him guilty and the

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means. For application of exclusionary rule in Common Law, see *Noor Mohamed v. R* [1949] AC 182.

<sup>40</sup> *Supra* Note 3.

<sup>41</sup> 384 U.S. 436 (1966).

<sup>42</sup> 342 F.2d 684 (9th Cir. 1965).

<sup>43</sup> 62 Cal. 2d.573.

State Supreme Court reversed the decision. The Majority in *Miranda* held that the statements in all the four cases before it in *Miranda*, were involuntary in traditional terms. It held that the interrogation environment created in these cases was only to subjugate the individual to the will of his examiner.<sup>44</sup> The court opined that the treatment by the police in these cases is destructive of human dignity though there was no evidence of physical intimidation. The court's rejection of the prosecution's contention stems from its observation that the "*practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles – that the individual may not be compelled to incriminate himself.*"<sup>45</sup> Some of the observations of the Majority viz., "*We sometimes forget how long it has taken to establish the privilege against self-incrimination, the source from which it came, and the fervor with which it was defended...*"<sup>46</sup> show the importance the court has attached to the dignity of the individual. The court held that an individual "*swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion ... cannot be otherwise than under compulsion to speak.*"<sup>47</sup> It also held that the Fifth Amendment privilege is available not only in criminal court proceedings but also in all settings in which the freedom of action of persons is curtailed in any significant way.

The court also rejected the contention that distinction should be made between inculpatory statements and exculpatory statements.<sup>48</sup> Most importantly, the court rejected the contention that the society's need for interrogation outweighs the privilege, though it noted that it was mindful of the burden which the law enforcement officials must bear by reason of its judgment in *Miranda*. The court explained that the Constitution has prescribed that the power of the government is circumscribed by the rights of the individual and no individual can be

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<sup>44</sup> See also *Davis v North Carolina*, 384 U.S. 731 (1966), wherein the court held that confession extracted as a result of the sustained pressure and by breaking the will was not free, and constitutionally inadmissible.

<sup>45</sup> *Miranda*, *supra* note 3 at 457-458.

<sup>46</sup> *Id.* at 458.

<sup>47</sup> *Id.* at 461.

<sup>48</sup> In *Nishi Kant Jha v. State of Bihar*, (1969) 1 SCC 347 (India), the Indian Supreme Court has held that the inculpatory part of the statement could be accepted and the exculpatory part could be rejected. See also *Jethamal Pithaji v. Asst. Collector of Customs*, (1974) 3 SCC 393 (India).

compelled to give evidence against himself; and that such a right cannot be restricted. It laid down the principles to be followed in interrogation. This celebrated judgment is one of the hallmarks of a nation that protects and preserves individual dignity as the court recognizes that “[T]he quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of its criminal law.”<sup>49</sup> After noticing instances of police brutality in the above cases, the Majority was categorical in its conclusion that “[Un]less proper limitation upon custodial interrogation is achieved ..... there can be no assurance that practices of this nature will be eradicated in the foreseeable future.”<sup>50</sup> It quoted the conclusion in Wickersham Commission Report<sup>51</sup> that “[T]o the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): It is not admissible to do a great thing by doing a little wrong ... It is not sufficient to do justice by obtaining a proper result by irregular or improper means.”<sup>52</sup> The Minority in *Miranda* made a scathing attack on the Majority view. The Minority held that the Majority view is not supported by the Constitution and it would result in a dictum that statement, whether compelled or not, from the accused could not be used against him.<sup>53</sup> They also held that the interest of the society is paramount in the allowing the interrogation.<sup>54</sup> The minority view reflects the initial understanding of the American courts that the Fifth Amendment was a reiteration of the safeguards inherited by America from the criminal procedures prevailing in England concerning the evidentiary value of the involuntary confessions. It ignores the purpose of elevating this protection to a constitutional status and the principles governing interpretation of the

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<sup>49</sup>*Miranda* note 3 at 480. The court referred to Schaefer, *Federalism and State Criminal Procedure*, 70 Harv.L.Rev. 1, 26 (1956).

<sup>50</sup>*Miranda*, note 3.

<sup>51</sup> NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (169R), (1931).

<sup>52</sup> *Miranda*, note 3 at 447.

<sup>53</sup> In the context of the minority’s statement that “the Court’s result in that case adds up to a judicial judgment that *evidence from the accused should not be used against him in any way, whether compelled or not*”, it was noted that “*this is as it should be*” by O. John Rogge, *Proof by Confession*, 12 VILL. L. Rev. 1 (1966).

<sup>54</sup> Similar arguments were considered by the Wickersham Commission in its Report, *supra* note 48 at 173.

Constitution.<sup>55</sup> Before *Miranda*, it was thought that the Fifth Amendment did not address the informal, pre-trial pressure that resulted in confessions in the station house.<sup>56</sup> The courts earlier attempted to address police interrogation out of general due process principles. These attempts did not effectively deal with the difficulties faced by the courts and *Miranda* is believed to be the Court's next attempt to remedy difficulties.<sup>57</sup> Later, in *Fisher v United States*,<sup>58</sup> the court held that in order to invoke the protection of the Fifth Amendment, three requisites should be fulfilled. They are (a) compulsion, (b) incrimination and (c) testimony. In *Fisher's* case, the issue was whether the defendant is entitled to invoke privilege in respect of the work papers of the accountant handed over to the attorney of the defendant. The court held that the protection was not available in this case. The court's reasoning was premised on the principle that the compelled production of the documents does not amount to self-incrimination.<sup>59</sup> Though *Miranda* is hailed as an important milestone and helped the spread of awareness concerning self-incrimination, it is also recognised that once the warning is given any statement made by the defendant would be admissible. This brings us to the question of 'waiver' of the privilege.<sup>60</sup> One of the main problems that remains unresolved is the emphasis placed by many courts on the term 'accused' to extend the privilege. Discussions surrounding, and analysis of *Miranda* continues. But,

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<sup>55</sup> See *Hoffman v United States*, 341 U.S. 422 (1956), where the United States Supreme Court held that the Fifth Amendment "be accorded liberal construction in favour of the right it was intended to secure." See also *Ullman*, note 22.

<sup>56</sup> Louis M. Seidman, *Rubashov's Question : Self-Incrimination and the problem of Coerced Preferences*, 2 Yale J.L. & Human. (149) (1990), citing "Development in the Law of Confession", 79 Har. L. Rev. 935, 960-61 (1966).

<sup>57</sup> *Id.* at 163.

<sup>58</sup> 425 U.S. 391 (1976).

<sup>59</sup> This conclusion is contrary to the judgment in *Hoffman v United States*, 341 U.S. 479 (1951) wherein the court held that if the documents sought to provide the missing link in proving the crime, the protection of the Fifth Amendment is available. See Brian M. Lidji, *Fifth Amendment Protection against Self-Incrimination in Tax Records : Fisher v United States*, 30 Sw.L.J.788 (1976).

<sup>60</sup> The *Miranda* warning puts the obligation on police officers to issue the warning and prove that it was issued. This has been commented upon by Chief Judge David L. Bazelon that a system that places reliance on police warning places mouse under the protective custody of the cat.

the fact that *Miranda* is still followed clearly shows that the United States Supreme Court does not accept the Minority view in *Miranda*.

#### IV. Position in United Kingdom

England is the origin of the privilege against self-incrimination. As noted earlier, the protection was necessitated by the *ex-officio* oaths administered by the Star Chamber in England. The English judges issued writs of prohibition and habeas corpus against the Star Chamber and High Commission from proceedings on the basis of the *ex-officio* oath.<sup>61</sup> The contention of John Lilburn when compelled to swear the *ex-officio* oath in the Star Chamber that, “Another fundamental right I then contended for was that no man’s conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so.”<sup>62</sup> explains the spirit with which the people fought for this protection. Finally, the Parliament abolished the Star Chamber in 1640. The earlier judgments in the United Kingdom leave no doubt concerning this protection. In *R v. Purnell*<sup>63</sup> the court held that “We know of no instance wherein this court has granted a rule to inspect the books in a criminal prosecution nakedly considered.” In *Roe v. Harvey*<sup>64</sup> the court took a somewhat similar position and held that “[I]n a criminal or penal cause the defendant is never forced to produce any evidence though he should hold it in his hands in Court.” In administering this principle, the courts were confronted with the issue of whether the refusal to answer a discovery is justifiable on the ground that such discovery would expose the defendant to prosecution in some other jurisdiction. In *East India Co. v. Campbell*,<sup>65</sup> the Court held that “this court shall not oblige one to discover that which, if he answers in the affirmative will subject him to punishment of a crime ...”<sup>66</sup> In *King of Two Sicilies v. Wilcox*, the court refused

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<sup>61</sup> Helmbolz, *supra* note 10, citing L. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (2<sup>nd</sup> ed. 1986).

<sup>62</sup> The Trial of John Lilburn and John Wharton. 3 How.St.Tr.1315 (1637), as cited in *Miranda*, note [3] at [460].

<sup>63</sup> 1 WB 137, as cited in *Shyamlal Mohanlal*, note 94.

<sup>64</sup> 4 Burr 2494, as cited in *Shyamlal Mohanlal*, note 94.

<sup>65</sup> 27 E.R.1010.

<sup>66</sup> *Murphy* note 21. This case was followed in *United States v Saline Bank of Virginia*, 1 Pet 100 as cited in *Murphy*.

the protection.<sup>67</sup> In *United States of America v McRae*,<sup>68</sup> the Lord Chancellor distinguished *Two Sicilies* and held that *Two Sicilies* went beyond the scope of the case and laid down a broad proposition without any necessity. Finally, the Lord Chancellor held that the "*The United States coming into our Courts must be subject to every rule of evidence which prevails in them, and, amongst others, to that which protects a witness from exposing himself to penalties by his answer.*" The court rejected the contention of the prosecution that the protection is available only where a person might expose himself to penal proceedings in England and it cannot be extended to cases where the penalty or forfeiture is in breach of laws of another country. In *Redfern v. Redfern*,<sup>69</sup> the Court held that a spouse cannot be compelled to answer the interrogatories if the answers would implicate the witness for adultery. In *Blunt v. Park Lane Hotel*,<sup>70</sup> the Court of Appeal rejected the protection when the interrogatories were made to establish justification in an action for slander. In *Blunt*, the court held that "[T]he rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for."<sup>71</sup> In *Blunt*, the court followed the principle laid down in *Lamb v Munster*<sup>72</sup> that "*The words "criminate, himself" may have several meanings, but my interpretation of them is "may tend to bring him into the peril and possibility of being convicted as a criminal."* The current tendency of the Parliament in United Kingdom is to limit this protection against self-incrimination. Section 72 of the Senior Courts Act, 1981 excludes the privilege against self-incrimination in relation to proceedings for infringement of rights pertaining to any intellectual property or for passing of. This restriction was challenged in *Stephen John Coogan v. News Group Newspapers Limited*.<sup>73</sup> Prior to *Coogan*, the courts had requested the Parliament to consider removing the privilege against self-incrimination in relation to all civil claims. In *Coogan*, this

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<sup>67</sup> Cited and followed in *Murdock*, Note 24 as stating the legal position in England. *Murphy* Note 21, clarified this position later and *Murdock* was overruled.

<sup>68</sup> L.R., 3 Ch.App. 79.

<sup>69</sup> [1891] K.B P.139.

<sup>70</sup> [1942] 2 K.B. 253.

<sup>71</sup> *Id.*

<sup>72</sup> (1882) 10 Q. B. D. 110.

<sup>73</sup> [2012] EWCA (Civ) 48 [Eng].

request was repeated. The court rejected the plea for extending the privilege and also rejected the argument that Section 72 contravenes Article 6 of the European Convention on Human Rights holding that Article 6 could be invoked only if any criminal action is brought based on the information furnished. In a number of enactments, the Parliament has cut down the protection against self-incrimination.<sup>74</sup> The reluctance of the courts in rejecting this principle completely is evidenced by the words of Lord Denning, M.R. who has held that it can be invoked in case of “*a real and appreciable risk as distinct from a remote or insubstantial risk.*”<sup>75</sup>

### V. Legal Framework and Position in India

The Common Law rule against self-incrimination was incorporated in some of the pre-independence laws. Section 25 of the Indian Evidence Act, 1872 (Act No. 1 of 1872) (hereinafter referred to as Evidence Act) makes a cryptic and categorical statement that “*No confession made to a police officer shall be proved against a person accused of an offence.*”<sup>76</sup> Section 27 of the Evidence Act prescribes the extent to which the statement made by a person while in police custody may be proved.<sup>77</sup> Section 161 of the Code of Criminal Procedure, 1973

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<sup>74</sup> *Id.* at para 16. See also Criminal Justice and Public Order Act, 1994 and sub-section 2A to Section 34 introduced in 1999.

<sup>75</sup> *Rio Tinto Zinc Ltd v. Westinghouse Electric Co.*, [1978] AC 547 [HL] 574. The court has not considered what would happen if the risk materialized.

<sup>76</sup> Because of the prohibition contained in Section 25 of the Evidence Act, the cases in India do not arise out of the confessions made to the police. However, since Section 27 permits admissibility of the evidence recovered based on the statement made to the police while in custody, the rigour of Section 25 is diluted. The Supreme Court of India has held that any discovery made in pursuance of statements made while in custody is admissible. See *Navaneethakrishnan v. State*, AIR 2018 SC 2027 (India) and *Selvi v. State of Karnataka*, (2010) 7 SCC 263 (India). See also *Kathi Kalu Oghad*, *infra* note 89, para 13. A clear distinction in this regard has been brought out by the Canadian Supreme Court in *The Queen v John Wray*, [1971] S.C.R. 272, where a murder weapon was recovered based on the statement made by the accused. In his dissenting judgment, Cartwright, C.J., had stated that the fact that the weapon was recovered pursuant to the statement made by him is admissible and not the statement that he had thrown it there.

<sup>77</sup> “*That part of the information given by a person whilst in police custody whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.*” *State of U.P. v Deoman Upadhyaya*, (1961) 1 SCR 14 (India).

(Act No. 2 of 1974) hereinafter referred to as Cr.P.C) stipulates that the person examined by the police officers shall be bound to answer all questions ‘other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture’.<sup>78</sup> Section 162 of the Cr.P.C mandates that no statement made to the police officer, if reduced into writing, be signed by the person making the statement.<sup>79</sup> Section 163 of the Cr.P.C prohibits the police officer from making any inducement, threat or promise. Section 165 of the Cr.P.C deals with the procedure to be followed by the Magistrate for recording confessions. Section 132 of the Evidence Act provides that a witness is not excused from answering a question on the ground that the answer would incriminate him. However, the proviso to Section 132 grants immunity to such a witness by declaring that “*no such answer given by the witness shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding*”.<sup>80</sup> Section 4(2) of the Oaths Act, 1969 (Act No. 44 of 1969) prohibits

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The Supreme Court has held that if a self-incriminating statement is given by an accused whilst in police custody, such a statement cannot be proved by using Section 27. These observations are similar to the observations of the Canadian Supreme Court in *John Wray*. Though the Majority rejected the challenge to Section 27 on the basis of Article 14 of the Constitution of India, Subba Rao, J wrote a strong dissenting judgment holding that Section 27 offends Article 14. *Kathi Kalu Oghad* also observed that the information and discovery made as a result of such information may be proved under Section 27 even if such evidence may incriminate the person who made the statement. See also note 73.

<sup>78</sup> Section 161 in the Code of Criminal Procedure, 1898 is the corresponding provision in the previous Act. The Supreme Court held that the scope of the words ‘expose him to a criminal charge’ cover “*not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges.*” *Nandini Satpathy*, note 87.

<sup>79</sup> For a discussion on Section 162 See *Tahsildar Singh v State of U.P.*, 1959 Supp (2) SCR 875 (India).

<sup>80</sup> See *R. Dineshkumar v. State*, (2015) 7 SCC 497 (India) at 523. The court held that no prosecution can be launched against the maker of a statement falling within the sweep of Section 132 of the Evidence Act on the basis of the “answer” given by a person while deposing as a “witness” before a Court. The court approved the view expressed by the dissenting judges in *R v. Gopal Doss*, ILR (1881) 3 Mad 271 (India) in which the court explained the scope of compulsion under Section 132 as:

“Section 132 abolishes the law of privilege and creates an obligation in a witness to answer every question material to the issue, whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that the answer shall not be admitted in evidence against him in a criminal prosecution”.

administering oaths to an accused person unless he is examined as a witness for the defence.<sup>81</sup> The protection against self-incrimination has been incorporated as a fundamental right under Article 20(3) of the Constitution of India.<sup>82</sup> In addition to being an independent right, the protection against self-incrimination is also recognised as part of the right of 'personal liberty' under Article 21.<sup>83</sup> Articles 20 and 21 are given a special status as the right to enforce them cannot be suspended even during an emergency declared under Part XVIII of the

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In dealing with the issue of a co-conspirator who was not arraigned as an accused giving the evidence and its admissibility, the court held that:

"In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. The protection is further fortified by Art. 20(3) which says 'that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answer questions from the witness box waives the privilege which is against being compelled to be a witness against himself, because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself."

Lakshmi Pat Chordia v. State of Maharashtra, AIR 1968 SC 938 (India).

<sup>81</sup> In Lakshmi Pat Chordia v. Jagjit Singh, AIR 1968 SC 938 (India), the Supreme Court rejected the contention that the evidence of the co-conspirator is not admissible without first granting pardon under Section 306 of Cr.P.C as it violates Article 20(3) and the administration of oath is also prohibited under the Oaths Act, 1969. The court held that the witness was not an accused in the case and Section 132 of the Evidence Act provides sufficient safeguard. In State (Delhi Administration) v. Jagjit Singh, AIR 1989 SC 598 (India) the court rejected the contention that an accused who was granted pardon could claim that he had rejected the pardon and he could resist the claim of the prosecution to examine him as a witness.

<sup>82</sup> INDIA. CONST. art. 20, cl. 3 states that "*No person accused of any offence shall be compelled to be a witness against himself*".

<sup>83</sup> Kartar Singh v. State of Punjab, (1994) 3 SCC 569 (India). The Supreme Court noted that Articles 20 and 21 of the Constitution of India are non-derogable within Part III. See also Selvi v. State of Karnataka, (2010) 7 SCC 263 (India). Some of the earlier judgments of the Supreme Court took the view that the right to privacy is not guaranteed under the Constitution. See Kharak Singh v State of U.P., AIR 1963 SC 1295 (India) dealing with police surveillance and *M.P. Sharma*, while dealing with the implication of Article 20(3) of the Constitution of India on search and seizure. In *K.S. Puttaswamy v Union of India*, (2017) 10 SCC 1 (India), a Constitution Bench has overruled the observations in *M.P. Sharma* and *Kharak Singh* that the right to privacy cannot be read into Article 20(3) and that the Constitution of India does not contain a provision to protect privacy.

Constitution.<sup>84</sup> The term "offence" is defined under the General Clauses Act, 1897 to mean "*any act or omission made punishable by any law for the time being in force.*"<sup>85</sup> The cumulative effect of all these provisions could be summarised as thus: any statement made to the police officer is not admissible in evidence; a police officer should not make any threat or inducement to extract any statement; confessions made to the Magistrate is admissible in evidence provided the procedure prescribed under Cr.P.C are followed to record such confession; no evidence given by a person can be used against him for arrest, prosecution or proved against him in criminal proceedings; no person accused of any offence shall be compelled to be a witness against himself - this is a non-derogable fundamental right guaranteed under the Constitution and the term "offence" means any act or omission punishable under the law. However, the effect of this protective umbrella has been subjected to various interpretations depending on factors such as whether the person is accused of an offence; whether the proceedings are criminal in nature; presence of compulsion; providing evidence against himself and statements made in pre-trial investigation.<sup>86</sup> Some of these aspects are discussed in the succeeding paragraphs.

## V. Judicial Response for Self-Incrimination

The scope of the protection afforded under Article 20(3) came up for consideration before the courts in several circumstances. In *M.P. Sharma*<sup>87</sup> the court refused to provide a restricted interpretation of the phrase 'to be a witness' used in Article 20(3) holding that it covers 'testimonial compulsions' also. The court rejected the contention that the protection is available only against 'appear

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<sup>84</sup> See INDIA. CONST. art. 359, amended by the Constitution (Forty-fourth Amendment) Act, 1978.

<sup>85</sup>Section 3(38) of the General Clauses Act, 1897 Act No. 10 of 1897) (India)

<sup>86</sup> In *Kathi Kalu Oghad*, the Union of India submitted that four conditions must be met in order for a person to avail the protection of Article 20(3): (a) he must be an accused; (b) he must have been compelled; (c) the compulsion must be to be a witness and (d) against himself.

<sup>87</sup> Note 4.

as a witness'.<sup>88</sup> Earlier, in *Mohammed Dastagir v. State of Madras*<sup>89</sup> the court refused the application of Article 20(3) of the Constitution of India holding that Dastagir was not accused of an offence and the Deputy Superintendent of Police who asked him to produce the money, which was allegedly offered as bribe, was not investigating the case. However, later, in *Nandini Satpathy v P.L. Dani*,<sup>90</sup> the court rejected the contention that the protection under Article 20(3) commences only in court, and held that the prohibitive sweep of Article 20(3) goes back to the stage of police interrogation. Article 20(3) of the Constitution of India and Section 161 of Cr.P.C are held to be applicable at anterior stages also i.e., before the case comes to the court.<sup>91</sup> The correctness of the propositions laid down by the court in *M.P. Sharma* came up for consideration for a larger Bench of 11 judges in *State of Bombay v. Kathi Kalu Oghad*.<sup>92</sup> The issue involved in the case was whether compelling the accused person to give specimen handwriting or signature; or impression of his fingers etc., would result in violation of Article

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<sup>88</sup> The issue involved in *M. P. Sharma* was whether the search and seizure of documents from an accused would violate Article 20(3). As noted by the larger Bench in *Kathi Kalu Oghad*, note 89, the court in *M. P. Sharma* had covered a much wider field. This leads to a question as to whether the view expressed in *M.P. Sharma* as well as *Kathi Kalu Oghad* which are not relating to the issue before the court could be treated as *obiter*, but for INDIA. CONST. art. 142.

<sup>89</sup> AIR 1960 SC 756 (India). The facts of this case show that there was no warning given to Dastagir that he was not required to produce any evidence and the limits on authority of the Deputy Superintendent of Police to demand Dastagir to produce evidence. The court has not considered the implied compulsion when a police officer was asking for production of documents. These circumstances justify application of the warnings directed by the United States Supreme Court in *Miranda*, note 3.

<sup>90</sup> 1978 (2) SCC 424 (India). The court held that the rule against self-incrimination and the right to remain silent, goes beyond that case and protects the accused in regard to other offences, pending or imminent. This proposition casts a shadow on the use of Section 132 of the Evidence Act.

<sup>91</sup> *Agnoo Nagesia v. State of Bihar*, (1966) 1 SCR 134 (India); *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600 (India). See also *Nandini Satpathy*, note 87.

<sup>92</sup> AIR 1961 SC 1808 (India). The Majority held that *M. P. Sharma* did not state anything contrary to what was decided in *Mohammad Dastagir*. For an interesting analysis of the judgment in this case and the history of this subject, see Abhinav Sekhri, *The right against self-incrimination in India: the compelling case of Kathi Kalu Oghad*, *Indian Law Review*, DOI: 10.1080/24730580.2019.1646963 (2019). For a critique on this judgment, see Shivani Mittal, *The Right Against Self-Incrimination and State of Bombay v. Kathi Kalu Oghad: A Critique*, 2(1) NLUJ Law Review 75 (2013).

20(3). The majority concluded that it would not and the minority agreed with that conclusion.<sup>93</sup> The majority had stated that the mere fact that the accused was in custody at the time of making the statement or that such a statement was made while the police officer was questioning is not sufficient to hold that such a statement was extracted by compulsion.<sup>94</sup> The majority also held that in order to bring the statement under the protection of Article 20(3), the person who made the statement should be an accused at the time of making the statement and it is not enough if he became an accused after the statement has been made.<sup>95</sup> The majority also held that "to be a witness" means imparting knowledge in respect of the relevant facts by an oral or written statement. The minority disagreed with the conclusion of the majority concerning the meaning of "to be a witness". A search warrant issued against the accused person was held to be hit by Article 20(3) but a general search warrant is not prohibited under Article 20(3).<sup>96</sup> A similar proposition was approved by the court in *State of Gujarat v. Shyamlal Mohanlal Choksi*,<sup>97</sup> wherein the majority held that the power to issue search

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<sup>93</sup> A similar approach has been adopted in *State of U.P. v. Boota Singh*, (1979) 1 SCC 31 (India) and *Sukhvinder Singh v. State of Punjab*, (1994) 5 SCC 152 (India), holding that providing specimen signature was not covered by Article 20(3). However in *Amrit Singh v. State of Punjab*, (2006) 12 SCC 79, the court held that a person could refuse to provide a strand of his hair for analysis.

<sup>94</sup> *Miranda* recognises that duration of custody plays a crucial role in determining the non-voluntariness of the statements made to the police. Another problem in the proposition is the burden of proof in establishing the presence or absence of compulsion. As noticed in *R.K. Dalmia*, note 103, the court puts the burden on the person who made the statement, which is an uphill, if not impossible, task that defeats the purpose of the protection.

<sup>95</sup> But see *Agnoo Nagesia v. State of Bihar*, (1966) 1 SCR 134 (India), the court held that Section 25 of the Evidence Act covers a confession made when the accused was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession.

<sup>96</sup> *M.P. Sharma*, note 4. In *V. S. Kuttan Pillai v. Rama Krishnan*, (1980) 1 SCC 264 (India), it was stated that the passive submission to search cannot be styled as compulsion.

<sup>97</sup> AIR 1965 SC 1251 (India). In this case, the Magistrate refused to issue a warrant. The District Court was of the opinion that following the judgment in *State of Bombay v. Kathi Kalu Oghad*, (1962) 2 SCR 10 (India), the court is entitled to compel production of the documents from the accused if they do not contain any statements based on the personal knowledge of the accused concerned. The High Court held that Section 94 does not apply to the accused.

warrant under Section 94 of the Code of Criminal Procedure, 1898 (hereinafter referred to as Old Cr.P.C.) does not apply against an accused person. J.C. Shah, J. disagreed with the majority. In his dissenting opinion Shah, J. argued that the power to issue the warrant could not be restricted but Article 20(3) would be available to the accused as a defense for not producing the document in response to a summon issued to him. He also argued that the court could not ignore the power to issue warrant as it is in the statute and suggested that any restriction to issue a warrant to an accused could be circumvented by issuing a general search warrant under paragraph 2 of Section 96 of the Old Cr.P.C. With due respect, it is submitted that the minority view did not take into account the effect of Article 13<sup>98</sup> on existing and new laws and the inherent safeguards provided in the Cr.P.C that the powers to issue summons and warrants are circumscribed with the condition that such powers could be exercised if there were 'reasons to believe'.<sup>99</sup> If the court or the officer seeking issuance of the warrant has 'reasons to believe' that some evidence would be available in a place or with a person, it would be difficult to conclude that such belief would not include a suspicion concerning the role of the person in the said offence. Such a belief would trigger the mandate of Article 20(3) as per the principles laid down in *Nandini Satpathi*. Any action circumventing the constitutional protection would render such an action *mala fide* and without authority. Some of the later judgments show that the court has moved away from the position in *Kathi Kalu Oghad* that only an accused person could invoke the protection of Article 20(3) of the Constitution of India. In *Ramanlal Bhogilal Shah v. D. K. Guha*,<sup>100</sup> the court rejected the contention that a petitioner who was not named as an accused was not entitled to the protection under Article 20(3) holding that a general allegation made in the complaint against the 'management and other officers' include the petitioner. The

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<sup>98</sup> INDIA. CONST. art. 13

<sup>99</sup> Section 26 of the Indian Penal Code, 1860 defines "Reason to believe" as "A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise. In *A.S. Krishnan v State of Kerala*, (2004) 11 SCC 576, the court explained that "*Reason to believe*" is another facet of the state of mind. "*Reason to believe*" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "*Reason to believe*" is a higher level of state of mine."

<sup>100</sup> (1973) 1 SCC 696. But see *Balkishan Devidayal v State of Maharastra*, (1980) 4 SCC 600 (India), where the court held that if there was no formal accusation then the protection is not available.

proposition in the earlier judgments that the person invoking the protection should be formally arraigned as an accused has been changed in the subsequent judgments in *Nandini Sathpathy*<sup>101</sup>, *Navjot Sandhu*<sup>102</sup> and *Aloke Nath Dutta*.<sup>103</sup>

Confessions and their retraction, produced conflicting propositions. Confessions are required to be voluntary and any amount of compulsion, pressure or coercion would infringe the right to life under Article 21<sup>104</sup>. Any confession obtained by such methods would also be hit by Article 20(3). In *Kalawati v. State of Himachal Pradesh*,<sup>105</sup> the court held that a retracted confession would not be hit by Article 20(3) and it may have an impact on its probative value. The court based its decision on the premise that all confessions are required to be voluntary and once a person has chosen to exercise his right to make a confession before the Magistrate, it cannot be assumed that it was a product of a compulsion or threat. However, in some cases, the courts have put the burden to prove that the confession was extracted by coercion on the person who made the confession. In *R.K. Dalmia v. Delhi Admn.*,<sup>106</sup> the court held that the statement was made voluntarily under the Insurance Act<sup>107</sup> and there was nothing to suggest that there

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<sup>101</sup> Note 87.

<sup>102</sup> Note 88.

<sup>103</sup> *Aloke Nath Dutta v. State of West Bengal*, (2007) 12 SCC 230 (India).

<sup>104</sup> INDIA. CONST. art. 21. In *Puttaswamy*, the Supreme Court overruled the observations in *M.P. Sharma and Kharak Singh v State of U.P.*, (1964) 1 SCR 332 (India) that the right to privacy is not protected by Article 21 of the Constitution of India, holding that the doctrinal basis on which these judgments were given have been changed in *R.C. Cooper v. Union of India*, 1970) 1 SCC 248 (India) and *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

<sup>105</sup> AIR 1953 SC 131 (India). Interestingly, the court found that the circumstances of the case and minute details in the confession show that it was unsafe to rely on the confession of Kalawati. This case is an apt example concerning the risks in relying on confessions.

<sup>106</sup> AIR 1962 SC 1821 (India). The court emphasized the importance of state of mind of the accused completely freed from any possible influence from the police. Similar observations have been made in *Miranda*, note 3. The practice of the prosecution to seek custody of the accused for interrogation and the routine manner in which such custody is granted are not part of this article. However, it is suggested that the custody for interrogation should be granted only for a limited period and in other cases custody should be granted only where there is a risk of the accused leaving the jurisdiction or would destroy the evidence pending investigation.

<sup>107</sup> Insurance Act, 1938 (Act No. 4 of 1938).

was any coercion. In reaching this conclusion the court considered that a person of position, grit and intelligence could not be so coerced. This scale appears to be unreasonable. On facts, the High Court found that Dalmia's statement was not voluntary as there was an implied offer of amnesty though there was no threat. The Supreme Court did not appropriately appreciate the fact that Dalmia was given only 30 minutes to make the statement. But in *Adambhai Sulemanbhai Ajmeri v. State of Gujarat*<sup>108</sup> the court held that if reasonable reflection time was not given to the accused then the confession statement could not be considered by the courts. In *Kartar Singh v. State of Punjab*,<sup>109</sup> the court upheld the provision that authorised the police officer to record confession and framed guidelines for recording such confessions. Ramaswamy, J., wrote a separate opinion concurring in part and dissenting in part. In his opinion, Ramaswamy, J., has held that Article 20 is not only confined to individual or common law offences, but also extends to statutory offences.<sup>110</sup>

In relation to other enactments where the law provided that a person could be compelled to give evidence that might inculcate him, there are divergent views.<sup>111</sup> In *K. Joseph Angusthi v. M.A. Narayanan*,<sup>112</sup> the Supreme Court held that a public examination ordered under Section 45-G(6) of the Banking Companies Act, 1949 was not hit by Article 20(3). The court accepted that in some cases, the person so examined might be compelled to be a witness against himself but denied the application of Article 20(3) holding that unless it is shown that the person ordered to be examined was an accused at the time of examination, the protection would not be available. Subsequently, the court expanded the scope of the judgment in *Joseph Angusthi* stating that even if the application contained allegation of commission of offences, it would not amount to accusation within Article 20(3) if those accusations were idle at the time of the enquiry.<sup>113</sup> These judgments are contradictory to the judgments where the court

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<sup>108</sup> (2014) 7 SCC 716 (India).

<sup>109</sup> (1994) 3 SCC 569 (India).

<sup>110</sup> *Id.* at 728.

<sup>111</sup> For a list of laws compelling a person to provide information, see *Shyamlal Mohanlal*, Note 94.

<sup>112</sup> AIR 1964 SC 1552 (India). Similarly, in *Raja Narayanlal Bansilal v. Maneck Phiroz Mistry*, AIR 1961 SC 29 (India), the court held that a general enquiry into the affairs of a company would not attract Article 20(3).

<sup>113</sup> *Official Liquidator, Popular Bank Ltd v K. Madhava Naik*, AIR 1965 SC 654 (India).

has held that the protection under Article 20(3) would be available during the investigation stage also.

In the judgments dealing with the compulsion to make inculpatory statements under enactments like Customs Act, Central Excise Act, Foreign Exchange Regulation Act<sup>114</sup> etc., the conflict is more pronounced. In *Tukaram G. Gaokar v R.N. Shukla*,<sup>115</sup> the court held that if an accused is required to give evidence in support of his case, such a requirement is not hit by Article 20(3). However, if any summons were issued to a person under Section 108 of the Customs Act directing him to give evidence, then different considerations would arise. In *Tukaram*, the counsel for the Customs Department gave an undertaking in the High Court that the statement made by the petitioner would not be used in criminal proceedings. In some judgments, the court held that the Customs authorities are not police officers; and thus neither Section 25 of the Evidence Act nor Article 20(3) would be attracted in respect of the statements made before them.<sup>116</sup> The rationale provided in some of these judgments was that the main purpose of these enactments was the collection of revenue and not crime

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<sup>114</sup> Customs Act, 1962, Act No. 52 of 1962); Central Excise Act, 1944 (Act No. 1 of 1944); Foreign Exchange Regulation Act, 1973 (Act No. 46 of 1973)

<sup>115</sup> AIR 1968 SC 1050 (India).

<sup>116</sup> *State of Punjab v Barkat Ram*, AIR 1962 SC 276 (India); *Ramesh Chandra Mehta v State of W.B.*, AIR 1970 SC 940 (India); *Badku Joti Savant v State of Mysore*, AIR 1966 SC 1746 (India) and *Percy Rustomji Basta v State of Maharashtra*, (1971) 1 SCC 847 (India). But see *Directorate of Enforcement v Deepak Mahajan*, (1994) 3 SCC 440 (India) where the court held that “*the word ‘investigation’ cannot be limited to police investigation but on the other hand, the said word is with wider connotation and flexible so as to include the investigation carried on by any agency whether he be a police officer or empowered or authorized officer or a person not being a police officer under the direction of a Magistrate to make an investigation vested with the power of investigation.*”

detection and prosecution.<sup>117</sup> In *Raja Ram Jaiswal v. State of Bihar*,<sup>118</sup> the court distinguished the judgment in *State of Punjab v. Barkat Ram*<sup>119</sup> and held that any statement made to the officers under the Customs Acts would be hit by Section 25 of the Evidence Act. In *Noor Aga v. State of Punjab*,<sup>120</sup> the court held that “Any confession made under Section 108 of the Customs Act must give way to Article 20(3) wherefor there is a conflict between the two.” The finding in *Kanhaiyalal v. Union of India*<sup>121</sup> and *Raj Kumar Karwal v. Union of India*<sup>122</sup> that the officers under the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985) (hereinafter referred to as NDPS Act) are not police officers has been overruled in *Tofan Singh v. State of Tamil Nadu*.<sup>123</sup> By majority, *Tofan Singh* held that a confession made to the officers investigating offences under the NDPS Act are hit by Article 20(3). The contempt proceedings have been held to be quasi-criminal proceedings to which Article 20(3) would not apply.<sup>124</sup> Many of these judgments have not considered the impact of the definition of "offence" under the General Clauses Act, 1897. On the compelled production of documents

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<sup>117</sup> See *Tofan Singh v. State of Tamil Nadu*, AIR 2020 SC 5592 (India), *para* 126. This observation has helped the court to overcome the binding effect of the prior judgments holding contrary to what *Tofan Singh* has held. However, if we analyse this proposition more carefully, even in those cases, the courts have not considered the fact that its own judgments have held that the adjudication proceedings and the prosecution under enactments such as Sea Customs Act, 1878 (Act No. 18 of 1978), Foreign Exchange and Regulation Act, 1973 (Act No. 46 of 1973) are independent of each other and they can proceed simultaneously. See *Asst. Commissioner of Customs v L.R. Melwan*, AIR 1970 SC 962 (India); *Standard Chartered Bank v Director of Enforcement*, (2006) 4 SCC 278 (India). The courts have held that only when the adjudication proceedings are dropped in favour of the assessee, the criminal proceedings on the same set of facts would be quashed and not otherwise. See also *Radheshyam Kejriwal v State of W.B.*, (2011) 3 SCC 581 (India).

<sup>118</sup> AIR 1964 SC 828 (India).

<sup>119</sup> Note 113.

<sup>120</sup> (2008) 16 SCC 417 (India).

<sup>121</sup> (2008) 4 SCC 668 (India).

<sup>122</sup> (1990) 2 SCC 409 (India).

<sup>123</sup> AIR 2020 SC 5592 (India). The court approved the principles laid down in *Nirmal Singh Pehlwan v Inspector Customs*, (2011) 12 SCC 298 (India) and *Noor Aga. Tofan Singh* also distinguished the judgments under Customs Act and Central Excise Act etc., holding that the officers under the said enactments are not 'police officers' on the ground that these finding are given on the basis that the purpose of these enactments are revenue collection however the purpose of NDPS Act is prohibition.

<sup>124</sup> *Delhi Judicial Services Assn v. State of Gujarat*, (1991) 4 SCC 406 (India).

and other evidence, the court held that compelled production of documents would be covered by Article 20(3).<sup>125</sup> However, a general search is not prohibited by Article 20(3).<sup>126</sup> Since some of the judgments hold that Customs Officers and certain other authorities are not police officers for the purpose of Section 25 of the Evidence Act and consequently excluded the application of Article 20(3) in respect of the statements made to them, there has not been any discussion on the difference between compelled production of documents that are required to be maintained as per law and compelled production of private papers. However, it appears that a compelled production of statutory documents would not be covered by Article 20(3).

## VII. Conclusion

The Bill of Rights in the United States and the fundamental rights in the Indian Constitution are natural rights reserved by citizens and they act as restrictions on the State and its organs. These rights are inviolable. The Supreme Court has rejected the contention that in order to achieve the goals of Directive Principles in Part IV of the Constitution of India, the fundamental rights could be abrogated. There is nothing in the language of Article 20(3) to suggest that it would apply only to offences tried under the provisions of Cr.P.C. or to the cases to which the Evidence Act applies. The protection against self-incrimination is available to all proceedings which are criminal in nature i.e., has the potential to inflict a punishment of whatever nature, be it imprisonment, penalty, confiscation etc., It should be remembered that even in civil proceedings the power of the court to compel production of documents from a party to the proceedings is limited and if the document is not produced, the court could only draw an adverse inference. The statutory provisions compelling a person to make inculpatory statements result in a cruel trilemma; and they fall squarely in the field occupied by Article 20(3). Confession is not proof, and it has been sufficiently demonstrated that in many cases that confessions are extracted by compulsion. As noted earlier, proof by confession dispenses with the proof of the charges to the satisfaction of the

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<sup>125</sup> *M.P. Sharma*, Note 4. But see *Shyamalal*, Note 94 where the court held that it could be compelled.

<sup>126</sup> *Id.* This position is reiterated in *Justice K. S. Puttaswamy (Retd) v. Union of India*, (2017) 10 SCC 1 (India).

court. The courts have also recognised the risks in relying on such confessions. The difficulties faced by the prosecution is not a ground for the courts to dilute the constitutional protection and permit the authorities to extract confessions or inculpatory statements. There can be no doubt that the interest of the society will take precedence over that of an individual but it cannot be ignored that the very purpose of the society is to ensure dignified living of its subjects. Commission of offences can always be punished by proving them with sufficient evidence. A study of the judgments on the privilege against self-incriminations shows that the attempts by the courts to strike a balance failed and the courts are constrained to make a hard rule to protect individual rights. The experience in India shows that the protection guaranteed under Article 20(3) has not been recognized in its full vigour and spirit. The recent judgments of the Supreme Court lead the way in the correct path. Some of the earlier judgments that have diluted the protection against self-incrimination are required to be reconsidered.

## Health Care Concerns of the Homeless in India: A Human Rights Approach in COVID-19

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Dr. Giri Sankar S S<sup>2</sup>

### Abstract

*Homelessness is the absence or denial of one's housing rights. Homelessness is the violation of human rights that occurs in every country, endangering the health and lives of the poorest people. Thousands of human lives are at stake every year just because of lack of shelter. Due to lack of reliable statistics on the homeless population and lack of accountability towards them, the homeless tend to be overlooked in government programmes. Homeless people aren't limited to a specific population. In the vicious cycle of homelessness, children, women, the elderly, particularly the disabled and people with special needs are all victims. Comparing to other marginalized groups like women, children, indigenous and elder people, homeless face many human rights violations as well as health and social inequalities. Massive health inequalities are found across the world among homeless people; hence, the right to health is one of the most violated human rights for homeless. The misery of homeless people has been exacerbated by the Covid-19 pandemic<sup>3</sup> which has spotlighted the significance of adequate housing in a way that has never been seen before. This paper considers that homeless people are one of the most vulnerable members of the society, and faces many health care inequalities and human rights abuses during Covid-19. This study focuses on the human rights obligations of India to provide the right to housing during the COVID-19 pandemic. For the purpose of the study various international human rights laws as well as Indian constitutional and legal documents has been analysed.*

**Keywords:** Rights of Homeless People in India and Human Rights Violation, Right to Health and Access to Healthcare, Obligation of Government.

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<sup>3</sup> THE WIRE (last visited Oct. 23, 2021), <https://thewire.in/uncategorised/homelessness-amid-covid-19-miseries-untold-and-promises-shattered>.

## I. Introduction

“The connection between health and dwelling is one of the most important that exists.”

---Florence Nightingale<sup>4</sup>

Article 25 of the Universal Declaration of Human Rights (UDHR)<sup>5</sup> recognize food, clothing, housing, health care and social services as essential human right components of adequate standard of living for health and well-being.<sup>6</sup> Several people struggle to meet the first two requirements while the third stays afar their reach. As a result, a significant portion of the population lives in public locations such as roads, pavements, and streets, and is classified as "homeless."<sup>7</sup> Homelessness is about the absence or denial of one's housing rights. Despite the right to shelter being at the central place within the global legal system, over one billion people are not adequately housed. Every year millions are forcefully evicted from their homes, or threatened with forced eviction because of various reasons. Thousands of human lives are at stake every year just because of lack of shelter. Due to major lack of reliable statistics on the homeless population and lack of accountability towards them, the homeless tend to be overlooked in government programmes. Homeless people aren't limited to a specific population. This affects all races and genders including men, women, girls, youth, who lack education and employment, and families who are unable to pay rent or mortgage home. They can't afford to rent houses or rooms as their income is low. In the vicious cycle of homelessness, children, women, the elderly, particularly the disabled and people with special needs are all victims. Therefore, this complex issue of homelessness requires a robust legal framework and effective public policy to ensure socio-economic and cultural protections for homeless people.

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<sup>4</sup> TEE L. GUIDOTTI, HEALTH AND SUSTAINABILITY AN INTRODUCTION 320 (Oxford University Press 2015).

<sup>5</sup> Universal Declaration of Human Rights 1948. Art 25, par. 1.

<sup>6</sup> Id at 4.

<sup>7</sup> Sanjukta Sattar, Homelessness in India, Vol 15. No. 1, SHELTER 9, 11 (2014) (Dec. 30, 2015), <https://www.hudco.org/writereaddata/shelter-apr14.pdf>.

Homelessness is a heinous violation of human rights that occurs in every country, endangering the health and life's of the poorest people.<sup>8</sup> Comparing to other marginalized groups like women, children, indigenous and elder people, homeless face many human rights violations as well as health and social inequalities. Homeless people around the world live in conditions that are life-or health-threatening, or in other environments that do not protect their human rights and dignity. Massive health inequalities are found across the world among homeless people; hence, the right to health is one of the most violated human rights for homeless.

The misery of homeless people has been exacerbated by the Covid-19 pandemic.<sup>9</sup> The pandemic has spotlighted the significance of adequate housing in a way that has never been seen before. The present public health crisis has shown how housing and health are inextricably connected. Housing is a social determinant of health, yet it is rarely taken into account when developing health policies. However, when we are encouraged to stay at home in a quarantine or self-isolate, it is clear that our home is the most important health setting in our lives, and one cannot enjoy their right to health without a secure home.<sup>10</sup>

This paper considers that homeless people are one of the most vulnerable members of the society, and faces many health care inequalities and human rights abuses during Covid-19. This study focuses on the human rights obligations of India to provide the right to housing during the COVID-19 pandemic. For the purpose of the study various international human rights laws as well as Indian constitutional and legal documents has been analysed.

## **II. Definition and Concept of Homelessness**

The definition of 'homelessness' is different in each nation and figuring the exact picture of homelessness is difficult. Definitions of homelessness vary widely across the globe, depending on language, socio-economic conditions, cultural

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<sup>8</sup> LEILANI FARHA, (Special Rapporteur On The Expulsion On The Right To Adequate Housing), Info Note on the Homelessness And Human Rights, (Dec. 30, 2015), U.N. Doc. A/HRC/31/54.

<sup>9</sup> THE WIRE <https://thewire.in/uncategorised/homelessness-amid-covid-19-miseries-untold-and-promises-shattered>, (last visited Oct. 23, 2021).

<sup>10</sup> EUROPEAN PUBLIC HEALTH ALLIANCE <https://epha.org/the-impact-of-the-covid-19-crisis-on-homelessness/> (last visited Oct. 23, 2021).

norms, affected groups and the purpose for which homelessness is defined.<sup>11</sup> The human right to adequate housing has been defined by the UN Special Rapporteur on adequate housing as follows: “The right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity”<sup>12</sup> The term houseless, pavement dwellers, roofless, homeless, and shelterless do not always cover the same meaning. The definition of homeless or homeless person for the purposes of this study is the same as that in Aashray Adhikar Abhiyan defines a homeless person as[one] who has no place to call a home in the city. By home is meant a place which not only provides a shelter but takes care of one’s health, social, cultural and economic needs. Home provides a holistic care and security.<sup>13</sup>

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<sup>11</sup> In the United Nations (UN) System, used for example, in the “Compendium of Human Settlement Statistics”, the expression “Homeless household” refers to households without a shelter that would fall within the scope of living quarters. They carry their few possessions with them sleeping in the streets, in doorways or on piers, or in any other space, on a more or less random basis. The Statistics Division of the Department of Economic and Social Affairs of the United Nations has defined “primary homelessness” as persons living without a shelter or living quarters and “secondary homelessness” as including persons with no place of usual residence.

The Census of India 2011 defines 'houseless household' as, 'households who do not live in buildings or census houses but live in the open on roadside, pavements, in hume pipes, under flyovers and staircases, or in the open in places of worship, mandaps, railway platforms, etc.'

The Habitat defines homeless as “people sleeping rough, on the street, in public places, or in any other place not meant for human habitation”. It also identifies less visible types of homeless i.e. those sleeping in shelters provided by welfare or other institutions. In the compendium of Human Settlement Statistics, the expression “Homeless household” refers to “¼ households without a shelter that would fall within the scope of living quarters. They carry their few possessions with them sleeping in the streets, in doorways or on piers, or in any other space, on a more or less random basis”.

<sup>12</sup> Miloon Kothari et al, The Human Right to Adequate Housing and Land, NATIONAL HUMAN RIGHTS COMMISSION (Oct. 24, 2021, 10.24 PM), <https://nhrc.nic.in/sites/default/files/Housing.pdf>.

<sup>13</sup> GRAHAM TIPPLE, SUZANNE SPEAK, THE HIDDEN MILLIONS: HOMELESSNESS IN DEVELOPING COUNTRIES, 77 (Routledge Taylor and Francis Group, 2009).

About 2 per cent of the world's population may be homeless, based on statistics, and another 20 per cent lack adequate housing.<sup>14</sup> According to the 2005 UN Global Report, more than 100 million people are homeless and about 1.6 billion people are without adequate housing.<sup>15</sup> In a developing nation like India, homelessness is a major issue. According to the 2011 census there are 1.77 million homeless people in India, or 0.15 percent of the country's total population.<sup>16</sup>

**TABLE 1: Estimated Number of Homeless People in the Latest Available Year**

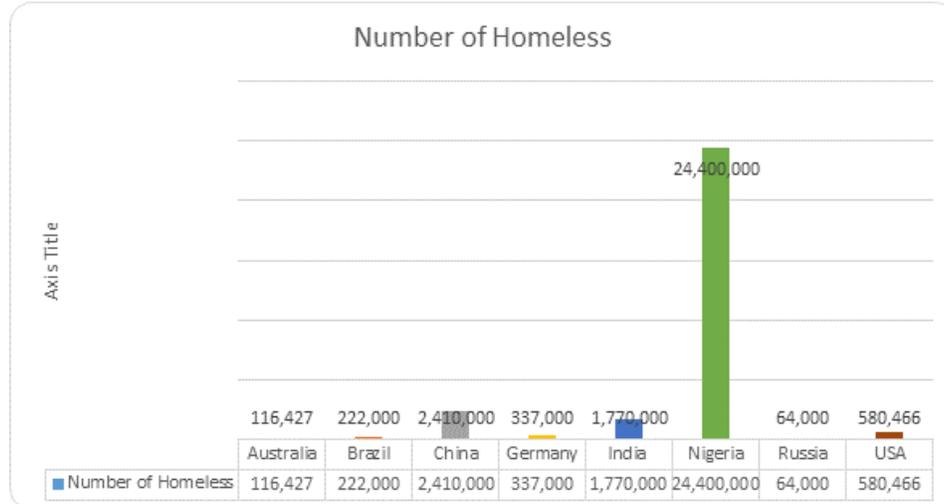
SI No:	Countries	Year	Number of Homeless	Homeless as a % of Total Population
1	Australia	2016	116,427	0.48%
2	Brazil	2020	222,000	0.05%
3	China	2011	2,410,000	0.18%
4	Germany	2018	337,000	0.41%
5	India	2011	1,770,000	0.15%
6	Nigeria	2007	24,400,000	1.7%
7	Russia	2010	64,000	0.44%
8	USA	2020	580,466	0.18%

<sup>14</sup> JOSEPH CHAMIE, As Cities Grow, So Do the Numbers of Homeless, (Oct. 24, 2021, 10.35 PM), <https://yaleglobal.yale.edu/content/cities-grow-so-do-numbers-homeless>.

<sup>15</sup> GLOBAL HOMELESSNESS STATICS, HABITAT (2015), <http://www.homelessworldcup.org> (last visited Oct. 23, 2021).

<sup>16</sup> CENSUS INDIA, 2011, <http://www.censusindia.gov.in> (last visited Oct. 23, 2021).

**Figure 1:** Estimated Number of Homeless People in the Latest Available Year

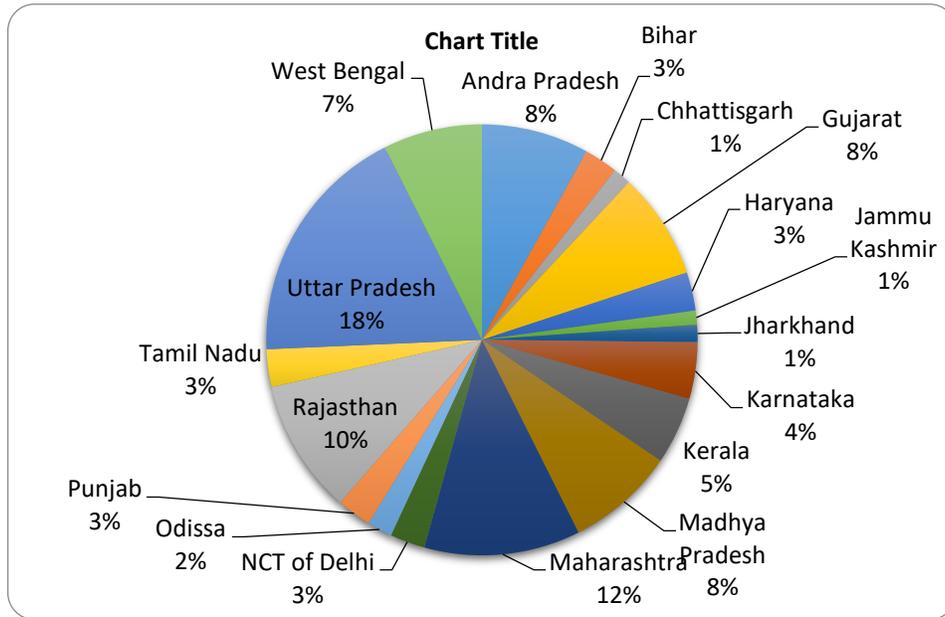


**Source: Compiled by Author from OECD Affordable Housing Database<sup>17</sup>**

It is evident from the above table that in all the developed, developing and under-developed countries (for which the statistics is available - except Nigeria), the number of people listed as homeless accounts for less than 1% of the total population. As the exact number of homeless persons is unknown and is difficult to get as well, the aforementioned numbers cannot be relied completely as the available data might not be accurate.

<sup>17</sup> OECD AFFORDABLE HOUSING DATABASE, <https://www.oecd.org/els/family/HC3-1-Homeless-population.pdf> (last visited Oct. 22, 2021).

**Figure 2: Distribution of Homeless Population across Selected States in India**

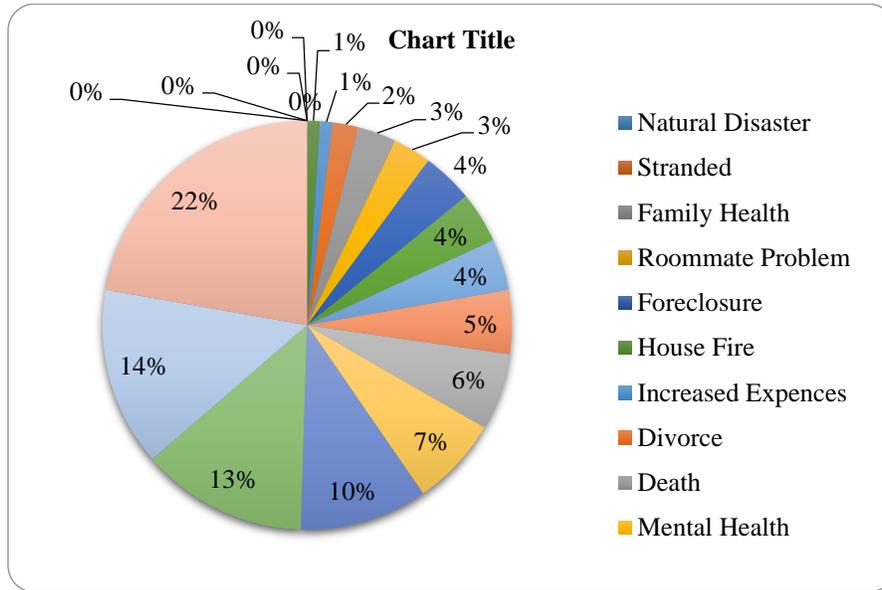


From the above chart, it is apparent that the highest number of homeless people can be found in the state of Uttar Pradesh (18% of Total Population) followed by Maharashtra (12% of Total Population). These figures were compiled prior to the Covid-19 outbreak, and if the number of homeless people is counted now, the total will be much greater.

### III. Causes of Homelessness

There are many reasons why people become homeless, and for each individual, the combination of factors leading to homelessness is different. Following are some of the main reasons for homelessness.

**Figure 3: Showing Causes of Homeless for Household**



**Source:** The Homeless Resource Network<sup>18</sup>

The above figure 3 shows the pictorial representation for the reasons of homeless. Apart from the above reasons, there are some other factors which also contribute to homelessness. They are mentioned below

- Poverty
- Domestic Violence
- Demolitions of Slum and forced evictions sans rehabilitation
- Insufficiency of Law

#### **IV. Common Health Problems Faced by Homeless Persons**

The homeless are, by their conditions, vulnerable to ill health. People who are homeless are at higher risk for most adverse health problems than the general

<sup>18</sup> SOLVING HOMELESSNESS TOGETHER, HOMELESS RESOURCE NETWORK, [https://homelessresourcenetwork.org/?page\\_id=1086](https://homelessresourcenetwork.org/?page_id=1086) (last visited Oct. 21, 2021).

population. Some of the health problems especially evident in those with homelessness include the following:

**A. Mortality and accidental injuries (bruises, cuts, burns, etc.)**

Homeless people have a substantially higher chance of death. Deaths caused by an accidental drug or alcohol overdose, or both, are also popular. Exposure to the environment poses a significant threat.<sup>19</sup>

**B. Chronic Diseases and Disorders**

Many chronic diseases and disorders, such as hypertension and diabetes, are widespread. Homelessness was associated with seizures as well.<sup>20</sup>

**C. Hunger and Nutrition**

Malnutrition and hunger is widespread among homeless people. When homeless people are prohibited from working, and their belongings are seized, they are unable to earn their daily income, causing them to go hungry because of their inability to purchase food.<sup>21</sup>

**D. Sexual and Reproductive Care**

Homeless people tend to have more sexual partners and at younger ages, thus increasing their risk of sexually transmitted diseases. Reaching homeless makes reproductive problems like pregnancy much more difficult, as safety has already been affected and there are no support services available.

**E. Skin and Foot Problems**

People on the street are especially vulnerable to contracting skin diseases such as cellulite, impetigo, venous stasis, scabies and body lice. Often, the failure to shower regularly and maintain good hygiene leads to existing health issues.<sup>22</sup>

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<sup>19</sup> The risk of frostbite and hypothermia is high in cold weather, and deaths from freezing are not uncommon. Extreme sunburn and heatstroke can occur in hot weather. Suicides are common among homeless people. Violence is also a determinant of death and injury.

<sup>20</sup> ANNY ROUVEL et al. *Epilepsy Among the Homeless: Prevalence and Characteristics*, 16(5), EUR. J. PUBLIC HEALTH 484–486, (2006).

<sup>21</sup> Poor nutrition over time can lead to a variety of chronic conditions, including short-term problems such as exhaustion including weakness.

<sup>22</sup> STEPHEN W HWANG et al. *Chronic Pain Among Homeless Persons: Characteristics, Treatment, And Barriers To Management*, 12, 73, BMC FAM. PRACT., (2011). Foot conditions such as onychomycosis, tinea pedis, corn and callous, and immersion foot

### **F. Infectious Diseases**

Homeless people are also at risk for infectious diseases — such as hepatitis A, B, and C, tuberculosis, and HIV / AIDS — due to compromised immune systems, inadequate nutrition and sanitation, and chronic overcrowding in shelters.

### **G. Respiratory Illness**

Bronchitis, chronic obstructive pulmonary disease, emphysema, and other types of respiratory illness are also widespread among homeless people.

### **H. Mental Health Issues**

The prevalence of mental illness among homeless people is higher as compared to the general population.<sup>23</sup> The mental effect of homelessness is a serious breach of the right to health.<sup>24</sup> One of the important goal of the National Mental Health Policy (NMHP) in India is to expand access to mental health services to disadvantaged populations, including homeless people.<sup>25</sup> In India the new Mental Health Care Act (MHCA) 2017 has brought a list of rights for the Homeless persons with mental illness (HPMI).<sup>26</sup>

### **V. Reasons for Poor Access to Health Care of Homeless**

Homeless persons are the most marginalized group who face the biggest obstacles to accessing healthcare. There are certain barriers which prevent them from accessing the health care, they are as follows:

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typically result from insufficient footwear, excessive exposure to moisture, long walking and standing times, and repeated minor trauma.

<sup>23</sup> RAVISHANKAR RAO, et al. *Mental Healthcare Act, 2017 And Homeless Persons with Mental Illness in India*, 61(10) Indian J. Psychiatry, 768-762, (2019).

<sup>24</sup> A substantial percentage of the homeless people have significant mental health issues. "Overall, 30-35% of homeless women and up to 75% of male women were diagnosed with mental illness. 20-25% of homeless people suffer from combined conditions (severe mental illness and addictions). People with serious mental illness are over-represented in the homeless population because they are often released from hospitals and jails without adequate help from the community. HOMELESS HUB, <https://www.homelesshub.ca/about-homelessness/topics/mental-health> (last visited Oct. 22, 2021).

<sup>25</sup> REETINDER KAUR R K, PATHAK, Homelessness and Mental Health in India, 3(6), LANCET, 500-501, (2016).

<sup>26</sup> Mental Health Care Act, 2017, Chapter V para 18 (7), 19 (1), Chapter XIII 100 (6)(7)

- Poor ability to eat a balanced diet because of lack of food options, storage and cooling
- Eating, sleeping and bathing can be done only in communal places facilitating the transmission of communicable disease
- Lack of health insurance and unable to afford the necessary medicines
- There is no proper place to rest to make recovery easier when they are sick, as most shelters close during the day
- Poor access to basic hygiene, including limited access to toilets, clean clothes and a desire to keep shoes on for a long time out of fear of being stolen
- When living outdoors, exposure to the elements raises the risk of sunstroke, sunburn, frostbite and hypothermia
- lack of continuity of care and insufficient general health awareness
- reluctant to be treated in a hospital because of negative experiences in the public health system
- Health care affordability

#### **VI. Adequate Housing and Land as a Human Right and Human Right Violations of Homeless People**

Housing rights are a fundamental human right. This has been documented in a number of international human rights instruments<sup>27</sup> and is routinely monitored by the UN and the Council of Europe. The right to adequate housing has been recognised as an important component of the right to an adequate quality of standard living since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The fundamental human right to safe and secure housing has, therefore, been a universal issue. The right to housing includes over forty national Constitutions.<sup>28</sup>

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<sup>27</sup> Universal Declaration of Human Rights 1948, Art. 25(1); INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR), Art. 11(1); General Comment 4 of the ICESCR; HABITAT MEETING IN ISTANBUL 1996; ISTANBUL AGREEMENT; HABITAT AGENDA para 61.

<sup>28</sup>Monte Leach, *A Roof is not Enough – A Look at Homelessness World Wide*, September 1998, available at [https://www.share-international.org/archives/economics/ec\\_mlroof.html](https://www.share-international.org/archives/economics/ec_mlroof.html) (last visited Oct.22, 2021).

The right to adequate housing is a human right that cannot be considered in isolation. If the right to adequate housing and land is to be realised and maintained by all groups in society, the full enjoyment of other rights, such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence, the right to information and prior informed consent, and the right to participate in public decision-making, is required. As stated by UN Special Rapporteur on Adequate Housing studies, the human right to adequate housing is increasingly being understood to include the human right to land. In establishing the human right to appropriate housing and land, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home, or correspondence is also a critical component.<sup>29</sup> The States Parties should take the necessary actions to ensure that this right is realised.

The world health organization's health principles of housing 1989<sup>30</sup> states that housing is closely connected with hygiene. Suitable housing supports physical and mental health at its finest and provides people with psychological stability, physical connections with their community and culture, and a way to convey their identity.

The WHO has set out six key concepts relating to housing conditions and human health<sup>31</sup>. They are as follows<sup>32</sup>:

1. Protection against communicable diseases<sup>33</sup>
2. Protection against injuries poisonings and chronic diseases<sup>34</sup>

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<sup>29</sup> Miloon Kothari, Sabrina Karmali & Shivani Chaudhry, *The Human Right to Adequate Housing and Land*, NATIONAL HUMAN RIGHTS COMMISSION, 2006.

<sup>30</sup> Regarding the health dimensions of housing, General Comment No. 4 offers the clearest articulation of the minimum standards that are required for housing to be regarded as adequately health security.

<sup>31</sup> WHO HOUSING AND HEALTH GUIDELINE 2018, <https://www.ncbi.nlm.nih.gov/books/NBK535293/> (last visited Oct. 23, 2021).

<sup>32</sup> Id.

<sup>33</sup> Communicable diseases can be minimized if housing provides clean water supply, sanitary excreta and garbage disposal, sufficient surface water drainage and facilities essential for household hygiene and proper storage and preparation of foods.

<sup>34</sup> Adequate housing provides protection against burns, poisonings, thermal and other pollutants that may lead to chronic disease and malignancies. Specific consideration

3. Reducing psychological and social stresses to a minimum<sup>35</sup>
4. Improving the housing environment<sup>36</sup>
5. Making Informed use of Housing<sup>37</sup>
6. Protecting People at Special Risk<sup>38</sup>

Homelessness has emerged as a global human rights crisis. People experiencing homelessness face violations of a wide range of human rights, like violation of basic human rights and dignities, such as the right to adequate housing,<sup>39</sup> right to Life, Liberty and Security of the Person,<sup>40</sup> right to health,<sup>41</sup> the right to freedom

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should be provided to structural features and furniture, indoor air pollution, chemical protection and the use of the house as a place of work.

<sup>35</sup>Adequate housing supports social and economic growth for people and decreases the psychological and social pressures associated with the housing climate to a minimum.

<sup>36</sup>Adequate housing environments provide access to workplaces, critical services and amenities which promote good health. The health effects' will be beneficial when the housing environment provides for physical protection, friendly surroundings, active social participation, and access to essential resources (educational, health, social) and industrial, cultural and recreational facilities. The circumstances and the results in deprived societies will be just the reverse.

<sup>37</sup>Health also depends on how the people use their homes. The best of buildings won't protect or encourage safety if its inhabitants don't use the facilities safely and for safer purposes-or if they don't maintain housing so as to preserve it from health hazards.

<sup>38</sup>Some groups living conditions position them at unique health risks, making them highly vulnerable to numerous health hazards. The inhabitants of inner-city slums and peri-urban shanty towns and squatter settlements as well as the homeless, transient and refugee communities are prominent among these groups. Due to their biological vulnerability and increased exposure to hazards in the household, the health of children and women within these and all other classes is of exceptional concern. Across both nations, the elderly, the mentally ill, and the disabled have special welfare conditions across relation to their accommodation.

<sup>39</sup>Art. 11(1), ICESCR; Art.27, CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989; Art. 5(e) INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 1969; Art. 5(e), CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979, Art. 25, UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR).

<sup>40</sup>Art. 9(1), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) 1976.

<sup>41</sup>Art. 12, INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR) 1976; Art. 24, CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989; Arts. 12, 14(2) CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979.

from discrimination<sup>42</sup>, the right to privacy,<sup>43</sup>the right to be free from Cruel inhuman or degrading treatment or punishment,<sup>44</sup> right to education,<sup>45</sup> the right to freedom of expression,<sup>46</sup> the right to adequate standard of living<sup>47</sup>, the right to vote,<sup>48</sup> the right to freedom of association<sup>49</sup> and the right to social security<sup>50</sup>.

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<sup>42</sup> Art. 17 & 26, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) 1976; Art. 2(2), INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR); Art. 5(d) INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 1969; Art 2, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979.

<sup>43</sup> Art. 17 International Covenant on Civil and Political Rights (ICCPR) 1976; art. 16, CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989.

<sup>44</sup>Art. 7, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) 1976; Art.7, CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989.

<sup>45</sup>Art. 13, INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR); Art. 28, CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989; Art. 11, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979; art.5 (e), INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 1969.

<sup>46</sup> Art. 19(2) and (3) INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) 1976; art. 5(d), INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 1969.

<sup>47</sup>Art 11(1), INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS (ICESCR); Art.27, CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989; Art.5(e) International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1969; Art. 14(2), CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979; Art. 25, UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948.

<sup>48</sup> Art. 25(2), International Covenant on Civil and Political Rights (ICCPR) 1976; Art. 7, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979; Art. 5(d) INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 1969.

<sup>49</sup> Arts. 12 and 22(1), International Covenant on Civil and Political Rights (ICCPR) 1976; ICCPR, Art. 15, CONVENTION ON THE RIGHTS OF THE CHILD (CRC) 1989; Art. 5(d), INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 1969.

<sup>50</sup>Art. 9, International Covenant on Economic Social and Cultural Rights (ICESCR); Art. 26, Convention on the Rights of the Child (CRC) 1989; arts. 10 and 14(2), CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 1979; Art. 5(e) INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD) 1969.

Furthermore, in the American Declaration in Article XI, the right to housing is seen as the part of the protection of the right to health.<sup>51</sup> The condition of homelessness is making people vulnerable to, or at least particularly prone to, violations of these human rights and freedoms mentioned above. For the purpose of this study, more importance is given to the right to health aspect.

## **VII. Violation of Right to Health of Homeless Person**

Every person has the right to enjoy the highest possible standard of health. The right to health can be found in many international human rights instruments.<sup>52</sup> However, homelessness can lead to severe and permanent violations of this basic human right. Despite lack of adequate accommodation, the right to health is undoubtedly one of the most clearly violated human rights of homeless. CESCR recognizes that health is proportional to the biological conditions of a person and the States available resources.<sup>53</sup> In addition, General Comment No. 4<sup>54</sup> articulates 7 Health Principles of Housing, like,

- a. legal tenure security;
- b. availability of services, materials, facilities, and infrastructure;
- c. affordability;
- d. habitability;
- e. accessibility;
- f. location;
- g. cultural adequacy

Among these elements, habitability and accessibility touch most closely on the health issue. Adequate housing must be habitable to provide adequate space for the occupants and to protect them from air, humid fire, rain, wind or other environmental, structural hazards and disease vectors. Further, deficient and inadequate housing and living conditions are certainly linked to higher mortality

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<sup>51</sup>Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

<sup>52</sup> Art. 12(1), ICESCR; Art 25(1), UDHR; Art.16, AFRICAN CHARTER; Art.24, CRC; Arts. 12 & 14(2), CEDAW.

<sup>53</sup> General Comment 14, The Right to the Highest Attainable Standard of Health, UN Doc E/C.12/2000/4, 11 August, 2000.

<sup>54</sup> Para 8 CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), Dec. 13, 1991, (E/1992/23).

and morbidity rates.<sup>55</sup> Accessibility requires accessible housing for people with disabilities, including physically disabled people, terminally ill people, HIV-positive people, people with chronic medical problems and people with mental illness.

The UN-Habitat study titled "The Right to Adequate Housing" lays out the duties that States that have ratified the ICESR and other human rights treaties must immediately implement. This includes the states' 'protection commitment'.<sup>56</sup>

### VIII. International Judicial Decisions

Courts in various countries played a decisive role in realization of the right to shelter in connection with right to health. Following are the cases which is relevant in this context.

In *SERAC and CESR v. Nigeria*,<sup>57</sup> the Nigerian State destroyed homes and villages by killing and attacking people in response to the people's protest in Ogoniland.<sup>58</sup> The African Commission also held that the implicit right to housing (including protection from forced eviction), resulting from the specific right to property, health and family, was violated by the destruction of housing and the abuse of residents who returned to restore their homes<sup>59</sup> thereby violated 4, 14, 16, 18 and 24 of the African Charter.<sup>60</sup>

In a landmark case *Social and Economic Rights Action Centre v Nigeria Communication*<sup>61</sup> The SERAC has submitted a case before the African Commission on Human and Peoples ' Rights concerning the militarized, forced

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<sup>55</sup> Id.

<sup>56</sup> AASTHA SONI, *The Lost Right to Housing in COVID-19: A Case for the Marginalized*, (Feb. 20, 2021) <https://www.lawctopus.com/academike/right-to-housing/> (last visited Oct. 23, 2021).

<sup>57</sup> *SERAC and CESR v. Nigeria*, Communication No. 155/96 (2002)

<sup>58</sup> Id at, Para 69

<sup>59</sup> Id at, Para 60

<sup>60</sup> Which recognize the African peoples' right to life, right to property, right to physical and mental health, right to family and for women and children to be free of discrimination, and right to a satisfactory environment for development, respectively.

<sup>61</sup> *Social and Economic Rights Action Center v. Nigeria*, available at <http://www.hlrn.org/img/documents/SERAC%20v%20Nigeria%20Communication.pdf> (last visited Oct, 24 2021).

displacement of some residents of the Lagos State, Nigeria. In this case the applicant alleged that:

- The evictee's health condition after the eviction was abysmal.
- Numerous hospitals and other health-care facilities were bulldozed during the demolition.
- Many of the evictee's suffered physical and psychological trauma and succumbed to various illnesses following the demolition violence and subsequent group dislocation.
- Most of the places they searched for shelter were vulnerable to malaria, typhoid and other infectious diseases.
- In these places, there is almost no access to healthcare of any kind.
- Finally, continuing evictions and demolitions have left many Maroko evicted homeless, subjecting them to illness and leaving many vulnerable to violent crimes, particularly women and children.<sup>62</sup>

In this case the commission noted that Nigeria's government has committed a major infringement of the right of Maroko evictee's to health by:

- i. destroying the healthcare facilities on which the community depended,
- ii. creating or failing to remedy the unsafe, sickly living conditions for those who had been left homeless by the destruction, and
- iii. Alleged to resettle some community members in a dangerous and unhygienic situation<sup>63</sup>

In *Free Legal Assistance Group and Others v. Zaire, Comms*,<sup>64</sup> the Commission has held that Article 16 of the Charter imposes a substantive duty on the part of States to provide essential elements for public health. Therefore, a government failure to provide basic services such as safe drinking water and electricity and medication shortages constitutes a violation of Article 16.

In *Purohit and Moore v. The Gambia*,<sup>65</sup> (finding that the right to health includes the right to health facilities) the Commission noted that "the enjoyment of the

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<sup>62</sup> Id. at Para 25

<sup>63</sup> Id. at Para 64

<sup>64</sup> *Free Legal Assistance Group, Et Al. v. Democratic Republic Of Congo*, (1995) 25/89, 47/90, 56/91, 100/93 (ACHPR1995), 9th Annual Activity Report, 47.

<sup>65</sup> *Purohit And Moore v. The Gambia*, (2003), Comm. 241/2001 (ACHPR 2003), 16th Annual Activity Report, 80

human right to health is essential to all aspects of a person's life and well-being, and is crucial to the realization of all other fundamental human rights and freedoms." At its most fundamental level, this requirement includes statements to "reject direct threats."

For these reasons, from the international perspective of human rights as well as from the case laws it is clear that the right to insufficient housing affects many other human rights such as the right to property, the right to food and the right to health.

### **IX. Rights of Homeless People in Indian Legal Framework**

In India, certain constitutional and legal provisions make it mandatory for the government to provide all citizens with suitable housing. The following is a list of constitutional provisions that affect the right to appropriate housing, including the rights of women and children:

#### **A. Fundamental Rights**

- Article 14: Equality before law
- Article 15(1): Non-discrimination on grounds of religion, race, caste, sex, place of birth
- Article 15 (3): Special provisions in favour of women and children based on the principle of protective discrimination
- Article 16: Equality of opportunity in matters relating to employment or appointment of any office under the State
- Article 19(1)(d): Freedom to move freely throughout the territory of India
- Article 19 (1) (e): Freedom to reside and settle in any part of the territory of India
- Article 19 (1) (g): Right of all citizens to practice any profession, or to carry on any occupation, trade or business
- Article 21: Right to life and personal liberty

Certain Directive Principles of State Policy such as State policy to be directed to securing for both men and women equally, the right to an adequate means of livelihood (Article 39 (a)); State policy to be directed to ensure equal pay for equal work for both men and women (Article 39 (d)); State policy to be directed towards securing that the health and strength of workers, men and women and

children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength (Article 39 (e)); State policy to secure equal justice and free legal aid to ensure that opportunities of securing justice are not denied to any citizen (Article 39-A); Provisions to be made by the State for securing just and humane conditions of work and for maternity relief (Article 42)); State to secure a Uniform Civil Code for the citizens (Article 44); Duty of the State to raise the level of nutrition and the standard of living and to improve public health (Article 47); State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another (Article 51 (c))

### ***Constitutional Provisions vis a-vis Right to Shelter***

In Indian scenario, several key decisions have clarified the relationship between the right to housing and the right to life given by Article 21 because the Indian Constitution does not expressly include the right to housing. The Supreme Court of India through many decisions has established that the right to shelter or adequate housing is a fundamental human right. In *U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd*<sup>66</sup>, the Court held that, the right to shelter is a fundamental right derived from Article 19(1)(e) and Article 21 of the Indian Constitution.

In *Francis Coralie v. Union Territory of Delhi*<sup>67</sup> the Court held that: We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.

In the case of *P. G. Gupta v. State of Gujarat*, a three-judge panel considered the mandate of the human right to shelter and included it into Article 19(1)(e) and Article 21 of the Indian Constitution to ensure the right to residence and settlement.

In *Chameli Singh v. State of U.P.*, Minimum human rights include food, shelter, and clothing. The government has made big housing initiatives a priority in its

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<sup>66</sup> 1995 Supp (3) SCC 456,

<sup>67</sup> AIR 1981 SC 746, at 753

economic agenda. The right to assign residences built by the Housing Board to the weaker sections, lower income group persons under the Lower Income Group Scheme was held to be a constitutional policy, an economic programme undertaken by the State, and that the weaker sections are entitled to allotment as per the scheme.<sup>68</sup>

The Supreme Court of India held in *State of Karnataka v. Narasimhamurthy* that the right to shelter is a basic right under Article 19(1) of the Constitution.

In a landmark case of *Olga Tellis v. Bombay Municipal Corporation*<sup>69</sup> (Payment Dwellers Case) the Supreme Court of India for the first time decided that the Right to shelter and livelihood as being an important element of right to life. There were then numerous cases reaching the Supreme Court which vigorously followed the case of *Olga Tellis*.<sup>70</sup> The court in many cases observed that the duty of the government's to provide shelter and other amenities to its citizen under the Constitution of India.<sup>71</sup> The role of the judiciary in identifying and resolving homelessness and creating strain on the state to distribute has been important over the years. Recently in *Rajesh Yadav vs. State of UP*<sup>72</sup> the court held that "Right to life guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. Right to shelter is a fundamental right guaranteed under Article 19(1)(e) read with Article 21 of the Constitution of India"

The apex court also took Articles 14 (Equality before law), 15 (All citizens shall have the right of all citizens to freedom of movement and freedom to reside and settle in any part of the territory of India) and 19(1)(e) (All citizens shall have the

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<sup>68</sup> *Chameli Singh v. State Of U.P* (1996) 2 SCC 549

<sup>69</sup> *Olga Tellis & Ors v. Bombay Municipal Council*, 1985 SCR Supl. (2) 51.

<sup>70</sup> *Shantistar Builders v. Narayan K Totame* (1990) 1 SCC 520; *Chameli Singh v. State of UP* 1995 Supp (6) SCR 827; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*, (1997) 11 SCC 123; *Sudama Singh and Others v. Delhi and Anr* *Sudama Singh and Others v. Government of Delhi and Anr.*, W.P. (C) Nos. 8904/2009, 7735/2007, 7317/2009 and 9246/2009, High Court of Delhi, 11 February 2010; *Government Judges, and PK Kopul v. Estate Officer, and Anr.*

<sup>71</sup> *PUCL v. Union of India and Others*, 2004(12) SCC 104; *E R Kumar and Anr. V Union of India*, (2017) 12 SCC 784 (1); *Deepan Bora v Union of India*, (2017) 12 SCC 792; *The Court on its Own Motion v. Govt. of Delhi and Anr.*, W.P. (C) 29/2010.

<sup>72</sup> 2019 SCC OnLine All 2555.

right of all citizens to freedom of movement and freedom to reside and settle in any part of the territory of India) into consideration in order to accept them as a deciding factor in an individual's dignity. The States have a duty to uphold an individual's integrity by providing a home for the homeless. Along with these provisions, some of the Directive principles of State Policy also provide for the protection of homeless persons.<sup>73</sup> In some of the cases that affirmed the right to shelter, the Court looked at distinguishing between a mere animal-existence and a decent human existence<sup>74</sup>, thus emphasizing the need for a life of dignity<sup>75</sup>. In some other cases, the Supreme Court ruled that the right to shelter was a constitutional right secured by Articles 19 and 21 of the Indian Constitution.<sup>76</sup>

In India under some legislation, homelessness is considered a crime within the country, like the the Delhi Police Act 1978,<sup>77</sup> Homeless people are often stigmatized as offenders and, because of the perceived threat posed by their appearance; their very existence is also considered as illegal. Their residences are often targeted in public or public spaces. Recently, in *Harsh Mander & Anr v UOI & Ors*<sup>78</sup> the Delhi High Court delivered a landmark judgment decriminalizing begging in the national capital. The High Court also ruled the provisions of the Bombay Prevention of Begging Act, 1959, to be unconstitutional as applicable to the begging of the National Capital.<sup>79</sup> The State

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<sup>73</sup>Article 39 (1): State policy to be directed in order to secure for both men and women, equal right to an adequate means of livelihood. Article 42: Provisions to be made by the State for securing just and humane conditions of work and for maternity relief. Article 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

<sup>74</sup> *Shantistar Builders v. Narayan Khimalal Totame*, AIR 1990 SC 630.

<sup>75</sup> *Chameli Singh v. State of U. P.*, 1995 Supp (6) SCR 827.

<sup>76</sup> *U.P. Avas Evam Vikas Parishad v. Friends Cooperative Housing Society Ltd.*, 1995 Supp (3) SCC 456, para 8; *State of Karnataka v. Narasimhamurthy*, (1995) 5 SCC 524, *Chameli Singh v. State of U.P.*, (1996) 2 SCC 549, and *Ahmedabad Municipal Corpn. v. Nawab Khan Gulab Khan*, (1997) 11 SCC 121.

<sup>77</sup>See Delhi Police Act 1978:Tamil Nadu Prevention of Begging Act, 1945 and the The Juvenile Justice Act, 2006 person found under 'suspicious circumstances between sunset and sunrise' can be apprehended by the police

<sup>78</sup> 2018 SCC OnLine Del 10427.

<sup>79</sup> *Id.*, para 31: Criminalizing begging is a wrong approach to deal with the underlying causes of the problem. It ignores the reality that people who beg are the poorest of the poor and marginalized in society. Criminalizing begging violates the most fundamental

must ensure that the homeless persons are not criminalised, penalised, or punished as a result of curfew or confinement measures, and put an end to law enforcement activities that marginalise people who are homeless, such as the seizure of personal items or street 'sweeps'.<sup>80</sup>

India's housing and land regulatory system consists of laws and many policies at the central and state levels. There are several schemes in India to protect the homeless people.<sup>81</sup> But many of the schemes are not implemented in a proper manner. The United Nations Special Rapporteur<sup>82</sup> on Housing argued that, "The housing and living conditions [of slum dwellers and homeless people] are often inhumane, and an affront to human dignity – the essence of the right to adequate housing." One of the major recommendation from that report is that Homelessness is the unacceptable consequence of failure by states to enforce their right to adequate housing which needs an effective and immediate human right approach from the International and National level.

#### **X. Human Right Impact of Covid-19 for the People Experiencing Homelessness**

On March 11, 2020, the World Health Organization (WHO) formally announced the spread of COVID-19 virus to be a global pandemic. To flatten the pandemic curve and reduce Coronavirus infection rates, governments around the world have implemented "stay at home," "self-isolate," "physical distance," and "wash your hands" measures. These policies are based on the notion that everyone has access to a home with acceptable sanitation. This is not the case for the 800 million or so people who are homeless around the world. Homeless people live

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rights of some of the most vulnerable people in our society. People in this stratum do not have access to basic necessities such as food, shelter and health, and in addition criminalizing them denies them the basic fundamental right to communicate and seek to deal with their plight.

<sup>80</sup> COVID-19 Guidance Note Protecting those living in homelessness Leilani Farha Special Rapporteur on the right to adequate housing Updated 28 April 2020.

<sup>81</sup> Deendayal Antyodaya Yojana – National Urban Livelihoods Mission, NULM (National Urban Livelihoods Mission) Pradhan Mantri Awas Yojana (housing for all) and the Swachh Bharat Abhiyan (clean India scheme).

<sup>82</sup> LEILANI FARHA, (Special Rapporteur On The Expulsion On The Right To Adequate Housing), Info Note on the Homelessness And Human Rights, U.N. Doc. A/HRC/31/54 (Dec. 30, 2015).

in conditions conducive to an outbreak of disease and may not have daily access to basic hygiene supplies or shower facilities, which may promote transmission of the virus. Being a vulnerable group, their potential exposure to COVID-19 may adversely affect their ability to be housed and mental and physical well-being. Comparing to other group of people in society, homeless people are at risk of SARS-Cov-2 infection because of the possibility of transmission in shared accommodations, comorbidities, and a poorer immune response due to poor nutrition and food instability.<sup>83</sup> Furthermore, this medically vulnerable group suffers disproportionate health issues and high rates of respiratory sickness, making them more vulnerable to disease, including the novel virus.<sup>84</sup> The COVID-19 pandemic has highlighted the importance of housing as a social determinant of health, prompting a re-evaluation of present approaches to treating homelessness.<sup>85</sup>

In India, daily wage workers, primarily migrant labourers or beggars, make up the majority of the homeless population (excluding the street children or those with mental illness). The majority of them have been made penniless as a result of the lockdown, with no opportunity to return to their own towns or villages. Thousands of such migrant workers are stuck along India's roadsides.<sup>86</sup>

Homelessness, regardless of nationality or legal status, is a prima facie violation of human rights, particularly during a crisis. The primary rights guaranteed by the right to shelter, as well as the rights to health and food, are so important to human dignity and the preservation of life that they can never be interrupted, even in an emergency. In addition, there is a lack of access to health and social

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<sup>83</sup> A. MOHSENPOUR et al. *SARS-Cov-2 Prevalence, Transmission, Health-Related Outcomes And Control Strategies In Homeless Shelters: Systematic Review And Meta Analysis*, 38 *ECLINICALMEDICINE* 1 (2021).

<sup>84</sup> LEILANI FARHA, (Special Rapporteur On The Expulsion On The Right To Adequate Housing), *Info Note on the Homelessness And Human Rights*, U.N. Doc. A/HRC/31/54 (Dec. 30, 2015).

<sup>85</sup> MELISSA PERRI, et al., *COVID-19 and people experiencing homelessness: challenges and mitigation strategies*, 192,26 *Can. Med. Assoc. J.* E716–E719 (2020).

<sup>86</sup> DEBANJAN BANERJEE, PRAMA BHATTACHARYA, *The Hidden Vulnerability of Homelessness in The COVID-19 Pandemic: Perspectives from India*, 67, *INT J SOC PSYCHIATR*, (2021).

services. Individuals experiencing homelessness may have had reduced access to screening and treatment services such as primary care clinics.

Homeless people are already at a greater risk of contracting the COVID-19 virus due to their poor health and lack of nutrition. In India, as a result of the pandemic, homeless people living on the streets were forcibly relocated to schools and community halls, which were designated as temporary shelters. This move was often imposed without previous notice, consultation, or approval. As a result of these rash actions, some homeless people have lost possessions and essential documents, as well as been separated from family members in certain situations.<sup>87</sup> Several Indian states, have established emergency shelters for homeless people with food provisions. During the lockdown, the government also gave free lunch and dinner to existing homeless shelters and temporary shelters. Despite these precautions, many homeless individuals faced a severe hunger crisis during the lockdown due to their distance from food distribution centres, long wait times for meals, and the lack of breakfast, tea, and milk for children. Many of these issues were remedied in part by state governments during the lockdown, thanks to advocacy from civil society organisations. Following the relaxation of lockdown rules, those who are homeless continue to be unable to find job, putting them at risk of hunger and misery.<sup>88</sup> Homeless people with chronic illnesses, such as HIV and tuberculosis, as well as older people, people with disabilities, and pregnant women, encountered additional difficulties during the lockdown due to their lack of access to medical facilities and services.<sup>89</sup>

Furthermore, homeless households frequently lack the requisite documents to get relief with food, shelter, health, cleanliness, and livelihood. Furthermore, because they have little money, they have become vulnerable to the infection. In addition,

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<sup>87</sup> SUBMISSION TO THE SPECIAL RAPPOREUR ON THE RIGHT TO ADEQUATE HOUSING FROM HOUSING AND LAND RIGHTS NETWORK COVID-19 AND THE HUMAN RIGHT TO ADEQUATE HOUSING IN INDIA, <https://www.ohchr.org/Documents/Issues/Housing/COVID19/CivilSociety/HLRNIndia.docx> (last visited Oct, 24, 2021).

<sup>88</sup> *Id.*

<sup>89</sup> HINDUSTAN TIMES, [https://www.hindustantimes.com/delhi-news/at-delhi-s-shelter-homes-inmates-complain-of-no-medicine-while-doctors-battle-multiple-threats/story-ygEUDEqBpmztdr3t5xF51L\\_amp.html](https://www.hindustantimes.com/delhi-news/at-delhi-s-shelter-homes-inmates-complain-of-no-medicine-while-doctors-battle-multiple-threats/story-ygEUDEqBpmztdr3t5xF51L_amp.html) (last visited Oct. 23, 2021).

insufficient testing has been reported among them, resulting in under-detection and neglect.<sup>90</sup>

### ***Vaccine for the Homeless: A Challenge***

The bulk of the homeless may not be able to afford treatment if they become infected due to a lack of public health infrastructure.<sup>91</sup> The Centre sent a letter to all states on May 13, 2021, ordering them to make COVID-19 immunisation easier for occupants of urban homeless shelters, especially those without identification. The letter also argues that homeless people are one of society's most vulnerable groups, and that they should be given vaccines as soon as possible. For the same, Standard Operating Procedures (SOPs) have been created.<sup>92</sup>

While India has made immunisation available to anybody over the age of 18, vaccine availability is now based on an online registration system, which is likely to be a barrier for the homeless who do not have access to digital technology or technological know-how. Furthermore, if authorities do not effectively administer and manage vaccination centres, they may become super spreader places in their own right. High-risk populations may find it difficult to cross these packed settings and may be turned away after waiting hours for their immunisation.<sup>93</sup>

## **XI. Obligation of Government to Guarantee the Right to Housing During COVID 19**

The Indian Government is obliged by international human rights law to respect, protect, and fulfil the right to housing. The Indian government also has a

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<sup>90</sup> THE WIRE, <https://thewire.in/uncategorised/homelessness-amid-covid-19-miseries-untold-and-promises-shattered> (last visited Oct. 23, 2021).

<sup>91</sup> Id.

<sup>92</sup> CHITRA V RAMANI, Vaccination Of Homeless Not In Shelters A Challenge, HINDU, June 07, 2021 <https://www.thehindu.com/news/national/karnataka/vaccination-of-homeless-not-in-shelters-a-challenge/article34750453.ece> (last visited Oct. 22, 2021)

<sup>93</sup> IDINSIGHT, <https://www.idinsight.org/article/the-challenges-of-indias-vaccination-drive/> (last visited Oct.24 2021).

responsibility to ensure that the right to housing is realised "without discrimination of any sort,<sup>94</sup>" just as it is with other human rights.<sup>95</sup>

#### **A. The Obligation to Respect**

The obligation to respect means that the government must refrain from interfering with the existing enjoyment of a right by rights-holders when using its public functions.<sup>96</sup> For example, obligations not to demolish existing housing or to prevent attempts by individuals or communities to replace lost dwellings are included in the right to housing.

#### **B. The Obligation to Fulfil**

This appropriate housing "involves the establishment by a State of institutional machinery required for the fulfilment of rights" as well as direct housing assistance for people who are unable to meet their own housing needs.<sup>97</sup> This, for example, necessitates the establishment of a sufficient number of appropriately resourced shelter homes for those who need accommodation and essential services such as sanitation, water, and food. India, on the other hand, lacks enough shelters for homeless people and stranded migrant labourers. They do have some, but they are overcrowded and often lack basic amenities.<sup>98</sup>

#### **C. The Obligation to Protect**

The Indian government also has an obligation to monitor the right to adequate housing. It is required to prevent third parties from interfering with people's right to dwelling under this requirement. As a result, the duty to protect often necessitates States proactively enacting legislation and policy and ensuring its implementation in order to prevent violations of the right to housing.

The measures taken by the Indian government in response to COVID-19 do not appear to have taken into account the right to adequate housing, and thus do not fully meet the obligations to respect and fulfil it, particularly for those from

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<sup>94</sup> ICESCR, Article 2.

<sup>95</sup> COVID-19 PANDEMIC IN INDIA: THE RIGHT TO HOUSING A BRIEFING PAPER, *International Commission of Jurists*, (June 2020)

<sup>96</sup> INTERNATIONAL COMMISSION OF JURISTS, PRACTITIONERS GUIDE 8: <https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-PublicationsPractitioners-guide-2014-eng.pdf> (last visited Oct. 23, 2021).

<sup>97</sup> *Id.* at page 61.

<sup>98</sup> *Supra* note 92.

"economically weaker sections," as defined by the Supreme Court and the legislature. On March 24, the Ministry of Home Affairs issued the first Order prohibiting internal migratory employees from returning to their permanent residences. In light of the COVID-19 pandemic, the existing temporary accommodation in their places of work, which was sometimes overcrowded and lacking in basic amenities, became even more inadequate. The result was that they were unable to return to their permanent residences on the one hand, and that they were not given enough time to acquire a more suitable place to live where they were temporarily stationed (or to provide such accommodation directly) on the other.<sup>99</sup>

At this point, concerted efforts from all relevant stakeholders – government, civic society, and civil society organisations – are critical for the basic rights of the homeless. Affordable housing, social housing, job creation, and the elimination of prejudice could all help to prevent homelessness. The government should not only focus on building physical infrastructure and securing basic services, but also on enhancing, maintaining, and monitoring those that already exist. It is also vital for the government to obey the Supreme Court's directives and follow the appropriate recommendations regarding the homeless.<sup>100</sup>

They should be given to more thorough testing. Quarantine, as well as frequent medical examinations at shelters and homeless hotspots, is essential. It is necessary to address livelihood restoration, financial aid, and the provision of nutritional meals for homeless children, the elderly, women, and the disabled.<sup>101</sup>

## **XII. Findings**

- Compared to other marginalized groups like women, children, indigenous and old-age people, homeless are the most vulnerable category who face many human rights violations especially the health and social inequalities.
- Homeless people do not have sufficient documentation evidence to prove their identity; they are excluded from the benefits that government initiative schemes offer to economically weaker sections of society including health, food, water, and housing.

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<sup>99</sup> *Id.*

<sup>100</sup> *Supra note 87.*

<sup>101</sup> *Id.*

- Homelessness is the most obvious human rights abuse; without a shelter, sanitation services, no bed to sleep of their own and definitely no prospect of long-term housing options. They are exposed to unimaginable abuse, discrimination, criminalization and stigmatisation, with life expectancies much lower than the population that is housed.
- People who are homeless are unable to receive basic medical care easily due to lack of funds or insurance to cover the expenses and the inability to plan and keep appointments. As a result, their restorative needs and inadequate hygienic treatment have not been met.
- As per the direction from the Supreme Court of India, the Indian Government has formed new policies and programmes for affordable housing, but most of the people who are in need of the service are not properly getting the benefits.
- Most notably, there are hardly less legislative and regulatory frameworks that protect homeless people's rights and this situation needs to be improved.
- People who are homeless have been particularly hard hit by the pandemic, making isolation, hand washing, and social distancing all the more difficult.

### **XIII. Solutions**

- State and lawmakers must prioritize immediate and rapid assistance to unsheltered people in providing safe and resourced housing.
- There is an immediate need to build permanent, 24-hour shelters for homeless people in both towns and villages as mentioned by the Supreme Court
- The government have to initiate low-cost housing and public housing schemes with special initiative for the homeless.
- The state ought to guarantee access to affordable services such as electricity, water, heating, as well as access to education, employment and health facilities to the homeless.
- Homeless persons should be provided with adequate health insurance.
- Ensure emergency health-care coverage and chronic illness management.

- Better treatment should be provided to homeless people suffering from mental health issues
- Government must make national laws and policies on homeless people's health care in compliance with international human rights law, and the Indian Government must try to meet its international legal obligations.
- A country that has signed and ratified the international instruments concerning the right to shelter has the legal responsibility to respect, promote and fulfill this right to all its citizens and also needed to take concrete steps towards the realization of all economic and social rights, to the extent of its available resources.
- As the lockdown has depleted the resources available to the homeless, various official and non-governmental programmes have been launched to give them with shelter and food, but this will not prevent the virus from spreading. It will take a coordinated effort from all parties – government, community mental health services – as well as partnership with homeless-focused organisations.<sup>102</sup>
- To stop the spread of COVID-19, make sure emergency accommodations provide for physical separation, self-isolation, quarantine, and any other health recommendations published by the World Health Organization.
- Make sure that the women, children, and youth who are forced to leave their homes due to domestic violence do not become homeless and are provided with adequate alternative accommodations that ensure their safety and provide access to water, sanitation, food, social support, health services, and COVID-19 testing.
- Provide a safe location to remain for homeless people who are exhibiting virus symptoms or who have tested positive for corona virus, as well as timely medical attention, food, and any additional medical or other help they may need to cope with quarantine or self-isolation.
- It is necessary to conduct more tests on persons who have been recognised as vulnerable. Those who test positive must be detained for the duration of the quarantine and get proper medical care. Testing should be stressed to them and their families on a regular basis.

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<sup>102</sup> *Supra note 83.*

- Provide immediate shelter to all homeless people living 'rough' or on the streets, with the goal of converting them to permanent homes so that they do not return to homelessness once the pandemic has passed. This may necessitate the acquisition of hotel or motel rooms, as well as the repurposing of buildings such as army barracks or abandoned hospitals. Privately held unoccupied housing or secondary residences should be made available by public agencies.<sup>103</sup>
- Governments must refrain from taking any actions that could lead to individuals becoming homeless, such as evictions. Ensure that individuals, families, or communities that have experienced homelessness or have been evicted into homelessness and are seeking effective remedies have access to justice.<sup>104</sup>
- People who are homeless should be educated and made aware of their situation. Community activities are needed to increase knowledge, attitudes, and practises. It is necessary to communicate necessary preventive measures in their language and to clarify any concerns. All Universal Human Rights and basic self-dignity apply to them, and they must be protected in every way feasible.

#### **XIV. Conclusion**

The current research demonstrated that there is a high prevalence of many diseases among homeless people and handling this vulnerable population is a major challenge. It is apparent from this study that homelessness is a palpable violation of the basic human rights. The right to health is perhaps one of the most clearly violated human rights for those who are homeless. There are health disparities among members of the homeless population with multiple chronic conditions as discussed above in this paper. Such compounding risk factors also result in adverse health effects, and need to be resolved in order to promote the ability to find and maintain stable housing. The tragic example of the failure of democracy and the idea of 'welfare state' is highly evident in the extent of homelessness, one of the by-products of poverty and one of the worst forms of social vulnerability. For any so-called welfare state to have its people lying right

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<sup>103</sup> LEILANI FARHA, (Special Rapporteur On The Expulsion On The Right To Adequate Housing), Info Note on the Homelessness And Human Rights, *U.N. Doc. A/HRC/31/54* (Dec. 30, 2015).

<sup>104</sup> *Id.*

on the streets and exposed to all sorts of social deprivation and vulnerability is an alarming state of affairs. Adequate housing will provide these vulnerable groups to achieve stability; improved health; lift individuals and families out of poverty; and encourage participation in society.

Pandemics aren't merely medical emergencies. They have far-reaching psychosocial consequences that influence the entire population. During previous pandemics of SARS and Influenza, it has been proven that the homeless population offers distinct risks to both individuals and the general public. The government should learn from health disasters like Covid-19, as well as other man-made or natural disasters like mass displacement, accidents, and even earthquakes, and include homelessness in "disaster management practises" and devise action plans for it, which will only be possible if the state engages in smart planning and judicious spending of funds. The focus of these vulnerable people is the hunt for food rather than the care for these diseases. Newer approaches to diagnose and treat this specific population are required.

In most of the countries the issues surrounding homelessness and the health care system of such people have not been documented properly. The primary protections offered by the right to shelter, as well as the rights to health and food, are so important to human dignity and the preservation of life that they can never be interrupted, even in an emergency. In this scenario, governments must fulfill the housing needs of homeless persons as soon as possible in order to assure their equitable protection from the virus and the safety of the general population. This will entail mutual support and aid between national and state governments in order to ensure that all pandemic-fighting measures are effective.

Policymakers must recognise and address the disparities faced by the homeless people and the government have a duty to work vigilantly to provide prompt solutions that protect the health, safety, and well-being of all. Meanwhile, affordable housing for large swathes of the country remains out of control. The present Indian Government foresees that by 2022 no Indian shall be left homeless; however, this is a very tough and ambitious target which the government is trying to achieve. This dream can be fulfilled by doing the right kind of planning, judicious funding of expenditure and framing new legislations by the Government of India.

## Philosophical Correlation between Rational Design Theory and Model Bilateral Investment Treaties

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### Abstract

*Model Bilateral Investment Treaties have grown parallel to the evolution of Bilateral Investment Treaties; however, little importance have been given to the theoretical premise of the treaty design and raison d' être for framing Model Bilateral Investment Treaties. Even the 2001 project on Rational Designing of International Institution, which discussed theoretical premise of participation of States while concluding international agreements, limited the study to the multilateral agreements, and left out bilateral agreements. However, it could be seen that the modern BIT regime, since its inception, was mounted upon the idea of need. On one hand States needed to import capital for economic development, on the other hand the States needed protection for the investments. Thereby making the regime based only on certain rationales. The development and transitions of Bilateral Investment Treaties and Model Bilateral Investment Treaties evidences the philosophy of Rational Design Theory. The Treaty practice may on occasion do not reflect rational measures, however, the form the philosophical standpoint it does.*

**Keywords:** *Model Bilateral Investment Treaty, Rational Design Theory, Bilateral Investment Treaty, BIT, Treaty Design, MBIT*

### I. Introduction

The present research article explores a philosophical correlation between the framing and designing of Model Bilateral Investment Treaties (hereinafter referred to as MBITs) and the Rational Design Theory (hereinafter referred to as RDT). Which means it theoretically enquires about the rationale upon which the designing and framing of MBITs is premised upon, thereafter, examines the said

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rationale against the philosophy of RDT upon which it is premised i.e. “*Our main goal is to offer a systematic account of the wide range of design features that characterise international institutions. We explore theoretically and empirically the implications of our basic presumption that states construct and shape institutions to advance their goals. The most direct implication is that design differences are not random. They are the result of rational, purposive interactions among states and other international actors to solve specific problems*”<sup>3</sup>. At the outset, it must state that the RDT was an outcome of a project undertaken by Barbara Koremenos, Charles Lipson, and Duncan Lipson in the Autumn of 2001. However, the present study limits itself to the philosophical correlation between the creation of MBITs and the philosophical premise of RDT, as the RDT was examined through conjectures specifically developed for multilateral Treaties and not bilateral agreements.

This research article explores the development of MBITs over the years and examines the philosophy governing the act of creating the MBITs, and traces its correlation with the RDT. Further, explores the developmental stages of the MBITs, the factors influencing the change in designing, how some of the countries responded to the changes. Thereafter, the article examines the theoretical and philosophical correlation between designing the MBITs and upon which the RDT is premised. The study in its route to establish the correlation between RDT and MBITs also engages in examining MBITs practice of few major economies such as The USA, Austria and India, belonging to three continents and have actively engaged to adapt to the changing environment of International Investment Law regime.

Through the research article, it is intended to establish theoretically that MBITs are unique set of documents in the realm of International Law, as there exist no such parallel regime with such unilateral instrument which reflect the State’s intention to engage with a regime. Thus, MBITs reflect the truest form of RDT and are philosophically correlated.

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<sup>3</sup> Barbara Koremenos, Charles Lipson, and Duncan Snidal. 55 (4):1051-82 “*Rational Design: Looking Back to Move Forward*”. International Organization(2001).

## II. Development of Model Bilateral Investment Treaties

MBITs are not a binding document upon any state; as the name suggests, a “Model” treaty text, created by Nation- States independently. The Nation-State has significant liberty in creating the Model text, which is capable of aiding them in negotiating an investment treaty, whether bilateral or multilateral. However, designing the Model treaty text has undergone significant changes over years and development and is still a work in progress. This segment discusses about the development of the Model investment treaty, the alterations, the rationale for framing the model treaty text and trace the root philosophy of the concept of Model treaties.

### A. Birth of Investment Treaties and Model Investment Treaties

International agreements with protection of foreign investment could be traced in as early as in Treaty of Peace and Friendship between Great Britain and Spain signed in the year 1667, *inter alia* the Treaty provided for protection of nationals of the contracting States engaged in trade and commerce, in the land of other contracting parties against denial of justice, national treatment. Thereafter, the Treaty of Utrecht in 1713, Treaty of Amity, Commerce, and Navigation between Great Britain and the United States in 1794 had provisions that had modern investment law elements protecting the private properties<sup>4</sup>. The Modern International Investment Law is heavily motivated by political and economic developments in the 19th century, which saw the rise in the concerns relating to the standards of treatment of aliens<sup>5</sup>, albeit with the significant assistance of Customary International Law on the issue<sup>6</sup>.

Even though elements of modern international investment treaties could be traced as back as the 17th and 18th centuries, it is widely accepted that the Friendship Commerce and Navigation Treaties are precursors to the Modern International Investment Treaties<sup>7</sup>. It is even argued that the FCN treaties act as

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<sup>4</sup> Chester Brown, “Introduction: the development and importance of the model bilateral investment treaty”. Commentaries on Selected Model Investment Treaties, pp.1-5. (2013).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Kunzer, “Developing a Model Bilateral Investment Treaty”. Law & Pol’y Int’l Bus., 15, p.273 (1983)

precursors to Modern Investment Treaties and continues to inspire modern International Investment Agreements<sup>8</sup>. FCN treaties were the instrument which predominantly designed to protect the interest of nationals of the Contracting States who invested in the other Contracting State, which were similarly placed from the economic standpoint<sup>9</sup>. FCN Treaties addressed the business interests of nationals in the alien contracting States in general and not prima facie focused on protecting investments. The Modern International Investment Agreements owe much to the FCN treaties, and certain key provisions and features of FCN treaties have found immense importance in Modern Investment Treaties such as Fair and Equitable Standard and they continue to inspire the modelling, drafting and designing of International Investment Agreement<sup>10</sup>. The development of other transactional agreements such as the General Agreement on Trade and Tariffs and the “executive trade agreement device” did reduced the prominence of FCN treaties<sup>11</sup>. Thus, there was shift from the comprehensive document to a simpler one protecting the right foreign investor’s rights and is largely influenced by the European practice<sup>12</sup>.

Since the turn of century the regime witness change trend of capital flow, and the economic status of parties engaging with each other and eventually tracking back to the comprehensive agreements similar to the FCN treaties<sup>13</sup>.

Schill states that the International Investment Law have moved away from the fringes of Public International Law and have contributed to the development of Public International Law over the years. The regime has not only adhered to the existing structure of Public International Law but also shaped it, including the relation of the principle to the sources of International Law<sup>14</sup>. Schill notes that the failure to conclude Multilateral Investment Treaty was the genesis of BIT

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<sup>8</sup> Wolfgang Alschner “*Americanization of the BIT universe: the influence of friendship, commerce and navigation (FCN) treaties on modern investment treaty law*”, 5 Goettingen J. Int’l L., p.455.(2013)

<sup>9</sup>*Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Wolfgang Alschner, *Supra* Note 6

<sup>12</sup> Wolfgang Alschner, *Supra* Note 6

<sup>13</sup> *Id.*

<sup>14</sup> Stephen Schill. “*Sources of International Investment Law.*” The Oxford Handbook of the Sources of International Law. (2017).

regime. However, contrary to the expectations, these bilateral treaties failed to set themselves apart, especially standards and principles governing the international investment law and continued to appear as mirror versions of each with limited alterations<sup>15</sup>. The uncanny similarity in the initial phase of modern BITs were not an occurrence of chance; instead, it was a well thought out result of planned acts by the capital-exporting countries<sup>16</sup>. Post Second World War, significant number of nation- State emerged due to independence and decolonisation, these nation- States were in the process of rebuilding it; with the political institutions at a nascent stage and dire need of capital to develop the economy; the politico-economic condition gave the opportunity to the capital-exporting countries to place the well-planned common design upon the capital importing States<sup>17</sup>. It marked the introduction of model treaties by the capital-exporting countries, especially the USA, the UK, Germany and Netherlands, who acted in coordination with regard to their investment policies<sup>18</sup>. The said models were subsequently promoted by international organisations such as the United Nations Conference for Trade and Development<sup>19</sup>. However, the change in capital flow, rise in investment disputes, development of human rights principles the regime underwent certain changes so did the Models existing in the regime.

The journey of the Model Investment Treaty is similar to the journey of the Investment Treaty, and it continues to evolve; the initial phase witnessed the domination of the capital-exporting country, which framed it according to their desire and need, while the capital importing states were not that focussed in developing model text as they desired foreign Investment. The Model Investment Treaty texts experienced diverse development across the economies and timelines<sup>20</sup>.

### **B. Development of Model Bilateral Investment Treaties**

Before venturing into the development of MBITs, it is of significance to briefly establish the importance of MBITs in contemporary times. A Model Treaty Text

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Wolfgang Alschner, *Supra* Note 6

assists the States in numerous ways, including, but not limited to, facilitating negotiation, reduction in drafting and designing cost, brings in uniformity in approach, establishing State's investment policy, attitude towards the dynamic jurisprudential development, treaty practice in terms of declared investment policy and deviation from thereto<sup>21</sup>, the rationale, reason and importance would be further elaborated upon in the forthcoming segments.

The development of MBITs can be broadly classified in three specific eras as expressed by Vandeveld, which are as follows: a. the Late 1950s till late 1980s, b. The late 1980s till brim of the turn of the century, and, c. Turn of the century till present time<sup>22</sup>. The three eras witnessed different approaches, reactions, and designing of actual investment treaties.

The first era involved shaping the first generation of BITs. During this era, the capital-exporting countries and developed countries were the ones who had developed MBITs; while negotiating, they presented the model upon which the Treaty could be signed, the treaties were focused on protecting the interests of the investors predominantly against injurious acts of the host states<sup>23</sup>. The impact of the Model Treaties created explicitly by the capital-exporting States did little for the regime. Not only the developing countries were still on course shaping and structuring the national institutions and were justifiably suspicious of such instruments as many of the nations had just received independence after decolonisation<sup>24</sup>. In addition, there was a significant presence of alternate economic theories which was distant from economic liberalisation.

The second phase marked the rise in the conclusion of BITs between states as the developing countries lost their scepticism towards foreign Investment<sup>25</sup>. The era witnessed growth in investment treaties North-South BITs and South-South BITs, thereby shifting the erstwhile asymmetric characters of the Contracting States to the conclusion of treaties between asymmetric as well as symmetric contracting States<sup>26</sup>. With the change in capital flow from unidimensional to bi-

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<sup>21</sup> Supra Note 3

<sup>22</sup> Kenneth Vandeveld *"Model bilateral investment treaties: The way forward"*. 18 Sw. J. Int'l L., 18, p.307, (2011)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

dimensional and economic characteristics of the contracting States, the regime witnessed the development of MBITs by the developing countries. However, from the design perspective, the model treaties had a strong resemblance to the Model treaties from the 1st era and the model treaties of developing countries<sup>27</sup>, thereby failing to represent the needs and desires of the developing countries.

The third phase was an outcome of the backlash against economic liberalisation<sup>28</sup>. This phase started at the turn of the millennium. The phase of development owes to two prominent factors: the first being the instances of claims instituted against such States who had been the erstwhile capital-exporting countries and had concluded investment treaties designed in accordance with the MBITs framed by them<sup>29</sup>. The other factor was the rise of environment-related regulations leading to indirect expropriation or regulations and environmental organisation critical of the regime and the investor-state dispute resolution mechanism<sup>30</sup>. This era has witnessed extensive development of MBITs and a shift from the earlier practice of mirroring the existing models by other nations. States have been focused on developing the Model treaties as per the need of the respective State. The shift in the approach was evident as the treaties moved from the philosophy of cooperation to the philosophy of reason and rationality. However, it is worth mentioning that the approach is yet to find popularity as only handful nation-States have adopted newer MBITs.

A close look in the philosophy and practice reflects that most nations engaged in designing and developing MBITs to further their collective economic goal as a nation based on reasons, as have been more evident in recent years. The South African Development Community developed a treaty template with regard to MBIT and published it in 2012<sup>31</sup>. In its introductory section, it is explicitly stated that the purpose of the SADC is to harmonise and assist the member States to develop their own MBITs. The document states that “*The Member States can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment*

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> SADC Model Bilateral Investment Treaty Template with Commentary

*treaty negotiation*<sup>32</sup>. Even though the African countries have similar economic status, however, it is worth realising the harmonization even though is appreciated, there exist certain peculiarities associated with certain economies, hence, a blanket objective of harmonisation may not lead to appropriate MBITs designs. Models such as SADC or IISD can at best should act a guiding document to design MBITs.

The progressive development in the Model Investment Treaty designs are evidenced by MBITs, and Investment Treaties concluded by developed countries and developing countries alike. The very change in the design and approaches will be discussed in the following segment, citing examples of global North (USA) and global South (India).

### **C. Change over the years in the Model Bilateral Investment Treaty**

As discussed in the segment enumerated as 2.2, the Model Investment Treaty has undergone significant changes, from being an instrument commanded over by the developed country with predominantly a single point agenda of protecting investors in host States to an instrument in the hands of developed and developing alike, crafted to put forward the investment policies without compromising on the interest of the country on other fronts such as security, sovereignty, environment, etc. Needless to say, that the earlier envisioned simple treaty design had given way to a comprehensive design. This change took decades of progress, change in the direction of capital flow<sup>33</sup>, financial crisis, experience, invocation of arbitration clauses<sup>34</sup>, criticism from quarters that were adversely and unfairly affected<sup>35</sup>, etc. This segment will examine the changes in approach and attitudes in designing MBITs of the United States, India and Austria as they are representative of three different continents and belong to developed and developing economy. These nation States have actively participated with the regime and have framed multiple MBITs to adapt with the change to establish

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<sup>32</sup> *Id.*

<sup>33</sup> Kenneth Vandeveldel, *Supra* Note 20

<sup>34</sup> Wolfgang Alschner and Skougarevskiy, D., 2016. "Mapping the universe of international investment agreements." 19(3) *Journal of international economic law*, pp.561-588 (2016)

<sup>35</sup> Mark Waibel. "The backlash against investment arbitration: perceptions and reality". Kluwer Law International BV.(2010)

the reason, rationale, and philosophy of MBITs.

### ***The United States of America***

Post the Second World War, the United States emerged as an economic powerhouse and champion advocating liberal economic policies<sup>36</sup>. However, as a nation, it continued to rely upon the FCN treaties as late as the 1980s<sup>37</sup>, while the European nations had already negotiated significant numbers of BITs in comparison<sup>38</sup>. In the January of 1982, the U.S. Trade Representative announced the formulation of the prototype BIT, in other words, a document mirroring the concept of the MBITs, which was framed to aid the treaty negotiations<sup>39</sup>. The Reagan Administration was motivated to introduce the prototype BIT to address the growing concerns with uncertainties associated with the investments by the U.S. investors in developing and least developed countries and improve the environment for international investment<sup>40</sup>. The prototype was designed with seven principle features<sup>41</sup>. Ruttenberg described the objective of the BIT during the Reagan Administration as foreign investors to have a sense of security in terms a. National and/or most favoured nation, b. Compensation in the event of expropriation, c. transfer of capital and profits, and d. Access to arbitration mechanism in the event of any dispute<sup>42</sup>.

The third phase was initiated by the criticisms and backlash against the regime as it demanded a rigorous review of the existing MBITs which led to the outcome of the 2004 MBIT of the United States. Vanderveelde classified the change in the 2004 Model Investment Treaty in four categories which are as follows: a. Developing new exceptions in the host State's obligations (Enhancing Host State's Regulatory power); b. Introducing limitations in the ISDS mechanism by reducing the discretionary power of the ISDS arbitration tribunal by limiting the scope of jurisdiction dissuades from using the ISDS arbitration mechanism

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<sup>36</sup> Pribičević, O. "Trump, Brexit and the crisis of the liberal world order". 57(2) *Teorija in praksa*, pp.471-488.(2020)

<sup>37</sup> *Supra* Note 7

<sup>38</sup> *Id.*

<sup>39</sup> *Supra* Note 6; Ruttenberg, V.H. "The United States bilateral investment treaty program: Variations on the model". 9 U. Pa. J. Int'l Bus. L.p.121 (1987)

<sup>40</sup> *Id.*

<sup>41</sup> Wolfgang Alschner, *Supra* Note 6

<sup>42</sup> *Supra* Note 39

(Enhancing Host State's Regulatory power); c. Advocacy regarding creation and facilitation of normative frameworks, such as a higher focus on transparency, environmental rights, labour rights, etc. which considerably reduced the host State's discretion (Promoting best practices); d. Measures focused on revamping the arbitral mechanism by introducing expedited procedure, dismissal of frivolous claims, appellate provisions, expert reports, amicus curiae submissions, etc. (Focused on reshaping and bringing clarity). The changes that the 2004 Model Treaty reflects are evidence of the shift in the approach according to the nation's need and changing characteristics of the international investment regime due to economic and environmental reasons.

In 2012, the United States introduced a MBIT, replacing the 2004 Model. The model was primarily criticised for not bringing many changes. The provisions addressing the treatment standards, expropriation, transfers of capital and profits remained similar to the 2004 Model Treaty<sup>43</sup>. The arbitration clause reflecting investor-state dispute settlement remained intact and not moving towards the State-State Dispute Settlement mechanism, which was demanded from several quarters<sup>44</sup>. The significant change in the 2012 Model could be apportioned to the inclusion of provision focussed towards improving the standard of transparency relating to laws, judgments, arbitral awards etc.<sup>45</sup>. Other critical inclusion were obligations upon contracting states and the investors to abide by the host states laws on environment and labour related issues<sup>46</sup>. The 2012 Model also included the territorial sea and the part of the high sea as part of territory of State based on Sovereign activities undertaken or Customary Int'l Law<sup>47</sup>.

The United States approach towards the international investment treaty regime evidence that they have undergone continuous change over the years, from FCN to phase-wise versions of Model Investment Treaty starting with the prototype followed by Models of 1994, 1998, 2004 and finally 2012 have always represented the interest the United States of America in the regime and their

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<sup>43</sup> Johnson, L.. "The 2012 us model bit and what the changes (or lack thereof) suggest about future investment treaties". 8(2) Political Risk Insurance Newsletter, p.2. (2012)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Di Rosa, P. and HEWETT, D.Y.Y., "The new 2012 US model BIT: Staying the course". Yearbook on International Investment Law & Policy, 2013, pp.595-607 (2012)

policies.

### **India**

For a significant period of time the developing countries aped the Model Treaties of developed States, the gradual changes in the Model treaties design evidence the acknowledgement of the reasons and rationale for participation in the regime. India represents the quintessential developing country actively engaging with the regime.

Post-Independence, the economic policies of India was sceptical towards the International Investment Regime until the cold post-cold war era, as India ventured into free-market capitalism. The shift in approach was influenced by two factors: a. Shift from Soviet Union kind economic policies and b. Inspiration from the Chinese Model opened China for the world economy and allowed market forces to play a significant role in 1978 and achieve substantial growth, as expressed by T.N Srinivasan<sup>48</sup>.

India developed its first MBIT in 1993<sup>49</sup>. This Model treaty was based on the Organisation for Economic Co-operation and Development (OECD) Draft Convention for the Protection of Foreign Property of 1967<sup>50</sup>. The Model Treaty represented that India accepted the existing international standards and practice regarding the protection of investors and Investment<sup>51</sup>. It was a conscious decision based on rationale, reason, and objective to make India a favourable country for foreign Investment and overcome the challenges posed by Section 29 of the Foreign Exchange Regulation Act.<sup>52</sup>

India revised its initial MBIT and developed the Model instrument of 2003 to incorporate an annexure, explaining the concept of indirect expropriation. However, Ranjan states that the claim is not supported by any evidence<sup>53</sup>. For all practical purposes, the 2003 Model Instrument reflected a similar position as 1993 one. From 1993 till 2015, India had signed over eighty BITs, closely

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<sup>48</sup> Prabhash Ranjan “India and bilateral investment treaties—a changing landscape”.29(2) ICSID Review, pp.419-450, (2014).

<sup>49</sup> *Id*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

resembling the OECD Draft Convention of 1967. India engaged with developed as well as developing countries over the period<sup>54</sup>.

The design of Indian BITs, which were significantly influenced by the 1993 prototype and 2003 Model Treaty, did not draw much controversy or conflict until 2011<sup>55</sup>. Dabhol power project was the only incidence that gave certain room for conflicts. However, none of the none BIT claims instituted against India based on the power project resulted in an investor-state arbitral award<sup>56</sup>. However, the White Industries Award altered the earlier view regarding India's exercise of regulatory power. A number of claims were instituted against India on several regulatory measures undertaken by India, such as retrospectively imposed taxes, cancellation and revocation of the spectrum and telecom licenses etc.<sup>57</sup>, which led to the review of BIT practice.

The review of BITs led the pathway for the 2015 MBIT, the model significantly departed from the earlier designs. The Law Commission of India, in its report, notes that the Government website states the objective of the Model of 2015 with two fold objectives as it states “*to provide appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of the relevant international precedents and practices, while maintaining a balance between the investor’s rights and the Government obligations*”<sup>58</sup>, implying that framing of new Model was primarily a reactionary act to the developments in the regime. Even though the development was reactionary and restrictive, it primarily stemmed from the rationale and reason borne out of the national interest and not any external pressure.

The major shift in designing the MBIT could be witnessed in the provisions addressing the definition of Investment, the scope of the Treaty, the standard of treatment, most favoured nation clause, money transfer provision, non-precluded

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<sup>54</sup> *Id.*

<sup>55</sup> Prabhash Ranjan and Pushkar Anand “*The 2016 model Indian bilateral investment treaty: a critical deconstruction*”.38 Nw. J. Int'l L. & Bus., p.1 (2017); Law Commission of India, Report No.260: Analysis of 2015 Draft Model Indian Bilateral Investment Treaty (2015). <https://lawcommissionofindia.nic.in/reports/Report260.pdf> on 24.11.2021

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

measures, investor-state dispute settlement provision<sup>59</sup> etc. A brief description of primary designing alteration could be seen in a. Shift from asset-based definition to an enterprise-based definition of “investment”<sup>60</sup>; b. inclusion of negative list of investments, exclusion of pre-investment activities, keeping a measure of local Government outside the purview of the investment treaty and express exclusion of taxation policy<sup>61</sup>; c. Removal of Most Favoured Nation clause<sup>62</sup>; d. Incorporating of International Minimum Standard as the benchmark for “Treatment of Investment”<sup>63</sup>; e. Transfer of money were saddled with restrictions<sup>64</sup>; f. Comprehensive Non-precluded Measures<sup>65</sup>; g. Revamped and restricted design for Investor-State Dispute Settlement mechanism.

A hawk-eye view of the design of the Model of 2015 would reveal that the model is focused on enhancing the regulatory power of the host State significantly and restricting the invocation of Investor-State arbitration. The efficacy of such a Model is a different debate, but as far as the approach of India is concerned, it could be seen that they were not an outcome of any whim or to co-operate. Instead, it is based on rationale, need, and the concerns of the State.

### *Austria*

Austria has donned the roles of capital-exporting and capital importing country<sup>66</sup> and thus had a keen interest in developing the investment regime. With most of the treaties influenced by the earlier European Model, entailing strong investor protection and limited protection to the policy-making discretion in the hands of host States, thus giving rise to the need to designing of the Treaty from letting it be an offensive tool in the hands of investors against the Government of the host

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<sup>59</sup> *ibid*

<sup>60</sup> Prabhash Ranjan “*India-Brazil Bilateral Investment Treaty – A New Template for India?*”(2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/> (Nov. 24, 2021).

<sup>61</sup> *Id.*

<sup>62</sup> *Supra* Note 55

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Bernasconi-Osterwalder and Johnson. “*Commentary to the Austrian Model Investment Treaty*”. IISD Report at, 27 (2011)

States<sup>67</sup>.

The Model Investment Treaty of 2008 is similar to the earlier one, except it is quite not<sup>68</sup>. The objective of the Model of 2008 was to transcend from the philosophy that investment treaties are about the protection of the investors and promotion of Investment to a philosophy wherein investor protection and investment promotion being a mechanism or tool for the attainment of sustainable economic development, this change in philosophy ensured that the rights bestowed by the Treaty were subject to policies governing the environmental concerns, labour laws, the corporate social responsibilities, etc<sup>69</sup>. Thereby, introducing balance between the investors' rights and obligations of the host state and enhanced regulatory powers.

To accommodate the objective laid down in the preamble, there have been changes in the designing of not all but some of the provisions, such as the definition of investors and investments, the provision on expropriation, the inclusion of exceptions to the provision on transfer, the inclusion of provision on environment and labour laws etc.

The definition of investor is significantly similar to the definition provided in the earlier MBIT of Austria, with the prominent difference being qualifying the term of “nationality” with “dominant and effective nationality”<sup>70</sup>. Thereby narrowing the scope of the definition of investors. The earlier definition was a broad one that could introduce a wider ambit of investors, thereby leading to potential incidents of alteration in nationality to take advantage of the investor rights provided in the Treaty. Although the issue was dealt with by some of the arbitral awards, such as the Phoenix Award<sup>71</sup> and Cementownia<sup>72</sup>, nonetheless, the restrictive designing of the investor would eliminate the chance of new interpretations which the Contracting States did not desire, thereby explicitly outcasting the “Mailbox” or “paper” companies from taking undesired advantage of broad definition of an investor.

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Model BIT of 2008 Austria.

<sup>71</sup> ICSID Case No. ARB/06/5, Award, April 15, (2009).

<sup>72</sup> ICSID Case No. ARB(AF)/06/2, Award, September 17, (2009).

The Austrian MBIT of 2008 incorporated the characteristics “commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk” as essential part of the definition of Investments, which was inspired from the controversy stoked by *Salini Test*<sup>73</sup>.

The National Treatment and Most Favoured Nation clauses were present in the MBIT, however with certain added exceptions such as: a. Obligations of the Contracting States as a member of the United Nations Charter; b. Obligations of the Contracting States as the member of economic integration treaty, c. Obligation met under international agreement or arrangement or domestic legislation regarding taxation<sup>74</sup>. Incidentally, these aforementioned exceptions were also forming the part of the provision on transfer in the Model of 2008. The rest of the exceptions to the right of transfer were not an altered position than the earlier model<sup>75</sup>.

The provision dealing with expropriation provided narrower obligation upon the Contracting State, as the provision keeps the non-discriminatory and reasonable measures in good faith, taken in rare occasions, addressing the legitimate public welfare objectives, such as environment, safety and health<sup>76</sup>. The provision closely resembled the Canadian FIPA<sup>77</sup>.

The Investor-State Dispute Settlement mechanism saw change too, however their approach do not seek to discourage the use of ISDS mechanism. Austrian MBIT explicitly reject the idea of exhaustion of local remedies<sup>78</sup> however, it closes the door on arbitration of the domestic forum gives an award on merit of the claim, however, the door for arbitration remains open if approached before the conclusion of the proceeding at the domestic forum. From the technical standpoint, the Model Treaty neither has a true “fork in the road” clause, nor an “exhaustion of remedies” clause.

Realising the changing climate in the international investment environment, Austria framed the 2008 MBIT to accommodate the enhanced policy interest of

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<sup>73</sup> *Salini Costruttori SpA v. the Kingdom of Morocco* (2001).

<sup>74</sup> Article 3(4) Austrian Model BIT 2008.

<sup>75</sup> Article 9(4) Model BIT 2008.

<sup>76</sup> Article 7 Austrian BIT 2008.

<sup>77</sup> *Supra* Note 66/.

<sup>78</sup> Article 15(2) Model BIT 2008.

the Host State within the ambit of the Treaty, thereby creating the balance between the rights and obligations of the parties. The designing of the model was in its totality influenced by its own needs and investment policy, the different approaches from the other MBITs with respect to critical areas evidence that the choices to alter or not, was based on reason and not whimsical or due to undue pressure.

#### **D. Rationale of Model Bilateral Investment Treaties**

The MBITs are tremendously influential in negotiation the Treaty, as it acts as the starting point of negotiation and it indeed acts as “efficient and convenient” tool to develop the investment regime of the participating nations<sup>79</sup>. Furthermore, the MBITs acts to reduce drafting and negotiating costs and bring uniformity in the practise across the investment treaties<sup>80</sup>.

A MBIT is not a mere referential document, which comes in aid only during negotiation. Instead, it has a comprehensive role, including interpretation of negotiated treaty. The model acts as “an expression of State’s investment policy”<sup>81</sup>. This formulation of the Model Investment treaty could be inspired by several factors, including “aping a foreign system”. However, since the third phase of the Model Investment Treaty described by Vandeveld<sup>82</sup>, the instruments are much evolved and are strongly influenced by the notion of balance<sup>83</sup>, reaction to the investor-State arbitration<sup>84</sup>, change in the flow of capital, economic position of the contracting parties<sup>85</sup>. Even though the model investment treaty is still being shaped by nation-States, nonetheless, it is designed by the Nations-States, representing its approach towards the International Investment Regime.

The benefits, risks, critical considerations of MBITs were elaborately discussed in a webinar organised by the International Institute of Sustainable Development

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<sup>79</sup> Chester Brown. ed. *Commentaries on selected model investment treaties*. Oxford University Press (2013).

<sup>80</sup> Stephen Schill. *The multilateralization of international investment law*, (Vol. 2). Cambridge University Press, p 91 (2009).

<sup>81</sup> *Supra* Note 3.

<sup>82</sup> *Supra* Note 21.

<sup>83</sup> *Supra* Note 66

<sup>84</sup> *Supra* Note 55

<sup>85</sup> *Supra* Note 3

held on 8th Oct 2018<sup>86</sup>. Ms Patience Okala, Deputy Director & Legal Advisor, Nigerian Investment Protection Commission, shared the Nigerian experience with Model investment Treaty and Investment Treaty practice in length<sup>87</sup>. Briefly stated, she expressed that the MBIT has a diverse role as it includes its benefits in terms of negotiations of treaties, actively laying down priorities of the country, and acts as a statement of the objectives which nation-State desires to address through the Treaty and its goals with respect to sustainable development. Ms Okala drew the analogy of not having a MBIT with “going to war unprepared”<sup>88</sup>. She further shared the difficult experience of Nigerian BITs, which did not meet the needs of the people, especially from the environmental degradation perspective and challenges which cropped up in the Niger-Delta region<sup>89</sup>. The existing Treaty negotiated without the MBITs was with limited focus, addressing the protection of the investors and without heeding the quality of investments made, especially in the Niger-Delta region, where the investors had limited responsibility with significant responsibility protection<sup>90</sup>. The experience in the Niger-Delta region led the Nigerian Government to review the Investment Treaties<sup>91</sup>. The Nigerian Government realised that an Inter-Ministerial body, with key agents of Government, who may have an interest in the development of investment regime, must be involved in the review process. Thus, the Investment Promotion Agency, Federal Ministry of Justice, Finance and Foreign Affairs, Inland Revenue Service, Academicians collectively designed the MBIT, thereby expressing a true national position, a rationale need<sup>92</sup>. The Model Investment Treaty included objectives covering sustainable development, balance between extremes of protection, responsibility and obligation, and thereby, create a win-win atmosphere for the contracting States and investors<sup>93</sup>. The MBIT serves as a reference point to the negotiators, assists the negotiators to list out nations

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<sup>86</sup> IISD Webinar on Model Investment Treaty. Deliberation by Patience Okala and Dr Jonathan Bonnitcha <https://www.youtube.com/watch?v=GQe0Y7U0Bz> Accessed in 20.12.2020

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

priorities, sustainable objectives, and avoid such treaties that run counter with the country's sustainable development<sup>94</sup>. Ms Okala also hinted that prior to the MBIT, the representative leaders often signed treaties for optics and cameras, which has been since curbed as signing a poorly designed Investment Treaty can cost a lot for a nation<sup>95</sup>. The MBIT is a “living document” dynamic in nature and helps the country realise its goal as a collective over the years. It may not be feasible to alter the document frequently, as it must have a certain life span and then. However, it is capable enough to negotiate and be upgraded as and when time demands<sup>96</sup>.

In the afforested webinar, Dr Jonathan Bonnitcha, Senior Lecturer, University of South Wales, and Associate, International Institute Sustainable Development deliberated upon the rationale for a Model and discussed why a nation-State should consider designing and developing a Model Investment Treaty<sup>97</sup>. He expressed that a Model Treaty would permit a nation-State to move towards a considered approach as it allows to attain the policy objectives of a nation-States investment policy, incorporate the desired treaty provisions and analyse the efficacy of the existing treaties<sup>98</sup>. It opens doors for broader input as it considers an inter-ministerial approach, public consultation and expert opinions<sup>99</sup>. The Model Treaty further permits designing based on experiences and allows redesigning the definition, scope, rights, and obligations<sup>100</sup>. Once again, Dr Bonnitchia reaffirms the dominant role of the MBIT in the negotiation stage. It allows the opening of negotiation, puts the nation-States in considerably stronger positions, and assists them in preparing for negotiation. It further acts as a resource for faster decision making in the event of a dispute<sup>101</sup>.

Some of the common challenges encountered by the MBITs, such as practical difficulty, reduction in flexibility, confidentiality concerns, and time and

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

resources, are often unfounded<sup>102</sup>. When questioned on the lack of resources with a particular nation-State causing a hindrance in designing a MBIT, Dr Bonnatchia suggested two solutions, one taking the pragmatic approach other and the other a realist approach<sup>103</sup>. He suggested that if a nation-State is short on resources to design a MBIT, then in such a situation, the nation-State might want to stay away from the regime, as the flawed treaty practice from the host country standpoint could lead to heavy cost<sup>104</sup>. Whereas the realist approach would be to examine MBITs of similarly placed countries in economic terms and/or resort to the Models designed by the economic groups and adopt them<sup>105</sup>.

To summarise, the MBITs have become so significant that it widely accepted, that the nation -States engage with the regime must develop MBITs to effectively use the regime to meet the rationale of the regime, i.e. Protection of Foreign Investment and Economic prosperity of the contracting parties<sup>106</sup>.

### III. Model Investment Treaty and Rational Design Theory

To understand the correlation between the philosophy of the RDT and the Model Investment Treaty, it is crucial that one examines the philosophy of the RDT and the philosophy of MBITs. In this segment, the fundamentals of the RDT and Model Investment Treaty will be explored, leading to a theoretical correlation between the two.

#### A. Philosophy of Rational Design Theory

In the Autumn of 2001, Barabara Koremanos, Charles Lipson and Duncan Snidal authored an article titled “The Rational Design of International Design”, which was published in “International Organization”, leading to the formation of the premise for Theory of Rational Design. The present segment engages establishing the theoretical and philosophical premise of the concept of Rational Design.

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> KENNETH VANDEVELDE,. BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION. Oxford University Press. (2010).

While it is admitted that the concept was essentially practically examined and empirically tested against the backdrop of the international institution, which involved multilateral engagements, however, the philosophy of RDT could not be chained within that box. The philosophy could be effectively traced to the editors' introduction of the special issue, which stated, “*Our main goal is to offer a systematic account of the wide range of design features that characterise international institutions. We explore theoretically and empirically the implications of our basic presumption that states construct and shape institutions to advance their goals. The most direct implication is that design differences are not random. They are the result of rational, purposive interactions among states and other international actors to solve specific problems*”<sup>107</sup>. The authors embarked upon the journey which led to the development of the theory based on the design features playing a significant role in the conclusion of treaties. These design features were not random in nature rather far from it. In negotiated agreements, these design features acted as windows to the mind of negotiators acting on behalf of the nation-States. They were the outcome of not mere cooperation, rather “rational” and “purposive interactions” between the negotiators from nation-States on behalf and the said negotiations were undertaken to achieve common and collective goals. The work of Koremenos, Lipson & Snidel is based on the widely acceptable presumption of “rational choice,” i.e. “*states use international institutions to further their own goals, and they design institutions accordingly*”<sup>108</sup>, and “*They are the self-conscious creation of states*”<sup>109</sup>. However, it is of great importance to note that the above presumption holds true even when nation-States enter negotiated bilateral agreements. In the modern era of International Law, it would be incorrect to assume that nation-States engage in bilateral treaties without their consent as the philosophy of “consent” theory is the premise of International Law *per se*<sup>110</sup>. However, it must be noted that the price of signing a BIT, is realised much later, especially in the 1<sup>st</sup> and 2<sup>nd</sup> generation BITs as they were often governed by the template provided by the developed world, whereas the consent offered by a developing and least developed States during negotiation were often based on

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<sup>107</sup> *Supra* Note 2.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Barbara Koremenos, Charles Lipson, and Duncan Snidal. “*The Rational Design of International Institutions*”. 55 (4) International Organization :761-99. (2001).

expectation economic prosperity, which do not have any quantifiable parameter incorporated within the substantive clause, and remains one of the chief aspirations as reflected in preambles. If one were to assume that nation-States engage in Bilateral Treaty practice without heeding to their own goals, then it would amount to counter-productive and devoid of consent, translating into bringing more significant questions on the table, which runs counter to the development of international law.

Thus, it could be deciphered from the aforementioned arguments that that nation-state engages in negotiated treaty practice, whether multilateral or bilateral in present time it must follow the philosophy of rational designing theory, i.e. Nation-State engage in negotiated treaty practice to further their goals collectively as a nation, to fulfil their collective needs, whether it is economical, environmental, social, or political. These treaty designs based on negotiations are not random or whimsical, rather, act of careful design based on rationale. The rationale may differ for each country but directly traceable to the need of the nation as a collective.

#### **B. Philosophy & Rationale of Model BIT**

MBIT is a document prepared at a national platform<sup>111</sup> created by an individual nation-State, with the assistance of Inter-Ministerial Bodies, academicians, experts from the industries, etc.<sup>112</sup> Barring the exception of BLEU, every other country has developed a MBIT created as part of their national strategy. However, it must be noted that BLEU negotiated BIT with other countries as a singular economic unit. Hence, effectively they represented their national position through the regional model<sup>113</sup>.

The brief discussion undertaken segment numbered 3.1 helps us trace the development of the MBIT. In addition, the segment helps one realise its dynamic characteristics, evolutionary features, approaches governing the change in designing of the model, and ultimately the benefit and rationale for letting it take place in the regime.

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<sup>111</sup> As classified in the UNCTAD web platform hosting the Model Investment Treaties <[investmentpolicyhub.unctad.org](http://investmentpolicyhub.unctad.org).

<sup>112</sup> *Supra* Note 54; *Supra* Note 85.

<sup>113</sup> *Supra* Note 110.

As witnessed, MBITs were not very common during the conclusion of 1st Generation BITs<sup>114</sup>. It was a tool in the hands of the capital-exporting countries who looked for protection of the investments of their nationals' in the capital-importing countries<sup>115</sup>. The capital-exporting countries presented their models to negotiate the BITs, which were agreed upon by the capital-importing countries, who believed such agreements would pave the way for the much-desired foreign investments.<sup>116</sup> The risks associated with such agreements were not assessed; the benefits were the highlights. The second stage of the MBITs witnessed the initiative of the erstwhile capital-importing states, i.e., the developing countries, towards framing and designing MBITs. However, little experience and failure to assess the potential cost of such treaties became a roadblock to creating a suitable Model Investment treaty to aid them in negotiation. Instead, it was mere aping the developed countries practice<sup>117</sup>. It was only at the third phase of the MBIT, the countries, irrespective of developed and developing countries, started designing MBITs, which were based on adverse experience, the realisation of the potential cost of such Treaty, concerns regarding restrains over the policy-making powers, the existing skewed balance of rights and obligations of the investors. Instead, the abovementioned realisations led to the beginning of the 3rd phase of MBITs<sup>118</sup>.

The turn of the millennium was marked by events such as the backlash against the economic liberalisation, the capital-exporting States facing claims from the investors of erstwhile capital importing countries, rise in the environmental regulations leading to indirect expropriation<sup>119</sup>. The events led to the realisation that the countries need to act in accordance with their social, environmental, economic desires. Thereby, needing comprehensive investment policies that gave way to sustainable development and addressing the needs of the people in multiple parameters and achieving the coveted economic development has always been an aspiration of the nation-State, motivating her to negotiate the investment treaties and move away from the erstwhile aping practice. The three

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<sup>114</sup> *Supra* Note 21.

<sup>115</sup> *Supra* Note 21 & *Supra* Note 7.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

stages, which involved three distinct approaches, laid the foundation for the philosophy of designing the MBITs.

The change in the investment policies of developed and developing countries, as evidenced earlier in segments enumerated as 2.2, 2.3 and 2.4 provides the basis, rationale, and reasons for designing the present MBITs.

The *raison d' être* of the MBIT leads us to its philosophical understanding of such documents. Presently, the MBIT plays several roles in the international investment regime, which could be broadly classified into a. Pre-Negotiation, b. Negotiation, Post-Negotiations Stage. During each of these stages, the document helps the nation-State understand the State's need at a national level and reason to participate in the regime, then assert herself with much strength during negotiation. The assertion is based on the reason to participate in the regime and finally assist in interpretation in case of any dispute regarding the understanding of the nation-State.

#### ***Pre -Negotiation Stage***

It is the stage when the nation-State forms an exclusive committee composed of stakeholders from various fields such as Ministerial Representatives, Government Officials, Academicians, Experts, Practitioners, Industrial Representatives etc<sup>120</sup>. The committee engages in designing the MBIT, which would reflect the needs of the people and pave the path for sustainable development<sup>121</sup>. The design outcome of the pre-negotiation stage represents the truest form of the State's need and rationale design of the Treaty.

#### ***Negotiation Stage***

At this stage, the Nations-State representative engages in negotiation with other nation-States. The MBIT often proves beneficial on several counts at this stage, such as enhanced clarity on the design and its implications, putting the nation-State relatively stronger than a situation where it did not have such document, reduction in cost negotiation in terms of time and money<sup>122</sup>. It is expected that during negotiation, certain dilution may happen from the MBIT of the pre-negotiation stage, and the truest form of rational design be subjected to delusion.

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<sup>120</sup> *Supra* Note 86 & *Supra* Note 55.

<sup>121</sup> *Supra* Note 86.

<sup>122</sup> *Supra* Note 86; *Supra* Note 80.

However, it also helps to analyse the extent of deviation while concluding the BIT<sup>123</sup>. This assessment is essential as it would be a reflection of the success and failure of RDT in the Bilateral Investment Regime.

### *Post Negotiation Stage*

After the conclusion of the Treaty, the role of the MBIT is much reduced; however, it continues to play a significant role in decision making and disputes<sup>124</sup> as it helps the interpreter peep into the negotiators' minds, even when Treaty has deviated from the Model Treaty.

Thus, it could be reasonably concluded, that the MBIT is a form of document that other areas of treaties have not witnessed. MBIT not only expresses the nation-State's investment policy but also plays a critical role. It represents the *raison d' être* of the nation-State to engage with the international investment regime, thereby being the truest form of rational approach, which a nation-State would desire. Negotiating a treaty may lead to deviation, but the extent of variation determines the place of RDT in the realm of the BIT. It also assists in ascertainment of the extent a State has compromise while negotiation and ultimately consenting to the BIT.

### **C. The Correlation**

The abovementioned discussions in segment enumerated **under B and C** on the philosophy of the RDT and MBITs provide for two distinct philosophies: a theoretical conception, while the latter reflects the development of a philosophy based on the application of the earlier one. The RDT advocates that the Nation-State engages in negotiated treaty practice to further their goals collectively as a nation and fulfil their collective needs, whether economic, environmental, social, or political. These treaty designs based on negotiations are not random or whimsical; instead, an act of careful design based on rationale. Thereby pinning the theory to the need of the nation-State as a collective and development of treaty design in accordance with that. Whereas, MBIT is designed based on the need of the nation-State to engage with the investment regime. When observed, RDT suggests that it is the need of the nation-State which motivates it to sign a treaty; the need represents the rationale. The MBIT is designed to address the

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<sup>123</sup> *Supra* Note 3.

<sup>124</sup> *Supra* Note 86.

need of the nation-State and reflect the investment policy of the nation-State. No other treaty regime has a structured form like the Investment Treaty.

The MBITs reflect the truest form of the nation-State's interest. If RDT is to be traced from the BIT, then there can be no better instrument than the MBIT, as it is a national level document expressing the need, desire and Investment policy of that particular country, without any interference from the other nation-State, thereby, representing pure representation of RDT. However, when a nation-State armed with a MBIT participates in negotiation with other nation-States to conclude a BIT, there will be a certain amount of dilution in the final Treaty. It is the extent of dilution which could help us assess if a particular nation-State successfully adhered to the philosophy of RDT or not in the treaty practice. Nonetheless, the correlation between the philosophy of RDT and the MBIT stands absolute.

#### **IV. Conclusion**

MBITs had a long gestation period to come into the shape it is today. It developed through three different eras, each marked by its significance. The growth of the MBIT over the years reflected the change in the negotiating capacities, the experience of the nation-States, nature of parties, the flow of capital, changing climate of the investment regime, the controversial dispute settlement mechanism, the development of alternative principles, balancing of rights and obligations of the investors and Contracting States etc. The experience of nation-State who realised the importance of MBITs highlights their own need and rationale for engagement with the regime. However, certain factors remained constant through the area that is the philosophy of the MBITs, i.e. rationale for its creation being indeed of the nation-State negotiating based on the model. Even though the MBITs have been in fray from three phases, it is third phase which is the most significant one. The third phase witnessed an extensive rise in MBIT numbers based on backlash against the globalisation, environmental concerns, controversial arbitral awards, and ill-effects of earlier BITs, etcetera. This era witnessed the nation-State, including the developed and developing nation-States with MBIT not through aping but through deliberation and discussion at the national level. Thereby adhering to the philosophy of RDT.

The correlation between the philosophy of RDT and the MBIT is undeniable. As

the former suggests, nation-States participate only in treaties whose design fulfils the collective goal of the nation-State, whereas later is application of such rational design by reflecting the nation-State's objectives and policies in the regime of international reflecting the rational choice made with regard to Investment. However, it is challenging to hold such standards of rationality while negotiating a BIT, as the other nation-State also may come with their Model Investment Treaty reflecting their investment policy. It is expected that the negotiated Treaty between two such countries with the MBITs will face a certain amount of dilution. It is the extent of dilution which can help realize the presence or absence of RDT for each Contracting Parties in each of the BITs. Incidentally, even though the MBITs may have philosophical grounding at in the philosophy of RDT, most nations- States are yet to realise the importance of the MBITs at their national level, as only handful of States from developed and developing world have engaged in designing of the MBITs. It is imperative that the nation-States intending to engage with the regime, they give due consideration to the idea of MBIT before interacting with the regime.

## Public Health Management: The Way Forward through Patent Pools

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### Abstract

*Patent pools covers agreements whereby two or more parties agree to pool their respective technologies and license them as a package. It facilitates public health management of IP through a partnership between an entity with a public health mandate on one hand and private pharmaceutical companies on the other hand. This model of access-oriented and nonexclusive voluntary licensing mechanisms with a clear public health mandate can contribute to achieving this goal of Universal Health coverage and can overcome a number of access and innovation challenges in the biopharmaceutical field. This can be substantiated by analyzing the successful Medicines Patent pool. The benefits of collaborative research and an efficient patent pool could also be witnessed when COVID-19 pandemic was declared as a Public Health Emergency of International Concern by the World Health Organization (WHO) on January 30, 2020, where they launched the COVID-19 Technology Access Pool (C-TAP) with a Solidarity Call to Action for sharing intellectual property on treatments and vaccines.*

**Keywords:** Patent pools; Public Health Management; Medicines Patent Pools; Healthcare sector; COVID-19 pandemic, Patent licensing.

### I. Introduction

Patent pool is a mutual exchange of patent rights among multiple patent holders to aggregate their patents and license them as a package. Licenses are provided to the licensee, either directly by the patentee or indirectly through a new entity that is specifically set up for the administration of the pool<sup>2</sup>. The rationale for patent pools is that by reducing the number of necessary transactions and by simplifying patent landscapes, they can reduce transaction costs and facilitate

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<sup>2</sup>J. Clark, B. Stanton, K. Tyson, Patent Pools: A Solution to The Problem of Access In Biotechnology Patents? USPTO 5 (Dec. 5, 2000) <http://www.pharmacist.or.kr/sites/default/files/wp-content/uploads/2007/04/patentpool2.pdf>.

technology transfer. So they significantly reduce the transaction costs of exchanging rights when compared to a series of one-shot licensing deals.

They became a common phenomenon by the nineteenth century and there were many pools in the ICE technology and biotechnology. Though of recent origin, a sector where it has evidently proved to be successful and became a model of just balancing of societal and private rights is in the healthcare sector. Its presence in the biomedical and public health fields address innovation and access challenges.

### **VIII. Healthcare: A Unique Sector**

Healthcare sector is a unique industry due to the fact of information asymmetry. There is lack of consumer sovereignty because consumer is not the chooser like in the other industries. There is no information exchange between the buyer and the seller. Usually in other industries, with the responds of the price, the demand changes and that is what is called as demand elasticity. This is not so with pharmaceutical sector. Here it is demand inelasticity. Usually, top brand will be of high prices. So, access and affordability are always an issue in the health sector and the only possible solution is to have a good public health sector.

The patent pooling model in health represents a new type of public-private partnership (PPP) that relies on the licensing of patents on access-oriented terms to enable multiple third parties to develop or supply patented health technologies in a given geography<sup>3</sup>. Thus it is a mechanism for public health management of IP through a partnership between an entity with a public health mandate on one hand and private pharmaceutical companies on the other hand. In other fields they have generally been established as private consortia of patent holders, each owning intellectual property on technology considered as essential to the implementation of a particular standard so that they can facilitate product development and enable interoperability between products. Due to all these

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<sup>3</sup> Esteban Burrone, *Patent Pooling in Public Health* in THE CAMBRIDGE HANDBOOK OF PUBLIC-PRIVATE PARTNERSHIPS, INTELLECTUAL PROPERTY GOVERNANCE, AND SUSTAINABLE DEVELOPMENT 93-108 (Margaret Chon, Pedro Roffe, Ahmed Abdel-Latif ed., 2018). For an overview of different models of public-private partnerships in health, see Kent Buse & Gill Walt, *Global Public-Private Partnerships: Part II – What are the Health Issues for Global Governance?* 78(5) BULL.WORLD HEALTH ORGAN 699-709 (2000).

reasons an exclusive study of the patent pools in the healthcare sector is of significance.

### **IX. Patent Pooling in Public Health**

Patent pooling in the biomedical field began with the advent of biotechnology patenting in the early 2000s and focused on enabling access to intellectual property on key research tools or platform technology needed by other innovators to undertake further research and development. In December 2000, the United States Patent and Trademark Office (USPTO) proposed<sup>4</sup> the establishment of a patent pool as a possible solution to concerns about access to biotechnology patents. Though there were attempts to ensure that genomic sequences remained in the public domain,<sup>5</sup> the surge in patenting of genomic sequences raised some concerns about the hampering of further pharmaceutical research and development without widespread licensing of such research tools.<sup>6</sup> The necessity of the need for a patent pool-type mechanism to overcome multiple overlapping patents on genomic sequences emerged following the outbreak of Severe Acute Respiratory Syndrome (SARS) in 2002–2005. The filing of patent applications on the genomic sequence of the coronavirus responsible for SARS by several institutions led to discussions on the establishment of a patent pool.<sup>7</sup>

The patent pool would issue licenses on essential patents on a nonexclusive basis and enable developers to work on the development of vaccines for the benefit of all stakeholders.<sup>8</sup> It was also hoped that a patent pool for SARS could set a helpful precedent that might lead to the establishment of analogous pools for other disease areas. The subsequent end of the outbreak removed the sense of urgency and the patent pool was never established.

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<sup>4</sup> U.S. Patent and Trade Office (USPTO), *Patent Pools: A Solution to The Problem of Access in Biotechnology Patents?* (2000), (Nov. 23, 2017), [www.uspto.gov/web/offices/pac/dapp/opla/patentpool.pdf](http://www.uspto.gov/web/offices/pac/dapp/opla/patentpool.pdf).

<sup>5</sup> Jorge Contreras, *Bermuda's Legacy: Policy, Patents, and the Design of the Genome Commons*, 12 MINN. J. L. SCI. & TECH. 61 (2011).

<sup>6</sup> Esteban Burrone, *supra* note 2 at 94.

<sup>7</sup> See James H.M. Simon et al., *Managing Severe Acute Respiratory Syndrome (SARS) Intellectual Property Rights: The Possible Role of Patent Pooling*, 83(9) BULL. WORLD HEALTH ORG. 707-710 (2005).

<sup>8</sup> PROMOTING ACCESS TO MEDICAL TECHNOLOGIES AND INNOVATION 118 (WTO, WHO, WIPO 2012).

In 2006, the World Health Organization (WHO) Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH) reviewed the arguments for the establishment of patent pools in public health and recognized that patent pools on upstream technologies could be useful to promote innovation relevant to developing countries<sup>9</sup>. The report suggested that the relative lack of market incentives for technologies that are particularly needed in developing countries could enable agreements that would otherwise be more difficult to achieve. The subsequent WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property (GSPOA) went further by recognizing the role patent pools could play not only to facilitate innovation, but also to promote access to new health products. In adopting the GSPOA, the World Health Assembly recommended the development of new mechanisms to promote access to key health-related technologies and specifically called for examining the “feasibility of establishing voluntary patent pools of upstream and downstream technologies to promote innovation of and access to health products and medical devices.”<sup>10</sup> In order to follow up on certain elements of the GSPOA, the WHO established a Consultative Expert Working Group on Research and Development (CEWG) that was to focus on issues relating to the financing and coordination of R&D for diseases that disproportionately affect developing countries. In reviewing proposals from various stakeholders, the CEWG noted the potential for combining patent pools with possible incentive mechanisms such as prize funds to promote innovation for new formulations needed in developing countries. Moreover, the CEWG recommended patent pools (and in particular downstream pools) as cost-effective approaches to improving access in developing countries and as a way of delinking the cost of R&D from the final price of products<sup>11</sup>. In total the public health patent pools aim to improve access to health technologies especially in developing countries and facilitate further innovation through nonexclusive voluntary licensing<sup>12</sup>. An example of this is the

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<sup>9</sup> Report of the Commission on Intellectual Property Rights, Innovation and Public Health, WHO (April 25 2006), <https://www.who.int/intellectualproperty/en/>.

<sup>10</sup> GLOBAL STRATEGY AND PLAN OF ACTION ON PUBLIC HEALTH, INNOVATION AND INTELLECTUAL PROPERTY, WHO 13 (2011), [https://www.who.int/phi/publications/Global\\_Strategy\\_Plan\\_Action.pdf](https://www.who.int/phi/publications/Global_Strategy_Plan_Action.pdf).

<sup>11</sup> Esteban Burrone, *supra* note 2 at 95.

<sup>12</sup> Other initiatives to establish IP pooling-type mechanisms in the biomedical field include the Pool for Open Innovation against Neglected Tropical Diseases proposed by

Medicines Patent Pool (MPP) whose mandate includes increasing accessibility to drugs for the treatment of HIV, hepatitis C, tuberculosis, and other essential medicines.<sup>13</sup>

## **X. Medicines Patent Pool**

Medicines patent pool is the first patent pool with a clear public health mandate. It was established in 2010 following a decision by the Executive Board of UNITAID, a publicly funded global health initiative that is housed by the WHO<sup>14</sup>. Its mission was to improve health by providing patients in Low- and Middle Income Countries (LMICs) with increased access to quality, safe, efficacious, more appropriate and more affordable health products, through a voluntary patent pool mechanism.<sup>15</sup> The core work of the Medicines Patent Pool is to negotiate public-health driven licenses with patent holders and sublicensing them to generic manufacturers and product developers.

It aims to generate robust market competition which lead to reduced prices and improved access. It also leads to the development of new products. It offers a public-health driven business model that aims to lower the prices of HIV medicines and facilitate the development of better-adapted HIV medicines. The MPP called sharing of patents a win-win solution because it helps original

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pharmaceutical company GSK; WIPO Research, a platform established in 2011 to enable access to IP, technology, and know-how for the development of medical products for neglected tropical diseases, malaria, and tuberculosis; and Librassay, a patent pool for diagnostics and tools in support of personalized medicine and health care administered by MPEG-LA.

<sup>13</sup> Medicines Patent Pool, 2018 Annual Report: Vision and Mission 12 (2019), [https://annual-report-2018.medicinespatentpool.org/downloads/MPP\\_2018\\_Annual\\_Report\\_Vision-and-Mission.pdf](https://annual-report-2018.medicinespatentpool.org/downloads/MPP_2018_Annual_Report_Vision-and-Mission.pdf)

<sup>14</sup> UNITAID is a global health initiative, established to provide sustainable, predictable, and additional funding to significantly impact on market dynamics to reduce prices and increase the availability and supply of high quality drugs and diagnostics for the treatment of HIV/AIDS, malaria, and tuberculosis for people in developing countries. It is a foundation under Swiss law that negotiates licenses for patents on medicines from the WHO "Essential Medicines List" to facilitate their production by generic manufacturers. It is hosted by the World Health Organization. On the establishment of the MPP, see Memorandum of Understanding, Jun. 8–9, 2010, MPP-UNITAID, EB12/R7.

<sup>15</sup> Memorandum of Understanding, Jun. 8–9, 2010, MPP-UNITAID, EB12/R7.

manufacturers to share their products in poor countries and still make money. There also exist some arguments that it's favorable to the Big Pharma or an indirect way of making profits in resource-poor settings without the threat of generic production. But the fact that the countries that benefit from such agreements make access to medicines faster cannot be overlooked. Interestingly, since it's in agreement with the original manufacturers, many western donors also support such programs.

## **XI. History of Medicines Patent Pool**

In July 2008 the Executive Board of UNITAID<sup>16</sup> approved the principle of establishing a patent pool for medicines and was established with a base in Geneva, Switzerland and became a separate legal entity in July 2010. It was formed with an aim to provide patients in low and middle income countries with increased access to more appropriate and affordable medicines. The initial focus was in the area of pediatric anti retro virus (ARVs) and new combinations.<sup>17</sup> It was also possible to enhance and accelerate treatment to patients with ARVs<sup>18</sup> in sub Saharan Africa<sup>19</sup> by the introduction of generic product which was brought

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<sup>16</sup> UNITAID is an innovative global health financing mechanism whose mission is to contribute to scaling up access to treatment for HIV/aids, malaria and tuberculosis in low and middle income countries.

<sup>17</sup> See *The Medicines Patent Pool*, UNITAID, <https://unitaid.org/project/medicines-patent-pool/#en> (July 9, 2017).

<sup>18</sup> There also exist contradictory views regarding the same. A patent pool would act as a group compulsory license, depriving patent-holders of their rights in growing markets around the world and giving the fruits of their R&D investment to copiers for little compensation, if any. In such a system, the fear would be that any new ARVs would be automatically included in the patent pool, thus reducing the possibility for the innovator to recoup his or her R&D investment for these medicines. Furthermore, some observers have expressed concerns regarding the quality of combination products which have not been approved by major, industrialized-country regulatory authorities and, by implication, have indicated that patent pools would lead to lower-quality products being developed by copy companies without sufficient regulatory oversight.

<sup>19</sup> Souteyrand Y, *Global and regional progress in 2008*, WHO (July 2009), [http://www.who.int/hiv/mediacentre/statement\\_july2009/en/print.html](http://www.who.int/hiv/mediacentre/statement_july2009/en/print.html).

by the collaborations of R& D based industry and generic producers. This also helped to drive down the raw material prices.<sup>20</sup>

UNITAID provides funds so as to improve the access of medicines for different diseases. The MPP aims to manufacture low cost generic drugs (ARVs) for under developed and developing nations for securing licenses from originator companies and these drugs (ARVs) are made easily accessible to the low income patients. Moreover, more improved drugs can be made available. The prices of HIV medicines has crashed by 99 per cent since 2000. The average cost of treatment, which was about \$ 10,000 by the turn of millennium is about US \$ 70 in countries such as India.

## **XII. MPP Model**

MPP started off to improve access to more affordable quality-assured HIV medicines in developing countries by enhancing competition among manufacturers. Now the list has been expanded even to include health technologies that could contribute to the global response to COVID-19.

The aim is to make them available faster and cheaper to the greatest possible number of people, in order to have the greatest impact in terms of public health. This means negotiating with the pharmaceutical companies on the one hand to give MPP these licenses and on the other hand to select and monitor the generic producers of these treatments<sup>21</sup>. It enable the development of formulations adapted to developing country needs such as pediatric formulations, also facilitate the development of fixed-dosed combinations or “three-in-one pills” that combine various active pharmaceutical ingredients into a single dosage form.

The model has made it more efficient for the generic companies to negotiate with the MPP for access rights to a license than to do it themselves directly. MPP is concerned with the most favorable in terms of public health, that is getting the

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<sup>20</sup>Dionisio D, Gass R, McDermott P, et al., *What strategies to boost production of affordable fixed-dose antiretroviral drug combinations for children in the developing world?* PUBMED (July 2009), <http://www.ingentaconnect.com/content/ben/chr/2007/00000005/00000002/art00002>.

<sup>21</sup> Par Fabrice Delaye, *Medicines Patent Pool can be conduit for access to affordable Covid-19 treatments*, GENEVA SOLUTIONS, <https://www.heidi.news/geneva-solutions/medicines-patent-pool-proposed-as-main-conduit-for-inexpensive-covid-19-treatments> (last updated on jun. 2, 2020).

best prices, the widest geographical coverage and the best quality downstream. In certain cases there may be no payment, in some cases the generic companies may have to pay reduced royalties. The pool sees to it that the parties who take license meet with the agreed standard. A highlight of the mechanism is that it offers benefit to all those are involved.<sup>22</sup>

The incentive for pharmaceutical companies to give up its intellectual property for a treatment in some countries is their realization that they are not losing anything for the simple reason that there is no market in low-income countries. On the other hand, there is a gain in terms of image and social responsibility. This is more effective than trying to earn a few extra cents<sup>23</sup>. The Pool works to stimulate competition by saving generics companies the uncertainty of having to negotiate with several patent holders for the right to produce a particular medicine, making it easier for them to enter the market. They help in providing a fair royalty to the right holders, make it easier for innovators to access the patents needed to develop new products and it also helps people living with HIV/AIDS by providing the necessary medicines that too at an affordable cost.

### **XIII. Working of MPP**

It operates by negotiating licenses with patent holders<sup>24</sup> and in turn licensing those patents to multiple manufacturers. Such manufacturers are then able to develop the licensed medicine (including new formulations and combinations) and make it available in a defined set of developing countries in exchange for royalties.

Once the best possible license on a patent is obtained, MPP calls for expressions of interest among companies. A committee evaluates the applicants and selects those that have both the means to produce at scale, and the best quality control. Subsequently, agreements are signed and sub-licenses are issued to local manufacturers. The companies obtain the licenses, and are then closely

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<sup>22</sup>*The Medicines patent pool, Stimulating Innovation, improving access* (January 2011) [http://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_gc\\_lic\\_ge\\_12/wipo\\_gc\\_lic\\_ge\\_12\\_ref\\_factsheet.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_gc_lic_ge_12/wipo_gc_lic_ge_12_ref_factsheet.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> The MPP first prioritizes the HIV medicines that need fast-tracked access. It then invites manufacturers for negotiating for licensing. Its first round of negotiations that began in 2010. MPP says that most of the manufactures have responded positively to their proposal.

monitored through reports of sales and quarterly meetings. MPP publish everyone's progress in order to maintain competition and bring prices down. The right of audit at any time is reserved with the MPP. Thus MPP is the most successful example of patent pooling in biotechnology and life sciences in general.

The pool is governed by two main bodies: the Governance Board and the Expert Advisory Group. Every member of the Governance Board is selected among the most dedicated and competent experts for a standard term of two years - there is no cap limitation on the number of terms. Transparency and accountability are ensured by the appointed body of External Auditors, which conducts an annual audit of the pool's accounts and reports to the Board for its approval, as well as ensures the compliance with the foundation's by-laws. The Expert Advisory Group provides consultations to the Board and the Executive Director, upon request, with regards to ongoing negotiations and decisions on licensing agreements. Unlike the Board members, experts of the group do not receive a regular salary<sup>25</sup>.

Any violations of the foundation's policies are investigated by the MPP Compliance Officer. The fulfilment of legal requirements is ensured by pro bono legal consultations by several companies.

In order to prioritize medicines for in-licensing, it's important to know which medicines were patented where. Through on-line searches and the support of WIPO and many patent offices, the MPP managed to obtain information and is made public. Thus a patent status database was launched in April 2011. In October 2016, MPP launched MedsPaL<sup>26</sup> as the most comprehensive open access/free database providing information on the patent and licensing status of patented medicines on the World Health Organization (WHO) Model List of Essential Medicines (EML) and select products under investigation for the treatment of HIV, tuberculosis and COVID-19 in low- and middle-income countries (LMICs).

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<sup>25</sup> Medicines Patent Pool Foundation By-Laws, <http://www.medicinespatentpool.org/wp-content/uploads/By-Laws-August-20165.pdf> (last updated May 15, 2017).

<sup>26</sup> MedsPaL, <https://medicinespatentpool.org/what-we-do/medspal/> (last updated Oct. 14, 2016).

Contents of MedsPal include granted patents and pending patent applications relating to specific medicinal formulations, with bibliographical details, legal status,<sup>27</sup> expected expiry dates, links to actual patent documents on Espacenet.<sup>28</sup> It also contains information on patent licenses that enable generic access in LMICs licenses negotiated by the MPP (with links to the full licenses), bilateral licenses between originators and generics, public commitments not to enforce patents, compulsory licenses, if publicly available<sup>29</sup>.

MedsPaL seeks to address the challenges faced when seeking patent information on medicines. There always exist complexity of patent documents and patent procedures, issues with the technical and legal knowledge required to search and assess patent documents, the need to go to each national patent office to check the patent status, unavailability of electronic national patent registers and unavailability of those in the national language.

#### **XIV. Features of MPP licenses.**

By evaluating the licensing agreements<sup>30</sup> the key features of MPP can be summarized as follows

**Wide geographical scope:** Despite certain geographical limitations, terms and conditions present in MPP licenses were recognized as providing wide access, containing great flexibilities and having the broadest geographical scope. Up to 131 countries are covered in MPP's licenses and hence the geographical scope for sale is high.

**Quality assured products:** Licensees must obtain approval from WHO Pre-qualification, or a Stringent Regulatory Authority. Where such approval is not yet available, temporary approval from a WHO Expert Review Panel may be obtained.

**Sublicenses:** Sublicense can also be issued to qualified entities worldwide in a nonexclusive and non-discriminatory manner to multiple generic manufacturers.

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<sup>27</sup> e.g. filed, granted, opposed, expired.

<sup>28</sup> The European Patent Office public database.

<sup>29</sup> It is updated by automated data feeds, online searches, patent holder disclosures (MPP licenses, Pat-Informed, disclosures to patent offices), collaborations with patent experts and collaborations with national/regional patent offices (collaboration agreements).

<sup>30</sup> ANNEXURE 1: LICENSING AGREEMENT OF MPP.

A key guiding principle for the MPP during its negotiations has been to enable access to new patented treatments in as many low- and middle-income countries as possible while ensuring that the license itself does not constitute an additional barrier to access for countries not included in the license. Hence provisions in many of MPP licenses enabling supply by licensees outside the licensed territory if no patents are being infringed.

Permission to develop new formulations of existing medicines and to combine several medicines into fixed dose combinations.

Flexibility to encourage generic competition: Allows for the manufacturing of active pharmaceutical ingredient and finished formulations anywhere in the world. Sales to countries outside the agreed countries are also permitted where there is no granted patent or where sales of a generic version do not infringe on an existing patent, such as in cases in which a compulsory license has been issued.

There also exist *Additional flexibilities for licensees*. Licensees can challenge any of the licensed patents. In certain cases, a technology transfer package is provided to all the sub-licensees, but there is no obligation to use the technology.

Royalties : In certain cases the license is royalty-free<sup>31</sup>. In others<sup>32</sup> three percent royalty for adult formulations in countries where granted patents on ARV are in force. Royalties to be collected by MPP and channeled back to a community-based HIV organization in the country paying the royalty. Royalties not payable for paediatric formulations or for sales of adult formulations in Sub-Saharan Africa and India

Disclosure of company patent information: The licensee discloses the list of all pending and granted patents at the time of signing the license.

Waivers for data exclusivity: Data exclusivity is waived in countries with such form of protection, thus facilitating regulatory approval of generics.

Compatible with the use of trade-related aspects of intellectual property rights agreement flexibilities.

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<sup>31</sup> ABACAVIR – PAEDIATRICS (ABC).

<sup>32</sup> ATAZANAVIR (ATV).

Transparency: Key feature with the MPP licenses is its transparency. They are all published in full form on the MPP website<sup>33</sup>. This has introduced unprecedented transparency in access-oriented licensing of pharmaceuticals as a part of its transparency policy<sup>34</sup>. It also applies to the patent data collected by the MPP.

Thus it can be seen that by having very flexible features it promotes patent holders from joining the MPP. The terms and conditions in MPP licenses thus seeks to improve treatment options for the broadest number of people living in developing countries.

## **XV. MPP Experiences**

In 2010 after its establishment, the MPP has entered into voluntary licenses with seven patent holders on thirteen HIV medicines and one technology that can be used for the development of nano-formulations of HIV medicines and the main aim was to accelerate availability of quality assured generics of new HIV medicines for use in developing countries.

In November 2015, following extensive consultations, the mandate of the MPP was expanded to hepatitis C and tuberculosis.<sup>35</sup> While there are significant differences between the two disease areas, in both cases there are new medicines that have recently obtained regulatory approval or are in late-stage development that have patents pending or filed in several developing countries.

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<sup>33</sup> The full text of MPP licences, as well as summaries of key terms and conditions see Licences in the MPP, MEDS. PATENT POOL, <https://medicinespatentpool.org/progress-achievements/licences/> (last updated Jun. 17, 2017).

<sup>34</sup> An analysis by the Access to Medicines Index concluded that based on an analysis of the licences available for examination, those negotiated through the Medicines Patent Pool provide licensees with the highest level of flexibility and broadest geographic scope. ATM Index 2014, 105 (Nov. 17, 2014), <https://access-to-medicine-foundation.org/media/atmf/2014-Access-to-Medicine-Index.pdf>. See also The Medicines Patent Pool Transparency Policy, MPP, <https://medicinespatentpool.org/uploads/2020/05/MEDICINES-PATENT-POOL-TRANSPARENCY-POLICY-301014.pdf> (last visited May 31, 2016).

<sup>35</sup> *The Medicines Patent Pool Expands Mandate to Hepatitis C and Tuberculosis Treatment*, MPP (Nov. 6, 2015), <https://medicinespatentpool.org/news-publications-post/the-medicines-patent-pool-expands-mandate-to-hepatitis-c-and-tuberculosis-treatment/>.

In terms of innovation, while there has been significant private investment in R&D for hepatitis C in recent years, leading to multiple new HCV treatments reaching the market, investments in tuberculosis R&D have been very limited, with only two new products have reached the market in the past forty years. Thus, while patent pooling in HCV will likely be primarily aimed at facilitating affordable access for products that are already on the market, patent pooling in the field of tuberculosis could be very important in relation to upstream technology to enable collaborative research and the development of new TB regimens. Hence, the first MPP license in HCV was for a medicine already widely used in high income markets that had recently been included in the WHO Model Essential Medicines List (EML). The objective of the license, therefore, was to enable manufacturing of generic versions of the medicines for the competitive supply in 112 low- and middle-income countries. The first MPP license in TB, on the other hand, was for a medicine that has been stalled in clinical development for a number of years. The MPP license is expected to contribute to accelerating its development by facilitating access to the IP by other potential developers.<sup>36</sup>

## **XVI. Licensing issues in MPP**

### **A. New Use of Known Products**

There were certain issues with the licensing agreement of the MPP. If a new use of one of the known products licensed is discovered then the licensee will be required to pay royalty for this new treatment as well. This can be clearly seen in the issue between Gilead and MPP which included 4 products for HIV treatment, tenofovir disoproxil fumarate (TDF), emtricitabine (FTC), elvitegravir (EVG), cobicistat (COBI) and a combination pill comprising all four drugs known as the 'Quad'. The license allows the patented products to be used in a field of use as defined in the license. For products using TDF as the sole ingredient, the field of use is HIV and Hepatitis B. However, the problematic part arises with EVG and COBI, where the field of use covers these products for *any use* that is consistent with use approved by the FDA or other applicable foreign regulatory authority. Thus if a new use of one of these known products is, then the licensee will be

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<sup>36</sup> The Medicines Patent Pool Announces First License for Tuberculosis Treatment, MPP (Jan. 25, 2017), <https://medicinespatentpool.org/news-publications-post/medicines-patent-pool-announces-first-licensing-agreement-with-a-pharmaceutical-company/>.

required to pay royalty for this new treatment as well. It also means that in order to sell this, the licensee will be locked into the restrictions provided by this current license.

However, countries like India do not allow new use patents. This means that if the extended field of use provision was absent generics would have been able to produce this treatment without needing to pay a royalty to the patent holder. However, the presence of this 'any use' clause, has the same effect as a new use patent being granted, even in countries which do not allow it. This does not encourage new use patents per se, but for all purposes of the generic company, it effectively grants one.

While a generic can choose to terminate a license on a product, it cannot choose to opt out of only the 'new use' of the product. Thus, it doesn't present a realistic choice for a generic company which is producing the product for its original use already, since it is unlikely that it would make business sense to stop a product that is already selling to start producing another one.

#### **B. Forming a global patent system**

As per the terms of the license under a MPP a royalty would be charged even in countries in which the product is not patented. Adding this 'new use' product to the equation, royalty will have to be paid in countries which do not allow 'new use' patents too. I-Mak has pointed out that the TDF patent has only been granted in Indonesia, and yet royalties need to be paid for it in all territories with a change in the royalty rate from 3% -> 5% if the patent is granted. Also, the license cannot be severed based on territory. Thus even if a product is not patented in India in the first place, it's 'new use' will now be protected under this license and royalties will have to be paid on it, effectively granting 'new use patent'-like privileges over the product in all territories covered by the license, as well as the other restrictions brought on by the license.

#### **C. Unjust Enrichment**

The terms of the license holds good even in the case of a controversial patent as long as the status of the patent is under dispute. In a country like India, by pushing the case through various levels of adjudication, this could take up enough years of royalty generation so as to not actually make much of a difference whether the patent is eventually granted or not.

#### **d. Restriction to certain countries**

The production of the Active Pharmaceutical Ingredient (API) for the licensed drug is restricted to Indian generic companies located in India. This removes countries like Brazil, China and Thailand from the equation, as well as Indian companies with manufacturing sites outside India.

Though MPP is a well-intentioned project, it is important that they should take into account these licensing issues so as to ensure that the current negotiations with other pharmaceutical companies can at least take these into consideration

### **XVII. COVID -19 pandemic and patent pools**

COVID-19 pandemic was declared as a Public Health Emergency of International Concern by the World Health Organisation (WHO) on January 30, 2020. It has shown us the benefits of collaborative research. The World Health Assembly on May 2020 discussed on patent pooling to manage the pandemic with the open sharing of data and information<sup>37</sup>. Costa Rica suggested pooling of rights to deal with the pandemic through free or minimal, affordable licensing to ensure the outcomes of efforts can be used by countries with limited economic resources to deal with the problem. India assumed the chairmanship of the Executive Council<sup>38</sup>.

On Friday 29 May 2020, the World Health Organization and 37 countries launched a launched the COVID-19 Technology Access Pool (C-TAP) with a Solidarity Call to Action for sharing intellectual property on treatments and vaccines. MPP would serve as the operational conduit for patent sharing. MPP has been instrumental in pushing for the establishment of a pool with respect to COVID-19. The MPP has also updated their Medicines Patents and Licenses database (MedsPal) to include the status of patented candidate products for COVID-19. Currently the only candidate product on the MedsPal database that is described in the database as being for the treatment of coronaviridae viral

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<sup>37</sup>Balakrishna Pisupati, *Patent Pooling, A Covid Success Story*, <https://www.thehindubusinessline.com/opinion/patent-pooling-a-covid-success-story/article31891866.ece> (last updated Jun. 22, 2020).

<sup>38</sup> Heena Lamba Singh, *India: Contribution Of IPR Regimes In Fight Against COVID-19 Pandemic*, (June 09, 2020), <https://www.mondaq.com/india/patent/949744/contribution-of-ipr-regimes-in-fight-against-covid-19-pandemic>.

infections is Remdesivir (remdesivir is an experimental drug, not currently approved for treating COVID-19). Though MPP was in existence for a longer time, formation of such global pool was quite a new initiative. The earlier existed mega pools were only at industry-wide levels.

This initiative complements the European Commission-led Covid-19 Tool Access Accelerator (ACT), which has already raised over 7 billion Euros for R&D and expanded distribution of future drugs. ACT has been supported by industry, non-profits such as the Bill and Melinda Gates Foundation and the Global Alliance for Vaccines (GAVI), and the UN-hosted drug purchasing facility, UNITAID.

Through C-TAP, WHO is now asking public and private funders of R&D to commit to IP knowledge-sharing, in particular through open licensing. It aims to collect patent rights, regulatory test data and any other information and IP that will help in the development of vaccines and drugs and improve diagnostic abilities. This can ultimately lead to global public good<sup>39</sup>.

According to GISAIID, the global initiative to sharing of all influenza data, as of June 22, 49,781 genome sequences of the Covid virus have been shared, voluntarily, by researchers from around the world. The importance of this sharing, supported by the number of pre-peer review publications of results from research on various aspects of dealing with the pandemic made available for free, online, has enormously speeded up the effort to find medicines and vaccines to stop/contain the spread of this novel virus<sup>40</sup>.

The Trade Related Intellectual Property Regime (TRIPS) allows countries to grant compulsory licenses to companies to produce a patented product at times of emergencies. In April 2020, the European Commission, the European Medicines Agency and the European medicines regulatory network alluded to options for areas where regulatory flexibility is possible to address some of the

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<sup>39</sup> Namratha Murugesan, *Are Patent Pools an Effective Solution to COVID-19's IP Barriers?* (May 26, 2020), <https://spicyip.com/2020/05/are-patent-pools-an-effective-solution-to-covid-19s-ip-barriers.html>.

<sup>40</sup> Marie-Paule Kieny and Charles Gore, *The World Needs a Master Plan for Covid-19 Patents. We are Creating One.* (April 10, 2020), <https://www.barrons.com/articles/the-world-needs-a-master-plan-for-covid-19-patents-were-building-one-51586524940>.

constraints that may be faced within the context of COVID developments. This voluntary pool is an alternative to the compulsory licensing and voluntary licensing options mooted by various governments and advocates.

Several COVID-19 health technologies such as diagnostic testing devices and drug treatments are developed and are undergoing clinical trials. Similar to the HIV and proposed SARS patent pools, a COVID-19 patent pool could serve to improve accessibility to essential medicines or future vaccine and improve standardization of diagnostic testing. As the COVID-19 patent pool is developed, the WHO will need to determine which patents are essential and recruit them for the pool in order to initiate meaningful license negotiations that can increase access to IP. Due to the emergence of COVID-19 being a relatively recent event, patents specific to the current strain have not yet been issued and the applications have generally not even been published yet (early patent publication and expedited examination is often available upon request). However, patents directed to coronaviridae viral infections, such as Gilead's patent for Remdesivir, have previously been issued and these patents could form the foundation for a patent pool in its early stages, if these therapeutics are proven effective against COVID-19. If implemented properly, a COVID-19 patent pool could encourage innovation and improve accessibility to life-saving medications, encourage further innovation, as well as streamline and accelerate the adoption of diagnostic standards. More than scientific advancement, the focus of such a pool is to make sure that the outcomes of such advancement is made available across the globe, particularly to countries that would not be able to afford the same otherwise<sup>41</sup>.

Thus the major benefits of patent pool in dealing with the COVID 19 pandemic are:

- Patent pooling can ensure fast (R&D) Research and development of a medicinal drug which may play a role during a pandemic like COVID-19 while being transparent about patent rights and legal issues.

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<sup>41</sup> Namratha Murugesan, *Are Patent Pools an Effective Solution to COVID-19's IP Barriers?*, (May 26, 2020), <https://spicyip.com/2020/05/are-patent-pools-an-effective-solution-to-covid-19s-ip-barriers.html>.

- Patent pooling may enable and allow the drug manufacturing companies to combine distinct medications into single/fixed doses to create better medicines
- Patent pooling also can aid in teaming of big pharma companies with generics companies globally for coming up with the required medicine(s)
- Patent pooling may enable immediate licensing across several manufacturers globally leading to the quick availability of medicines <sup>42</sup>.

While there are obvious benefits to the creation of this voluntary pool, concerns have been expressed as to how a voluntary pool can possibly incentivize firms and pharma companies to share their IP. Further, while patent pools were proposed even during the public health crises of the SARS outbreak in 2002 and the H1N1 pandemic in 2009, they were not formed, therefore leaving this open to doubts over its success during public health emergencies. Also, given that patent pools are not common in the pharma sector, it further adds to doubts over its success. Given the high costs of production involved in the pharma sector, a long incubation period in the form of clinical trials and regulatory barriers alongside the search for market exclusivity for products, the possibility of collaboration has been very minimal. Apart from this, the creation of a voluntary patent pool cuts into the power of countries to exercise compulsory licensing as a mechanism to ensure the availability of life-saving drugs. The proposal being for a voluntary pool, a patentee can simply choose not to participate in the same. Considering that COVID-19 presents a goldmine to pharma companies, it remains to be seen how many will voluntarily share their patented products in the pool<sup>43</sup>.

However, there seems to be enough pressure from the public and media on private entities, particularly pharma companies, that seeks to push them into sharing their products and patents in more open manners and to add to the efforts of tackling the virus, alongside emergency measures taken up by governments to

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<sup>42</sup> Neha Manoria, *India: Medicine Patent Pool (MPP) And Its Role In Battling COVID 19*, (Aug. 18, 2020), <https://www.mondaq.com/india/patent/976980/medicine-patent-pool-mpp-and-its-role-in-battling-covid-19>.

<sup>43</sup> Namratha Murugesan, *Are Patent Pools an Effective Solution to COVID-19's IP Barriers?*, (May 26, 2020), <https://spicyip.com/2020/05/are-patent-pools-an-effective-solution-to-covid-19s-ip-barriers.html>.

overcome patent barriers. So, there need to be some mechanism working in favour of more collaborative research rather than privatized research methods; and having a voluntary pool for sharing IP can possibly push collective efforts in the right direction<sup>44</sup>.

### **XVIII. INDIA AND MEDICINES PATENT POOL**

MPP has entered into sub-licensing agreement with many Indian companies with respect to many medicines.

One of the first major generic companies to tap into the patent pool was the generic-drugs maker Aurobindo Pharma Ltd for the manufacture of several antiretroviral medicines.<sup>45</sup> The agreement enabled Aurobindo to manufacture products licensed to the Pool by Gilead Sciences in July 2011.<sup>46</sup> The development speeded-up access to critical HIV medicines in developing countries. By this agreement, the advantage to Aurobindo was that it could sell tenofovir to a larger number of countries and without paying royalties.<sup>47</sup>

Later MPP, Shilpa Medicare and Gilead Sciences have entered into an agreement whereby they can produce five key HIV medicines for sale in over 100 countries depending on the medicine. In this agreement there is a 3-5 per cent royalty payable by Shilpa to the patent-holder, Gilead, depending on the medicine. The technology transfer, as a result of the agreement, will allow Shilpa to make its

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<sup>44</sup> *Id.*

<sup>45</sup> The products include emtricitabine (FTC), cobicistat (COBI), elvitegravir (EVG), and the fixed-dose combination of these medicines known as the Quad (a combination of FTC, COBI, EVG, and tenofovir). News, Events and Press releases of Medicines Patent Pool, <https://medicinespatentpool.org/news-publications/mpp-in-the-media/>.

<sup>46</sup> The Pool signed its first licence agreement with a pharmaceutical company, Gilead Sciences, in July 2011, securing several public-health related improvements on the status quo for voluntary licences.

<sup>47</sup> P.T. Jyothi Datta, *Aurobindo, first major generic drugs-maker to tap into Patent Pool*, THE HINDHU BUSSINESS LINE, Oct. 11, 2011, <https://www.thehindubusinessline.com/companies/aurobindo-first-major-generic-drugs-maker-to-tap-into-patent-pool/article20347086.ece1>, (last updated Mar. 12, 2018).

chemically similar version of these drugs at a lower price. The four-medicines-in-one Quad, is an important drug that simplifies treatment delivery.<sup>48</sup>

AIDS drug atazanavir was made available by a licensing agreement signed by multinational drug-major Bristol-Myers Squibb and MPP. This medicine is used in the second-line treatment of HIV/AIDS whereas the earlier agreements were covered with first line treatments. BMS has existing agreements on this drug with the Pune-based Emcure and the Gurgaon-based Ranbaxy, besides multinationals Mylan and Aspen. But these agreements cover about 50 countries. The MPP agreement more than doubles the countries covered, and allows for more players to make the drug. As more companies participate, the resulting competition will further drive down medicine prices. Royalties are not applicable in the vast majority of the countries and are waived for all pediatric products, any royalties collected under this license agreement will be reinvested in local HIV/AIDS groups in those countries<sup>49</sup>.

During the 20th International AIDS conference in Melbourne, MPP announced an agreement with seven drug makers for the manufacture of two anti-AIDS medicines. Among these there were India-based companies Cipla, Emcure, Aurobindo, Micro Labs and multinational Mylan's India subsidiary.<sup>50</sup>

A licensing agreement was reached between MPP and Gilead Sciences on tenofovir alafenamide (TAF). The license allowed manufacturers in India and China to develop generic versions of TAF for 112 countries that are home to

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<sup>48</sup> P. T. Jyothi Datta, *Shilpa Medicare in pact with medicines patent pool for entering HIV space*, THE HINDHU BUSSINESS LINE, Jun. 26, 2013, <https://www.thehindubusinessline.com/companies/shilpa-medicare-in-pact-with-medicines-patent-poolfor-entering-hiv-space/article20627390.ece>, (last updated Mar. 12, 2018).

<sup>49</sup> P. T. Jyothi Datta, *BMS-Medicines Patent Pool pact opens up manufacture of generic versions of AIDS drug*, THE HINDHU BUSSINESS LINE, Dec. 12, 2013, <https://www.thehindubusinessline.com/companies/bms-medicines-patent-pool-pact-opens-up-manufacture-of-generic-versions-of-aidsdrug/article20698464.ece1> (last updated Mar. 12, 2018).

<sup>50</sup> P.T.Jyothi Datta, *Cipla, Aurobindo in Medicines Patent Pool agreement on anti-AIDs drugs*, THE HINDHU BUSSINESS LINE, July 17, 2014, <https://www.thehindubusinessline.com/companies/Cipla-Aurobindo-in-Medicines-Patent-Pool-agreement-on-anti-AIDs-drugs/article20821033.ece>, (last updated July 17, 2014).

more than 92 per cent of people living with HIV in the developing world<sup>51</sup>. And it signed six sub-licenses with Aurobindo, Cipla, Desano, Emcure, Hetero Labs and Laurus Labs, allowing them to make generic anti-AIDS medicine Tenofovir Alafenamide (TAF).<sup>52</sup>

Emcure, Hetero and Natco's sub-licenses from MPP was the first one to increase access to new hepatitis C medicines for developing world patients. The agreement was regarding the making of generic versions of Bristol-Myers Squibb's hepatitis C drug daclatasvir.<sup>53</sup> The companies signed non-exclusive, royalty free agreements with Bristol-Myers Squibb (BMS) and the United Nations-backed MPP to produce and sell the anti-viral daclatasvir in 112 low and middle-income countries.<sup>54</sup>

All these agreements help in providing access to affordable medicines to patients using established mechanisms where the priority is the patients<sup>55</sup>. The agreement increased the availability of the drugs. It also increased competition and will be a big boost to national treatment programs. Governments would be able to include them in their list of available medicines.

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<sup>51</sup>MPP–Gilead agreement: Opportunity for Indian drugmakers, THE HINDHU BUSSINESS LINE, Jul. 24, 2014,

<https://www.thehindubusinessline.com/companies/mppgilead-agreement-opportunity-for-indian-drugmakers/article20826827.ece>, (last updated Mar. 12, 2018).

<sup>52</sup> *Indian drug makers in UN patents pool*, THE HINDHU BUSSINESS LINE, Sep. 26, 2014, <https://www.thehindubusinessline.com/economy/Indian-drug-makers-in-UN-patents-pool/article20874831.ece>, (last updated Sep.26, 2014).

<sup>53</sup> *Indian drug firms dip into patent pool for Hep C drug*, THE HINDHU BUSSINESS LINE, Jan. 20, 2016, <https://www.thehindubusinessline.com/companies/indian-drug-firms-dip-into-patent-pool-for-hep-c-drug/article8130728.ece>, (last updated Jan. 19, 2018).

<sup>54</sup> G Naga Sridhar , *Natco Pharma inks pact to sell hepatitis c treatment drug*, THE HINDHU BUSSINESS LINE, Jan. 21, 2016, <https://www.thehindubusinessline.com/companies/natco-pharma-inks-pact-to-sell-hepatitis-c-treatment-drug/article8133625.ece>, (last updated Jan. 19, 2018).

<sup>55</sup>*Medicines Patent Pool signs deal with 5 Indian companies for HIV drug*, BUSSINESS STANDARD, [http://www.business-standard.com/content/b2b-pharma/medicines-patent-pool-signs-deal-with-5-indian-companies-for-hiv-drug-114092600945\\_1.html](http://www.business-standard.com/content/b2b-pharma/medicines-patent-pool-signs-deal-with-5-indian-companies-for-hiv-drug-114092600945_1.html), (last updated Sep. 26, 2014).

## **XIX. CONCLUSION**

Patent pools in the health sector, especially public health patent pools is one of the best innovative model of a PPP that can manage privately held IP right to protect public interest. Negotiating public-health driven licenses with patent holders and sublicensing to generic manufacturers and product developers is the core work of the Medicines Patent Pool. This shows complete justice to the purpose of IP rights and has the crux of Article 7 of TRIPS. Access-oriented and nonexclusive voluntary licensing through patent pooling mechanisms with a clear public health mandate can contribute to achieving this goal and overcoming a number of access and innovation challenges in the biopharmaceutical field. The potential of this model needs to be exploited with focus on universal health coverage. This would be one of the best models how a pro-competitive patent pool should work. But at the same time certain criticisms leveled against these should be kept in mind. One of the arguments pointed out is the incoherence of the pool's aim to provide equal access to all of the pooled patents with the absence of a standardized licensing agreement. Various proposals for the license were claimed to be available for any interested party to get acquainted with and express its opinion<sup>56</sup>. The second point of criticism was the ambiguous status of the object of the sub-license provided by the MPP and its first contributor. There is issues of Gilead Sciences and its sub licenses<sup>57</sup>. This initiative will be a good role model if the issues raised in its licensing term are also given due consideration. Patent pools work to develop a robust framework for identifying priority medicines and thus it can have the greatest public health mandate and enable wider access to essential medicines in low and middle income countries.

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<sup>56</sup> Love, J. *KEI comments on the ITPC Letter to the Medicines Patent Pool Foundation and UNITAI*, (2011), [http:// www.keionline.org/node/1294](http://www.keionline.org/node/1294) (last updated May1 5, 2017).

<sup>57</sup> Tripathy, S. *Bio-patent Pooling and Policy on Health and health Technologies that Treat HIV/AIDS: A Need for Meeting of Open Minds* in GLOBAL GOVERNANCE OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY 29-50 (Perry, M. ed.,2016).

## Federalism and the Concept of Consociationalism: An Experience in Indian Context

*Tabesum Begum*<sup>1</sup>

### Abstract

*Today a federal form of governance with its nature and scope is presenting itself as an increasing important and relevant issue with the changing nature of polity. The very idea of consociationalism and the concept of Federalism are very useful tools for understanding any political systems in its core. Actually federalism and consociationalism are both based on compound majoritarianism rather than simple majoritarianism, and both represent modern attempts to accommodate democratic complexity and pluralism, although the two systems are not quite symmetrical, and territorial organization is not the only feature that differentiates each of the term in real sense. Again, in a highly plural society, the decision-making process becomes so competitive that new types of interest aggregations take place, thereby making the system looks like more complicated. My paper exactly emphasizes these fundamental issues within a broad framework of Consociationalism and Federalism in India.*

**Key Words:** *Federalism, Consociationalism, Majoritarianism, Pluralism, and Interest Aggregation.*

### I. Introduction

Based on the logic of plural society any type of nation-states has basically come to face with larger obstacles in acquiring the required democratic outcomes than any type of homogeneous political system. Pronounced cultural diversity entails the presence of diverging and often incompatible interests. Processing differentiate interest articulations into widely accepted political decisions is a particularly cumbersome exercise. Naturally, this system remains politically segmented and instable and in this respect how the democratic principles are arrange and rearrange with own institutional framework and further how are confronted with, to borrow Easton's observation<sup>2</sup>, the dual tasks of 'system-maintenance' and 'system-persistence' seems to be appeared as crucial question.

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<sup>2</sup> David Easton, A Framework of political analysis, N.J. Printice Hall, (1965), P.88

In spite of a significant pessimism about the future of democratic rule in such states, scholar, like Lijphart<sup>3</sup> offered a new kind of terminological model called consociational democratic framework for plural societies. This model of democracy suggests a particular form of power sharing for divided power components. He suggested that the constitutional engineering of developing countries like India need to adopt the mechanism of consociational democracy to meet the challenges of diverse interests in the plural societies in the specific arrangements of federal structure.

## II. The Concept

Before engaging ourselves in the study of consociationalism and federalism, a brief reference seems to be relevant about the importance and significance of such an exploration. Very often these two terms, consociationalism and federalism are taken to mean a kind of governing arrangement based on power-sharing among a number of stake-holders. Arend Lijphart has identified the overlapping features of both these systems: ‘Consociationalism plus some additional attributes spells federalism and vice-versa’.<sup>4</sup> It is accepted that both federalism and consociationalism are basically the concepts of “non-majoritarian democracy” also they differ mainly with regard to their political form.”<sup>5</sup> Daniel J. Elazar has coined the term “compound majoritarianism” and concludes that federalism focuses on compound majoritarianism as a constitutional form, whereas consociationalism refers to the – mostly informal – modes of interest intermediation of a polity’s regime.”<sup>6</sup>

Elazar has in his studies on federalism and consociationalism, identified ‘six’ ambiguities associated with the concept of federalism. These are:

- (1) Federalism involves both structures and processes of government.

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<sup>3</sup> Arend. Lijphart, *Democracy in Plural Societies*, London, Yale University Press, (1977).

<sup>4</sup> *Id.*, and Arend. Lijphart. *Consociation and Federation: Conceptual and Empirical Links*, Canadian Journal of Political Science, Vol. 12: No. 3 (1979).

<sup>5</sup> Arend. Lijphart, *Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories*, *Publius*, Vol. 15: No.2. (1985).

<sup>6</sup> Daniel. J. Elazar, *The Ends of Federalism in Partnership in Federalism*, edited by Max Frankel, Peter Long, Bern, (1977).

- (2) Federalism is directed to the achievement and maintenance of both unity and diversity.
- (3) Federalism is both a political and social phenomenon.
- (4) Federalism concerns both means and ends.
- (5) Federalism is pursued for both limited and comprehensive purposes.
- (6) There are several varieties of political arrangements to which the term federal has properly been applied.<sup>7</sup>

A clear method of distinguishing between federalism and consociationalism has been sought to be made by stating that while federalism involves both structures and processes of government, consociationalism involves processes only. Both federalism and consociationalism are directed to the achievement and maintenance of both unity and diversity.<sup>8</sup>

Consociationalism as a method of administrative mechanism has been clearly made by Lijphart in the following words:

“Consociational democracy can be defined in terms of two primary attributes – grand coalition and segmental autonomy – and two secondary characteristics – proportionality and minority veto. Grand coalition, also called power-sharing, means that the political leaders of all the significant segments of a plural, deeply divided society, jointly govern the country. Segmental autonomy means that the decision-making is delegated to the separate segments as much as possible. Proportionality is the basic consociational standard of political representation, civil service appointments, and the allocation public funds etc. The veto is a guarantee for minorities that they will not be outvoted by majorities when their vital interests is at stake.”<sup>9</sup>

A brief reference to the existing consociational regimes of the Netherlands, Israel, Lebanon, Cyprus and Belgium will establish the fact that most of these countries have been successful in retaining consociational arrangements

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<sup>7</sup> Daniel. J. Elazar, *Federalism and Consociational Regimes* in Publish, Vol. 15: No.2, (1985), pp.19-20.

<sup>8</sup> *Id.*

<sup>9</sup> Arend. Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, University of California, Berkeley, (1969).

primarily because of their movements in the direction of formal federation along territorial lines.<sup>10</sup>

Thus viewed, consociationalism can be considered to be “a relatively transient arrangement.” It has been very correctly observed:

“Indeed, the classic consociations seem to last for about two generations before giving way to some other form of regime, which, coincidentally or not, is about the length of time that a majority party maintains its majority coalition in fact in two party systems. This has been true for the United States over the entire course of its history as an independent nation. It seems to be true for other democratic polities as well; hence it may teach us something about the lifetime of coalitions for their survival capacities.”<sup>11</sup>

This brings to the fore another aspect of the problem under discussion. This is relating to the issue of models of polity. Basically there are three models of power-sharing in a polity which may be outlined as (a) hierarchical, (b) pyramidal and (c) cybernetic models. In a hierarchical model organized in a pyramidal fashion, power is concentrated at the top. In a cybernetic model power is distributed through a matrix of centers, federal systems, on the other hand, are based upon the third model with multi-centric form and non-centralized organization of powers.

It has been rightly observed:

“It is true that the overwhelming majority of consociational regimes are democratic in character and that consociationalism was developed as a form of democratic regime, but even it can be used for other purpose. It is true that there are two kinds of federal systems – those in which the purpose of federalism is to share power broadly, pure and simple, and those in which the purpose of federalism is to give individual national communities a share in the power of the state. The former is more simply devoted to advancing the cause of popular

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<sup>10</sup> Aristide R. Zolberg, *Splitting the Difference: Federation without Federalism in Belgium: Ethnic Conflict in the Western World*, ed. Milton J. Esman, Ethaca, Cornell University Press, (1977), pp.103-142.

<sup>11</sup> Daniel J. Elazar, *op.cit.* p.31.

government, while the latter may rely upon other mechanisms for securing popular government and merely add federalism as an extra device.”<sup>12</sup>

### **III. Consociation and Federation: A Comparison of Majoritarian and Non-Majoritarian Democracy**

According to Arend Lijphart, the nine elements of majoritarian democracy are the following:

- (1) Concentration of executive power in one-party and bare-majority cabinets.
- (2) Executive dominance in executive-legislative relations.
- (3) Unicameralism or bicameralism with a weak second chamber.
- (4) Two-party systems.
- (5) One dimensional party system (i.e. a party system in which the programmes of the parties differ from each other mainly along the one issue dimension of socio-economic policy).
- (6) Plurality systems of elections.
- (7) Unitary and centralized government in which there are no clearly designated geographical and functional areas from which the parliamentary majority and cabinet are barred.
- (8) Unwritten or constitution and parliamentary majority: the majority's power to legislate is not restricted by any requirement of qualified majorities or judicial review.
- (9) Exclusively representative democracy: the power of the parliamentary majority is not restricted either by any element of direct democracy such as referendum.<sup>13</sup>

Again, he has outlined eight elements of non-majoritarian democracy. These are:

- (1) Executive power-sharing: Instead of one party, bare majority cabinets, non-majoritarian democracy tends to have coalition of governments of two or more parties that together have the support of a broad majority in parliament. Such an arrangement often leads to which called grand-coalition.

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<sup>12</sup> *Id.*

<sup>13</sup> For details, see Arend Lijphart, *The Politics of Accommodation*, op.cit.

- (2) Balanced executive-legislative relations: Instead of an executive that dominates the legislature, non-majoritarian democracy is characterized by an executive and legislature that maintain a somewhat balance of power with each other.
- (3) Strong bicameralism: In place of concentration of all legislative power in the hands of the majority in a unicameral legislature, legislative power is shared by with the second chamber in which certain minorities may enjoy special representation.
- (4) Multi-party system: It may offer the existence of a number of parties in which all parties are minorities.
- (5) Multi-dimensional party system: in addition to the socio-economic issue dimension, the parties in non-majoritarian democracy tend to differ from each other along one or more other issue dimensions.
- (6) Proportional representation: In place of plurality of rates, the system of proportional representation appears to be more effective in a non-majoritarian democracy.
- (7) Federalism and decentralization: A federal arrangement with wide ranging decentralization of power provides more space for all the regional and local interests to play effective role in the governing process.
- (8) Written Constitution and majority veto: Non-majoritarian democracy is generally characterized by a more or less rigid constitution which can be amended only after complying with a special procedure provided for it.<sup>14</sup>

From this construction of Lijphart, one can notice that while dealing with non-majoritarian democracy, his main reference point was the Westminster System. On this issue, the observation by Daniel J. Elazar appears to be more specific and pointed. To quote him:

“While I accept the basic distinction, I would like to redefine it a distinction between single majoritarianism and politics based upon compound majorities – in short, compound majoritarianism.”<sup>15</sup>

Federal systems are dependent on “dispersed majorities” based on territorial arrangement, whereas consociational systems are dependent upon concurrent

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<sup>14</sup> *Id.*

<sup>15</sup> Daniel J. Elazar, *op.cit.* p.17

majorities, generally a territorial in nature. “Both involve the systemic building of a more substantial consensus that is the case in simple majoritarian systems.”<sup>16</sup> Elazar has presented this idea in a diagram which shows the nature and interconnectedness among different segments of a federal arrangement:

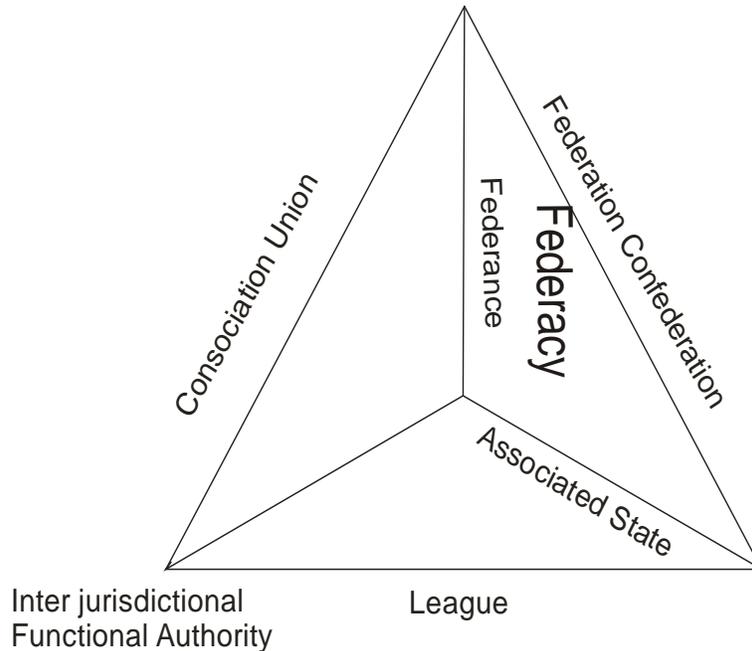


Fig: 1: Forms of Federal Arrangements<sup>17</sup>

As an extension of this idea, Elazar has identified six basic ambiguities associated with federalism as ‘a theoretical and operational concept’. These are:

- (1) Federalism involves both structures and processes of government.
- (2) Federalism is directed to the achievement and maintenance of both unity and diversity.
- (3) Federalism is both a political and social phenomenon.
- (4) Federalism concerns both means and ends.
- (5) Federalism is pursued for both limited and comprehensive purposes.

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<sup>16</sup> *Id.*

<sup>17</sup> Source, Daniel J. Elazar, Federalism and Consociational Regimes, Publish, Vol.15, No.2, (1985),p.20.

- (6) There are wide variations in the federal arrangements all over the world.<sup>18</sup>

Thus viewed, federalism is considered to be a process of structure which includes within itself a sense of partnership manifested through negotiated cooperation on issues and programmes based on a commitment to open bargaining for power and share. It is agreed by all that federalism should combine both structure and process. This aspect has been beautifully presented in the following observation:

“Where a federal structure exists without a correspondingly federal process, there is evidence to indicate that it may have some impact on process of governance, even if the latter are not ultimately federal, but in the last analysis, its impact will be secondary.”<sup>19</sup>

Again, he observes:

“The terms ‘federalism’, ‘federalist’ and ‘federalize’ are commonly used to describe both the process of political unification and the maintenance of the diffusion of political power .....Federalizing does involve both the creation and maintenance of unity and diffusion of power in the name of diversity. Indeed, that is why federalism and presumably consociationalism as well, is not to be located on the centralization – decentralization continuum, but on a different continuum altogether, one that is predicated on non-centralization, or the effective combination of unity and diversity.”<sup>20</sup> In this connection, Morton Grodzins has opined that federalism, like all forms of government, must be judged as a means of fostering democratic ends.<sup>21</sup>

In the process of forming a federation, the role of sub-cultural groups needs special attention. Alan Chairns, while analyzing the nature of Canadian federation has stated that the basis for federalism in Canada is ‘a constitution which has provided political entrepreneurs with the tools for seeking and

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<sup>18</sup> Ibid. For further details, see S. Rufus Davis, *The Federal Principle*, Berkeley, University of California Press, (1978) and Deil S. Wright, *Understanding Inter governmental Relations*, Duxbury Press, (1978).

<sup>19</sup> Daniel J. Elazar, *op.cit.* p.22

<sup>20</sup> *Id.* p.23; For a further discussion of non-centralization, see Daniel J. Elazar, *American Federalism: A View from the states*, Harper and Row, N.Y., (1984).

<sup>21</sup> Mertin Grodzins, *the American System: A New view of Government in the United States*, Chicago, (1956).

obtaining power.”<sup>22</sup> It has been suggested that while explaining Canadian federalism, Cairns might have ignored the role of language and culture in this respect.

This position may lead one to another dimension in the formation of a federal arrangement – that is, elite accommodation. It has been very correctly observed that elite accommodation lies at the heart of any kind of consociational arrangement and very often described as “the will to cooperate”, compromise or even “fear of system collapse”. On the other hand, it is argued that a general definition of federalism does not, in many cases, refer to the motion of process or informal behavior. Elite accommodation is considered to be one of the informal mechanisms that play its important role in this process.

These informal mechanisms in this process of the formation of federal arrangements have been described under different names, such as, intra-state federalism, cooperative federalism, interdependence and the like.<sup>23</sup> One may not disagree with the following observation in which the scholar has tried to contextualize the issue on a broader theoretical and operational plane:

“In most federations, the objective is to work out differences between central and local governments and to a considerable extent, between units themselves, usually concerning the development and implementation of policies and programmes affecting both levels of government. However, more serious conflicts can also be handled in these more broadly based arenas; whether these practices are superior to, or more democratic than, the technique of elite accommodation is not really at issue here.”<sup>24</sup>

That elite accommodation goes a long way in the process of integration of a federal arrangement has been highlighted in the following observation:

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<sup>22</sup> Alan Cairns, *The Government and Societies of Canadian Federalism*, Canadian Journal of Political Science, Vol. 10, (1977), pp.695-725.

<sup>23</sup> This aspect has been discussed in greater details by many scholars. For further details, see Daniel J. Elazar, *The American Partnership*, Chicago Press, (1962), A.H. Birch, *Federalism, Finance and Social Legislation in Canada, Australia and the United States*, Oxford, (1955) and Roger Gibbins, *Regionalism: Territorial Politics in Canada and the United States*, Toronto, (1982).

<sup>24</sup> Herman. Bakvis, *Structure and Process in Federal and Consociational Arrangements*, *Publius*, Vol.15, No.2, (1985), p.63.

“One must further be able to show that elite accommodation does indeed play an important role in diffusing conflict at the mass level or in bringing about a degree of integration of diverse units. Ultimately, this informal behavior is dependent upon the perceptions, beliefs and attitudes of the participants; formal rules cannot guarantee cooperation among elites.”<sup>25</sup>

Structure plays important role in other ways restricting the number of policy options and bringing the elites much closer to one another. In defining the role of ‘sub-cultural’ blocs in this process, social or political institutions do play a major part. Their role may create conditions for bringing the elites to minimize their gaps and differences and in the ultimate analysis, it may be seen that these elite groups may form a compact force. One may find examples of such outcomes with reference to the federalizing process of Canada, Austria and even, Germany.

#### **A. The Benchmark: Federalism and Consociationalism:**

There is a common agreement on what constitutes the yardsticks of federalism which may be outlined as follows:

- (1) Indestructible identity and autonomy of the territorial components;
- (2) Their residual and significant power;
- (3) Equal or favourably weighted representation of equal units;
- (4) Their decisive participation in amending the constitution;
- (5) Independent sphere of central authority;
- (6) Immunity against secession, i.e. a permanent commitment to build and maintain “federal nation”;
- (7) Two sets of courts;
- (8) Scope for the operation of the power of judicial review;
- (9) A clear division of power between the centre and the constituent units;
- (10) Exclusive national control over subjects affecting the nation as a whole.

This refers to another area where one can make a distinction between a federal and a consociational arrangement. The basic points in respect can be noted as:

- (1) The segments of the plural society must be geographically concentrated;
- (2) The boundaries between the component units of the federation must follow the segmental boundaries as much as possible;

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<sup>25</sup> *Id.* 64

- (3) If segmental autonomy assumes a federal form, this necessarily entails that the primary requirement of a central-regional division of power as well as the secondary requirements of internal constitutional autonomy and decentralization are fulfilled.

Moreover, in addition to these, the following features are worth-noting in this connection:

- (1) A federation must be a democracy;
- (2) Only federation in plural societies can be consociations;
- (3) Only federations which are highly decentralized and in which the component units are highly autonomous can be consociations;
- (4) The federal boundaries must be drawn in such a way that they approximate the segmental boundaries; as a result, the heterogeneity of the federal state as a whole is transformed into a high degree of homogeneity at the level of component units;
- (5) Such a high degree of segmental homogeneity in the component units can be achieved optimally if the federation consists of relatively many and relatively small units.<sup>26</sup>

#### **IV. Indian Constitution and Consociational Arrangements**

Thus, following these arguments we can consider that the spirit of consociationalism is still continuing in Indian democracy with its unique federal characteristics. If we review the Indian constitutional arrangements we find that it introduces a federal system as the basic structure of government though there is a strong admixture of unitary bias. However, none of the provisions of Indian constitution, the state is given the epithet of a Federal state. In fact, in Article 1(1) of the constitution, the Indian state is declared as a 'Union of States' and the constitution does not proclaims it means a federal state. Therefore, in what ground we will say that the Indian state is a Federal state. It can be stated if we

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<sup>26</sup> Details of this aspect can be seen in the following works: Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, Yale University Press, (1977); Carl J. Friedrich, *Limited Government: A Comparison*, Prentice-Hall, N.J. (1974); Ivo D. Duchacek, *Comparative Federalism: The Territorial Dimension of Politics*, New York, (1970).

observe the nature of the state of India that follows some fundamental features of federalism.

Firstly, the constitution of India, as in all federal states of the world is written and rigid. Truly is not fully rigid but partially rigid because some of its provisions declare that an alteration of them shall not be treated as amendment within the meaning of Article 368 which lays down a rigid process of amendment of the constitution. Similarly, there are some provisions which may be amended not by a special procedure but by the ordinary process of lawmaking<sup>27</sup> and at the same time; some provisions may be amended only by a special procedure as written in Article 368.

Secondly, in India there is a dual government – Centre and State governments and the source of power of both the structure is Constitution. In normal conditions, the governments at these two levels independently exercise their powers according to the constitution. The constitution of India follows a threefold distribution of legislative, administrative and financial powers between the Union and the States. The legislative and administrative relations between Centre and States in the Indian federal system have been detailed in Part XI of the constitution and Part XII gives an account of financial relation between them.

Thirdly, the judicial powers are not divided and the constitution clearly stated that there is a common Judiciary for the Union and the States. The Supreme Court plays the role of a federal court. In its original jurisdiction, the court settles the dispute between the Centre and one or more than one States and also between different States.

Fourthly, “following the federal principle, the Indian Constitution has provided for a bicameral central legislature and the upper House of this legislature is constituted on the basis of federal representation”.<sup>28</sup>

Thus, recognising all these features we may state that Indian state clearly proves as a federal kind of state. Additionally, in the *Keshavananda Bharati v. State of Kerala*, (1973), *Srikumar v. Union of India* (1992), *S.R. Bommai v. Union of*

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<sup>27</sup> AMAL KUMAR MUKHOPADHYAY, 'A JOURNEY ACROSS THE INDIAN CONSTITUTION', Kolkata: Sreedhar Publication, (2017), p. 257.

<sup>28</sup> *Ibid.*, 258.

India (1994) etc. cases the Supreme Court has identified the federal character of Indian state as the primary base of the constitution.

Following these unique federal characteristics with definite spirit of consociationalism as observed by Lijphart, India also attains its integrativeness with regards to power sharing. If we consider the era of Nehru we find the prevalence of command polity rather than demand polity, which may be termed as ranked or controlled polity with the institutionalization of diffused power.<sup>29</sup> Thus, in this context we may refer Horowitz's integrative democratic model<sup>30</sup> to proper understanding of the issue. This model actually emphasizes the importance of fostering multi-ethnic political coalitions. In fact, both these issues are important to understand federalism and consociationalism in its best collaborative form.

#### **A. The Consociational-Integrative Forces:**

It is however, not out of context here to mention Horowitz concept of 'integrative democracy' which is a fair account of an alternative approach to the rule of plural societies. The integrative power-sharing approach 'seeks to deal with ethnic conflict potential through fostering political arrangements that will lead to bridging or transcending ethnic group differences'.<sup>31</sup> However, though '...India was a consociational state before Independence, from 1947-64 it was a non-consociational state-what Horowitz would term a "ranked" society, or Lustick a "control" state-in which lower castes, religious minorities, and linguistic minorities within states were denied cultural rights and largely excluded from government jobs and political power. Since the late 1960s, far from becoming "less firmly consociational", as Lijphart claimed, India has in fact become more consociational.'<sup>32</sup>

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<sup>29</sup> A. M. Mallick. *Indian Federalism and the Multicultural Context*, *Journal of Management & Public Policy*, Vol. 4, No. 2, (2013), p. 28.

<sup>30</sup> Donald. L. Horowitz, *D. Ethnic Groups in Conflict*, Berkeley CA: University of California Press, (1985); & Donald. L. Horowitz, Donald L. *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, *William and Mary Law Review*, Vol. 49: No. 1213(2008).

<sup>31</sup> Mallick, op. cit.

<sup>32</sup> Ian. Steven. Wilkinson, *Consociational Theory, and Ethnic Violence*, *Asian Survey*, Vol. 40: No. 5 (2000) & Mallick, op. cit.

Apart from this, Indian constitution not only protects the rights of the state through the distribution of power, but also provides for the protection of rights and interests of the socio-cultural minorities and the disadvantaged groups, and decentralized and autonomous governance within its federal set up.<sup>33</sup> The constitution recognizes cultural diversity, but does abolish communal representation. Article 29(1) says that any sections of the citizens of India with distinct language, script or culture of its own shall have the fundamental right to preserve their identity.<sup>34</sup> Article 29(2) regards prohibition of discrimination on the grounds of religion, race, caste, or language with regard to admission into educational institutions maintained by the state.<sup>35</sup> Article 30(1) specifies that the minorities can establish and administer educational institutions of their own choice.<sup>36</sup>

Further, Articles 330-334 and 336-337 categorically mention the advancement of the socially and economically backward classes and minority communities. The Constitution of India has provided, among other various protections and safeguards, safeguards for Public employment to the persons belonging to the Scheduled Castes and Scheduled Tribes, keeping in view the discrimination and disabilities suffered by these classes to catch up and compete successfully with the more fortunate ones in the matter of securing public employment.<sup>37</sup>

Therefore, what we find in India is a combination of compromise by segregation and compromise by negotiation. It is a compromise formula between the two alternatives: group building block approach relying on accommodation by ethnic group leaders guaranteeing group autonomy and minority rights and integrative approach seeking to integrate society along the lines of division within a common society. It is observed that the integrative approach tries to build multi-ethnic political coalitions, to moderate ethnic conflict and to enhance minority and disadvantaged groups' influence in the decision making<sup>38</sup> process.

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<sup>33</sup> Mallick, op. cit., 30.

<sup>34</sup> D. D. Basu, Introduction to the Constitution of Indian', 22<sup>nd</sup> edition, Nagpur: LexisNexis, (2015), p. 440.

<sup>35</sup> *Id.*, 441.

<sup>36</sup> *Id.*, 442.

<sup>37</sup> Mallick, op. cit.

<sup>38</sup> *Id.*, 30-31.

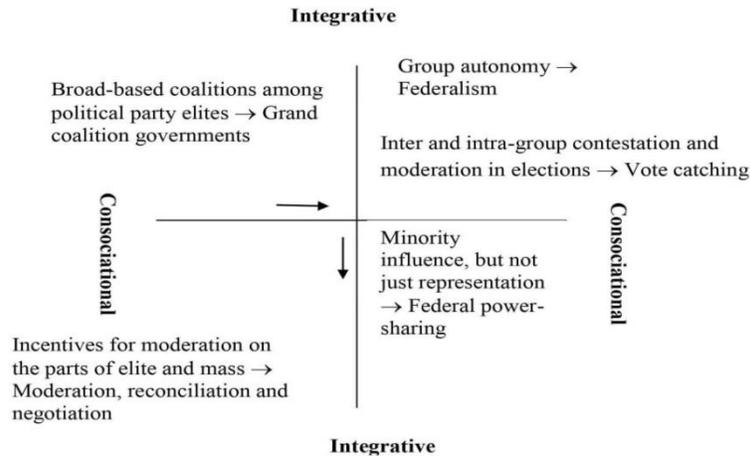


Fig. 2. Diagrammatic representation of integrative approach<sup>39</sup>

Hence, in the post-independence period it is observed that in several times the governments of India are often formed coalitions with ministers deliberately chosen to correspond to various religious, linguistic, ethnic and caste groups which actually provide a consolidated consensual power structure within a system and the Nehru regime is the good example in this regard. As mentioned above that the cultural autonomy is maintained using a variety of devices like creation of linguistic states, separate personal laws and allowing minority education institutions. Sometimes it is executed using the system of affirmative actions with caste groups having reservation in legislatures, higher education and government jobs.

In the post- Nehruvian era what we have been witnessed that the shrinking of dominance of one party system. ‘During the last four decades, independent India has undergone a transformation from a homogeneous polity in which power was shared between the centre and the states under the control of the ruling Congress party into one in which control is shared between a centre... and the states in

<sup>39</sup> Source, A. M. Mallick. Indian Federalism and the Multicultural Context, Journal of Management & Public Policy, Vol. 4, No. 2, (2013),p. 40.

which a variety of different parties have won executive power in legislative assemblies ... India may well be on the verge of a new era of power sharing,... powerful states can benefit from a strong Indian state controlled at the centre by a coalition of parties representing diverse ruling class interests.<sup>40</sup>

As we know that linguistic minorities are represented using states since Nehru era, and India's federal nature has been greatly strengthened for that. Previously we have witnessed many incidents of misusing of Article 356, which allow the Union government to dismiss an elected state government and rule the state directly from Centre almost at their will till the 1970s. Now on days it is rarely rare in practice. Moreover, the rise of state centric parties has further strengthened the consociationalist power sharing amongst different groups. Naturally, the presentation of these regional parties in the Union legislature is predominant which in many respect compel the ruling parties accommodates certain amount of interest with these parties.

Commenting on the nature of Indian political structure James Manor<sup>41</sup> said that the federal-state relations in India remain generally manageable because its formal and informal political institutions can still make the politics of bargaining work. All political parties have enough people and support bases with appropriate skills and attitudes to sustain the bargaining process. A veritable legion of political activists and "fixers" give India a major resource that is unavailable in most less developed countries. With their help, the politics of bargaining works well enough to keep socio-cultural heterogeneities from sowing political chaos. As against the American 'Melting Pot' democratic model where all the identities get subsumed under the major American nationality, Indian democracy has come to be defined as 'Salad Bowl'.<sup>42</sup>

## V. Conclusion

Thus, the foregoing discussion conclusively proves that there are certain areas where federalism and consociational arrangements come very close to one

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<sup>40</sup> T. V. SATHYAMURTHY, IMPACT OF CENTRE-STATE RELATIONS ON INDIAN POLITICS: AN INTERPRETATIVE RECKONING 1947-1987, PARTHA CHATTERJEE (ED.), STATE AND POLITICS IN INDIA, New Delhi: Oxford University Press, (1997), pp. 269-270.

<sup>41</sup> James. Manor, *Making Federalism Work*, *Journal of Democracy*, Vol. 9: No. 3, (1998).

<sup>42</sup> Ashis Nandy as quoted in Y. Atal, Y. Managing Multiplicity: The Insider-Outsider Duality, *Economic and Political Weekly* (2001) & also see, Mallick, op. cit., 35.

another. But there are also areas where they differ substantially both in terms of structure and process. Again, a distinction should be made between institutional structure and decision – processes. The decision process refers to the dynamics of day to day interactions among the decision-makers-the nature of coalition-making of interests, policies and also actions. This also brings within it the forms of bargaining activities and modes through which these bargaining activities operate. The process is complex and at many points, it is difficult to identify them and place them in a clear distinct position. But at the same time no one can ignore the idea that these forces and factors need to be identified, explained and placed in their respective position. Again, in a highly plural society, the decision-making process becomes so competitive that new types of interest aggregations take place, thereby making the system more complex.

Thus it is seen that elite accommodation takes place in different ways in different types of federal arrangements. Such accommodation becomes necessary for preventing the symptoms of, what is called, ‘system-collapse’. In order to place the problem in broader perspective, a new term has been employed by the scholars who come almost closer to the concept of system maintenance. The term which is now used is known as “the system-saving behavior”. It implies that for the sake of the survival of the system, such arrangements become necessary, no matter whether achieved through national or local/regional initiatives – which may help in the process of greater degree of “integration of diverse units.”<sup>43</sup>

In this respect, it can be stated that with experience of Indian context since independence, in true sense federalism and consociationalism are neither undemocratic nor dysfunctional in its nature. Consociationalism when is applied to a vast, ethnically diverse country with many cleavages to eventually undermine itself would require representation for every section of people, which in India’s case is simply impossible. Rather in case of India the constitution seems to be a great tool for blending both the features of federalism and consociationalism.

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<sup>43</sup> Santa Ghosh and Pradip Kumar Sengupta, *Ethno-Cultural Conflicts, Federalism and Consociational Arrangements: An Exploratory Note Towards Theory – Building on a Cross-Cultural Basis, Administrative Change*, January-December, 2010, Vol.XXXVII, (2001), pp.93-100.

**NOTES AND COMMENTS****Terrorism and the International Criminal Justice System*****Dr. Samraggi Chakraborty<sup>1</sup>******Abstract***

*Terrorism has always haunted mankind. In recent years, terrorism has become a global issue. States are frequently becoming victims of terrorist activities. The consequence of terrorism is that it violates human rights. The attack on World Trade Centre tower, New York in September 11, 2001 has made the world consider terrorism as a matter of serious concern. At present, international terrorism is a matter of grave concern. There have been adoptions of many Conventions to deal with terrorism. However, there is a hurdle to it. This hurdle is because there is no uniform definition of terrorism.*

***Keywords:*** *international terrorism, terrorism, human rights*

**I. Introduction**

“Terrorism has been a dark feature of human behavior since the dawn of recorded history. Great leaders have been assassinated, groups and individuals have committed acts of incredible violence, and entire cities and nations have been put to the sword- all in the name of defending a greater good. Terrorism, however defined, has always challenged the stability of societies and the peace of mankind of everyday people. In the modern era, the impact of terrorism- that is, its ability to terrorize- is not limited to the specific locales or regions where the terrorists strike.”<sup>2</sup> Terrorism as a concept is not of new origin. Incidents like assassinations, conquest can be found in Bible. State terrorism can be traced to the Roman Empire. Mention of “cases exist of movements in the ancient and medieval Middle East that used what modern analysts would consider to be terrorist

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\* The article is based on research paper carried out by the author while pursuing LLM at NLSIU, Bangalore.

<sup>2</sup> G. Martin, “*Understanding Terrorism Challenges, Perspectives, and Issues*”, Sage Publications, p.2

tactics.”<sup>3</sup> The term ‘terrorism’ was coined by Edmund Burke during French Revolution.

In 1934, the issue of international terrorism was raised after the King of Yugoslavia was killed by certain terrorists and “Yugoslavia formally raised a finger against Hungary in the league of Nations for connivance in the assassination of the King.”<sup>4</sup> After this, the League of Nations (LON) adopted the Convention on the Prevention and Punishment of Terrorism. However, this convention never saw the light of the day. The matter of international terrorism came up before the United Nations (UN) when private individuals carried out activities which jeopardized civil aviation during the international flights. This resulted in adoption of many conventions like Tokyo Convention, 1963; The Hague Convention, 1970 and the Montreal Convention, 1971. In 1972, the General Assembly (GA) of the UN set up an Ad Hoc Committee on Terrorism comprising of 35 members. This Ad Hoc Committee in 1985 condemned “all acts, methods, and practices of terrorism”<sup>5</sup> as criminal act. The GA also adopted Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979; International Convention for the Suppression of Terrorist Bombing, 1997 and the International Convention for the Suppression of the Financing of terrorism, 1999.

Consideration of terrorism as an “instrument of State control persisted until the end of the Second World War.”<sup>6</sup> After the Second World War “terrorism became mired in the ideological cleavages and proxy violence of the Cold War. Whereas developed States focused on non-State terrorism, developing and socialist States emphasized ‘State terrorism’ by imperial powers, and regarded anti-colonial violence either as an exception to terrorism, or as justified by colonialism.”<sup>7</sup> In later part of 20<sup>th</sup> century emerged the idea of “fundamentalist religious terrorism”<sup>8</sup>. After the September, 11 (2001) attack, there developed a trend to

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<sup>3</sup>G. Martin., “*Understanding Terrorism Challenges, Perspectives, and Issues*”, Sage Publications, p.5

<sup>4</sup>K.C. Joshi, “*International Law & Human Rights*”, Eastern Book Company, Lucknow, p. 277

<sup>5</sup>J.G. Starke, “*Introduction to International Law*”, Butterworths, p. 103.

<sup>6</sup>B. Saul, “*Defining Terrorism In International Law*”, Oxford University Press, p.1.

<sup>7</sup>B. Saul, “*Defining Terrorism In International Law*”, Oxford University Press, p.2.

<sup>8</sup>B. Saul, “*Defining Terrorism In International Law*”, Oxford University Press, p.2.

conflate “disparate terrorist threats into a homogeneous global pandemic, erasing the specificity of the concrete conditions giving rise to different situations of violence.”<sup>9</sup>

There is no denial to the fact that terrorism is a threat to the society, human rights, peace and security. The international community condemns terrorism. However, there is failure on the part of the international community in defining terrorism.

## II. Hurdles in Defining Terrorism

After the Second World War, there have been debates at the UN regarding the definition of terrorism. But there was no conclusion reached as to the definition of terrorism. This was because the newly formed third world countries had their reservations in arriving at a conclusion for the definition of terrorism. They wanted that the violent activities of the freedom fighters should not come under the definition of terrorism and opined that “the notion that no treaty could be adopted to ban terrorism unless at the same time the historical, economic, social, and political causes underlying resort to terrorism were studied in depth and thrashed out”<sup>10</sup>.

Even though there was failure in defining terrorism, the activity of terrorism was condemned in many treaties. For example, Article 33(1) of the Fourth Geneva Convention, 1949 provided that ‘collective penalties and likewise all measures of intimidation or of terrorism are prohibited’. Similarly, in Article 4(2)(d) of the second Additional Protocol, 1977 on the Internal Armed Conflicts prohibited ‘acts of terrorism’ at any time and in any place whatsoever. Also, Article 4 of the International Criminal Tribunal for Rwanda, 1994 dealt with situations of acts of terrorism. The focus was on “prosecution or extradition of perpetrators of certain designated acts such as the hijacking of aircraft, acts of violence against aircraft, airports, ships and oil platforms, attacks on diplomats or hostage taking”<sup>11</sup>

The UN GA set up an Ad-hoc Committee on International Terrorism for the purpose of defining terrorism between the year 1972 and 1979. This Ad- hoc Committee failed to define terrorism as voices were raised by the third world

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<sup>9</sup>B. Saul, “*Defining Terrorism In International Law*”, Oxford University Press, p.3.

<sup>10</sup>as cited in Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 120.

<sup>11</sup>G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

countries not to include in the definition of terrorism the national liberation movement. “It appeared than and later that, quite often according to a commonplace of our times, ‘one person’s terrorist is another person’s freedom fighter.’”<sup>12</sup>

The term terrorism in 1990 ‘reappeared under the pressure of politicians, the media and NGOs, first of all in press releases, unilateral declarations or other so-called ‘soft law’ texts, then in international conventions.”<sup>13</sup> In 1977, the Council of Europe adopted European Convention on the Suppression of Terrorism. However, this Convention did not provide definition of terrorism. After twenty of the adoption of this Convention, UN in 1999 drafted International Convention on the Suppression of Terrorist Bombings. This Convention of 1999 also did not define terrorism. In 1999 in another convention titled International Convention for the Suppression of the Financing of Terrorism<sup>14</sup>, there was an attempt to define terrorism.

Even after the deadly September 11 attack on the World Trade Center, New York, the situation remains the same. There is no consensus arrived regarding the definition of terrorism. “The Security Council, in its resolution 1368 of 12 September 2001, called on the international community to ‘redouble their efforts to prevent and suppress terrorist acts. Later on Resolution 1373 of 28 September 2001, the council decided upon a certain number of appropriate measures to be taken by States. However, the Council failed to provide any clarification as to what is meant by ‘terrorism’. Moreover, India presented a proposal to the UN General Assembly for comprehensive convention against international terrorism, which has been unsuccessful due to the failure to agree on the scope of the Convention, that is to say, once again, on a definition of terrorism.”<sup>15</sup>

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<sup>12</sup>G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

<sup>13</sup>G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

<sup>14</sup>G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

<sup>15</sup>G. Gullaume, “Terrorism and International law”, *International and Comparative Law Quarterly*, Vol. 53(2004), pp. 537-548.

The concept 'one man's terrorist is another man's freedom fighter' has obstructed in providing definition of terrorism.

### III. Necessity of Dealing Terrorism at the International Level

Terrorism "undermines human rights, jeopardizes the state and peaceful politics, and threatens international peace and security."<sup>16</sup> Thus, terrorism is a serious crime which is a concern at the international level. Terrorism needs to be dealt at the international level i.e at the International Criminal Court (ICC) established by the Rome Statute (Statute).

The Statute in Article 36(3) mentions "the judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." Under Article 36(8) (ii) of the Statute it mentions that judges to be selected according to 'equitable geographical representation'. This unbiased feature of ICC will help in dealing with cases relating to terrorism. This is because the States will not be able to play a role in dealing with crimes of terrorism.

Inclusion of terrorism as a crime in the Statute will be beneficial to States that are small and have weak governments. Small States who do not have sufficient financial resources to carry out proceedings related to terrorism cases will be benefitted. Also States with weak governments who may be unable to carry out proceedings related to terrorism cases because of adverse political consequences will be benefitted by such inclusion of terrorism as a crime in the Statute. Also inclusion of terrorism as a crime in Statute will be beneficial in situations where the governments of States find it difficult to deal with terrorists. As in today's time terrorism operates all throughout the globe, there is a need for ICC to deal with terrorism.

#### A. Definition of Terrorism- The Need

Terrorism at today's time is a global concern that needs to be dealt with effectively. The concern that arises before the world at large is to arrive at a

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<sup>16</sup>B. Saul, "Defining Terrorism In International Law", Oxford University Press, p.7.

definition for terrorism. Arriving at a definition for terrorism will help in preventing the effects of terrorism.

There can be no denying of the fact that terrorism has become a constant element of our time. Also the nature of the acts of terrorism has undergone a sea change from what it was in olden times. Technology has helped a lot in bringing about the change in the activities of terrorists.

“Defining terrorism as a discrete crime normatively recognizes and protects vital international community values and interests, symbolically expresses community condemnation, and stigmatizes offenders.”<sup>17</sup>

Terrorism results in gross violation of human rights. “If terrorism is thought to threaten international peace or security, an international definition must be limited to acts capable of that result- for instance, because of its cross-border or multinational preparation or effects, the involvement of State authorities, or injury to other vital international community values or interests.”<sup>18</sup>

In the book *Defining Terrorism in International Law*, the author Ben Saul has given a definition of terrorism. He defines terrorism as:

- a) Any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property;
- b) Where committed outside an armed conflict;
- c) For a political, ideological, religious, or ethnic purpose; and
- d) Where intended to create extreme fear in a person, group, or the general public, and:
  - (a) seriously intimidate a population or part of a population, or
  - (b) unduly compel a government or an international organization to do or to abstain from doing any act.
- e) Advocacy, protest, dissent or industrial action which is not intended to cause death, serious bodily harm, or serious risk to public health or safety does not constitute a terrorist act.<sup>19</sup>

According to Paul Wilkinson terrorism consists of the following major characteristics:

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<sup>17</sup>B. Saul, *“Defining Terrorism In International Law”*, Oxford University Press, p.7

<sup>18</sup>B. Saul, *“Defining Terrorism In International Law”*, Oxford University Press, p.61.

<sup>19</sup>Ben Saul, *“Defining Terrorism In International Law”*, Oxford University Press, pp.65-66.

- i. Terrorism is premeditated and aims to create a climate of extreme fear or terror;
- ii. Terrorism is directed at a wider audience or target than the immediate victims of violence;
- iii. Terrorism inherently involves attacks on random and symbolic targets, including civilians;
- iv. The acts of violence committed are seen by the society in which they occur as extra-normal, in literal sense that they breach the social norms, thus causing a sense of outrage; and
- v. Terrorism is used to influence political behavior in some way- for example, to force opponents into conceding some or all the perpetrators' demands to provoke an overreaction, to serve as a catalyst for more general conflict, or to publicize a political cause.<sup>20</sup>

It is said that terrorism has a “chameleon- like character.”<sup>21</sup> Depending upon the circumstances in which terrorism is committed<sup>22</sup>, it can be included in varied categories of crime like war crime or crime against humanity under ICC. The question that arises is whether it is right to include terrorism under the many categories of crime or should terrorism be considered as a separate crime altogether under ICC? Let us analyze what happens if we include terrorism in the varied categories.

Let us now analyze these issues and then try to come to a conclusion.

### ***Terrorism as ‘war crime’***

International Humanitarian Law says that act of terrorism is “prohibited and criminalized so long as it is directed against civilians.”<sup>23</sup> The Fourth Geneva Convention under Article 33(1) prohibits acts of terrorism committed against civilians who are eligible for the status of protected persons, whether they are perpetrated by the armed forces of a belligerent’s territory as internees, or in an

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<sup>20</sup>as cited in Joshi, K.C., “*International law & Human Rights*”, Eastern Book Company, p. 278.

<sup>21</sup>as cited in Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 125.

<sup>22</sup>See Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 125.

<sup>23</sup>See Article 7 of the Rome Statute of the International Criminal Court 1998.

occupied territory. The Second Additional Protocol of 1977 in Article 4 (2) (d) prohibits acts of terrorism against persons or civilians who ceased to be a part of the internal armed conflicts. “In addition, under both the First and Second Additional Protocol ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited’ (Articles 51(2) and 13(2) respectively.)”<sup>24</sup>

### ***Terrorism as ‘crime against humanity’***

‘Crimes against humanity’ comprises of acts like extermination, murder, deportation, torture, imprisonment, sexual slavery, rape, enforced prostitution. Such acts will be considered as ‘crime against humanity’ when done “as part of widespread or systematic attack”<sup>25</sup> and “the perpetrators are aware or cognizant of the fact that their criminal acts are part of a general or systematic pattern of conduct.”<sup>26</sup>

Murder, extermination, deportation, imprisonment, torture, rape sexual slavery, enforced prostitution etc. amounts to crimes against humanity. These acts when committed against the civilian population will amount to crime against humanity only when committed ‘as part of widespread or systematic attack’<sup>27</sup> and ‘the perpetrators are aware or cognizant of the fact that their criminal acts are part of a general or systematic pattern of conduct.’<sup>28</sup> But what about acts done by the terrorists which are aimed at others than civilians? How can such acts be brought under the category of ‘crime against humanity’? The Statute under Article 7 does not mention about it. Thus within the framework of international criminal law, it is not possible to consider terrorism under the category of ‘crime against humanity’.<sup>29</sup>

### ***Terrorism as ‘separate category of crime’***

Given the consequence that terrorism has, it is time that terrorism be considered as a ‘separate category of crime’. In order to curb down the menace of terrorism, there is need of international support. In the book *International Criminal Law*,

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<sup>24</sup>Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 128.

<sup>25</sup>See Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 128.

<sup>26</sup>Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 127.

<sup>27</sup>Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 127.

<sup>28</sup>See Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 128.

<sup>29</sup>Cassese, A., “*International Criminal Law*”, Oxford University Press, p. 129.

the author Antonio Cassese mentions that ‘all acts of terrorism are not international in nature.’ When the crime of terrorism is carried out within a state then the act of terrorism is punishable and dealt by the state itself.<sup>30</sup> “Terrorism acts amount to international crimes when, first, they are not limited in their effects to one State solely, but transcend national boundaries as far as the persons implicated, the means employed, and the violence involved are concerned; and secondly, they are carried out with the support, toleration or the acquiescence of the State where the terrorist organization is located or of a foreign State. The element of State promotion or State toleration, or even State acquiescence due to inability to extradite the terrorist organization, seems crucial for elevating the offence to the rank of international crime. This is because it is at this stage that terrorism stops being a criminal activity against which States can fight by bilateral or multilateral cooperation, to become (and this is the third element) a phenomenon of concern for the whole international community and a threat to peace.”<sup>31</sup>

During drafting of the Statute, there was interest for including in it provision of terrorism. However, it could not be achieved. In September 2001, with the terror attack on World Trade Centre “the world has awakened to a new danger; terrorism after the September attacks is a totally different phenomenon from that which existed before the attacks in the United States. This is not merely due to the scale of the atrocities, but also because these actions took place on American soil. The message conveyed was that no place is safe; not even a superpower is immune.”<sup>32</sup>

The threat that terrorism poses to international peace and security demands that terrorism be categorized and recognized as ‘a separate category of crime’ and not as ‘war crime’ or ‘crime against humanity’.

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<sup>30</sup>B. Ganor, *The Changing Threat of International terrorism*, <https://www.ict.org.il/Article.aspx?ID=849#gsc.tab=0> (Dec 10, 2019).

<sup>31</sup>Cassese, A., *International Criminal Law*, Oxford University Press, p. 129.

<sup>32</sup>B. Ganor, *The Changing Threat of International terrorism*, <https://www.ict.org.il/Article.aspx?ID=849#gsc.tab=0> (Dec 10, 2019).

#### **IV. Conclusion**

There is no denial to the fact that terrorism poses great threat to humanity. With the ever expansion in terrorist activities it has demeaned human rights. The international community has put a brave fight against terrorism. However, there being no definition of terrorism at the international level is creating hindrances in putting up an effective fight against it. The international community should come up with a definition of terrorism by doing away with the concept of 'one person's terrorist is another person's freedom fighter'. As already discussed in the paper, absence of definition of terrorism should not act as a limitation for incorporating terrorism in the Statute. Terrorism needs to be included under the jurisdiction of ICC as a separate category of crime. Such inclusion will help in effectively combating against terrorism. But this does not mean that there is no need for defining terrorism. Coming up with a definition of terrorism will help in a uniform understanding of terrorism. Including terrorism in the Statute will send a strong message that the international community condemns terrorism and they are together in the fight against terrorist activities.

## Right to Fair Trial for the Victim – Changing Paradigm in 21<sup>st</sup> Century

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### Abstract

*The concept of fair trial is the foundation stone of any justice delivery mechanism for the prevention of miscarriage of justice. While the general concept of 'fair trial' should mean a 'trial' in which there is no biasness or prejudice against any party to trial or the cause, yet it is considered, to be the trial wherein there is no biasness against the defendant/accused only. But a trial can be fair only when the whole of the prosecution procedures has been fair-minded and reasonable, and it is extended to all the participants of the criminal justice system along with the accused. Thus, this paper attempts to investigate the scope of the concept of fair trial and observe whether it can be extended to the other players of the criminal justice system, especially the victims of crime.*

**Keywords:** Defendant, Fair Trial, Human Rights, Pre-trial Procedures, Right, Victims, etc.

### I. Introduction

A trial primarily aims at ascertaining the truth and it must be fair to everyone – the accused, the victim and the society at large. The concept of 'fair trial', being the keystone of any criminal justice system, is a method to prevent miscarriage of justice and upheld 'rule of law'. It is not only to protect the suspect or the defendant but also to make the society safer and stronger. With this basic guarantee, not only the subject will have confidence that justice will be done but also there will be trust in the government system. While the general concept of 'fair trial' should mean a 'trial' in which there is no biasness or prejudice against any party to the proceedings or the cause, yet, it is considered to be a trial wherein there is no prejudices against the defendant/ accused only. It is based on the idea of 'fair play' in a criminal trial giving a fair chance to the defendant to defend

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his/her case against the powerful State. The United Nations describes this right as a 'fundamental' guarantee of human rights, and it cannot be alienated to anyone, for the preservation of rule of law. This concept of fair trial is generally understood as to mean 'the trial process taking place in the open court by an impartial judge' to ensure that individuals are protected from arbitrary and unlawful deprivation of basic rights and freedom. It extends to the procedures outside the Court *i.e.* pre-trial and post-trial procedures as well and this can be understood when the European Court of Human Rights<sup>3</sup> has stated that 'the principle of fair trial contained in Article 6 of ECHR is not limited to the trial, but also to the whole proceeding, of which the trial is only the culmination'. The Indian Judiciary has held similarly in many cases like *Rattiram & Ors*<sup>4</sup>, *NHRC*<sup>5</sup> case and in *Zahira Habibullah Sheikh (2004)*<sup>6</sup>, it has held that the concept of fair trial "is reflected in numerous rules and practices.....fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and judicial calm". Thus, the view of 'fair trial' being only fairness in trial procedure is only in literal sense and one should not forget that the concept of fair trial has broadness in its concept as it extends its purview to both pre-trial and post-trial procedures. After all, a trial can be fair only when the whole of the prosecution procedures has been fair-minded and reasonable, and it is extended to all the participants of the criminal justice system along with the accused.

Thus, the researcher wants to investigate the scope of the fair trial and see if the concept of the right to fair trial can be extended to everyone (including the victim), for better administration of justice. Unless the prosecution has granted a fair trial to the victims of crime along with the accused, the criminal justice system will not be entrusted with faith by the common people and with this perspective in mind, the researcher aims to discuss the normative approach of the concept of the fair trial and investigate if the fairness in prosecution system can be understood in terms of fair trial to the victims in this paper. In the first part, the researcher will also study the various human rights instruments and investigate

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<sup>3</sup> *Imbrioscia v. Switzerland*, (1993) Ser. A no. 275, p. 13; (1994) 17 EHRR 441 (ECHR); *John Murray v. United Kingdom*, (1996) Ser. A, p. 26 (ECHR).

<sup>4</sup> *Rattiram & Ors. v. State of M.P. Transport Inspector of Police*, 17 February, 2012.

<sup>5</sup> *National Human Rights Commission vs. State of Gujarat & Ors.*, 1 May, 2009.

<sup>6</sup> *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.*, Appeal (Crl.) 446 – 449 of 2004.

whether the concept of fair trial is meant only for the accused or there is protection for the victims of crimes also. The next part will re-assess the scope and limit of the concept, to find whether the right to fair trial could be extended beyond the accused to the other parties of the justice system. In this part, the researcher will study various supreme court judgements which talks about the concept of fair trial. Finally, the paper will be concluded with necessary conclusion with the hope of elaborating the limit of the concept of fair trial from the accused and extending it to the victims of crimes and the witnesses.

## II. Pre-Trial Procedures – Relevance in Fair Trial

Pre-trial procedures in a criminal case plays an overly critical role in the fair trial in any justice delivery mechanism. The concept of fair trial does not mean only the courtroom trial but also include pre-trial, and post-trial stages and this was asserted in *Vinubhai Haribhai Malaviya (2019)*<sup>7</sup> when the apex court stated that “a trial encompasses investigation, inquiry, trial, appeal and re-trial, *i.e.*, the entire scrutiny including crime detection and adjudication.....”. The importance of pre-trial procedures was upheld in *Seesa Hemchandra (2001)*<sup>8</sup> wherein the Apex Court has held that ‘a fair trial in modern parlance must be a trial based on an equally fair investigation’. Regarding the absoluteness of fair trial, the Court has held that the fairness of criminal trial cannot be adjudged in absolute terms, and it must be examined in relation to the gravity of the crime, time, resources the society can reasonably afford and the prevailing social values, *etc.* The procedures prior to the courtroom trial consist of registration of FIR, medical examination of the victim, arrest and bail of the accused, statement of the victim to the Magistrate, and cognizance of the offence. Information to the police is the first step of the pre-trial procedures when an offence is committed. Thus, the fairness of criminal trial starts with the receipt of the information or FIR as it sets the criminal law in motion. But not all information is worth investigating as it may be false information also, hence the police officer or investigating officer must check the veracity of the information based on documents received, before proceeding with the investigation.<sup>9</sup> Once the information is notified, it is the responsibility of the police to investigate into the matter with utmost integrity to

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<sup>7</sup> *Vinubhai Haribhai Malaviya v. The State of Gujarat*, 2019 SCC OnLine SC 1346.

<sup>8</sup> *Seesa Hemchandra Sashissal v. State of Maharashtra*, AIR 2001 SC 1246.

<sup>9</sup> *State of Haryana v. Ch. Bhajanlal*, 1992 Cri. L. J. 527 (SC).

find out the truth by ascertaining the facts and circumstances relevant to the offence. In certain crimes, the police may be informed of the causation of crime after the passage of time but delay in filing the FIR cannot be the ground for non-registering of the information if there is explanation for the delay and there is no motive for implicating the accused, especially in rape cases<sup>10</sup>. Recording the information and investigating a crime in a fair manner will result in a fair trial for both the accused and the victim. The fairness and success of the trial depends entirely on the investigating report of the police, but the public and the criminal justice system do not repose their trust in them.<sup>11</sup> The investigation of the crime is governed by the internal Standard Operating Procedure (SOP) of the Police which provides the procedures to be followed by the police during the investigation process. The rules regarding the medical examination of the accused and the victim are provided by the Ministry of Health & Family Welfare guidelines and protocols. It has been observed many a times that non-fulfilment of any procedural requirements or inadequacies of evidence or non-examination of material witnesses, mistakes in investigation and similar other factors have often contributed to the acquittals of accused leading to the failure of the criminal justice system. Even the Malimath Committee had acknowledged that such acquittals resulting from inefficient pre-trial procedures contribute to the failure of the Courts in the pursuit of truth to do justice. Regarding fair investigation, it was stated by the apex court in the case of *Babubhai (2010)*<sup>12</sup> that 'if the police authorities did not make a fair investigation and left out conspiracy aspect of the matter from the purview of its investigation, then it open to the State and/or High Court to direct investigation in respect of an offence which is direct and separate from the one for which the FIR had already been lodged'. The power entrusted upon the State and the High Courts by this judgment, to direct for proper investigation in case of any discrepancy in the investigation procedure indicate its importance and contribution in the fairness of trial. In *Inspector of Police, NIB, Tamil Nadu (2010)*<sup>13</sup>, the Court observed that 'a fair investigation is the very foundation of a fair trial and thus it expects that the informant and the investigator must not be the one and the same person. Thus, the concept of fair trial includes

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<sup>10</sup> Harbans Kaur v. State of Haryana, 2005 Cri.L.J. 2199 (SC).

<sup>11</sup> Malimath Committee Report on Reforms of Criminal Justice System, 2003. Ministry of Home Affairs. Government of India.

<sup>12</sup> Babubhai v. State of Gujarat & Ors. (2010) 12 SCC 254.

<sup>13</sup> Inspector of Police, NIB, Tamil Nadu v. Rajangam, (2010) 15 SCC 369.

the pre-trial procedures within its ambit as per Cr. P. C. and the rulings of the Supreme Court. After all, any probability of biasness has to be forbidden for the fairness of the trial.’

### III. Normative Concept of Right to Fair Trial and India

‘Fair trial is the foundation of rule of law and criminal justice system’<sup>14</sup> as accepted by any legal system. The Black’s Law Dictionary<sup>15</sup> has defined the concept of ‘fair trial’ as “a trial by an impartial and disinterested tribunal in accordance with regular procedures”. The concept of ‘fair trial’ is generally used in relation to such criminal trials in which the constitutional and legal rights of the accused are safeguarded by the prosecution system. Thus, this right is generally understood to be indistinguishably connected with the defendant’s right to confront and cross-examine witnesses in criminal matters (Hoopes, 2009)<sup>16</sup> and not with other players of the prosecution system *e.g.*, victims and witnesses.

This right as a basic guarantee is upheld by the European Convention on Human Rights (ECHR)<sup>17</sup> (Article 6), International Covenant on Civil & Political Rights (ICCPR)<sup>18</sup> (Article 14), Universal Declaration of Human Rights (UDHR)<sup>19</sup> (Article 10 & 11), *etc.* in the form that is expected as a norm in any legal system. The basic rights of fair trial as provided in the ICCPR includes the right to a public hearing, right to be informed, right to legal counsel and right to examine and have examined witnesses against him along with the right not to be compelled to testify against himself. Article 10 of UDHR provides that every

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<sup>14</sup> SCC Online Editorial. 4<sup>th</sup>Sep, 2020, (May 27, 2021.), <https://www.scconline.com/blog/post/2020/09/04/fair-trial-is-the-foundation-of-the-rule-of-law-and-criminal-justice-system-islamabad-hc-rules-in-favour-of-extending-another-chance-to-the-govt-of-india-to-appoint-a-counsel-for-k/>

<sup>15</sup> BRYAN A. GARNER (Ed.), BLACK’S LAW DICTIONARY. (Seventh Edition, West Group. 1999).

<sup>16</sup> Lindsay Hoopes, The Right to a Fair Trial and the Confrontation Clause: Overruling Crawford to Rebalance the U.S. Criminal Justice Equilibrium. 32 HICLR. 305 (2009).

<sup>17</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>18</sup> International Covenant on Civil and Political Rights, United Nations, General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>19</sup> Universal Declaration on Human Rights, United Nations General Assembly Resolution 217A, 10 December, 1948.

accused is entitled to fair and public trial in full equality by an independent and impartial tribunal in the determination of his rights and obligations. The Declaration on Justice to Victims (1985)<sup>20</sup> is a specialised human rights instrument meant for the victims' rights and it says that a victim of violent crime has the right to access justice delivery mechanism, right to participate in the prosecution, and right to get legal assistance during the prosecution process. It is worth noting that all these human rights instruments points towards the right to fair trial of the accused or defendant only and not of other parties to the prosecution. The concept of fair trial includes both pre-trial and post-trial rights, like right to information, right to lawyer, right against self-incrimination, *etc.* but all these rights are guaranteed to the accused and the other players of the criminal justice system do not find an express mention in these instruments. The logic behind guaranteeing more rights to the accused is that he/she is standing against the powerful State prosecution mechanism, and it is believed that victims do not need rights as their freedoms are not at stake.

In spite of the importance of the right to fair trial of the accused, there is no denial to the fact that the victim's right to fair treatment and access to justice deserve equal importance in the eyes of law. After all, victims are person like the accused, with rights and freedoms and crime constitutes a violation of these human rights as well as an act against the State.<sup>21</sup> Appreciating this fact, the United Nation's Declaration of Basic Principles of Justice for Victims of Crime<sup>22</sup> has attempted to recognise the rights of victims as human rights and failure to guarantee the access to justice to the victims of crimes as human rights violations in 1985. The Declaration guarantees the right to fair treatment and access to justice to the victim and his/her immediate family and the dependants. It states that every victim must be treated with compassion and respect for their dignity, and this becomes even more necessary when the victim is of sexual violence. Beside the dignified treatment, the victims are expected to grant fair, expeditious redress, restitution, and access to justice. This Declaration provides that victims must be

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<sup>20</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. General Assembly Resolution 40/34 of 29 November 1985

<sup>21</sup> Jo-Anne Wemmers, Victims' rights are human rights: The importance of recognizing victims as persons. TEMIDA. Pp. 71 – 84. (2012). DOI:10.2298/TEM1202071W.

<sup>22</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. General Assembly Resolution 40/34 of 29 November 1985.

informed of their rights for accessing justice and proper assistance throughout the prosecution process, like that of the accused. After all, it is the victims who sets the criminal justice mechanism in motion by giving information to the police. Following the Declaration, the victims of crime have been granted with few rights under the Criminal Procedure Code (Cr. P. C.) regarding filing of FIR and identification of the accused in India.

The victim of crime has the right to inform the police regarding the crime and is entitled to give copy of information 'free of cost' and where the prosecuting officers deny to act upon such information, they can enforce the right by writing to the Superintendent of Police.<sup>23</sup> There is provision (Sec. 439, Cr. P. C.) which empowers the victim to move the Court for the cancellation of bail granted to the accused, if there is reasonable grounds<sup>24</sup>. Sec. 301 provides for the appointment of special prosecutor on request, from the victim's side, who will act under the direction of the public prosecutor. Beside these rights, the female and child victims deserve special rights and attention, which the criminal justice system has failed to get in the procedural code and this condition is more painful in case of female victims of sexual violence. Also, the legal provisions have failed to address the needs of the victims to be treated with dignity, to render access to the justice mechanisms, and to rehabilitation.<sup>25</sup> Muralidhan (2004)<sup>26</sup> has rightly said that the response of the legislature to the needs of the victims of crimes against women has not been adequate and impulsive. The law has somehow failed to address the need of the female victims to be treated with dignity and respect despite enacting enhanced punishments and by shifting the burden of proof in such offences. There have been broad parameters laid down by the Supreme Court for assisting the victims of sexual violence in *Delhi Domestic Working Women's Forum's case* (1995)<sup>27</sup> but they are neither followed by many in practice nor there are any concrete provisions legislated. Not only this, there are many more cases which laid down various principles for the fair trial of the

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<sup>23</sup> Sec. 154 of Cr. P. C.

<sup>24</sup> R. Rathinam vs. State, (2000) 2 SCC 391. (India)

<sup>25</sup> S. Muralidhan, (2004). Rights of Victims in the Indian Criminal Justice System. International Environmental Law Research Centre. National Human Rights Commission Journal. (June 6, 2021) <http://www.ielrc.org/content/a0402.pdf>.

<sup>26</sup> Ibid.

<sup>27</sup> Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14.

victims, but without benefit. There is no denial that few States have formulated certain measures for the assistance of the female victims of crimes against women, but the fruitfulness of those measures still raise questions on their effectiveness. Still the victims in most cases remain unrepresented and unassisted in the courtroom and they are not treated more than just witness of the crime. The whole environment for victim's right to fair trial depends upon the mindset or perspective of the Judge.

#### **IV. Reassessing the Scope & Limit of the Right to Fair Trial**

'Trial is the finding out by due examination of the truth of the point in issue or question between parties, whereupon judgment may be given'<sup>28</sup>. It is quite surprising to note that the normative understanding of the concept of 'fair trial' talks about protecting the rights of the defendant only and not of others. But the term 'fair' itself means 'impartial, just, equitable, disinterested, unbiased' and so on. 'Fairness' means 'free of biases and prejudices' but when the definition of fair trial as understood by various legal document talks about protecting the rights of defendant to make the trial fair. Also, while assessing the scope of the concept of fair trial, it seems to be clear that it is not confined within the meaning of the procedure that takes place in the Court but also the pre – trial and post – trial procedures, which takes place outside the Court. And that's the reason the concept of fair trial has considered certain rights which are necessary before the actual trial takes place, *i.e.* rights during arrest, right to be informed, right of *habeas corpus*, *etc.* However, the concept of fair trial is always seen in the purview of the accused although there are rights provided for the victim as well. It must be remembered that when the term itself direct towards unbiased trial, how can it leverage or tilt towards one party of the trial and not towards others, or towards a single process and not the entire process of trial. Although most legal systems maintain the right to fair trial as a guarantee only for the defendant, yet there are perspectives which demonstrates the concern for providing a balanced and unbiased right to fair trial amongst all players of criminal justice system. In *NHRC vs. State of Gujarat*<sup>(2009)</sup><sup>29</sup>, the Supreme Court has held that –

*“The concept of fairtrial entails familiar triangulation of interests of the accused, the victim and the society.....It has to be*

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<sup>28</sup> EARL JOWITT. DICTIONARY OF ENGLISH LAW.

<sup>29</sup> National Human Rights Commission vs. State of Gujarat & Ors., 1 May, 2009.

*unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with..... Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.”*

In *Zahira Sheikh Abdullah's* case<sup>30</sup>, it was held that “Fair trial means a trial in which a bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated”. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that act through the State and prosecuting agencies. In *Vinubhai Haribhai Malaviya's* case<sup>31</sup>, it was observed that “Jurisprudentially, the guarantee under Article 21 embraces both the life and liberty of the accused as well as interest of the victims, his near and dear ones as well as of the community at large and therefore, cannot be alienated from each other with levity. It is judicially acknowledged that fair trial includes fair investigation as envisaged by Article 20 and 21 of the Constitution of India.” Thus, there are plethora of cases that says that the right to fair trial should not only be extended to the accused/defendant but also to victim. Granting rights to the victims will empower them to prosecute the violators of rights and seek justice. With this perspective only, there are several provisions provided in Cr. P. C. for ensuring the fairness of trial from victim's side as well, e.g. having a lawyer from his/her side beside the State Prosecutor (Sec. 301). However, there is no denial that the service of

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<sup>30</sup> *Zahira Habibullah Sheikh &Anr. v. State of Gujarat &Ors.*, Appeal (Crl.) 446 – 449 of 2004.

<sup>31</sup> *Vinubhai Haribhai Malaviya v. The State of Gujarat*, Appeal (Crl.) 478 – 479 of 2017.

lawyers is taken by the ones, who are both aware and can afford; and such service is not availed by the ones who cannot afford it or unaware of this right. After all, there is no concept of free legal aid guaranteed to the victims, who cannot afford it. This disparity in the exercise of rights by the victims, definitely influence their right to fair trial. The presence of the victims' lawyer can ensure that he/she is heard and informed about the prosecution process of the accused. In spite of this, the prosecution machinery is more concerned with the rights of the defendant than that of the victim and the only concern shown regarding the victim is that of restorative or compensatory justice. Even the victim is not seen to exercise the rights granted by the criminal justice system and the reason behind this might be due lack of awareness about the rights. After all, a victim not only seeks economic justice to be done against the injuries caused but also expects that real justice is done and this can be done only when he/she is aware of her rights to fair trial as provided by the Cr. P. C.

#### **V. Analysis & Conclusion**

Fair trial promotes the quality of justice by preventing an innocent person from getting unnecessary penalised and pre-trial procedures by the police, the doctor, and the Magistrate, forms the foundation of the fair trial in a criminal justice system. From the above discussion, it is seen that the concept of fair trial is connected to both pre-trial and trial procedures as observed from the provisions of Cr. P. C. and various judicial pronouncements but the awareness with respect of rights is quite low in our country. It is an extremely elusive term as well as qualified one, depending upon the necessity of the situation. Also, the concept is extended to all players of the criminal justice system through various judicial pronouncements of the highest court and the Cr. P. C. as over emphasis on the accused tend to overlook the concerns of the victims in criminal proceedings. But the problem with the concept is that people or the prosecution do not tend to understand it in terms of victims or witnesses, except the accused. This mindset is further enhanced by the lack of awareness of the rights of the victims themselves, enhancing their further victimisation. Also, at times even if they remain aware of their rights, they are unable to exercise them due to poverty and lack of voice of the victims. The concept of free legal aid is not extended to the victims like that of the accused, which should be extended to the poor and vulnerable victims, who cannot afford to have one to assist the State Prosecutor. The victims' advocate will assist the Public Prosecutor, who remains busy with

the duty of prosecuting the accused and he/she has no time to attend the victim with care and compassion and keep the victim informed about the procedures and progress of the case. The helpless and unaware victim remains in the prosecution process, being nothing more than a witness. There is no denial that the accused's right to fair trial needs to be safeguarded against the State prosecution system, but the scenario is also true for the victims, who are vulnerable. The situation is even worse when the victim is a woman, prosecuting the sexual offences meted upon her and their rights demand equal protection against the patriarchal prosecution system. Unless justice to the victim of crimes is considered as the pivotal point of criminal proceedings like that of the accused, the system is improbable to reinstate the balance as a fair procedure in the quest of truth.<sup>32</sup> After all, Justice must not only be done, but must appear to be done when one observes it.

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<sup>32</sup> G. S. Bajpai, (2012). Criminal Justice System Reconsidered: Victim and Witness Perspectives. Serials Publishing, pp. 3

# **Understanding the Kamptapur Movement from A Feminist Perspective: A Study of Role and Participation of Women in the Movement for Autonomy**

*Niviya Arshed (Goswami)<sup>1</sup>*

## **Abstract**

*The paper is an attempt to understand the Kamptapur Movement of North Bengal the region from the theoretical lenses of the feminist school. It is an effort to trace how the movement which initially started with the demand for recognition and autonomy eventually has ignored and disregarded the role and importance of women leading to a gender-biased construction of identity crisis. Baking primarily on a feminist critic the paper makes a serious effort to find the research gap that was the major factors for understanding the question of identity politics of individuals and groups. Through empirical data and an extensive filed based survey and interviews the paper will try to explain that despite evidence and reports of women participation why there in almost all existing kinds of the literature we find a very narrowly narrated contribution of the women in the movement.*

**Key Words:** *Kamptapur movement, Feminism, Role of Women and Women Autonomy.*

## **I. Introduction**

Social movements occupy a vital position in social science research and with the birth of identity politics social movement has been perhaps the most vital essence of Indian politics. As Amartya Sen points out, "India's recent achievements in science and technology (including information technology), or in world literature, or in international business, have all involved a good deal of global interaction." And "these interactions are not unprecedented in Indian history." Indeed ideas "as well as people have moved across India's borders over thousands of years, enriching India as well as the rest of the world."<sup>2</sup> To be very precise

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<sup>2</sup> AMARTYA SEN; THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY; 1995; New York, Picador; pp 84

Identity politics refers to politics driven by demands and concerns rooted in identities - religious, ethnic, linguistic, national, gender, etc. Identity politics or what we might call the demand for recognition is thus, at its core, essentially the politics of equal dignity and the politics of difference (or authenticity). It has emerged both in the developing and developed world, and has roots in gender politics, sexual politics, ethnic politics, and religious interpretations, or some combination thereof.<sup>3</sup> With regard to identity politics, one can make a clear distinction between two dimensions: macro and micro. The macro questions have to do with national, sub-national and group identities-religious, linguistic, tribal, caste-related and how they have been prominent in national politics whereas the micro questions have to do with how families and individuals adapt to, and counter, changes in environment, and what sorts of politics such adaptations and challenges spawn. This paper makes an attempt to understand one such social movement which has been witnessed in the discourse of Indian Politics based on the principle of identity and recognition. Primarily resting on the macro level analysis this paper seeks to explore how the perils of the social movements eventually has its spillover effects on the micro level understanding and analysis of the movement. As Charles Taylor has famously argued, two basic developments - the demand for dignity and the urge to find one's authenticity-are critical for understanding the identity politics of individuals and groups, the paper thus tries to explore deep the major dynamics and underlying factors that resulted in the birth and the rise of the *Kamptapur Movement* in some North Eastern States of the India.<sup>4</sup>

The term movement came from a French word '*movior*' which means to move. Social movement is engaged in moving towards a change in our society. According to M. N. Karna in his book "Social Movements in North-East India" change is a social reality and for that the conflict.<sup>5</sup> Rudolph Heberlein his book "Social Movements: An Introduction of Political Sociology" also says that social movement is a collective effort to transform established relations in existing

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<sup>3</sup> CHARLES TAYLOR; MULTICULTURALISM AND THE POLITICS OF RECOGNITION; Princeton University Press; 1995; PP 25

<sup>4</sup> Id.

<sup>5</sup> M.N KARNA,; SOCIAL MOVEMENTS IN NORTH EAST INDIA, Indus Publication; 1991

society.<sup>6</sup> In the book “Theory of Collective Behavior” Neil Smelser views social movements as directly oriented towards a change in social institution and social norms.<sup>7</sup> MSA Rao in his book “Social Movements in India” represents social movements as a collective mobilization. The plural character of the Indian society manifest a large number of socio-political mobilizations and some of them have developed into bitter, violent and sectionals protest directed against the discrimination, differentiation regarding the mentioned variation in the society. In overall view social movement is considered as the voice of people against the existing order. Thus it’s pretty evident that like the question of identity politics social movement seeks as a medium to channelize the core grievances and voices for recognition and acknowledgement. Generally a movement can be classified in different categories based on different issues. In case of person it can be *special individuals* or it can be *everyone* and in case of nature of the movement that how much change will be occurred by the movement it can be *limited* and *radical*. The phenomena of the movement have been changed periodically in compare to old social movement. With the onset of globalization and identity based movements the nature of the new social movement has taken a completely different formeand moderate in nature. The term new social movement refers to those movements which have come up since mid-1960s. These differ in from the old that, (a) they are concerned with non-material phenomena; (b) they work for quality of life, rather for merely life; (c) they are cooperative and non-conflictive; (d) they are followers-oriented rather than leader oriented; (e) they are decentralized, rather than centralized ones. T.K Oommen refers three different types of movements. *Charismatic, ideological, organizational*. But because of the different structure of the society the same kind of movement can be different in nature.<sup>8</sup> Moving further deep in understanding the discourse of social movement from the theoretical dimension one can use multiple paradigmatic shifts in interpreting the definition of movement, like political, sociological, cultural, and more commonly Marxist approach. The very first and foremost reason behind the social movement is the political power which fuels the issue regarding the gap between two sections in society.

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<sup>6</sup> Rudolph Heberle,; “Social Movements: An Introduction of Political Sociology” New York; 1951

<sup>7</sup> Neils melser, ,J; “Theory of Collective Behaviour” Routledge and Kegan Paul; 1962

<sup>8</sup> T.K Oommen,.; “Sociological Issues in the Analysis of Social Movements in Independent India” Sociological Bulletin; 1977

According to Gurr (Gurr,1970) the theory of Relative Deprivation portray the picture of a gap between the expectation and capabilities involving three general sets of values-economic condition, political power and social status. This gap may originate when expectation remains stable but capabilities decline then it is called as detrimental deprivation; When expectation rise and capabilities decline it is called as progressive deprivation and when expectation rise but capabilities remain stable it is called as aspirational deprivation.<sup>9</sup>

Finally perhaps the most precise understanding these new social movement in the post industrial world order in the context of identity question is forwarded by Alain Touraine and his idea of '*Historicity*' and '*Social Actor*'. Historicity is contented a set of culture, economic, political situation on which a set of relation in a specific environment is formed. Social actor is an individual or a group of individuals live in the field of historicity and covered with it. In the absence of historicity there is no social actor. When in their own set up any adversary called '*Foreign*' enters they get afraid of losing their own identity, culture, their historicity. According to Touraine in this situation a '*Class Relation*' is formed. This class relation does not articulate money or capital. This is demarked by the own historicity which the ruled class tries to preserve which gives birth to the identity based social movement or ethnic social movement.<sup>10</sup> Given this background the succeeding section of the paper seeks to trace the rise, evolution and multi-layered aspect of the Kaptapur Movement of North Bengal region primarily from a feminist perspective with and attempt to explore how the macro level dimension of the movements eventually made its inroads in the micro level understating the setting the societal equation.

## **II. Historical Background of the Kamptapur Movement**

Primarily due to the geographical location and the geo- political composition the Northern part of West Bengal possess a wide range of diverse ethnic composition which includes so many ethnic groups like Mech, Toto, Rabha, Munda, Bodo, Santal. Bhutia, Lepcha, Limbu etc. Amongst them one important aboriginal community which has played a significant role in shaping the geo-political landscape of the region are the Rajbanshis (they are called Rajbanshis as the

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<sup>9</sup> MOHAMMAD YASIN, SRINANDA DASGUPTA; INDIAN POLITICS: PROTEST AND MOVEMENTS, Anmol publication, New Delhi.

<sup>10</sup>ALAIN TOURAINE, AN INTRODUCTION OF THE STUDY OF SOCIAL MOVEMENTS; 1985.

descendants of 'Raja' or 'King'. Basically they are the original homogenous people of northern part of India, specifically North Bengal who includes different tribes, such as Bodo, Mech, converted Muslims etc. these Rajbangshis people are recognized as Schedule Caste in North Bengal of West Bengal) who later on led the foundation pillars of the Kamatapuri Dynasty. According to Nalini Ranjan Roy Rajbangshis or Kamatapuri people basically trace their origin from mediaeval kingdoms of Kamatapuri and modern Cooch Behar kingdoms of Eastern/Northeastern India. They have the mixed origin of Mongoloid, Dravidian and Aryan where Mongoloid features are more prominent.

Kamatapur dynasty was founded by Kashitrya King Prithu Ray in Kamarupa, Assam. After his death in 1228 AD his successor King Sandhya Ray transferred their capital to the plains of Gosanimari, (presently at) Dinhata subdivision in Cooch Behar district, West Bengal. Multiple attempts to seize the dynasty was seen from 1200 to 1400 AD from Ikhtiyar-ud-din Ujbek (1257), Tughlak (1332), Ilyas Shahi (1404), Hussain Shah (1498) till the advent of the most popular king Niladhawaja (1440-1460) who restored peace and stability in the region followed by King Chakradhwaja and King Nilambara.<sup>11</sup> Under different rulers the Kingdom eventually spread from Goalpara district of Assam to the North and South-West of Jalpaiguri, Rangpur, Dinajpur, Malda, Bogra, Rajsahi and Pabna district.<sup>12</sup> (Adhikary, 2015) Geographically the dynasty stretched its boundary from Korotoa River in west, to the east it was Brahmaputra River, to the north it was the foot hills region of Himalaya and in south it was Gouda district of Bengal<sup>13</sup>(Barman, 2005). This Kamatapuri dynasty ended up with the king Nilambar and it shifted with the hand of King Biswa Singha to the new place in Cooch Behar.

After the partition of Bengal in 1905 the refugee problem started. After independence the Bengali Hindus started to come in Bengal from the then East Pakistan and settled over here in Kalyani city and Kolkata. The population was

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<sup>10</sup> Niladhawaja belonged to 'Kshen' dynasty. The term 'Kshen' is divided in two parts 'Kshe' from 'Kshatriya' and 'Na' from the word 'Noti'(dancer).one of the famous narratives behind it is that Niladhawaja was the son of the parents where the paternal relation came from Kshatriya and the maternal relation came from the 'Noti' (dancer) community.

<sup>11</sup> Adhikary, Chandra, Madhab; "Identity Crisis A Study of the Rajbangshis of North Eastern India(1891-1979)"; 2015

<sup>12</sup> Harimohon Burman,; "Kamatapur Rajyer Kahini" North Bengal Printing Works; 2005

different from the people of North Bengal in terms of their origin, their culture, their language, their rituals etc. they started to come over North Bengal from Kolkata because of its rich natural resources. In comparison with the refugees the ethnic group of North Bengal was less educated and simple minded. According to the participants of the movement popularly known as the “*son of the soil*” were being dominated by the migrated Bengali main stream people whom they call as “*Bhadrolok*”. Here according to Tourain’s theory the ethnic society of North Bengal carried ‘*historicity*’ and the indigenous people were the ‘*social actor*’ where the migrated people were ‘*foreigners*’. The limitless deprivation of the indigenous people by the main stream Bengali people made them to demand for their separate “Kamatapur” state along with the demand for recognition of Kamatapur language in 8th schedule in the Indian Constitution.<sup>14</sup>(Barma, 2007)

In the post-independence era the first systematic demand for the Kamtapur people was voiced in 1950 when independent Cooch Behar was merged with West Bengal as a district. A group called Uttar Khanda Dal (UKD) under the leadership of Panchanan Mallick renewed the idea for a separate homeland for Koch Rajbanshis again in 1969 in North Bengal. The Kamatapur movement has been going through with different organization based on different ideology with different period of times in different places but their demands were same. Eventually the demand of separate kamtapur state was organized in Assam in 1955 at the time of state reorganization by the princely family of Gouripur under the leadership of Santosh Badua with their support in 1967 the “Kamatapur Rajya Sangram Parishad”(KRSP) was formed under the leadership of Dr. Girija Shankar Roy in west Bengal.

Gradually in the year 1984 the “Bharatiya Koch Rajbangshi Kshatriya Mahasabha” (BKRKM) was established under the leadership of Dr. Purnanarayan singh in Dhubri, Assam. Their demand was for overall development of the Rajbangshi people living in Assam and West Bengal. They also fought for the preservation of Kamrupi-Kamatapuri language.

“Kamatapur Gana Parishad” (KGP) one of the most important organization in the movement which was formed following the same pattern of “Assam Gana Parishad” (AGP).along with these organization there were some extremist

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<sup>14</sup> Sukhbilas Barma; “Socio Political Movements in North Bengal” 2007

organization named “All Kamatapur Students Union” (AKSU), Kamatapur Liberation Organisation (KLO) who violently protested against the mainstream people.

The movement reached to its zenith under the strong leadership of Atul Roy and Nikhil Roy who founded “Kamatapur Peoples Party” (KPP) in 1996 in the village named Daukimari in Jalpaiguri district of West Bengal, demanding six districts of North Bengal( Cooch Behar, Jalpaiguri, Darjeeling, Uttar Dinajpur, Dakshin Dinajpur, Malda). Along with these the Kamatapur Peoples Party also demanding Alipurduar district of North Bengal. In the year 1999, they submitted a 9 point charter of demands to the President of India through the C.M of West Bengal highlighting on –the recognition of Kamtapuri language in 8<sup>th</sup> schedule of the Indian constitution, demanded a separate and full-fledged department of Kamatapuri language and history in North Bengal University and a dedicated programme at the All India Radio. In due course of time the demand moved beyond language and recognition to rights for improved condition of livelihood of the Kamatapuri people, to increase the job opportunity, uplift the education system to increase the literacy rate etc.<sup>15</sup>But later in 2004 KPP got fractioned and the new party emerged under the name of “Kamatapur Progressive Party” (KPP) with the leadership of Atul Roy in Shibmandir, Darjeeling district. But later on in 2010 both Kamatapur Peoples Party and Kamatapur Progressive Party got merged and again before 2011 assembly election the party got divided.<sup>16</sup>(Barman, 2016, second edition) Nikhil Roy called his party as KPPU(Kamatapur Peoples Party United) which includes KPP, KWRF(Kamatapur Women’s Right Forum), KVSP(Kamatapur Vasha Sahitya Parishad), AKSU(All Kamatapur Students Union).

### **III. Eminent Views Relating to Kamptapur Movement**

A critical understanding of the paper however provides a different interpretation of the movement. Almost all existing dominant literatures provides one sided interpretation of the movement and has been projecting ‘men’ as the sole flag

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<sup>15</sup> LALIT CHANDRA BARMAN, RAJYER DABITE UTTARBANGE ANDOLON N.L.Publisher; 2016.

<sup>16</sup>LALIT CHANDRA BARMAN, RAJYER DABITE UTTARBANGE ANDOLON N.L.Publisher; 2016.

bearer and vanguards of the Kamatapur Movement. This section thus seeks to explore the feminist dimension of the movement and strive to fill in the research gap by challenging the main-stream literature and dominant narratives through raising the question of identifying women's participation in social movement.

In the book named "*Rajyer Dabite Uttarbange Andolon*" the chapter "*Kamatapuri Andolon*" have projected and depicted the role and contribution of the women community in this movement. The author narrates the existence of a "*Kamatapur Women's Forum*" which was formed in the year 1998. The member of the forum actively worked for the upliftment of Kamatapuri people and raised their voice for the recognition of their language in the 8th schedule of the Indian Constitution.<sup>17</sup>

Interviewing the former Kamatapur leader Nikhil Roy from Dhupguri on 11/03/2019 it was further revealed that perhaps the most important and active women wing of the organisation was the WUK (Women's Union of Kamatapur). Formed in a small village named Daukimari in Jalpaiguri district, WUK was apparently more radical and strong in rejecting and protesting the repressive state apparatus and fight for the demand of recognition. Among the eminent members of the group was Mrs. Sonamani Roy the wife of Nikhil Roy Mrs. Sumati Barman who was the secretary of the organization from Malda district.<sup>18</sup> This women organization reorganized on 17<sup>th</sup> January 2021 in Daukimari village and Rina Roy Barman became the new president.

In an another interview with Madam Mrs Mitali Roy, a former Kamptapur leader and present MLA of Jalpaiguri District narratives of Mitali Roy, narratives of other such string operational and active women fronts in the movements were unveiled. Accounts of police atrocities on Mrs Mitali Roy, Mamuda Begum, Sunila Roy, Maya Roy and others were mentioned while recalling the activities like strike, dharna, submitting deputation in police station centering the movemnet during the early 90's in the adjoining regions of Dhupguri and Jalpaiguri. Referring to one such movement Mitali Roy narrates that how once "*organizing a rally in Rangdhmali in Haldibari in the district of Jalpaiguri, we were violently repressed by the police and the armed forces, the armed force raided the villages on the fixed day and used repressive physical violent means*

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<sup>17</sup>/d.

<sup>18</sup>/d.

*to eradicate the members of nearby villages so that the rally turns out a failure. Despite their repressive dominance we did not stop and managed to organise the rally but then the police forces started beating up the women community. The attack was so violent that the did not feel to make a distinction between young and old even between pregnant and old aged ladies. They were brutally harassed and I also was badly injured in the course of negotiation and two of my party members Pratima Roy and Menaka Roy was imprisoned for 9 months in Jalpaiguri jail. It was a heinous attempt of the state apparatus to suppress the movement. However this did not break out our goal and we again within few days started organizing and strengthening our activities.”*

Recently, on November 2019 a gathering was held at the famous Jalpesh Temple in Jalpaiguri, demanding about their recognition of Kamatapuri language in 8th schedule of Indian Constitution. The most interesting part of it was the more participation of women rather than men. Similarly on 6<sup>th</sup> November, 2020 the prominent student organisation of Kamatapur movement AKSU (All Kamatapur Students Union) submitted a deputation to Jalpaiguri Commissioner Office on the demand of Kamatapuri Language and for the separate statehood, along with many female participants.

#### **IV. Conclusion**

Despite such active role and participation of the women community the core question which instigated the study is the fact that why the role and importance of the women in the Kamatapur Movement has been blatantly ignored. One objective criterion could be the lesser number of active women in compared to the men in the movement might have provided a safe ground for all academic scholars and existing literatures to remain silent on the issue of the role and participation of the women in the movement. However the empirical data and an extensive field based survey and interview negates the existing hypothesis and proves the fact that there were multiple women warriors who were not only actively guiding the movement but played a very crucial role in mobilizing the mass throughout the region. This is however not surprising phenomenon, since the field of social movements, especially compared with other areas of study, has been remarkably untouched by the gender scholarship produced in the social sciences over the past decade. The few social movement scholars who have examined gender relations in protest groups find that movements are organized

along gender lines in ways that previously have gone unrecognized.<sup>19</sup> This relatively scant or ignorance attention to gender by main-stream scholars of social movements provides a stark contrast to a growing body of case material on women's protest by feminist writers, which demonstrates that gender is, in fact, a pervasive feature of social movements.<sup>20</sup> Gender hierarchy is so persistent that, even in movements that purport to be gender-inclusive, the mobilization, leadership patterns, strategies, ideologies, and even the outcomes of social movements are gendered and this is primarily what has happened with the Kamatapur Movement too. In her study of Black women's participation in the civil rights movement, Robnett (1997) identifies a distinct form of grassroots leadership carried out by women who were prevented from occupying formal leadership positions by the exclusionary practices of the Black Church. She coins the term "bridge leaders" to refer to the behind-the-scenes leaders who held no formal titles but played key roles both in mobilizing mass participation and creating movement solidarity,<sup>21</sup> which might have been the case with the leaders in the Kamatapur Movement. Nagel's thesis holds that masculinity is integral to nationalist politics in the contemporary world. Gender hierarchy is expressed not only in more subtle forms, such as the construction of patriotic manhood and exalted motherhood as icons of nationalist ideology and the designation of gendered places for men and women in national politics, but in more explicit forms, such as the domination of masculine interests in the ideology of nationalist movements and sexualized militarism that simultaneously constructs the male enemy as oversexed and undersexed and the female enemy as promiscuous.<sup>22</sup> This paper although at this moments fails to test the various existing dominant thesis on the question of ignorance and exclusion of women in the discourse of the Kamatapur Movement however seeks to conclude the paper with a question on the incomplete gendered interpretation of the Kamatapur Movement.

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<sup>19</sup> Rick Fantasia; *Cultures of solidarity: Consciousness, action, and contemporary American workers*; Berkeley; 1988; University of California; pp 32.

<sup>20</sup> Kathleen M Blee; *Becoming a racist: Women in contemporary Ku Klux Klan and neo-Nazi groups*. *Gender & Society*; pp- 680-702.

<sup>21</sup> Blinda Robnette, *How long, how long? African-American women in the struggle for civil rights*. New York: 1997; Oxford University Press.

<sup>22</sup> Joanne Nagel; *Masculinity and nationalism: Gender and sexuality in the making of nations*; *Journal of Ethnic and Racial Studies*; 1998; pp 21-24.

## BOOK REVIEW

**Annihilation of Caste: The Annotated Critical by B.R. Ambedkar, Edited and Annotated by S. Anand; Navayana Publishing (New Delhi, 2014), 415 pp., ₹499**

*'Annihilation of Caste: The Annotated Critical Edition'* as the title itself suggests, is a reprint of one of Ambedkar's classic and most radical works, which had originally been published on 15 May 1936. This famous text forms an integral part of Indian sociocultural history, and has been a repository of spiritual and moral support for Dalits in our country who have had the misfortune of living in a society where they are constantly made the subject of stigma and ridicule. *'Annihilation of Caste'* by way of its robust new annotated edition of 2014, once again brought to the forefront of socio-political discourse, the debates surrounding caste based stratification which had otherwise been relegated to the backburner. Broadly, this edition been divided into three sub-parts. The first part consists of a fairly lengthy introductory essay by Arundhati Roy titled *'The Doctor and the Saint'*, the second part is an undelivered speech by Dr. B.R. Ambedkar and the third reproduces the debate between Ambedkar and Gandhi that was triggered subsequent to the publication of Ambedkar's speech which was meant to be delivered in Lahore before the *Jaat-Paat Todak Mandal*.

The first part of the book, an essay titled "The Doctor and the Saint" by Arundhati Roy, examines the persistence of caste, and also lays down the much needed premise of the ideological differences between Gandhi and Ambedkar, which continues to resonate to a large extent even in the present day. She portrays Gandhi as an orthodox Hindu who, while proposing to do away with the concept of untouchability, advocated the retention of 'caste' and its associated occupational identities. That is to say, Gandhi deeply admired the Caste system, yet idealised an absence of hierarchy among castes inter se. Ambedkar on the other hand, greatly differed from Gandhi and believed that "There would be outcastes as long as there is caste". He wanted the concept of Caste to be denounced in all its forms and facets, and said that it was the root cause of all social segregation at the time, and perpetuated evils like systemic inequality and oppression of the lower castes, thereby posing a massive roadblock in the attainment of an egalitarian society. Further, Roy gives the reader an insight into the beginning of Gandhi's political

career in South Africa, which played an instrumental role in shaping his views on imperialism, race and the like. Also, she takes one through the trajectory of Ambedkar's emergence as an eminent political figure in the national movement, and projects him as the lone warrior who managed to inspire a struggle against sectarianism. She urges the reader to reflect upon Ambedkar's ideology which was based on pragmatic western liberalism, as the current socio-political structure in India has further heightened and modernised the concept of caste, while having promised to eradicate it. Roy's essay is also significant for it puts together the countless unspeakable realities of caste-based discriminatory practices prevailing in the present day, including denial of drinking water, and innumerable instances of horrid violence including lynching and sexual abuse.

In its second part, the book consists of Ambedkar's speech, which remained undelivered because it was deemed to be exceedingly provocative by the Jaat-Paat Todak Mandal, a group of radical Hindu reformers, who sought to eliminate and abolish caste. Ambedkar's speech pierces the conscience of the Hindu and advances logical critiques upon the holy scriptures of the religion as well as its material manifestations such as the Caste system. He also questions the basic tenets of the religion, calling them a 'multitude of commands and prohibitions' and their ramifications on collectivization, harmony and liberation. Ambedkar associates the idea of political reform with that of social as well as economic reform, giving his argument a truly subaltern perspective. For him, it is only such fundamentally iniquitous laws and commands of Hinduism that hinder growth, progress and peaceful coexistence, while rendering certain groups of people feeling cramped and crippled. Ambedkar's disbelief and aversion towards the entire institution of caste rests on four pillars. Firstly, it is because the institution permits and perpetuates the horrendous and archaic practices of untouchability, insult and violence. Secondly, while attempting to enforce a hereditary division of labour in society, the upper castes have perennially deprived the lower castes of education as well as the right to bear arms, both of which are crucial means of revolution. Thirdly, caste tramples upon the basic human right of being able to freely practice a profession of one's choosing, based on their natural inclination or talent. Fourthly, he regards caste as a mass of rules and regulations camouflaged as religion, and a notion which pays mindless subservience to tradition. If for these four reasons, caste is annihilated, Ambedkar simply states that it would amount to the doom of Hinduism in entirety. Hence, through

'Annihilation of Caste', what Ambedkar calls for is the reconceptualization of religion itself, and concludes the text with a sense of optimism - that people are willing to challenge this dated value system and bring about radical reform in Hinduism itself. Over the decades, this text has become a massive source of inspiration for Dalits towards attainment of justice and liberation.

The third and final part of the book involves a series of back and forth letters between Gandhi and Ambedkar. It is noteworthy at this juncture that their debate is not a new one, and by no means has ended. Putting their ideological conflict into context would require an insight into their very different backgrounds as well as political trajectories. Ambedkar was an 'Untouchable' and was a flagbearer of the anti-caste tradition. M.K. Gandhi on the other hand, was a Vaishya, born into a Gujarati Bania household. That is to say, each of them represented starkly distinct interest groups. Gandhi responded succinctly to Ambedkar's essay in his journal 'Harijan', which was included by Ambedkar in the 1936 reissue of *Annihilation Of Caste*, as well as his own reply to the same. While Gandhi persists on reformation of Hinduism without wiping out caste, yet in saying so, he fails to respond to Ambedkar's logical and powerful arguments. Gandhi seems to be conservative and reverential in his approach, as he heavily sympathizes with archaic ideals of Caste. He certainly does recognize the need to ensure human dignity, but also upholds the authority of religious texts and tradition. Ambedkar on the contrary, does not make peace with any half-way measures, and only uses critical reasoning to further his argument. For instance, an unresolved point of discord between them pertains to the ideal mode of societal development. Here, Gandhi denounces the ways of the West and predicts that if we too take that route, there would be mass ecological damage, the environment would be ravaged and we would all be living in hellish conditions. In saying so, he idealizes the self-governing villages of India. For Ambedkar however, cities are the only place where the Dalit can break free from the shackles of oppression and tyranny. The intellectual rivalry between the two men wasn't merely theoretical, and unfolded quite in the middle of India's national movement. Even today, it bears relevance in contemporary politics, and seemingly, these ideological differences have been and would continue to remain irreconcilable.

In summary, *Annihilation of Caste* is a book of immense importance, not just because of its historic relevance, but for its bearings even in the contemporary Indian era. At a point in time where caste is viewed as an obsolete concept, yet

cases of discrimination persistently make headlines not just in our country, but across the globe in different guises, Ambedkar's work becomes a must-read. It imbues in the reader tremendous moral strength, and gives them a greater sense of hope for the future, than disappointment at the present. Through this book, the finer yet complex details pertaining to exclusionary and exploitative practices, dehumanizing vocations, physical/structural abuse, violence and deprivation become astonishingly apparent. While these issues are seemingly addressed by way of constitutional and legal mandates, yet their social manifestations have only seen minute shifts. Further, to read Ambedkar now and learn from his example ought to not only involve the annihilation of caste for attainment of true liberation, but annihilation of all forms of marginalization and subjugation as a whole.

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Printed at North Bengal University Press, Raja Ram Mohanpur, P.O. North Bengal University,  
District: Darjeeling (W.B.), India, Pin - 734018,  
for the Department of Law, University of North Bengal

## **DEPARTMENT OF LAW, UNIVERSITY OF NORTH BENGAL**

The Department of Law is prominently situated on National Highway 31 between Bagdogra and Siliguri in the District of Darjeeling, West Bengal. The distance from Bagdogra is six kilometers and from Siliguri is seven kilometers. The Department has its own campus in the south Block of the North Bengal University. The sprawling campus of the University enjoys the pristine beauty of the eastern Himalayas and is the intellectual hub of North Bengal. Siliguri is an important sub-division of the district and commercial capital of North Bengal. Located at the foot hills of eastern Himalayas, Siliguri is the gate way to North eastern India and land locked countries like Bhutan and Nepal. It shares a huge and porous international border with Bangladesh, Nepal and Bhutan. It is well connected with all metropolis and major cities by air and rail.

The Department of Law was formerly known as the University College of Law and was established as such in the year 1974. It was upgraded as the Department of Law in the year 2000. Presently the Department offers a B.A. LL.B. [Honours] 5 year integrated course, LL.M. course and Ph.D. The intake at the LL.B. level is eighty, and the LL.M. course which was started in 1993 has twenty five seats. The criteria of admission both at LL.B. and LL.M. is on merit. The Department has a rich Ph.D. programme. It was started in 1999 and since then more than 24 Ph.D. degrees have been awarded. Presently there are about twenty five scholars engaged in doctoral research under various faculty members under the UGC Regulation, 2009. The Department attracts scholars and students from all over India and especially from Sikkim, Assam, Tripura, Arunachal Pradesh, Uttar Pradesh and Orissa. It also attracts students from Bhutan, Nepal and Bangladesh. The self financing P.G. Diploma course on Environment has presently been discontinued.

The Department was jointly selected by the British Council, Delhi, University of Warwick, U.K., and the National Law School of India University to carry out the 'Human Rights Outreach Project'. It was also a partner institution with CEERA, National Law School of India University for carrying out environment education for forest personnel, Tea Garden personnel and judicial officers.

The Department has published number of books as well as Booklets in Human Rights, Environment Legislations in Bengali and Nepali. It has a Legal Aid Clinic in collaboration with the State Legal Services Authorities. It runs a very successful NSS programme.

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*Published by University of North Bengal,  
Raja Rammohunpur, P.O. North Bengal University,  
Dist. Darjeeling, West Bengal, India  
Pin- 734013  
Phone No.: (0353) 2776 307, 2776 310, 2776 325  
Fax: (0353) 2776 307, 2 699 001  
Website: www.nbu.ac.in  
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