Vol 14 No. 2 SEPTEMBER 2023 ISSN: 0976-3570

INDIAN JOURNAL OF LAW AND JUSTICE

DEPARTMENT OF LAW
University of North Bengal
Darjeeling, West Bengal, India

Vol. 14 No. 2 *September 2023* *ISSN: 0976-3570*

Vol. 14 No. 02 September 2023 ISSN-0976:3570

INDIAN JOURNAL OF LAW AND JUSTICE

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Cite This Volume as IJLJ (2023)

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.

Editorial Note

For more than a decade now, *Indian Journal of Law and Justice (IJLJ)* has been the go-to, peer-reviewed journal for academicians, judges, researchers and advocates. It played a key role in my early career success, and I look forward to building on the journal's legacy.

Law has been a dynamic concept all the time. It has various dimensions depending upon the period of time as well as its applicability to the nature of society in which it is to operate. The basic concepts of law remain changing with the changing situation of the social norms, the political strategy and the needs of the common man. The rule of law is the slogan of the day may it be on one side or the other. The act which is legal today may be an offence tomorrow and the vice-versa. At the same time an act which is legal in one part of the world may be a crime in other part of the world. Even in a country a "Law" may be valid in a part of its territory may be illegal and punishable in the other part. The law cannot be studied in isolation. In such a decimal context a common man wonders about to learn what is the true law? The answer of the question cannot be given on looking at the statutory law alone. One has to draw the conspectus of the legislative enactments, judicial interpretations and the opinion of the jurists. It is a sheer paradox that everyone is supposed to know the law of the land while the fact remains that nowadays nobody knows the whole law of the land. The Legislators, in general, make law, the judges interpret it and the academicians teach it in addition to studying it, analysing it and researching upon it. But the ambiguity remains even after repeated amendments. This poses a complex issue before a modem man how to know the "law in force". The only solution may be found in deep analysis and research on various aspects of the law. A humble attempt has been made by bringing out the present publication.

The Department of Law, University of North Bengal, although a recent centre of legal education in comparison to others in North India, has played a significant role. The academic excellence of any institution may be judged by the achievements of its students and performance of its teachers in addition to the given infrastructure and the facilities available for such goals. Present shape of the journal has been the product of a long process and initiatives undertaken by our faculty members. The present publication is the testimony to the fact which will go a long way in spreading the inference of multifaceted research in various fields of law that may be the source of knowledge on some of the areas of legal discussion.

We firmly believe, that our journal should ideally be a platform for exchange of ideas and dissemination of information not only from established legal luminaries but also from the young faculties and researchers in the field of law and allied subjects who will be the future leaders in the field of legal education in our country.

As the Chief Editor of the Journal, I am committed to making it a forum that welcomes scholarship from a diverse and global group of authors, whose ideas are at the cutting edge of law and policy research. I will dedicate myself to making the journal an inclusive publishing space that embraces work from a variety of methodological and theoretical perspectives, and I will be working to make the journal and its content more accessible to our readers both in the India and around the world. But I'm not doing this alone. It is my great pleasure to be working with a fabulous Editorial Team who work relentlessly to up the quality of the Journal.

You will soon see some significant changes to the journal. For the sake of brevity, I will not go into great detail, but I can assure you we are working to ensure *IJLJ* remains a highly respected publication venue for your scholarship. As a quick overview, here are few of the changes you can expect in the coming year:

- An online-based submission portal to improve and expedite peer review.
- Online-first publishing that means we can get your research out quicker.
- Priority submission deadlines with the goal of expediting review to 45 days or less.
- Accessibility-friendly online article formatting that works better with screen readers.
- Increased promotion of *IJLJ* authors and their scholarship through social media.
- Workshops to help law and policy scholars enhance their research skills.

In Volume 14, Issue 02, we pay homage to the journal's past and embrace the journal's future, publishing three articles that I believe align with my vision for the journal. I think you'll find there's a little something for everyone in this issue, from insightful legal analysis to incisive policy work.

I hope you enjoy this issue, and I welcome your feedback.

Dr. Rathin Bandyopadhyay
Chief Editor

INDIAN JOURNAL OF LAW AND JUSTICE

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BOOK REVIEW

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Role of Divestment: Realizing Welfare Indonesian

Suwarsit Suwarsit[1] & Yoyo Arifardhani[2]

Abstract

Divestment is the sale of a business carried out by a company, which is the opposite of investment. Based on this definition, this study aims to determine whether divestment can contribute to creating an Indonesian welfare state. The results of the study show Indonesia's welfare state; one of its characteristics can be seen in the state constitution as stipulated in Article 33 Paragraph 3 of the 1945 Constitution regarding land, water, and natural resources that are in its territory and controlled by the state to achieve the goal of realizing prosperity for its people. In an attempt to realize the Indonesian welfare state, mineral and coal mining forces foreign companies to divest through Article 112 of Law No. 3 of 2020 concerning mineral and coal mining regarding the divestment and acquisition of shares in Article 8 of Law No. 25 of 2007 concerning investment.

Keywords: Divestment, Coal Mining, Welfare State, Indonesian.

I. Introduction

The welfare state is defined as a socially responsible state, a thriving capitalist market economy, and a civil society that is integrated into a historical bloc characterized by high levels of wealth, welfare, and social equality. This broader definition of the welfare state has envisioned the modern welfare state as a combination of Keynesian, Fordist Compromise, and Beveridgean welfare system. Such a broad view of the welfare state is concerned with providing political, economic, and social conditions for the interests of its people.[3]

The welfare state is a response to the concept of the night watch state. The state of the night watchman, the basic character of freedom, initially developed in the

[1] Faculty Of Law, Pancasila University, Jakarta, Indonesia
[2] Department of Law, UPN Veteran Jakarta, Indonesia.
[3] JACOB TORFING, POLITICS REGULATION AND THE MODERN WELFARE STATE 166 (ST. Martin's Press 1998).

18th century, mainly because of the push for invisible hands. In this liberal system, the state's role is minimal, so it is often referred to as a minimum state, which is a view that believes that the government does not have the right to use a monopoly to enforce or regulate relations or transactions between citizens. This situation is the background for the birth of socialism or a new understanding that requires more intensive government intervention in the economy and all fields of society, which is manifested in the form of a welfare state.[4]

Against the background of the socio-economic conditions of the community, which are increasingly concerning, in particular by the failure of a free market economic system without any intervention from the State, this has resulted in an economic crisis in the community. At that time, the relationship between society and the state, based on freedom and equality, was no longer adequate. The role of the state, which was previously limited to order, has been expanded by giving greater authority to the state to regulate the economy of the people. The public interest as the basis of public law can no longer be defined as state interest, namely as a power that maintains order or bourgeois.[5]

The idea of a welfare state is not only a description of a situation or a way to get happiness but also a tool that is forced for every human being to get his rights. The welfare state is the mother of ideologies such as Marxism, Socialism, and Social Democracy.[6]

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[4] Maria Alfons, *Kekayaan Intelektual dan Konsep Negara Kesejahteraan*, Badan Pembinaan Hukum Nasional, 77-90 (2016), https://unsla-dev.uns.ac.id/neounsla/index.php?p=show_detail&id=213042&keywords=

[5] *Id.*

[6] Edi Suharto, *Peta dan Dinamika Welfare State di Beberapa Negara: Pelajaran apa yang bisa dipetik untuk membangun Indonesia*, ACADEMIA.EDU (Sep. 13, 2023, 13:56 PM), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiX6LHt_aiAAxVC4jgGHc2PBIcQFnoECBEQAQ&url=https%3A%2F%2Fwww.academia.edu%2F10044074%2FEdi_Suharto_Welfare_State_2006_1_PETA_DAN_DINAMIKA_WELFARE_STATE_DI_BEBERAPA_NEGARA_Pelajaran_apa_yang_bisa_dipetik_untuk_membangun_Indonesia_1&usg=AOvVaw0klhpdHInrJ87TQPTVyt3o&opi=89978449

On the other hand, divestment is the sale of an existing business by a company and the opposite of investing in new assets.[7] Hornby& Wehmeier also said that divestment is a provision that regulates the sale of shares owned by a company or how to get money from investments owned by someone.[8] While Miriam Flickinger defines divestment as the company's decision to increase the important value of the company's assets, which aims to increase the company's power in changing the asset structure and resource allocation.[9]

According to Abdul Moin, the company takes the business shrinking strategy if it is in a weak competitive position. The influencing factors come from the internal environment. Among others are low labour productivity, liquidity problems, too much debt, inefficiency in the production process, which results in low product quality, and inexperienced salespeople. From the external environment, the factors may include macroeconomic conditions and social conditions that are not conducive, changes in consumer tastes, the potent threat of competitors, and the emergence of new entrants in the industry, thus limiting the company's space to compete.[10]

Furthermore, in the business strategy, Abdul Moin explained that the company's management must constantly evaluate strategies based on the results of the company's external and internal environment diagnoses. For example, it decides when the company will enter a new business field, when to expand, and when to leave the business, so part of the management's decision on whether to leave or enter a new business must be an integral part of the strategy and policies that are in line with the company's vision and mission.[11]

Divestment is a business strategy choice for companies. Jan-Hendrik Sewing, in his book, describes the role that divestment can play as a strategic option for

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[7] JEEF MADURA, INTRODUCTION TO BUSINESS 654-656 (Florida Atlantic University 4nd Ed 2007).

[8] ALBERT SYDNEY HORNBY & SALLY WEHMEIER, OXFORD ADVANCES LEARNER'S DICTIONARY OF CURRENT 427-428(Oxford University Press 2000).

[9] MIRIAM FLICKINGER, THE INSTITUTIONALIZATION OF DIVESTITURE A META-ANALYSIS OF STOCK MARKET PERFORMANCE 1-2 (The Deutschec Nationalbibliothek 2009).

[10] ABDUL MOIN, MERGER AKUISISI DAN DIVESTASI 332-333 (Ekonisia 2004).

[11] *Id.*

company development.[12] The primary measure of success for the seller is to close the transaction at a price that includes a premium over the retention value of the property. Hence, to achieve that, the above potential is presented to the market on a risk-free basis in a credible manner. As the calculation of reserves is interpretive and the buyer takes the risk of the assets differently, an aggressive interpretation of the data is generally a good deal.[13]

The company's business strategy can be done by divesting a business unit or part of the assets in a company. This strategy is carried out because divestment can also gain profits if done properly so that it gets offers from quite high buyers. Divestment is a trend for companies in carrying out business strategies to obtain company profits and heal companies from bankruptcy. However, in divesting, they must obtain a fairly high offer or sales agreement that the company's management considers profitable.

Divestment is targeted to increase the company's value so that selling its business units differs from other business strategies such as Mergers and Acquisitions. Mergers and acquisitions have an impact on the size of the company so that divestment will result in a smaller company size due to the separation or sale of some business units.[14]

The difference between divestment and acquisition is very significant, and these differences impact important aspects of the divestment process. The differences in the process are the existence of substantial communication and management challenges, the lack of a robust knowledge base, and the need for the preparation and staging of the transaction.[15]

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[12] JAN-HENDRIK SEWING, CORPORATE DIVESTITURE MANAGEMENT ORGANIZATIONAL TECHNIQUES FOR PROACTIVE DIVESTITURE DECISION-MAKING 36-37 (Deutsche National bibliothek 2010).

[13] JIM HAAG, THE ACQUISITION & DIVESTITURE OF PETROLEUM PROPERTY A GUIDE TO THE STRATEGIES PROCESSES AND TACTICS USED BY SUCCESSFUL COMPANIES 9-10 (PennWell Corporation 2005).

[14] *Id.* at 330.

[15] WILLIAM J. GOLE & PAUL J. HILGER, CORPORATE DIVESTITURES: MERGERS AND ACQUISITIONS BEST PRACTICES GUIDE 7-8 (John Wiley & Sons, INC 2008).

Divestment has occurred in Indonesia such as those carried out by mining companies, namely Freeport McMoran,[16] Newmont,[17] Kaltim Prima Coal,[18] and Vale,[19] the State of Indonesia is one of the developing countries and has a number of poor people in March 2022 by 26.16 million people.[20]

Although poverty is not a moral, socio-cultural problem or permanently excluded from lower-class society, it is an economic risk that affects everyone. The goal of the welfare state is not for the poor. However, to ensure that there is a common framework of resources, services, and adequate opportunities for the needs of society, it can be used by everyone.[21] Thus, divestment can create a welfare state for Indonesia.

This research is important because it is different from other studies that do not examine the harmonization of the relationship between the central government and local governments in the divestment of mining company shares,[22] as well as

[16] Bisnistempo, www.bisnis.tempo.cohttps://bisnis.tempo.co/read/1157723/divestasi-saham-freeport-mcmoran-menguntungkan-kedua-pihak (last visited Sep. 13, 2023).

[17] Detiknews, https://news.detik.com/berita/d-4219533/tgb-divestasi-saham-newmont-untungkan-daerah (last visited Sep. 13, 2023).

[18] Minerba.esdm,www.minerba.esdm.go.idhttps://www.minerba.esdm.go.id/berita/minerba/detil/20121013-pemerintah-desak-kpc-segera-lakukan-divestasi (last visited Sep. 13, 2023).

[19] KumparanBisnis, www.kumparan.comhttps://kumparan.com/kumparanbisnis/belum-ada-titik-terang-rencana-divestasi-saham-vale-dibawa-ke-panja-dpr-1yPBlNadtDx (last visited Sep. 13, 2023).

[20] Badan Pusat Statistik, www.bps.go.id https://www.bps.go.id/pressrelease/2022/07/15/1930/persentase-penduduk-miskin-maret-2022-turun-menjadi-9-54-persen.html (last visited Sep. 13, 2023).

[21] PAUL SPICKER, POVERTY AND THE WELFARE STATE: DISPELLING THE MYTHS 6-7 (Catalyst 2002).

[22] Demson Tiopan, *Harmonizing Relationships of Central Government and Regional Governments in Share Divestment of Mining Companies*, Vol. 12, No. 1, DIALOGIA IURIDICA (2020) https://doi.org/10.28932/di.v12i1.2998.

rational choice theory in mining share divestment schemes,[23] and the study of PT Freeport Indonesia's Contract of Work divestment law.[24]

II. Research Method

This research represents a qualitative study with the focus on the efforts of the Indonesian state to prosper its people by requiring divestment in its economic sector. The research data uses secondary data, which are divided into: The Importance of Self-Determination in the Sovereignty of the State of the Republic of Indonesia; Prosperity in State Sovereignty Against Indonesia's Natural Resources; Divestment Can Be Forced Through the Divestment Law; Indonesian Investment Law; and Mineral and Coal Mining Resources Law Indonesian. The data obtained is then analyzed and presented by describing the actual situation.

III. Finding & Discussions

The Importance of Self-Determination in The Sovereignty of The State of The Republic Of Indonesia

The state is an organization within a region with the highest legal power and obeyed by its people. Scholars who emphasize the state as the core of politics focus on state institutions and their formal forms. These definitions are traditional and narrow in scope. This approach is called the institutional approach.[25]

The word "state" can have two definitions, firstly, a state is a society that occupies an area as a political unit, and the second is a guarantee institution for political

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[23] Widhayani Dian Pawestri & Muchammad Zaidun, *Rational Choice Theory in the Mining Shares Divestment Scheme*, Vol. 49, No. 4-5, ENVIRONMENTAL POLICY AND LAW (2020). https://www.proquest.com/openview/01edcb87bd7a8784dc14623f6709f779/1?pq-origsite=gscholar&cbl=33885

[24] Tina Amelia & Faisal Santiago, *Legal Studies Divested to Contract of Work PT. Freeport Indonesia*, A07 PRESS *(2018)* https://doi.org/10.2991/iceml-18.2018.73

[25] MIRIAM BUDIARDJO, DASAR-DASAR ILMU POLITIK 48-49 (Gramedia Pustaka Utama2003). https://books.google.co.id/books?id=_dZ247rCydIC&pg=PR3 &dq=Dasar-dasar+Ilmu+ Politik.+Gramedia+Pustaka+Utama.&hl=ban &newbks=1&ewbks_redir=1&sa=X&ved=2ahUKEwiqssSBor2AAxUL3jgGHS1cAUwQ6AF6BAgFEAI

unity that occupies an area with its powerful tools to regulate human life in society.[26]

Regarding the elements of the state, it has also been stated in the Montevideo Convention of 1933, in Article 1 there are four characteristics of a country said to be a country: government, a defined territory, a permanent population, and the ability of the state to enter into international relations.

From the text of the Convention, it can be seen that the use of the words "sovereignty" or "independence" is avoided and the formula "a capacity to enter into relations with other states" is given. If this fourth element exists, then the qualifications of the state as a subject of international law will be recovered. Thus, its status can be in the form of a colonial state or a state of a federal state.[27]

For a country, establishing international relations (even if it is limited) is important so that its international personality is not lost altogether. The ability to enter into external relations also depends on the recognition of other countries because, without it, it is difficult for a new country to establish international relations with other countries thus, the formation of a new state must first meet the requirements of Article 1 of the 1933 Montevideo Convention and secondly recognition from other countries.

From the descriptions above, the requirements must be fulfilled to establish a state. It is also supported by the statement of Soepomo in a meeting of the Investigating Agency for Efforts to Prepare for Indonesian Independence (hereinafter called BPUPKI) on May 13, 1945, which stated:[28]

> "The absolute conditions for establishing a state from a legal point of view and a formal (jurisprudence) point of view are that there must be a territory, people and there must be a sovereign government according to international law".
> Soepomo, as a figure of the independence of the Republic of Indonesia and a figure in the formation of the Republic of Indonesia explained the importance of state sovereignty, which is not only recognized in

[26] *Id.*
[27] YUDHA BHAKTI ARDHIWISASTRA, IMUNITAS KEDAULATAN NEGARA DI FORUM PENGADILAN ASING 27-29 (PT Alumni 1999).
[28] *Id.* at 59.

> national law or its intention in its actions to its people requires sovereignty that is recognized according to international law.

The Proclamation of Independence of the Republic of Indonesia on August 17, 1945, was a statement of the Indonesian nation to the international community about the existence of a new state, namely the Republic of Indonesia. Muhammad Yamin interprets the meaning of the Proclamation of Independence as follows:[29]

> "The Proclamation of Independence is an international legal instrument to declare to the people and the whole world that the Indonesian nation takes fate into its own hands to hold all rights to independence which include the nation, the homeland, governance, and the happiness of society".

Mohammad Yamin's interpretation explains sharply that in international law the Proclamation of Independence is the embodiment of the right to self-determination involving the nation (population), homeland (region), and government as a tool to make people happy.

The Proclamation of Independence as the right to self-determination in the 1945 Constitution is contained in the first paragraph of the Preamble. The first paragraph of the Preamble is an affirmation of the right of all nations to independence, which affirming that in the sense that independence is the authority of the state, therefore all colonialism on earth must be annihilated because it is not in accordance with the principles of justice and principles that are in humans.

Its interpretation is in accordance with the concept of the right to self-determination in international law as regulated in Article 1 paragraph (2) of the United Nations Charter which is not intended as an operational rule but as a global moral code. The provisions of Article 1 paragraph (2) of the United Nations Charter in essence explain the respect for the principles of equal rights and the right of the people to self-determination, and taking other appropriate measures to strengthen universal peace can develop friendly relations between nations.

The Atlantic Charter signed by President Roosevelt of the United States and British Prime Minister Winston Churchill on August 14, 1941, contributed to the

[29] YAMIN, PEMBAHASAN UNDANG-UNDANG DASAR REPUBLIK INDONESIA 19-20 (Yayasan Prapanca 1960).

doctrine of the right to self-determination. The inclusion of the principle of self-determination in the United Nations Charter means that the principle of self-determination has gained recognition as a principle in international law.

The application of the principle of self-determination can be found in the proclamation of the national independence of a nation free from the colonial system, such as the Proclamation of Independence of the Republic of Indonesia on August 17, 1945. The implementation of independence for certain residents within the territory of a nation to determine or have their own government is the same as various provisions contained in the 1962 New York Agreement on the Surrender of West Irian. The right of every nation to freely determine the political, social, and economic system in accordance with its national ideals is a manifestation of the right to self-determination.[30]

The third paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia states that by the grace of Allah the Almighty and with the encouragement of a noble desire to live a free national life, the Indonesian people hereby declare their independence.

This third paragraph contains a statement or proclamation of Indonesian independence to the international community regarding the intention of the Indonesian people to establish an independent Republic of Indonesia. Thus, the statement of the Proclamation of Independence of the Republic of Indonesia has earned its place in the concept of international law.

Thus, the three paragraphs of the Preamble to the 1945 Constitution of the Republic of Indonesia are provisions regarding the Republic of Indonesia which begins with the concept of the right to self-determination which is carried out through the struggle for independence as an announcement to the international community regarding the intention of the Indonesian people to establish the Republic of Indonesia which is independent and sovereign.

III. Prosperity in State Sovereignty Against Indonesia's Natural Resources

Jean Bodin said that true sovereignty always seizes its sovereignty.[31] It is almost the same as Vaughan Love who states that sovereignty can have connotations that

[30] YUDHA BHAKTI ARDHIWISASTRA, *supra* note 26, at 60.
[31] JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH TRANSLATED BY M. J. TOOLEY 25-26 (Kemp Hall Bindery without year).

include principles such as self-determination, non-intervention, and so on so that the reference to sovereignty brings these principles into account what factors must be taken into account.[32]

The concept of state sovereignty is also the basis of one of the doctrines known as the act of state doctrine. This doctrine in England is known as: "the sovereign act doctrine". This legal doctrine that emerged in the nineteenth century asserts[33] that every sovereign state is bound to respect the independence of other sovereign states and the courts of a country will not judge the actions of the government of another country committed within its own territory.

Several aspects need to be considered in sovereignty; these aspects are divided into three: external, internal, and territorial. These three aspects are as follows:[34]

a. The external aspect of sovereignty is the authority possessed by a country to freely use it, without any pressure or interference from other countries, which means that in this aspect the state can freely act to determine its attitude on its international policies;

b. The internal aspect of sovereignty is the authority of a state to form institutions in government, state instruments, and how they work as desired;

c. The territorial aspect of sovereignty is the full and exclusive authority of a country over natural resources within its territory.

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https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact =8&ved=2ahUKEwja2d7Nn72AAxXnTmwGHRSRCaUQFnoECA 4QAQ&url=https%3A % 2F%2Fwww.yorku.ca%2Fcomninel %2Fcourses%2F3020pdf%2Fsix_books.pdf&usg=AOvVaw3OIfjvJ9i1s-km7iAzCFD3&opi=89978449

[32] VAUGHAN LOWE, SOVEREIGNTY AND INTERNATIONAL ECONOMIC LAW, IN SIMONS, W. S. P & SINGH, D. (EDS) REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 77-78 (Hart Publishing 2008).

[33] Sigit Riyanto, *Kedaulatan Negara Dalam Kerangka Hukum Internasional Kontemporer,* Vol 1, No. 3, JURNAL YUSTITIA (2012) https://jurnal.uns.ac.id/yustisia/article/view/10074

[34] HANS KELSEN, TEORI UMUM TENTANG HUKUM DAN NEGARA (GENERAL THEORY OF LAW AND THE STATE), TRANSLETED BY RAISUL MUTTAQIEN 355-356 (Nusa Media dan Nuansa 2006).

Sovereignty can be defined as the implementation of the basic principles for order. The point is that society needs power to be a guide for its safety. The concept of sovereignty contains the principle of authority, namely power, or the ability possessed by a person or an entity to carry out a legal action, which can produce effects, power, coercion, domination, and control of others.[35]

State sovereignty over natural resources in the United Nations General Assembly Resolution of December 21, 1952, concerning the principle of self-determination in the economic field of each country (economic self-determination) affirms the right of every country to utilize freely its natural resources.[36] The 1974 United Nations General Assembly and the Declaration on the establishment of a New Indonesian Economic System and the 1974 Charter of Economic Rights and Duties of States reaffirmed the state's right to control its natural resources in order to promote economic growth.[37]

State sovereignty over other natural resources is also regulated in the Covenant on Economic, Social, and Cultural Rights (Article 1). In addition, Covenant and Civil Political Rights (Article 1) dated December 16, 1966, affirms the right of a country to freely utilize its natural resources,[38] and one of them in full can be seen in the United Nations Resolution 1803 (XVII) on December 14, 1962, concerning Permanent Sovereignty over Natural Resources, which explains among others "The rights of the people and the nation to permanent sovereignty and their natural resources must be provided for the national development and the welfare of the people of the country concerned".[39]

Dealing with the State's sovereignty over natural resources, the State has the right to dispose of its natural resources freely without interference from other States,

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[35] Munir Fuady, Teori-Teori Besar (Grand Theory) DAlam Hukum 92-93 *(* Kencana 2013).

[36] Starke, J. G. Introduction TO International Law 121-122 (Butterworth 10nd Ed 1989).

[37] Parry & Grant, Encyclopedic Dictionary OF International Law 290-291 (Oceana Publication Inc. 1986).

[38] Kuswandi, *Model Pengelolaan Sumber Daya Alam Untuk Sebesar-besarnya Kemakmuran Rakyat,* Vol. 1, No. 2, 525, Jurnal Mimbar Justitia (2015). https://jurnal.unsur.ac.id/jmj/article/view/3

[39] Francis Botchway, Documents In International Economic Law 454-455 (Routledge Taylor & Francis Group 2006).

and the State has broad rights to use them for interests and purposes. State sovereignty over natural resources is recognized in international law.

The principle of state authority does not mean that the state becomes the entrepreneur, but it can also be managed by national private companies and even foreign companies. The state is given the power to regulate the economy and prohibit the exploitation of the weak by other people with capital. The state as a regulator given the power must make strict rules against foreign investment when it comes to the interests of the state for the welfare of the people and make rules that are friendly to foreign investment. This means that the interests of the people to obtain the maximum benefit from the exploitation of natural resources must be a priority in opening foreign investment so that foreign investment is only a means to realize the prosperity of the people.[40]

Welfare which is the goal of controlling natural resources can be seen through the regulations of Ghana and the Philippines. The Mineral and Mining Act, 2006, of the Republic of Ghana, explains that every mineral, both under and above the land of Ghana, rivers, watercourses, in the exclusive economic zone and covered by the territorial sea or continental shelf is the property of the State and is used for the welfare of the people. While section 2 of the Philippine Mining Act of 1995, explains that welfare is aimed at protecting the rights of the affected community and the environment.

The country's constitution contained in Article 33 Paragraph (3) of the Constitution of the Republic of Indonesia 1945, as one of the state's economic systems, explains that the water, land, and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people. The State of Indonesia has explicitly recognized and has sovereignty over the natural resources in its territory. Sovereignty is owned and can be used as a tool to achieve its goals, namely the welfare of its people.

IV. Divestment Can Be Forced Through the Divestment Law

Divestment which is believed to be a company's business strategy that is considered to be healthy for the company if the sale gets a fairly high offer price obviously requires a series of preparations for the company's management.

[40] MUHAMMAD HATTA, BUNG HATTA MENJAWAB WAWANCARA DR.MOHAMMAD HATTA DENGAN DR. Z.YASNI 201-204 *(*PT Idayu Press 1978).

Preparation to divest the business unit, if it has been decided, the thing that needs to be prepared is that the shareholders get the maximum value in the sale agreement. Preparation for this divestment has several steps, namely:[41]

a. Building Capabilities. Sales require preparation that is influenced by the company's internal and external costs. This is done to ensure the right price and success in sales;

b. Forming a Team during the Divestment Process. During the divestment process, it is necessary to form a team that is responsible for sales from preparation to the transfer of business units. There are cases where a company plans to divest a lot of the time required, thus requiring building a Corporate Development team focused on repeat sales, even though Members of the Corporate Development team are difficult to motivate, as sales cause the company to shrink rather than grow which has an impact on career sustainability;

c. Requires Advisor. The risk of divestment in the company is very high since the seller usually plays a role in submitting several bids and sometimes negotiates simultaneously with several prospective buyers. The seller will likely need an advisor to provide expertise and a competent workforce;

d. Resources from Other Companies. The seller must collect various company resources to complete the sales process effectively. The team managing the deal should call on staff from the same corporate and line functions. In fact, the sales process usually requires a much greater dedication of resources, especially at the preparatory stage than at the purchase. This is because the purchasing workload increases after the deal is completed, whereas the selling requires preparation and a competent team to get a good price and finish after the sale deal.

Divestment as one of the company's business strategies can actively take steps to better position itself to achieve its goals, so the criteria for divestment decisions depend on the particular business situation. The company's objectives and strategies, which mean the divestment motives are diverse and most have more

[41] MICHAEL E. S. FRANKEL & LARRY H. FORMAN, MERGER AND ACQUISITIONS BASICS THE KEY STEPS OF ACQUISITIONS DIVESTITURES AND INVESTMENT 104-107 (John Wiley and Sons. Inc. 2nd Ed. 2017).

than one determining factor. The various divestment motives in the company as described by Jan-Hendrik Sewing are:[42]

a. Dropping ballast. The motive for such divestment is the unsatisfactory performance of the business unitand business units that are not profitable for the company.

b. Enabling maneuvers. That is, a business unit in a strong position to be divested to use attractive returns for funding acquisitions or other investments;

c. Establishing strategic fit means that strategic change can occur at different levels within a company, for example through a complete strategic reorientation, gradual new strategic focus areas, or strategic refocusing on core strengths. Therefore, a strong business unit can also be divested because it results in a mismatch between individual and corporate businesses;

d. Supporting restructuring, in this case, divestment can be considered due to company resource constraints, and certain business units have disproportionate resource requirements, either in terms of financial or managerial attention.

According to Abdul Moin, the divestment motive has more than one determining factor because it returns to competence, avoids negative synergies, is not economically profitable, has financial difficulties, changes in company strategy, obtains additional funds, gets cash immediately, and other reasons for individual shares shareholders.[43]

While Jim Haag gave several reasons, among others: geographic location is no longer attractive, assets held against their financial metrics are assessed poorly (high lifting costs or low-profit margins), properties for sale no longer fit into the company's portfolio, the environment has changed (increased regulatory oversight or landowner issues), scheduled capital outlays do not have the desired

[42] JAN-HENDRIK SEWING, *supra* note 11, at. 106
[43] ABDUL MOIN, *supra* note 9, at. 334

profitability, and reserve recovery is in jeopardy (performance indicators have deteriorated).[44]

Salim distinguishes divestment motives into two types: voluntary and involuntary. Voluntary divestment can be used as a way to return or save investment. It can be carried out by private legal entities, such as Limited Liability Companies, Firms, and Limited Liability Companies but can also be carried out by public legal entities such as the State, for example, the Indonesian Government divesting shares of State-Owned Enterprises to a Singapore legal entity, namely Singapore Technology Private Ltd. The State-Owned Enterprise is Indosat, which in 2002 was considered by the Government to cover the needs of the 2002 State Budget, which had experienced a deficit.[45]

In addition to voluntary divestment, there is also involuntary divestment. The reason for this involuntary divestment is due to coercion on the company caused by the existence of laws and regulations.[46] The reasons for involuntary divestment due to nationalization or statutory regulations can be seen as an example of the case of companies in the United States, namely American Telephone & Telegraph (AT&T) and Microsoft which were once considered monopolies and had to be split into two companies to avoid unfair competition.[47]

Unlike Germany, which did not divest in cases of unfair business competition, this is possible because the country has five institutions that are deployed in law enforcement, such as the Anti-Cartel Agency, the Federal Ministry of Economy, the Regional Cartel Office, the Monopoly Commission, and the Courts.[48]

Regarding the motives above, it is clear that the divestment is carried out only for business considerations, namely to maintain the company's profitability. In contrast to the divestment motive in law, it is an obligation, meaning that the disposal of shares is carried out not because of business considerations, but rather

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[44] JIM HAAG, *supra* note 12, at. 12

[45] SALIM & NURBANI, HUKUM DIVESTASI INDONESIA PASCA PUTUSAN MAHKAMAH KONSTITUSI RI NOMOR 2 /SKLN-X/2012, 38-*39* (Raja Grafindo Persada 2013).

[46] JAN-HENDRIK SEWING, *supra* note 11, at. 29

[47] ABDUL MOIN, *supra* note 9, at. 335

[48] ISIS IKHWANSYAH, HUKUM PERSAINGAN USAHA DALAM IMPLEMENTASI TEORI DAN PRAKTIK KAITANYA DENGAN HUKUM PERLINDUNGAN KONSUMEN DALAM SEKTOR TELEKOMUNIKASI 20-25 (UNPAD Pers 2010).

to fulfill contractual obligations and/or applicable laws and regulations so that foreign investors release some of their shares to be sold to national participants. In other words, the divestment motive comes from external to the company, due to coercion from the government.[49]

V. Investment Law and Mineral and Coal Mining Resources Law in Indonesia

Investment law is the implementation of the state in its relations with the international community, especially as a member of the World Trade Organization (WTO) international organization. The background of the establishment of the WTO is inseparable from the history of the birth of the GATT (General Agreement on Tariffs and Trade) which aims to improve living standards, and incomes, create jobs, expand production and trade, and make optimal use of the world's wealth resources, has other objectives to carry out activities such as:[50]

a. The WTO introduces the notion of sustainable development in the use of the world's resources and the need to protect and preserve different economic environments;

b. The WTO recognizes positive efforts to ensure that developing countries, particularly disadvantaged countries, get a better share of developments in international trade.

As the main international economic institution, WTO is considered important because it plays a crucial role in international trade, especially in solving trade problems in general. The most important thing is the fact, that the large number of countries that are members of the WTO and the desire of these countries to be bound by the obligations contained in the WTO.[51]

The principles of the WTO include the principle of non-discrimination, market access rules including transparency, regulations regarding unfair trade, special

[49] SALIM & NURBANI, *supra* note 44, at. 135.

[50] HUALA ADOLF, HUKUM EKONOMI INTERNATIONAL SUATU PENGANTAR 92-*93* (CV Keni Media 2015).

[51] MERIA UTAMA, HUKUM EKONOMI INTERNASIONAL 55-56 (PT Fikihati Aneska 2012).

regulations for developing countries, rules regarding decision-making and dispute resolution, and rules governing conflicts between trade liberalization with social values and interests.[52]

Law Investment No. 25 of 2007, the consequence of the State of Indonesia as a member of the WTO. The principles of investment has a close correlation with law enforcement, where this is realized in the form of legal certainty over applicable legal provisions, not only on regulations that specifically regulate investment issues, but also other regulations, both sectoral and cross-sectoral in nature.

The condition of the submission of foreign investment to the recipient country was also emphasized by an Chandrawulan, regarding Judge Oda who declared the establishment of a foreign company in a country. Furthermore, in making foreign investment regulations and policies, policymakers at least face the following problems:[53]

a. How to attract foreign direct investment without causing harm to domestic foreign currency savings and use of natural resources while investment in developing countries, especially in the natural resource sector, requires no small amount of money.

b. How to protect the legal rights of foreign investment and provide adequate protection, while at the same time maintaining dominance as a sovereign state and minimizing negative effects on foreign direct investment, one of the reasons is that foreign investment can make the dependence of the investor country bring profits from the country that owns the resources to the investor country.

c. How to form a law and tax system that can simultaneously encourage economic growth and on the other hand attract foreign investment to increase sufficient income according to the requirements for using state finances.

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[52] AN-AN CHANDRAWULAN, HUKUM PERUSAHAAN MULTINASIONAL LIBERALISASI HUKUM PERDAGANGAN INTERNASIONAL DAN HUKUM PENANAMAN MODAL 124-127 (PT. Alumni 2011).

[53] *Id*. at. 70.

In addition, foreign direct investment flowing into a country is determined by several things. They are the global savings imbalance which will determine the amount of capital that may enter through foreign investment both officially through the government and the private sector, the comparative advantage of the recipient country of capital in certain industrial fields which will attract foreign investors to invest, and the competitive advantage of private companies that can encourage them to compete in globalization.

The objectives of foreign investment include attracting significant capital flows to a country, obtaining benefits in the form of low production costs, local tax benefits, and others, and obtaining higher returns, higher than at home through higher economic growth rates, a more profitable tax system, and better infrastructure.[54]

Foreign investment arrangements in Indonesia are not only regulated by the Investment Law, but also by other laws and regulations that are hierarchically under the law. Even, they are also regulated by other sectoral laws and do not cover investment arrangements in banking, insurance, securities businesses (securities companies), and financing institutions.

Law Investment No. 25 of 2007 shows the implementation of the country's economic sovereignty over the current capital obtained by a country such as Indonesia which is not only obtained from within the country but also obtained from abroad. Before, it distinguished between capitals obtained from abroad and capital obtained from within the country by the issuance of the Law Investment No. 1 of 1967 with Law Investment No. 6 of 1968.

After the issuance of Article 1 of Law Investment No. 25 of 2007, Investment law in Indonesia no longer distinguishes capital originating from abroad and capital originating within the country.According to Article 3 paragraph (2) of Law Investment No. 25 of 2007, the objectives of implementing investment are, among others, to increase national economic growth, increase the competitiveness of the national business world, increase national technological capacity and capability, encourage the development of the people's economy, and increasing the welfare of the community.

[54] HULMAN PANJAITAN & ANNER MANGATUR SIANIPAR, HUKUM PENANAMAN MODAL ASING 47-50 (CV Indhill 2008).

According to Article 7 of Law Investment No. 25 of 2007, the treatment investment Government provides equal treatment to all investors from any country conducting investment activities in Indonesia, except for investors from a country that obtains special rights based on an agreement with Indonesia.

The next article is on the treatment of investment. The Government will not take action to nationalize or take over the ownership rights of investors, except by law. On the contrary, if the Government takes actions to nationalize or take over ownership rights, it will provide compensation, which is determined based on the market price, and the settlement can be done through arbitration.

The treatment of investment in Article 7 and Article 8 of Law Investment No. 25 of 2007, is like a regulation that may occur or an article that needs to be anticipated by the investment party because if it is carried out it provides rights and obligations for both the investment party and the Government itself. Investments are required to carry out government policies that will occur through the laws that are issued if there is a share takeover.

Explanation in the Law Mineral Coal Mining No. 3 of 2020, mineral and coal mining resources as one of Indonesia's natural resources have been firmly controlled by the state to achieve prosperity for its people. State control which has been regulated in the Law Mineral Coal Mining No. 4 of 2009, has now changed with the issuance of the Law Mineral Coal Mining No. 3 of 2020. The reason for the amendment of Law Mineral Coal Mining No. 4 of 2009 its implementing regulations is considered not to be able to answer the problems of actual conditions in the implementation of Mineral and Coal Mining, including cross-sectoral problems between the Mining sector and the non-mining sector.

VI. Conclusion

Divestment as a business strategy in companies that is different from mergers and acquisitions in its implementation can be forced through the law, while foreign investment in Indonesia as a form of cooperation with the Indonesian state becomes a member of international organizations. Law Number 25 of 2007 is the implementation of the state's economic sovereignty over capital not only obtained from within the country but also from abroad. It is different from the previous

law, which distinguished between capital obtained from abroad and that obtained within the country.

One of the characteristics of Indonesia's welfare state is seen in the state constitution as regulated in Article 33 Paragraph 3 of the 1945 Constitution regarding the earth, water, and natural resources in its territory controlled by the state to achieve the goal of realizing welfare for its people. Divestment in realizing Indonesia's welfare state is carried out by foreign companies by selling their shares to the Indonesian side through the sovereignty owned by Indonesia in the mineral and coal mining sector by requiring foreign capital to divest as regulated in Article 112 of Law Mineral Coal Mining No. 3 of 2020 and acquisition of shares in Article 8 of Law Investment No. 25 of 2007.

In other words, the divestment will not be able to create a welfare state for Indonesia if the state cannot use its sovereignty. Sovereignty owned by the State of Indonesia plays an important role in helping the country realize the welfare of Indonesia through divestment. The sovereignty possessed by the state makes the divestment of foreign companies happen.

Vol. 14 No. 2 ISSN: 0976-3570

Cultural Defence in Criminal Law: Instances and Issues

Dr. Akhilendra Kumar Pandey[1]

Abstract

Every society has its distinct culture and its orientation. Law cannot remain aloof from the culture. The culture is in fact embedded in the law of land. Culture makes law and law also makes culture. Culture and law are interdependent. The legal proceedings, particularly criminal proceedings, do not accept cultural practice and tradition as a defence. At times, cultural practices and traditions come in conflict with each other. Protection of cultural rights on the one hand and the prevention of harmful consequences arising out of conduct have to be nicely dovetailed. In this paper an attempt has been made to analyse those circumstances where cultural tradition may be recognized as a defence in criminal or other legal proceedings on the basis of degree of harm likely to be caused by the conduct and also the circumstances where such defence cannot be extended. Where the culture and tradition violate the conscience, it may be considered in mitigating the sentence.

Keywords: Cultural Defence – Justification for - degree of harm – minimal – Indeterminate – Irreparable

I. Introduction

Culture and crime are interlinked. Cultural studies movement seeks to analyse the experience of individuals in every sphere of knowledge including law. The culture concept is being taken over in other disciplines, said Weiner.[2] The relation between law and the culture of a nation are considered as constitutive of law and, on the other hand, law as constitutive of culture.[3] Sometimes the observance of

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[2] The President of American Anthropological Association in 92nd Annual Meeting held in November 1993.

[3] Manachem Mautner, *Three Approaches to Law and Culture,* (2011) Vol . 96 CORNELL L REV 839.

cultural practices and traditions of one community is not acceptable to law of the land. Such a situation is aggravated when one move from his country to another and in the country where one has moved recognizes such a practice or tradition as a distinct crime. While States argue that the practices or traditions are in violation of law, the accused defends by arguing that it were a recognized part of life to the community of which he is a member. In other words, the accused sets up the defence that the act done was not an offence as it were culturally approved in the society to which he belongs. The accused either seeks excuse from liability or justifies his conduct. It is also a debatable issue whether culturally approved conduct of the accused would be a complete defence or would be treated as a mitigating factor. The culture plays a vital role in criminal proceedings. It is strange that the defence of cultural defence does not find any standard criminal law text.[4]An attempt has been made in this paper to highlight the instances where the issue of cultural conflicts arose and the issue was sought to be resolved on the basis of the degree of harm caused by the alleged conduct.

II. Justifications for Cultural Defence

Man never does one thing. The conduct may be done intentionally and extensionally. Marrying a widow is not ethically bad but marrying a widow mother is. Oedipus knew that he was marrying the widowed Queen without knowing that he was also marrying with his own mother. Oedipus intentionally married a widow but extensionally married his own mother. In other words, the doer may foresee the consequence and some consequences may remain unforeseen.[5] Cultural defence assumes such a situation where the person is following his cultural traditions without intending to violate the law.

Law is more than custom and less than social control. Customs consist of social norms and social norms are sanctioned. Behaviour in conformity with social norms is rewarded and deviation is dealt with punitively.[6] The culture of different

[4] Michel Jafferson, *Criminal Law*. (1997) Third Edition ; Smith & Hogan, *Criminal Law*, (1983) Fifth Edition; Glanville Williams, *A Textbook on Criminal Law*, (1983)Second Edition; Andrew Ashworth, *Principles of Criminal Law* (1995) Second Edition; Card, Cross and Jones, *Criminal Law*, (2008)18th Edition

[5] EZIO DI NUCCI, ETHICS WITHOUT INTENTION, (2014)

[6] See, LLOYD'S INTRODUCTION TO JURISPRUDENCE, pp. 910-16, 7th Edn. (2001)

societies may be in conflict with that of the other. This may thus attract arguments for accepting the cultural defence or rejecting it. Justifications for admitting cultural defence mainly revolve around the basic principles of law, particularly the criminal law, international human rights regime pertaining to fair trial and religious liberty.[7] Since criminal liability is determined by guilty act (*actus reus*) and guilty mind (*mens rea*), the motive for commission of crime is usually irrelevant.[8] The accused is thus prevented from bringing the evidence on record explaining the motivation for conduct. The court is, under the circumstances, deprived of considering cultural aspect and may not arrive at a just verdict. Moreover, in judging the reasonableness the understanding of cultural traditions is apt. This matters more when a person is tried for an offence in such a country which is ignorant of cultural traditions and practices the accused belonged to, while the same would not have occurred in case where the counsels and the court are acquainted with the customs and practices of the community to which the accused was a member. It may be inferred that the accused following traditions and practices of his community is denied equal protection of law as he is not allowed to produce evidence of cultural practices. The cultural defence is based on motivational factors deeply embedded in the cultural background and its denial offends the equality right.

Another principle is of notification of conduct which is prohibited by law in the country where the accused is residing. In other words, it is fair notice regarding forbidden act. The practice which is common in one country may be criminal in another but principle of fairness requires notification. Further, as one of the component of fair trial the right of the accused to be defended by a counsel. It is expected that he counsel will produce and explain the cultural evidence for explaining the conduct of the accused and dispel any prejudice of the court against the traditions and customs of the accused. The right to effective assistance under Sixth Amendment is violated in United States where the defence counsel fails to present cultural evidence.[9] There is, thus, a need to enable the courts by making

[7] See, United Nations Universal Declaration on Human Rights, 1948 International Covenant on Civil & Political Rights, 1966, Constitution of India.

[8] Motive is a value laden concept. It is relevant in the determination of quantum of sentence. Good motive mitigates sentence while bad may aggravates it.

[9] Kwai Fai Mak v. James Blodgett 754 F. Supp.1490 (1991) District Court for the Western District.

provisions in the Code in balancing the culture and traditions of the accused with the nature of harm caused cause.

III. Justification against Cultural Defence

On the basis of same referred instruments and documents, arguments against cultural defence revolve around the assumption that culture is primitive, static and unscientific. This belief leads to formation of irrational society where prejudices and inequality prevails and scientific temper is jeopardized. The growth and development of society would be hampered. The cultural defence will perpetuate and strengthen ill treatment against children, women and weaker sections of the society. The recognition will lead to plurality of contradictory culture and tradition leading to anomie and compromised social order. Moreover, the principle of equal protection of law shall be marginalized.

Further, where the courts receive cultural defence during trial, it would be an encroachment on the domain of other organ of the State. In any robust legal system, the doctrine of separation of power is followed where the policy laying is the function of the legislature and adjudication by the courts.

IV. Nature of Harm Arising Due to Observance of Cultural Practices and Traditions

The cultural traditions and practice is harmful or not, has to be decided by its effect. In prohibiting any conduct, the risk or danger to the society arising out of conduct has been significant and the same logic may be extended where cultural practice or tradition is being declared criminal. The issue arising out of various instances leading to its potential effect on the society may be discussed under three broader heads:

A. No Actual Physical Harm

Conduct which is likely to cause either no harm or minimal harm may be exempted from criminal liability. The instances are of cultural food pattern and religious practices.

Food Habits

During 1980s a controversy arose in America pertaining to Peking duck, a Chinese delicacy[10], having public health issue and the Public health law required that the sale of unwholesome food should not be sold to public and its violation was made penal. The health inspectors threatened to prosecute various Chinese restaurants for failing to comply with health and safety codes. The ducks were displayed without maintaining the temperature posing risk of bacterial growth and it was contrary to law. The food inspectors closed the restaurant despite no illness was reported from consuming Peking duck either in America or in China. As the controversy gained ground the Peking duck was sent to laboratory for testing. The laboratory did not find any contamination or risky to health. Thereafter an attempt was made to exempt pecking duck from health statute. Similar situation occurred in respect of Korean Rice Cake[11] (*Tteok/Tteokbokki*). In Korean culture *tteok* is a food that is shared with family and friends at any celebrating event, It symbolizes offering to the spirits that bring good fortune and blessings. The consumption of *tteok* which initially appeared to be a health hazard if not properly stored at a given temperature and thus the health inspectors threatened to prosecute men running bakeries for violating the provisions of food regulations. The cake was, ultimately, not banned by the government but it made a provision for putting date stamp and to be sold within 24 hours. These are classic cases where America accommodated cultural difference in food habit as Peking duck or the Korean Rice Cake did not cause any ill consequences.

Dog eating has been considered to cause psychological trauma. Thus where two Cambodians consumed dog flesh after cooking it, but in the process of killing the dog, the neighbours were psychologically traumatized and called police. It was found that dog eating was not prohibited and thus no criminal proceeding could be initiated. However, a law was enacted subsequently prohibiting the eating of pets. Though the dog eating did not cause any physical harm to the members of the society, but as the pet lovers perceived emotional and psychological trauma

[10] Dish is said to have originated during 13th century near Sanghai in China.
[11] It originated sometimes between 480 – 222 BC during China - Korea war.

thus the eating of pets was prohibited and it did not accommodate the cultural difference.

Religious Practices: Instances of Tandav Dance, Sword (Kirpan) and Full Face Veil (Hijab)

There is a sect in India called Anand Marg and its followers are called Anand Margis. The Anand Margis wanted to hold *Tandava* dance[12] on Public Street. The police did not permit and a writ was filed by the follower of Anand Marg who claimed that *Tandava* dance is one of the essential rites of Anand Marg. But in *Acharya Jadishwaranand Avadhut v Police Commissioner*[13] it was held that *Tandava* Dance in public is not an essential rite of Anand Marg. Thereafter, Sri Anand Murti Sarkar, the founder of Anand Marg, who had written a book wherein he prescribed that *Tandava* dance in public was an essential rite for the Margis. On this basis the believer of Anand Marg again approached the Police Commissioner and obtained the permission that *Tandava* dance may be performed in Public Street without knife, live snakes, trident and human skull. This order was challenged. The matter was remanded to the High Court and the High Court held that *Tandava* dance was essential rite of Anand Marg and could be performed in public streets without any restriction. This order of the High Court was challenged and the matter was referred to the Constitution Bench of the Supreme Court.[14] The Supreme Court observed that Anand Narg was one of the sects of Hindu religion and *Tandava* dance in public is not essential rites of Anad Marg. The restriction imposed by the Police Commissioner was found to be in consonance with the restriction laid down on freedom to religion under Article 25 of the Constitution of India. This judgment has its importance for the present paper only to substantiate where the risk to public order is imminent; the argument on the basis of cultural defence is not acceptable.

For Sikhs kirpan is a religious symbol. Sikh children after a particular religious ceremony wear kirpan besides other things. Sometimes in the name of campus policy prohibiting weapons on the school campus, the Sikh children were expelled

[12] According to Hindu scriptures *Tandava Dance* is associated with Lord Shiva who performed it on various occasions particularly when Sati (the first wife of Lord Shiva) gave up her life.

[13] (1983) 4 SCC 522.

[14] Commissioner of Police v. Acharya Jagdishwaranand Avadhut, Appeal No. 6230/1990 Date of Judgment 11.3.2004.

from schools. This controversy arose in *Gurdev Kaur Cheema v. Harold Thompson*[15] where three Sikh children were expelled on the ground of no knives policy on school campus. The central tenet of their religion required them to wear all the times five symbols including kirpan – a ceremonial knife, the school refused the children to wear kirpans. However, the court did not permit to carry kirpan in school campus despite there being to reported incident of violence with kirpans.[16] An attempt was made through legislation for exemption of kirpans from application of Arms law but it could not be materialized.[17]

While in United Kingdom, carrying kirpan by the members of Sikh community was made through legislation, in Canada it was through judiciary. In *Balbir Singh Multani v. Commission Scholaire Marguerite Bourgeyos*[18]the son and the father were an orthodox Sikh and believed that his religion required wearing kirpans all the times. The son dropped the kirpan which he was wearing all the times in the yard of the school which he was attending. The school board found that wearing kirpan was against the code of conduct of the school which prohibited the carrying of weapons. However, the court permitted to have a symbolic kirpan as a part of religious liberty. The religious practice of carrying kirpan was accommodated either through legislation or the legislation. In other words, the cultural defence was accepted in United Kingdom and Canada.

Under Islamic traditions women put on veil (hijab). There are many countries where it is banned.[19] It has been reported that people in hijab committed offence by hiding their identity and thus hijab has been banned. It has also been observed that many males after putting on hijab committed crimes. The investigating agencies may effectively identify the accused. It appears that putting on hijab, a cultural tradition observed particularly by muslim women, is an innocuous not

[15] (1995) United States Court of Appeals Ninth Circuit decided on October 12, 1995.
[16] It has been reported that pencils and scissors have caused injuries on many occasions in public schools but no prohibition was imposed.
[17] California Senator Bill Lockyer agreed to sponsor the legislation but it was vetoed by the Governor.
[18] 2006 Supreme Court of Canada 6 Date of Judgment 2.3.2006
[19] Austria, Canada, France, Russia, Kosovo etc. Recently in India wearing hijab in schools was banned in State of Karnataka and the order was challenged before the Karnataka High Court which has upheld that wearing hijab is not an essential religious practice of the Islamic faith. See, W.P. no. 2347/2022; for contrary view see Amnah Bint Basheer v. CBSE (2016), Ker. WP No. 6813/2016 date of judgment 26.4.2016

harmful conduct in itself and it could have been accommodated under law as in case of kripan and food pattern unless it proved to have detrimental social consequences.

B. Indeterminacy as to actual Harm

There may be certain circumstances where it may be difficult to ascertain whether the conduct is harmful or harmless. From one perspective the conduct may be regarded as harmful and from that of another, it may be harmless. Such instances may be analysed under following two heads:

Folk or Traditional Treatment

In a community of South Asia a traditional form of medicine and technique called coinage (*cao gio*) is prevalent. This method is used by the parents to treat their children when they suffer from flu, cold or other kind of physical ailments. In this method of treatment the parents put oil mixed with menthol on the body of child and massage the body of the child patient with a coin which has dentate edge. Such serrated edge leave temporary marks on the soft skin of the child.[20] Causing such marks on the body of child is interpreted as child abuse. Theoretically such an act is contrary to law as causing hurt itself is an offence and if it is in respect of a juvenile it may amount to child abuse as it involve intentional infliction of injury but usually it is realized that it is not a case of child abuse. The motive of the parents has a dominating role as they want to cure the child from illness and not to inflict any injury. A Bill was introduced in the State Assembly of California to put such practices beyond the purview of child abuse but was defeated under the pressure of medical practitioners and also due to apprehension that it will result into none reporting of child abuse case. The faith healers will erode the scientific attitude in the society was also one of the reasons for the defeat of the said Bill. However, non-recognition of coinage treatment or folk medicines may at time leave the honest parent in state of trouble for violating the law.

Chewing qat

Qat (botanical name *Catha edulis*) is a flowering plant found in eastern and southern part of Africa. This plant and its leaves contain alkaloid, a stimulant which causes greater sociability, excitement and mild euphoria. Usually its young

[20] See, John Scarborough, (Ed.) *Folklore and Folk Medicines* ed. American Institute of History of Pharmacy, 1987 pp.33 -61

buds and leaves are chewed as stimulant. Chewing *qat* is part of social life of an individual particularly in Kenya, Somalia and Yemen including some part of India. It has an effect like a drug called amphetamine. The harmful consequences of *qat* chewing are not known. While the United Nations has classified *qat* as a dangerous substance and it is treated as a felony by putting *qat* in the category equivalent to LSD, heroine and other narcotic drugs of category A. Some of the European governments are considering criminalizing the use of *qat*.[21] The criminalization of chewing *qat* may lead to a situation where the court has to be apprised of cultural habits of its users and the Europeans and the Americans might be unaware of such practice of chewing *qat*. The defence of culture in cases where the harmful consequences have not been ascertained may lead to plead the cultural defence successfully.

Child Marriage

Child marriage is prohibited by law in many jurisdictions including India.[22] Despite prohibition about 5.2% of the marriages in India are of children. Moreover, there are many communities in India where child marriage is their culture[23] and girls below 18 years are given in marriage as many tribes like Jangil, Andmanese, Rabari Khairwar have either become extinct or at the verge of becoming extinct. In such tribes the marriage takes place early. In communities where child marriage is prevalent, the introduction of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) made the sexual assault against children below the age of 18 years an offence without taking into consideration of cultural practices and traditions of several communities. Moreover, there is no provision in Evidence Act, 1872 for receiving any evidence on behalf of the accused on the basis of cultural defence. Similarly, the Indian Penal Code provides that sexual intercourse or sexual acts by a man with his wife below the age of fifteen years amounts to rape.[24] Neither the substantive nor the procedural laws consider defence on cultural basis.

[21] Netherlands, Norway, Germany and European member States. In U.K. it is illegal drug of class C.

[22] Child Marriage restraint Act, 1929; Prohibition of Child Marriage Act, 2006.

[23] In Kolha Tribes in Mayurbhanj District of Odisha child marriage is celebrated. Rabari Tribes in Kutch area of Gujarat, it's common in Jats and Bishnoi community in Rajasthan.

[24] See, Exception 2 of Section 375 of the Indian Penal Code, 1860.

The traditional or folk treatment is a kind of right which is has been created and preserved from time immemorial and it is equivalent to intellectual property right. The observance of such traditions unless it has some pernicious effect on the society must be guarded. Certain tribal communities which are at the verge of extinction must also receive the cultural defence unless their conduct is found to be so offensive that shook that conscience.

C. Irreversible Harm

There are certain cultural practice and traditions which cause irreversible harm. The prevalence of cultural practice resulting to irreversible harm may, by way of illustration, may be analyzed under following headings:

Clitoridectomy

In certain part of the world Female Genital Mutilation (FGM) is a common custom, particularly, in Nigeria[25]. Clitoridectomy involves surgical removal, reduction of partial removal of the clitoris. Rarely, it is used for treatment purpose. Sometimes it is used when cancer develops or for change of sex. Such a cultural practice violates the rights of women and female children.[26] It was debated whether such a surgery could be called as harmful but it was rejected on the preliminary ground that the child on whom surgery is performed is incapable of giving a valid consent. It was observed that the relatives covertly took the female child to a country where it was permitted and came back to America or other country where FGM was prohibited. The concept of cultural defence has been abolished by U.S. federal Female Genital Mutilation Prohibition Act, 1995 except for medical purpose.[27] The United Nations has declared FGM a human rights violation. However, it is not specifically prohibited in India but complaints under the Indian Penal Code can be made for voluntary causing grievous hurt.[28] Since FGM is such a conduct which causes permanent and irreversible harm and that

[25] 18 African Countries have criminalized FGM. In 2000 Kenya also criminalized but there was a huge protest of Massai people who opposed the ban on the ground that it was an assault on their cultural practice.

[26] Timothy F. Yerima & Daniel F. Atidoga, JOURNAL OF LAW, POLICY AND GLOBALIZATION (2014) Vol. 28 pp. 129-140.

[27] The Secretary, Health and Human Services was directed to compile data on number of females living in US who have been subjected to FGM whether in US or in country of their origin.

[28] See, Section 326 of the Indian Penal Code, 1860.

too without the consent of the person concerned, the extension of cultural defence would not be appropriate in such a situation. The defence on the ground of culture should not prevail where human rights are violated and the harm cannot be reversed.

Honour Crime

While honour killing and honour crime are usually used interchangeably, in fact, honour crime is a genus and honour killing is the species. India is caste ridden society where marriage outside the cast is viewed with contempt and hatred. The marriage within sapinda or prohibited degree is not acceptable. The caste system puts barrier on the choosing the life partner in the name of caste or religion while it is legitimate constitutional right for any man or woman. In fact, it is individual choice and assertion of choice cannot be segregated from liberty and dignity. Liberty embraces the ability to choose. Such right is not expected to succumb to class honour or thinking of a group. The sense of class honour has no legitimacy even though practiced by people in the name of custom, practice or tradition. Honour killing has been viewed seriously by the legal system in India. Any kind of ill treatment in the name of honour is an assault on the choice of the individual relating to love and marriage is illegal and cannot be allowed. Motivated by cultural pride many girls and boys are killed every year in India. In few cases where the village court pronounced the order of gang raping the woman for breach of custom and culture of the society, the Supreme Court condemned such conduct for violating the constitutional morality and criminal law of the country.[29] Similarly in South India, a young man has to fight with a bull in a function of bull fight commonly called *Jallikattu* which endangers the life of man fighting with bull, and such cultural traditions has been prohibited by the court.[30] The accused are dealt with sternly and the court has not taken into account the fact of cultural practice and traditions. The Supreme Court on many occasions passed orders of severe punishment against honour killing.[31]

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[29] *In re Indian Women says Ganged raped on Orders of Village Court Published in British & Financial News dated 23.1.2014* AIR 2014 SC 2816.

[30] Arumugham Servai v. State of Tamil Nadu AIR 2011 SC 1859.

[31] Shakti Vahini v. Union of India AIR 2018 SC1601; Asha Ranjan v State of Bihar AIR 2017 SC 1079; Vikas Yadav v. State of Uttar Pradesh AIR 2016 SC 4614; State of U.P. v. Krishna Master AIR 2010SC 3071; Bhagwan Dass v. State NCT of Delhi AIR 2006 SC 2522; see also 242nd Law Commission of India Report on Prevention of

Adulterous union of wife offends the sentiments of a patriarchal society. The reaction of the aggrieved spouse is conditioned by cultural value of the accused to which he belongs. The provocation is generally a limited defence under criminal law mitigating the degree of culpability instead of absolving the accused from liability altogether.[32] In such situations the degree of harm may be irreparable but criminal law has accepted the space for cultural defence. In an Australian case *R v. Dincer* (1983)[33] a Turkish Muslim immigrant was charged for murder of his daughter which was reduced to manslaughter. The father was, in fact, triggered by knowing the fact that his daughter was having extramarital relation. The court concluded that because of cultural differences the tradition of honor killing in Turkish culture may be allowed to reduce the degree of culpability. In *People v. Kimura*, (1985)[34] a Japanese mother of two children attempted to commit suicide by drowning after knowing about the infidelity of her husband. The children died but mother survived. She was charged for double murder. Under Japanese committing self by leaving children abandoned was much serious than what the accused did id in this case. However, out of plea bargain the surviving mother was sentenced one year imprisonment. In Germany, on the other hand, which had recognized culture defence is now not acceptable.[35]

It is desirable that the functionaries of the administration of justice should be exposed to culture of various communities and country so that they may assess whether or not to exculpate the accused; or alternatively, in reducing the quantum of sentence. In education system also this aspect may be taken care of by the education administrator and regulators.

V. Conclusion

Law cannot be separated from culture. In fact, law and culture both influence each other. Cultural may be addressed by law and law may be instrumental in

Interference with the Freedom of Matrimonial Alliances in the name of Honour and Traditions.

[32] Boya Munigadu v. The Queen ILR 3 Mad. 33; Re Muruggan ILR 1957 Mad. 805; Jan Mohd. v. Eperor AIR 1929 Lah. 861; Emperor v. Balku AIR 1938 All 532.

[33] See, Honour Killings and Cultural Defense (with Special focus on Germany)) Milnikiky Prava v. Stredoeuropsskom Priestore (2009) http://ssrn.com/abstract=1422503.

[34] *Ibid*.

[35] *Id.*

protecting healthy practices and traditions of the society followed since long. Every society has distinct cultural orientation. Culture is deep seated in every legal system which is also reflected in criminal law beside other laws. Cultural defence may be accepted in order to avoid injustice particularly to those who are immigrants having a different culture. Cultural diversity, it is submitted, may be given space in law. Since any conduct which is a part of social life of a community, if done, the intention is not to flout the provisions of law instead to carry on the cultural traditions. However, cultural defence has to be recognized on the basis of degree of harmful consequences arising out of a conduct. Cultural defence is acceptable only when the degree of harm caused is of less significance but its extension does not seem appropriate in cases where the harms are of considerable and irreparable nature. Further, any act done in pursuance of cultural tradition may be treated as a mitigating factor at the time of award of sentence.

Breaking the Cycle of Injustice: Investigating Restorative Justice Solutions for Street Begging Children in Dhaka City, Bangladesh through a Comprehensive Socio-Legal Analysis

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Abstract

Street children in Dhaka are subjected to subtle abuse, exploitation, and violence, like children in many third-world countries. Children are found in vulnerable conditions in street-side homes, public walkways, local bazaars, in front of big buildings, and at public gatherings. It contrasts with the UN SDGs' goals and juvenile rights conferred by articles 02 to 41 of the UNCRC[3], the Children Act 2013, and many other national and international laws. Is it not the responsibility of the state to comply with the mandate under international laws and the Constitution of the People's Republic of Bangladesh. What role have the special laws for women and children played in confirming safeguards from all forms of discrimination and vulnerabilities? Children should be safeguarded and free from all psychological, physiological, inhuman, and other nuances of human exploitation. This contrast to development objectives and the frequency of physical, emotional, and sexual abuse of street children in all spheres of social, economic, and cultural life is a major problem that reinvestigated the efficacy of the rule of law and challenged the restorative justice solution mechanism in place for street children in Dhaka City, Bangladesh. A comprehensive socio-legal analysis of the Children Act of 2013 was done using a mixed-methods approach. The study sought to identify the challenges to the effective execution of the Children Act 2013 in Bangladesh and explore how restorative justice approaches

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[3] Convention on the Rights of the Child | UNICEF, https://www.unicef.org/child-rights-convention (last visited Aug 15, 2021).

can break the cycle of injustice for the most deprived and vulnerable children in society. The study explores the socio-legal perspective through doctrinal and applied informatics approaches to explore, inter alia, the uprising rate of begging children on the streets of Dhaka. The study's findings explore the shortcomings of the restorative justice mechanism and attempt to address an alternative mechanism to deal with the root causes of street begging and promote social reintegration. This study included observations and interviews with key stakeholders and reviewed relevant literature and aims to provide insight into the effectiveness of protecting the rights and well-being of street children under the current legal system in providing protection, rehabilitation, and reintegration of street begging children under the Children Act 2013. The study addresses some specific reformations of the policy framework and practises to ensure better protection of the rights of street children and promote their social inclusion in the mainstream of city stakeholders in Dhaka. The findings of this research are expected to contribute to identifying evidence-based policy recommendations for improving the lives of street-begging children in Dhaka City.

Keywords: Restorative justice, Street begging children, Socio-legal analysis, Children Act 2013, Legal protection, Rehabilitation, and Social Inclusion in Dhaka, Bangladesh**.**

I. Introduction

A study conducted in 2017 by the Bangladesh Bureau of Statistics (BBS)[4] estimated that 1.8 million child labourers exist in Bangladesh, and though the recent BBS survey 2022 had no exact figure on the number of street children in Bangladesh, the report highlighted that the condition of street children is terrible and called for immediate steps. Another study by the Bangladesh Institute of Development Studies (BIDS)[5] in 2016 found that among the 600,000 street children in Bangladesh, a substantial number are engaged in begging. The study also revealed that many street children in Dhaka migrated from impoverished rural areas in search of work or due to various economic and social vulnerabilities.

[4] Goverment of the Peoples Republic of Bnagladesh, *Bangladesh Statistical Survey on Street Children 2022*. http://www.bbs.gov.bd/ (last visited March 01, 2023).

[5] Government of the People's Republic of Bangladesh, Bangladesh Institute of Development Studies (BIDS), http://www.bids.gov.bd/ (last visited Jul 2, 2023).

There is a lack of up-to-date graphical data on street beggars in Dhaka after the covid-19 pandemic. Still, the documented statistics highlighted the magnitude of the problem and the need for more concerted efforts to protect and support these vulnerable children in Bangladesh. The "Bangladesh National Child Labour Elimination Policy, 2010" and the "National Child Protection Policy, 2011"[6] also provide guidelines for protecting children from exploitation, abuse, and neglect, but millions of children are on the street, taking it as their ultimate survival destination.[7] This threatens their right to life and liberty, including the deprivation of minimum food access and healthcare facilities. This socio-legal study examines their vulnerabilities and analyses laws to identify socio-economic causes of this uprising's deviance.

This study closely observed and collected primary data on 150 child beggars aged 4 to 18 who are on the streets or very close to or adjacent to the streets of Dhaka city. An in-depth observation of their lifestyle, including their sufferings, family matters, and other social issues, was made. According to the study, a majority (53%) of street beggars are vulnerable, and 65% are separated from family members and stay with gangs or drug peddling groups. The study also revealed that 79% of street beggars are chain smokers, and almost 58% are habituated to taking dandy gum and other poisonous chemicals for pleasure and addiction. And alarmingly, 73% of street beggars are sexually exploited by adults and elderly people and closely linked with sex traders, gangs, and mastans.

Several governmental and non-governmental organisations are working to protect street children in Bangladesh in compliance with the existing legal framework. For instance, the Department of Social Services provides services and support to street children, while organisations like Save the Children,[8] UNICEF,[9] Jaggo

[6] Government of the People's Republic of Bangladesh, *National Children Policy 2011*, 14 (2011), http://ecd-bangladesh.net/document/documents/National-Children-Policy-2011-English-04.12.2012.pdf.

[7] BLAST-BANGLADESH LEGAL AID SERVICE TRUST & REFORM INTERNATIONAL)-PRI, *The Children Act 2013: A Commentary by Justice Imman Ali Bangladesh Legal Aid and Services Trust Penal Reform International*, (2013), www.penalreform.org/keep-informed.

[8] Save the Children | Bangladesh, https://bangladesh.savethechildren.net/ (last visited Sep 2, 2022).

[9]UNICEF, EVERY CHILD COUNTS : REVEALING DISPARITIES, ADVANCING CHILDREN'S RIGHTS. (2014), https://eric.ed.gov/?id=ED560009. United Nations International

Foundation,[10] BRAC,[11] and many others work to improve the lives of vulnerable children through various programmes and initiatives. While there are laws and regulations to protect street children in Bangladesh, more efforts are needed to ensure their rights are fully respected and that they have access to essential services, education, and protection.

This descriptive work is based on qualitative and quantitative data, and a mixed methods and techniques approach is applied to conduct the study. To compose primary data observation, *"Focus Group Discussion"* (FGD), case study, and use of key informants are used considering the objectives of the present study. This study uses secondary sources, too; it analyses scholarly books, journals, reports, relevant national and international legislation, case studies, newspapers, online documents, and some peer review publications as secondary data sources. Data accumulation and analysis for these primary and secondary sources conveniently determine the gap or drawback of the laws protecting human rights, especially for protecting people from inhuman treatment and torture.

The study aims to investigate and evaluate the current situation of child beggars in Bangladesh and compare it with international treaties, conventions, declarations, and national policies. Specific objectives included portraying the condition of child beggars in Bangladesh, observing existing laws and statutory safeguards to analyse the restorative justice scenario, and making suggestions to prevent child begging on the streets of Dhaka, Bangladesh.

Children's Emergency Fund (UNICEF) https://www.unicef.org/ (last visited Feb 20, 2023).

[10]JAAGO, A Child with JAAGO Foundation- JAAGO Foundation, https://jaago.com.bd/sponsor-a-child?utm_source=adwords&utm_medium=ppc&utm_term=jaago foundation school&utm_campaign=&hsa_cam=13308229899&hsa_mt=b&hsa_ver=3&hsa_src=g&hsa_ad=524856972479&hsa_net=adwords&hsa_tgt=kwd753879564957&hsa_acc=2142028348&hsa_grp=122403805349&hsa_kw=jaago foundation school&gclid=Cj0KCQjwl8anBhCFARIsAKbbpyTd_7XxGysAh9pKPONfo_HRV3neKMZyjzjxXF7-Q1J12zlC3wh-bgkaAt10EALw_wcB https://jaago.com.bd/. (last visited Sep 2, 2022).

[11] Bangladesh Rural Advancement Committee (BRAC), 1972. http://www.brac.net/. (last visited May 04, 2022.

II. Conceptual Frameworks

William Wordsworth rightly said that "the child is the father of man". Aligned with the statement, Bangladesh's legal framework for protecting street children's rights includes several laws and regulations. Bangladesh's Constitution[12] enshrines the rights of citizens, including the protection, care, education, and health of children. In addition, the Children Act of 2013[13] is comprehensive legislation that outlines the rights and protections for all children in Bangladesh. Sec. 4 of the Children Act 2013[14] defines a child as anyone below 18 years of age[1516] and prohibits all forms of violence, exploitation, abuse, and neglect against children. It also guarantees children's rights to education, healthcare, and social security.

In many cases, children who beg in the street are subject to torture by those whom they trust and, in some cases, are sexually exploited to earn money.[17] Child begging is a significant global problem linked to health concerns, insufficient educational opportunities, gender inequality, and poverty. Though child begging is a substantial problem in Bangladesh. Not many empirical studies have been undertaken to determine the issue's magnitude and spatial distribution at the national level and its relationship with poverty in Bangladesh. A sharp rise in child beggars has spread alarmingly in Bangladesh. It is time to address the issue more precisely, explore avenues to rehabilitate child beggars between 4-18 years old, analyse legal efforts to counter the illegal trade of begging, and address Bangladesh's problem of child beggars.

III. Literature Review

Most of the reviewed literature highlights the precarious living conditions of street children in Dhaka City,[18] including experiences of extreme poverty, social

[12] BD CONST. Art 8-Art 19.
[13] Government of the People's Republic of Bangladesh, *The Children Act 2013*, www.bdlaws.gov.org (2016)., Act No. XXIV of 2013 (Bangl.)
[14] *Ibid*.
[15] Government of the People's Republic of Bangladesh, *supra* note 13.
[16] Children Act 2013, § 4, *Supra* Note 6.
[17] UNICEF, *supra* note 9.
[18] RAHMAN, M.A. (2014), Street children at Dhaka City: Concept, causes and recommendation, SSRN ELECTRONIC JOURNAL [Preprint]. https://doi.org/10.2139/ssrn.2376790.

exclusion, and marginalisation, which make them susceptible to various physical, emotional, and psychological problems.[19] The reviewed studies indicated that street children often lack access to basic needs, such as adequate shelter, food, clean water, sanitation facilities, and essential healthcare services.[20] The reviewed research articles also reveal that street children in Dhaka city face various social, economic, and cultural challenges, engaging in hazardous labour, such as begging, street vending, rag-picking, and sex work, which expose them to risks of exploitation, abuse, and violence.[21] They face discrimination and stigmatisation from the broader society and law enforcement agencies, who often view them as a nuisance or a threat.[22] Some street children rely on religion and spirituality to cope with their difficulties and find a sense of purpose and belonging.[23] The reviewed literature also identifies several coping mechanisms and resilience factors that street children use to survive and thrive in challenging circumstances. For instance, some street children form peer groups and support networks to protect themselves from harm and to meet their basic needs.[24] They also develop various survival strategies, such as street smartness, adaptability, and resilience, which enable them to navigate the complex and unpredictable urban environment.[25]

The reviewed studies highlight the need for comprehensive and integrated interventions to address the complex challenges faced by street children in Dhaka

[19] *Ibid*.
[20] KHAN, A., BURTON, N.W. AND TROST, S.G. (2017), Patterns and correlates of physical activity in adolescents in Dhaka City, Bangladesh, Public Health, 145, pp. 75–82. https://doi.org/10.1016/j.puhe.2016.12.011.
[21] Abedin et al., Street Children in Bangladesh: A Critical Review of the Literature (2019); Hossain, The Life of Street Children in Dhaka City (2019); Rashid et al., Survival Strategies of Street Children in Dhaka City (2018); Rahman, Life of the Street Children in Dhaka City (2017); Saha, Life and Livelihood of Street Children in Dhaka City (2018).
[22] *Ibid*.
[23] *Ibid*.
[24] *Ibid*.
[25] Hossain, M. S. (2019). Street Children: An Overview of the Phenomenon, Concepts, and Policies. Children & Society, 33(2), 93-105; Khan, M. A. (2020). The Plight of Street Children in Bangladesh: A Study on the Necessity of Empowerment. Journal of Child & Adolescent Trauma, 13(4), 489-498; Uddin, M. S. (2020). Human Rights Violation of Street Children in Dhaka City, Bangladesh. Journal of Human Rights and Social Work, 5(3), 175-187.

City. The interventions should prioritise providing basic needs, such as shelter, food, and primary healthcare, as well as protecting their rights and dignity.[26] Root causes of child begging, such as poverty, Inequality and social exclusion, must also be countered. Social inclusion and empowerment of street children[27] must also be promoted. Finally, the interventions should involve a multi-sectoral approach, engaging major stakeholders, such as government agencies, civil society organisations, and community groups, to ensure sustainability and effectiveness.[28] The review has focused on literature that provides valuable insights into the lived experiences of street children in Dhaka and the challenges and opportunities of working with this vulnerable population. It underscores the urgent need for concerted efforts to protect and promote the rights and well-being of street children and to build a more inclusive and just society for all.

Another study investigated street beggars' health status and healthcare-seeking behaviour in Dhaka City.[29] The study found that street beggars face several health issues, including respiratory problems, skin diseases, and injuries. However, they were less likely to seek healthcare due to financial constraints and a lack of awareness. Basic, affordable healthcare and accessibility are two primary challenges the country needs to address.

A study explored the role of non-governmental organisations (NGOs) in improving the socioeconomic conditions of street beggars in Dhaka City.[30] The study found that NGOs significantly provided street beggars with healthcare, education, and vocational training. Last but not least, Ahmed and Haque's study looked at how COVID-19 affected street beggars in Dhaka City and discovered that they suffered greatly as a result of the pandemic due to a loss of income and increased health risks as a result of their occupation. The study emphasises the

[26] *Supra* note 17.
[27] *Supra* note 10 & 13.
[28] Md Manjur Hossain Patoari, *Socio-Economic, Cultural and Family Factors Causing Juvenile Delinquency and Its Consequences in Bangladesh: A Look for Way Out*, 7 ASIAN J. SOC. SCI. MANAG. STUD. 89 (2020).
[29] Alam, M.M. et al. (2022), *Impacts of health and economic costs on street children working as waste collectors in Dhaka City,* https://doi.org/10.31219/osf.io/e269a.
[30] Susan Bennett, Stuart N. Hart & Kimberly Ann Svevo-Cianci, *The Need for a General Comment for Article 19 of the UN Convention on the Rights of the Child: Toward Enlightenment and Progress for Child Protection*, 33 CHILD ABUS. NEGL. 783 (2009).

need for targeted interventions to support street beggars during the pandemic.[31]

The literature review suggests that street beggars in Dhaka City face significant socioeconomic challenges, including poverty, social exclusion, and health issues. While NGOs have played a crucial role in improving their conditions, sustainable interventions that address the root causes of poverty and social exclusion must be prioritised. Moreover, targeted interventions are required to support street baggers during crises such as the COVID-19 pandemic. In conclusion, street begging is a complex issue in Dhaka city, driven by poverty, a lack of access to education, and the absence of social protection systems. To address this issue, it is important to implement a range of strategies that address these underlying factors, including education and vocational training, social protection programmes, and efforts to address poverty and inequality in the city. By taking a holistic approach, including legal introspection, to the issue of street begging, it is possible to improve the lives of vulnerable children and families in Dhaka.

IV. Understanding the Laws on Children in Bangladesh

The right to life, liberty, and security of persons, as well as the prohibition of forced labour and discrimination, is secured by the "Universal Declaration of Human Rights-UDHR" adopted by the United Nations General Assembly in 1948. Bangladesh is subject to the declaration's provisions as a signatory.[32] The Universal Declaration of Human Rights (UDHR) recognises that all human beings, including children, are born free and equal in dignity and rights. Article 5 of the UDHR prohibits torture or cruel, inhuman, or degrading treatment or punishment for all individuals, while Article 7 guarantees equal protection under the law without any discrimination. Bangladesh, a signatory to the UDHR, must respect its provisions, which uphold and protect the right to life, liberty, and security and prohibit discrimination based on race, colour, or religion. These provisions provide protection for street beggars.[33]The "International Covenant on

[31] Md. Rakibul Islam Ahmed & Md. Anwarul Haque, Impact of COVID-19 on Street Beggars in Dhaka City, 14 Int'l J. Of Multidisciplinary Research And Publications 64, 66-67 (2021).

[32] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948)

[33] Ibid.UDHR, 1948.

Economic, Social, and Cultural Rights (ICESCR)"[34] recognises the right to a minimum standard of life, including access to food, clothing, shelter, and the right to employment and social security. Bangladesh signed the Covenant in 1998, thereby committing to its terms. These rights protect street beggars in the country.[35] The "UN Convention on the Rights of the Child-UNCRC"[36] that Bangladesh signed in 1990, acknowledges every child's right to an acceptable standard of life, including food, clothing, shelter, and education. As a signatory to the Convention, Bangladesh must make positive efforts to protect the rights of child beggars in the country.[37] Under international law, the rights of begging children are protected. Begging is considered a form of social deviance and a social problem as it involves requesting money without the intention of reimbursing or providing services in return. Child begging, a form of forced child labour, delivers children to another person to exploit their work.[38] Forced child begging may also involve trafficking for begging, which is defined as the recruitment, transportation, transfer, harbouring, or receipt of persons for exploitation.[39]

A. Definition of Child

According to the "*United Nations (UN) Convention on the Rights of the Child*"(UNCRC 1989), *Article 1 provides that "a child, for the Convention, refers to every human being below the age of eighteen years unless a majority is attained earlier under the law applicable to the child"*[40]a child is an individual under the age of 18. In Bangladesh, there are various legal definitions of a child.

[34] International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), art. 10, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), entered into force Jan. 3, 1976.
[35] International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966).
[36] Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49A) at 167, U.N. Doc. A/44/49 (Nov. 20, 1989).
[37] *Ibid*.
[38] De Boer-Buquicchio, M., 2020. Sale of Children and Trafficking in Children as International Crimes. The Palgrave International Handbook of Human Trafficking, pp.1341-1359.
[39] United Nations Office on Drugs and Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000).
[40] Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

Section 4 of the Children Act of 2013" mentioned defines a child as someone under 18[41], while the "Women and Children Oppression (Amendment) Prevention Act 2003 considers a person under 16 as a child. Under Muslim Shariah law, a child becomes an adult upon reaching the teenage age, typically 12 for girls and 15 or 16 for boys. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) acknowledges the need for special protection and assistance to prevent the economic and social exploitation of children.[42] Bangladesh ratified the ICESCR in 1998, recognising the right to an adequate standard of living, including food, clothing, and housing, protecting street beggars living in poverty (ICESCR, Art. 11).[43] Moreover, Article 24 of the International Covenant on Civil and Political Rights (ICCPR) mandates the adoption of special protection measures for children, regardless of their social status or circumstances, to prevent discriminatory action against them.[44] The CRC emphasises the importance of providing children with a loving and understanding environment, adequate nutrition, housing, medical care, education, and protection from neglect, cruelty, and exploitation, reinforcing the ICCPR's principles. The UN Convention on the Rights of the Child (UNCRC) sets forth ten principles emphasising children's right to equality, protection, and physical, mental, and social opportunities. These principles provide a framework for ensuring children's rights are respected, protected, and fulfilled (UNCRC, Art. 3).[45]

Bangladesh ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2007, which recognises the rights of persons with disabilities, including those who engage in begging due to their disability, and

[41] *Supra* note 6, Children Act, 2013, § 4, Acts of Parliament (Bangladesh).
[42] *Supra* note 28. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), art. 10, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), entered into force Jan. 3, 1976.
[43] Bangladesh, International Covenant on Economic, Social, and Cultural Rights, Office of the High Commissioner for Human Rights, https://tbinternet.ohchr.org/_layouts/15/ treatybodyexternal/Download.aspx?symbolno=E%2F1990%2F5&Lang=en (last visited Apr. 3, 2023).
[44] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 24, 999 U.N.T.S. 171, entered into force Mar. 23, 1976.
[45] Convention on the Rights of the Child, G.A. Res. 44/25, art. 2, 3, 28, Nov. 20, 1989, 1577 U.N.T.S. 3, entered into force Sept. 2, 1990.

mandates appropriate support and services for such persons.[46] Bangladesh also ratified the International Labour Organisation Convention No. 29 in 1972, which prohibits forced labour, including forced begging.[47]

In the national context, several laws and regulations provide protection for street beggars in Bangladesh. The Constitution of Bangladesh guarantees the right to life and liberty, prohibits discrimination based on occupation or economic status, and contains provisions that aim to protect children's rights (Constitution of Bangladesh, Art. 28(4), 29(3), 31, 32, 34, 47, 15, and 17).[48] The Children Act 2013,[49] the Prevention of Oppression Against Women and Children Act 2000,[50] and the National Child Policy 2011[51] are some laws and policies enacted to protect children's rights in Bangladesh.[52] The Penal Code of 1860[53] considers begging a potential public nuisance and a punishable offence under Section 268, which considers anyone causing common injury, danger, or annoyance to the public or people nearby guilty of a public nuisance. Such actions may be subject to a fine of up to 200 taka (Penal Code of Bangladesh, Sec. 268 and 290).[54]

B. Criminal Responsibility of Child

In Bangladesh, the age of criminal responsibility is 9 years old, according to Section 83 of the Penal Code of 1860.[55] As a result, a child who is aged 9 years

[46] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 27, Dec. 13, 2006, 2515 U.N.T.S. 3, entered into force May 3, 2008.
[47] International Labour Organization, Forced Labour Convention, No. 29, June 28, 1930, 39 U.S.T. 55, ratified by Bangladesh on Sept. 14, 1972.
[48] Constitution of the People's Republic of Bangladesh, art. 31, 32, 34, 47, 15, available at http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=367.
[49] Children Act, 2013, Act No. 24 of 2013, The Bangladesh Gazette, Extraordinary, June 10, 2013.
[50] Prevention of Oppression Against Women and Children Act, 2000, Act No. 8 of 2000, The Bangladesh Gazette, Extraordinary, May 9, 2000.
[51] Government of the People's Republic of Bangladesh, *supra* note 6.
[52] National Child Policy, Ministry of Women and Children Affairs, Government of the People's Republic of Bangladesh, 2011.
[53] Goverment of Bangladesh, *The penal code*, 65 BANGALDESH GOVERMENT 3255 (1860).
[54] Penal Code, 1860, § 268, Act No. XLV of 1860, The Bangladesh Gazette, Extraordinary, Oct. 6, 1860.
[55] Penal Code of Bangladesh 1860, § 83, Act No. XLV of 1860, The Bangladesh Gazette, Extraordinary, Oct. 6, 1860.

or older can be charged and sentenced for begging under Section 2(14) of the Vagrant and Shelterless Person (Rehabilitation) Act of 2011.[56] Such a child can be detained for up to two years in a shelter home under section 10. Furthermore, begging is considered a public nuisance under Section 268 of the Penal Code of 1860.[57] The section states that a person is guilty of a public nuisance if they perform any act that causes common injury, danger, or annoyance to the public or the people who occupy property in the vicinity. This section provides that a common nuisance is not excused even if it causes some convenience or advantage. Such acts of public nuisance are punishable by a fine of up to Tk 200.

The Children Act 2013[58] has replaced the outdated Children Act 1974 and the Children Rules 1976[59] to comply with the Convention on the Rights of the Child (CRC) of 1989.[60] According to this Act, anyone who assaults, abuses, neglects, abandons, or obscenely exposes a child, causing unnecessary suffering or injury, is charged with an offence. The punishment for such an offence is imprisonment for up to five years, a fine of up to one lakh taka or both.[61] The act also considers it an offence to engage a child in begging or to encourage the practice. Anyone found guilty of such an act will face imprisonment for up to five years or a fine of up to one lakh taka or both.[62]

C. Restorative Justice

Restorative justice is an approach to the justice delivery system that acknowledges every child's right to natural justice, namely "*audi alterem partem"* in particular. Restorative justice also takes child rights seriously by creating a safe space for them where they can take their responsibility and engage in every matter that revolves around them. The principal facets of restorative justice include the voluntariness, confidentiality, and impartiality of the facilitators. In matters concerning children who are in conflict with the law, restorative justice prioritises reintegration, support, and empowerment.

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[56] Vagrant and Shelterless Person (Rehabilitation) Act 2011, § 2(14).
[57] Penal Code, 1860, § 268, Act No. XLV of 1860, The Bangladesh Gazette, Extraordinary, Oct. 6, 1860.
[58] Government of the People's Republic of Bangladesh, *supra* note 13.
[59] Children Rules1976, (1976).
[60] Convention on the Rights of the Child | UNICEF, *supra* note 3.
[61] Children Act 2013, § 76.
[62] Children Act 2013, § 80, 84, 89d.

D. Restorative Justice under the Children Act, 2013

Child Development Centres

Section 59 of the Children Act 2013[63] mandates the government to establish and maintain an adequate number of child development centres, categorised by gender, for the accommodation, correction, and development of children who have been ordered to be detained in judicial proceedings or are under trial.[64] Additionally, Section 60 of the Children Act 2013[65] allows non-governmental institutions to be established and operated by individuals, organisations, or institutions with government permission to further restorative justice efforts.

Disadvantaged Children and Alternative Care

Under section 89(d) of the Children Act 2013[66],any child engaged in begging or any activity that endangers their well-being is classified as a disadvantaged child. Section 84[67] allows for alternative care to promote underprivileged children's overall welfare and best interests. Section 45 specifies that institutional care can be facilitated through designated institutions such as government-run children's homes (Sharkari Shisu Paribar), baby homes (Chotomoni Nibash), training and rehabilitation centres, government shelter homes, and any other institutes determined by the government.[68]

E. Restorative Justice under the Code of Criminal Procedure, 1898

If a criminal court sentences a person under fifteen years to imprisonment for any offence, Section 399(1) of the Code of Criminal Procedure 1898[69] provides an alternative option. Instead of being imprisoned in a criminal jail, the court can direct that the person be confined in a reformatory as a suitable place for confinement, where appropriate discipline and training in a helpful industry are provided. Alternatively, the person can be confined in an institution run by an individual willing to comply with government regulations regarding the

[63] Government of the People's Republic of Bangladesh, *supra* note 13.
[64] Children Act 2013, § 59.
[65] Government of the People's Republic of Bangladesh, *supra* note 13.
[66] Children Act 2013, § 89(d).
[67] Government of the People's Republic of Bangladesh, *supra* note 13.
[68] Children Act 2013, § 45.
[69] Government of the People's Republic of Bangladesh et al., *The code of criminal procedure, 1898*, 1973 39 (1973).

confinement, discipline, and training of the individuals placed in their care.[70]

F. Relevant Laws

The Prevention of Oppression Against Women and Children Act 2000 considers anyone who causes disabilities, disfigurement, or damage to a child's body parts, making them beggars or selling their body parts, a punishable offence. The punishment for such an act is death or rigorous imprisonment for life, along with a fine.[71]

The government has recently approved new laws to combat "beggar masters" who forcibly engage in amputating the body parts of children for money. The Children Act 2013 includes punishment for forcing anyone to beg, punishable by five years in jail and a fine of 500,000 takas (7,000 dollars). Anyone found guilty of severing the limb of a beggar and then sending them onto the streets will also face punishment under this law.[72] Street beggars in Dhaka City are a common sight. These people live on the streets and collect garbage for a living. Despite their significant contribution to the city's cleanliness, their living conditions and social status are often neglected.

The Begging (Control) Act, 1959: This Act regulates begging in Bangladesh and provides for the punishment of those who engage in or encourage begging. However, this act has been criticised for being discriminatory towards beggars and violating their rights.[73]

The Protection and Welfare of the Destitute Persons Act, 2001: This Act provides for the protection and welfare of destitute persons, including street beggars. It includes provisions for establishing shelters and rehabilitation centres for destitute people.[74]

The Prevention and Suppression of Human Trafficking Act, 2012**:** This act criminalises all forms of human trafficking, including the trafficking of beggars, and provides protection to victims of trafficking.[75]

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[70] Code of Criminal Procedure, 1898, § 399(1).
[71] Prevention of Oppression Against Women and Children Act 2000, § 12.
[72] Vagabond and Street Beggars Rehabilitation Act, 2010.
[73] Begging (Control) Act, 1959.
[74] Protection and Welfare of the Destitute Persons Act, 2001.
[75] Prevention and Suppression of Human Trafficking Act, 2012.

The National Plan of Action for Children (NPAC) 2016-2021 is a strategic document that outlines the government's commitments to protecting the rights of all children, including street children. The NPAC aims to ensure that children have access to essential services, are protected from violence and abuse, and have their voices heard.[76]

V. Relevant Discussion & Findings

Street children are a global phenomenon, present in every country in the world.[77] In Bangladesh, the number of street children is exceptionally high, with an estimated 1.5 million nationwide, and the figure is expected to increase significantly, addressed by the Bangladesh Institute of Development Studies (BDS).[78] Two main categories of street children have been identified in Bangladesh: those who live and sleep in public spaces and those who work on the streets during the day but return home to their families at night to rest.[79] The second category includes child beggars who work on the streets to support themselves and their families.[80]

Dhaka is the capital city of Bangladesh, situated in the central region and north of the Buriganga River. It has a population of more than 23 million as of 2023, making it one of the most densely populated cities globally (World Population Review, 2021).[81] Due to the high poverty rate in Bangladesh, millions of street children in Dhaka struggle to survive on the streets without necessities such as food, shelter, and education. The UNICEF Bangladesh report 2021 mentioned that these children often work in dangerous conditions and are exposed to violence and abuse while having limited access to healthcare services.[82] Although the government of Bangladesh and non-governmental organisations are trying to

[76] National Plan of Action for Children, 2016–2021

[77] Supra note 3.

[78] Bangladesh Institute of Development Studies (BIDS), Street Children in Bangladesh: A Situation Analysis (Dhaka: BIDS, 2017), 3.

[79] Nahid Begum, "Street Children in Bangladesh: Issues and Interventions," Journal of Children and Poverty 19, no. 2 (2013): 83-84.

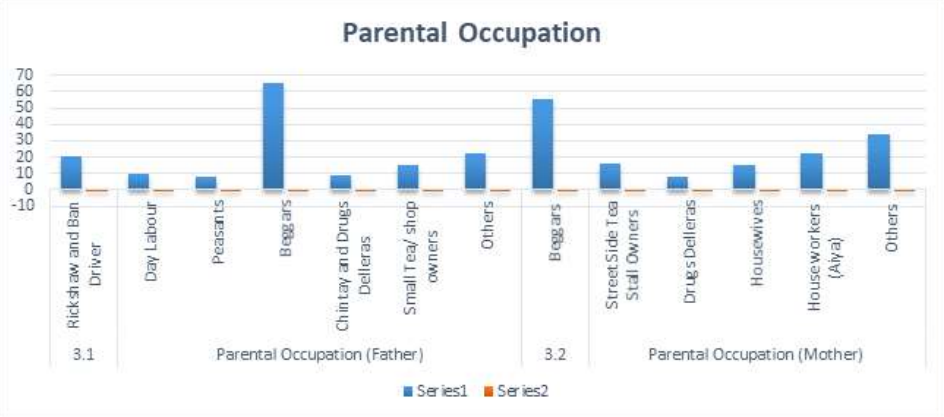
[80] *Ibid*.

[81] World Population Review Report 2023. https://worldpopulationreview.com/world-cities/dhaka-population. Accessed on January 2023.

[82] Marjan, N., Rahman, A., Rois, R. and Rahman, A., 2021. Factors associated with coverage of vitamin a supplementation among Bangladeshi children: mixed modelling approach. BMC Public Health, 21(1), pp.1-11.

address the issue of street children in Dhaka through various programmes and interventions, the problem persists due to various socio-economic factors.[83]

Based on the data presented in Table 1, annexed as Annexure No. 1, the following findings can be made regarding the socio-demographic characteristics of street-begging children in the Dhaka City Area, Bangladesh. Gender: Out of the total population of 150 street-begging children, 72% are male, and 28% are female. This indicates that male children are more likely to be involved in street begging than female children. Age Criteria: The majority of street-begging children fall within the age ranges of 10–12 (29.34%) and 13–15 (23.33%), followed by 7-9 (20.66%), 16–18 (11.34%), and 4-6 (15.33%). This indicates that older children are more likely to be involved in street begging than younger children.

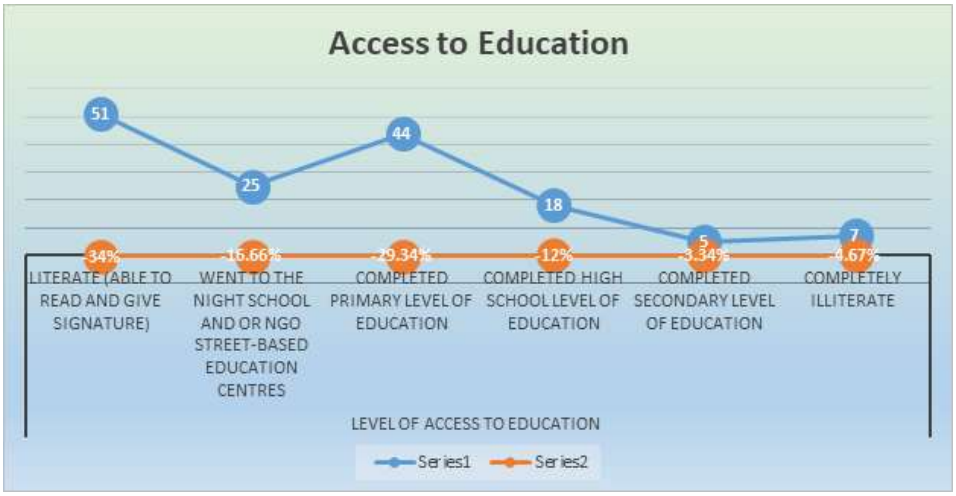


Parental Occupation

Considering the parental livelihood of street-begging children, the highest number of occupations reported was begging (43.33%), followed by small tea/shop owners (10%) and rickshaw/ban drivers (14%). Among the mothers of street-begging children, the highest number of occupations reported was also begging (36.67%), followed by housewives (10%) and street-side tea stall owners (10.67%). These findings suggest that street-begging children come from families

[83] Bangladesh Bureau of Statistics Survey on Street Children in Bangladesh2022. Summary published in April 2023. The Financial Express, https://thefinancialexpress.com.bd/national/378pc-street-children-leave-home-for-poverty-hunger-bbs-survey-shows. Last visited on April 28, 2023.

with low-income backgrounds, and begging is a common occupation for their parents.

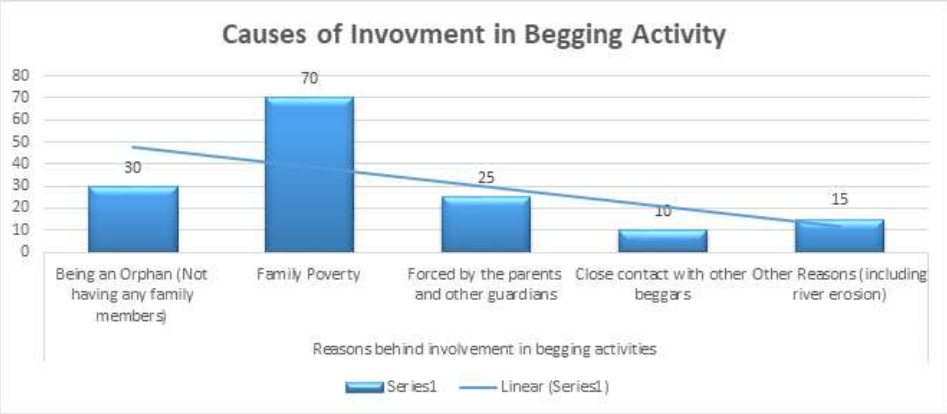


Level of Access to Education: 34% of street-begging children are literate and able to read and give signatures, while 16.66% went to night schools or NGO street-based education centres. 29.34% completed primary level education, 12% completed high school level education, and 3.34% completed secondary level education. Only 4.67% of street-begging children are entirely illiterate. These findings suggest that while a significant proportion of street-begging children have access to education, a considerable proportion also lack adequate education.

Overall, the findings suggest that street-begging children in Dhaka City Area come from families with low-income backgrounds and lack access to an adequate education. Addressing the socio-economic issues faced by the families of these children is crucial to addressing the issue of street begging. The Children Act 2013 can be critical in ensuring restorative justice for street-begging children by providing them access to education, healthcare, and protection from exploitation and abuse.

Table: 02: annexed as annexure No. 02 addressed Socio-Demographic Characteristics of Street-Begging Children and Their Family analysis to understand the patterns and trends to draw meaningful conclusions.

Reasons behind involvement in begging activities

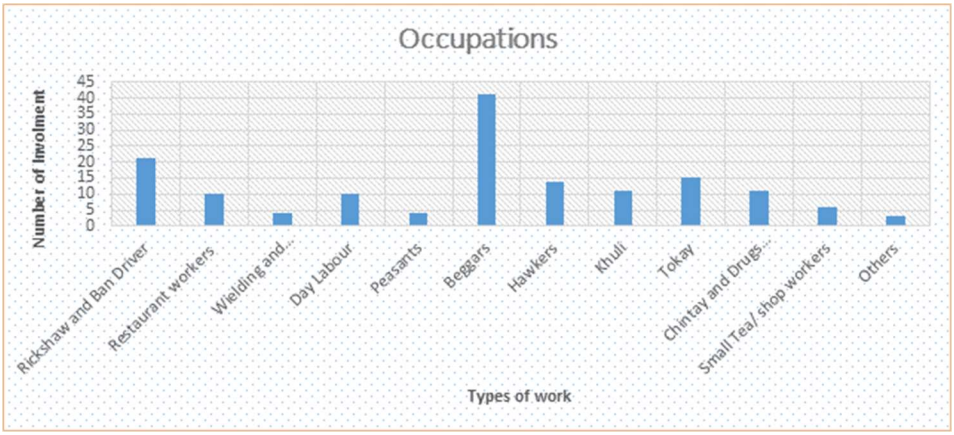


The data suggest that family poverty is the most common reason behind the involvement of children in street begging activities, with 70 respondents (46.67%) stating it as the reason. This is followed by being an orphan with 30 respondents (20%) and being forced by parents and guardians with 25 respondents (16.66%). Close contact with other beggars was cited as the reason by only 10 respondents (6.66%). 15 respondents (10%) gave other explanations, which included river erosion.

Monthly income of street beggars' children

The data suggests that the monthly income of street beggars' children varies widely. The highest number of respondents, 44 (29.34%), reported earnings between 2001-4000, followed by 43 (28.66%) reporting earnings between 4001-6000, and 27 (18%) reporting earnings between 6001-8000. The lowest number of respondents, 13 (8.67%), reported earning between 8001-10000, and 23 (15.33%) reported earning less than 2000.

Connecting Occupations

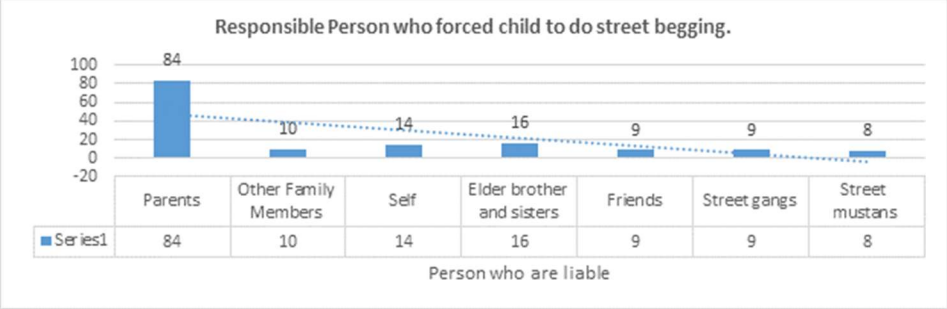


The data suggest that street begging is not the only occupation of children. The highest number of respondents, 41 (27.34%), reported being beggars. This was followed by Khuli with 11 respondents (7.33%) and Tokaay with 15 respondents (10%). Rickshaws and ban drivers were the connecting occupations for 21 respondents (14%), and restaurant workers were the connecting occupations for 10 respondents (6.66%). Other connecting occupations, such as day labourers, peasants, hawkers, chintay and drug dealers, and small tea shop workers, were cited by a smaller number of respondents.

Custodians and Family Contacts

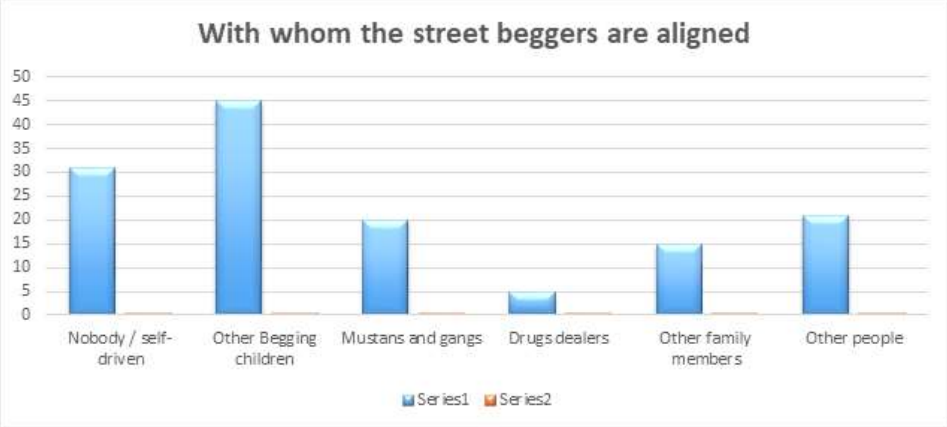
The data suggest that fathers are the most common custodians and family contacts of children involved in street begging, with 58 respondents (38.66%) reporting it. Mothers were the custodians and family contacts for 35 respondents (23.34%). 24 respondents (16%) stated that there was no family connection. A smaller number of respondents mentioned other custodians and family members, such as maternal relatives, grandfathers, other members of the parental side, and others.

Who forced them to do street begging?



The data suggests that parents are the most common people who force children to beg, with 84 respondents (56%) reporting it. Elder brothers and sisters were the next most common, with 16 respondents (10.67%), followed by themselves, with 14 respondents (9.33%). Street gangs, street mustangs, and friends were also reported as the people who force children to beg.

With whom they are closely intimated on the streets



The data suggests that other begging children are the most common people with whom street begging children are closely intimated, with 45 respondents (30%) reporting it. Nobody or self-driven was the second-most common, with 31 respondents (20.67%), followed by mastans and gangs, with 20 respondents (13.33%). Other family members and other people were also reported as the people with whom street-begging children are closely intimated.

The data suggest that family poverty is the most common reason behind the

involvement of children in street begging activities, and fathers are the most common custodians and family contacts of street begging children. Parents are the most common people who force children to beg, and other begging children are

Table 3, annexed as annexure No. 03, shows the victimisation dimensions of the respondents.

According to the study, being an orphan (20%), having parents or other guardians force you to beg (16.66%), being in close contact with other beggars (6.66%), and other reasons (10%) were the main causes of involvement in begging activities. These findings highlight the importance of addressing poverty as a critical factor in reducing the prevalence of begging activities.

Monthly income of street beggars' children

The study found that most street beggars' children earn between 2001-4000 (29.34%) and 4001-6000 (28.66%) monthly. This suggests that although these children are involved in begging activities, they are able to generate some income for themselves and their families. However, a significant number of children (15.33%) earn less than 2000 per month, which may contribute to their vulnerability to poverty and begging activities.

Connecting Occupations

The study found that most street beggars were also involved in other occupations, such as rickshaw and ban drivers (14%), restaurant workers (6.66%), day labourers (6.66%), hawkers (9.33%), and small tea/shop workers (4%). However, 27.34% of beggars listed begging as their primary occupation, suggesting that some individuals may have limited options for generating income and resort to begging as a last resort.

Custodians and Family Contacts

The study found that fathers were the most common custodians and family contacts for street beggars' children (38.66%), followed by mothers only (23.34%), no family linkage (16%), and others (21.34%). These findings suggest that family support may play a role in protecting children from street begging activities.

Who forces street begging

The study found that parents were the foremost perpetrators of forcing children into street begging (56%), followed by elder brothers and sisters (10.67%), self (9.33%), and friends, street gangs, and street mustangs (all under 10%). These findings highlight the need for targeted interventions to prevent parents and caregivers from forcing children into begging activities.

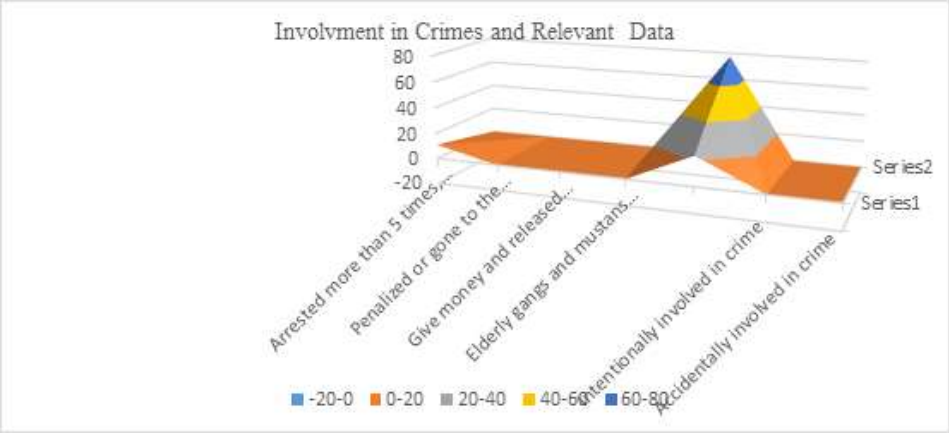
With whom they are closely intimated on the street

The study found that most street beggars were closely intimated with other begging children (30%) and mastans and gangs (13.33%). These findings suggest that street begging activities are often carried out within a social network and that interventions to reduce the prevalence of street begging should target these networks.

The study's findings regarding drug types and addictions showed that cigarettes were the most widely used drug by street beggars (63.33%), then gumas and other chemicals (53.33%), pethidine and other injecting drugs (16.66%), and ganga (16.66%). Additionally, 60% of street beggars reported taking two or more of the abovementioned items. These findings suggest that drug use is prevalent among street beggars and may contribute to their vulnerability to poverty and other adverse outcomes.

Modes of taking food and places of eating

The study found that the most common method of taking food among street beggars was to cook and eat on the street according to their arrangements (25.33%), followed by eating begging foods from homes (29.33%) and eating from street shops (18.66%). The most common sleeping place was on the streets.



ASK and BLAST have jointly filed a Public Interest Litigation (PIL)[84] regarding the Government's "Beggar Rehabilitation and Alternative Employment Programme," which involved 10 NGOs in registering beggars and classifying them into seasonal/irregular, occupational, women, and children within the age group of 1-12 years, 12-50 years, and above 50 years of age. However, this classification appears to be incoherent due to overlapping categories. The survey is only conducted in one day, making it challenging to include seasonal beggars who may appear occasionally. According to a study conducted by these organisations, the issue of street begging among children is a complex social problem that stems from the unique challenges beggars face, leading to further social problems such as child abuse and child labour. Children often turn to street begging due to poverty and their parents' inability to provide for them. Additionally, they may resort to begging because of their parents' demise, manhandling by relatives, and isolation.

The research uncovered that child beggars participate in negative activities like shopping, smoking, alcoholism, stealing, and premarital sex. They also engage in money-making activities, including prostitution, scrap-metal collection and sales, luggage carrying, trash disposal, and dishwashing. However, these young individuals are often bullied and exploited by "big brothers" who compel them to surrender their earnings and perform errands. The study also showed that some of these children have significant ambitions and would like to return to school if

[84] ASK & BLAST, Public Interest Litigation. (filed in the High Court Division of the Supreme Court of Bangladesh) (on file with author).

given a chance. The poverty and displacement of land are substantial reasons for becoming trapped in the cycle of poverty and begging, with around two-thirds of child beggars' families having no land or home and three-fourths living in slums or low-income settlements. Only 4 percent of the child beggars live in an NGO or government-run shelter, while the rest are forced to sleep on pavements, railway stations, or bus stations.

A top gang member arrested in Bangladesh has made it clear how thieves kidnap and maltreat kids before forcing them to work as beggars. These practises are real, as has been widely documented throughout South Asia, and they are mentioned in the Indian-set, Oscar-winning movie Slumdog Millionaire. Human rights activists and a local television firm discovered the Bangladeshi instance in the latter part of last year. Authorities detained a suspected gang member on December 28 in Dhaka's Kamrangirchar neighbourhood. The detainee, described to interrogators how he and his collaborators kidnapped infants and imprisoned them for months in cramped quarters or even in barrels without food.

As per authorities, the children were deserted on the city's streets, either with a woman posing as their mother or alone. They suffered permanent damage due to their imprisonment and near starvation. Based on what reportedly disclosed, the group had injured at least five children between seven and eight years old, earning between 500 - 1,000 takas (USD£4.50 to £9) every day after their injuries. Lieutenant Colonel Ziaul Ahsan, the director of intelligence for Bangladesh's Rapid Action Battalions, a feared paramilitary force deployed to combat suspected terrorists and significant criminals, stated that "the criminals who run this operation are part of a massive racket." "The detainee also confessed to murdering male partners in relationships and abducting women for prostitution when targeting couples in Beribadh. We possess video recordings of his confessions." The battalions are notorious for the brutal treatment of detainees and have recently been held accountable for hundreds of extrajudicial killings.[85]

Based on a leaked US State Department memo disclosed by WikiLeaks and the Guardian, members of a unit were allegedly involved in severe human rights violations without consequences. The cable further revealed that the British government continued to train these battalions despite their questionable history. The Guardian spoke to beggars on the streets of Dhaka who claimed that gang

[85] Hammadi & Burke, Bangladesh's begging children face prison and brutality.

bosses stole their earnings. Mohammad Nasim, a 35-year-old beggar in Bijoy Nagar, disclosed that beggar syndicates work for sardars, or leaders, and each gang has about 500 members. Nasim also shared that children were abducted and mistreated, causing them to weaken and become crippled. Begging was outlawed in Bangladesh in 2009, and the law stipulates that anyone caught begging in public may spend up to three months in jail. A judge recently ordered the police to enforce this prohibition.

However, welfare organisations have criticised this law as harsh and impractical, as it ignores the underlying socio economic issues that drive begging and does not provide for the welfare of the beggars. Alena Khan, the president of the Bangladesh Human Rights Foundation, emphasised that there is currently no suitable place for beggars to stay and that the government needs to renovate the existing homeless shelters. According to a previous study, there may be up to 700,000 beggars in the country, with a population of about 135 million. Although the proportion of Bangladeshis living in poverty has decreased from 49 percent to under 40 percent over the past decade, Bangladesh is still among the countries at the bottom of the economic ladder, despite recent economic progress.[86]

VI. Conclusion and Recommendations

Street begging in Dhaka is a complex social problem caused by poverty, and it is alarming when we find that a minor child is begging for a single penny. Their life is harshly vulnerable to problems beggars face, leading to further issues such as child abuse and child labour, mass drug addiction and crime. The children engage in hazardous and unlawful activities to survive, including prostitution, picking and selling metal scraps, and begging. Though a small portion has goals to go to school and study, in most cases, those goals fade after just a few days on the street. The Child Rights Act 2013[87] empowered the executive and judiciary with a number of duties to work at the mass level and align with that, and the government has to play a tremendous role; however, in the end, unfortunately, it is found that the laws are not implemented appropriately, and the state fails to benefit the child and build up their future. Key provisions of the act for children in conflict with the law are not dealt with appropriately in the state's pro-preventive stage. Poverty

[86] M. Mazharul Islam Hammadi & Sarah Burke, A Review of Poverty Reduction Strategies for Bangladesh, 11 J. of Poverty Alleviation & Intl. Dev. 1, 5 (2011).

[87] Government of the People's Republic of Bangladesh, *supra* note 13.

and land dispossession are significant reasons behind the issue, with most child beggars living with their parents, relatives, or even unknown people in slums or adjacent areas of street settlements. Child begging remains a severe issue internationally and nationally, and to cope with the UN SDGs and other vivid targets. The study highlights that street begging in Dhaka is a complex social problem caused by poverty and the unique problems beggars face, leading to further issues such as child abuse and child labour, mass drug addiction, and juvenile crime. The Children Act 2013[88] empowered the executive and judiciary with many duties to work at the mass level. Still, unfortunately, the laws are not implemented appropriately, and the state fails to benefit the child and build up their future.

Based on the findings of this paper, the authors propose the following measures to address the problem and improve the situation:

a) The government should take community engaged measures to integrate street begging children with the mainstream of the society.

b) The executive branch must demonstrate its commitment by approving relevant actions and incorporating them into our laws. After passing these laws, it is the judiciary's responsibility to ensure that they are enforced as intended by the lawmakers.

c) Children should not be separated from their families and left vulnerable to abuse and malnutrition. Therefore, parents must take responsibility for raising their children.

d) Welfare organisations should partner with the government at all levels to launch social campaigns and raise awareness of the degrading effects of begging.

e) To combat child abuse, neglect, labour, and destitution, the government must update, uphold, and implement both the Child Right Act and the National Child Labour Policy.

f) Negative societal elements might take advantage of these defenceless children, which would encourage them to engage in criminal or terrorist activity and end up being a burden on society. Authorities should take action

[88] *Id.*

to remove them from the streets.

g) The traditional curriculum should be incorporated into the education system, and the educational programme should include workshops and resources for acquiring new skills.

h) International organisations should contribute financially or offer service-oriented aid to support the welfare and education of these children.

It is expected that the current situation of street children will be improved to elevate the nation as a whole. With adequate infrastructure being developed to prevent wrongdoing against the most vulnerable section of society, it is very possible to have a stronger society with more responsible citizens.

List of Annexures

Annexure 01

	Table: 01: Addressing Socio-Demographic Characteristics of Street-Begging Children			
SL	Criteria Total Population (N: 150)		Frequency Distribution	Average/ Percentage
1	Gender	Male	109	(72%)
		Female	42	(28%)
2	Age Criteria	4-6	23	(15.33%)
		7-9	31	(20.66%)
		10-12	44	(29.34%)
		13-15	35	(23.33%)
		16-18	17	(11.34%)
3	3.1 Parental Occupation (Father)	Rickshaw and Ban Driver	21	(14%)
		Day Labour	10	(6.66%)
		Peasants	08	(5.33%)
		Beggars	65	(43.33%)
		Chintay and Drugs Delleras	09	(6%)
		Small Tea/ shop owners	15	(10%)
		Others	22	(14.66%)
	3.2 Parental	Beggars	55	(36.67%)
		Street Side Tea Stall Owners	16	(10.67%)

	Occupation (Mother)	Drugs Delleras	08	(5.33%)
		Housewives	15	(10%)
		House workers (Aiya)	22	(14.66%)
		Others	34	(22.67%)
4.	Level of Access to Education	Literate (Able to read and give signature)	51	(34%)
		Went to the night school and or NGO street-based education centres	25	(16.66%)
		Completed primary level of education	44	(29.34%)
		Completed High School Level of Education	18	(12%)
		Completed Secondary level of education	05	(3.34%)
		Completely illiterate	07	(4.67%)

Annexure 02

Table: 02: Addressing Socio-Demographic Characteristics of Street-Begging Children and Their Family				
SL	Criteria Total Population (N: 150)		Frequency Distribution	Average/ Percentage
1	Reasons behind involvement in begging activities	Being an Orphan (Not having any family members)	30	(20%)
		Family Poverty	70	(46.67%)
		Forced by the parents and other guardians	25	(16.66%)
		Close contact with other beggars	10	(06.66%)
		Other Reasons (including river erosion)	15	(10.00%)
2	Monthly income of street beggar's child	Less than 2000	23	(15.33%)
		2001-4000	44	(29.34%)
		4001-6000	43	(28.66%)
		6001-8000	27	(18%)

		8001-10000	13	(08.67%)
3	Connecting Occupations	Rickshaw and Ban Driver	21	(14%)
		Restaurant workers	10	(6.66%)
		Wielding and automobile workers	04	(2.66%)
		Day Labour	10	(6.66%)
		Peasants	04	(02.66%)
		Beggars	41	(27.34%)
		Hawkers	14	(09.33%)
		Khuli	11	(07.33%)
		Tokay	15	(10%)
		Chintay and Drugs Delleras	11	(07.33%)
		Small Tea/ shop workers	06	(04%)
		Others	03	(02%)
4	Custodians and Family contacts	Father	58	(38.66%)
		Elder brother	04	(02.66%)
		Mother Only	35	(23.34%)
		Grandfather and other parental side people	10	(06.67%)
		Maternal relatives	08	(05.33%)
		Others	11	(07.33%)
		No family linkage	24	(16%)
4.	Who forced to do street begging	Parents	84	(56%)
		Other Family Members	10	(06.66%)
		Self	14	(09.33%)
		Elder brother and sisters	16	(10.67%)
		Friends	09	(6%)
		Street gangs	09	(6%)
		Street mustans	08	(5.33%)
6.	With whom they are closely intimated on street	Nobody / self-driven	31	(20.67%)
		Other Begging children	45	(30%)
		Matans and gangs	20	(13.33%)
		Drugs dealers	05	(03.33%)
		Other family members	15	(10%)
		Other people	21	(14%)

Annexure 03

	Table: 03: Addressing Socio-Demographic Characteristics of Street-Begging Children and Their Family			
SL	Criteria Total Population (N: 150)		Frequency Distribution	Average/ Percentage
1	Types of Drugs they are used to take	Cigarettes	95	(63.33%)
		Ganga	25	(16.66%)
		Gumas and other chemicals	80	(53.33%)
		Pethodine and other injecting drugs	25	(16.66%)
		Two or more of the items mentioned above	90	(60%)
2	Modes of taking foods and places of eating	Eat from dustbins, and shops waste food corners	17	(11.33%)
		Eat from street shops	28	(18.66%)
		Eat begging foods from homes	44	(29.33%)
		Beggs foods from restaurants	23	(15.33%)
		Cooks and eat on the street by own arrangements	38	(25.33%)
3	Sleeping places	Rickshaw and Ban Garage	10	(06.66%)
		Railway station	26	(17.33%)
		On Streets and overbridges	40	(26.66%)
		Local mastans place	06	(04.00%)
		Night guards	02	(01.33%)
		Public places other than streets	11	(07.33%)
		Slums and small tents	30	(20%)
		Back to village homes	06	(24%)
		Others	19	(12.66%)
4.	Crime Contact: Did arrested by the police or faced harassment or not	Experienced with police harassment	Yes 54	No 96
		2-5 times arrested and managed bail/ release	14	(09.33%)
		Arrested more than 5 times, and criminal cases are still pending	11	(07.33%)

		Penalized or gone to the correction centres	Yes 08 (5.33%)	No 142 (94.67%)
		Give money and released from the police station	Yes 21 14	No 129 86
		Elderly gangs and mustans released or involved	Yes 34 22.66	No 116 77.34
		Intentionally involved in crime	Yes 29 19.33	No 121 80.67
		Accidentally involved in crime	Yes 40 26.66	No 110 73.33

Vol. 14 No. 2 ISSN: 0976-3570

Chances of Reform as a Mitigating Factor in Death Penalty Cases in India: Issues and Challenges

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Abstract

The chances of reform or rehabilitation of the accused is one of the important mitigating circumstances in criminal sentencing. In Bachan Singh v State of Punjab (AIR 1980 SC), the Supreme Court upheld the constitutionality of death penalty in India. However, the Court restricted it to Rarest of Rare cases. The Court said that a balance sheet of aggravating and mitigating circumstances is to be prepared and due regard must be given to the chances of reform/rehabilitation as a mitigating circumstance. This paper revolves around the central theme of chances of reform as a mitigating circumstance in death penalty cases and the procedures followed by the Courts to determine the same. Since the Bachan Singh judgment, it has been noticed in several cases on death penalty that the Supreme Court has either accepted or rejected the chances of reform without conducting any due inquiry on the reformative potential of the convict. This raises a serious question on the fairness of procedure under Articles 14 and 21 of the Constitution as these two Articles also applies at the stage of sentencing. However, in some of the recent judgments of the Supreme Court and of the Delhi High Court, as a course correction exercise, some guidelines and procedures have been laid down to determine the chances of reform as a mitigating circumstance. The Courts have admitted that the task of determination of reform has not attracted serious attention of the sentencing courts in the past. Under the procedures evolved, the responsibility has been entrusted upon the Probation Officer under Probation of Offenders Act, 1958 to determine the same. This is a welcome step in the judicial administration of death penalty in India.

Keywords: Death Penalty, Balance Sheet of Aggravating and Mitigating Circumstances, Bachan Singh, Chances of Reform, Rehabilitation of the Death Convict.

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I. Introduction

The possibility of reform or rehabilitation of the convict is considered to be an important mitigating circumstance recognize universally in criminal sentencing.[2] If there are possibilities of reform of the convict, then criminal court may not impose very harsh punishment including the punishment of death.[3] This mitigating circumstance derives its sanctity from the reformative theory of sentencing which is based on the doctrine of repentance which implies that the convict has repented his past bad conduct and is pleading for meaningful integration into the society as a law abiding citizen.[4] As far as the application of reformative approach in death penalty cases in India is concerned, the Supreme Court in the landmark judgment of *Bachan Singh* case[5], while upholding the constitutionality of death sentence as a form of punishment, propounded the Rarest of Rare Test under which death could be awarded in those extreme cases wherein the *alternative option (of life imprisonment) is unquestionably foreclosed*. While talking about mitigating circumstances, the Apex Court in *Bachan Singh* held that these circumstances should be given due consideration and one of the mitigating circumstances which should receive proper consideration is chances of reform of the convict. If there is possibility of reform, death penalty should not be imposed. The Court approved in principle the list of mitigating circumstances prepared by Dr Chitaley (amicus curiae in the case). However, the Court cautiously did not lay down any exhaustive list of mitigating

[2]John Tasioulas, *Punishment and Repentance*, 81 Philosophy. 279, 316–322 (2006). Also see Sheldon B Peizer, *Correctional Rehabilitation as a Function of Interpersonal Relations*, 46 Crim. L.
Criminology & Police Sci. 632, 636–640 (1956). Also see, Farrokh Anklesaria, and Scott T. Lary, *A New Approach To Offender Rehabilitation: Maharishi's Integrated System of Rehabilitation*. 43 J Correct Educ. 6, 10–13 (1992).

[3] Tonry, Michael, *Purposes and Functions of Sentencing*, 34 J. Crim. Justice. 1, 38-43 (2006). Also see, Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?* 77 J Crim Law Criminol. 1023, 1060–68 (1986).

[4] Steinberger, Peter J, *Hegel on Crime and Punishment*, 77 AM. POLITICAL SCI. REV. 858, 864–70 (1983). Also see Rabinowitz, Herbert S, and Spiro B. Mitsos, *Rehabilitation as Planned Social Change: A Conceptual Framework*, 5 J Health Hum Behav. 2, 11–14 (1964).

[5]Bachan Singh v. State of Punjab AIR 1980 SC 898.

circumstances as it would fetter judicial discretion.[6] Subsequently, in *Machhi Singh* case[7], the Apex Court once again stressed upon chances of reform as an important mitigating circumstance which could tilt the scale in commuting death sentence of the convict into life imprisonment. The Court said that while drawing the Balance Sheet, due consideration needs to be accorded to chances of reform as a mitigating factor. The Court also held that the burden lies on the prosecution to prove that the convict has no chances of reform. Post *Bachan Singh* and *Machhi Singh* judgments, there are several cases wherein the Apex Court had stressed upon reformative approach to sentencing in death cases. For instance, in the case of *Sandesh*[8], while commuting the death penalty of the convict into life imprisonment, the Apex Court observed that the doctrine of rehabilitation and doctrine of prudence are the two guiding principles in criminal sentencing for proper exercise of judicial discretion. In yet another case of *Gurdev Singh*[9], the Apex Court observed, "*It is indeed true that the underlying principle of our sentencing jurisprudence is reformation….*"

In a number of death cases reaching to the Apex Court, some of the mitigating circumstances recognized by the Court are the followings:

- Chances of Reform of the convict (which is a matter of enquiry under the present paper).[10]
- No Prior Criminal Record of the convict.[11]

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[6] Dr Chitaley suggested the following mitigating circumstances: (1) That the offence was committed under the influence of extreme mental or emotional disturbance; (2) the age of the accused. It the accused is young or old, he shall not be sentenced to death; (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society; (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above; (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence; (6) That the accused acted under the duress or domination of another person; (7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

[7] Machhi Singh v. State of Punjab AIR 1983 SC 957.

[8] Sandesh v. State of Maharashtra (2013) 2 SCC 479).

[9] Gurdev Singh v. State of Punjab ((2003) 7 SCC 258).

[10] Santosh Kumar Singh v. the CBI (2010) 9SCC 747.

[11] Mohammad Chaman v State (NCT Delhi) (2001)2 SCC 28, Raju v. State of Haryana AIR 2001 SC 2043, Nirmal Singh and Another v. State of Haryana AIR 1999 SC 1221.

- Young age of the convict.[12]

In addition, some of the other mitigating circumstances impliedly recognized by the Apex Court are as listed by Dr Chitaley in *Bachan Singh* case (see footnote 5). However, as said, this paper only focuses upon and analyzes the judicial approach towards determining the chances of reform as a mitigating factor in death cases. The need for analyzing chances of reform as a mitigating factor necessitated from the fact that it has been noted in a number of death cases that this mitigating circumstance has been applied in rather inconsistent manner without actually attempting any serious inquiry as regards the reformative/non-reformative potential of the death row convicts. At times, the answer to the question rest upon the subjective opinion of the Bench. Sometimes, the Bench applies the possibility of reform as a mitigating circumstance and commutes death into life while in other cases, on the more or less similar factual matrix, the Bench comes to the conclusion that there are no possibilities of reform and thus award/affirm death penalty. This is being done without attempting any serious inquiry on the reformative potential of the convict. This kind of approach raises the question of equality and fairness of procedure under Articles 14 and 21 of the Constitution since both these Articles apply at the stage of sentencing as held by the Supreme Court in its authoritative pronouncement in *Santosh Kumar Bariyar* case.[13] Of late, however, there has been some positive development in this direction. The Courts have started giving due attention to this aspect of mitigating circumstance. However, more concrete steps are required to be taken in order to seriously determine the chances/non chances of reform of the death row convict as it has an important bearing on the question as to whether death penalty will be affirmed or commuted into life.

In the light of the above introductory discussion, this paper centrally seeks to examine the judicial approach towards determining chances of reform as a mitigating factor in death cases.

[12] Amit v. State of Maharashtra (age 20 years) (2003) 8 SCC 93, Amit v. State of Uttar Pradesh (age 28 years) (2012) 4 SCC 107 , Santosh Kumar Singh v. the CBI (age 24 years) (2010) 9SCC 747 , Rameshbhai Chandubhai Rathod v. the State of Gujarat (28 years) AIR 2011 SC 803.

[13] Santosh Kumar Bariyar v. State of Maharashtra (2009) 6 SCC 498.

II. Reformation as a Theory of Punishment

Before going into the central topic, it would be prudent here to understand briefly the reformative model of sentencing. A rehabilitation/reformative model of sentencing aims at inner reformation of the offender in order to make him a law abiding citizen.[14] The pre-requisite for applicability of reformative model is that a criminal must regret his crime. He must be remorseful of his past conduct and hence he has taken an inner call not to go on the wrong side of the law in future. Reformation requires a changed mindset, a change of heart.[15] The aim of reformative theory is not to deter or retribute but to bring about change of heart of the offender so that he, out of his own will, choose not to commit the crime in the future.[16] He does this by becoming remorseful of his past wrongful conduct. The reformative theory derives its sanctity from a very strong argument, that is, the majority of the convicted persons are from the socially disadvantaged sections of the society and hence there is a moral duty on the part of the state to compensate by rehabilitating them rather than indiscriminately putting them behind the bar or hanging them as in the case of death penalty.[17] The implication that the reformative theory is on the criminal sentencing is that it signifies that the sentencing should be designed to meet the correctional needs of the offenders.[18] It should not be harsh. Rather, it should have a rehabilitative component. Another reason for the popularity of reformative model, now a days, is that it is compatible

[14] THOM BROOKS, PUNISHMENT 52-56 (Routledge Publication 2012).

[15], Michelle S Phelps, *Rehabilitation in the Punitive Era: The Gap between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 64–68 (2011). Also see, Merry A. Morash., and Etta A. Anderson, *Liberal Thinking on Rehabilitation: A Work-Able Solution to Crime*, 45 Soc Probl. 556, 559–563 (1978).

[16] Rex Martin, *Treatment and Rehabilitation as a Mode of Punishment*, 18 Philos. Top. 101, 118–122 (1990). Also See, Namita Wahi, *A Study of Rehabilitative Penology as an Alternative Theory of Punishment*, 14 STUD. BAR REV. 92, 102–104 (2002).

[17] Meyer, Joel, *Reflections on Some Theories of Punishment*, 49 J Crim Law Criminol. 595, 597–599 (1968). Also See Anna Louise Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984, 1014–1017 (1976).

[18] Peter Mascini and Dick Houtman, *Rehabilitation and Repression: Reassessing Their Ideological Embeddedness*, 46 Br. J. Criminol. 822, 833-836 (2006). Also see, Dennis L. Peck, *Rehabilitation and Behaviorism Future Prospects*, 62 Int. SOC. SCI. REV. 28, 34-39 (1987).

with the modern human rights standard.[19] This holds true for the Indian Courts as well. In the past few decades, one of the major thrusts of the Supreme Court of India has been on expanding the human rights of the accused at different stages of criminal justice administration by taking recourse to Article 21.[20] This hold equally true for death penalty cases which is evidenced by the fact that the death penalty has been confined to only Rarest *of Rare* cases since the authoritative pronouncement in *Bachan Singh* case coupled with the legal obligation to provide special reasons under Section 354(3) CrPC for awarding death.[21] In context of death penalty, the human rights aspect assumes all the more significance due to the fact that the punishment of death penalty is irreversible.[22] It is primarily due to the irreversible nature of death penalty coupled with the major thrust on the human rights to dignity, the courts in India apply reformative approach, wherever possible, in death penalty cases.[23] The Court applies reformative theory by

[19] Edy Kaufman, *Prisoners of Conscience: The Shaping of a New Human Rights Concept*, 13 Hum. Rights Q. 339, 364-367(1991). Also see, James B Jacobs, *The Prisoners' Rights Movement, and Its Impacts, 1960-80*, 2 J Crime Justice. 429, 464-470 (1980). Also see K. I Vibhute, *Right to Human Dignity of Convict under 'Shadow of Death' And Freedom 'Behind the Bars' In India: A Reflective Perception*, 58 *J.I.L.I.* 15, 50–54 (2016). Also see Connie de la Vega, *Using International Human Rights Standards to Effect Criminal Justice Reform in the United States*, 41 J Hum Rights. 13, 13-16 (2015). Also see Alison Shames, and Ram Subramanian, *Doing the Right Thing: The Evolving Role of Human Dignity in American Sentencing and Corrections*, 27 Fed. Sent'g Rep. 9, 17-18 (2014).

[20] Dr. G Kalyani, '*Guidelines of Supreme Court and NHRC on Human Rights'*, http://www.wbja.nic.in/wbja_adm/files/Guidelines%20of%20Supreme%20Court%20and%20Human%20Rights%20Commission%20on%20Human%20Rights%20by%20Dr.%20G.Kalyani.pdf (last visited July 6, 2023).

[21] Law Commission of India Report No. 262 The Death Penalty (August 2015). https://lawcommissionofindia.nic.in/report_twentieth/ (last visited July. 6, 2023). Also see *Death Penalty in India: Reflections on the Law Commission Report*, 50 Econ Polit Wkly. 12, 12-15 (2015).

[22] Michael Davis, *Is the Death Penalty Irrevocable 10 Soc* Theory Pract. 143, 153-156 (1984). Also see Kevin Mullen, Violence, *and the Death Penalty*, 31 The Furrow. 505, 514-516 (1980).

[23] S Muralidhar, *Hang Them Now, Hang Them Not: India Travails With The Death Penalty*, 40 J.I.L.I. 143, 170-173 (1998). Also see Mary K Newcomer, A*rbitrariness, and the Death Penalty in an International Context*, 45 DUKE LAW J. 611, 640-649 (1995).

commuting the death sentence into life imprisonment.[24] However, if the Court feel that there are no chances of reform or if the aggravating circumstances outweigh mitigating circumstances in totality , it will confirm the death penalty if the case falls under *Rarest of Rare* test and satisfies the *special reasons* doctrine under Section 354(3) CrPC. However, the question of reformative approach in death penalty cases is irrelevant for European Union and those other national jurisdictions where death penalty has been abolished either *de jure* or *de facto*.

III. Reformation and Death Penalty

Rehabilitation or Reformation, as a theory of punishment, by its very nature, is opposed to the idea of imposition of capital punishment. It is based on the assumption that every convict has a chance of reform. As a natural corollary, reform of the offender and the imposition of capital punishment are mutually contradictory. This is obvious as we cannot reform criminals through imposition of death penalty. Hence, it is generally perceived that rehabilitative theory is incompatible with the idea of award of capital punishment. However, it is perceived by some criminologists that the imposition of the punishment of death could led to rehabilitation of the death convict during the period while he is on death row.[25] Hence, the imposition of death penalty cannot be termed as entirely antithetical or irrelevant to the idea of reformation. A person may be reformed before he meet his maker. He does not die as an unreformed or unapologetic convict. Sometime, the period between the imposition of death and actual execution of the punishment could be used for rehabilitation of the death convict where he become remorseful of his past conduct and bring change in his personality whereby he repent his past conduct.

Further, there may be a significant time gap in the award of death penalty by the lower court and the final decision by the Apex Court. Such time gaps could be utilized for rehabilitation of the offenders. This reformative behaviour or good conduct of the convict while in prison awaiting the final verdict became the reason

[24] See the judgments of the Supreme Court in Mofil Khan v. State of Jharkhand (2021 SCC Online SC 1136) and in Rajendra Pralhadrao Wasnik v. State of Maharashtra (2019) 12 SCC 460.

[25] Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS LAW REVIEW. 1231, 1231-1235 (2013).

for commutation of death into life by the Supreme Court in *Sandesh* case.[26] In this case, the Supreme Court commuted the death penalty of the murder convict into life imprisonment by taking into account his good behaviour while he was in jail post-conviction awaiting the final verdict by the Apex Court. The Court said that there was no evidence that his conduct inside the jail was not worthy of any concession. Hence, post-conviction conduct of the accused was taking into account while commuting death into life imprisonment in the instant case. Emphasizing on reformation, the Court said that doctrine of rehabilitation and doctrine of prudence are the two guiding principles for the proper exercise of judicial discretion. The Court pointed out that the prosecution had led no evidence to show that he was hardened criminal and that there was no possibility of his being reformed.

IV. Inconsistent Judicial Approach in Determining the Chances Of Reform in Death Cases

As mentioned, the constitutionality of death penalty in India was upheld by the Constitution Bench of the Supreme Court in *Bachan Singh* case. However, the Court said that the death could be awarded only in the rarest of rare cases and for that purpose a balance sheet of aggravating and mitigating circumstance is to be prepared. While doing so, the mitigating circumstances especially the chances of reform have to be given considerable weight. Then, as mentioned, comes the *Machhi Singh* judgment in the year 1983, wherein the Supreme Court categorized the list of aggravating and mitigating circumstances. In the list of mitigating circumstances, one of the important circumstances highlighted was the chances of reform of the convict. Subsequent judgments of the Supreme Court on death penalty have followed or claims to have followed these two celebrated judgments on death penalty.

A. Acceptance or Rejection of "*Possibility of Reform*" as a Mitigating Circumstance

In context of death penalty, the acceptance of pleading of chances of reform of the convict implies that death penalty has been commuted into life whereas the rejection of chances of reform implies that the death sentence has been confirmed.

[26] Sandesh v. State of Maharashtra (2013) 2 SCC 479.

For the purpose of current discussion and in order to maintain uniformity, the author will pick up those cases where the offender has committed the offences of rape and murder. Since there are multifarious cases of rape and murder decided by the Apex Court, it will be difficult to discuss all those cases due to space constraints. Hence, the author has picked up some of the cases wherein the factual matrix is more or less similar with rape and murder being primary offences committed. It is to be noted that the cases discussed in the paper are only illustrative and not exhaustive.

In some of the Apex Court judgments such as in *Santosh Kumar Singh*,[27] *Amit*,[28] and *Amit*[29], the appellant had committed the offence of rape and murder of the victim and was consequently awarded death penalty by the lower court. In appeal, the Supreme Court took into account the chances or possibility of reformation of the convict and commuted death into life imprisonment.

However, the issue in all these cases is that it is not clear as to on what basis, the Court reached to the conclusion that there are possibilities of reform of the convict. There are two pressing issues here. First, the court has not embarked on a detailed enquiry as to whether there is possibility of reform of the convict or not. The approach of the court rather appears to be mechanical or cosmetic in determining the key question of reform. Secondly, it is noted that the Court, in some of these cases, has proceeded on the basis of the assumption laid down in *Bachan Singh and Machhi Singh* cases that the State must prove by positive evidence that there are no chances of reform which imply that if the State does not bring the incriminating evidence against the convict to the effect that there are no possibilities of reform, it shall always be presumed that there are chances of reform. However, this approach appear to be wrong and cannot be justified as right methodology especially in the matter of life and death wherein the highest amount of judicial wisdom and corresponding the same level of cautionary approach is expected. The Court especially the Apex Court, in its judicial wisdom and as the highest court of justice, must do an independent enquiry in order to reach to a definitive conclusion. The Court cannot base its decision of life and death entirely on the basis of production/ non-production of the material by the

[27] Santosh Kumar Singh v. CBI (2010) 9 SCC 747.
[28] Amit v. State of Maharashtra (2003) 8 SCC 93.
[29] Amit v. State of Uttar Pradesh (2012) 4 SCC 107.

State. An independent and objective enquiry at the Court level as to the chances or no chances of reform will be the most appropriate step in the entire scheme of judicial administration of death penalty and also in the interest of fairness and justice. This is all the more so when it has been affirmatively held in *Santosh Kumar Bariyar*[30] judgment that Article 14 (equalitarian principle) as well as Article 21 (just, reasonable and fair procedure) applies at the stage of sentencing. By not conducting such a detailed enquiry, it could be safely said that convict right under Articles 14 and 21 will be hit if the Court reach to the conclusion that there are no chances of reform and consequently affirm the death.

In contrast to the cases referred above, there are list of cases, on the other side of the spectrum, wherein the Apex Court has come to the conclusion that there are no chances of reform and hence affirms the death penalty awarded to the convict. For instance, in cases *of Dhananjoy Chatterjee*[31]*, Jai Kumar*[32]*, Mohammad Manna*[33] and in *B.A Umesh* [34] the Court awarded death penalty in rape and murder case on the ground that there was no possibility of reform of the convict. However, yet again no concrete reasoning has been provided nor detailed enquiry has been undertaken as to on what basis, the Court reached to the conclusion that the convict was incapable of reform. The Court judged the non-rehabilitative potential of the convict only on the basis of the brutal and diabolical manner in which the crime was committed. That again, cannot be the sound basis for determining the rehabilitative potential of the convict as reformative theory has a futuristic dimension i.e. future element involved as against the past conduct of committing the horrendous act. If the Court base its decision on the past conduct of the convict, then the Court, in all the probability, has applied either retributive, deterrent or proportionality theory but definitely not reformative model. In reformative model, the question regarding chances of reform occupies centre stage wherein the probable future conduct of the offender is envisaged.

The curious question which quite often arises in such cases is whether the decision as regard incapable of reform was based on the subjective opinion of the Bench. It will be very apt here to quote the observation made by the Apex Court in *Swamy*

[30] *Supra* note 12.
[31] Dhananjoy Chatterjee v. State of West Bengal (1994) 2 SCC 220.
[32] Jai Kumar v. State of M.P AIR 1999 SC 1860.
[33] Mohammad Manna v. State of Bihar (2011) 5 SCC 317.
[34] B.A. Umesh v. Registrar General, High Court of Karnataka AIR 2011 SC 1000.

Shraddananda case[35], in context of subjectivity in judicial administration of death penalty, wherein it said, *" the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench.*"[36] Way back in 2006, raising the red flag, the Apex Court in the case of *Aloke Nath Dutta*[37] admitted failure on the part of the Court *to evolve a uniform sentencing policy* in death cases. These observations reflect judicial subjectivity and inconsistency in death penalty which also necessarily include the key aspect of determining the chances of reform in death cases. In *Santosh Kumar Bariyar*[38] judgments also, the Apex Court, underwent detailed analysis of the present death penalty sentencing and reached to the same conclusion that there is no consistent policy on judicial administration of death penalty and even *Bachan Singh* mandate of Rarest of Rare test has not been followed with sincerity by subsequent benches.

The real issue in all these cases where the Court has either accepted or rejected chances of reform as mitigating circumstance is, as mentioned, as to how the court determined the issue of possibility or non-possibility of reform of the convict. Is there any standard procedure evolved by the court to conduct the aforesaid enquiry? This is a serious question because on the answer to it depends whether the convict will be sent to the gallows or whether his life will be spared. In all the above mentioned cases under both the categories, no sincere inquiry was done to find out the reformative/non-reformative potential. The convicts were neither referred to the psychiatrist nor subjected to any medical or psychological or social background test to find out the reformative/non-reformative tendency. Nor any Social Investigation Report (SIR) was prepared to know the antecedent and past of the convict. Since there are no legislative guidelines regarding determining the rehabilitative potential for death penalty convicts, the onus lies on the court to undertake the exercise. The same concern was echoed by the 48th Law Commission Report wherein the Commission pointed out that lack of comprehensive information about the characteristics and socio-economic

[35]Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka AIR 2008 SC 3040.
[36] Please refer to Para 33 of the Judgment.
[37] Aloke Nath Dutta v. State of West Bengal (2007) 12 SCC 230.
[38] *Supra* note 12.

background of the offender is a serious demerit in our criminal sentencing which need to be addressed at the earliest. [39]

The chances of reform has emerged as one of the most important mitigating circumstances in death penalty jurisprudence in India especially due to the emergence of human rights jurisprudence at both national and international level and hence due attention ought to have been given to this aspect. Recognizing the importance of this mitigating circumstance, the Supreme Court in *Anil* case[40] observed that the Court should take the task of determining the rehabilitative potential very seriously and the State is also obliged to furnish materials either in favour of or against the rehabilitative potential of the convict. However, as said above, the Court decision in this critical matter of life or death should not depend solely upon the enquiry done by the State. In appropriate cases, the Court should not be hesitant in conducting its own independent enquiry as and when the situation warrants. Echoing the same sentiment, in *Birju* case[41], the Supreme Court has said that while awarding sentence and while hearing the accused under Section 235(2) of the Code of Criminal Procedure, 1973 which provides for pre-sentence hearing, serious enquiry need to be undertaken and the Court can call for a report from the Probation Officer under Probation of Offenders Act, 1958. Section 235(2) of the CrPC provides that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 (of CrPC), hear the accused on the question of sentence, and then pass sentence on him according to law. The Court can then examine whether the convict is likely to indulge in future commission of crime or whether there is any probability of the accused being reformed and rehabilitated. The points pertaining to calling report from the Probation Officer are discussed in detail in later part of this paper.

In a recent judgment of 2021 in Mofil Khan and Ors [42], the Supreme Court again stressed on the importance of possibility of reform as a key mitigating factor in death cases. Highlighting its significance, the Court said that it is well settled law

[39] 48th Law Commission Report titled, *Some Question on the Criminal Procedure Code Bill 1970) (July 1972*), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080532-1.pdf (last visited, July 2023).

[40] Anil v. State of Maharashtra (2014) 4 SCC 69.

[41] Birju v. State of M.P AIR 2014 SC 1504.

[42] Mofil Khan and Ors. v. The State of Jharkhand 2021 SCC Online SC 1136.

that possibility of reformation and rehabilitation is an important factor which needs to be taken into account. There is a bounded duty cast on the courts to elicit information of all relevant factors pertaining to the possibility of reform even if the convict remain silent. The case was of review petition filed under Article 137 of the Constitution which seek to review the 2014 judgment of the Apex Court in which it has affirmed the death sentence of the appellant. The grievances of the appellant was that possible of his reformation was not given due consideration while upholding the death sentence by the Apex Court. Agreeing with the contention of the petitioner, the Supreme Court said that neither the trial court nor the High Court nor the Supreme Court in its appellate jurisdiction gave due attention to the possibility of reform of the appellant. The focus was only on the brutal and diabolical manner in which the crime was committed. There was no reference to the possibility of reformation of the appellant. Neither the State has procured any evidence to show that there was no possibility of reform nor the Court has undertaken any such exercise. In the present case, the petitioner along with others eliminated entire member of the family due to property dispute including the minor children. Eight persons lost their lives. In the review application, the Apex Court examined several factors pertaining to the appellant such as his socio-economic background, the absence of any prior criminal antecedents, affidavits filed by their family and community members and the certificate issued by the Jail Superintendent regarding the conduct of the appellant. Considering all these factors, the Court came to the conclusion that it cannot be said that there is no possibility of reformation of the petitioner. As a consequence, his death sentence was commuted into life imprisonment. But considering the gravity of the offence, he was directed to undergo 30 years imprisonment.

The Apex Court in *Mofil* case also refereed to its 2018 judgment of *Rajendra Pralhadrao Wasnik*[43] wherein the Court said that possibility of reform and rehabilitation of the convict must be seriously considered. The Court said that this is one of the mandates of the "*special reasons*" requirement under Section 354(3) of the CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. The Court said, "*To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is*

[43] Rajendra Pralhadrao Wasnik v. State of Maharashtra (2019) 12 SCC 460.

that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, and contact with his family and so on. Similarly, the convict can produce evidence on these issues as well"[44]

V. Judicial Guidelines on Determining the Chances of Reform in Death Cases: A Much Needed and a Welcome Move

Of late, there has been some positive developments in determining the chances of reform of the convict. In its 2014 judgment of Bharat Singh[45], the Delhi High Court, reflecting upon the issue of reformation of the convict in death cases, admitted that many times the courts take this factor for granted. The High Court observed that the criminal courts need to seriously determine whether the accused can be rehabilitated or not in death cases. The High Court laid down some procedures for determining the chances of reform in death cases. The Court observed that in order to determine as to whether there are chances of reform or not the Court should call for a report from the Probation Officer-an Officer having statutory position under the central legislation titled Probation of Offenders Act, 1958. The Probation of Offenders, 1958 is a post-independence legislation aiming towards rehabilitation of young and first time offenders wherein the young offenders can be released on probation under certain terms and conditions instead of mandating them to undergo imprisonment in the jail. The aim is to avoid intermixing of young offenders with hard core criminals inside the jail. However, the Act is not applicable to those convicted for offences punishable with death and/or life imprisonment. However, since there is no legislative or judicial procedure in existence for determining the rehabilitative potential of the death row convict, the High Court took the noble step of resorting to the provisions under the Probation of Offenders Act, 1958 for the purpose of aforesaid exercise. As per the procedure laid down, the Probation Officer has to conduct a detailed Social Investigation Report (SIR) of the convict pertaining to his antecedent and past social and educational background. This Report is to be presented before the sentencing court. After examining the Probation Officer's report, the Court can

[44] Please refer to Para 45 of the Rajendra Pralhadrao Wasnik Judgment.
[45] State v. Bharat Singh, MANU/DE/0920/2014.

then decide as to whether the convict is likely to indulge in criminal activity in future or whether there is any probability of the accused being reformed and rehabilitated. While pointing towards the responsibilities expected from the Probation Officer, the High Court said that the two questions need to be asked from the Probation Officer: (i) Is there a probability that in future the accused would commit criminal acts of violence as would constitute a continuing threat to society? (ii) Is there a probability that the accused can be reformed and rehabilitated? In order to determine the rehabilitative and reformative tendency of the convict, the Probation Officer shall enquire from the jail administration and seek a report as to the conduct of the convict while in jail. The jail authorities will extend their full co-operation to the Probation Officer in this regard. The Probation Officer will then also meet the family of the convict and the people from the local community even if it requires travelling to the outstation place where the convict resides. He will seek their inputs on the behavioural traits of the convict with particular reference to the two issues highlighted. Thereafter the Probation Officer shall consult and seek specific inputs from two professionals with not less than ten years of experience from the fields of Clinical Psychology and Sociology. The High Court further said in Para 69 of the Judgment that for the guidance of the Probation Officer, reference can be made to the United Nations Office on Drugs and Crimes Handbook on "*Prevention of Recidivism and Social Integration of Offenders*".[46] The Handbook is useful in ascertaining the recent trend in assessment of an offender's risk of re-offending. The High Court further said in Para 70 of the judgment that the report of the Probation Officer will be submitted within a period of ten weeks to the Court in a sealed cover. As soon as the sealed cover is received, it will be opened by the Registrar General and four copies be made thereof, two for the Court which will be kept along with the original in the cover and resealed and two given to each of the learned counsel for the parties, both of whom shall maintain confidentiality of the said document. The

[46]https://www.unodc.org/documents/justice-and-prisonreform/_crimeprevention/Prevention_ of_Recidivisrn _and_Social_ Reintegration_12-55107_Ebook.pdf). There is also a document titled: 'The Offender's Assessment and Sentence Management, 2005, https://www.justice.gov.uk%2Fdownloads%2Foffenders%2F psipso%2Fpso%2FPSO_2205_offender_assessment_and_sentence_management.doc &ei=OXJNU7u NDY39 rAeb4 oHQAg&usg=AFQjCNFEaLJevrNDa80zBfeIPPSokGxEw&sig2=EG176zO0eXCra yKyLj INeg&bvm= bv.64764171,d.bmk).

learned counsel for the convict can seek his instructions on the report before making submissions on the next date.

Echoing the same procedure which needs to be adopted in death cases, in its 2015 Judgment of *Mithilesh Kumar Khushawa* [47], the Delhi High Court again focused on this aspect. The High Court observed that the pre-sentencing report under Section 235(2) of the CrPC is a mandatory requirement. A Probation Officer may be appointed to prepare a Pre-Sentencing Report and he/she shall have the same obligation as mentioned in Probation of Offenders Act, 1958 though, as mentioned above, the Act does not apply to offences punishable with death or life imprisonment. The High Court said in Para 212 of the judgment that a pre-sentencing report by a professionally trained probation officer is an extremely valuable tool for the court to assess the possibility of reform and rehabilitation of the person convicted of the capital offence. Pointing towards the lack of adequate training for Probation Officer, the Court said that the Probation Officers have neither the necessary qualifications nor the requisite training to render the effective assistance to the Court on the question of possibility of reform and rehabilitation of the death row convict.

Subsequently, the same point has been emphasized by the same High Court in its 2015 judgment in *Vikas Yadav*[48] wherein the Court in Para 280 said that it is an important part of the sentencing function of the State in the trial as well as of the court to ensure that the State places materials before the trial court regarding the probability that the convict could be reformed and rehabilitated and that he would not commit criminal acts in future. However, the State has, in most cases, failed to do so. What is the court required to do, the Court asked. The Court said that Section 235(2) confers a valuable right on the convict upon conviction of a meaningful hearing and grant of an opportunity to place necessary material even by leading evidence to enable the sentencing court to impose an appropriate sentence on him, keeping not only the nature of offence but all the relevant circumstances in mind. The Court referred to *Mithilesh Kumar* case[49] wherein the Court has expressed the view that there is a dire need to revamp the training and educational qualifications for Probation Officers by following international

[47] Mithilesh Kumar Khushawa v. State (Decided on 21st September, 2015 Del High Court).
[48] Vikas Yadav and Ors. v. State of U.P. and Ors MANU/DE/0294/2015.
[49] *Supra* note 46.

standards. The Court said that apart from the knowledge of psychology, knowledge in several related fields such as sociology and criminology would be essential to equip a person for serving as a Probation Officer. The Probation Officers who are required to submit pre-sentencing reports or the Social Investigation Report must be the persons who have expertise in dealing with the unique challenges posed by cases involving the death penalty as a sentencing option. The court stressed on this aspect as the educational qualification prescribed for Probation Officer under Delhi Probation of Conduct Rule, 1960 is only a mere graduation without any requirement of specialization in sociology, psychology or criminology or any other relevant discipline. This aspect need to be addressed by the law makers on priority basis.

Due to lack of effective consideration to mitigating circumstances in death penalty cases, the Apex Court in September 2022, referred to the Constitution Bench the task of laying down a Comprehensive framework on Mitigating Circumstances for death row convicts.[50] This shall necessarily include the task of determining the chances of reform. The Apex Court registered the suo motu petition titled "*In re-framing guidelines regarding potential mitigating circumstances to be considered while imposing death sentences*" in order to streamline the processes concerning mitigating circumstances. Referring to the anomaly in death cases, the Apex Court noticed that in many cases the convict is condemned to death by a formal if not cosmetic sentencing process. The concern of the Apex Court has been that while the State is allowed the opportunity to present the aggravating circumstances against the convict during the entire process of trial, the accused is allowed to present the mitigating circumstances only after the conclusion of the trial and pronouncement of guilt which put the convict at a hopeless disadvantage tilting the scale heavily against him. Hence, the convict must be given fair opportunity to present the mitigating circumstances throughout the trial process and not only after the pronouncement of the guilt. The concern of the Court has been that death penalty, at present, is being administered casually. It would be very interesting to see the content of Comprehensive Guidelines to be framed by the Constitution Bench. The Guidelines is yet to be framed and appear in public

[50] Article, *Death penalty cases: SC refers key issue to Constitution Bench* https://www.thehindu.com/news/national/death-penalty-case-sc-refers-to-5-judge-bench-on-framing-guidelines-on-mitigating-circumstances/article65909082.ece (last visited, July, 2023).

domain. However, it is very welcoming that the Court has started giving due consideration and seriousness to mitigating factors in death cases, which ideally should have been made at center stage since the authoritative pronouncement in *Bachan Singh* case. The author is very optimistic that in the Comprehensive Guidelines due consideration and utmost seriousness would be given to the process and procedure of determining the chances of reform.

While referring the matter to Constitution Bench, the Apex Court has also raised the concern that sentence hearing in death cases sometimes happens on the same day on which the convict is pronounced guilty. This "*Same Day Sentencing*" violate the mandate of Section 235(2) CrPC which provides for pre-sentencing hearing which need to be comprehensive in nature and not just a roving enquiry. Of late, the Court has also started evaluating mental health status of the death row convicts and even expecting a prominent role of the mitigating investigator in death cases which is again a welcome move. [51]

VI. Some Suggestions

Although the guidelines laid down by the Delhi High Court in *Bharat Singh* and other cases, which derives inspiration from Supreme Court judgment in *Birju*[52], are commendable and praiseworthy, the author would suggest few measures to strengthen the existing institutional mechanism to determine the chances of reform of the death convict. These suggestions are followings:

- There is an urgent need to revamp the entire institution of Probation Officer under the Probation of Offenders Act, 1958. Highly specialized training programmes shall be organized for them on regular basis which will equip them with requisite skills and also give them the essential subject knowledge of Criminal Psychology, Sociology, Criminology and other allied discipline. Currently the minimum education qualification required for Probation Officer is a mere Graduation. It could be raised to Masters in Specialized subjects such as in Clinical Psychology, Cognitive

[51] Article, *SC enforces a landmark ruling on death penalty,* https://www.hindustantimes.com/india-news/sc-enforces-a-landmark-ruling-on-death-penalty-101646159222001.html (last visited August, 2023).

[52] *Supra* note 40.

Behavioural Therapy, Behavioural Science, Sociology, Criminology and other allied discipline.

- While conducting enquiry as to the reformative potential of the death row convicts, due attention must be paid by the Probation Officer to the socio-economic background of the convict. A comprehensive enquiry is expected from the Probation Officer in this regard. As noted by the 48th Law Commission, lack of comprehensive information about the characteristics and socio-economic background of the offender is a serious demerit in our criminal sentencing.
- In order to attract best talent as Probation Officer, the salary, terms and conditions and other emoluments shall be competitive. It is to be noted that Probation Officer has a very important role to play under Probation of Offenders Act, 1958 and also in the death penalty cases to determine the reformative potential of death row convicts. Hence, the best mind shall be attracted towards the post.
- Further, as a matter of safeguard, the Psychological Profiling of the Criminal should be avoided. The psychological profiling is the process in which the nature of crimes is used to draw inferences about the personality and the behaviour traits of the criminals. In death penalty cases, it could be used to find out whether there are chances of reform or rehabilitation of the accused or not or whether the convict has chances of relapsing back into the recidivism. The psychological profiling of the convict, although conducted scientifically, is not regarded as an accurate test. As studies done in the West, it has been found that the forensic professionals who are conducting such test, at times, become completely bias towards prosecution objectives and goals instead of giving a neutral opinion on the matter. Further, the Probation Officer are neither forensic experts nor a psychologist. Hence, it would be difficult for them to reach to the conclusion as to whether or not there are chances of reforms. There is no scientific evidence to support the reliability and validity of psychological profiling of the criminal. Hence, basing the decision of life and death by relying on the psychological profiling of the convict will not be a good idea. It is to be noted that the field of psychological profiling

of the criminal is yet to reach that level of advancement wherein it can be relied upon safely and that too in death penalty cases.

VII. Concluding Remarks

The chance of reform or rehabilitation is one of the very important mitigating circumstances in favour of the convict facing death penalty and hence all seriousness must be attributed to this mitigating circumstance. However, as critically pointed out in this paper, the difficulty arises in mechanical application of this mitigating circumstance without undertaking any sincere exercise to find out as to whether the convict has the chance of reform or not. It must be noted that the procedure which is based on whims violate fairness and equalitarian principles enshrined in Articles 14 and 21 of the Constitution of India. As mentioned, these Articles applies at the stage of sentencing also. However, the judgments of the Delhi High Court in *Bharat Singh, Mithilesh Khushawa* and *Vikas Yadav* cases are welcome steps in right direction wherein the Court has recognized the problem and have consequently made some sincere efforts to address the issue by laying down some procedures for determining the chances of reformation. This works well in the interest of the convict as well as in the interest of the justice as the courts will have clear understanding of the situation before taking the final call on the question of imposition of death penalty. This will also be in conformity with the *Bachan Singh* dictum on due emphasis being attributed to chances of reform as a mitigating circumstance. It will also be in consonance with the rule of law and our constitutional philosophy. Giving due concern and consideration to chances of reform will also be in conformity with the mandatory provision of pre-sentencing hearing under Section 235 (2) of the CrPC. It will also enable the sentencing court to decide whether the case falls under *Special Reasons* mandate under Section 354 (3) of CrPC. Hence, these recent developments in the form of guidelines to determine the chances of reform are very welcome steps in judicial administration of death penalty in India.

Vol. 14 No. 2 ISSN: 0976-3570

Employing Artificial Intelligence in the Interpretation of Contracts: A Legal Analysis[1]

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Abstract

The interpretation of contracts — as a subject — has been gaining more and more prominence and advancing at a very fast pace, as both in domestic and cross-border transactions, the main issue which the court or the tribunal, in a contractual dispute, normally addresses is in relation to the contract interpretation. Parties generally express their contract through a human language. Being an organic discipline, the language does not have a mathematical preciseness, for the meaning of the words and phrases keeps growing, evolving and expanding. Consequently, a contract is always to be construed against its context and background. These amazing facts about the language make the phenomenon of contract interpretation all the more fascinating as well as challenging. As artificial intelligence (AI) has been increasingly making inroads into different walks of life and functioning, therefore, the judicial system, judicial processes and dispute resolution systems cannot distance away from AI. Specifically, with regard to the interpretation of contract and AI, two legal questions arise: (a) what assistance, if any, can technology provide in the process of contract interpretation? (b) Whether the process of contract interpretation, with the help of appropriate technology or AI, be automated? These questions indeed unwrap a new area of legal research with the aim of examining whether or not the process of interpretation of contract can be automated. The first section of this paper introduces the subject and opens up the discussion. The second section explores the possibility of using technology for either interpreting a contract or providing aid in the process of interpretation. The third section critically reconnoitres the extent to which automation is possible

[1] This research paper is the revised and upgraded version of a paper which the author submitted to and presented at the 'International Conference on Artificial Intelligence and Law', held on 11-12 November 2022 and organised by the Centre for Business Laws and Taxation at Rajiv Gandhi National University of Law, Patiala, Punjab.

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in the process of interpretation of contracts. The fourth section highlights the limitations of the court in using AI for the contract interpretation. Finally, the last section concludes the discussion.

Key words: Artificial intelligence (AI), Automation, Contract interpretation, Machine learning (ML) and Technology**.**

I. Introduction

Technology has been playing an important role in all walks of life, including the law and the legal system. An important area where technology figures prominently and still there is a huge room for technology to play in that area is the 'justice delivery system'. The use of technology in the Supreme Court and various High Courts in India has already speeded up the functioning of the Court. If India really wants to address the issue of massive pendency of cases, then, it is technology which will be of a great aid. Around four decades ago, the focus of Artificial Intelligence (AI) was on machine learning (ML) enabling business intelligence capabilities to optimise operations and maximize profit —for instance, data analysis enabled decision support systems for managers; robots performing repetitive tasks, and so on; and now, with more cutting-edge technology, AI has stretched its service area to several other disciplines including contracts and contracting.[3] Laws, regulations, rules, court judgments, contracts, and all that can be translated from analog into digital data, from natural language to computer codes; and the conjunction between digitisation of colossal volume of data, algorithmic techniques and development of computer power is producing fascinating effects in the legal world, including the field of contract law.[4]

Artificial intelligence (AI) — a term coined by John McCarthy — is that branch of computer science which is concerned with designing intelligent computer systems that exhibit the characteristics which are associated with intelligence in

[3] Fatmah Baothman, *Artificial Intelligence Effects on Contracts and Contracting*, **IN** INNOVATIVE AND AGILE CONTRACTING FOR DIGITAL TRANSFORMATION AND INDUSTRY 4.0 150 (Mohammad Shalan and Mohammed Ayedh Algarni eds. IGI Global 2020).

[4] Michel Cannarsa, *Contract Interpretation***,** IN THE CAMBRIDGE HANDBOOK OF SMART CONTRACTS, BLOCKCHAIN TECHNOLOGY AND DIGITAL PLATFORMS 102-103 (Larry A. Dimatteo, Michel Cannarsa & Cristina Poncibo eds. Cambridge University Press 2020).

human behaviour.[5] AI can be broadly classified into the following three groups:[6] (i) Artificial Narrow Intelligence (ANI), which equips the machine with the capability to copy human capabilities in specific domains or specific tasks; (ii) Artificial General Intelligence (AGI), which equips the machine with the capability to copy human capabilities across several domains, bringing it closer to human intelligence; and (iii) Artificial Super Intelligence (ASI), which equips the machine with the capability to copy human capabilities in all domains in terms of general wisdom, scientific creativity and social skills.

AI generates and processes information through algorithms, without affecting the environment physically; however, once AI is integrated into a machine (it results in a robot, i.e. robot = AI + machine), it affects change in its environment by sensing, thinking and acting.[7] Three of the subsets of AI are Machine Learning (ML), Deep Learning (DL) and Natural Language Processing (NLP). ML's main object is to build computer systems which can adapt and learn from experience,[8] whereas DL is a subfield of ML and allows for processing huge amount of data to find relationships and patterns that humans are often unable to detect.[9] The various ML algorithms can be broadly classified into four main categories: (a) supervised learning (it uses labelled data); (b) unsupervised learning (it uses unlabelled data, and in consequence, deep learning algorithms are used to detect patterns); (c) reinforcement learning; and (d) semi-supervised learning (it is a mix of supervised and unsupervised learnings).[10] Accordingly, in supervised learning, an algorithm (rules plus data) is trained on human-labelled data; in unsupervised learning, an algorithm is fed with unlabelled data and the algorithm finds the pattern on its own; and in reinforcement learning (which is the most advanced model of learning), the algorithm is fed with a set of rules and constraints, and it learns how to achieve its goals by trying out varied arrangements of permitted

[5] RAJENDRA AKERKAR, INTRODUCTION TO ARTIFICIAL INTELLIGENCE 2 (PHI Learning Private Limited 2021).
[6] RODNEY D. RYDER & NIKHIL NAREN, ARTIFICIAL INTELLIGENCE AND LAW 1-3 (Law & Justice Publishing Co 2022).
[7] *Id*. at 3.
[8] AKERKAR, *supra* note 5 at 307.
[9] TOM TAULLI, ARTIFICIAL INTELLIGENCE BASICS: A NON-TECHNICAL INTRODUCTION 71 (Apress 2020).
[10] *Id*. at 50-54.

actions.[11] In DL, which is actually a special sub-set of ML, algorithms are arranged in layers creating a network having structure and functionality like the human brain.[12] Facial recognition, driverless cars, real-time transcription, voice-recognition, and the like are the results of DL algorithms.[13] NLP is that form of AI which involves understanding conversations, and consequently, allows computers to understand people.[14]

Given that AI has been progressively making advances into myriad processes and functioning in various disciplines, judicial processes and dispute resolution systems cannot remain unaffected by AI. From the standpoint of contract law, the legal landscape has been favouring and recognising the use of technology in the formation of contracts[15] and also in other aspects of contracts. As AI is also a technology, therefore, it (AI) could be validly used for facilitating several aspects of the contract. Can AI help in the contract interpretation, which is one of the intricate aspects of resolving a contractual dispute? There is a dearth of legal writings addressing the issue of contract interpretation with the assistance of AI (whether AI can be used or not; if yes, to what extent). There is, thus, a need for legal examination to evaluate whether or not the process of interpretation of contract can be automated. A legal investigation to find answers to these questions will be very useful to the legal professionals, including judges and advocates. This

[11] RYDER, *supra* note 6 at 10.
[12] *Id*. at 14.
[13] *Id*.
[14] TAULLI, *supra* note 9 at 124.
[15] Section 10A of the Information Technology Act, 2000 states: "Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose". Further, section 3 of the Indian Contract Act reads as follows: "The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it". Here, "any act" very well includes electronic or automated mode of communication. The foregoing statutory provisions accord explicit legislative recognition to contract formation in electronic form or by using electronic means.

paper delineates the possibility, if any, of employing AI in the process of interpreting the contract for the purpose of resolving a contractual dispute.

II. Technology and Contract Interpretation

This section of the paper explores the possibility of using technology for either interpreting a contract or providing some aid in the process of interpreting a contract. Technology has impacted and also eased various processes in the judicial system, particularly concerning administration of the justice dispensation mechanism. Now, the use of technology has to go beyond the administrative side of the judicial system (such as, e-filing, docket management, and the like). AI is enormously useful in performing tasks which form the major chunk of legal practice, for example, data analysis, review, due diligence, pattern recognition, logical functions, legal research, compliance, and so on.[16] In the field of legal research, there are some common research portals. A few popular examples of such research portals are: LexisNexis, SCC Online, Manupatra, etc. AI based legal research portals/platforms have also come into existence. Some common examples of AI based legal research portals are: Pensieve, CaseIQ by Casemine, mLeAP[17], ROSS[18], and so forth. Of the different branches of law, the 'law of contracts' is one of the areas wherein AI finds a vast role to play. With reference to contracts, the law has recognised the use of technology for making, implementing as well as managing the different aspects of contract.

A. Assistance Rendered by a Suitable AI Application in Contract Management and Administration

In addition to assisting in legal research, some of the ways by which a suitable AI application (software or tools) can assist in the contract management and administration, in terms of cost-saving, time-saving and risk mitigation are:

(a) *Analysing a contract*: In an efficient and accurate manner, a suitable AI application can read, understand and analyse a contract. This saves considerable time and energy, as reading,

[16] RYDER, *supra* note 6 at 161.
[17] It provides solution from legal research to information and case management.
[18] ROSS, powered by IBM's Watson technology, is a robot lawyer providing assistance in legal research.

understanding and analysing a lengthy contract consumes a lot of time.

(b) *Drafting a contract*: An appropriate AI application can also help in suggesting sample clauses for a particular clause that is to be drafted. Such applications can also help improvise the clause already drafted by, for example, pointing out the inconsistencies therein or suggesting change of terms taking into consideration the legal implications thereof.

(c) *Reviewing and due diligence*: Contract review is a tedious and time-consuming process. The reviewers have to ensure that the contract contains all the clauses as agreed between, and as per the mutual understanding of, the parties. Due diligence ensures that the agreement/transaction to be entered into is in compliance with the law of the land as also the policies of the organisation. Its aim is to minimise the risk by protecting the organisation against any possible future litigation. In these aspects of contract administration, a worthwhile assistance can be drawn from AI. A suitable AI application can be very useful in reviewing and effectuating due diligence, which can ultimately maximise profits, ensure compliance with the law, and identify and mitigate risks.

(d) *Monitoring the implementation of the contract*: After a contract is entered into, a significant aspect of contract management is monitoring and implementation of the contract. A suitable AI application can monitor whether all the obligations of the contracting parties are being discharged as per the schedule stipulated in the contract or not. Similarly, it will also observe and determine the accruing of rights at different stages during the currency of the contract. AI finds a good place in monitoring and tracking the contract because parties to the contract concurrently perform various contracts with different parties and it is quite possible that they might miss out a few aspects (for instance, rights or obligations in relation to invocation or extension of bank guarantees, letters of credit, foreign exchanges, advance/stage

payments, levy of liquidated damages, so on and so forth) in some of those contracts.

(e) *Post-completion of contract review*: A very crucial, but less discoursed, aspect of contract management is post-completion of contract review. Post-completion of contract review is an appraisal conducted after the completion (or discharge) of the contract in order to assess whether the purpose for which the contract was entered into was achieved or not. It also reveals the things which went right and things which went wrong during the currency of the contract. Post-completion of contract review puts the organisation on the learning curve, so that the mistakes can be avoided in the future. An appropriate AI application can be developed to carry on post-completion of contract assessment which will fetch enormous benefits.

The thesis of the researcher is not that the court or the lawyer is to fully depend on the AI application for discharging the above functions, or that they are to simply go by the output delivered by the AI software or tool. AI, nonetheless, provides a first-hand handy solution. In review and analysis of simple standard contracts (for e.g. loan agreements, credit contracts, and the like), AI powered solution proves to be efficient, accurate and time-saving. The result delivered by the AI software or tool should be examined by the judge/lawyer. Further, complex and unique contracts require human analysis and review, to a greater extent.

B. AI Tools/Software used in Contract Management and Administration

Organisations which are enthusiastic to employ AI for contract administration and management have two options: (i) to develop home-grown contract analysis AI, which is a time-consuming and expensive venture requiring the necessary expertise on top; or (ii) to embed or integrate contract analysis AI, developed by another entity, into its own applications or product workflows. A few leading 'integratable contract analysis AI' providers are: ContraxSuite[19], which is an open-source contract analytics and legal document platform by LexPredict;

[19] See, https://contraxsuite.com/contraxsuite/ (last visited December 13, 2022).

DocAI[20] by Zuva; Contract DocAI[21] by Google, which fast-tracks contract life cycle management by mining precise data from contracts 'via specialized models for processing contracts that are built on advanced decision tree learning, OCR, and Natural Language Processing'. Additionally, there are several 'workflow contract analysis tools' that incorporate contracts AI (as opposed to integratable contracts AI offerings), for instance: ContractPodAi[22], Della AI[23], eBrevia[24], Eigen® platform[25], Evisort's cloud-based AI-powered Contract Intelligence Platform[26], Heretik Analysis[27], Kira[28], Combined Intelligence by LegalSifter (this tool is called Combined Intelligence because it combines artificial intelligence and human intelligence by following a 'human-in-the-loop' principle.)[29], LinkSquares AI[30], Luminance Corporate[31], SealNow by Seal Software, so on and so forth.[32]

It would be worthwhile to hereinafter state some important examples of the AI powered software and tools used in contract administration and management:

(a) KIRA: It is a patented machine learning software that identifies, extracts, and analyses content in contracts and documents with accuracy and efficiency.[33]

(b) Contract Intelligence (COiN): In the year 2017, JPMorgan Chase & Co — one of the world's oldest, largest and best-known financial institutions

[20] https://zuva.ai/about/ (last visited December 13, 2022).
[21] https://cloud.google.com/solutions/contract-doc-ai (last visited December 13, 2022).
[22] https://contractpodai.com/ (last visited December 13, 2022).
[23] https://dellalegal.com/ (last visited December 13, 2022).
[24] https://www.dfinsolutions.com/products/ebrevia (last visited December 13, 2022).
[25] https://eigentech.com/solutions/industries/law (last visited December 13, 2022).
[26] https://www.evisort.com/platform/platform-overview (last visited December 13, 2022).
[27] https://www.heretik.com/features/heretik-analysis/ (last visited December 13, 2022).
[28] https://kirasystems.com/ (last visited December 13, 2022).
[29] https://www.legalsifter.com/faq (last visited December 13, 2022).
[30] https://linksquares.com/products/analyze/features/ai/ (last visited December 13, 2022).
[31] https://www.luminance.com/product/corporate.html (last visited December 13, 2022).
[32] Noah Waisberg and Adam Roegiest, *A Guide to Evaluating Contract Analysis AI Solutions* https://www.artificiallawyer.com/2021/12/15/a-guide-to-evaluating-contract-analysis-ai-solutions/ (last visited December 13, 2022).
[33] https://kirasystems.com/how-kira-works/ (last visited November 03, 2022).

— developed and deployed an unsupervised learning software called COiN (Contract Intelligence) that automates document analysis and review for a certain categories of contracts, by using image recognition to identify patterns in these agreements.[34] This software, which operates on machine learning system, can take note of certain patterns based on wording or location of clauses in the agreement.[35]

(c) SpotDraft: It is a contract lifecycle management (CLM) software used for making, executing and reviewing contracts faster, thereby reducing time and saving cost.[36] A few prominent businesses across the globe employing this AI-driven solution for managing contracts proficiently include: OnDeck, Chargebee, Razor Group, Kaleyra, Whatfix, People 2.0, DarwinBox, EndowUS, and so on.[37]

(d) HighQ Contract Analysis: This AI powered contract review and analysis tool has been introduced by Thomson Reuters. It employs ML and pre-trained models and assist legal professionals in augmenting efficiency, fast-tracking contract-review process for transaction due diligence, besides accelerating analysis and compliance assessment.[38]

(e) Evisort's cloud-based AI-powered Contract Intelligence Platform: It instantly tracks key information, dates, and clauses from contracts without any manual review or data entry; answers any question regarding existing contracts of the organisations concerned, and increases negotiation and execution.[39]

(f) Contract Review Automation Solution by Lawgeex: Lawgeex has brought out a contract review automation (CRA) solution which uses AI technology for the purpose of reviewing legal documents consistent with the predefined policies of the user/client, and also helps in contract

[34]https://d3.harvard.edu/platform-rctom/submission/jp-morgan-coin-a-banks-side-project-spells-disruption-for-the-legal-industry/ (last visited November 05, 2022).
[35] *Id*.
[36] https://www.spotdraft.com/techgc-global-summit-2022 05 November 2022.
[37] *Id*.
[38]https://www.thomsonreuters.com/en/press-releases/2021/june/thomson-reuters-launches-ai-powered-highq-contract-analysis.html (last visited December 13, 2022).
[39] https://www.evisort.com/platform/platform-overview (last visited December 13, 2022).

negotiation with the counter-party like a proficient counsel (by diagnosing and fixing contractual issues all through negotiation while reducing risk), in speedier and more accurate manner.[40] This AI powered solution is very useful in automating the contract review process during the pre-signature phase for routine, low-to-medium complexity agreements (such as, NDAs, supply agreements, framework agreements, etc).[41] The CRA solution has the following three levels of functionality — Level I (report card):[42]At this stage the solution assigns risk level to various clauses letting the client know which ones to focus on; Level II (suggested changes): At this stage, the solution provides replacement language suggestions and highlights which sections should be deleted; and Level III (surgical redlining): At this stage, it reviews and redlines contracts, and consequent iterations required to get the contract ready for signature.

(g) Luminance Corporate: Integrated with Microsoft Word, Luminance Corporate employs AI to augment and accelerate the whole contract lifecycle process, and also helps clients/organisations see all of their contracts in one platform, displaying both 'the status and workflow of contracts currently under negotiation' and 'executed contracts'.[43]

C. ROSS

ROSS Intelligence ('ROSS') builds AI-driven products to enhance cognitive abilities of lawyers.[44] ROSS, which is powered by IBM's Watson technology, is a robot lawyer providing assistance in legal research. For example, ROSS helps lawyers and judges find the relevant cases on a particular point. This AI product has an amalgamation of four competencies to offer the best search results every time: (i) machine learning (ii) grammatical structure (iii) word embeddings and

[40] https://www.lawgeex.com/ (last visited December 13, 2022).
[41] https://www.lawgeex.com/cra/ (last visited December 13, 2022).
[42] *Id*.
[43] https://www.luminance.com/product/corporate.html (last visited December 13, 2022).
[44] https://rossintelligence.com/about-us (last visited November 08, 2022).

(iv) facts and motions.[45] The ROSS AI search process can be broken down into three main categories[46]:

(i) *Understanding*: Upon a query being submitted, ROSS analyses the words using its own proprietary Natural Language Processing algorithms, which automatically apply filters/parameters to focus on search results of the query, for instance 'jurisdiction' and 'time-period';

(ii) *Retrieval*: After identifying the search results (e.g. appropriate 'jurisdiction' and 'time-period') in the query, it will retrieve the passages from the comprehensive corpus of the case laws that are most similar to the meaning of the query submitted, by using a combination of industry standard search functions and proprietary algorithms; and

(iii) *Ranking*: Having retrieved relevant passages and cases that contain an answer to the query submitted, it uses the AI algorithms to rank them so that the researcher can see the most relevant and appropriate cases first.

D. LegitQuest

It is an Indian Legal-Tech venture. By the use of AI, this platform helps the legal fraternity to research efficiently by providing access to the vast and comprehensive legal database to the users in the most reliable, accurate and speedy manner.[47] It offers some useful AI based products to the legal fraternity, such as: (i) ZAIAN, which is a real time analyser of case laws; (ii) IDRAF (issue, facts, arguments, reasoning and decision), which helps the user in finding out relevant parts of the judgment; and (iii) Litigation Management Tool, which is used to manage pre and post litigation workflows.

E. Contract Interpretation

The core issue to be addressed is what assistance, if any, AI can render to the court/judge while interpreting a contract. A contract may be either express or

[45] See https://rossintelligence.com/what-is-ai (last visited November 08, 2022).
[46] See https://rossintelligence.com/about-us (last visited November 08, 2022).
[47] https://www.legitquest.com/about (last visited December 12, 2022).

implied. When the existence of a contract is established from the conduct of the parties, it is said to be implied. On the other hand, when the existence of a contract is established from the words used (spoken or written) by the parties, it is said to be express. Language does not have a mathematical precision, consequently, a contract is always to be construed against its context and background, making the phenomenon of contract interpretation all the more fascinating as well as challenging. The principal objective of interpreting the contract, in all the cases, is to ascertain the 'intention of the parties'. The court pursues four main goals of contract law while interpreting a contract:[48] (i) Effectuating the freedom of contract (upholding the freedom of parties to make contracts) and freedom from contract (safeguarding parties from being bound by a contract unreasonably owing to presence of vitiating factors) by ascertaining and implementing the intention of the parties; (ii) Protecting and enhancing the security of the transaction, by enforcing reasonable expectations arising from the contract (making promisors bound by their promises and enforcing the reasonable reliance placed by the promisees on such promises); (iii) Resolving contractual disputes as per the law; and (iv) Achieving the administrability of the rules and principles.

The court pursues the afore-stated four main goals of contract law while interpreting a contract by performing three tasks:[49] (i) Identification of the contract/terms whose meaning is to be ascertained. This task is performed by identifying the clause(s) of the contract to be interpreted taking into consideration the disputes in question. (ii) Determination as to whether the terms of the contract are ambiguous and capable of multiple meanings. (iii) Resolution of the ambiguity, if any, by ascertaining 'the meaning' of the terms/contract.

[48] STEVEN J BURTON, ELEMENTS OF CONTRACT INTERPRETATION 1-2 (Oxford University Press 2008).

[49] *Id*. See also, RYAN CATTERWELL, A UNIFIED APPROACH TO CONTRACT INTERPRETATION 1 (Hart Publishing 2020). Catterwell has divided the interpretive process into four steps: (i) defining the question of interpretation; (ii) identifying potential or competing answers/interpretations (each being a potential interpretation); (iii) formulating arguments in support of each interpretation from the admissible materials (the background, the purpose of the contract, the consequences of the competing interpretations, normative factors, such as, business common sense, etc); and (iv) choosing the correct interpretation by weighing and balancing the rival considerations.

In view of the foregoing three tasks performed by the court, the contract interpretation process can be neatly divided into the following four stages, with each stage performing some specific tasks:

(a) *Stage 1*: Identification of the contract (or the terms/clauses thereof) whose meaning is to be ascertained. In the first stage, the court ascertains whether or not there exists a contract between the parties. If the answer is in affirmative, then, it determines the whole of the contract between the parties, for a contract is always to be interpreted as a whole. In this stage, the court also determines the clause(s) of the contract to be interpreted in view of the disputes in question.

(b) *Stage 2*: Determination of the nature of dispute. After having determined the whole of the contract between the parties, the court determines the nature of dispute between them. The dispute, for instance, may be regarding the 'payment clause', 'termination clause', 'warranty clause', and so forth.

(c) *Stage 3*: Determination as to whether the terms or clauses of the contract are ambiguous or not. If the terms are plain, the task of the court becomes patently simple. However, in case of any ambiguity, the court will have to resolve the same. This stage also includes the identification of competing or potential answers to the question of interpretation and arguments in support of each interpretation from the admissible materials, which include the contract as a whole, object of the contract, business common sense, the background to or the context of the transaction (which includes course of dealing, circumstance when the contract was made, trade usages and customs, etc), and so on. The court cannot decline to interpret the contract on account of its terms being ambiguous. Nor will the court straightaway declare the agreement to be void on account of it being uncertain, for one of the duties of the court is to make all possible efforts to save the agreement between the parties by resorting to several expedients and eventually finding the meaning of the agreement. The court will declare an agreement to be void on account of it being uncertain

only if, in spite of resorting to all expedients and making all efforts, the meaning of the agreement cannot be ascertained.[50]

(d) *Stage 4*: Resolution of the ambiguity, if any, by ascertaining 'the meaning' of the contract. This stage involves the evaluation of the potential meanings and competing arguments advanced in support, so as to resolve the dispute. It is in this stage that the court ascertains and states the intention of the parties (i.e. the meaning of the contract or clauses in question) and decides the dispute accordingly.

Theoretically and practically, there are three theories which guide the court for performing the task of contract interpretation (in other words, for performing the foregoing three tasks which the court performs while pursuing the afore-stated four main goals of contract law while interpreting a contract): 'literal theory' or literalism (which necessitates contract interpretation consistent with the literal meaning of the directly applicable words used in a contract, without making an allowance for their context), 'subjective theory' or subjectivism (which favours to construe a contract in line with the shared meaning the parties attached to the text of the contract) and 'objective theory' or objectivism (which takes into consideration a limited context to find the meanings of the parties' expression as used in the context).[51] The main difference between the aforesaid three theories of contract interpretation is the extent to which the court relies upon the resources or admissible materials. These resources or admissible materials are referred to as 'elements of contract interpretation'.[52] This extent is maximum in 'subjective theory' or subjectivism and minimum in 'literal theory' or literalism, whereas 'objective theory' or objectivism occupies the intermediate position. Steven Burton, in his scholarly written book titled, *Elements of Contract Interpretation*, has suggested that a moderate version of objectivism (to be called 'objective contextual interpretation') should be the preferred theory of contract interpretation, for it allows the court to consider enough context to avoid criticisms of literalism.[53]

[50] Section 29 of the Indian Contract Act, 1872 reads: 'Agreements, the meaning of which is not certain, or capable of being made certain, are void'.
[51] BURTON, *supra* note 48 at 17-34.
[52] *Id*. at xiii.
[53] *Id*. at 193-226.

As stated above, the contract interpretation is broadly a four-stage process; of which, it is the third and the fourth stages ('determination as to whether the terms or clauses of the contract are ambiguous or not' and 'resolution of the ambiguity, if any, by ascertaining the meaning of the contract') which are perhaps the most time-consuming or the most intensive. These stages, *in alia*, include the identification and assessment of competing or potential answers to the question of interpretation and arguments advanced in support of each interpretation from the admissible materials, in order to resolve the dispute. Technology or AI can play an important role in the second stage. Both the judges and the lawyers can take benefits of the AI driven software for preparation of or comparative assessment of arguments, as also for superior precedents. It is difficult if not impossible to completely rely upon AI in the third and the fourth stages, for these stages deal with issues unique to the contract in question, its parties and the evaluation of the competing arguments, so as to resolve the dispute and ascertain the intention of the parties — and these aspects could be well performed by a human judge rather than AI. AI may be helpful, to some extent, even in the third stage. However, the judge should remain the 'master' and use AI as his 'technical assistant' only — in the different stages of contract interpretation.

III. Automation of Contract Interpretation: Is it Possible

This section critically reconnoiters the extent to which automation is possible in the process of interpretation of contracts. AI has already entered the domain of the Indian judicial system in the form of AI powered software tools, such as, SUPACE and SUVAS. SUPACE stands for the Supreme Court Portal for Assistance in Court's Efficiency and is designed to collect and process relevant facts and laws and makes them available to judges looking for an input for a decision. It aims at assisting judges and judicial officers, so that they understand the case faster and better. The ultimate task of deciding the case, however, is to be performed by the judge only. SUVAS stands for 'Supreme Court Vidhik Anuvaad Software', and is a machine assisted translation tool trained by AI which has the ability of translating English Judicial documents, orders or judgments

into vernacular languages scripts and vice versa.[54]After having indigenously designed and developed an e-Filing Software, which allows advocates and litigants to file their cases online 24x7, the Supreme Court of India, in the year 2020, invited 'Expression of Interest for engaging a firm for developing Artificial Intelligence Solution for automation of scrutiny of cases in the Supreme Court of India', for the purpose of understanding and analysing the contents of legal documents (petitions, judgments, and so on) and for automatically classifying them in the relevant categories.[55]

With reference to the interpretation of contracts, AI driven software can meaningfully assist legal professionals for formulating and assessing legal arguments, besides providing with faster and improved inputs on applicable laws and precedents. While identifying competing or potential answers to the question of interpretation and arguments in support of each interpretation from the admissible materials, lawyers and judges can be profoundly aided by technology. Automation in the interpretation of contract can be done in the following possible ways: (i) automation of legal reasoning by logically coding the steps in the chain of reasoning based on algorithm design so that the machine is manually programmed to mimic a legal thought-process or by training a machine with data (ML) so that it can classify and extract new data or make predictions; (ii) automation in formulating interpretive arguments, which depend on the material relied upon to construct the argument; and (iii) automation in the resolution of interpretive disputes, i.e. whether a machine can be trained to assist the judge in assessing arguments in order to arrive at the correct interpretation.[56]

An AI powered software can be very helpful in the second stage of contract interpretation, as the software can evidently present the questions in dispute by skimming through the litigation files. By logically coding the steps in the process or by training a machine with data (i.e. ML) so that it extracts relevant information or predicts outcomes, technology can assist in the formulation of (a limited

[54] See, https://main.sci.gov.in/pdf/Press/press%20release%20for%20law%20day%20celebratoin.pdf (last visited November 08, 2022).

[55] EOI Ref. No.: AI-Scrutiny of Cases/2020/SCI-AM, Date: 24/12/2020. See, https://main.sci.gov.in/pdf/TN/24122020_044510.pdf (last visited December 14, 2022).

[56] Ryan Catterwell, *Automation in Contract Interpretation*, 12 LAW, INNOVATION AND TECHNOLOGY 81 (2020), https://ssrn.com/abstract=3542549

number of) arguments in favour of each possible interpretation and in the assessment of competing considerations to reach the most probable interpretation; nevertheless, there are many arguments that cannot be robotically identified, either through manual coding, ML or a combined approach.[57] AI powered legal predictive models can undeniably assist the legal counsel in formulating improved arguments for the case, and is equally helpful to the litigants in deciding whether or not to go ahead with litigating the case before the court or arbitration. It could also entice the litigating parties to resolve their dispute through alternative dispute resolution mechanisms.

As regards the last stage of interpretation (resolution of the ambiguity, if any, by ascertaining 'the meaning' of the terms/contract), the AI powered software (through ML or otherwise) may assist the judge in predicting outcomes in interpretive disputes; or by means of data analytics, the judge may also profit from some sort of discernment as to how the interpretive dispute should be decided by examining arguments and reasoning in prior judgments on interpretation — nevertheless, there are limits on the extent to which exploration of pattern of arguments in preceding judgments can be relied upon to assist in, or predict, the resolution of an interpretive dispute because each contract dispute is to be resolved in view of its unique facts and circumstances.[58] The final resolution of an interpretive case can be best done by a human judge on the basis of the appreciation of evidence against the assessment of unique facts and circumstances of the case, given also the fact that a contract is not an isolated act, rather it is a link in the chain of human or business relation. A contract manifests a legal relationship between the two parties. As they get into this relationship for the purpose of achieving some object, therefore, it is not possible to decide their contract dispute without knowing the full context from a human's perspective. Thus, as a general rule, a perfect generalisation or universalisation with the help of technology is not possible in resolving a contract dispute in its entirety. More so, different cases have diverse degrees of complexity and multifariousness, which encounter the efficiency of the predictive tools and software. The intention of the parties and their expectations provide the central justification for interpretive outcomes; and as the interpretation is a matter of law, therefore, the

[57] *Id*.
[58] *Id*.

court may look behind the nomenclature given by the parties to their contract.[59] Contextual interpretation is inevitable and there is an array of materials that can appropriately form part of the context.[60] Sometimes the court has to resort to rectifying the contract clause in question if the same was faultily drafted, and because of such drafting ambiguity arises. In such a case, the court does not rewrite the contract. It only rectifies the mistake in order to ascertain the intention of the parties. The court may also resort to other expedients (such as, 'supplying words', 'disregarding or ignoring words' or 'transposing words') to ascertain the actual intention of the parties. These functions which the court performs in exceptional cases possibly cannot be done by any AI powered solution. In appropriate cases, it is also essential for the court to identify and imply any terms or provisions which are implied in the parties' bargain.[61] It is further not necessary that the court will imply terms or provisions only in case of oral contracts or partly written contracts. Courts have resorted to implied terms in the case of considerably detailed contracts in writing as well.[62] Without human involvement, it will be perchance impossible for any AI powered solution to imply terms where such implication is the demand of justice.

Nonetheless, the assistance (whether in terms of speeding up the resolution process or shortening the period required for disposal) by such predictive tools to the judges/arbitrators cannot be ruled out. It may be helpful in preventing the judgments going incorrect. AI powered software will assist by presenting before the judge relevant (similar or near similar) cases involving same or similar questions of law. In their paper titled, 'Predicting Indian Supreme Court Judgments, Decisions, or Appeals: eLegalls Court Decision Predictor (eLegPredict)', Sugam Sharma, Ritu Shandilya and Swadesh Sharma introduced their ML-enabled legal prediction model and its operational prototype, 'eLegPredict', which predicts the judgments of the Supreme Court of India, by reading the content of the case-document and generating prediction.[63] Their paper

[59] CATHERINE MITCHELL, INTERPRETATION OF CONTRACTS 156 (Routledge 2019).
[60] *Id*.
[61] GERARD MCMEEL, CONSTRUCTION OF CONTRACTS 327-328 (Oxford University Press 2017).
[62] *Id*. at 328.
[63] Sugam K. Sharma, Ritu Shandilya and Swadesh Sharma, *Predicting Indian Supreme Court Judgments, Decisions, or Appeals: eLegalls Court Decision Predictor*

claims that the prototype (eLegPredict) was tested over 3072 Supreme Court cases and it was successful in attaining the accuracy level of 76%. On the question whether the process of contract interpretation can be automated applying current technology, the following erudite views of Ryan Catterwell are worth-reproducing:[64]

> 'A process of legal reasoning is automated by logically coding the steps in the process or through machine learning (ML), that is, by training a machine with data to extract information or predict outcomes. The challenging aspects of contract interpretation are … identifying interpretive arguments … and … weighing and balancing arguments to arrive at the most probable interpretation… Neither of these … can be automated entirely, either by logical design or through ML. We can manually program a machine to identify a few forms of interpretive argument. Likewise, data analytics can be applied to extract some relevant interpretive information from prior cases and from the contract itself; that is to say, through ML, we can extract information that forms the basis for at least a few types of interpretive argument. However, contract interpretation involves a wide range of arguments, many of which cannot be automatically identified using current technology. The scope to apply technology in the final stage of contract interpretation is similarly limited, although the best prospects of automation rest in ML. *This is because we cannot design a machine capable of weighing and balancing competing considerations to arrive at the most probable interpretation*. That said, through ML, a machine can provide insight regarding the appropriate resolution to a dispute by analysing argument patterns in prior judgments on contract interpretation. A machine may even be able to predict outcomes in interpretive disputes through quantitative analysis.'

(Emphasis supplied)

Smart Contracts

(eLegPredict), XX STATUTE LAW REVIEW 1 (2022). See, https://arxiv.org/ftp/arxiv/papers/2110/2110.09251.pdf

[64] Catterwell, *Automation in Contract Interpretation*, *supra* note 56.

Smart contract is another advancement integrating human behaviour and technology. It is a type of standard form contract wherein the agreement is coded by automators (technocrats), and the coded agreement is self-executing in nature.[65] The rise of blockchain technology has given stimulus to smart contracts. These contracts are in essence (automated or self-executing) programs that execute contractual obligations and may contain and implement contractual stipulations, as well as invoke physical remedies.[66] The protagonists of smart contracts believe in the limited role of the court in transactions and consider that all the aspects of contract can be automated. If correctly coded, a smart contract can exclude or reduce the gap-filing role played by the court, making the interpretation easier and more systematic.[67] However, the proposition — that in smart contracts, the interpretation can be fully automated without any role of the court — is difficult to accept. It is because though certain aspects in smart contracts can be automated; nonetheless, in case the dispute arises between the parties, it is the judge or the arbitrator who will resolve the dispute by resorting to the techniques, mechanisms and principles which are followed in deciding any other contract dispute. With the assistance of automated tools, it is possible to transplant the 'traditional contracts' by fixing interpretive rules, and the automated rules can eliminate the default rules of contract law.[68] Proper computer coding of contracts may, thus, help in reducing ambiguity and, in turn, prove supportive in reducing interpretive disputes. In addition to the prospective impact of smart contracts on the conventional interpretive tasks performed by courts, new tools of decentralised dispute resolution (based on block chain technology), aiming at replacing current dispute resolution systems, are also evolving, in an attempt to become more efficient, more transparent and cheaper than the conventional litigation or arbitration.[69]

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[65] The aim of this paper is not to discuss "smart contracts" and their "types", or their "formation", or their "legality". The reference is being made for the purpose of discussing the interpretive aspects in such coded contracts.

[66] Eric Tjong Tjin Tai, *Challenges of* Smart *Contracts*, IN THE CAMBRIDGE HANDBOOK OF SMART CONTRACTS, BLOCKCHAIN TECHNOLOGY AND DIGITAL PLATFORMS 82 (Larry A. Dimatteo, Michel Cannarsa & Cristina Poncibo eds. Cambridge University Press 2020).

[67] Cannarsa, *supra* note 4 at 113.

[68] *Id*.

[69] *Id*. at 114.

IV. Limitations of the Court in using AI for Contract Interpretation

This section highlights the limitations of the court in using AI for the contract interpretation. As contracts are based on a human language, there are limitations on judges and lawyers while relying upon technology (in particular AI) for the purpose of interpretation of contracts owing to the following features of the human language:[70]

(a) It is not uncommon that language may be ambiguous, for human beings use language against a particular context. AI may not be able to comprehend and recognise the context of the situation.

(b) Language (meaning of words) changes with time.

(c) Language has dialects and accents.

(d) Many words predominantly have the same meaning, but involve degree of nuances.

(e) Oral conversations could very well be non-linear and have interruptions.

Although a complete automation of contract interpretation is not possible; however, AI can definitely help judges and lawyers in framing/assessing arguments, quickly accessing and finding out relevant or similar cases for precedents, and so on. In other words, AI can be used in the formulation of some interpretive arguments through manual design; ML can be useful in mining relevant interpretive information and in drawing attention to similar cases; and through data analytics, the outcomes in interpretive disputes may be predicted.[71] Further, the assistance, of whatever sort, to be drawn from AI in any of the aspects of contract (including interpretation) has to be employed under the supervision of human beings, who in case of contract administration and management are the contracting parties and in case of contract interpretation while resolving the dispute are judges and arbitrators. That is to say, contract administration and management (including interpretation) cannot be left solely to the AI application (software or tools). As a result, the role of lawyers and judges will remain at all

[70] TAULLI, *supra* note 9 at 105.
[71] Catterwell, *Automation in Contract Interpretation*, *supra* note 55.

times; yet, with the help of AI, their functioning will get expedited and become more refined, and the chances of errors can also be minimised.

A. Challenges while Employing AI Powered Solutions and Tools for Administration and Management of Contracts

Before concluding the discussion, four important challenges[72] — while employing AI powered solutions and tools for administration and management of contracts (including interpretation) — ought to be highlighted. *Firstly*, the challenge of logistics. In order to develop algorithms for getting accurate, faster and efficient result, a large amount of data (which may be in the form of statutes, rules, regulations, court judgments, etc) is necessarily to be fed into the AI systems providing for legal solutions.[73] Further, it has to be constantly updated, as an AI powered system with obsolete data will give inaccurate results.

Secondly, there is a challenge pertaining to the law and legal system. A probability of something going wrong while employing AI powered solutions and tools for the administration and management of contract, cannot be dismissed. And, as a result of which, the court or the legal professional using such tools and software arrives at a wrong conclusion and the litigant or the client, as the case may be, suffers loss in terms of time, energy and money. Who should be held liable for such loss? Could the AI powered tool/software manufacturing company be made liable for the inaccurate result/conclusion on account of deficiency in manufacturing? The answer to this question should be in affirmative, for the manufacturing company's liability is based on the deficiency of service or malfunctioning of the AI powered tool/software system. Further, could the legal professional not be made liable for employing the AI powered tool/software without following the necessary instructions or protocols, which consequently led to the wrong result/output? The answer to this question should also be in affirmative, for it is the legal professional who employed the tool/software in violation of the necessary instructions or protocols, and thus, the manufacturing company can very well defend itself on this ground.

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[72] Other relevant issues like ethical issue, privacy related issue, criminal liability related issue, national and international security related issue, and so on — are not within the scope of this research paper.

[73] RYDER, *supra* note 6 at 164.

Thirdly, challenge with regard to the prediction of court judgments using predictive tools and software. Prediction of the court judgment is a dearly-discussed subject in the present era of AI. Significant emphasis is given to the use of ML and NLP for predicting a court judgment, thereby, helping the judicial system. Nonetheless, the ethical issue of bias is not so much debated. Would excessive reliance on AI for the sake of attaining uniformity or augmenting efficiency not affect the final judgment to be delivered by the judge (by creating bias because of the prediction)? Therefore, a controlled and measured use of AI could be permitted, and the final decision has to be always taken by the human judge.

Fourthly, the infrastructure and human resources related challenge. The biggest impediment in the use of AI in the judicial system (including resolution of contract dispute involving the question of interpretation) is the lack of proficient human resources and adequate infrastructure needed for the same at all the levels. It is predominantly true of a vast country like India. In order to successfully adopt AI in the contract dispute resolution, the legal professional and judges must be well versed with the technology. Further, reasonably adequate information technology based infrastructure should be set up in all the courts at all the levels. Furthermore, there is a need for change in the perception and mind-set, for the approach of professionals of different generations regarding the use of these technologies varies. Therefore, the government has to focus on the capacity and skill building of judges and lawyers in this regard, as also developing AI powered systems in courts with comprehensive data for ensuring accuracy and enhancement.

V. **Conclusion**

The contract interpretation, essentially a cognitive process, is progressively becoming ever more contentious. By way of employing AI in contract administration and management, businesses can get aid in evaluating risks and opportunities of enterprises, and they may select the best AI techniques and methodology (for example ML, DL or NLP) which will assist contract managers in making contracts and analysing different aspects of contracts; and sooner or later, the world may witness AI innovating even ground-breaking types of

intelligence for systems, humans and machines.[74] Employment of AI in the field of contracts has started stimulating challenges to legal professionals who have to ensure that these technological developments comply with the founding principles of law.[75] Concluding the discussion, it can be patently stated that AI cannot replace a judge from the judicial process, for certain functions in the judicial process characteristically require a human judge with human intelligence, human approaches, and human frame of mind. Nevertheless, AI can indisputably assist a judge in the judicial process in multifarious ways. This conclusion is squarely applicable to contracting and resolving a contract dispute. The dominant purpose while interpreting the contract is to ascertain the intention of the parties, which is the meaning of their contract. Even in the process of interpreting a contract, AI can assist the judge to some reasonable extent (be it shortening the time required for deciding a case, or presenting the relevant laws and precedents, or in any other manner). Nonetheless, the process of contract interpretation, even with the help of appropriate technology or AI, cannot be fully automated,[76] as the human judge will always be needed to finally resolve contract disputes because a contract is a legal relationship between the parties entered into in a context. A human judge with human approach is needed to comprehend the contract taking into account the matrix of facts and the context in which it was entered into. This paper has outlined certain limitations of the AI powered solutions in the process of interpreting contracts, primarily owing to the uniqueness of contracts and their contextual aspects. Further, the government has to work on upgrading the infrastructure of the courts and also on the skill and capacity building of legal professionals, if the judicial system is intending to make greater use of technology in the administration of judicial process. With the further advancement in the field of AI and all its subsets (ML, DL or NLP), the legal community will witness greater applicability and enhanced reliance on these technologies in resolution of disputes (including contract disputes). However, the golden rule is that this scientific advancement is to be used as a well-trained retainer for certain aspects of the judicial process; but, it should never be permitted to become the real master pronouncing judgments in court cases. In times to come, legal scholars will

[74] Baothman, *supra* note 3 at 149-150.
[75] Cannarsa, *supra* note 4 at 103.
[76] This conclusion is in sync with the conclusion arrived at by Ryan Caterwell in his paper titled, *Automation in Contract Interpretation*. See Catterwell, *Automation in Contract Interpretation*, *supra* note 55.

witness many more deep and meticulous researches on the area of employing AI powered solutions for resolving contract law disputes involving the issue of interpretation.

Finding the Hub and the Spoke of Cartels: Mapping the Indian Experience

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Abstract

As per the Competition Act 2002 (hereinafter called the Act), cartel is defined in terms of an agreement amongst competitors, operating at the same level of a commercial activity. Such horizontal agreements leading to anti-competitive practices are proscribed under the Act. The Act does not deal with the hub and the spoke of a cartel as there was a lack of urgency vis-à-vis such cartels. It has only been in the recent past, that the Competition Commission of India (hereinafter called the CCI) took note of hub and spoke cartels in the Indian market. Consequently, the Competition Law Review Committee (hereinafter called CLRC) in its Report of July 2019 has made recommendations pertaining to hub and spoke cartels. As a consequence, the 2023 Amendment to the Act has incorporated provision pertaining to hub and spoke cartels. The present article maps the Indian experience on the hub and spoke cartels. The primary argument of the author is that the legislative framework within the Act is inadequate to deal with hub and spoke cartels. Hence a comprehensive re-vision is needed.

Key Words: Cartel, Hub and Spoke, Competition Act, CLRC, Market, Amendment, CCI

I. Introduction

As per the Competition Act 2002 (hereinafter called the Act), cartel is defined in terms of an agreement amongst competitors, operating at the same level of a commercial activity.[2] Such horizontal agreements leading to anti-competitive practices are proscribed under the Act.[3] Against this backdrop, investigating and

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[2] The Competition Act 2002 (The Act) s 2 (c)

[3] *Ibid* [(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.]

prosecuting hub and spoke cartels is a challenge due to its peculiarity. The Act does not deal with the hub and the spoke of a cartel as there was a lack of urgency vis-à-vis such cartels. It has only been in the recent past, that the Competition Commission of India (hereinafter called the CCI) took note of hub and spoke cartels in the Indian market. Consequently, the Competition Law Review Committee (hereinafter called CLRC) in its Report of July 2019 has made recommendations pertaining to hub and spoke cartels. As a consequence, the 2023 Amendment to the Act has incorporated provision pertaining to hub and spoke cartels.[4] The present article maps the Indian experience on the hub and spoke cartels. The primary argument of the author is that the legislative framework within the Act is inadequate to deal with hub and spoke cartels. Hence a comprehensive re-vision is needed.

II. Hub and Spoke Vs Cartels: It's different!

Hub and spoke is different from ordinary cartels. In this brand of cartels, the coordination is not between firms that ought to be competing. On the other hand, apart from coordinating amongst themselves, these firms also coordinate with a firm "that resides either upstream or downstream from them."[5]. For example, say A, B, C and D are sellers of semi-conductor and E is the manufacturer of the product. Herein E can enter into a price fixing arrangement with any one of the players viz. A, B, C or D. Subsequently E can convince B that since A, C and D have agreed to fix the price, B should do so. This convincing will lead to each of the sellers colluding with E to fix the price. The implicit coordination in the conduct of the sellers amongst themselves as well as with the manufacturer is a classic example of hub and spoke. The proof of coordination is called the rim of the spokes. The hub is E and the spokes are different sellers. The incentives in this arrangement are the same, as in any other ordinary cartel. However, it is structurally different for an ordinary cartel.

The origins of the metaphor hub and spoke can be traced to a judgment of the US Supreme Court in a loan fraud case.[6] While assessing the nature of the conspiracy

[4] THE COMPETITION (AMENDMENT) ACT, 2023 [The Competition (Amendment) Act, 2023 has been published in the Gazettee of India on 11th April, 2023]
[5] Luke Garrod, Joseph E. Harrington, Jr.& Mathew Olczak, *Hub and Spoke Cartels- Why They Form, How They Operate, And How To Prosecute Them* (The MIT Press 2021) vii
[6] Kotteakos v. United States, 328 U.S. 750 (1946)

the US Supreme Court noted that the "*the pattern was that of separate spokes meeting at a common centre though ... without the rim of the wheel to enclose the spokes*."[7] The US Supreme Court concluded that since there was absence of the proof of a rim "*each set of loans constituted a separate conspiracy, between the hub and the individual spokes*."[8] As per the Act, cartel is defined as an association of "*producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services*".[9] Thus, the proof of cartels is based on anti-competitive practices amongst businesses working at the same level of production or distribution or selling or trading.

There need not be any written proof of such agreements. Circumstantial evidence is enough to establish such anti-competitive agreements.[10] Moreover as per the Act only horizontal anti-competitive agreements are regarded as cartels and are prima facie void. Section 3 (1) of the Act declares that all agreements are regarded as anti-competitive "*which causes or is likely to cause an appreciable adverse effect on competition within India.*"[11] As per Section 3 (3) of the Act agreements/arrangements/decisions by cartels are presumed to have an appreciable adverse effect.[12] Consequently since cartels are presumed to have an

[7] *Ibid* 755
[8] Barak Orbach, *Hub-And-Spoke Conspiracies*, 15-APR Antitrust Source 1, 3(2016)
[9] The Act (n 1) s 2 (c)
[10] Lovely Dasgupta, *Cartel Regulation-India in an International Perspective* (CUP 2014) 216
[11] The Act (n 1) [Anti-competitive agreements 3. (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.]
[12] *Ibid* [(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of service…shall be presumed to have an appreciable adverse effect on competition]

appreciable adverse effect on competition, as per section 3 (2) of the Act, they are per se void.[13].

In contrast to the conceptualisation of cartels, hub and spoke agreements involve both horizontal as well as vertical market players.[14] The focus is on the anti-competitive collusion between these differently situated market players. The rationale of treating such arrangements at par with cartels is to highlight their detrimental effect. The spokes are vertically situated in relation to the hub. However vis-à-vis each other the spokes are all horizontally situated. Further their decision pertaining to market sharing or price fixing *et al* is centralised in the hub. The hub thus facilitates the spokes to share information or collude. Consequently, the spokes don't have to come in contact with each other. They operate via the hub.[15] For instance in the Belgian Hub and Spoke cartels case involving pharmacy, perfumery and hygiene, the hub were the suppliers like Colgate-Palmolive, Beiersdorf, GSK, L'Oreal, Henkel, Procter & Gamble and Unilever.[16] On the other hand the spokes were the major retail chains who colluded with each of the suppliers. The collusion pertained to individual products of the suppliers. Accordingly, the regulators found evidence of the rim or an implicit agreement to fix prices.[17] Thus even though it is structurally different from a traditional cartel, the outcome is same. Consequently, competition law regulators across jurisdictions regard them as cartels.

[13] ibid [(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.]

[14] Jarod Bona, 'Hub-and-Spoke Antitrust Conspiracies and the Classic Case of Toys "R" Us v. FTC' (CPI Blogs -September 7, 2022) < https://www.competitionpolicyinternational.com/hub-and-spoke-antitrust-conspiracies-and-the-classic-case-of-toys-r-us-v-ftc-2/ > accessed 10 January 2023

[15] *Ibid.*

[16] Koen Platteau & Genevieve Borremans, 'Competition Authority settles hub and spoke cartel case' (*Lexology,* 16 June 2015) < https://www.lexology.com/commentary/competition-antitrust/belgium/simmons-simmons/competition-authority-settles-hub-and-spoke-cartel-case > accessed 10 February 2023

[17] *Ibid.*

As per the traditional competition law jurisprudence cartels are treated under *per se void rule*.[18] There is no presumption of pro-competitive effects in the case cartels. Hence it makes sense to treat hub and spoke arrangements as cartels. This ensures that hub and spoke cartels will face the same stringent treatment at par with traditional cartels.

Looking at the hub and spoke cartels through the lenses of the 'Amended' Act: A half-baked Indian experiment:

To begin with, the 2023 Amendment to the Act has not changed the narrative vis-à-vis cartel. Consequently, the narrative vis-à-vis hub and spoke cartel too remains equally problematic. For instance, notwithstanding the 2023 Amendment, the Act continues to define cartels in terms of horizontal agreements.[19] Further the amendment introduced to section 3 of the Act, is cosmetic. As discussed, above, cartels are *per se* void under section 3 of the Act. However, this statement is misleading. For a closer reading of the Act reveals that the Indian law on cartel is completely the opposite of the global trend. This is apparent from the provisions that form the core of the anti-cartel law in India. The first relevant provision which needs to be looked into is section 3 (1) of the Act. The emphasis is on the words '*appreciable adverse effect on competition within India*' in this part. Hence a cartel will be disallowed only if it has an appreciable adverse effect on competition. One can challenge this assertion since in section 3(3) it is clearly stated that cartels '*shall be presumed to have an appreciable adverse effect on competition*'. However, this presumption is rebuttable and the same is deduced from the usage of the word 'shall be presumed' in the said section.[20] Section 4 of the Indian Evidence Act 1872[21] defines 'shall presume' as:

[18] Dasgupta (n 9) 49
[19] The Act (n 1) s 2 (c).
[20] The Act (n 1).
[21] The scope of the applicability of the Indian Evidence Act, 1872 to the Competition Act, has been explained and detailed out by the CCI, via sub-regulation 2 and 3 of Regulation 41 of the the Competition Commission of India (General) Regulations, 2009.

> "*Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved*."[22]

This section embodies the principle of rebuttable presumption and the Indian courts have reiterated the same. For instance in the *Sodhi Transport Co* case,[23] the Supreme Court, explaining the concept of '*shall presume'*, declared that

> *"[t]he words 'shall presume' require the court to draw a presumption…unless the fact is disproved. They contain a rule of rebuttable presumption. These words i.e. 'shall presume' are being used in Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used…*"[24]

This statement unambiguously establishes that under the Act cartels are only presumed to have an adverse effect on competition. Hence, if a cartel can establish that it does not have any appreciable adverse effect on competition, it will be allowed. This is contrary to the jurisprudence that has developed in the leading jurisdictions on competition law. Neither Canada, nor USA or EU has given any room of manoeuvring to the cartels. They are primarily regarded as *per se void.* For instance, in *Socony –Vacuum Oil Co.* case, Justice Douglas, declared that

> "*…this Court has consistently and without deviation adhered to the principle that price fixing agreements are unlawful per se (emphasis applied) under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements are designed to eliminate or alleviate may be interposed as a defense*."[25]

In sharp contrast to this line of reasoning, the Act, as it stands, provides ample opportunity for the cartels to rebut the presumption of section 3 (3). And the same

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[22] The Indian Evidence Act, 1872, Section 4. "May presume".—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. "Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. "Conclusive proof".—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[23] Sodhi Transport Co. v State of U.P., AIR 1986 SC 1099; (1986) 2 SCC 486.

[24] *Ibid* 495 para 12.

[25] Socony-Vaccum Oil Co., Inc., et al v. United States, 310 US 150, 60 S. Ct. 811.

is to be found under section 19 (3) of the Act. As per the section 19 (3), the CCI, has to rely on the factors presented therein, while assessing cartels for appreciable adverse effect. There are six factors listed in section 19 (3) of which, post the 2023 Amendment to the Act, three and a half, are negative and two and a half are positive outcomes of an anti-competitive agreement. Further the CCI is given the discretion of either considering all or any one of the enumerated factors while deciding the question of appreciable adverse effect. This is evident from the words "the Commission shall have…due regard to all or any of the following factors" as used in section 19 (3). From the perspective of the cartel there is thus a huge space within which it can play around and defend its position. Accordingly a cartel can defend itself by showing a) that the said agreement does not create barriers to new entrants in the market or b) that the said agreement does not drive existing competitors out of the market or c) that the said agreement does not foreclose competition or d) that the said agreement accrues benefit to the consumers or e) that the said agreement leads to improvements in production or distribution of goods or provision of services or f) that the said agreement leads to promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.[26]

This reading of the Act leads to a clear conclusion that for hub and spoke cartels also, the same escape route is available. They too, like ordinary cartels, can use the defences available under section 19 (3) of the Act. Further the CCI can apply its discretion to accordingly let off a hub and spoke cartel. Thus, the reading of the Act, as explained above, clearly does not indicate that hub and spoke are to be treated as *per se void.* One can argue that the word '*or*' used in section 19 (3) need not be read as disjunctively. However, it still leaves room for ambiguity since the CCI is given the choice to consider any of the defences available under section 19 (3) of the Act. The long title of the Act, also does not resolve the ambiguity. It reads as:

> "*An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried*

[26] Dasgupta (n 9) 178.

on by other participants in markets, in India, and for matters connected therewith or incidental thereto."[27]

This long title indicates the objective of the Act and spells out the reasons for enactment viz. to promote competition, to protect consumer interests and to ensure that all anti-competitive practices are prevented. In the light of the same if section 3 (1) is read along with section 3(2), one can conclude that all agreements are to be prohibited '*which causes or is likely to cause an appreciable adverse effect on competition in India*' and thus void. And consequently, cartels of all kind including hub and spoke cartels are *per se void.* However, this reading of the Act and the anti-cartel provisions does not portray the complete picture. As per section 18 of the Act, the CCI's duty to '*protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India*' is *'[s]ubject to the provisions of this Act.*' And the 'provisions of this Act' includes section 19 (3). As explained above, section 19 (3) has to be read along with section 3. Thus, interpretation and application of section 3 (1) to section 3(3) is subject to CCI's discretion as per section 19 (3). And that takes us back to the argument stated above that cartels including hub and spokes are not *per se void* under the Act.[28] Herein it is important to emphasise that the 2023 Amendment to the Act has not changed the main text of either section 18 or section 3. In so far as section 18 is concerned, a proviso has been added which does not impact the interpretation of the said section, as discussed hereinabove. Hence the inference that has been deduced above from the reading together of section 3, section 18 and section 19, continues to hold notwithstanding the 2023 Amendment to the Act.

Further till date no guidelines or regulations on cartels have been issued which will help clarify CCI's stance vis-à-vis section 19 (3). The ambiguity pertaining to cartels is bound to affect India's ability to deal with hub and spoke cartels.

[27] The Act (n 1).

[28] The Act (n 2) [Section 18: Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.]

Further the issues vis-à-vis hub and spoke cartels are more complicated in the light of the provisions of the Act. As already explained the hub and spoke cartels involves a facilitator (the hub) who "*organizes collusion (the rim of the wheel or the rim) among upstream or downstream firms (the spokes) through vertical restraints."*[29] This understanding of hub and spoke cartel does not fit in with the definition of cartel as given in section 2 (c) of the Act. As explained above, the Act gives a very traditional understanding of cartel which includes only horizontal agreements. Hence unlike the situation in Canada USA or EU, under the Act it will be next to impossible to treat hub and spoke arrangements as cartels. On the other hand, like South Africa, in India the hub and spoke arrangement will be covered under section 3 (4) of the Act. For the same refers to "*[a]ny other agreement amongst enterprises or persons including but not restricted to agreement amongst enterprises or persons at different stages or levels of the production chain in different markets*…".[30] In case of a hub and spoke cartel, the undertakings are at different levels and stages of the production chain and in different markets. Even the addition of the proviso to section 3 (3), through the 2023 Amendment, will not led to a different outcome.

As per the said proviso "*an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part*"[31] of section 3(3) agreements, "*if it participates or intends to participate in the furtherance of such agreement*".[32] This proviso merely widens the ambit of section 3 (3) so as to include hub and spoke arrangements. It however does not impact the interpretational scheme of the Act viz. that cartels including hub and spoke are not *per se* void. For the 2023 Amendment to the Act has not brough about any theoretical changes to impact its interpretation vis-à-vis cartels. As pointe above, even the definition of cartel is retained without any amendment. Arguably thus, unlike the South African scenario, it makes no difference whether hub and spoke arrangement is treated as vertical restraint or cartel.

[29] Barak Orbach (n 6).
[30] The Act (n 1).
[31] The 2023 Amendment (n 3)
[32] *Ibid.*

Since, as explained above, all the anti-competitive agreements under section 3 are subject to the defences available under section 19 (3) of the Act. In the context of the South African Competition Act, both cartel as well as vertical agreements pertaining to resale price maintenance is prohibited.[33] In the Indian context both cartels as well as vertical agreements are presumed to be void. And the presumption is rebuttable. Thus, it really makes no difference whether we in India treat the hub and spoke arrangements as cartels or as vertical arrangements to fix resale price.

Nonetheless, the proviso to section 27 (b) gives an indication that within the Act, cartels are treated differently. As per the said proviso:

> "*in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent. of its turnover or income, as the case may be, for each year of the continuance of such agreement, whichever is higher.*"[34]

However, since this proviso deals with imposition of penalty, it does not help in terms of prosecuting cartels. For, as argued above, cartels including hub and spoke have the benefit of section 19 (3). The proviso only highlight that the cartels are problematic and that means even hub and spoke cartels, too will be amenable to the penalty provision.[35] The imposition of the penalty clearly reflects that cartels have detrimental effect on market and the same is also true for hub and spoke cartels. As discussed unlike any other anti-competitive agreements, cartels by nature are secretive. Hence detection of the same is further backed up by stringent penalty measures. For the stringency of the penalty is used to deter formation of cartels.[36] The hub and spoke arrangements, as discussed above, also have same features and hence are included in section 3 (3) of the Act. The detrimental effect

[33] DAF/COMP/WD(2019)93 (n 75)
[34] The Act (n 1)
[35] Dasgupta (n 9) 195-196
[36] OECD Reports, 'Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes 2002' <https://www.oecd.org/competition/cartels/1841891.pdf> accessed 12 February 2023

of cartel is also established through section 46 of the Act.[37] As per the section CCI has the authority to impose lesser penalty on the member of a cartel cooperating with the authorities. The cooperation has to be substantial and the member needs to disclose vital information enabling the regulator to detect cartel.

[37] The Act [46. (1) The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations, than leviable under this Act or the rules or the regulations made under this Act: Provided that lesser penalty shall not be imposed by the Commission in cases
where the report of investigation directed under section 26 has been received before making of such disclosure: Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section: Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to co-operate with the Commission till the completion of the proceedings before the Commission: Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings, —
(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or (b) had given false evidence; or (c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the contravention with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed. (2) The Commission may allow a producer, seller, distributor, trader or service provider included in the cartel, to withdraw its application for lesser penalty under this section, in such manner and within such time as may be specified by regulations. (3) Notwithstanding anything contained in sub-section (2), the Director General and the Commission shall be entitled to use for the purposes of this Act, any evidence submitted by a producer, seller, distributor, trader or service provider in its application for lesser penalty, except its admission. (4) Where during the course of the investigation, a producer, seller, distributor, trader or service provider who has disclosed a cartel under sub-section (1), makes a full, true and vital disclosure under sub-section (1) with respect to another cartel in which it is alleged to have violated section 3, which enables the Commission to form a prima facie opinion under sub-section (1) of section 26 that there exists another cartel, then the Commission may impose upon such producer, seller, distributor, trader or service provider a lesser penalty as may be specified by regulations…]

The said provision has been backed by CCI's Lesser Penalty Regulation 2009.[38] These two provisions viz section 27 (b) and section 46, read together with the 2009 regulation, makes it clear why inclusion of hub and spoke arrangements within section 3 (3) is justified. Since hub and spoke are equally secretive and difficult to detect, bringing them within the ambit of cartel provisions, is aimed at helping CCI to better investigate and prosecute them. For the same incentive available to the whistle blowers in the context of cartels will be there in case of hub and spoke cartels. Additionally, as noted above, hub and spoke cartels will now be amenable to penalty provision. Unfortunately, the ambiguity surrounding section 19 (3) negates the benefit that these two sections provide to the regulators. Such a negative impact on investigating and prosecuting of hub and spoke cartel is also due to the need to establish '*appreciable adverse effect on competition'*, as per section 3 (1) of the Act.[39]

In contrast to the Act, in the EU jurisprudence, cartels are *per se* regarded as having the object of restricting competition. Accordingly, they are not exempted from the application Article 101 clause 1 of TFEU by the *de minimis notice*.[40] As explained, under the Act however the effect on competition needs to be demonstrated even in case of cartels, as evident from section 3 (1). Notwithstanding the 2023 Amendment to the Act even in the case of hub and spoke cartels this requirement will be equally applicable. For, as explained above, the text of section 3 has not been changed by the 2023 Amendment. And thus the entire proceeding becomes cumbersome. Finally, even if one were to amend the

[38] THE COMPETITION COMMISSION OF INDIA NOTIFICATION, 'The Competition Commission of India (Lesser Penalty) Regulations, 2009' (New Delhi, 13 August 2009) <https://www.cci.gov.in/legal-framwork/regulations/6/0 > accessed 8 January 2023

[39] The Act (n 1)

[40] EUROPEAN COMMISSION, 'Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01)' [The Court of Justice has also clarified that an agreement which may affect trade between Member States and which has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition (2). This Notice therefore does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market.] (30 August 2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=en> accessed 6 January 2023

definition of cartel to include hub and spoke arrangements and resolve the ambiguity surrounding section 19 (3), it will not suffice. For it still does not resolve the problem relating to proving hub and spoke cartels. As seen in the context of Canada, USA and EU, they are still struggling to find the correct approach to prove hub and spoke cartels. Accordingly, CCI has to specify the tests that it will follow to prove hub and spoke cartels. Since, as noted above, cartels under the Act are regarded as having 'restrictions by effect'. Accordingly, the test to prove hub and spoke cartels needs clarification on the part of CCI. In terms of jurisprudence too CCI has not much to offer as will be seen in the next part.

III. Experiencing Hub and Spoke Cartels- The CCI tale

One of the first cases which resembled a hub and spoke cartel was *Jasper lnfotech Private Limited (Snapdeal) v M/s Kaff Appliances (India) Pvt. Ltd.*[41]. The allegation was that Snapdeal was colluding with the distributors of the manufacturer Kaff Kitchen appliances, to sell its goods online without it consent. Kaff objected to not only the sale but also the price at which they were being sold. Snapdeal countered by alleging that Kaff was forcing its distributors to stick to the high price or face consequences. For Kaff threatened to ban online sale of its product. It needs to be noted that Snapdeal is an online market place website where buyer and seller virtually meet to buy or sell. CCI treated it as a case of resale price restriction case under section 3 (4) (e) of the Act.[42]

The other case which again mimicked a hub and spoke arrangement was *Fx Enterprise Solutions India Pvt. Ltd. v Hyundai Motor India Limited*.[43] In the allegations it was stated that

> "*HMIL is responsible for price collusion amongst competitors through a series of "hub - and - spoke" arrangements. Informant-1 has alleged that HMIL perpetuates hub and spokes arrangement, wherein bilateral vertical agreements between supplier and dealers and horizontal agreements*

[41] Case No. 61 of 2014.
[42] Eeshan Mohapatra, 'Hub-and-spoke Cartels' (EPW, 8 January 2022) <https://www.epw.in/journal/2022/2/commentary/hub-and-spoke-cartels.html> accessed 7 January 2023
[43] Case Nos 36 & 82 of 2014.

> *between dealers through the role played by a common supplier, results in price collusion*."[44]

Herein too CCI treated it as case of vertical restraint under section 3 (4) (b), (d) and (e). Though an argument pertaining to hub and spoke arrangements was made, no discussion to that effect took place.[45] The other significant case that raised the concern of hub and spoke arrangements is the case of *Samir Agrawal v ANI Technologies Pvt. Ltd*.[46] (the Uber case). The allegations herein was that

> "*due to algorithmic pricing, riders are not able to negotiate fares with individual drivers for rides matched through App nor drivers are able to offer any discounts. Thus, the algorithm takes away the freedom of the riders and drivers to choose the other side on the basis of price competition and both have to accept the price set by the algorithm*."[47]

It was also pointed out that the drivers who are attached to Ola or Uber were not their employee but "*independent third party service providers*"[48]. Accordingly it was argued by the informant that "*Ola/Uber, act as 'Hub' where 'spokes' (competing drivers) collude on prices.*"[49]

According to the informant

> "*As Ola/Uber and its drivers do not share any agency/employee relationship, they do not function as single economic entity, and as such the cooperation between drivers orchestrated by Ola/Uber results in 'concerted action' under Section 3(3) (a) read with Section 3(1) of the Act*."[50]

Thus the informant tried to prove the existence of a hub and spoke cartels involving the app based companies and the drivers. However CCI did not accept this proposition as it held that

> "*For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first*

[44] *Ibid* para 7.
[45] *Ibid* para 48.
[46] Case no. 37 of 2018.
[47] *Ibid* para 5.
[48] *Ibid.*
[49] Case no. 37 of 2018 (n 77).
[50] *Ibid* para 7.

> *place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers*."[51]

CCI pointed to the fact that there was no evidence of any agreement "*between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators*."[52] In other words CCI highlighted the requirement of the rim that establishes the collusion between the spokes. In the absence of the rim there could not be a collusion established with Uber/Ola as the hub. At the maximum the vertical restraint between Uber and driver, on an individual basis, was visible.

However, CCI rejected allegations of both hub and spoke cartel as well as violation of section 3 (4) of the Act.[53] Though it is important to note that CCI's insistence on proof of rim via "*agreement, understanding or arrangement, demonstrating/indicating meeting of minds*"[54]appear to follow the trend as seen in Canada, USA and EU. However, it's too early to state with certainty as to the direction CCI will take in the case of hub and spoke cartels. In the Uber case the CCI has also failed to explain as in what way hub and spoke cartels can be read into the Act. Accordingly, no clarity was provided as to the applicability of section 3 (3) to hub and spoke scenario. Finally, it did not delve into the mismatch between the definition of cartel and the concept of hub and spoke arrangements. Thus, the Uber case does not further the Indian cause relating to hub and spoke cartels.

As of date the pointers on Indian approach to hub and spoke cartels thus needs to deduced from the CLRC's 2019 report[55] as well as the 52nd Report of the Standing Committee on Finance.[56] CLRC had recommended inclusion of:

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[51] *Ibid* para 15.
[52] *Ibid.*
[53] *Ibid* para 18.
[54] *Ibid.*
[55] Ministry of Corporate Affairs Government of India, 'Report Of Competition Law Review Committee' (New Delhi, 26 July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf > accessed 7 January 2023
[56]Ministry of Corporate Affairs, 'Fifty-Second Report Standing Committee On Finance (2022-2023) (SEVENTEENTH LOK SABHA) 'THE COMPETITION (AMENDMENT) BILL, 2022'' (New Delhi, 13 December 2022) <

> "*an explanation to Section 3(3) of the Competition Act to expressly cover 'hubs' and impute liability to such hubs based on the existing rebuttable presumption rule as envisaged under Section 3(3) and without any element of 'knowledge' or 'intention'.*"[57]

Accordingly in the Competition Amendment Bill 2022[58] an amendment had been proposed to section 3 (3). Thus, a proviso was proposed to be inserted to section 3 (3) which stated that:

> "*Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it actively participates in the furtherance of such agreement.*"[59]

However, the said recommendation of the CLRC and the said proviso to the Competition Amendment Bill, were debated and discussed by the Standing Committee on Finance. Various stakeholders presented their view. For instance, Federation of Indian Chambers of Commerce & Industry (hereinafter called FICCI) submitted that there should be clarity as to the evidence needed for regarding an arrangement as an hub and spoke cartel. They also submitted that for producers or sellers or retailers or any other "industry player" to be implicated for hub and spoke cartels there has to proof of intent or knowledge or actual participation in such arrangements.[60] On this submission the Ministry of Corporate Affairs observed that presumptions under section 3 (3) of the Act is rebuttable. This substantiates the concerns raised hereinabove as to the treatment of cartels under the Act. As per the Ministry, the trade players can thus rebut any finding of hub and spoke arrangements through evidence to the contrary. The representative of the Associated Chambers of Commerce and Industry of India also raised concern about the nature of evidence to be considered for determining

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https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf> accessed 9 May 2023

[57] Ministry of Corporate Affairs Government of India (n 102), 3.5

[58] Bill No. 185 of 2022, 'THE COMPETITION (AMENDMENT) BILL, 2022' (Lok Sabha, 5 August 2022) <https://prsindia.org/files/bills_acts/bills_parliament/2022/Competition%20(Amendment)%20Bill,%202022.pdf > accessed 9 January 2022.

[59] *Ibid.*

[60] Ministry of Corporate Affairs (n 103), 3.54.

a hub and spoke arrangements. Further they were not happy with the language of the proviso in the Competition Amendment Bill.[61]

Herein again the Ministry reiterated the fact that presumptions under section 3(3) of the Act is rebuttable. After considering the concerns and submission of all the stakeholders, the Finance Committee noted that

> *"that there is no clarity on the meaning of active participation in the agreement, which could potentially cover: (i) Entities merely providing intermediation services in digital markets, for instance online platforms; and (ii) Consortiums, industry association and trade unions that merely organise meetings without an agenda to share sensitive information*."[62]

Accordingly, it recommended change in the language of the proviso to section 3 (3). The 2023 Amendment Act thus has incorporated the recommendation of the Finance Committee by replacing the words active participation with intent to participate. However, as explained above, this change is cosmetic. It does not address the existing gaps. As noted above, treatment of cartels including hub and spoke has to be assessed on basis of their restraining object and not effect. Further the definition of cartels has to be amended to include arrangements mimicking hub and spoke. The amendment to section 3 (3) is thus a half-baked measure. For it continues to treat cartels at par with other anti-competitive agreements. As explained above, cartels are more detrimental to competition since they are difficult to detect. Hence, they need to be declared *per se void* without exception.

Unfortunately, section 3 (3) does not clearly address this issue. If hub and spoke cartels have to be dealt with effectively then the Act has to have more stringent provision for cartels in general. For hub and spoke cartels evinces the feature of cartels and the detection and investigation have to be across different level of markets. Hence if cartels are treated stringently through the *per se void rule,* then it will add teeth to the Act vis-à-vis cartels in general and hub and spoke cartels in particular. Finally, the CCI has to come up with clear policy statements on the issue of hub and spoke cartels. CCI's role is vital for its approach towards hub and spoke cartels will determine the fate of businesses as well as consumers. The more ambiguous the approach the more vulnerable is the consumers. However, if

[61] *Ibid*, 3.56.
[62] *Ibid*, 3.59.

the CCI decide to treat rimless arrangements as hub and spoke, that will put the business interest in peril. Importantly small enterprise will be burdened with the cost of litigation and may not be able to rebut the presumption of hub and spoke cartel. For instance, a small-scale manufacturer may have vertical arrangements across the board with different suppliers. And the suppliers have no tacit or explicit collusion amongst themselves. In case of any price escalation, on the part of all the suppliers, a rimless prosecution will burden this small-scale manufacturer to rebut the allegations of hub and spoke. This will disincentivize the small business enterprise and lead to market concentration. The same may not be beneficial to the consumer. Hence CCI needs to urgently come up with clear guidelines on the issue. In this regard the Canadian approach is worth looking into. As the guidelines on hub and spoke, issued by the Canadian competition bureau is more detailed and can be a good reference to start with. However, while doing so the interest of both traders as well as consumers needs to be factored in.

IV. Conclusion

The point that the author brings out is that within the Act, the existing provisions on cartels are ambiguous. For at one end there is lack of *per se void* approach towards cartels at the other end there are provisions on penalty and incentives for whistle blowers vis-à-vis cartels. Against this back ground, it will be difficult for the CCI to deal with hub and spoke cartels. The foremost reason for the same is the definition of cartels, as it exists does not cover hub and spoke arrangements. The hub and spoke cartels involve both vertical and horizontal arrangements, across different level of markets. The current definition only covers horizontal agreements. Thus, there is a conceptual impediment. Further the amended section 3, as discussed above, is still be subjected to the rebuttable presumption test, as per section 19 (3). Hence there are two-fold gaps within the Act while dealing with hub and spoke cartels. One is specific to hub and spoke cartels and the other is via-a-vis cartels in general. One at the conceptual level and the other at the level of enforcement. If the hub and spoke cartels are included within the definition of cartels still then there is the problem of section 19 (3). The rebuttable presumption rule vis-à-vis cartels means that hub and spoke arrangements, too can escape the consequences of the law. If the conceptual gap is filled in, and CCI is able to overcome the problem of section 19 (3), only then will there be a chance of prosecuting hub and spoke cartels. Else in its current form, the Act is not adequate

to deal with hub and spoke cartels. Hub and spoke cartels are now part of our competition law jurisprudence. They thus have to be dealt with through clear policy measures and fine tuning of the Act. Lessons from Canada, USA, EU and South Africa prove that its object is no lesser harmful than cartels in general. Hence the first step to effectively deal with hub and spoke cartels is to settle the test to assess an arrangement as hub and spoke. Apart from that the CCI also needs to come up with guidelines on the applicability of section 19 (3) of the Act. Finally, any proposed amendment to the Act ought to segregate the treatment of cartels from other anti-competitive agreements. Only then will the Indian experience on hub and spoke cartels will be at par with the other more mature competition law jurisdictions across the world.

Vol. 14 No. 2 ISSN: 0976-3570

Environmental Victimology in Indian Jurisprudence

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Abstract

In view of the varied kinds of emerging wrongs/crimes the legal injury suffered by an individual, community or non-human due to environmental crime is referred to as Environmental Victimology. This study aims to find out the development of environmental victimology in India, which means through this study the institutional response pertaining to protection of victims of environmental crime in India would be traced out. The present study is an attempt to find how has the Indian legislature and judiciary perceived a person or community who has suffered a legal injury due to environmental crime i.e. whether they are considered as victim as defined under sec. 2w(a) of the Criminal Procedure Code, 1973 or a victim under specific environmental legislations or a person whose fundamental right has been infringed thereby providing a remedy under the Indian Constitution. Finding the answer to the above questions raised would help in in determining the scope of environmental victimology in India.

Key words: Victimology, Crime, Victim, Environmental Victimology, Environmental Pollution

I. Introduction

The study of victim and victim rights has gained a considerable attention in the present era. The concept of victim and protection of victim's right has been well recognized by the legislature and the judiciary. The concept of victim and its related concepts do not require much introduction. Yet, with the development of science and technology, industrialization and globalization where the world is getting connected thereby making distance negligible in terms of trade, commerce and economics, the traditional victim typology divided basically into '*victim of crime*' and '*general victim*' needs a reconsideration. With the victim becoming

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an integral part of the criminal justice system the stereotypical view of victim seems to be incomplete. In general parlance a victim is understood to be a person or communities, who has/have suffered a legal injury because of an act or omission of some other person or agency. In view of the varied kinds of emerging wrongs/crimes the legal injury suffered by an individual, community or non-human due to environmental crime is referred to as Environmental Victimology.

This study aims to find out the development of environmental victimology in India, which means through this study the institutional response pertaining to protection of victims of environmental crime in India would be traced out. The present study is an attempt to find how has the Indian legislature and judiciary perceived a person or community who has suffered a legal injury due to environmental crime i.e. whether they are considered as victim as defined under sec. 2w(a) of the Criminal Procedure Code, 1973 or a victim under specific environmental legislations or a person whose fundamental right has been infringed thereby providing a remedy under the Indian Constitution. Finding the answer to the above questions raised would help in determine the scope of environmental victimology in India.

II. Definition of the Term 'Crime Victim'

Theoretically the term 'victim' or the phenomenology of 'victim of crime' can be traced back to the year 1937 when Benjamin Mendelsohn initiated the study of victims of crime and made the society acquainted with the term 'Victimology' in 1947, which generally refers to the scientific study of victims and victimization[2]. The study of victim and victimology later on was found in the writings of Von Hentig in the year 1948 in his book: 'The Criminal and his Victim'.[3] Historically, the term is said to be derived from the Latin term victim who was generally referred in the context of those individual or animals that were sacrificed before

[2] David Sarah Ben, 'Needed: Victim's Victimology, Victimology at the Transition From the 20th to the 21st Century, Essays in Honor of Hans Joachim Schneide, Shaker Verlag in cooperation with WSVP, WORLD SOCIETY OF VICTIMOLOGY PUBLISHING, MONCHENGLADBACH, 2000.

[3] David Sarah Ben, 'Needed: Victim's Victimology, Victimology at the Transition From the 20th to the 21st Century, Essays in Honor of Hans Joachim Schneide, Shaker Verlag in cooperation with WSVP, WORLD SOCIETY OF VICTIMOLOGY PUBLISHING, MONCHENGLADBACH, 2000.

the god/deity in order to please the god/deity.[4] Victim in a general sense pertains to a person who has been subjected to a loss, harm, injury or suffering which is recognized by law which means for which the law provides for a remedy, the condition being that the loss, harm, injury or suffering must have been caused by an act or omission of some other person or agency. Hans Joachim Schneider a German Criminologist has described a victim as either an individual or an organization, he moral order" or the legal system of a state which is threatened, harmed, or destroyed by an action[5].

There is a lack of standard definition of the term 'crime victim'. The word 'crime victim' represents generally a person who has been affected i.e. suffered a loss, injury, harm or damage due to the commission of an act which is defined in the criminal law of that country as an offence or crime i.e. a person who has been victimized due to a traditional/conventional crime.

The U.N. Declaration on Justice to Victims of Crimes and Victims of Abuse of Power, 1985 has defined the Victim as:

> "*'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power*.[6]"
>
> "*A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the*

[4] Ferguson Claire and Turvey Brent E., *Victimology: A Brief History with an Introduction to Forensic Victimology*, https://booksite.elsevier.com/samplechapters/9780123740892/Sample_Chapters/02~Chapter _1. pdf, (visited on May 23, 2022, at 3:30 PM).

[5] Lindgren Magnus And Nikolić-Ristanović Vesna, Crime Victims International And Serbian Perspective, Published by: Organization for Security and Cooperation in Europe, Mission to Serbia, Law Enforcement Department, Ch. 02: What is a Crime Victim?, ISBN 978-86-85207-75-4., I[st] ed., 2011, at pg. 19

[6] Resolutions adopted on the reports of the Third Committee, 40/34. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, https://www.unodc.org/pdf/rddb/CCPCJ/1985/A-RES-40-34.pdf, (visited on May 26, 2022, at 11:00AM).

> *victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization*."

This definition is an exhaustive definition encompassing not only an individual or collective group of person who have suffered harm, loss or infringement of fundamental rights through an act or omission which is in violation of criminal laws of the member states or laws proscribing criminal abuse of power but also, includes the immediate family or dependants of the direct victim who have suffered harm intervening to assist the victim in distress in the course of prevention of a person from victimization. This section considers a person harmed or who has suffered a loss or legal injury as a 'crime victim' irrespective of the fact whether there has been identification, prosecution or conviction of a perpetrator or not. The definition provided under this international instrument clearly specifies that, there has to be an criminal act or omission done resulting into a legal injury to a person individually or collective to be brought within the purview of the term 'crime victim'. So it is the act or the omission, through which a person is harmed or suffered the legal injury, which would be taken into consideration while determining whether that person is a victim of not, because if the act or the omission which resulted into the harm or the legal injury to the person does not fall within the definition of an offence/crime the victim would not be considered a 'crime victim'.

In Indian the Indian Penal Code, 1860 provides the different kinds of crime and its respective punishment, whereas, the Criminal Procedure Code, 1973 provides for the procedure for the trial of the criminal cases along with the jurisdiction and powers of the courts and other procedural matters related to trial of criminal case. There term 'crime victim' has not been specifically defined by any of the above criminal laws. The Criminal Procedure Code, 1973 defines the term 'victim' under section 2(wa) as:

> *"victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been*

charged and the expression "victim" includes his or her guardian or legal heir"[7].

This definition provided under section 2(wa) of the Criminal Procedure Code, 1973 is not specific but may be regarded as a general definition of the term victim, as reading the definition it is clear that to be a victim under this Act, one has to be a person who has suffered any loss or injury due to some act or omission for which some other person must have been charged and the guardian and legal heir of the direct victim may also be considered as a victim depending on the facts and circumstance so a particular case. The term accused person used within the section only gives a hint that this section talks about a crime victim as there is no direct use of the term crime, violation of criminal law or offence made in this provision.

On every occasion of discussion on the definition of victim generally and crime victim or any other type of victim specifically in the Indian context is interpreted by referring to the definition provided by the Criminal Procedure Code, 1973 and the definition provided under the provision of the U.N. Declaration on Justice to Victims of Crimes and Victims of Abuse of Power, 1985. Though the 'term 'crime victim' has not been categorically defined in either an international instrument or the criminal law of the country yet it cannot be said that due to lack of a specific definition of the term, the vicitm's of crime are not been provided adequate protection or justice. So, the term 'crime victim' is open to wide interpretation of the judiciary may be depending on the facts and circumstances of the case.

III. Victim of Environmental Crime in India

With the growing concern about the degradation of the environment and its protection the State's have made laws in order to appreciate what can and cannot be sustained, regulated and in certain circumstances are also proceeding, towards criminalization of environmental damage. The result of such concern was the 12th United Nations Congress on Crime Prevention and Criminal justice (2010)[8],

[7] Section 2(WA) of The Criminal Procedure Code, 1973; Ins. by Act 5 of 2009, s. 2 (w.e.f. 31-12-2009).

[8] Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, 19 April 2010, A/CONF 213/18, para 14 [Salvador Declaration]: We acknowledge the challenge posed by emerging forms of crime that have a significant impact on the

where it was acknowledged by the Member States of the International Community that the crimes evolving in the present era are posing a significant impact on the environment. Therefore, the Members States were called for to deliberate on this issue and share best practices. As environmental crime affects the society at large and the harm caused by such crime is not generally immediate and gets diffused therefore usually remains undetected for a long period of time. One of the major drawback of environmental crime is it is generally a "victimless" crime as the damages are assessed on the bases of harm caused to the environment and not specifically a person or individual. This is the reason that victims of environmental crime remains unrecognized and outside the purview of victimology. It therefore needs an analysis as to how the Indian judiciary has perceived the victims of environmental crime and whether they have been successful in protecting their rights irrespective of the harm done to the environment. This brings out another issue which needs a research is; whether a person harmed individually or collectively can be truly fall within the definition of victim of crime, knowing the fact that most of the environmental harm is state sanctioned.

IV. Legislative Protection of Victims of Environmental Crime in India

In India there are a number of central and state legislation which focuses of the diverse areas of environmental protection[9] with different aims and objective as per the requirement of the law yet, the ultimate goal of all these laws is to protect the environmental pollution and further the goals of sustainable development. A

environment. We encourage Member States to strengthen their national crime prevention and criminal justice legislation, policies and practices in this area. We invite Member States to enhance international cooperation, technical assistance and the sharing of best practices in this area. We invite the Commission on Crime Prevention and Criminal Justice, in coordination with the relevant United Nations bodies, to study the nature of the challenge and ways to deal with it effectively; Skinnider Eileen; The International Centre for Criminal Law, Reform and Criminal Justice Policy, Victims of Environmental Crime – Mapping the Issues; March 2011, www.icclr.law.ubc.ca.

[9] National Green Tribunal Act, 2010 • The Air Act, 1981 • The Water Act, 1974 • The Environment Protection Act, 1986 • The Wildlife Protection Act, 1972 • Hazardous Wastes (management, handling and trans-boundary) Rules, 2008 • The Forest Conservation Act, 1980, Public Liability Insurance Act, 1991 • Biological Diversity Act, 2002 • Noise Pollution (regulation and control) Act, 2000

brief overview of the legislative provisions dealing with the nature and objective of the few environment protection laws would provide a clear idea whether the legislature intends through enacting law on environment to protect only the environment or also providing remedy protecting the rights of the victim of environmental crime.

A. The Environment (Protection) Act, 1986

This Act is a general legislation. The major objective of this Act is to enable co-ordiantion of had been enacted to "enable co-ordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening environment and deterrent punishment to those who endanger human environment, safety and health"[10]. This Act is penal in nature as its provides under section 15 punsihment of five years and a fine which may be extended to one lakh rupees or with both for the failure to comply with or contravention of the provisions of this Act, or the rules made thereunder or any order or directions issued thereof. This Act further provides for additional fine of rupees Five thousand per day for the continuing violation. This Act provides penal provision for not only an individual who contravenes the provisions of this Act but also the companies and government departments[11].

B. National Green Tribunal Act, 2010

Having felt an "urgent need to establish a specialized agency to deal with the multidisciplinary matter related to environmental cases, and especially[12] in view of the mass disaster occurring due to manufacturing and handling of hazardous substance and applying the principles of strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environment Tribunal has been established through this Act. This agency aims at providing for effective and expeditious disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment". On going through the objective of this Act it can be claimed that by providing a separate institution to

[10] The Environment (Protection) Act, 1986; Statement of Objects and Reasons.
[11] Section 15, 16 and 17 of The Environment (Protection) Act, 1986.
[12] The National Green Tribunal Act, 2010 Statemnet of Objects and Reasons.

deal with matters of environment pollution somewhere the rights of the victim of environmental damage are being protected to a great extent. Yet on going through the powers provided to the tribunal constituted under this Act[13] it can be seen that the tribunal is empowered to order relief, compensation restitution of property or restitution of the environment of such area or areas as a remedy for the loss suffered due to the environmental damage. This makes it clear that the tribunal is not empowered to impose criminal liability as all the remedy for environmental degradation are civil in nature.

C. The Forest Conservation Act, 1980

The Forest Conservation Act, 1980 was enacted to check further deforestation recognizing the fact that deforestation and ecological deforestation has become a social evil and continuing deforestation and ecological imbalances needs to be prevented. Along with the other necessary laws for prevention of deforestation, the Act under Section 3A provided for penalty for contravention of the provisions of this Act, which is a mere punishment of fifteen days simple imprisonment. This criminal liability may be imposed of governmental authorities and departments also.

D. The Wild Life (Protection) Act, 1972

In view of the declining wild animals and birds; the rapid extinction of some wild animals and birds; and to improve the protection afforded to wild life in National Parks and Santuaries, the legislature enacted the Wild Life Protection Act, 1972. The major objectives of this Act were to constitute a Wild Life Advisory Board for each State; regulate hunting of wild animals and birds; lay down the procedure for declaring areas as Sanctuaries, National Parks, etc.; regulate possession, acquisition or transfer of, or trade in wild animals, animal articles and trophies and taxidermy thereof; and to provide penalties for contravention of the Act.

E. The Air (Prevention and Control of Pollution) Act, 1981

To combat the problems of air pollution caused due to increased industrialization and to provide an integrated approach to tackling the problems of environmental problems related to pollution, the Air (Prevention and Control of Pollution) Act has been enacted. This Act aims primarily for the proper implementation and

[13] Section 15, 16, 17 and 18 of the National Green Tribunal Act, 2010.

enforcement of anti-pollution laws and to evade ecological imbalance and its evil effects. Chapter VI of this Act provides under section 37, 38, 39, 40 and 41 provides for penal provisions for contravention of the various provisions of this Act imposing liability on individuals, companies and even government departments.

F. The Water (Prevention and Control of Pollution) Act, 1974

With the objective to prevent and control water pollution and for the maintenance or restoration of wholesomeness of water, the water (prevention and control of pollution) Act, 1974 was passed. In Chapter VII from section 44 to section 49 of this Act prescribes the punishment for the contravention of the various provisions of this Act, including the liability may be imposed on companies and government departments.

The major environmental legislations are penal in nature and have specifically prescribed punishment or fine or both as a measure of remedy for the violation of the provisions of those Acts, which clarifies that the intention of the legislature was to create a deterrence and provide remedy accordingly. In India compensation to the victim is a recognized form of remedy[14] and the courts have been empowered to award compensation to the victim for the loss or injury suffered. The fact remains that in India environmental crime has not been recognized as a crime specifically and for the degradation or pollution of environment the general trend is to file a case under Article 32 or 226 of the Constitution which provides either for a direction to be passed by the court to stop the pollution or take measures for its prevention or provide remedy in the form of compensation but hardly are the matters of environmental crime filed in the criminal courts seek punishment as the remedy for the crime committed.

[14] Section 357A of The Code of Criminal Procedure Code, 1973; 357. Order to pay compensation.
(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied- (a) ……..; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court; ……

V. Landmark Judicial Observation in Environmental Pollution Cases

The plethora of cases decided by the Indian judiciary fulfilling its constitutional obligation to protect the rights of people and provide them a clean and healthy environment establishes the fact that environmental law is now a most vital and expeditiously growing branch of law. The major development in the branch of environmental law in India is through judicial pronouncements rather than by the legislative action. The Courts have widened the scope of the laws protecting and controlling the environmental pollution by interpreting the laws comprehensively. Though the judiciary has contributed immensely in the protection, prevention and preservation of the environment yet there is a very negligible role of the court in imposing criminal liability in cases of environmental pollution cases despite the fact that most of the laws protecting the environment are penal in nature.

To find out the judicial outlook environmental crime it s essential to analyze certain landmark judgments related to environmental law. The Indian judiciary is always appreciated for its remarkable achievement in the protection of environment either by applying the law as it is or by filing the gap left by the legislature through formulation of new principles and doctrines for e.g. in the case of *M.C. Mehta v. Union of India*[15] the then Chief Justice Bhagwati; had remarked:

> "*we have to evolve new principles and lay down new norms, which could adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to constrict by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order*."[16]

This pronouncement by the then Chief Justice proves that protection from, preservation of and prevention of environment pollution and ecological imbalance was a issue of concern and the judiciary though its activism has upheld its duty to affirmatively in this regard.

Let us take the example of few landmark decisions of environmental degradation where the judiciary has failed to impose a criminal liability:

[15] A.I.R. 1996 S.C. 1466.
[16] A.I.R. 1996 S.C. 1466.

M. C. Mehta v. Union of India & Ors.[17]**:**

This case is related to a major leakage of oleum gass which occurred in one of the units of Shriram Foods and Fertilizer Industries. A large number of person comprising both of workman and public dead due to inhalation of this gas. Within two days of the first day there was another leakage from the same industry due to gas spill because of a minor hole in the gas tank. A quick response to this disaster was the order passed by the Delhi Administration under sub-section(1) of section 133 of the Code of Criminal Procedure Code, to cease work in this industry. The present Public Interest Litigation was filed Mr. MC Mehta under Article 32 of the Constitution seeking from the highest court of the land to order for the closure of the Industry and compensation for the aggrieved. The Hon'ble understanding the seriousness of the issue involved in the case and similar other cases evolved anew doctrine i.e. the rule of absolute liability.

The Bhopal Gas Tragedy Case[18]

This case is the result of the massive gas leakage caused in the MIC storage tank of one of the plant of Union Carbide Corporation situated in Bhopal, on the 2 and 3 December 1984. The Union Carbide Corporation was a New York company established in India holding 50.99% shares where the Insurance Corporation of India and Unit Trust of India held 22% of the company share. Therefore, the Indian Government was a joint tort-feasor. To compensate the victims of the gas disaster the Bhopal Gas Disaster (Processing of Claims) 1985 law was passed by the Indian Government. This was a measure to secure that the vicitims claims arising out of the disaster was decided speedily, effectively and equitably. In this case the constitutional validity of the Bhopal Gas Disaster (Processing of Claims) 1985 was challenged on various grounds. The court upheld the validity of the said Act and had affirmed that "The magnitude of the gas leak disaster in which hundreds lost their lives and thousands were maimed, not to speak of the damage to livestock, flora and fauna, business and property, is an eye opener."

[17] 1987 AIR 965.
[18] Cahran Lal Sahu v. Union of India & Ors. 1990 AIR 1480.

Municipal Corporation, Ratlam v. Shri Vardhichand & Ors.[19]

This is a case related to the fact that the residents of a residential locality had filed a case under Section 133 of the Criminal Procedure Code before the Sub-divisional Magistrate averring that the municipal corporation had failed to fulfill its primary objective of maintenance of sanitary facilities on the roads, public conveniences for slum dwellers, prevention of discharge from the nearby alcohol plant into the public streets etc. which was a statutory obligation of the corporation. Finding the facts true the Magistrate had ordered the Municipal Corporation to provide the basic amenities and to stop the nuisance and warned the corporation that failure to comply with the order would result into prosecution under section 188 of IPC. The order was challenged in the session court ad then upheld in the High Court which appeared as a special leave petition before the Apex Court, questioning whether a Court can by affirmative action compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost and on a time-bound basis? Therefore, this case which was initially a criminal case turned to be a case under the constitutional law questioning the power and jurisdiction of the courts. The beauty of this judgment lies in the fact that the court has agreed that under our judicial system is a beautiful system which is frequently a luxury and getting high quality justice only when parties can surmount the substantial barriers which this system erects. Therefore, the common man should not be driven to file public interest action but what needs to be done is to follow the do's and dont's found in the Directive Principles. The court in this case affirmed that:

> *"The officers in charge and even the elected representatives will have 115 to face the penalty of the law if what the Constitution and follow-up legislation direct them to do are defied or denied wrongfully. The wages of violation is punishment, corporate and personal"*[20]

M.C Mehta v. Union of India[21]

In this case, the court awarded "exemplary damages" due to the degradation caused to the environment by the hotel construction.

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[19] 1980 AIR 1622.
[20] 1980 AIR 1622; para 115.
[21] AIR 2002 SC 1515.

S Jagannath v. Union of India and Ors.[22]

The issue in this case was regarding a private commercial aquaculture of shrimps which was degrading the surrounding mangrove. The court ordered the closure of the commercial aquaculture of shrimps. The court used the "polluters pay" principle and ordered compensation tp be paid for the environmental damage caused.

M.C Mehta v. Union of India[23]

The degradation of the famous monument *Taj Mahal* was in question in this case. The court took a firm stand and ordered the industries to stop using industrial fuel and switch to natural fuel. Failing to do which, they were warned to relocate.

Deepak Nitrite v. State of Gujarat[24]

This case was a PIL regarding discharge of effluents in the river and causing water pollution. The court observed that committees need to be formed which would evaluate what is the extent of damage being caused and in case of victims what is the norm to be followed for compensation. The court again relied on the "polluters pay" principle.

Uttar Pradesh Pollution Control Board v. Mohan Meaking Ltd. And Ors.[25]

In this case, a company manufacturing liquor was accused of discharging effluents in the Gomti River beyond reasonable levels. The court states that cases of air and water pollution cannot be taken lightly. A message must be sent to the all people concerned. The people involved in such pollution through effluent discharge are not careful about the injury it is causing to public health as well as the environment. When it comes to company, every person in charge of the company would be liable for punishment.

In the other landmark judgments like *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh* (1985); *M.C Mehta v. Union of India* (Ganga case)1988; ***Indian Council for Enviro-Legal Action v. Union of India* (1996);** *Animal Welfare Board of India vs. A. Nagaraj and Ors. We find*

[22] (1997) 2 SCC 87.
[23] (1997) 2 SCC 353.
[24] (2004) 5 SCALE 612.
[25] [2000] 101 Comp Cas 278 (SC).

that PIL were being filed seeking compensation and passing of necessary orders and direction were filed and affirmed by the Courts.

VI. Conclusion

A question which arises in cases specially of environmental wrongs resulting into death of persons specifically and public in general, like in the case of Oleum Gas leak case and the Bhopal gas tragedy is; why is there no criminal case filed despite the fact that there are provision in the Indian Penal Code[26] dealing with public safety, health, nuisance and negligence which provides financial sanction, imprisonment or both as a form of remedy and being public nature of crime can be brought against the state too. There have been cases like in the case of *Sansar Chand v. State of Rajasthan*[27] where the court has made critical observations and displayed zero-tolerance for environmental offences yet in general environmental pollution cases the court fail to impose criminal liability. In the line of cases discussed above it can be concluded that, for environmental law cases the remedy seeked is generally under the Constitution of India though the application of Article 32 and 226 as a Public Interest Litigation contending the violation of the fundamental right to life and personal liberty guaranteed under Article 21; generally no criminal cases is filed for violation of the provisions of the environmental legislations basically under the Environment (Protection) Act, 1986 though it provides for punishment not only to individual but also companies and Government Departments; the victims of environmental crime are basically invisible in environmental jurisprudence in India, the basic motive of the legislature and the Judiciary being bound by the nature of remedy seeked before it is 'damage control' rather than creating deterrence for commission of such offences, though the law proposes stringent fines and imprisonment but that remain in oblivion. It is important with growing nature of environmental crimes and its effect on the environment and ecological balance that the public spirited

[26] Section 268 to-Section 294-A • Section 269-271- spread of infectious disease is a public nuisance and a crime • Section 277- to prevent water pollution • Section 290- Smoking in public is a crime • Section 426-Pollution caused by mischief • Section 430-Pollution caused by mischief • Section 431-Pollution caused by mischief • Section 432-Pollution caused by mischief.

[27] 2010 (10) SCC 604.

people, lawyers, academicians, the legislature and the judiciary try to take steps to impose criminal liability for the environmental offences committed, thereby creating deterrence in the minds of the environmental criminals and provide adequate remedy to the victims thereof. Hence, it can be concluded that the scope of environmental victimology in the criminal sense of the term ‘victim’ is yet to gain importance in the Indian environmental jurisprudence.

Crisis and Response of Indian Federalism-Assessing the Federalism through the Prism of Constitution and Democracy

Dr. Narender Nagarwal[1]

Abstract

"This research paper investigates the profound claim of India as nation having cooperative federalism. The most striking feature of Indian federalism is the concentration of power at the central level as well as the decentralization of certain powers to provincial units. Nehru envisioned a cooperative federalism for India's government structure, which postulates a multifaceted mechanism to maintain its territorial integrity as well as its democratic and plural character. The federal arrangement is constitutionally protected, and certain subjects, areas, and residuary powers are predominated by the union. The contentious issue of present discourse is whether India's cooperative federalism exists or lost its distinctiveness. The main task of this research paper is to examine how the politics has endangered the core tenets of Indian federalism thereby pushed the nation into totalitarian or majoritarian state. The massive abuse of the authorities, institutions and repeated dents to fiscal federalism are the area of concern. The main political battle is not about who is supreme-central government or regional government but whether Nehruvian model of cooperative federalism will survive or not. The regional government have been struggling to have equitable share in the resources, finance, and legislations. Many regional governments have steadily outspoken on the subject of undermining their power and central government authoritarianism. The tribulation journey of Indian federalism from cooperative to confrontationist poses serious questions about the future of Indian federalism and what would be the future of many territories, states, and centrally administered regions in India if this confrontationist approach continues. The primary base of the present research is to critically

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examine the political development of last few years and how these events have undermined the constitutional ethos apart from crisis of federalism"

Key Words: *Constitution of India, Democracy, Federalism, Secularism, Parliament, Cooperative Federalism, Asymmetrical Federalism.*

I. *Prologue*

Indian federalism rests upon multi-layered sovereignty-both centre and state shared their own autonomy in respective sphere.[2] Principally, the Indian state appears as a federal state if the Constitution of India is closely examined, because it is divided between the central government and regional governments, with the central government being given more authority.[3] India is not purely federal or unitary but a combination of both, observed Khosla (2012).[4] Indian federalism is regarded as *sui generis*, or unique in itself, since Indian federalism is not fully federal but a combination of unitary and centrist government with greater power for the central government, none of the established theories of federalism could account for this type of federalism. The writings of A.V. Dicey and K.C. Wheare were crucial in giving legal coverage for the growth of the concept of federalism in both classical and traditional terminology of federalism. They were rather the first to give federalism a legal foundation in constitutional law studies.[5] They have made it easier to discern between federation and confederation, a federal state and a unitary state, and the sovereignty of the federation and federating states according to their legalistic explanation of federalism.[6] Apologetically, the federalism theories promulgated by Dicey and Wheare remain futile to acknowledge the Indian variety of federalism due to irrefutable paradox and distinctiveness character of Indian federalism.

In State of Haryana v. State of Punjab, the Hon'ble Supreme Court used the word- semi-federal, which denote the Constitution of India is not purely federal

[2] TILLIN, LOUISE, INDIAN FEDERALISM, 10 (Oxford University Press 2019).
[3] Dharam Dutt v. Union of India (2004) 1 SCC 712
[4] KHOSLA, MADHAV, THE INDIAN CONSTITUTION, 75 (Oxford University Press, 2012).
[5] WHEARE, K.C, *FEDERAL GOVERNMENT* 67 (Oxford University Press, 2021).
[6] DICEY, A.V. , THE LAW OF THE CONSTITUTION 257 (Oxford University Press, 2013).

but a combination of both.[7] Again, in Shamsher Singh v. State of Punjab the constitution was called 'more unitary than federal' that mean Indian constitution doesn't fulfil the idealist characteristics of federalism.[8] Having its own uniqueness and differences, broadly speaking Indian Constitution is federal with limited power to regional government.[9] Moreover, federal structure can't be changed even by an amendment in the Constitution. India bestowed with commonly accepted features of the federalism-existence of two levels of governments and distribution of powers-legislative, executive and financial. Such unique mechanism is obvious as the country is large and heterogenous as many states have own history, culture, language and geography.[10] The constitutional structure has recognised the varied nature of the provinces; hence the idea of amicable federalism was first time mooted with providing the dual form of polity, administration and governance.[11] This arrangement has made India chiefly a federal nation, with loci of autonomous authorities. The multi-level governance, elected legislatures, independence of revenue and judicial system lead to label India a quasi-federal nation with predominance of union over states.[12]

In the recent time a deliberation among academics has erupted whether the Indian state rightly represents a federal state or a pure unitary state. Many scholars have termed the Indian brand of federalism as consensual federalism, multilayers federalism or centralised federalism. Though Indian federalism is sui generis and hard to define under the conventional explanation of federalism. To examine the deliberation, it would be desirable to revisit the constitutional assembly debates. The Constituent Assembly adopted and interpreted the

[7] AIR 2002.
[8] (AIR 1974) AIR 2192, 1975 SCR (1) 814.
[9] K. C. WHEARE, *FEDERAL GOVERNMENT* 64 (Oxford University Press, 2021).
[10] Singh, Surendar *Restructuring Indian Federalism-A New Perspective,* Vol-LXXV No. 2, THE INDIAN JOURNAL OF POLITICAL SCIENCE, , 2014, p. 359-360
[11] GRANVILLE AUSTIN, INDIAN CONSTITUTION-CORNERSTONE OF A NATION 233 (Oxford University Press, 2019).
[12] Bhim Singh v. Union of India, (2010) 5 SCC 538, Supreme Court held in this case that India primarily a federal nation with more power to union government and few power to regional governments.

federalism with strong central government in accordance with circumstances and requirements of post-partition period.[13]

After independence, India adopted the federalism to promote unity in diversity by balancing the competing forces of centripetal and centrifugal trends in order to achieve common national goals. Since the political structure of Indian Constitution is so unusual that it is impossible to describe in brief-what constitute Indian federalism. The regional governments are sovereign but to limited extent, foreign affairs, banking and defence are the subjects of central government but subjects like local administration, health, land, transport, law and order remain vested with the regional government. Interestingly, the central government despite clear demarcation of subject and area can make law on state list and even over-ride the law enacted by the state government.[14]

The Constitution of India unequivocally characterized India as a federal state with sufficient provisions that protect and preserve the interests of regional governments.[15] But many regional governments have registered their strong disagreement over the various issues wherein the central government failed to maintain the political balance and sometime overriding power preserve to regional government. It would be fair to state that Indian state is federal in theory but unitary in practical.[16]

II. *Understanding the Indian Federalism*

Classical federalism theories suggest division of power between central and provincial government so that both can work smoothly in their respective sphere. According to K.C. Wheare (Wheare 1967) federalism is nothing but upholding the principles of division of power within a sphere and both units work closely with coordination, cooperation and independently.[17] The term asymmetrical federalism a kind of exception to the classical federalism theory that suggests a unique type of union that grant special status to some federative units in the

[13] Constitutional Assembly Debates XI, 11, 950: T T Krishnamachari
[14] Article 246, Schedule-VII, Const. of India 1950
[15] M.P JAIN, INDIAN CONSTITUTIONAL LAW 529-530 (LexixNexis Pub, 2018).
[16] DR. DURGA DAS BASU, THE CONSTITUTION OF INDIA LECTURE SERIES 163, 2008.
[17] K. C. WHEARE, *FEDERAL GOVERNMENT* 67 (Oxford University Press, London 2021).

Constitution. Therefore, the question at hand is whether India may be included in the discourse of asymmetrical federalism? The answer would not be in affirmation, since merely granting special status to some provinces does not transform the state into an asymmetrical federal state, as vital doctrines of asymmetrical federalism i.e. cooperation, coordination, financial freedom and independence in governance are equally significant and can't be ignore. Though, Constitution of India has granted special status to few states but it is also a factual reality that their administrative structure, financial independence, and autonomous nature have been by and large administer by the central government.

The foremost example of asymmetry among centre-state ties was in the way how North East states govern as crucial power has been retained by the central government. Through the Article 371 of the Constitution and special legislation like AFSPA (Armed Forces Special Powers Act 1958) most of the powers have been exercised by the central government through the office of the Governor. Arunachal Pradesh, Assam, Nagaland, Manipur, Tripura, Sikkim, Mizoram, and Jammu and Kashmir are a few instances of states that are under the direct control of the central government.[18] The state of Jammu and Kashmir was permitted to have its own Constitution, as well as its own criminal procedure and penal code, until August 2019. After abrogation of Article 370, the special status was unilaterally removed, which sparked a political uproar in the nation.

If the Constitution of India grants special status to certain north eastern states, Kashmir, Puducherry or National Capital of Territory of Delhi it means the history, culture, geography and distinctive political character demands that special status to these regions. This idea of asymmetrical federalism not new as it has been implicit in the constitutional text and other literature on federalism.[19] A different treatment to certain region or territory is justified as

[18] AFSPA was put into effect in 1958, due to the rise in violence in the North East States, The Armed Forces Special Powers Act of 1958 was the name given to it. It is applicable throughout all of Nagaland, Assam, Manipur (with the exception of Imphal's seven assembly districts), and portions of Arunachal Pradesh. The Centre cancelled it in Meghalaya on April 1, 2018. The AFSPA previously applied to a 20 km stretch of the border between Assam and Meghalaya. The AFSPA was repealed by Tripura in 2015. The Act also covers Jammu and Kashmir.

[19] MICHAEL BURGES, COMPARATIVE FEDERALISM THEORY AND PRACTICE 67 (Routledge London, 2006).

asymmetrical federalism recognised formulation of separate policies on the matter of specific concern and it exists in all federation, Ronald Watts (2008) observed.[20] The basic ideals of asymmetrical federalism are to promote national cohesion, secularism, minorities rights and social justice, but impediments, usurping state power, and violations of the constitutional scheme of harmonious interactions have been substituted these ideals if we examine the Indian federalism through asymmetrical standpoint.[21]

The literature on India as an asymmetrical federalist nation is profoundly disputed. To substantiate this contentious discussion, recent events demonstrate how the Indian state is unable to join the asymmetrical federalism. The Jammu and Kashmir held special status until August 5, 2019, when Article 370 was repealed, and the whole administration was transferred to New Delhi. The revocation of Article 370 through a single legislative stroke was severely condemned by all leading constitutional experts that amplifying the idea of centralised federalism. The states like Sikkim, Nagaland, Mizoram and other north eastern states retain their distinct status but maximum directions come from Ministry of Home Affairs. Similarly, Puducherry and Delhi have their own legislative assembly, although other union territories such as Chandigarh, Daman and Diu, and Dadra and Nagar Haveli lack legislatures and are administered directly by the Ministry of Home Affairs. It may be noted that Puducherry and Delhi have legislatures but Lieutenant Governors have surpassed the constitutional limits and usurping the power of governance and administration of elected government of the both States. The case of Delhi is somewhat different because the national capital has all powers except police, land, and public order. As a limited state, Delhi has sole authority for education, commerce, health, water, transportation, and state bureaucracy.[22] However, with the central government usurping capital's powers in virtually every field of legislation, open disagreement and impasse have emerged in

[20] Watts, Ronald, *Comparing Federal System,* MONTREAL AND KINGSTON-INSTITUTE OF INTERGOVERNMENTAL RELATIONS, 2008, p. 144.
[21] Saxena, Rekha *Is India a Case of Asymmetrical Federalism*, ECONOMIC AND POLITICAL WEEKLY, Jan-Vol. 47 No. 2, (2012) pp.70-71, 73-75.
[22] M.P. SINGH, CONSTITUTION OF INDIA Article 239-A and 239-AA, 739-740 (Eastern Book Co. Lucknow, 2019).

almost every domain of legislation. This is diametrically opposed to the concept of asymmetrical federalism.[23]

III. Cooperative Federalism-Nehruvian Model of Governance

Nehru was well aware that only federalism could assure the nation's safety, security, and economic success, which is why he stressed for a strong centre with the policy of non-interference with provinces over local governance.[24] The Nehruvian model of federalism is nothing but promotion of unique model of governance based on the cooperation, harmony and national interest-it's a combination of two governments union and provincial level and both are agreed to work together to accomplish the agenda of development.[25] This was the mechanism earlier adopted by the British government and can be traced right from the Regulating Act-1773 which set up a system whereby the British administration supervised the work of East India Company but didn't take power for itself.[26]

Several legislative actions during the British period need to be investigated if we follow the evolution of the federal governance system in India. The Government of India Act 1919 (Montagu-Chelmsford Reforms) is one of the significant events of colonial India that led to conferring some rights and power to provincial governments however this system of dual governance called by 'dyarchy'.[27] The Nehru Committee 1928 (under the headship of Motilal Nehru) is another event that gave a federal solution by proposing to introduce dyarchy at the centre and to fully responsible government in the provinces. The salient features of the Nehru

[23] Ministry of Home Affairs, Govt. of India Notification Dt 21.05.2015 which give primacy to LG over posting and transfer of Delhi bureaucrats. Please visit, https://timesofindia.indiatimes.com/city/delhi/najeeb-jung-vs-arvind-kejriwal-lg-has-primacy-in-postings-and-transfers-of-officers-mha-notification-says/articleshow/47380244.cms

[24] *Constituent Assembly Debates*, Volume V, 20 August 1947.

[25] SAIFI, WASEEM AHMED, AUTONOMY OF A STATE IN A FEDERATION-A SPECIAL CASE OF JAMMU AND KASHMIR 32-36 (Springer Pub., 2021).

[26] MP Jain, *Nehru and Indian Federalism*, JOURNAL OF INDIAN LAW INSTITUTE, Oct-Dec 1977, p. 405.

[27] Sharma, Sumir, "*History of Constitution of India-Charter Act During Company Rules-1773-1858*", Independent Pub., 2018, p. 44

Committee 1928 were to give legislative, administrative and few financial powers to the provinces and this system can be term as arrangement of power through federal system of governance.[28]

he Government of India Act of 1935 was another remarkable legislation that provide a holistic canvas of the governance between union and provinces. The federal concept was unquestionably brought to India by the Government of India Act, 1935.[29] It considered both federalizing British India and integrating the princely states into the Indian federation.[30] However, the federal section of the Act was surrounded by several limitations, and many provincial governments and princely states were not allowed to exercise full autonomy.

After independence the idea of strong centre mooted by the Nehru was occasioned also by the circumstances in which it was taken. The need of strong central government was inevitable for handling the communal riots that preceded and accompanied partition. After the creation of Pakistan, the country was not in position to face another partition on the religion or language basis, hence strong centre was necessary to meet the various challenges.[31] Nehru was of the view that only a strong centre can handle the unprecedented situation arising out of the food crisis, problem of refugees, maintaining the national unity and promotion of social and economic development which had thwarted under colonial rule.[32]

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[28] ADITYA MUKHARJEE, INDIA SINCE INDEPENDENCE 42-43 (Penguin India Pub New Delhi-2008).

[29] *CAD Official Report* Vol-XI, 14.11.1949 , "A federal system of government was established for India by the Government of India Act, 1935. With the passage of this law, the dyarchy established by the GOI Act 1919 was abolished, and a Federation of India was established, consisting of the provinces of British India and part or all of the Princely states. The talks at the Third Round Table Conference, the White Paper of 1933, the reports of the Joint Select Committees, and the Simon Commission Report were the four primary sources from which the Government of India Act, 1935, drew its information."

[30] GRANVILLE AUSTIN, INDIAN CONSTITUTION-CORNERSTONE OF A NATION 259 (Oxford University Press, 2019).

[31] BIPIN CHANDRA, INDIAN AFTER INDEPENDENCE 63 (Penguin Pub New Delhi, 2008).

[32] Along with Nehru, Dr. Ambedkar too stressed for federalism stating that "Constitution is a Federal Constitution-The Union is not a confederacy of states... Neither are the states agents of the Union, deriving authority from it. The Constitution founded both the Union and the states, and each draw their separate authority from the Constitution. See Constituent *Assembly Debates*, Vol. VIII, 33.

Nehru believes that only federation can promote the economic prosperity by removing internal barriers to trade, through economies of scale, by establishing and industries.[33] While Nehru deeply believed that states were an integral part of India, yet, as the Chairman of the Constituent Assembly's Negotiating Committee, he made it clear to the states that it was entirely for them to join the Constituent Assembly, or accept or not to accept the scheme. According to him, "there can be no coercion, except, of course, the coercion or compulsion of events". He, however, hoped that sooner than later all the states would be represented in the Constituent Assembly, for the peoples of the states wanted to join the Assembly. Nehru thus adopted an indulgent attitude to give a sense of assurance to the provincial governments and princely state so as to persuade them to join the Constituent Assembly.[34] According to Ambedkar, the constitution has tried to minimize the conflict between the centre and states by clearly specifying the legislative powers of each. The overwhelming financial powers of the centre and the dependence of the states upon centre for grants to discharge their function place them under federalism as all disputes of allocation of revenue dealt by the finance commission under Article 280 of the Constitution of India.[35]

The first fifteen years of after independence under Nehru were marked by a democratically elected regime with comfortable majority coupled with consultation, cooperation, harmony, and idealism with state governments. The State Reorganisation Act 1956 under Nehru creating linguistic states accorded the demand that was being made vociferously and was a victory of popular will.[36] Five zonal councils were set up vide part III of the State Reorganisation Act 1956 with the object, in Nehru own words, to develop the habit of cooperative working. The Zonal Councils have so far met 105 times since their inception and also

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[33] Nehru while moving the Objective Resolution on 13th December 1946 and during a speech to meeting of the Negotiating Committee of the Chamber of Princes and State Assembly Committee, held on 08th August 1947, *Prasad Papers*, File11-C/46-7-8

[34] HM Rajshekhara, *Nehru and Indian Federalism*, INDIA JOURNAL OF POLITICAL SCIENCE, April-June 1994, p. 135-148

[35] Venkataramanan, K, "Explained: India's asymmetric federalism", *The Hindu,* August 11, 2019.

[36] The State Reorganisation Act 1956 come into effect on 1st November 1956, the Act was enacted by the Nehru Government after the recommendation of J. Fazal Ali Commission Report who recommended the creation of states on the linguistic formula, other members of commission were; K M Panicker and H N Kunjru.

develop the sense of togetherness among all regional governments. The Nehru period also witnessed some major development that strengthen the federal structure of the country and various issues were resolved through amicable means including inter-state water disputes. Many significant institutions were created during prime minister Nehru era and his term of office can be characterise an amicable federalism which was based on trust and cooperation. The Planning Commission was set up to promote rapid rise in the standard of living, economic stability and efficient exploitation of the resources. The National Development Council was created in 1952 with an aim to impart national character to the entire process of planning.[37]

IV. The Troubled Federalism-Indira to Manmohan

After Nehru's death, India was left without a strong leader capable of uniting the country. The country was seeking for a dynamic political figure, and Mrs Gandhi was the natural candidate to lead the country after the Nehru. Mrs. Gandhi also had pan-India acceptability and charismatic political image that is capable to defeat all opposition forces. The changing dynamics of Indian politics and some unsavoury development paved the way for Mrs. Indira Gandhi to establish herself a pan India national leader. The first ten years of Mrs. Gandhi were marked by a democratically elected regime with comfortable majority and acceptance in southern part of India. Taking the legacy of Nehru, Mrs. Gandhi too endorses the tenets of cooperative federalism that essentially implies working together.

After assuming the power, for Mrs. Gandhi, the year 1969 was the significant in the Indian political history as first time a collective voice of many state leaders emerged against the central government. The Bangalore's chief ministers' conference was the striking point, the chief ministers of Tamil Nadu, Andhra Pradesh, Karnataka, Kerala and Union Territory of Pondicherry raised the issue of step-motherly treatment by the central government. Though Kerala didn't accept the invitation of the Bangalore chief minister's conclave by the major opposition party of the state endorses the view of the conference. Most of the

[37] Nehru set up the National Development Council to strengthen and mobilize national efforts and resources for the plan, to promote common economic policies in all vital spheres, and to ensure that all parts of the country develop in an equal and rapid manner, the National Development Council was established on August 6, 1952.

leadership in southern India were dissatisfied with the issue of financial assistance provided by the central government. Their concern on agriculture issue and discriminatory tax policy formulated by the centre led the strong discontentment against the Indira led central government.[38] The conventional dispute of Centre-State relations, such as fiscal devolution and unfettered state autonomy without Central incursion in the functional areas of economic and social development, which had become part and parcel of perennial discourse since the 1960s, could no longer be pushed off as they had been under the umbrella of the Indira Gandhi government. The Indira led government at the Centre, as well as the overall political picture in the majority of states, shows a considerably closer resemblance to the picture that prevailed in the country during the 1967-71 phase than to the picture that prevailed during the 1971-77 phase.

Following the chief ministers' conference, the communist regime in Kerala, led by Namboodiripad, went to the extent of convene a national colloquium (Trivandrum, 1969), which culminated in the formation of an alternative national plan framework, which was then presented to the Central government. In Tamil Nadu, the only state where a regional party won a clear and secure majority, the new ruling party emphasized the issue of Centre-State relations, focusing on specific linguistic, cultural, economic, and political grievances against the Central government.[39] The appointment of the Rajamannar Committee by the Tamil Nadu government, with a remit to go into the question of Centre- State relations in its entirety, represented a landmark in the development of the debate on Centre-State relations in India.[40] Even so, during the first five years of Indira Gandhi's Prime Ministership, corresponding to the general weakness of the Congress at the

[38] TV Sathyamurthy, *Southern Chief Ministers Meeting*, Vol-18, No. 15, ECO. & POL. WEEKLY, April (1983), p. 576-579.

[39] *Ibid.*

[40] The Rajmannar Commission (1969) was constituted by the Tamil Nadu DMK government of the time, and it was presided over by Dr. P.V. Rajamannar. It was constituted to investigate the issue of what sort of relationship should exist between the states and the federal government. In 1971, the commission submitted its report. The report recommended that the VII schedule be revised and that the states be given additional power. The following are some of its other key recommendations: The immediate establishment of an Inter-State council, the permanent status of the Finance Commission, and the deletion of Articles 356, 357, and 365, which dealt with the President's rule, etc.

Centre, there was no great urgency in the controversies surrounding the federal relationship and its constitutional and political ramifications.

Federalism came under heavily pressure with the declaration of emergency in 1975 under the ominous conditions. Apart from damaging the federal structure, it also sowed the seeds of secessionist militant movement in different parts of the country. The harassment and torture to the political leaders pave the way to unseat the Congress government and the new Janata Party regime introduced various reforms. The 44th Amendment helped to mitigate the abuse of emergency provisions. By deleting the clauses which made the declaration and continuance of emergency by the President conclusive, it provided an opportunity for judicial review. The reference of *S R Bommai* v. *Union of India* judgement is desirable here how the supreme court restore the power of judicial review even in the case of proclamation of emergency.[41] In this background of simmering discontent among the opposition ruled state, in 1984 Mrs Gandhi constituted the Commission on Centre-State relations headed by Justice R. S. Sarkaria. The commission submitted its voluminous report in 1988. The noteworthy report provided many recommendations to maintain the harmonious relation between the centre and state and largely stresses on strengthen the federalism.[42] The unfortunate assassination of Mrs. Gandhi by Sikh militants in 1984 had ruined the implementation process of Sarkaria Commission recommendation.

Though critics says that Congress led government has weaken the federal structure as the party had ruled the country several years. However, it would be unfair to blame for the Congress for all centre-state discontentment. The party had

[41] S.R. Bommai v. Union of India, 1994 AIR 1918, 1994 SCC (3) 1.

[42] Roy, Jaytilak Guha (1990) The Indian Journal of Political Science, Vol. 51, No. 1, pp. 46-53, "The Sarkaria Commission Report made specific comments for decentralisation and state strengthening by proposing appropriate constitutional amendments, which are primarily still on paper today. Mrs. Indira Gandhi established a commission in 1983, headed by Justice R. S. Sarkaria, to look at the relationship between the federal government and the states and make recommendations. Dr. S.R. Sen and Shri B. Sivaraman were members of the commission. It was established to assess how well the current agreements between the Union and the States were functioning given the altered socioeconomic environment. The Commission examined and evaluated the operation of the existing arrangements between the two in terms of powers, functions, and obligations in all areas before making its recommendations. The recommendations have been highlighted by the supreme court such as the formation of an inter-state council, the appointment of a governor, and article 356, etc.

acknowledged the major fiasco and tried to resolve all outstanding disputes in an amicable manner. The resolution of Assam problem through Assam Accord 1988, militancy in Punjab, separatist movement in North-East region and special status to Jammu and Kashmir made the country into the comfortable situation.

V. Crisis of Indian Federalism-2014 and Beyond

The last three decades preceding 2014 had witnessed a troubled federalism, though various attempts were made to harmonise the centre-state relations with constitutional mechanism but period of post 2014 can be characterise a clean dismemberment of federalism from the Indian polity set-up. In order to contextualise this assessment, it would be worthwhile to examine the events in the political, judicial and administrative arena. The dismemberment hypothesis not just rhetoric but an evident assessment where cooperative federalism annulled and the nation has been pushed to totalitarian state which is being administered from the South Block. Evidently, the previous Congress governments retained its commitment to federalism; their efforts to revitalise the federal ethos and encourage mutual cooperation, social justice, and secularism through numerous legislations were significant. The ten years of the UPA regime (2004-2014) and the Rao period (1990-1995) displayed extraordinary trust between national and regional governments, that brought tremendous economic development in the states. This was the time when regional parties and civil society had a greater say in governance. Strikingly, the decisive victory of the BJP in 2014 and rise of Hindutva brought the curtain down on the accomplishments of previous governments that led to rupture of amiable constitutional federalism. Since 2014, the typical public discourse has been resounding with the triumphalism of a strong central government (thumping majority of the ruling party) on one hand and waning the regional government on the other hand. A robust central government doesn't mean a sheer mandate to pull apart the constitutional structure, muzzle the centre-state coordination, and jeopardize the opposition parties' governments in the provinces.

Various decisions of the central government in the period 2014 to 2022 have deteriorated not only the federalism but also the spirit of political negotiation, economic cooperation, social justice and secularism. In a federal structure of the nation-the national view is always different from the regional standpoint and the

central government should show a large heart to accommodate the aspirations of the regional governments. Unfortunately, various move of the central government has reinforced the notion that the current adminisation at the centre failed the appreciate the basic tenets of the federalism. Looking the present state of affairs, it would be rightly appropriate the C H Alexandrowicz (1954) who questioned India's claim of a federal nation.[43] The below mentioned details and account is a clear display lament on the defeat of Indian federalism.

A. Legislative Despotism

The period of 2014 to 2022 can be characterise the phase of legislative tyranny. This was the phase of clean break from an original republicanism and it is not just rhetoric but substantive legislative oppression was evident. The most vicious form of legislative oppression can be seen in the enactment of farm laws and approval of the recommendation of Fifth Delimitation Commission headed by Justice Ranjana Prakash Desai.[44] The farm laws have been withdrawn by the government after nationwide farmers agitation. The case of farm law was pretty inimitable, central government passed the three farm laws which are subject of State List Entry 14. Surprisingly, the parliament passed the laws with a single legislative stroke and no consultation was made with the states and farmers union. The Essential Commodities (Amendment) Act, 2020, the Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020, the Farmers Empowerment and Protection) Agreement on Price Assurance Act, 2020, and the Farm Services Act 2020 were enacted even the entire opposition demanded more debate and consultation.[45] The agricultural laws were finally withdrawn due to nationwide protest of farmers union. The international media had extensively reported how India's largest farmers movement have launched a massive public movement in the capital to repeal three agricultural laws which were not only unconstitutional

[43] Alexandrowicz CH, *Is India a Federation* INTL. & COMPARATIVE LAW QUARTERLY, p. 393.

[44] Justice Ranjana Prakash Desai appointed as fifth chairman of the Delimitation Commission, she assumed charge on 13th March 2020.

[45] The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020, The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020 and Essential Commodities (Amendment) Act, 2020introduced in 27th September 2020. These bills were promulgated hurriedly and all opposition parties boycotted the legislations but to no avail and finally government issued the notification that led to unprecedent farmers movement.

rather a sheer attempt to appropriating farmers crops, benefits and agriculture security, these laws were termed as draconian and anti-farmers; A formal guarantee on Minimum Support Prices (MSP) for agricultural crops was also demanded by the farmers' union and this demand yet to be met.

The issue of the delimitation commission's recommendation is quite peculiar as the recommendation has given undue to favour to Jammu region and legitimate concern of Kashmir have been sidelined. The central government appointed a delimitation commission to redraw legislative and parliamentary seats in the state of Jammu and Kashmir, which is now divided into three union territories: Jammu, Kashmir, and Laddakh.[46] The commission's proposals contain numerous problems, since all prominent political parties in Kashmir have expressed strong resistance to the findings and suggested measures for Kashmir. The commission has deceitfully treated Kashmir and many regions of the Kashmir transfer to Jammu and entire report ignored the legitimate claims of the Kashmir. It should be emphasised that the commission was formed during the legislative freeze on increasing or decreasing the number of assembly seats. The Supreme Court has yet to pronounce the legitimacy of Article 370 and whether the 2019 abrogation motion was in accordance with the spirit of the Indian Constitution. Furthermore, Section 63 of the Jammu and Kashmir Reorganisation Act 2019 forbids any changes till 2026.[47] The canonical federal principles explicitly indicate that the decisive approval for any law belonging to the state will be obtained from the elected bodies of the state legislatures. However, the elected body of Jammu and Kashmir will not be able to adopt or reject the regulations for their representation.

Another move that brought the country under intense international condemnation was the abrogation of Article 370 from Jammu and Kashmir. The government's disrespect for the set protocols of parliamentary process in the way the Jammu and Kashmir Reorganisation Bill 2019 was presented in the house was appalling.

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[46] The Jammu and Kashmir State (Reorganisation) Act 2019, notified on 09th August 2019.

[47] Sec. 63 states that "notwithstanding anything contained in sections 59 to 61, until the relevant figures for the first census taken after the year 2026 have been published, it shall not be necessary to readjust the division of successor Union territory of Jammu and Kashmir into Assembly and Parliamentary Constituencies and any reference to the "latest census figures" in this Part shall be construed as a reference to the 2011 census figures. The Jammu and Kashmir State (Reorganisation) Act 2019, notified on 09th August 2019.

The abrogation of Article 370 was unilateral, blatant, and undemocratic and the state of Jammu and Kashmir was divided by misinterpreting some of the Constitution's provisions is condemned by many prominent constitutional experts and lawyers. The provisions of the Instrument of Accession between the State of Jammu and Kashmir and India are recognised under Article 370 of the Constitution of India and it deserved to be honoured until it was amended, following due deliberation with all stakeholders of the state.

This move has also created strong apprehension amongst different states of India especially north east region that whether their autonomy, cultural identity and socio-economic interest are safe after 5th August 2019 development? There is apprehension among many states that same method may be adopted against other states of north east and southern state to implement the agenda of central government? On the line of state of Jammu and Kashmir, Mizoram, Nagaland, Arunachal Pradesh, Meghalaya and Sikkim also enjoy special protection under constitutional scheme. Hence, it would catastrophic if Mizo people of Mizoram state lost their autonomy through any arbitrary action from New Delhi. Similarly, Naga and Kuki community of Manipur are apprehensive about their democratic, cultural and ethnic identity as happened in Kashmir, New Delhi can take any decision disregarding the voice of the people.

The central government increasingly extending its hands on the subject in the State and Concurrent List is matter of deep concern as the balance of the Constitution is now turned on its head. The field of Concurrent List is area of common interest and the law enacted by the central government must confirm the interest of the regional government. Moreover, the area of State List is completely a prohibition zone for the central government subject to the rule that two and more state approached to the central government giving their consent to make the law. The Sarkaria Commission report rightly observed that if there is no coordination between the centre and state it will be a situation of legislative tyranny. The commission specifically recommended that there should be a coordination of policy or imbrication of jurisdiction through a process of mutual consultation and cooperation.[48]

[48] *Supra* note 44.

B. Emergence of Authoritarianism?

The period of 2014 to 2022 of Indian polity can be termed as authoritarianism in Indian political system. The current regime at the centre running the states through their representatives in states and the office of the Governor has been turned into party office of the ruling regime. The appointment of Governors in the state is purely a political position and their job is not to create hindrances but to facilitate the governance. As per the constitutional scheme the position of Governor is alike to President of India at the centre and he has to act at the aid and advise of the cabinet. This mechanism has been brought to ensure the no possibilities of the constitutional crisis and elected government is always accountable to the people. Last eight years of the governance at the centre has been unprecedented as the country had never witnessed the massive abuse of the office of the Governor and repeated attempt to sabotage and disruption of the governance, legislative assemblies and routine administration by the Governors.[49]

The governance and administration of many States are a pale imitation of the return of Viceroy Raj in India, as Governors control the state administration from the New Delhi, hence complete disregarding the mandate of the elected government and ethos of the federalism. The situation of Maharashtra Governor is amusing as the Governor administered the oath of chief minister to Devendra Fadanvis in the wee hours of 2020 in order to prevent larger alliance to form government.[50] It is noteworthy to mention that the Lieutenant Governors of Delhi and Puducherry sabotaged the governance and administration of the elected legislative bodies and it is unprecedented and nothing but mockery with the Constitution of India and Constitutionalism. A few months ago, the Governor of Rajasthan had refused to convene the assembly session as he was under apprehension that biggest alliance may form the government and that move will dwindle the prospects of opposition party to form government through horse-

[49] According to constitutional provisions, the Governors have no discretion over when to call the Assembly session. It should be noted that because our Constitution is based on a parliamentary democracy, the Governor may occasionally call a meeting of the Assembly at any time or place "he thinks fit"; however, he must do so in accordance with the Council of Ministers' advice. This is the authority of the Cabinet, according to Article 174 of our Constitution when and how to convene the Assembly session.

[50] https://www.hindustantimes.com/india-news/in-his-quiet-invite-governor-gave-to-fadnavis-14-days-to-prove-majority/story-Kk0MNRi4Q04xYNZGaugm7M.html.

trading.[51] Though, the opposition party lost the election but didn't lose the hope to form government through unconstitutional methods. This kind of situation has been prevailed in almost all states and office of the Governors were the instrumental in formation of the government in various states viz Madhya Pradesh, Goa, Karnataka, Meghalaya and Maharashtra.

Complexities of GST and Financial Concern of Provinces

The constitutional scheme grants the central government more revenue collection powers while the regional governments are tasked to undertake most of the development and welfare responsibilities. The sharing of revenue with the regional government is well documented under Article 268 to 281 of the Constitution. Considering the vitality of intergovernmental financial relation, the revenue subject assigned to both Parliament and legislatures as the matter is critical in a federal setup.[52] It is obligatory to the central government to share income tax, sharing of excise duties and also grant aid to the regional governments to meet their welfare and development programmes. The Indian constitution contain provisions for flexible and adaptive financial relationships that may be reviewed on a periodical basis in light of the experience of central resources and state demands. The state has sole jurisdiction over the taxes listed in the State List. The central government is entitled to the earnings of the Union List taxes. The Concurrent List includes no taxes. The overall tax structure of the country is such like central government play a big role in collection tax, levies, excise and other duties etc. It is also fact that centre is under obligation to meet the all kind of financial requirement of the regional government.[53]

The financial health of the regional government deteriorated when the central government introduced the GST (Goods and Service Tax) regime and implemented throughout the nation.[54] The revenue source of regional governments had deteriorated badly as a result of GST implementation abruptly**.** In the GST scheme (Constitutional Amendment Act of 101st of 2016) it has been

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[51] Mustafa, Faizan (2020), Deccan Chronicle, 28.12.2020. https://www.deccanchronicle.com/opinion/columnists/271220/by-not-letting-assembly-meet-did-arif-fulfil-governors-role.html.

[52] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 625 (Lexisnexis Pub, 2018).

[53] *Ibid.*

[54] Praveen Chakravarty, Heading for GST Exit, *The Indian Express*, New Delhi Ed. May, 12/2022.

specified the provision to reimburse states for revenue losses caused by the introduction of the GST. The GST was made possible by the states renouncing practically all of their authority to levy local-level indirect taxes and consenting to let the existing multiplicity of imposts be merged into the GST. While the States would receive the SGST (State GST) component of the GST as well as a share of the IGST (Integrated GST), it was agreed that revenue shortfalls caused by the transition to the new indirect tax regime would be made up from a pooled GST Compensation Fund for a five-year period ending in 2022. This corpus, in turn, is funded by a compensating cess charged on so-called "demerit" items. The shortfall is calculated annually by projecting a revenue assumption based on 14% compounded growth from the base year's (2015-2016) revenue and calculating the difference between that figure and the actual GST collections in that year, as specified in Section 7 of the GST (Compensation to States) Act, 2017. The revenue shortfall for the 2020-21 fiscal year is likely to be 3 lakh crore, with the Compensation Fund expected to have only around 65,000 crore from cess accruals and balance to pay the compensation to the States. The demand of various regional government that GST compensation cess regime be extended to another five years and central scheme fund should be raised seems logical as pandemic has severely hit their revenues.[55]

In August 2022, the many chief ministers of Indian states have expressed deep concern about dwindling state revenue in NITI Aayog meeting chaired by the prime minister.[56] Many regional governments sought higher or at least equitable share in the divisible pool of taxes and an extension of GST compensation but no positive response from the central government. The state financial capability further worsened when the central government introduced the Ujwal DISCOM Assurance Yojana, Waiver of Farm Loan and slowdown of the economy due to pandemic.

[55] Singh, Vivek & Karan Bhasin, *Variation in the GST experience of States may have a big message*, 16.11.2020, https://www.livemint.com/opinion/online-views/variations-in-the-gst-experience-of-states-may-have-a-big-message-11605536097609.html

[56] George, Verghese K, Renewing India's Federalism Pledge, *The Hindu*, New Delhi Ed. AuG. 10, 2022.

Administrative Hostilities over Centre-State Services

Escalation of hostility between centre-states over governance, administration, and central grants has been a major concern for the future of Indian federalism. The discriminatory and hostile treatment of the opposition party government has made the situation tense to explosive, resulting in unprecedented hostility between the centre relations. The whole idea of federalism lies on the cooperation and coordination but when hostility, aggression and discrimination replaced the former it would be the situation of annihilation of federalism. The recent trends in Indian politics demonstrate a new low of federal ethos and the hostility is somewhat of a paradox to the basic ideas of constitutional scheme of harmonious relation between centre and state. The earlier philosophy of cooperative federalism has been turned into confrontationist and reasons are many. This contradiction between centre-state relation can be considered an outcome of the most intense and conflictual relationships that exist in the Indian federal system.

In general, states avoid any resentment or annoyance to the centre because they are vulnerable and largely rely on the central assistance. On the other hand, the central government's superiority in parliament and discretion in grants make a farce of cooperative federalism and violate not only the constitutional scheme of harmonious relations but also the underlying concepts of federalism. The frequent centre-state skirmishes in the recent times can be identified as developing enmity and both are mutually hostile toward one another, yet their antagonism rarely reaches the point of conflict, since major power always vested with the central government.[57] The misuse of all-India service cadre bureaucracy for political gain, discrimination in aid, and abuse of central agencies against political opponents is the root cause of all hostility between the centre and the state. The proposed amendments to the Indian Administrative Service (IAS) Cadre Rules 1954 have triggered another round of tussle between central and state governments.[58]

[57] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 719 (LexisNexis Pub., 2018).

[58] The government recently proposed changing the cadre norms for central civil service officers. The proposed rules will give the central government complete authority over the transfer and posting of IAS, IPS, and IRS officers. The move will restrict the power of states to refuse to give over civil servants for central deputation. Furthermore, if a dispute emerges between the centre and states, the central government will make the final

A group of former civil servants termed the proposed amendments to the IAS service rules arbitrary, illogical, and unconstitutional.[59] These amendments will amount to interfere with the basic structure of the Constitution of India as a Union of States and can cause irreparable damage to the impartial, autonomous, and independent bureaucracy. These proposed amendments in the service rules would give unilateral powers to the central government to pick and choose any all-India service officers working in the states to be withdrawn from their services in the state of their allotment and brought to the Centre without the concurrence of either the officer concerned or of the state government. While this change in the rules may appear to be a minor, technical one, it, in fact, hits at the very core of the constitutional scheme of Indian federalism.

The proposed amendment has made mockery of the delicate federal balance that the all-India services are designed to maintain.[60] In the latest tragic tussle between Punjab Police and Delhi Police, the delicate federal structure of the Indian union has been exposed completely. When interstate police rivalry erupted and instead of extending support both were engaged in brawl, certainly such kind of situation is alarming for federal structure. In connection with a case registered in Punjab, the state Police landed in Delhi to arrest a prominent firebrand leader, but the Delhi Police, got released him enroute to Punjab disregarding the warrant and copy of the first information report of the state police.[61] Similarly, the Uttar Pradesh Police got released a news anchor under false pretence when the Chhattisgarh Police attempted to arrest him in Ghaziabad. There has never been an interstate police rivalry like this before.[62]

The primary argument of centre-state hostility is that the central government looks at the opposition governments in the different states as political rivals. If the opposition government allowed to continue in the State and the opposition party government complete its term, it would be a heightened risk of losing the

decision, and the states must follow it. Please visit: http://dopt.nic.in for further details about Department of Personnel and Training (DoPT) IAS (Cadre) Rules, 1954.

[59] Shetty, K Ashok Vardhan "Drop the IAC Cadre Rules Amendment" *The Hindu*, New Delhi, January 21, 2022

[60] The New Indian Express, New Delhi Ed. January 28, 2022.

[61] https://indianexpress.com/article/cities/delhi/tajinder-pal-singh-bagga-arrest-bjp-haryana-punjab-delhi-police-highway-drama-7904667/.

[62] https://timesofindia.indiatimes.com/city/noida/noida-police-detain-zee-news-anchor-over-doctored-video-of-rahul-gandhi/articleshow/92674628.cms.

parliamentary seats the upcoming parliamentary election, the central government apprehension. Since 2019 the nation has witnessed fall-apart of the various regional government or frequent changes in chief ministers and it became possible due to constructive support of central government. The main allegations of the regional government and opposition parties' leaders were-the central government has unleased all central agencies against their cabinet members and leaders for acute harassment led to collapse of their government. The heavy misuse of CBI, Income Tax and Enforcement Directorate has been unprecedented and these agencies were instrumental to form the choice government in the State. The central government had many tools at its disposal, but to choose to use these tools was strategic in the context of central-state relations. The central government has not used these tools against their allied partners or where their own government are ruling.[63]

The essence of cooperative federalism lies in consultation and dialogue. It is deeply concerning that how the central government has extended its hand at the domain of the state administration and disrupted their routine administration function. The case of Delhi Government tussle with the central government through the office of the Lieutenant Governor was the testament how ruthlessly the state power usurps by the central government that too unconstitutionally. How the central government rip the pieces of ACB (anti-corruption branch) which directly works under the Government of Delhi was unparallel. The central government deployed the paramilitary forces overnight and took over the control of entire administration of ACB in their own hand, it was unprecedented. Moreover, through a notification the ministry of home affairs almost robbed the entire administrative powers from the Government of Delhi shifted to office of the Lieutenant Governor. In this context, the Delhi High Court provides a relief to the Government of Delhi but central government challenged the verdict and the matter sub-judice since then.

VI. **Concluding Remarks**

It is clear that Indian federalism has been passing through one of its most critical phases. India adopted the federalism not by choice but under compulsion to be survived as multicultural, multi-ethnic, and multi-religious

[63] Chidambaram, P "My right to live without fear" *The Indian Express*, New Delhi Ed. August 28, 2022, p. 10

nation. Despite the array of differences amongst states the federalism have tied the nation together in complex ways. Hence, survival of federalism is critical for the survival of the nation. The Indian model of federalism protect the resentment, secularism, social justice and multiculturalism as discussed above in the Nehruvian model of federalism.[64] This research pape SubmitS few propositions; firstly, the legislative despotism of the union must end and states autonomy in legislation, supremacy of Constitution and rule of law must be restored. Certainly, it's an alarming situation as how the parliament enacted some contentious laws ramming the constitutional conventions pose serious threat to democracy, rule of law and Constitution. Secondly, the issues relating to fiscal federalism must be resolved amicably. After introduction of the GST, the financial state of the many States has been declined. The GST compensation must be release priority wise and recommendations of Finance Commission report should be executed judiciously keeping in view of population size, geography, and economic status of the States.

Furthermore, central government has restructured the sponsoring scheme of various centrally funded schemes and that causes undue financial burden on the regional government, and it should be pragmatic. Thirdly, the central government must withdraw the authoritarian views and avoid imposition of ultra-nationalism ideology on the States. The new paradigm from cooperative federalism to confrontationist is deeply concerning and poses a threat to very idea of India. Lastly, it would be desirable to highlight the track-record of judiciary how it has preserved the federalism. It may be noted that judiciary performance is not appreciable as the supreme court has remained unsuccessful to preserve federalism in some extent. Generally, courts are expected to defend the constitution in liberal democracies, whenever the action of the political class are excessive or undermine the constitutional principles, the judiciary are known to be first intervener through the power of judicial review. Unfortunately, the country has not witnessed rigorous and emphatic behaviour of the judiciary whenever there was an attack on constitutional principles.

[64] Mahwood Philip, *The Politics of Survival: Federal States in the Third World*, Vol 5(4), *INTL. POL SC. REV.,* 1984, pp. 521-531

Vol. 14 No. 2 ISSN: 0976-3570

Exploring the Socio-Legal Dimensions of Godmen Phenomena in India: A Gendered Analysis

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Abstract

This research paper delves into the complex and multifaceted phenomenon of Godmen in India and examines it through a gender lens. Godmen, also known as spiritual leaders or gurus, wield significant influence over their followers, often with implications for gender dynamics in society. This study aims to shed light on the socio-legal aspects of this phenomenon from a gender perspective, analyzing the role of these new religious formations in reinforcing or challenging gender norms and the legal challenges and implications of their actions. It also looks through the obligation of the state in contemporary times to provide safeguard to its citizens from the debilitating effects of these new religious movements.

Keywords: Godmen, Gender, Ethnography, Celibacy, Religious Socialization

I. Introduction

Religion as a social institution has adapted to the forces of modernity. It has metamorphosed into newer religious formations in tune with modern sensibilities. The rise and growth of new religious movements (NRMs) is attributed to structural and cultural change in society like rapid social change, moral ambiguity, value confusion, and communal dislocations. The emergence of new religious movements has gained significant traction, coinciding with a resurgence in societal interest in religion as a whole. New expressions of spirituality, religious institutions, and discussions infused with religious themes appear to be sprouting worldwide. These new religious movements have become a recognizable and established component of the religious landscape.

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These NRMs addressed the lacunae in the traditional religion. Historically, in traditional religions, men have predominantly occupied key leadership positions and have been responsible for performing religious rites and rituals. In contrast, women have typically been assigned lesser roles and have been excluded from positions of authority. Feminist writer Mary Daly has highlighted religion's central role in perpetuating patriarchy. Consequently, it is argued that religion exhibits androcentric tendencies, relegating women to passive roles within this institution. However, new religious movements offer women more empowering roles, avenues for self-transformation, and opportunities for constructing their identities. They provide an alternative source of authority and influence through unique beliefs, rituals, and symbols[3]. The inclusion of women in the religious sphere prompts fresh inquiries into gender roles. To explore this phenomenon, the researcher has opted to study the Brahma Kumaris movement, which stands as one of the most prominent movements in contemporary society. The choice of Brahma Kumaris for an in-depth analysis of gender dynamics in new religious movements is because the founder of BKs was a male: Dada Lekhraj. But subsequently, it has been led and managed mainly by females. Further, the Brahma Kumari is a new Hindu religious movement, showcasing a case of 'indigenous feminism'[4]. Brahma Kumaris aims to empower females not only through their preachings but also with their practices. New religious formations acquire significance as it provides a conduit to look at specific forms of human social behaviour and an expression of religious, social, and cultural dynamism[5].

Further, through an ethnographic study of religious socialization in NRMs like Brahma Kumaris, this paper examines how they promote the adoption of white or saffron uniforms for colourful clothing; life of celibate to married life; regimented and rigid schedules for their preferred food for satvic bhojan, and liberal individualized routines? Looking through the narratives of devotees, this paper seeks to highlight the impact of these bodily practices on the concerned individual

[3]STEPHEN J. HUNT, ALTERNATIVE RELIGIONS: A SOCIOLOGICAL INTRODUCTION 99-100 (Ashgate Publishing Ltd, Hampshire, U.K. 2003).

[4] LAWRENCE A. BABB, REDEMPTIVE ENCOUNTERS: THREE MODERN STYLES IN THE HINDU TRADITION (Delhi, Oxford University Press, 1987).

[5] GEORGE D. CHRYSSIDES, EXPLORING NEW RELIGIONS, 1 (London and New York, Cassell, 1st ed. 1999).

and the socio-legal impact of these practices on the life and rights of spouse and other family members.

II. Methodology

This ethnographic research is heavily rooted in fieldwork conducted over a span of two and a half years, focusing on the study of the Brahma Kumaris. Ethnography, as defined, is a dynamic practice that evolves in design as the study progresses. It involves prolonged, direct engagement with individuals within the context of their everyday lives utilizing a variety of methods including participant observation and conversation. It seeks to respect the intricate nature of the social world and aims to convey nuanced, sensitive, and credible narratives[6].

The choice of ethnography in this research is both a deliberate decision and a necessity. It is chosen with the belief that ethnography is ideally suited to capture the lived experiences and perspectives of devotees. Simultaneously, ethnography is a requirement because building meaningful relationships with devotees is essential to eliciting genuine information. Ethnographic methods are particularly advantageous when the objective is to understand the devotees' perspectives, as they firmly believe that their practice can only be comprehended through experience rather than mere intellectual understanding.

Throughout the research project, the researcher made three visits to the international headquarters of the Brahma Kumaris in Mt. Abu. Rajasthan. The initial visit lasted approximately 15 days the second about a month, and the final visit in 2017 extended for two months. These stays were made possible with the permission of the movement's leaders. On each occasion, the researcher required a recommendation letter from the local center to visit Mt. Abu, as staying at the headquarters without such a recommendation is not permitted. Given the necessity of participating in Brahma Kumaris Center activities, the researcher attended evening murli classes at their Agartala center, known as the Light House, over a period of two and a half years. The researcher also participated in the Shiv Chaturdashi Mela on the eve of Shiva Batri and a seven-day course at the Brahma Kumaris Center Light House Agartala Throughout the fieldwork spanning over, two and a half years, the researcher diligently maintained a daily field diary, recorded interviews, and took photographs. To preserve confidentiality, the term

[6] K. O'REILLY, ETHNOGRAPHIC METHODS 11 (London, Routledge, 2nd ed. 2011).

devotee' is used in this research article instead of individual names or organizational titles

The ethnography was conducted with a theoretical orientation rooted in symbolic interactionism and the social construction of reality. By actively participating observing, and engaging in discussions with movement members the researcher gained a deeper understanding of the faithful intentions of the Brahma Kumaris[7]. However, while engaging with New Religious Movements (NRMs), the researcher had to be mindful of what Wilson termed Sympathetic detachment[8] as a methodological challenge. This concept expects the researcher to maintain a safe and neutral distance from the movement, even if they may personally adhere to another faith. Achieving complete empathy and objectivity, although desirable, is often practically impossible[9]due to the researcher's social background and beliefs. One of the methodological challenges faced in this study aligns with those encountered by other scholars[10][11][12], which involve navigating hagiographical literature predominantly written from a devotional rather than academic perspective presenting a unique set of complexities.

III. Gendered Analysis of New Religious Formations

This section analyzes the roles and positions of women within new religious formations, exploring how gender norms and stereotypes are perpetuated or challenged within these contexts. The paradoxical experience of empowerment on the one hand and exploitation on the other hand is evident. Through an ethnographic study of Brahma Kumaris, it is revealed that there is a paradoxical situation. On the one hand, scholars point out that the indigenous feminism[13] of Brahma Kumaris empowers women; on the other hand, the spouse or other family

[7] FRANK WHALING, UNDERSTANDING THE BRAHMA KUMARIS (Pentagon Press, New Delhi 2013).
[8] BRYAN WILSON, RELIGION IN SOCIOLOGICAL PERSPECTIVE 13 (Oxford University Press, London 1981).
[9] FRANK WHALING, UNDERSTANDING THE BRAHMA KUMARIS 12 (Pentagon Press, New Delhi 2013).
[10] *Id.*
[11] JOHN WALLISS, THE BRAHMA KUMARIS AS A 'REFLEXIVE TRADITION': RESPONDING TO LATE MODERNITY (Motilal Banarsidas, New Delhi, 2007).
[12] BAAB, *supra* note 4.
[13] *Id.*

members suffer due to stringent life practices like celibacy, regimented and rigid schedules, etc. adopted by the members of Brahma Kumaris.

Researchers argue that the definition of feminism is not universally applicable to all women at all times because feminism is shaped by historical and cultural contexts. The paper emphasizes that religious worldviews and practices are influenced by cultural factors and are learned through religious socialization. Gender roles, appearance, and preferences within these religious movements are not sudden developments but result from ongoing socialization processes Devotees are prepared for participation in these new religious groups through consistent practice of codes of conduct and behavioral norms, which serve as a form of role-training.

Brahma Kumaris, according to Babb Lawrence has a distinct place in new religious movements because of its 'distinctly feminist colouring.'[14] It would be erroneous to assume that there is singular feminism. Kamla Bhasin and Nighat Said Khan argue that "There is, therefore, no specific abstract definition of feminism applicable to all women at all times. The definition does change because feminism is based on historically and culturally concrete reality and levels of consciousness, perceptions, and actions. Feminism can be different from one situation to another."[15]

Toeing the line further, Puttick writes, 'Female leadership in secular life is still relatively rare and contentious, despite the advances of feminism. Women have barely been acknowledged as possessing souls and capacity for spiritual growth, let alone allowed to achieve rank and status in religion'[16]. Besides, Brahma Kumaris, Mata Amritanandamayi, and Ananadamayi Ma are other movements which as Hunt mentions, 'provide women with more liberating roles, pathways to self-transformation and image construction, and furnish an alternative source of authority and power through distinctive beliefs, rituals, and symbols.'[17]

[14] *Id.* at 8.
[15] KAMALA BHASIN & NIGHAT SAID KHAN, SOME QUESTIONS ON FEMINISM AND ITS RELEVANCE IN SOUTH ASIA (Kali for Women, New Delhi 1993).
[16] INGA BÅRDSEN TØLLEFSEN & CHRISTIAN GIUDICE, FEMALE LEADERS IN NEW RELIGIOUS MOVEMENTS 15 (Palgrave, Switzerland 2017).
[17] HUNT, *supra* note 3, at 99-100.

IV. Embodiment of Faith

Commonly, society values the grihastha ashram (the householder stage) and views sexual activity as a fundamental human need. However, when New Religious Movements (NRMs) like the Brahma Kumaris advocate celibacy for the general population, it often encounter opposition. It is intriguing to observe how these newly emerging religious groups justify specific sets of rules and behaviors. These rules and behaviors become apparent through the physical practices of individuals within a particular religious community. Elias's seminal work is quite illustrative of the linkage of the code of conduct and behaviour on bodily practices and bodily habit. Through regular practice of code of conduct and behavior in new religious groups socialization takes place.

As per the worldview of the BKs, sexuality and power have a crucial connection. To be unfree is to be powerless; therefore, the secret of freedom is power.[18] The

[18]For more details refer Richard Musselwhite.2009. Possessing Knowledge: Organizational Boundaries Among the Brahma Kumaris. Unpublished PhD Thesis. University of North Carolina. Musselwhite.2009 outlines that as per BKs cosmology, 'The world creates itself a new approximately every 5,000 years after having deconstructed the previous world cycle' (2009: 4). Further, 'It moves through four stages of approximately 1250 years each, beginning with the Golden Age and proceeding through the Silver Age, Bronze Age, and Iron Age. There is also a fifth age. Between the end of the Iron Age and the start of a new Golden Age is a special transitional time called the Diamond Age. The Diamond Age is the time when God speaks and tells the children the truth about who God is, who they are as souls, and how the world works. During the Diamond Age, souls make efforts to purify themselves and earn their places in the Golden Age of the next world order' (ibid.:5). According to the Brahma Kumaris, 'when our current world cycle created itself approximately 5,000 years ago, the population of Earth stood at 900,000 human beings. These persons did not evolve over billions of years from more primitive life forms. At the beginning of each Golden Age, they descend from the spiritual world and are incarnated on the Earth as its inhabitants' (ibid.:9). The Brahma Kumaris' teachings about the world cycle, outlines Musselwhite , 'are important for understanding the organization's objectives. During the first quarter of each world cycle, only nine hundred thousand souls are incarnated on earth, including sixteen thousand who serve as leaders, and one hundred and eight who serve as royalty. These nine hundred thousand souls are the same souls who served in the same capacities during every previous world cycle, and who will serve in the same capacities during every future world cycle. These are the most royal, pure, and elite souls in existence. These nine hundred thousand souls are the only souls who reincarnate on earth throughout the cycle, and these are the only souls who—during these critical years just prior to the end of the world—are now remembering God, their true nature as deity souls, and the truth of the world cycle. The Brahma Kumaris are dedicated to identifying these original souls and helping them to

setback for women in this era is that they are powerless within the unjust social institutions. – 'worldly' families in which they are but the 'heel of the left foot' of man[19]. Sexuality binds both men and women to the world. Sexual intercourse also involves the expenditure and waste of vital power.

The BKs held that sexual intercourse is the root cause of women's inequality since the subordination of women began in history when sexual intercourse became a factor of human existence. For women, without the option of sanyas are trapped in worldly marriage. Thus women are not merely house-bound but they are bound absolutely to the world.

The BKs felt that sexual intercourse has nothing to do with love, since love for them is to love what the person is, i.e., a soul. Individuals are normally deceived by their undiscriminating physical eyes, instead of souls we see male and female body forms when we look at other persons. In the daily discourses, frequent reference is made to women being tortured by demands for sex, and in one of the movement's booklets it is asserted that people who look at each other with lust 'do not make love, but actually commit criminal assault on each other.'[20]

It's intriguing to examine the contrasting perceptions that emerge regarding dietary choices and the imposition of specific restrictions. Equally noteworthy is the process by which devotees rationalize substituting their preferred foods for those prescribed by New Religious Movements (NRMs). Within NRMs, daily routines encompass embodied practices, including dietary habits, clothing choices, and celibacy, among others, which devotees tend to internalize through socialization. Human biological drives naturally incline individuals toward certain desires, yet these NRMs do not address these biological urges directly. Instead, they channelise these impulses in specific ways through various mechanisms of socialization, establishing distinct parameters and restrictions that guide how individuals can think and act to channelise these biological urges effectively.

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remember their highest purpose in life, which is to guide humanity through the coming transformation and to lead them virtuously in the Golden Age to come'(ibid.:9).

[19] BABB, *supra* note 4, at 144.

[20] PRAJAPITA BRAMHA KUMARIS ISHWARIY VISHWA-VIDALAYA, PURITY AND BRAHMACHARYA AS SOLUTION OF OUR PROBLEMS 14 (Mount Abu, Rajasthan, 1976).

In Hinduism, food has always held a significant role in concepts of purity and pollution. Within the Brahma Kumaris, there is a prevalent belief that food serves as a vital source of spiritual vibration. One of the Brahma Kumaris devotees shared that, he does not have food cooked by others and doesn't lead a lavish lifestyle, and hardly attends any parties even if he does he does not take anything.[21] Yet another BKs devotee shared that, slowly she is trying to follow strictly the BKs philosophies and used to play songs while cooking as the teaching is that food should be prepared in remembrance of God. If the person who prepared the food does not follow this rule the people who have it will be influenced by his/her negative vibrations. That is why the BKs don't eat food prepared by other non-BKs.[22] A longstanding and surrendered devotee in BKs shared about the importance of 'food' and the three-dimensional approach – for a healthy heart, happy mind, and healthy body. So the three-dimension means – mental care, spiritual care, and physical care – all are integrated in this approach. We can heal the mind, body, and heart and every cell of the body can be healed through this approach of Raja Yoga meditation, and pure vegetarian diet, and pure sattvic exercise of staying soul-conscious throughout the day.[23] The practice of celibacy and food are also intricately linked to each other. A surrendered devotee at Shantivan, Mount Abu BKs center for over decades shared his views regarding the importance of pure food in the practice of celibacy. He said, 'On this earth, celibacy is very important in the life of a Raja Yogi. The foundation of new creation is purity – pure food, pure thoughts, pure actions – the more we have purity within us our mind is elevated – we have peace and content, and we can easily connect with the Supreme soul through meditation, and experience his power/energy. The main foundation of this Brahma Kumaris Ishvariya Vishvidyalay is celibacy. Celibacy can be explained in BKs terms in four ways – one to wake up at the pure time, to keep celibacy, to listen to the murlis which come through the mouth of Brahma and last have Brahma Bhoyan – to have clean and pure food prepared here; listen the great teaching of Shiva Baba through Brahma Baba; to meditate in Brahma time; and obey the disciplines then only we are fit to be called a BKs. if anyone follows these four things then their lives become happy and better. Because happiness and joy come from leading a pure

[21] Personal interview on 26.5.2016.
[22] Personal interview on 28.03.2017.
[23] Personal interview on 30.5.2016.

life or celibacy, the more we stay celibate love, humbleness, purity, and no attachment come but feel that all are our family. We become more loving and caring like our own family.[24]'

V. Gendered Analysis of Socio-Legal Impact Brahma Kumaris Practices

Brahma Kumaris radical practices like the adoption of white uniforms for colourful clothing; life of celibate to a married life; regimented and rigid schedules for their preferred food for satvic bhojan, and liberal individualized routines.

As Babb's has written about the daughter of a recently converted elderly couple who bluntly expressed her feelings saying that 'I am afraid of them' she expressed what seems to be a widespread feeling. He also noted in his study that most of the non-movement middle-class informants with whom he interacted about the BKs had negative attitudes[25]. Dada Lekhraj proclaimed the current human predicament as an urgent crisis. He asserted that the end was imminent, emphasizing that every remaining moment held tremendous significance, necessitating extreme measures for extraordinary times. In this brief timeframe, the only path to secure a place in heaven was through thorough self-purification of an exceptional nature. As a result, celibacy, once reserved exclusively for male ascetics or renunciants, became mandatory for both men and women in pursuit of true salvation. Many viewed this shift as eccentric or even worse. However, the Brahma Kumaris maintained that celibacy stood as the sole means for the transformation of the world. To quote one devotee's perspective, "if we really understand our heart and also purity which we sacrifice as a helping hand to god and whatever work we do is done through the firm mind or with pure mind. Look at any founder of a religion, they make purity as their foundation, for e.g., Gautama Buddha, though he was married when he left everything and accepted celibacy then only he was able to carry forward the religion. So if some huge transformation is to take place then there is a demand of purity. God is asking our help, asking us to remain pure in one birth to give us happiness for the next 21 births. To get something great we need to remain pure in this birth, it is like depositing money in a bank account. Previously, women were forced to marry but now in 2017, marriage is not given much importance or women can choose whether to marry or remain single.

[24] Personal interview on 31.5.2016.
[25] BABB, *supra* note 4, at 95.

Everyone is trying to make their destiny and career and remain content by themselves which can be said that the thought of purity is coming into the mind of many people. We are making our destiny and helping god by remaining pure and also living our life"[26] The Brahma Kumaris incorporated Hindu practices such as celibacy, abstinence from alcohol, and vegetarianism in a unique manner that often led to bewilderment and suspicion directed at them. Criticism of these practices emerged early in the history of the Brahma Kumaris. In the Sindhi community, where Dada Lekhraj initiated the Brahma Kumaris, instances occurred where husbands returned from business trips to discover that their wives had taken vows of chastity and were determined to transform their homes into places of worship. They expressed a desire to live with their husbands in a celibate manner, mirroring the asexual love attributed to deities like Lakshmi and Narayan. In such situations, opposition to the Brahma Kumaris often arose from the family members of their followers, as they perceived these changes as a departure from traditional norms. For example, one of the family member's predicament is reflected in his narrative while seeking help at the legal help website, "Sir, I have been married to my wife (almost 27 years). She started going to Brahmakumari's Ashram in 2014, I didn't then realise it's a cult organisation. I did not oppose initially and thought that it may be good for her to spend some time in religious activities/ social work. After she started going to Ashram, she started following and imposing those cult rules(a few given below) in the family. She was flexible initially but slowly has become very rigid in following these things and not ready to listen to any logic or apply her mind Started off with 'Not to eat food cooked by others' and then * Not to use onions and garlic in the food * Always take bath after you come from the toilet, no matter how many times you use toilet * Not to allow others touch food cooked by her or she will not eat that food(she prefers throwing it or giving it to someone) * Celibacy-No physical relationships, No romance, No physical contacts or whatsoever leading to romance * Always talking and preaching about Bhrahmakumari(BK) principles. * sitting for hours in dhyan and listening loud music related and given by them * Only watching peace of mind channel related to BK * Not reading Newspaper and other (other than BK literature) etc and not socializing with relatives *Strictly following schedule and work given by them * Visiting villages and even outstation centers and villages (spending days together without bothering for

[26] Personal interview on 2.4.2017.

family and home) * No hesitation in taking money and spending on all these activities * Not bothered about children / family *Always approaching all the relatives to convince them about BK and their philosophy *People eating non veg are Atyachari and Rakshas *She is very normal and happy, if somebody listens to her or she is with BK persons * She is not mad and beyond any psychiatric treatment * She has started preaching the same to anyone coming near her/ in contact. * Now, she has started saying we husband and wife are actually brother & sister by BK's principle * She will become Devi/Devta in next birth * She has surrendered completely and blindly following them/ 'BABA' and so on... I am frustrated due to this kind of life. I am not able to come out of this unimaginable situation. I have two grown-up children not yet married studying. They know everything and do not like this situation but are helpless and do care about their mother due to her health and emotional attachment. We are living separately in the same house. She is neither ready to compromise nor willing to leave the place. I am worried about my son's future and about my daughter's marriage. Why they should suffer, who have made no mistake? I must say that she is ready to do her duties partially as a mother and as a wife, i.e. to cook and maintain the house. This is what BK asks to follow. Is this the correct approach way to live in a family? I am doing my job and trying to maintain calm. Sometimes it becomes very difficult to manage as I cannot even share my feelings with other persons as I do not know, what to say and what others can do/advise in such a complicated matter not seeing any direct solution. Want to get out of it as soon as possible as it may affect my mental status and health. I don't know what to do. Is divorce a way out? Can I rope in Brahma Kumari Sanstha in a court case as they are the main culprit, although there is little to directly blame them since they got control over her mind and she is doing all this nonsense willingly and will confess it?"[27]

Article 25 of the Constitution of India guarantees the freedom of conscience, and the freedom to profess, practice, and propagate religion to all citizens. So, a person is entitled to follow the religious order of Bramha Kumari and follow the dictates of the religion. If a particular way of life has been prescribed by a religious order the followers are entitled to follow the way of life. It is apt to point out that the religious order proscribes sexual intercourse for the followers of this religious order. However sexual intercourse is considered necessary to preserve a marital tie. Thus a partner in the marriage has a right to restitution of conjugal rights

[27] (Sep. 22, 2023, 8:39 AM), https://www.kaanoon.com/legal-questions/63997/.

against the partner who has withdrawn from cohabitation without any justification for doing so. If we look at the penal law, Section 375 of the Indian Penal Code defines rape but provides an exemption to sexual intercourse or sexual acts by a man with his wife against her consent. So marital rape is not an offense. The feminists do not accept this position on marital rape and have challenged this legal position. Though there is no authoritative pronouncement declaring marital rape to be an offense the wind of change has started blowing to criminalise marital rape. From the traditional viewpoint, conjugal rights are seen as the adhesive that strengthens the marriage. But from the feminist perspective, conjugal rights are intrusive, unconstitutional, and in violation of basic human rights. Thus, the enforcement of the spouse's right to restore conjugal rights is considered a sort of personal liberty violation, and hence a violation of the partner's right to life and personal liberty under Article 21 of the Constitution of India. A husband aggrieved by the wife's refusal to cohabit with the husband for the reason of her having faith in a religious order can seek a matrimonial relief under the Hindu Marriage Act 1955. The Hindu Marriage Act 1955 under section 13(1)(vi) considers renouncing the world by entering into a religious order by a party to the Hindu Marriage a ground of divorce.

VI. Conclusion

Religion is a way of life intrinsically linked to the dignity of an individual. Every individual has freedom of religion under the constitution of India. Within the ambit of freedom of religion, a person has all incidental entitlements contemplated by the dictates of religion. A woman following the religious order of Bramhakumari is entitled to lead a way of life as prescribed by the religious order. She can eat and choose the attire she pleases or as it has been prescribed by the religious order. She cannot be compelled to cohabit with her husband against her wishes in the name of Law. Thus, the exclusion of the rights of the wife in favour of the husband in the name of the Right to Restitution of conjugal rights under the Hindu Marriage Act 1955 should not be allowed, as it infringes upon the fundamental freedom to practice and profess the wife's religion. The law should keep pace with the needs of the society. Section 375 of the Indian Penal Code should be amended and sexual intercourse with a wife against her consent should be criminalised. A woman entering the Bramhakumari faith and strictly following the religious order prescribed for the followers of Bramhakumari can be validly freed from a marital tie under the Hindu Marriage Act 1955 on the

ground that she has renounced the world. Female leadership in religious institutions like Bramhakumari and Mata Anandmayi will go a long way in women's liberation, empowerment, and their fullest enjoyment of freedom of religion and faith.

An Empirical Analysis of Police Perceptions about Role of Forensic Science in Crime Investigation

Shivkanya Kadam (Wadikar)[1]
Ankita R. Lokhande[2]

Abstract-

The objective of the present study was to find out importance of forensic science from the point of view of the investigating officers i.e., police. The police officers who are involved in the work of crime investigation in the city of Nagpur, Maharashtra, India were selected as a sample of the study. The data was collected by personally visiting randomly selected police stations and distributing the questionnaire to the investigating officers there at. In all total 152 participants data was collected and analysed. The results indicated that near about all the investigating officers were aware about forensic science and its utility in the process of crime investigation. Similarly, participants agreed with the fact that crime scene management plays very important role in the process of investigation.

Keywords: Police perspective, crime investigation, forensic science, importance, crime scene management.

I. Introduction

Crime is an indivisible part of every society. There is no society in the world without the existence of crime. Thus, the role of criminal justice system becomes very essential in eradicating the menace of crime from the society. In every system of government, a separate wing is constituted to deal with the problem of crime by name Criminal Justice System of that country. Criminal Justice System which not only includes the investigating agencies such as police and other enforcement agencies, but it also includes the judiciary and prison administration

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as well. After occurrence of any crime in the society, the first agency which came into motion is the police machinery. Therefore, upon receiving information as to crime occurrence, it is the duty of police officers being first responding officers to immediately reach at crime scene and take all necessary steps as required by the law. Such duties of police officers include-

- •Immediately reaching at crime scene and protecting the evidence present from contamination by securing crime scene.
- • Begin taking crime scene security measures by using barrier tape, official vehicles, or other means, as required.
- • Establish a crime scene security log to record any persons who enter or exit the crime scene and limit access to those who truly need it.
- • Prevent contamination of the scene with materials brought in after the crime has occurred.
- • Provide Assistance to the victims if required.
- • Search for and arrest the suspect if he is still thereon
- • Record statements of eyewitnesses and other witnesses. If possible, keep the witnesses separated to preserve their objectivity.
- • Seize the articles, weapons etc if present on the crime scene.
- • Document all movements, alterations, or changes made to the crime scene and pass this information to crime scene investigators.

II. What is Forensic Science?

The term "forensics" means 'the art or study of formal debate; argumentation.'[3] However, the word forensics now a day is used mostly in the area where assistance is provided by scientific community to the criminal justice system. Many dictionaries nowadays interchangeably use words "forensics" and "forensic science". The Oxford English Dictionary describes the phrase "forensic science" as "a mixed science".[4] As per this definition the early period of evolution of

[3] THE AMERICAN HERITAGE® DICTIONARY, 2020.
[4] OXFORD ENGLISH DICTIONARY, 2005.

forensic science could be called as a mixed science as there at science served justice by its application to the questions before the court.[5] Forensic science describes the science of associating people, places, and things involved in criminal activities; these scientific disciplines assist in investigating and adjudicating criminal and civil cases. The discipline divides neatly into halves, like the term that describes it. "Science" is the collection of systematic methodologies used to increasingly understand the physical world. The word "forensic" is derived from the Latin forum for "public."[6]

Forensic science is the application of the scientific method to legal questions. The laws themselves are enforced and upheld by the criminal justice system including federal, state, and local law enforcement agencies and the courts. The goal of the criminal justice system is the establishment of the guilt or innocence of a suspect or suspects accused of a crime.[7] The importance of forensic science to criminal law lies in its potential to supply vital information about how a crime was committed and who committed it. If the information survives the screening function of the rules of evidence, it can be accepted as evidence of a material fact in the ensuing trial.[8] The Forensic scientists are the agency which is a part of this criminal justice system but as it is endowed with function of assisting police in crime investigation, they are included in the wing of investigating agency.

"Forensic science is the scientific discipline which is directed to the recognition, identification, individualisation and evaluation of physical evidence by the application of principle and methods of natural sciences for the purpose of administration of criminal justice."[9] As per Oxford Advanced Learners Dictionary "investigation is an official examination of facts about a situation, an event, crime etc., to find out the truth about it or how it happened."

[5] Max M. Houck, J. A. (2010). Fundamentals of Forensic Science.
[6] OXFORD ENGLISH DICTIONARY, 2005.
[7], K. M. ELKINS, INTRODUCTION TO FORENSIC CHEMISTRY (First edition, 2018).
[8] STUART H. JAMES, J. J. FORENSIC SCIENCE- AN INTRODUCTION TO SCIENTIFIC AND INVESTIGATIVE TECHNIQUES (Fourth Edition ed. 2015).
[9] Nabar, B. S. (2002). Forensic science in crime investigation. Hyderabad: S.P.Gogia.

III. Types of Forensic Evidence

The evidences which are found at the crime scene can be generally classified into four categories i.e., physical evidence, transfer evidence, trace evidence, and pattern evidence. Physical evidence includes the objects which can be seen by physical observation and is able to provide the understanding as to commission of offence. Weapons, arms, ammunitions, substances used in crime commission are examples of physical evidence.

Transfer evidence is the second type of evidence which is exchanged between two objects as a result of contact. Trace evidence is the third category of evidence which exist in very small size like dust, soil, hair etc which can be transferred between two surfaces without being noticed. Pattern evidence is the fourth type of evidence which refers to evidence in which its distribution can be interpreted so as to ascertain its method of deposition as compared to evidence undergoing similar phenomena. This type of evidence can include fingerprint, footprint etc.[10] Forensic scientists examine firearms, tool marks, controlled substances, deoxyribonucleic acid (DNA), fire debris, questioned documents, fingerprint and footwear patterns, and bloodstain patterns etc. They provide information concerning the corpus delicti; reveal information about the modus operandi; link or rule out the connection of a suspect to a crime, crime scene, or victim; corroborate the statements of suspects, victims, and witnesses; identify the perpetrators and victims of crimes; and provide investigatory leads.[11]

The importance of forensic science is increasing day by day due to use of advanced technology by the offenders in commission of crime. Without use of scientific methods in crime investigation, it is highly impossible to resolve the mystery of the crime. The crime scene management is thus very important step in the process of crime investigation which involves scientific methods of handling the crime scene which further helps in effective investigation of crime. The proper identification, documentation, collection and preservation of physical evidence at a crime scene are the critical first steps in ensuring the integrity and admissibility

[10] Maras H. Marie, M. D. (2014). Forensic Science. New York: Springer Science+Business Media.

[11] *Ibid*.

of the physical evidence.[12] Judiciary is also considering forensic evidence as an essential type of evidence during trial. Since 99% of the investigations of criminal cases are done only by police officers,[13] it becomes very important to understand the factual knowledge and viewpoint of police personnel about usefulness of forensic science in crime investigation.

IV. Public Perceptions about Role of Forensic Science in Criminal Investigation

The role of forensic science in Indian criminal justice administration is still at a very basic stage or prohibitory in nature, even though since last few decades, a tremendous technological advancement in scientific era has been made. The Indian legal system and its allied subsidiaries need to be remoulded towards the achievement of result oriented forensic investigation and trial, so that speedy remedy and justice to victims of heinous crimes may be provided.[14] The orthodox attitudes, lack of implementation, lack of funds, lack of training staff, equipment and laboratories etc are the main causes behind poor knowledge of forensic science among society. Not only public even law enforcement agencies such as police lacking the knowledge of forensic science. Society knows it is useful, but they do not know its application.[15] In a study examining the criminal justice system of Bangladesh with a view to find out the scope for the application of forensic science, it is observed that it is a great challenge to utilize the scientific and physical evidence in administration of justice in Bangladesh. There are some shortcomings in the existing laws with respect to applicability of forensic science, so the traditional judicial mechanism is not in favour of giving much importance

[12]M. K. Fisher, *Crime Scene dynamics*. In A. M. Fisher, Forensic Evidence management from crime scene to courtroom (pp. 1-8). CRC Press, Taylor and Fracis Group 2018.
[13] Sithannan, V. (2014). Police Investigation- Powers, Tactics and Techniques. Online: eBooks2Go.
[14]D. S. Shali, *Applicability of Forensic Science in Criminal Justice System in India. Medico-Legal Desire Media and Publications*, MEDICO-LEGAL REPORTER, Inaugural Issue 2018.
[15] M.A.Avais, *Examining the role of forensic science for the investigative- solution of crimes.* Vol 44 (2) SINDH UNIVERSITY RESEARCH JOURNAL (Sci. series) 251-254 (2012).

to forensic evidence.[16] Forensic Science can also be used to protect the people from false prosecution.[17] In a study to find out public perceptions as to accuracy of forensic science techniques, it is observed that individuals in the United States hold a pessimistic view of the forensic science investigation process, believing that an error can occur about half of the time at each stage of the process.[18] The criminal justice system heavily relies on the results of the forensic examination of evidence collected at crime scenes, especially fingerprint and DNA evidence. The proper collection and submission of this evidence is crucial to the prosecution of a case and the identification of an individual.[19]The evidence collection if done by variety of individuals, from the first responding law enforcement personnel to the highly trained civilian lab/crime scene personnel then multiple handling by leaving lacunas affect badly to the case at trial. The study shows that there is a difference in the results and are dependent on who does the evidence collection. The trained Crime Scene Investigators will give the best results.[20] Thus, it can be said that involvement of Forensic analysis can help in resolving crime mysteries by scientific way. It is high time that we realize the full potential of forensic science and crime scene investigation. The Forensic science labs and law enforcement agencies if provided with the necessary resources and funds to implement the latest technology in solving cases then we can say that we are moving towards reaching the goal of crime free society.[21] The role of forensic science in criminal investigation though corroborative in nature but is proved to be very helpful in dispensation of criminal justice in many influential and complicated matters. The police machinery being indivisible part of criminal investigation, it becomes necessary to find out their opinions as to their requirements with respect to forensic science. Therefore, to check and analyse the

[16] Ali, *A. Role of forensic science in criminal justice: Bangladesh Perspective*. Vol.2, No.1 SOUTHEAST UNIVERSITY JOURNAL OF ARTS AND SOCIAL SCIENCES, (2017).
[17], A. K. Uzabakiriho, *The role of forensic science in crime investigation in Rwanda*, Vol 3(5), RESEARCH JOURNAL OF FORENSIC SCIENCES, (2015).
[18]M. C. Jacob kaplan, *Public beliefs about the accuracy and importance of forensic evidence in United States*, SSRN ELECTRONIC JOURNAL (2019).
[19] L, P. Police Chiefs/Sheriffs' *Views on Varying Forensic Response*, Vol. 4 Issue 1, JOURNAL OF FORENSIC SCIENCES & CRIMINOLOGY (2016).
[20] *Ibid.*
[21] V. Rathod, *Role of forensic science laboratory in investigation of crime*, JOURNAL OF CRIMINOLOGY & FORENSIC STUDIES (2018).

knowledge and requirements of investigative agencies with respect forensic science the present study is carried out.

V. Material and Method

It is an empirical study based on primary data collected with the help of survey questionnaire method of data collection. This study was conducted on sample of 152 police officers belonging to different police stations in Nagpur city, Maharashtra State, India. The multistage random sampling technique is used for sampling of data. With respect to jurisdiction of police stations, the city of Nagpur is divided into Five Zones. Each zone contains six police stations except zone V wherein eight police stations are there. It means in totality 32 police stations and a cyber-cell is there in Nagpur. So, researcher randomly selected minimum two (2) and maximum three (3) police stations from each zone i.e., in total 14 police stations were selected for the survey. Then the police officers were also selected from amongst the officers involved in the process of investigation by using simple random sampling technique. The officers having rank above constable to Inspector were taken as a sample of the study. The sample is selected in such a way that all possible officers who work on crime scene should be covered in variety. The opinion-based data is collected by distributing structured questionnaire to the sample population and data required is collected accordingly. The collected data further tabulated with the help of MS Excel. The software advanced Excel is used to analyse and graphically represent the data results.

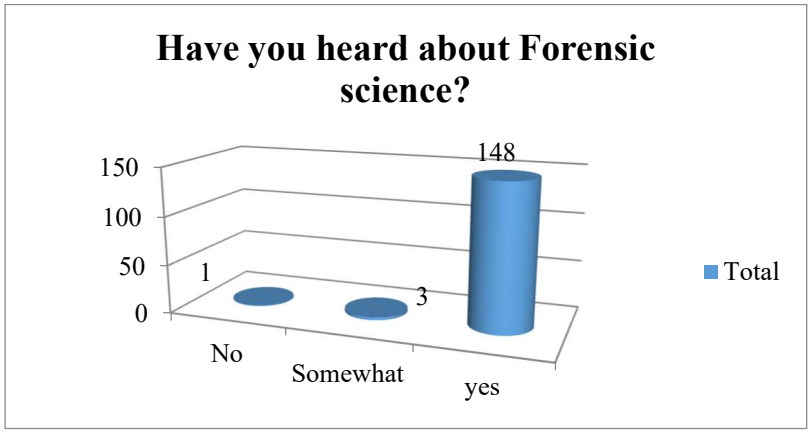
VI. Result and discussion

A. Knowledge of Police Officers about Forensic Science

For analysing the knowledge of police officers about the forensic science the basic question was asked to the sample population. Figure 1.1 provides the data regarding overall knowledge of police officers about forensic science.

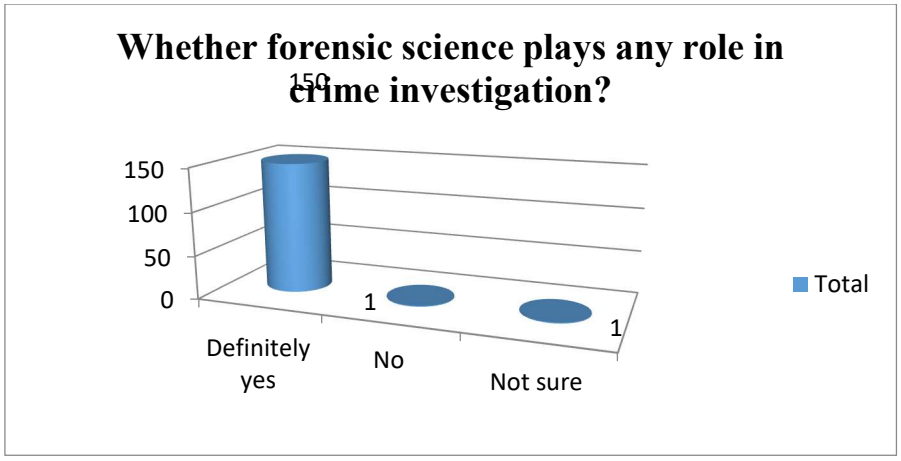
From the information provided in Figure 1.1 it came to know that 97% police officers are having knowledge about forensic science whereas only 1% officers are unknown as to what exactly forensic science is. It means that most of the people working in the process of crime investigation know about forensic science.

Figure 1.1- Knowledge about forensic science



Source: Primary Data

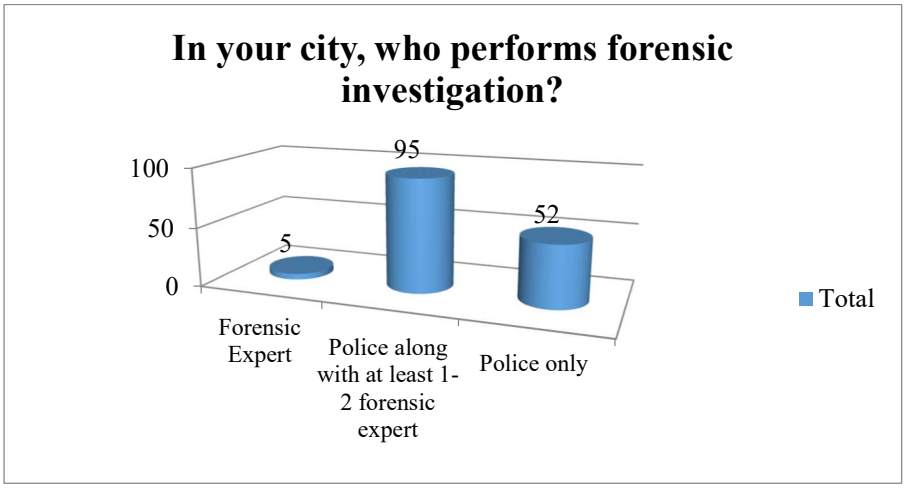
Figure 1.2- Opinion as to role of forensic science in crime investigation



Source: Primary Data

The opinions of police officers as to role of forensic science in crime investigation were shown in Fig 1.2. According to the numbers, 99% of the population affirmed that forensic science plays important role in crime investigation. To assess the practical information about investigative procedure questions were asked to participant.

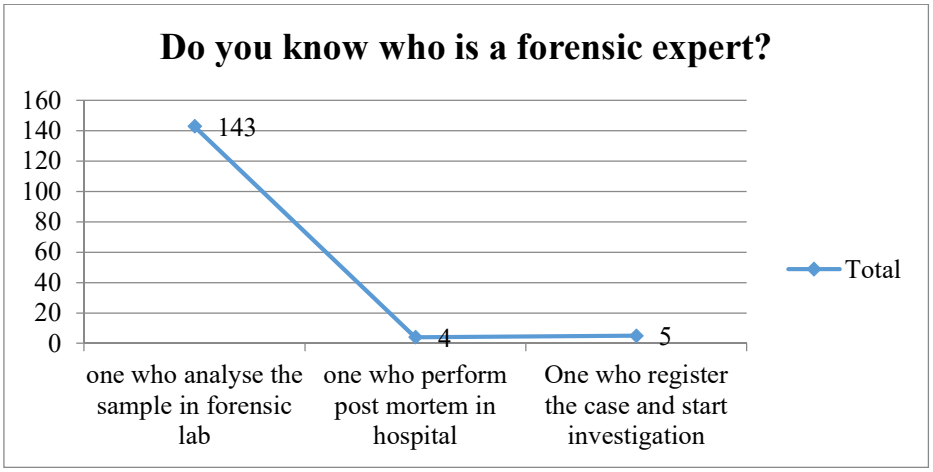
Figure 1.3- Knowledge about forensic investigation



Source: Primary Data

Fig 1.3 indicates that in city of Nagpur as a sample, near about 34% of the police opined that forensic investigation of crime scene is performed by Police only. Whereas 64% stated that police officers accompany forensic investigators at the crime scene. The figures revealed that still in many cases the management of crime scene is done by police personnel only.

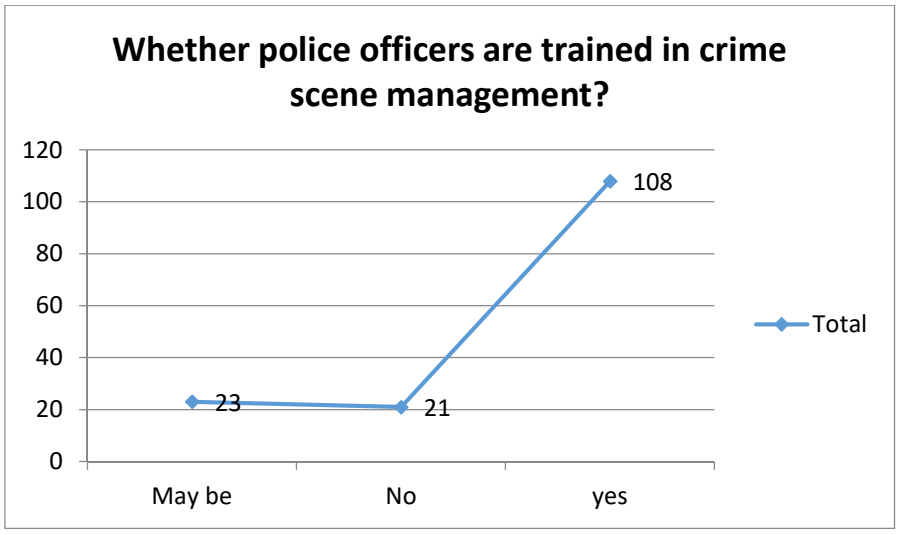
Figure 1.4- Knowledge about Forensic Experts



Source: Primary Data

For analysing whether police officers having knowledge when asked about who forensic experts is, 94% of the population answered one who analyse the sample in forensic lab whereas 3% answered that one who does post-mortem and 3% as one who register the case and start investigation. From Fig 1.4 it become crystal clear that majority of the population know about the forensic experts and what role a forensic expert performs.

Figure 1.5- Does police officers provided with Training in crime scene management



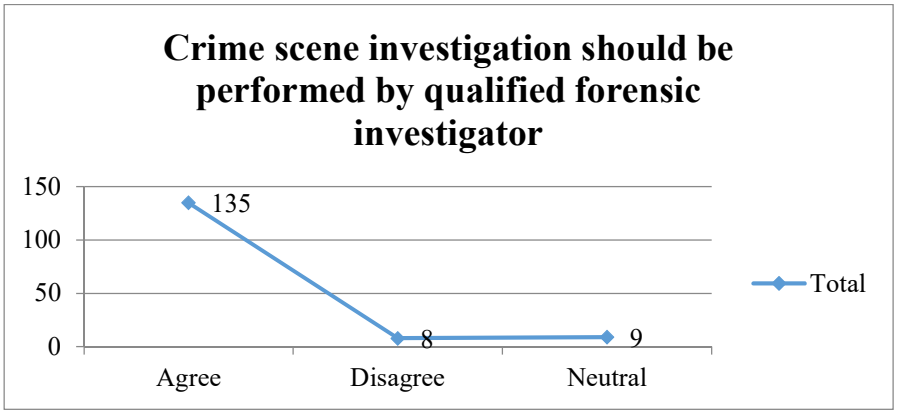
Source: Primary Data

In furtherance of this while answering question as to whether they get any training as to crime scene management or not, 71% participants voted in favour, 14% voted against whereas 15% voted for sometimes they get training (Fig 1.5).

B. Opinion as to investigation of crime scene-

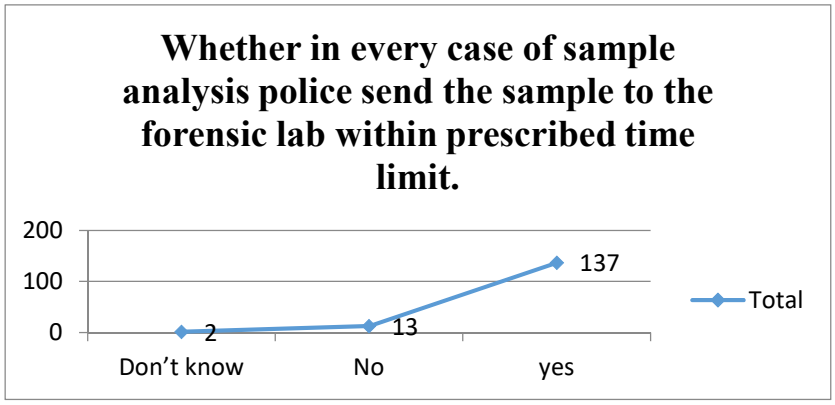
In above point the information as to forensic science and the knowledge of police officers about forensic science is analysed. As we came to know that in many cases crime scene investigation is performed by police, the opinions of the police officers were analysed for knowing their viewpoint as to crime scene investigation. Out of the total sample assessed, majority of the population opined that crime scene investigation should be performed by qualified forensic investigator whereas 5% are disagree and 6% are neutral with it (Fig 2.1)

Figure 2.1- Opinion as to investigation of crime scene



Source: Primary Data

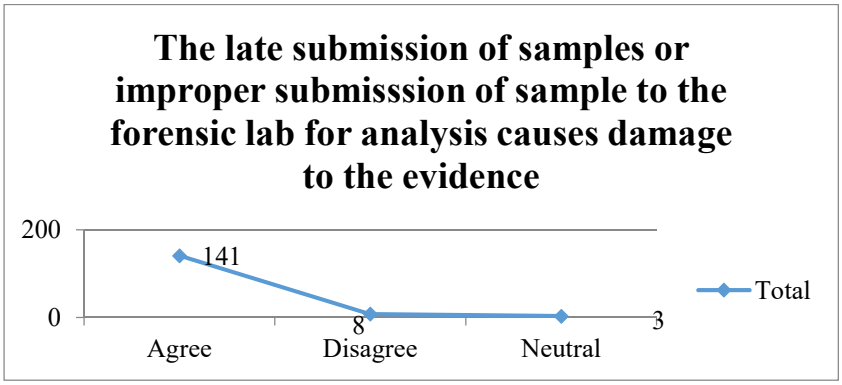
Figure 2.2- Opinion as to timely sending of sample for analysis to FSL



Source: Primary Data

Also, majority of the population knew that late or improper submission of sample may cause damage to the sample and in turn is prejudicial to the crime investigation (Fig 2.3)

Figure 2.3- Opinion as to effect of late submission of sample to FSL

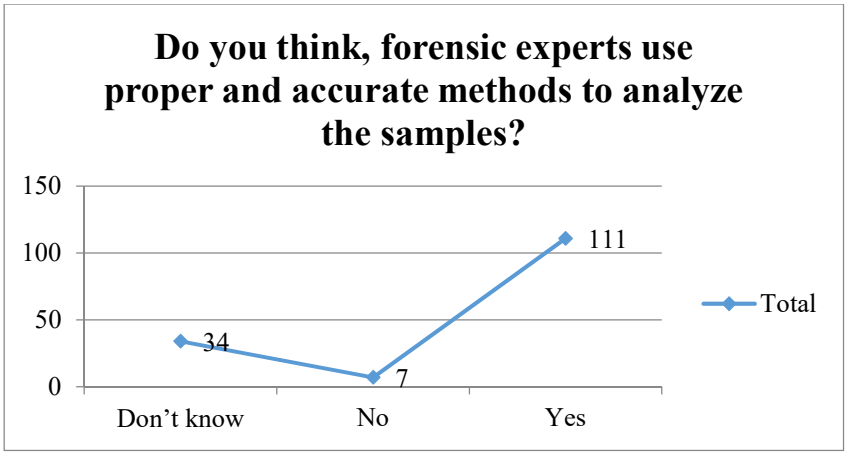


Source: Primary Data

C. Testing efficiency of forensic laboratories-

So as to analyse opinions as to working efficiency of forensic science laboratories (FSL's) some questions were asked to the sample population of police officers. As per the results of the study, 73% participants believe that forensic experts analyse the sample properly whereas 5% disbelieve upon the results of forensic labs (Fig 3.1).

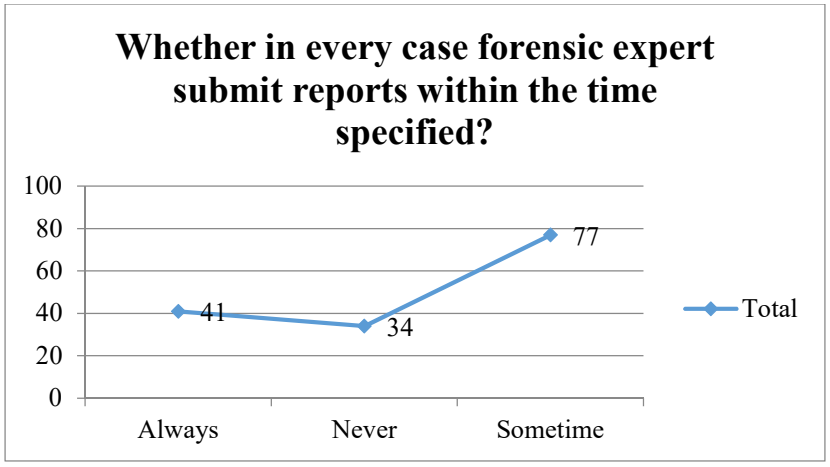
Figure 3.1- Opinion as to accuracy of sample analysis by FSL



Source: Primary Data

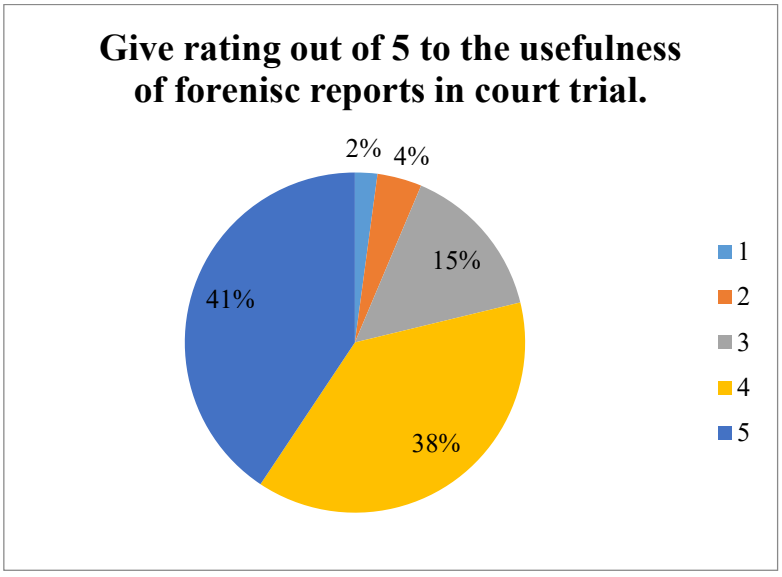
Further as to timely submission of Reports by forensic labs, only 27% population answered in positive whereas 22% answered in negative. Rest of the 51% population said that sometimes they submit on time (Fig 3.2).

Figure 3.2- Submission of Reports by Forensic Labs within time



Source: Primary Data

Figure 3.3- Usefulness of Forensic Reports in Trial



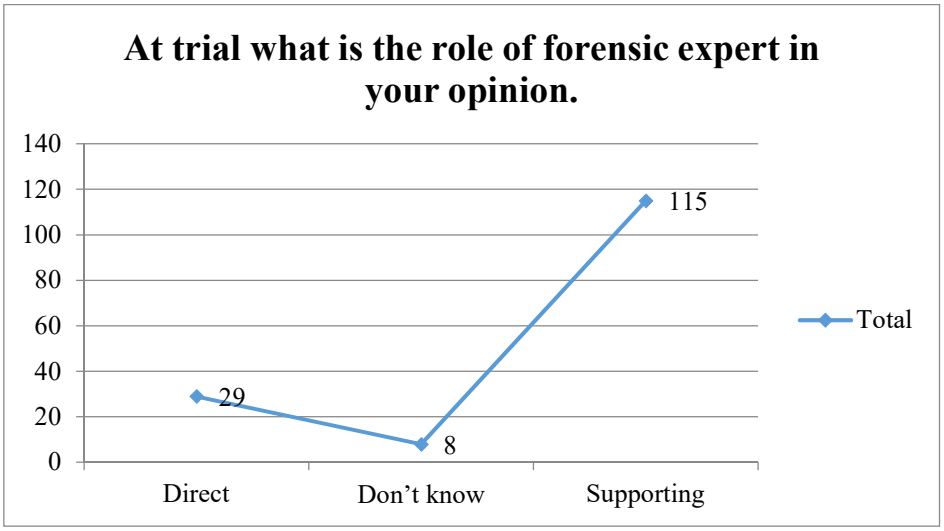
Source: Primary Data

Further when took point of view of police officers as to usefulness of forensic Reports during trial, 79% opined in favour whereas 31% voted against it (Fig 3.3). From the above analysis it become clear that no doubt forensic labs reports are useful for crime investigation and also during trial but are many times not submitted on time and police population is not satisfied with working of forensic labs due to the late submission of Forensic reports by it.

D. Opinions as to role of forensic science at Trial-

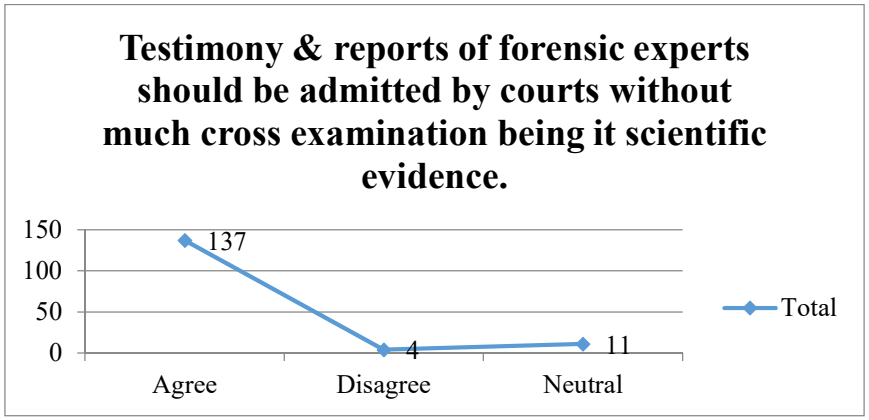
From the above discussion it is clear that forensic reports are useful in the process of crime investigation but what role they exactly play during trial and does police officers had knowledge about it or not some questions further asked and analysed. From the study it become clear that majority of the police officers knew that role of forensic experts is supportive and not direct (Fig 4.1) and being it scientific evidence, it should be admitted by Courts without much cross examination (Fig 4.2).

Figure 4.1- Opinion as to role of forensic expert during trial



Source: Primary Data

Figure 4.2- Opinion as to admissibility of forensic reports

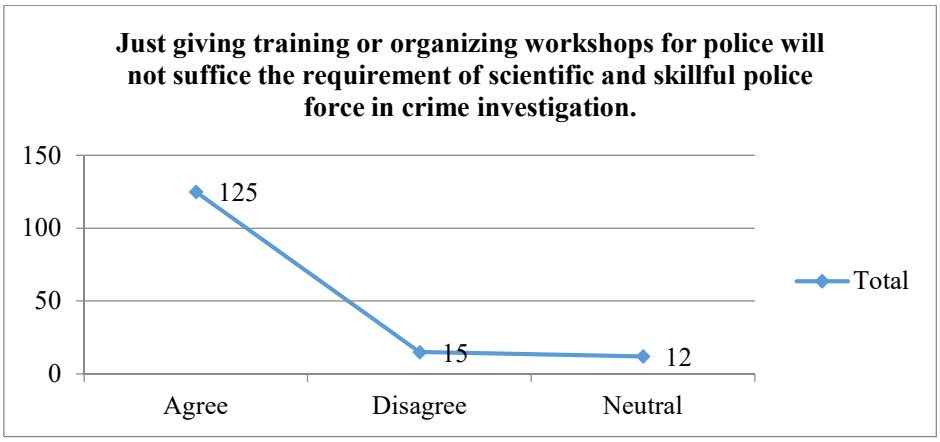


Source: Primary Data

E. Opinions as to need and necessity of forensic experts in crime investigation-

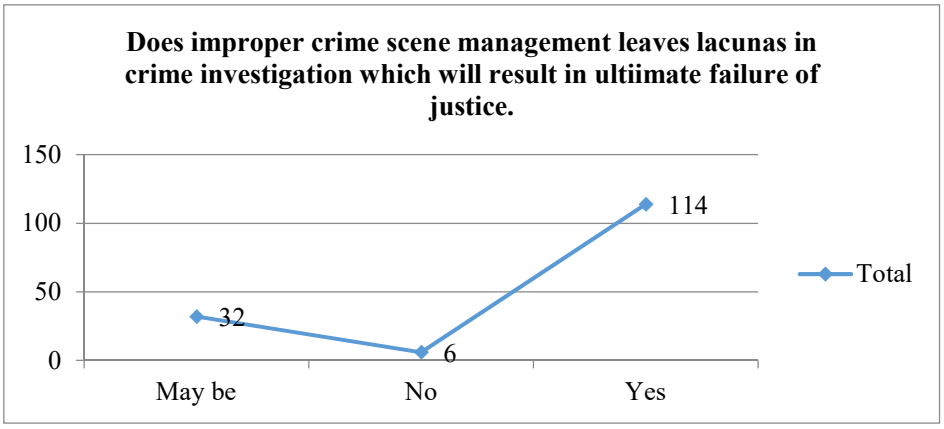
Finally with a view to analyse need and necessity of forensic experts in crime investigation further analysis is done. As per the view of most of the sample population, just giving training or organizing workshops for police will not suffice the requirement of scientific and skilful police force in crime investigation (Fig 5.1). Majority of the sample viewed that improper crime scene management may leave lacunas in crime investigation and ultimately in delivery of justice (Fig 5.2). Therefore 89% population opined that crime scene investigation should be performed by qualified forensic experts only (Fig 5.3). Therefore, majority of the population suggested that appointment of forensic expert at every police station can be a solution for efficient and accurate crime scene management which ultimately help in speedy investigation (Fig 5.4) and should be performed by qualified forensic experts only (Fig 5.3).

Figure 5.1- Does giving training can suffice the requirement of Forensic investigators



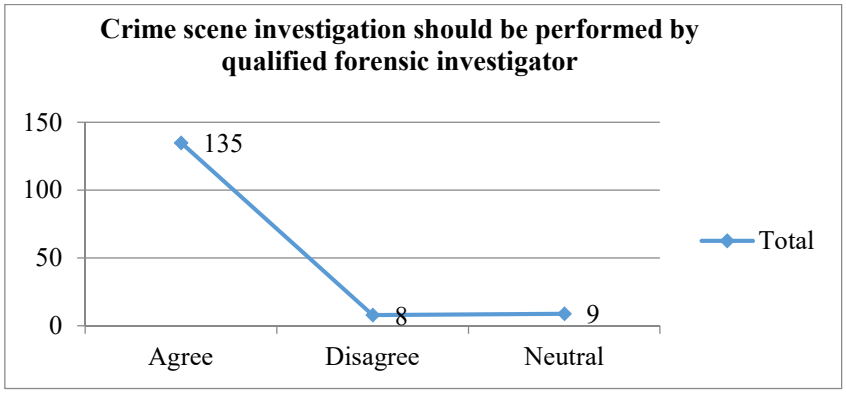
Source: Primary Data

Figure 5.2- Does Improper crime scene management leaves lacunas in investigation



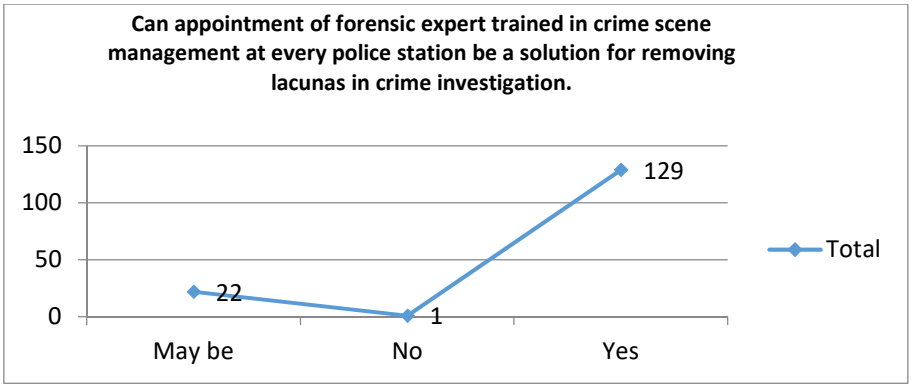
Source: Primary Data

Figure 5.3- Opinion as to who should perform crime scene investigation



Source: Primary Data

Figure 5.4- Opinion as to Appointment of Forensic investigators at police stations



Source: Primary Data

From analysis of the above data researcher came up with some findings as to importance of forensic science in crime investigation from the perspective of the police officers-

1. Majority of the police officers who are involved in the task of crime investigation have knowledge about what exactly forensic science is and is helpful in investigation of crime. The investigation of crime no doubt is the work of police machinery, but they need assistance of forensic experts, and it is lacking. Still many crime scenes are handled by police themselves. They are of the view that if training is given to them, they can handle the task more efficiently. It means that

now the task of creation of awareness about importance of forensic science among different stakeholders already accomplished. So instead of organising awareness workshops, if advanced training is given to police personnel's it will help more to them in performing their duties. It is observed that still no advanced training is given to police, and they are left only with teaching the basic concepts of forensic science through lecture method and therefore police officers feel that they need expert guidance. Instead, if advanced training is given, they can manage the crime scene without any errors, and it can help in effective administration of justice.

2. About forensic laboratories, police officers are not very happy with the working of it as according to them laboratories fail to submit report of analysis on time. The sending of sample is done by police on time, but laboratories sometimes send report on time and sometime not.

3. The report of forensic analysis plays very important part at trial and so forensic experts should be very careful and cautious while analysing the sample. It is admitted that in complicated cases judiciary always rely and put trust upon forensic analysis and thus if reports are not up to the mark, then it causes irreparable damage, and all the efforts of investigating agencies turn out to be useless and thus duty of forensic expert is very crucial in this regard.

4. About forwarding assistance of forensic experts, police officers are of the view that if crime scene investigator is appointed for assistance in crime investigation it can be a solution for reaching at speedy and effective investigation of crime.

VI. Suggestions and Conclusion

In the present era of technological advancement, criminals already moved from traditional modes of commission of crime to using advanced methods. Being techno savvy criminals now have very easy access to advanced tools and techniques which can easily save them from the clutches of law. Forensic science thus plays very important role in crime investigation. No doubt police machinery is well trained in handling crime scene but as they didn't have scientific education with respect to crime scene management some lacunas may be left by them which can affect adversely to the case. In this study researcher tried to find out police perspectives with regard to usefulness of forensic science in crime investigation process. Among the total population 99% respondents agree with the usefulness

of forensic science in the process of crime investigation. As improper handling of crime scene may leave lacunas in the process of investigation which raise questions on efficiency of investigating machinery therefore it is essential that the investigating machinery should be equipped with the skilled manpower trained in forensic science. At present no police station is equipped with skilled manpower specialised in forensic science. The police officers are trained in that regard by organising training sessions but the study shows that it will not suffice the requirement of skilled crime scene handling machinery and therefore it is recommended at every police station at least one crime scene investigator should be appointed who will help in handling and collection of samples at crime scene. Also, the appointment of forensic crime scene investigator will open opportunities of job for the forensic students, and it will also help in reaching the object of more scientific and accurate investigation by police which ultimately resulting into speedy and effective administration of justice.

Vol. 14 No. 2 ISSN: 0976-3570

The Intersection of Technology and Environmental Law: Recent Developments and Future Challenges

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Abstract

Due to the growing effect of technical breakthroughs on the environment, the confluence of technology and environmental law has become a crucial field of research. This research analyses current advancements in the area and pinpoints potential problems brought on by the fusion of environmental legislation and technology.

The study examines the current legal frameworks that control how technology and the environment interact. It looks at how environmental laws have changed to address issues related to emerging technologies, including how to safeguard digital ecosystems, and how to enforce environmental standards for new technologies like artificial intelligence.

The urgency of addressing the convergence of technology and environmental law is emphasised in the paper's conclusion. To create a balance between technological progress and environmental sustainability, it urges proactive measures such as strict legislation, technological innovation, public awareness, and stakeholder participation.

This research examines the recent advancements in environmental law and technology, outlines the issues that may result from this confluence, and provides insights into possible avenues for building a sustainable and technologically enabled future.

Keywords: Sustainable development and Technological innovation; Artificial intelligence, Internet of Things; International environmental governance; Harmonizing environmental regulations

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I. Introduction

In recent years, there has been a substantial increase in interest in and concern over the nexus between technology and environmental law[3]. Human lives have undergone significant change as a result of technological breakthroughs[4], particularly how they affect the environment[5].

The paper seeks to investigate the ways in which technology has altered the environment, and it looks at the changing legal frameworks governing this intricate interaction. Promising answers to environmental issues have been brought about by technological breakthroughs. Technology is being used by "smart cities" to improve waste management, transportation, and energy efficiency[6]. These developments have the potential to fundamentally alter sustainability practices and enhance the state of the environment as a whole[7].

Technology has brought about new environmental hazards[8] and problems in addition to the regular changes. The change in existing technology has led to an increase in electronic waste, which is a serious environmental hazard[9].

[3]Nielsen, Yngwie Asbjørn, Karolina A. Ścigała, Laila Nockur, Tina AG Venema, and Stefan Pfattheicher. *A cautious note on the relationship between social mindfulness and concern with environmental protection*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 119, no. 9 (2022): e2120348119.

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[8]Cvetkovich, George, and Timothy C. Earle. *Environmental hazards and the public*, JOURNAL OF SOCIAL ISSUES 48, no. 4 (1992): 1-20.

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Additionally, concerns have been expressed relating to the ecological footprint[10] and energy usage of digital infrastructure, such as data centres and cloud computing[11].

The laws for controlling technology and the interacting environment have experienced tremendous change in recent days[12]. To handle new technology challenges, environmental laws have been modified and enacted[13]. Various jurisdictions have created laws governing the destruction of electronic trash[14], the preservation of digital ecosystems, and the application of environmental standards to developing technologies like nanotechnology and artificial intelligence[15]. The development of suitable regulatory measures frequently lags behind the rate of technology change[16], creating gaps in legal protection and enforcement.

II. Research Objectives

1. To examine the ways in which technology has transformed the environmental landscape;

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2. To analyse the existing legal frameworks governing the relationship between technology and the environment;
3. To identify and analyse the future challenges and risks that arise from the convergence of technology and environmental law.

III. Technological Innovations for Environmental Compliance

The term "technological innovations for environmental compliance" refers to the creation and application of technology to enhance and facilitate adherence to environmental standards, rules, and regulations[17]. These developments are meant to advance environmental management practises, including reporting, monitoring, and evaluation. The significant technological advancements in this area, are:

i. Environmental monitoring systems use a variety of sensors and data collection techniques to track and measure various environmental factors[18], such as air quality, water quality, noise levels, and emissions. These systems could consist of portable sensors, remote sensing tools like satellites or drones[19]. These systems' real-time data collection offers insightful information on the state of the environment[20], enabling businesses to quickly identify issues concerning compliance and assist in taking appropriate action.

ii. Data Analytics and Machine Learning: Data analytics and machine learning techniques help organisations in spotting patterns, trends, and

[17]ASHFORD, NICHOLAS A. UNDERSTANDING TECHNOLOGICAL RESPONSES OF INDUSTRIAL FIRMS TO ENVIRONMENTAL PROBLEMS: IMPLICATIONS FOR GOVERNMENT POLICY (chapter). (1993).

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anomalies by analysing massive amounts of environmental data[21]. Organisations identifies non-compliance, evaluate risks, and improve environmental management plans by using these tools to analyse environmental monitoring data. Machine learning algorithms can learn from prior data to enhance their predictive powers, assisting in the early detection of environmental problems or compliance violations[22].

iii. Geographic information systems connect spatial data with efforts to comply with environmental regulations[23]. Organisations uses GIS technology to visualise and map environmental data[24], overlay it with additional pertinent data such as land use or protected areas, and analyse spatial linkages[25].

iv. Remote Sensing and Drones: For the purposes of environmental compliance, remote sensing technologies, such as satellite photography and aerial drones, offer useful information[26]. Large-scale environmental data, such as shifts in land cover, rates of deforestation, or sources of pollution, is gathered by satellites[27]. Drones with cameras and sensors can enter dangerous or isolated locations and provide precise measurements

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[26]Green, David R., ED. Unmanned Aerial Remote Sensing: UAS For Environmental Applications (CRC Press, 2020).

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and imaging[28]. These tools support environmental impact assessments, monitoring compliance, and potential infractions.

v. Digital Reporting and Documentation Systems: These systems improve and streamline the processes for reporting compliance[29]. Organisations efficiently gather, handle, and report environmental data in offering proper solutions. These systems guarantee accurate, consistent, transparent and responsible reporting procedures during compliance.

vi. Sensor networks and the Internet of Things: Real-time data collection and communication between devices are operated by sensor networks and the Internet of Things[30]. IoT networks with integrated environmental sensors continuously monitor variables like temperature, humidity, air quality, or energy usage[31]. These networks identify irregularities, generate alerts, and automatically carry out compliance procedures. IoT and sensor networks also make it possible to remotely manage and improve environmental systems, which improves compliance performance and resource efficiency.

vii. Blockchain Technology: For data and transactions relating to environmental compliance, blockchain technology enables safe, transparent, and immutable records. It improves compliance reporting, certification, and verification procedures' accountability, and

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[30]Ferrández-Pastor, Francisco Javier, Juan Manuel García-Chamizo, Mario Nieto-Hidalgo, Jerónimo Mora-Pascual, and José Mora-Martínez. *Developing ubiquitous sensor network platform using internet of things: Application in precision agriculture*, SENSORS 16, no. 7 (2016): 1141.

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transparency[32]. Systems built on the blockchain ensures the validity and integrity of compliance, avoiding fraud and manipulation[33].

viii. Smart environmental management systems integrate a number of technologies, such as the Internet of Things, data analytics, automation, and control systems[34]. The environmental management procedures and compliance efforts are optimised by these systems. This offers automated environmental system control, predictive modelling, and real-time monitoring of environmental systems[35]. For sustainable environmental results, smart environmental management systems offer proactive compliance management, early detection of compliance concerns, and effective resource allocation.

IV. Privacy and Data Protection in Environmental Technology

When examining the interaction of technology and environmental law, privacy and data protection in environmental technology are essential factors to take into account[36]. It is crucial to address the privacy and data protection issues that arise as technological breakthroughs make it possible to gather, process, and share enormous volumes of environmental data.

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Sensors, monitoring equipment, and data analytics tools are frequently used in environmental technology to collect and analyse environmental data[37]. This information could be private or sensitive, such as location data, health-related data, or details on people who live close to environmental monitoring sites.

V. International Harmonization of Environmental Standards for Technology

An essential component of global environmental governance is the international harmonisation of environmental standards for technology. In order to effectively address common environmental concerns, it is increasingly important to ensure consistency and coherence in environmental standards and laws when technology crosses international borders. In order to promote environmental preservation and sustainability while facilitating the development and use of ecologically sound technology, international harmonisation strives to establish shared frameworks and norms.

The creation of universal technical standards for environmental technologies is a crucial component of global harmonisation. For evaluating the environmental performance of technology, these standards provide the requirements, criteria for performance, and measuring techniques. By harmonising these standards, it is possible to assure that the technologies created in many nations meet the same standards by facilitating interoperability and compatibility while lowering obstacles to commerce and technology transfer.

VI. Public Engagement and Participation in Technology and Environmental Decision-Making

Sustainable development and democratic governance depend on public involvement and participation in environmental and technological decisions[38]. A wide range of different viewpoints, interests, and concerns are taken into account

[37]Hart, Jane K., and Kirk Martinez, *Environmental sensor networks: A revolution in the earth system science*?. EARTH-SCIENCE REVIEWS 78, no. 3-4 (2006): 177-191.

[38]Warren, Lynda M, *Sustainable development and governance*, ENVIRONMENTAL LAW REVIEW 5, no. 2 (2003): 77-85.

when the public is included in decision-making processes[39], resulting in better informed, inclusive, and transparent decision-making.

Public participation and engagement are essential in environmental impact analyses and technological decision-making processes[40]. Public participation in EIAs ensures that local expertise, issues, and potential effects on communities and ecosystems are taken into account[41]. People and communities can express their opinions, ask questions, and participate in the decision-making process through public hearings, comment, or by organising seminars[42]. This strengthens public trust, encourages accountability and openness in increasing the validity of choices.

Public engagement might aid in bridging the knowledge gap between scientific expert knowledge and traditional indigenous ideas. In order to make decisions that are inclusive and culturally sensitive, it is crucial to acknowledge and respect the knowledge base, experiences, and values of local communities, indigenous peoples, and marginalised groups. It is possible to gain a deeper understanding of the potential social, cultural, and environmental effects of technology and to create cooperative solutions by involving a variety of stakeholders in decision-making processes.

Public participation and engagement also improve ideas and knowledge relating to environmental and technological challenges[43]. People can become informed and empowered to actively participate in decision-making processes. Participation and engagement of the public may help in increasing social acceptance of different concerns by building trust in environmental and

[39]Garnett, Kenisha, Tim Cooper, Philip Longhurst, Simon Jude, and Sean Tyrrel. *A conceptual framework for negotiating public involvement in municipal waste management decision-making in the UK,* WASTE MANAGEMENT 66 (2017): 210-221.

[40]O'Faircheallaigh, Ciaran. "Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making." *Environmental impact assessment review* 30, no. 1 (2010): 19-27.

[41]NATIONAL RESEARCH COUNCIL, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING (National Academies Press, 2008).

[42]Laird, Frank N. *Participatory analysis, democracy, and technological decision making*, SCIENCE, TECHNOLOGY, & HUMAN VALUES 18, no. 3 (1993): 341-361.

[43]Beierle, Thomas C., and Jerry Cayford. *Democracy in practice: public participation in environmental decisions*. Resources for the Future, 2002.

technological decision-making process. Involving public in decision-making through meaningful engagement processes fosters a sense of legitimacy, justice, and ownership[44]. This addresses public concerns, lessens friction, and fosters an environment that is conducive to the adoption of technologies and environmental regulations.

VII. Sustainable Business Models for Environmental Technology

In order to promote the adoption and implementation of environment friendly solutions while assuring long-term economic sustainability, sustainable business models for environmental technology are essential[45]. By encouraging innovation, resource efficiency, and the shift to a more sustainable economy, these business models ensure consideration as to environmental urges into the fundamental functions of working organisations.

Sustainable business models promote the idea of life cycle of every available product. This requires considering how products and services affect the environment throughout their whole life cycle, i.e., from the extraction of raw materials till the final disposal of the product. By implementing life cycle assessments into the decision-making procedures, businesses can identify areas for improvement, streamline their operations, and develop innovative solutions in producing sustainable goods.

The use of renewable energy resources and the reduction of greenhouse gas emissions are frequently given top priority in sustainable business strategies[46]. This may entail implementing carbon offsetting policies, investing in energy-efficient infrastructure, or integrating renewable energy technologies into

[44]Callahan, Kathe. *Citizen participation: Models and methods*, INTERNATIONAL JOURNAL OF PUBLIC ADMINISTRATION 30, no. 11 (2007): 1179-1196.

[45]Ali, Ernest Baba, Valery Pavlovich Anufriev, and Bismark Amfo. *Green economy implementation in Ghana as a road map for a sustainable development drive: A review,* SCIENTIFIC AFRICAN 12 (2021): e00756.

[46]Neagu, Olimpia, and Mircea Constantin Teodoru. *The relationship between economic complexity, energy consumption structure and greenhouse gas emission: Heterogeneous panel evidence from the EU countries,* SUSTAINABILITY 11, no. 2 (2019): 497.

operations[47]. Businesses may contribute to the prevention of climate change and establish themselves as environmentally conscious organisations by lowering their dependency on fossil fuels and reducing carbon emissions.

Moreover, collaborative strategies and partnerships are frequently used in sustainable business models while adopting environmental technologies[48]. To promote innovation, information sharing, and group action, this includes establishing partnerships with suppliers, clients, research institutions, and other stakeholders. Businesses can leverage complementary knowledge through collaborative models, share risks, and work together to address environmental concerns.

VIII. Environmental Impact Assessments for Emerging Technologies

Environmental impact assessment is essential for assessing and controlling any potential environmental implications of introducing any emerging technology[49]. EIAs offer a systematic and all-encompassing method for determining, assessing, and mitigating any unfavourable environmental effects that could result from the usage of developing technology[50].It is important to evaluate possible effects of new environmental technologies' before deploying them widely in order to minimise harm to ecosystems, natural resources, and human populations.

Determining the potential social and economic repercussions are also needed while evaluating environmental concerns during introducing a new technology. Assessing possible effects on people's health, communities, and cultural heritage is part of this step. Social considerations such as community relocation, aesthetic effect, and noise pollution should be taken into consideration while arriving any conclusion. To ensure a thorough understanding of the potential environmental

[47]Gössling, Stefan, *Carbon neutral destinations: A conceptual analysis*, JOURNAL OF SUSTAINABLE TOURISM 17, no. 1 (2009): 17-37.

[48]Sarkar, Amoudip N. *Promoting eco-innovations to leverage sustainable development of eco-industry and green growth*. EUROPEAN JOURNAL OF SUSTAINABLE DEVELOPMENT 2, no. 1 (2013): 171-171.

[49]GILPIN, ALAN. ENVIRONMENTAL IMPACT ASSESSMENT: CUTTING EDGE FOR THE 21ST CENTURY, (Cambridge University Press, 1995).

[50]Esteves, Ana Maria, Gabriela Factor, Frank Vanclay, Nora Götzmann, and Sergio Moreira. *Adapting social impact assessment to address a project's human rights impacts and risks,* ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 67 (2017): 73-87.

effects, the assessment process should involve the concerns of stakeholders, including local communities, professionals, and appropriate authorities.

Environmental impact analyses for developing technologies focuses on establishing management techniques and mitigation measures to reduce or completely avoid potential negative consequences on the environment[51]. Investigating alternative technologies while making design or changing operational procedures can all help to lessen their negative effects on the environment. Incorporating the best and most practical mitigation strategies into the technology's development, use, or regulatory requirements is the goal of the assessment process.

The cumulative effects must be taken into account when evaluating the impact of new technology through environmental impact assessments. In a specific area or region, cumulative impacts evaluate the combined consequences of numerous technologies, activities, or initiatives. Recognising potential synergistic effects, trade-offs, or cumulative dangers that may result from the concurrent usage of developing technologies requires an understanding of the cumulative aftermaths.

The environmental impact assessment procedure involves monitoring and follow-up activities to guarantee the effectiveness of mitigating measures[52]. Monitoring procedures are put up to check the projected effects and keep an eye on key environmental indicators. As a result, it is now possible to apply adaptive management, allowing adjustments to be made to decrease any unexpected or shifting environmental effects when the technology is put into use.

IX. Liability and Responsibility in Emerging Environmental Technologies

While analysing the interaction of technology and environmental law, liability and accountability in new environmental technologies are crucial elements to take into account. Issues about the distribution of duty and responsibility for any potential environmental harm or negative repercussions that may occur from their

[51]Tsoutsos, Theocharis, Niki Frantzeskaki, and Vassilis Gekas. *Environmental impacts from the solar energy technologies,* ENERGY POLICY 33, no. 3 (2005): 289-296.

[52]Marshall, Ross, Jos Arts, and Angus Morrison-Saunders. *International principles for best practice EIA follow-up.* IMPACT ASSESSMENT & PROJECT APPRAISAL 23, no. 3 (2005): 175-181.

use arise as new technologies with environmental implications are gradually developed.

In determining who should be held responsible for any environmental harm, is a crucial part of the step of accountability and responsibility in emerging environmental technologies. This entails identifying the parties engaged in the design, implementation, and usage of the technology, including the creators, suppliers, users, and service providers.

The creation of legislative frameworks that expressly handle liability concerns for new environmental technologies is another factor to take into account. In order to reduce environmental risks, these frameworks should specify the legal requirements, norms, and obligations that technology developers and operators must adhere to. They must put in place systems for observing and enforcing adherence to these requirements by ensuring accountability for environmental harm.

The environmental concerns of responsibility arise when autonomous systems or artificial intelligence used in new environmental technology make decisions or do acts that affect the environment. In order to determine who should be held accountable for such harm, it is necessary to consider causality, predictability, and control difficulties. To meet these issues, it is necessary to develop clear rules and legal standards, such as establishing the degree of human supervision or control necessary in the adoption of autonomous environmental technologies.

The question of accountability and responsibility also include the possible long-term effects of introducing new environmental technologies. Some technologies, like genetically modified organisms or nanotechnology, may have ambiguous or unknown long-term implications on the environment. The development and implementation of new technologies for tracking, evaluating, and dealing with these long-term effects is essential, which will detect the accountability of the person involved in handling the environmental technologies.

In order to achieve uniform and efficient enforcement, it is crucial to resolve concerns relating to cross-border liability, standardisation of liability requirements, and collaboration among various countries.

X. Ethical Considerations in Environmental Technology Development

Environmental technology is developed with ethical considerations in mind[53], ensuring that new developments are consistent with moral standards, societal norms, and ethical guidelines. The impact of technology on ecosystems, people, and the planet as a whole is addressed by a wide spectrum of ethical concerns in the creation of environmental technology.

Promoting environmental justice is one important ethical factor. This entails fulfilment of the expectations of different socio- economic groups, including marginalised populations, so that benefits from environmental resources are equally distributed. Environmental justice seeks to eliminate or lessen inequality in the development and application of technology by acknowledging that vulnerable communities frequently bear a disproportionate weight of environmental consequences.

Primarily, the ethical consideration in development of environmental technology is minimising harm and damage to biodiversity and ecosystems. This requires taking preventive measures to evaluate and reduce any potential ecological effects linked to the use of technology. Environmental technology ought to be planned and applied in a way that avoids or reduces negative effects on ecosystems, habitats, and species, protecting biodiversity and ecosystem services for both the present and the future.The preservation of human health and safety is a key ethical factor. Environmental technologies must put people's health first in order to prevent unforeseen negative health effects on both individuals and communities.

Furthermore, ethical considerations include minimising resource depletion and waste generation by managing environmental resources responsibly. In order to promote the use of renewable resources and reduce the consumption of scarce resources, environmental technology should work towards resource efficiency.

Transparency, accountability, and public involvement are further ethical factors in the development of environmental technology which involves obtaining pertinent information and take part in the creation and application of technologies by all the stakeholders through open and transparent decision-making processes.

[53]ISRAEL, MARK. RESEARCH ETHICS AND INTEGRITY FOR SOCIAL SCIENTISTS: BEYOND REGULATORY COMPLIANCE. (Sage, 2014).

Ethical considerations encompass concerns with data security and privacy. Large volumes of data are frequently collected, processed, and shared for development of new environmental technologies. To preserve people's rights to privacy and stop unauthorised access to or exploitation of personal information, ethical practices call for strong data protection measures. Maintaining the public's trust and confidence in the development of environmental technologies depends critically on respecting privacy rights and ensuring data security.

The ethical management of technological risks and uncertainties is another aspect of environmental technology development to be taken into account. This requires carefully dealing with any unexpected repercussions, moral challenges, and long-term effects associated with it. By combining procedures for constant monitoring, evaluation, and modification, ethical practises may incorporate proactive methods to detect and mitigate hazards.

XI. Legal and Regulatory Frameworks

The harmonisation of legal and regulatory frameworks is a significant aspect of globalisation[54]. To establish a consistent and predictable international regulatory framework, this entails balancing various national legislation and policies. Harmonising regulatory frameworks promotes compliance with environmental standards, encourages compliance with regulatory requirements, and stimulates international cooperation in addressing transboundary environmental concerns.

International harmonisation seeks to address issues brought on by varied techniques and environmental assessment processes[55]. Standardising the techniques used in determining potential risk, life cycle of newly invented products, and environmental impact assessments falls under this category.

[54]Shams, Heba. *Law in the context of globalisation: A framework of analysis*. vol. 35 INT'L L., p. 1589. 2001.

[55]Handford, Caroline E., Christopher T. Elliott, and Katrina Campbell. *A review of the global pesticide legislation and the scale of challenge in reaching the global harmonization of food safety standards*, INTEGRATED ENVIRONMENTAL ASSESSMENT AND MANAGEMENT 11, no. 4 (2015): 525-536.

International attempts to harmonise include the exchange of knowledge, expertise, and experiences between nations[56]. This entails encouraging knowledge sharing, capacity-building skills, cooperative research and development initiatives. Countries can learn from one another's expertise for implementing efficient environmental standards and practises by exchanging experiences and lessons gained in the past.

Resolving questions of accountability and duty is necessary for the harmonisation of environmental norms for technology. By establishing standard rules and directives for liability frameworks, it will be possible to guarantee that accountability for environmental harm is clearly identified and distributed uniformly.

XII. Conclusion

Future technological and environmental regulation challenges are severe and necessitate immediate action. To address new concerns like the use of block-chain in carbon markets, the environmental effects of autonomous technologies, the effects of the Internet of Things on resource management, energy use, and enactments of strict legal and regulatory frameworks are required. To successfully negotiate the complicated connection between technology and the environment, innovative legal solutions, interdisciplinary cooperation, and international cooperation are crucial.

The creation of comprehensive frameworks for governing technology and the environment depends heavily on international cooperation. International cooperation on environmental issues and the advancement of sustainable technology have been made possible by organisations like the European Union and the United Nations. Achieving global environmental goals and guaranteeing fair competition in technological breakthroughs require harmonising environmental regulations and standards across jurisdictions.

Privacy and data protection while adopting environmental technology demands specific criteria and permission processes for data gathering and usage. The sorts of information gathered, the purposes for which they are used, and the

[56]Fairhead, James, And Melissa Leach. Science, Society And Power: Environmental Knowledge And Policy In West Africa And The Caribbean, (Cambridge University Press, 2003).

organisations that have access to it should all be made clear to the public. Informed permission is necessary to safeguard people's right to privacy and ensure ethical data collection and processing. Strong data security measures must be put in place to protect environmental data against unauthorised access, data breaches, and cyberattacks. To retain accurate and private environmental data, encryption, safe data storage, access controls, and frequent security assessments are required.

The advancement of technology and loopholes of environmental legislation presents future challenges that require innovative solutions and international cooperation. Privacy and data protection in environmental technology demand the adoption of privacy-by-design principles, privacy impact analyses, and clear privacy rules to protect individuals' data. Strategies like differential privacy and safe multi-party computation can balance data utility and privacy protection. Additionally, transparency, public participation, and accountability should be integral to environmental impact assessments by fostering a range of divergent perspectives in ensuring transparency in the decision-making processes.

To achieve international harmonization of environmental standards for technology, multilateral participation and cooperation among governments, international organizations, businesses, and civil society are essential. Collaborative platforms facilitate discussions, consensus-building, and the development of shared strategies. While harmonization seeks universal standards, and that should consider adoption of regional or local variances. Eco-design and sustainable business models incorporate elements like energy efficiency, material choice, and monetizing environmental benefits, while triple-bottom-line strategies consider social, environmental, and financial implications.

The involvement of financial and insurance companies in handling liability and responsibility for emerging environmental technologies is crucial. Adequate insurance and financial frameworks can mitigate risks and provide compensation in case of environmental harm. Environmental impact assessments play a vital role in identifying and assessing potential environmental risks, considering the technology's life cycle, and evaluating direct and indirect environmental effects.

To navigate these future challenges, creative legal solutions, interdisciplinary collaboration, and global cooperation is indispensable. The establishment of comprehensive frameworks, privacy protection measures, transparency, public

engagement, and harmonized international standards will contribute in ensuring responsible development and deployment of environmental technologies while safeguarding privacy, promoting sustainability, and ensuring accountability.

Effective legal frameworks and regulations should be established to address privacy and data protection issues in environmental technology. These frameworks need to cover areas such as data ownership, data sharing contracts, international data transfers, and individual rights concerning environmental data. Regulatory bodies play a vital role in enforcing compliance with these rules and upholding privacy standards within the realm of environmental technology is the need of the hour.

Vol. 14 No. 2 ISSN: 0976-3570

The Efficacy of Doctrine of Precedent: Analysing of the Common and Civil Law Countries with Reference to India

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Abstract

The famous jurist Salmond, explained precedent as ounce of gold in tons of unnecessary material in a Judgement. He opined; the legislations are coins ready to be used in a realm. Precedents are creative interstitial (filling up gap in legislation and declaring guidelines in absence of legislations) law making by the Judges, which are flesh and blood in a statutory skeleton. Precedents are primary source of law, in the common law countries like India.[3] However in Civil law countries, as for example in continental Europe, precedents are not as strong as in common law countries. In Civil law countries, as for example in France, there are exhaustive codes, like French Criminal Procedure Code. Judges in Civil law Countries most of the time need not to be creative as in common law countries. The main sources of law in Civil law countries, as for example in France, are legislations, edicts of Courts and Juristic opinion. The edicts of Court, rarely has values of precedent. Though Higher Courts' jurisprudence needs to be followed by the lower Courts. In common law countries, it is a pain to identify the precedent/ obiter dicta in a voluminous Judgment. In Civil law Countries, there is no such pain, as judges are hardly expected to interpret. They are expected only, to apply the law to a fact. A comparative analysis of doctrine of precedent, in Common law Countries and Civil law countries, are worthy of analysis, as it will help us to iron out creases in our legal systems, and we can incorporate the beneficial qualities from the Civil legal system.

Key Words: - Constitution, Doctrine of Precedent, law making by judges, Civil and Common law system.

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[3] Article 141 of the Indian Constitution.

I. Introduction

Law is not a static collection of laws, but an organic collection of principles endowed with the capacity for development. The justice is constantly clothing the standard that he believes should exist inside the robes of legal system. Not only should we not declare that the legal system's creative era is over, but the conceptions of the legal system did not fully fall from the sky. Exaggerated positivism ignores the fact that laws change over time not just via reasoning but also through the gradual extraction of fresh data from social interactions and the shaping of norms to fit modern expectations.

In the larger canvas of the common law system as developed by the Courts of Records in United Kingdom, the "Doctrine of Precedent" has to be understood. Truly speaking, the "Doctrine of Precedent" is the soul of common law system. The whole gamut of common law system is practically centred around the Ratio-Decidendis of judgments delivered by Courts of Record of competent jurisdictions which have to be theoretically followed by the lower courts or lower Benches of the same court, basically to maintain four Cs i.e. certainty of the law, continuity of the law, clarity of the law and most importantly consistency of the law.

The two widely recognized and accepted legal traditions are namely the Common law and the Civil law. Common law tradition originated in England during the middle ages, was applied in British colonies around the world, the civil law tradition was originated in Europe and was applied in the colonies of the European imperial powers. India being colonized by British observed common law.

The difference between the two systems is sometimes attributed to the judicial system being more case-oriented and, thus, more judge-oriented, allowing for a more flexible, workable solution to the specific issues raised in court. It's possible to write the legislation from scratch. Depending on the side, the legal system, which controls judicial authority, is usually a codified collection of large abstract concepts. In reality, both of these perspectives are extreme, with the former exaggerating the range of the discretion that judges of statute-law courts may use and the latter doing the same for judges of civil courts.

Common laws are uncodified, signifying that Common law is not comprised of an inclusive compilation of legal rules and statutes. The common relies on some legislative decisions; it is mainly based on judicial precedence, i.e. the judicial

decisions which were made in similar cases. Theses precedence is maintained by year by year through Court records, journals and reports in the forms of collections of case law. The applications of precedent in the decision of each case are determined by presiding judges of the case.[4]

Whether one regards a system of judge-made rules or as a system sense that it is a body of traditional ideas received experts, the process of legal development is similar. It is, as Lord Goff stated in his "Maccabean Lecture", a movement from the identification of specific heads of recovery to the identification and closer definition of the limits to a generalized right of recovery; a search for principle.

Lord Goft saw it as a mosaic that is kaleidoscopic in the sense that it is in a constant state of change in minute particulars. By contrast civilian systems are essentially codified legislative systems and owe their inspiration to the principles of the Nepoleonic codes. In such systems judicial decisions are not primary sources of law but only a gloss on the law in the legislative code.[5]

Professor Atiah viewed, a lawyer today would say that the common law is by definition what the judges say it is (either by declaring or by making, emphasis is of the researcher); Parliament may command the judges to change the rules they apply, even retrospectively, but Parliament cannot make the common law different from what the judges say it is any more than it can alter a historical fact. But these are rather deep waters of constitutional theory.[6]

Common law is an adversarial system in which a dispute among two parties is conducted before a judge who serves as moderation, and a jury of ordinary citizens renders a judgement based on the facts in this case. Following that, the presiding judge determines the appropriate sentence or penalty based on the jury's verdict.

[4]The Common Law and Civil Law Traditions, https:// www.law, Berkeley, eds. Library/ robbins/CommonLawCivilLawTraditions.html, (last visited on March 24, 2015).

[5]Jack Beatson, "Has the Common Law a Future?" 56(2) CAMBRIDGE LAW JOURNAL 291-314 (1997).

[6]P.S. Atiya, *Common Law and Statute Law*, 48(1) MLR 1-28(1985).

II. Historical Background

English common law evolved during the middle Ages as kings changed and centralized power. Following the Norman Conquest in 1066, medieval rulers started to consolidate rules in their hands, culminating in the formation of royal power and justice systems. The arrest warrants or royal orders system had begun to give a specific remedy for a specific injustice.

The writs system gradually became much codified. As a consequence, courts might lawfully utilize writs that rely on this procedure to achieve justice. Furthermore, the necessity for appealing to the court had to be submitted to the king, which led to the creation of a new type of court, the Court of Equity, also known as the Court of the Council of Ministers owing to its role as the court of the King's Chancellor. In order to reach a fair decision, these tribunals were given the authority to apply principles of justice derived from a range of sources, including Roman and Natural law, rather than only common law.

Today, the fundamental source of law differentiates civil law from common law. Judicial review and common law share contrasting views on judicial review. Judges of common law serve as the system's authority, capable of establishing new legal ideas as well as rejecting redundant legal conceptions. In the civil law system, judges are viewed as individuals who execute the law, with no ability to create (or destroy) legal conceptions.

III. Features of Common Law and Civil Law System

A system of common rule is less restrictive than a system of civil law. As a result, a state may want to codify citizen rights through laws particular to the construction initiative under consideration. For instance, it may want to prevent the provider from shutting off of the water or energy supply to non-paying customers or to compel the disclosure of records pertaining to the deal under a right to information legislation. Additionally, there may be legal obligations to include equal bargaining clauses into the agreement when one party has a much better collective bargaining power than another.

Civil law nations are often those that were previously holdings or former colonies of the French, Dutch, German, Spanish, or Portuguese, which comprise a substantial section of Central and South America. The majority of countries in Eastern and Central Europe, as well as East Asia, follow a civil law framework.

Civil law is a written legal structure. It derives from Roman law. Generally, a constitutional amendment based on particular rules (e.g., civil rules, codes covering corporation, administrative law, tax law, and constitution) enshrines fundamental rights and obligations; administrative statute, on the other hand, is typically less codified, and administrative court justices behaving more like legal system courts. Only parliamentary provisions of the act are regarded to be universally binding. In civil, criminal, and economic courts, there is limited opportunity for judge-made legislation, although judges generally adhere to earlier judicial judgments; constitution and administration courts have the authority to invalidate rules and regulations, and its rulings are binding on all parties.

IV. Doctrine of Precedent in Indian Legal System

The Indian constitutional process is a general legislation structure that includes components from civil law, socialist legality, and religion law systems. It establishes rights, regulates obligations, and enforcing those obligations. Court decisions have a role in the development of laws, while human legislation is intended to address all possibilities in the Indian Law.

A legal system encompasses a set of legal principles and norms to protect and promote a secure living to its subjects in the society. It recognises right, prescribes duties of people and provides the ways and means of enforcing the same. With independence and adoption of the Indian Constitution, there was a move to a significant new legal landscape and a whole range of new perspectives generated by the constitutional context which led to a radical reorientation at the level of the Supreme Court in regard to Court's continuing obligation to follow the common-law in India introduced the common law into this country. Although common law systems to make extensive use of statutes, judicial cases are regarded as the most important source of law, which gives judges an active role in developing rules. For example, the elements needed to prove the crime of murder or desertion are contained in case law rather than defined by statute. To ensure consistency, Indian courts abide by precedents set by higher courts examining the same issue. Parallel civil law system, by contrast, codes and statutes are designed to cover all eventualities has made its place in Indian Legal system. Indian legal system is basically a common law system, it contains elements of the other three systems (the civil law, the socialist legality, religious systems of law) as well.

Great Britain has a unitary unwritten Constitution in which Parliament is supreme and sovereign so that no law passed by Parliament can be declared *ultra vires* by a court of law. In this respect, the written federal Constitutions of the United States, Canada, Australia and India all differ from the British Constitution. But the doctrine of *ultra vires*, though not applicable to laws enacted by the British Parliament, was applied by English Courts to subordinate bodies constituted by Statute or Charter, and by the Privy Council in considering the validity of laws passed by the Colonies. In fact, one reason for the fact that the Supreme court of the United States finally took this power to itself was the Colonial practice. The Colonial courts and on appeal the Privy Council of England had the power to declare legislative acts void if it conflicts with colonial charters. The colonists consequently acquired the habit of seeing colonial laws occasionally declared void by the courts.[7] The enactment of a Bill of Rights in the Constitution itself no doubt indicates that the constitution look upon those rights as important and as rights which cannot be abrogated by ordinary process of legislation. In the first place, the very terminology of a Bill of Rights bespeaks its English origin, for the English Bill of Rights, 1689, declares the basic freedoms which Englishmen claimed for themselves. The Rights so declared have been enjoyed for centuries, and only a cataclysm can sweep them away. Secondly, apart from procedural advantage conferred by Article 32 for the enforcement of fundamental rights, a fundamental right is not different from any other right conferred by the Constitution, nor is it necessarily more important than another right which is not described.

The framers of the Constitution may be fairly taken to have kept in view the available experience in regard to the operation of precedent in British Indian Courts. But the framers had also written into our fundamental rights with the guarantee of judicial enforcement annexed thereto. As a healthy exercise in constitutional reform, this was bold and imaginative innovation which constituted a break with the common-law tradition, with significant broadening in the functioning of judicial review. A radical equation had been imported into the legal landscape and this could not but compel readjustment in the ideological disposition of the Indian judiciary to the English doctrine of precedent. This apart,

[7]Willis Constitutional Law 75, quoted by H.M.SEERVAI, CONSTITUTIONAL LAW OF INDIA-A CRITICAL COMMENTARY 160, Vol-1,(Universal Law Public Company Private Ltd., Fourth Edn.).

the theory of limited Government, although not alien to our way of legal thinking, acquired an extended thrust in the setting of the Indian Constitution. The doctrine of ultra vires was not new to the judges trained in common law, but judicial review of legislation entailed an obligation to enforce constitutional limitations against the political branches of Government.[8]

Britain has a unitary undeclared constitutional, but English Courts applied the concept of ultra-vires to subordinate authorities formed by Statue or Charters. In the event of a disagreement, both Colonial courts and the English Privy Council had the power to pronounce legislative actions invalid.

The English Bill of Rights, 1689, states the fundamental liberties which England claimed. It is the language of the Bill of Rights that defines its English origin. Despite the procedural benefit of protection of these rights, a fundamental human right is not necessarily more essential than other constitutionally bestowed rights.

We have avoided the other extreme, namely, that of 'judicial supremacy', which may be a logical outcome of an over-emphasis on judicial review, as the American experience demonstrates. Judicial powers of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.[9]Unfortunately, much British Indian legislation denied the enjoyment of civil and political rights to the Indian citizens. The letters of the law, therefore, went against the spirit of the law. Therefore, from the earlier American example, the Constitution of India was made the supreme law of the land in 1950. The Constitution is based on the ideals of justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and fraternity assuring the dignity of the individual and the unity and integrity of the nation. The rule of law was, therefore, placed on a footing higher than ordinary legislation. Constituent power is, thus, superior to ordinary legislative power.

Thus, unlike the British Parliament which is a sovereign body, the powers and functions of the Indian Parliament and the state legislatures are subject to limitations laid down in the Constitution. In England, the sovereignty of

[8]A. Lakshminath, Judicial Process Precedent In India 21, (Eastern Book Company, third Edn. 2009).

[9]Dr.Durga Das Basu, Introduction To The Constitution Of India 213 (LexisNexis, India, 22nd Edn., 2015).

Parliament has meant, "*the supremacy of the existing law so long as Parliament was fit to leave it unaltered*."[10] It is well known that Parliament identified itself with the cause of the supremacy of the law and did not alter by statute the basic principle that the individual enjoys all the liberties unless restrictions on them are placed by the statutes.

The Constitution of India established the "Supreme Court" under Article 124. Articles 32 and 226 embody judicial review and the power of the Court of Justice to declare an unlawful legislation in violation of the First Amendment. Sections 32 and 226 have not introduced new principles, but have provided the Supreme Court and Higher Court with the authority to publish English letters of habeas corpus, mandamus, certiorari, prohibition and quo warranto. This authority was transferred to the U.S. with the English colonists, granting various authorities in the U.S. the ability to grant these letters.

Finally, Article 142 states that "there is a ruling or order to be enforced all across the Indian union that may be needed to exercise full justice in any case or issue" by the Supreme Court. Article 142, especially the phrase “complete justice”, has given the judiciary a virtual license to intervene in any matter whatsoever. In addition to these textual enablers, the Court has over the years created its own powers in a number of domains.

Judicial review in India is based on the assumption that the Constitution is the supreme law of the land, and all governmental organs, which owe their origin to the Constitution and derive their powers from its provisions, must function within the framework of the Constitution, and must not do anything which is inconsistent with the Constitution. In a federal system like ours, independence of judiciary is an essential feature so that the Centre and States may equally respect its decisions with respect to matters affecting them. Article 13(2) expressly prohibits the State from making any law which takes away or abridges the fundamental rights enshrined in the Constitution; and any law made in contravention of this provision shall, to the extent of inconsistency, be void. The inclusion of this provision appears to be due to abundant caution, because even in the absence of such a provision, the courts would still have the power to examine the constitutionality

[10] SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 187, (Great Britain, Methuen & Company, 1903).

of a law on grounds of infringement of fundamental rights.[11] This is so because the judges are bound by oath to uphold the Constitution, and the courts can be approached for the enforcement of the fundamental rights. One of the unique features of the Constitution is that a person has a fundamental right to approach the Supreme Court. Moreover, wide, original and appellate jurisdiction has been given to the Supreme Court and the High Courts to adjudicate on the constitutionality of any disputed matter.

The power of formal amendment has been conferred upon Parliament by Art. 368 of the Constitution and the scope of resorting to the Judiciary to introduce changes has been reduced by making the process of amendment easier than in the U.S.A., the working of Indian Constitution has opened the avenue for judicial review in nearly the same way as in the U.S.A.

Power of judicial review in our Constitution is not confined to determining the validity of the laws made by the Parliament and State Legislatures, it also extends to examining the validity of the constitutional amendments on the ground that an amendment violates the basic structure or features of the Constitution.[12] In *Indira Nehru Gandhi v. Raj Narain*,[13] the court had observed that the basic structure limitation applied only to constitutional amendments and not [14]ordinary laws. In *Indra Sawhney v. Union of India*,[15] a smaller Bench of the court has held that it applies to ordinary law also. But again in *Kuldip Nayar v. Union of India*[16] and *Ashoka Kumar Thakur v. Union of India,*[17] the Constitution Benches of the court have reiterated Indira Nehru Gandhi position. More than once the Supreme Court has held that the judicial independence and judicial review are basic features of the Constitution, which cannot be taken away even by an amendment of the Constitution.

[11] A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
[12]Keshavananda Bharati v. State of Kerela, AIR 1973 SC 1461.
[13] AIR 1975 SC 2299.
[14] https://www.gktoday.in/gk/nehru-report.
[15] AIR 2000 SC 498.
[16] (2006) 7 SCC 1, 67.
[17] (2008) 6 SCC 1.

In 1928, the Motilal Nehru Committee said that "our primary concern should be to ensure that our basic rights are protected in a way that prevents their infringement."

Judicial review is a necessary concomitant of 'fundamental rights', for, it is meaningless to enshrine individual rights in written Constitution as 'fundamental rights' if they are not enforceable, in Courts of law, against any organ of the State, legislative or executive. Once this choice is made, one cannot help to be sorry for the litigation that ensues. Each year the Supreme Court invalidates a dozen of statutes and a like number of administrative acts on the ground of violation of the fundamental rights.[18]Today the constitutional position of Judicial Review is dictated by the need to prevent the abuse of power by the executive as well as to protect individual rights.

Even after the making of the Constitution and enactment of relevant statutes, the ecology of the Constitution and the statutes, is formed by "that part of common law which has been received in India as rules of 'justice, equity and good conscience' as suited to the genius of this country".[19] This much of common law is in force in India as recognised by Art. 372 (1) of the Constitution. A nine-judge Bench of the Supreme Court had this to say about the common law in India: It is well-known that the common law of England was applied as such in the original sides of the High Courts of Calcutta, Bombay and Madras, and that in the mofussil courts the principles embodied in the common law were invoked in appropriate cases on the ground of justice, equity and good conscience.[20] The Bench speaking through *Subba Rao, C. J.*, further observed:

> It has been held by this court that the said expression 'law in force' includes not only enactments of the Indian legislatures but also the common law of the land which was being administered by the Courts in India.

[18]Dr.Durga Das Basu, Introduction To The Constitution Of India 42, (LexisNexis, India, 22nd Edn., 2015).

[19] Bar Council of Delhi v. Bar Council of India AIR 1975 Del. 200 at 202.

[20] Superintendent & Legal Remembrances, State of West Bengal v. Corporation of Calcutta (1967) 2 SCR 170.

In *M.C. Mehta v. Union of India*[21], Justice Bhagwati observed: "We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence."

The development of the absolute liability rule in the *M.C. Mehta*[22] case and the Supreme Court's direction on Multi National Corporation Liability, recognition of Government liability by employees of government, principles on legality of State, evolution of guidelines of sexual harassment, grant of interim compensation to a rape victim, and award of damages for violation of human rights under writ jurisdiction including a recent Rs. 60 crore exemplary damages in the Upahaar Theatre fire tragedy case by the Supreme Court are significant changes in the law of India, which affords a preliminary answer the credential of common law system in India.

Since the closing years of last century, a version of judicial review has acquired the nick-name of judicial activism. In judicial activism judges participate in law-making policies, i.e. not only they uphold or invalidate laws in terms of constitutional provisions, but also exercise their policy preferences in doing so. With the widening jurisdiction of the courts, especially through the instrument public interest litigation, the issue of judicial activism has become a matter of national concern. It requires an amicable solution through scholarly exercises and broader consensus on constitutional values between the judiciary, on the one hand, and legislature and the executive, on the other.

The Indian Constitution strikes a balance between the U.S. constitution of Courts Supremacy and the English principle of Parliaments Supremacy by vesting the Judges with the authority to exercise discretion if it exceeds the Legislature's competence or violates a basic freedom. However, the Supreme Court found the term 'due process' in Art. 21 and the bulk of the Convention is amendable by a specific democratic majority of the Union Government.

[21]AIR 1988 SC 1037.
[22] *Ibid.*

The urge for judicial intervention has arisen from the very tendency of the Legislature to make frequent amendments to the Constitution, which were perishing the vitals of the Constitution. Hence, asserted the Court that it could set aside even an Act to amend the Constitution, not only on (i) a procedural ground, viz., that the procedure laid down in Art. 368 has not been complied by the relevant Bill, but on (ii) the substantive ground, viz., that the amending Act has violated one or other of the basic features of the Constitution.[23]

Conversely, it has come to be held that if the Legislature is not prompt enough to implement the provisions of the Constitution, the Court has the duty to make the changes necessary to adopt the demands of a progressive society.[24] At this length, the Court has propounded two doctrines-

(a) The Court is the exclusive and final interpreter of all provisions of the Constitution.

(b) The Court has the duty to make the ideals enshrined in the Constitution a reality,[25] and to meet the needs of social change in a welfare society.

V. Parliament's Creation of Statutory Laws and the Judiciary's Operation

The Indian government has complied with UN principles on social responsibility and environmental law, as well as international trade rules. Personal Indian law is complex, with each faith following its own set of rules. Goa has an unified civil code under which all faiths get legal principles covering weddings, separation or divorce. There are 1,248 statutes in force as of January 2017.

The majority of areas of law in India have been written, but there are a number of laws enacted that incorporate liability provisions. These include the Public Liability Insurance Act, the Environment Protection Act, the Consumer Protection Act, the Human Rights Protection Act, the Preconception Prenatal Diagnostic Techniques Regulations and Prevention of Misuse Act, and the Disaster Management Act. The Bhopal Gas Leak catastrophe ushered in a new jurisprudence, including environmental responsibility, toxic liability,

[23]Bommai v. U.O.I., AIR 1994 SC 1918 (para 30).
[24]State of Karnataka v. Appa, (1995) 4 SCC 469.
[25]Ravichandran v. Bhattacharjee, (1995) 5 SCC 457.

governmental culpability, MNC liability, congenital liability, and tighter absolute liability. Indian Court Decisions provide a stark difference in this regard.

In *Tika Ram and Others v. State of Uttar Pradesh and Others*[26], the Court stated that the Legislature has the ability to amend a statute to eliminate flaws and examine it in a manner that balances with the legislation specified by the Court. This exercise of legislative authority is not an infringement on the Court's judicial jurisdiction, but rather a legitimate measure taken by the component authorities to suitably change the statute and legitimize the conduct considered unconstitutional.

Legislative purpose has diminished as has the belief that laws should be read in such a way that they do not alter common law. Many pieces of legislation, such as the Public Liability Insurance Act of 1992, have a defined objective. They are intended to make common law more applicable. Courts frequently favour these modifications. It would be pointless if they did not have a goal in mind.

The public has recently rediscovered many of the fundamental ideas of the common law, such as the rights of due process and the freedom to judicial independence. These rights have withstood the test of time and laws are still enforced in accordance with their guidelines. An interpretation of this approach would argue that a law cannot deny people access to the service, showing the complementary and supplemental nature of Common and Civil Law in an Indian mixed legal system.

VI. Consonance of Common Law and Civil Law

The profession of judges in mixed jurisdictions has been greatly augmented by training in the common law. This is due to the abundance of legal literature, better case collections, and more effective legal information retrieval. In a mixed jurisdiction, civil law has certain benefits, such as the ability to overrule bad precedents and save futures from becoming the slave of yesterday and the tyrant of tomorrow. A statute also attracts a large body of existing law, as both statute and common law are often used in different ways. The Consumer Protection Act and the Indian Contracts Act may each become relevant in their own rights if and

[26] 2009 (8) SC J 37.

when legislation, such as the common law principles they modify, bring them under the jurisdiction of an Act that creates civil liability.

The Act may also establish crimes, and all of the principles that govern criminal law apply. This silence in this regard results in the new legislation becoming part of a large source of rules, even if no words appear in the act itself. Legislation encroaches only in the most unexpected places, such as the existence of a corporation, public institution, or married woman.

VII. Legislative- Judiciary Partnership

The law is a vast network of interconnected regulations, with the activities of the National Assembly and the courts interdependent. Acts that have chosen intentionally open-textured wording may lead to distortion of justice. For example, the Workmen's Compensation Acts formula describes a mixture of legislation and adjudication. The Acts' operation demonstrates an established judicial-legislative relationship, with the first step taken when the law was drafted and modifications put in place over time. Strategic planning governed by standards and post-hoc reasoning.

The Workmen's Compensation Acts, The Environment Protection Act, 1986, and the Consumer Protection Act, 1986 give judges broad discretionary powers to settle disputes. These powers include property division, inheritance, paternity, custody, and guardianship law. Courts use reasoned explanations, searching of rules, and categorization of facts.

The most important details in this text are that the legal system is difficult to leave due to the principles of the legal system becoming so involved with the rules of the legislation that it can be difficult to relinquish one's grasp on the legislation. Communities which live under a written constitution, such as the United States, Australia or Canada, have a different attitude, as they live under the domination of a statute of the most general and sweeping character, far more powerful in its effect upon the life of the citizen than the codifications under which Continental States have lived for many years. The experience of interpreting a Constitution has not had any notable impact on the common law approach to ordinary statute law in these countries. This is due to the fact that English judges have often tended to interpret statutes, and the problem is super-national and determined by trends of legal thought and public policy. Social policy interpretation is an important corrective, as social legislation grows in quantity and quality, but not all

legislation is dictated by an easily definable social purpose. Most of all, statutes leave choice of different social purposes, and their content and direction change with succeeding generations and conditions.

VIII. Conclusion

The Indian court is often recognised as an authoritative interpreter of different constitutional provisions in order to promote social justice. It integrates two main concepts: the parliamentary sovereignty of the United Kingdom and conventions supported by a written constitution and the division of powers and judicial oversight. Fundamental law, in the context of the written U.S. Constitution, was derived from the liberal ideology of the architects of the Constitution of India. India has a lasting mark on her constitution, which was created using elements between the Britain and America systems.

The Indian political system is a conceptual puzzle based on both parliament and federation characteristics that emphasises the previously unchallenged socio-political component of nation-states imbued with British traditions and American ideals. Reasonableness is a distinguishing characteristic of the common law and it is nothing more than an external aspect or chance, instead of a structure or fundamental component of the law. The Constitution of India was drafted in 1948-49 and confirmed the uncodified British House of Commons' rights, but only as a temporary measure. Since then, many of the principles have been settled by Supreme Court legal judgments and the consensus of precedents lay down by the Presiding Officers of the Houses of the Union and State Legislatures. It is not conducive to a smooth working of the Parliamentary system in developing country to have a war between the Courts and the Legislatures.

The predominance of statute law in the legal life of modern communities is insufficiently appreciated in the common law system. Indian Judges are guided by the same principle as in the creative development of precedent in the interpretation of predominantly technical acts.

A Study on Prosecuting Officers in Siliguri Court with Reference to the Code of Criminal Procedure, 1973.

Subhajit Bhattacharjee[1]

Abstract

In an adverserial system of criminal investigation, which India follows Prosecuting an accused is alaways a challenging and complex task . The criminal justice system consist of the police, prosecution, courts and correctional administration. All this organs needs to be working in tandem to ensure smooth running of the criminal administration. A prosecuting advocate has to aptly balance between the victim's right and that of maintaining strictest impartiality where he works as agent of justice and not as the mouthpeice of the State. The rights of the accused under Indian Criminal Jurisprudence flows from being the Constitutional rights to be ensconed under the The Code of Criminal Procedure,1973. The victim right under The Code of Criminal Procedure,1973 is not explicit enough. It merely provides the definition of victim without underlying the representational right properly only to engage an advocate of his/her choice.Barring the stage of appeal a criminal proceeding can be segregated into three parts broadly, investigation inquiry and trial. A very critical position in the criminal justice system is that of the prosecutor.Every organised society has a well developed prosecution system to prosecute those who break the society's establish legal rules. The objective of any criminal trialis to investigate the crime and decide the accused's guilt or innocence, and it is the prosecutor's primary responsibility to assist the court in determining the truth of a case. As a result, the prosecutor is required to carry out his duties in a fair, fearless and responsible manner. This author seeks to discern the fact, as to what are the statutory safeguards and limitation offered to a prosecutor in every stage of criminal proceeding under the before mentioned code. The prosecutor are given a very limited power within Code of Criminal Procedure Code, 1973. This author has interviewed prosecutors in the magisterial and sessions court of Siliguri.The interview was done using tool of questionnarie. The prosecutors are all for better and enabling powers and duties. Prosecutors are task with the delicate job of

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asssting the court in finding and taking a criminal proceeding to a logical conclusion. They are tasked with being an agent of justice in criminal proceedings. This author suggest certain changes and modification within the criminal code to remove the hindrance and which shall augment in better administration of justice.

Keywords: Prosecutors, Court, Criminal Justice System, Police, Investigation Inquiry, Trial.

I. Introduction: Nature, Scope and Importance

In India, the Constitution has provided the organs of State, namely the legislature, the executive and the judiciary. The efficient working of these organs depends on honest and efficient personnel that man these organs and the political ideology the nation chooses to follow. Article 50 of Indian Constitution states that the State shall take steps to separate the judiciary from the executive in the public service of the State. 'The legislature and the executive are politically partisan bodies and are committed to certain policies and programmes which they wish to implement. Therefore, they cannot be trusted with the final power of constitutional interpretation. They would often seek to bend the Constitution to their own views and accommodate their own policies. The constitution would thus become a plaything of the politicians[2].' Prosecutors are personnel who assist in the administration of criminal justice. Administration of Criminal justice does not centre on conviction of the accused but also invokes protecting the interest of the society and victims. It is an inclusive concept. Prosecutors are influential at every stage of criminal proceeding. They decide what offences the accused person should be charged with, whether to seek pretrial custody, and what sentence to ask for. However, prosecutors unlike defence counsel, have an ethical obligation to seek justice balancing the interest of the victims of crime, society, and those accused of crimes. They represent the public and are not mere mouth pieces for law enforcement agencies. There role is neither adversarial to the accused and definitely not the victim. The Indian Penal Code, 1860 is a substantive law with the Code of Criminal Procedure, 1973 which is the foremost procedural law of the country. As per section 4 of the Code of Criminal Procedure, 1973 all offences

[2] M.P JAIN, INDIAN CONSTITUTIONAL LAW 1668 (8th edition Lexis Nexis, 2018).

under the Indian Penal Code are to be inquired into, tried and investigated as per the provisions of the code. The sub-section appended to further states that 'all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences'. The Code of Criminal Procedure, 1973 has explained what kinds of offences are to be tried by which Courts. The Criminal procedural Code, 1973 also has specified various classes of Prosecutors or Prosecuting officers for various trial courts and also the High Court. After the enactment of the Constitution there was no change in the working of the Prosecutors till the year of 1973. That the appointment and functioning of the Prosecutors in District and Sub-Divisional Courts was supervised by the concerned District Superintendent of Police of the district till 1973. That prior to 1-4-1974 when the old Code of Criminal Procedure 1898, was in force, prior to the trial stage a police officer not below the rank of inspector would even conduct the prosecution. The only caveat was that the concerned police should not be below the rank of inspector and should not have taken part in the investigation of the case of which he is prosecuting. The traces of this can be found under section 302 of the Code of Criminal Procedure, 1973.

The Supreme Court in Sheo Nandan Paswan v State of Bihar & others [3] cautioned that even though prosecutors have a duty to represent the executive for trying the offender and it is broadly their responsibility to see that the trial results in conviction, they need be extremely concerned about the outcome of the case. They act as officers of the court and are obliged to ensure that the accused person is not unfairly treated. The High Court of Delhi , in Jitendra Kumar v State[4] warned that in performance of his duty he can prosecute the accused, but he cannot assume the role of a prosecutor. It is no part of his duty to secure conviction at all costs. The Public Prosecutor should act fairly and impartially and must be conscious of the rights of the accused. The duty of a public prosecutor to not assume the role of spokesperson of the state is vital in trial as well in the stage of inquiry of the case.

[3] AIR 1983 SC 194.

[4] Jitendra Kumar@Ajju v. State (NCT of Delhi) & others on 12 Nov, 1999.

Prosecutors also have a role in narrative building. Since they present the state's case in criminal trials, they build narratives of criminality and criminalization. In doing so they are influenced by intrinsic and extrinsic factors. Such as their faith, inner morality and social upbringing and responses. Daniel Richman describes them as "adjudicative gatekeepers "who play a key role in translating criminal "law on the books " to criminal "law in action". Such narratives are especially harmful in cases involving alleged terrorist activities and anti –nationals, where anxieties about the security of the state already haunt the imagination of those in criminal justice system and ordinary citizens. Thus, public prosecutors who support criminal justice reform can be a powerful force for altering the culture of under trial detention.

II. Prosecutors: Appointment and Function

India follows the adversarial form of investigative system unlike the inquisitorial system where the prosecutors are involved with the investigation at every step of investigation. The prosecutors formulate an opinion and influence the investigation, which opens the scope for check and balances. They act as a caution bar to investigative excesses. The term 'Prosecuting officer' is used in widest amplitude under the Code of Criminal Procedure, 1973. It means a person, by whatever named called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public prosecutor. Moreover in an amendment to Section 24[5] of the Code of Criminal Procedure, 1973, a victim too can engage a lawyer of his/her choice who could only assist a Prosecutor in criminal proceedings, but at all relevant times has to work under the direction of such prosecutor.

The Supreme Court in Shrilekha Vidyarthi v State of U.P.[6] stated that the function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of acting only in the interest of administration of justice. Public prosecutor, Additional Public Prosecutors and Assistant Public Prosecutors along with Special Public Prosecutors are appointed under section 24 & 25 of Code of Criminal Procedure Code 1973. There is also a provision for Directorate of Public

[5] Ins .by Act 5 of 2009, sec. 3 (w.e.f 31-12-2009).
[6] AIR 1991 SC 537 (547).

Prosecution under section 25A of Code of Criminal Procedure 1973. The Public Prosecutor, Additional Public Prosecutor and if appointed Special Public Prosecutor are appointed to conduct cases in Sessions Court or in Special Courts having power akin to the Sessions Court (example NDPS Court & POCSO Court). The Additional Public Prosecutor also conducts cases in Assistant Sessions Judges Court. The Assistant Public Prosecutors act as prosecuting officers in the court of Magistrates. Then now as for the appointment of prosecuting officers is concerned, for every High Court, the Central and the State Government respectively with the consultation with the High Court appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutor to carry out the brief in respect of the concerned government before the High Court. However, for the appointment of Prosecuting officer in lower judiciary the same is regulated by the State Government through District Magistrate except for the case where the Central Government is involved (the Union of India is prosecuting) or where there is a regular cadre of prosecuting officers is available. On contrary the District Magistrate in consultation with the Sessions Judge prepare a panel of names fit to be appointed as Public Prosecutor or Additional Public Prosecutor and even Assistant Public Prosecutors. The eligibility criteria for Public Prosecutor & Additional Prosecutor are seven years of practice whereas for Assistant Public Prosecutor is three years and Special Public Prosecutor is ten years of practice. Since Prosecutors are integral part of criminal proceedings they have an important role to play in the use and application of Criminal Procedure Code. Since they are government appointees, they often cannot remain indifferent to government ideologies. Hence it is important to understand and observe how they apply the Criminal Procedure Code to their day to day litigation work. In the case of Subhash Chandra Vs. Chandigarh Administration [7] it was held that the Public Prosecutor who alone is entitled to pray for withdrawal from Prosecution under section 321 of Code of Criminal Procedure, 1973 is to act not as a part of executive but as judicial limb and in praying for withdrawal he is to exercise his independent discretion even if it incurs the displeasure of his master affecting continuance of his office. To speak briefly about the functions of the Prosecutors under the Code of Criminal Procedure, 1973, one must first take into account that the criminal procedural code, other than the appeal, revision or reference part can be segregated into three parts. Broadly speaking the parts are investigation,

[7] (1980) 2 SCC 155.

inquiry and the trial. Investigation is the sole domain of the law enforcement agencies and the role of prosecutors first comes in the time of inquiry. The role of a prosecutor is very important at the hearing of bail application in a non- bailable case before the commencement of the trial and also thereafter. It is a statutory mandate to hear the Prosecutor while hearing a pre-arrest or post arrest bail application, where the offence alleged prescribe a punishment with death, imprisonment for life or any punishment over seven years. At the stage of inquiry if new evidence is collected by the investigating officers or the enforcement agencies it is put forward by the prosecutor before the Court of Law. Any application is it of seeking police custody, or an application for search seizure or warrant of any kind or that of a prayer for proclamation or attachment is made by the Prosecutor on behalf of the State. In a case which is tried in a Court of Session, the prosecutor shall open the case by describing the charge brought against the accused. That every Prosecutor be it in a Sessions Court or Magistrate Court examines the witness, cross-examines the witness of the accused/accuseds person. The prosecutor leads the argument of any criminal proceedings. A very important role of the Prosecutor is to formulate an opinion, whether an approver has deposed truly before a court of law. If the Prosecutor certifies otherwise, the accused can lose the status of the approver. That though the Prosecutor has been vested with considerable power under the Code of Criminal Procedure and also under various criminal minor Act's yet there is always an executive control over the Prosecutors.

III. Why Siliguri Court is a Subject of Study for Prosecution Story?

Siliguri is a unique place not only in the State of West Bengal, but also in India. It is fondly called the 'chicken neck of the country'; the reason is for the geographical location in which it is situated connecting the entire north-east with the rest of the country. Due to its presence near three international borders namely of Bangladesh, Nepal, Bhutan and being a commercial hub it is prone to various cross-border crimes, along with traditional and interstate crimes. Though administratively from 5TH August 2012, a large portion of Siliguri Sub division barring Phansidewa, khoribari and parts of Naxalbari bloc, entire Siliguri Municipal Corporation area, with a large portion of Rajganj Block, constitute what is today called the Siliguri Metropolitan area. Due to administrative impasse and lack of political will and consensus, Siliguri still houses a Sub-Divisional Court. It has five First class Judicial Magistrate Courts including the court of

Additional Chief Judicial Magistrate, three Additional District & Sessions Judge's Court including one Fast Track Court the other two Courts also discharges the function of Special Courts, one adjudicating cases related to NDPS Act 1985 and the other of POCSO Act 2012. There are also two civil courts, a Junior Division and one Senior Division Court, the latter also is designated as the Assistant Sessions Judges Court and a special CBI court hearing only cases arising out of the Prevention of Corruption Act. Yearly Siliguri Court receives approximately 5000 to 6000 number of cognizable cases a year and a variety of them making an interesting case for academic study. Being a sub divisional Court, it has around 25 (twenty five) number of Additional Public Prosecutor and four number of Assistant Public Prosecutor. The Additional Public Prosecutor conducts the cases in Additional District and Sessions Judges Court, Special Courts and Fast Track Court and Assistant Sessions Judge's Court. The Assistant Public Prosecutor conducts the cases in the first class Judicial Magistrate Court along with the court of Additional Chief Judicial Magistrate. Every year as stated before somewhere between five thousand to six thousand cases are investigated, inquired and tried in Siliguri Court making an interesting study of how, if any structures within the Code of Criminal Procedure exerts pressure upon the public officers of the lower judiciary. The writer herein also tries to discern if there is any extraneous pull and constraints in working of the prosecuting officers. Probably in our Indian Political map there are very few sub-divisional areas with such a cosmopolitan character as Siliguri. Invariably due to the demographics there are various socio- cultural and political bodies representing its concerned constituencies, also throwing up a challenge for law enforcing agencies. This confluence of law, politics and various factors influencing it and how do common citizenry engage, conform or confront with the realms of law in this particular area makes the study distinctive.

IV. Limitation of the Study

In India, where there are about 680 district courts, and some thousand sub divisional Courts, there is still no unified data collection grid and hence most of the decisions, order and judgments of the trial Courts goes without any notice and hence never gets reported. Though very recently even in the District and Sub-Divisional Courts concrete effort are being made by the Concerned High Court to develop the e- courts system where all the order of the courts is being uploaded.

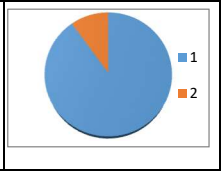
The problem herein is structural. Under the Code of Criminal Procedure, 1973 the respective High court is under the statutory duty to supervise and monitor the lower judiciary (the District and Sub-Divisional Courts). The High Courts and Supreme Court are courts of record. A particular case of the lower judiciary if goes for appeal or any other proceedings in Higher Judiciary has then only the chance of being reported and thereafter notified. That law and order is a State subject, though by virtue of the second entry to the Concurrent List, both the Central Government and the respective State Government can legislate upon the matters relating to Code of Criminal Procedure and hence the Prosecutors. India is a union of states, and with the changing landscapes, the political landscape also changes effecting the administration of justice. Practically hence it is impossible to collect data on all prosecuting officers in the country be it a Central or the State Government appointee. The data collected herein can be amplified and attributed to at least Prosecuting officers all over West Bengal.

V. Detailed Methodology and Data Analysis

The researchers' main objective herein is to understand whether the Prosecutors face any kind of impediment in performing their duty and also whether they need further enabling power under the Code of Criminal Procedure 1973 to further the cause of justice. Therefore, the objective of this survey is to find the responses of prosecutors to questions raised in the questionnaire framed for the purpose of field study.

The universe the researcher faces of a finite nature but of a considerable size. Only those Prosecutors present and were willing alone were interviewed. The technique of survey was through close ended questionnaire. The responses received during the survey were recorded in writing. Samples in this report have been collected from Siliguri Sub-Divisional Court within Darjeeling district within state of West Bengal. The survey was done by way of interviewing Prosecutors of Siliguri Court. That 10 (ten) prosecutors was interviewed for the purpose of the present pilot field work. The survey at the Siliguri Court was conducted between 23 August 2021 to 27 August 2021 at Siliguri Court premises. That all the 10 (ten) prosecutors were met and asked questions. The report shows the opinion of all the prosecutors interviewed. The report does not reflect the opinion of the researcher. The report of the survey is presented hereinafter. .

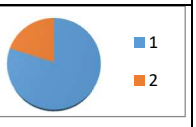
1) Do you think that some more enabling power is needed to be endowed with prosecutors under Code of Criminal Procedure 1973?

R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Total Yes	Total No	Total	Yes %	No %	Pie Chart
Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	9	1	10	90%	10%	

Blue – Yes
Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to" Do you think that some more enabling power is needed to be endowed with prosecutors under Code of Criminal Procedure 1973?". That the overwhelming number of prosecutor's answers were in affirmative ie 90% of them wanted more enabling powers while one was satisfied with the current scheme of powers delegated to them under Code of Criminal Procedure 1973.

2) Do you think the Prosecutors under Code of Criminal Procedure 1973 can conduct themselves freely without any pressure or hindrance whatsoever?

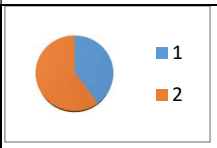
R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Total Yes	Total No	Total	Yes%	No %	Pie Chart
Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes	8	2	10	80%	20%	

Blue – Yes
Red – No

That has manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to" Do you think the Prosecutors under Code of Criminal Procedure 1973 can conduct themselves

freely without any pressure or hindrance whatsoever?". That majority of prosecutors i.e. 80% said that they can perform so, whereas 20% of the prosecutor said that they work and perform under some pressure whatsoever.

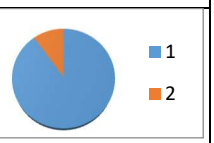
3) Do you think the Prosecutors face resistance from Police/Executive if they conduct themselves independently to any proceeding or trial?

R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Total Yes	Total No	Total	Yes %	No %	Pie Chart
No	Yes	No	No	Yes	Yes	No	No	No	Yes	8	2	10	80%	20%	

Blue – Yes
Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to" Do you think the Prosecutors face resistance from Police/Executive if they conduct themselves independently to any proceeding or trial? That 40% respondent answered in affirmative while 60% said there was no such resistance from the police or executive.

4) Do you think the Prosecutors face resistance from Police/Executive if they conduct themselves independently to any proceeding or trial?

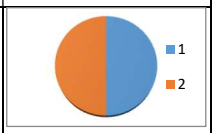
R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Yes	No	Total	Yes %	No %	Pie Chart
Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	9	1	10	90%	10%	

Blue – Yes
Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to" Do you think that the

Prosecutors as in inquisitorial form of investigation must be given power to take part in investigation under Code of Criminal Procedure 1973?".That 90% of the respondent affirmed the fact that the prosecutor must be given a role to play in investigation as per their counterpart in countries that follow inquisitorial form of investigation while one out of ten i.e. 10% answer was in negative.

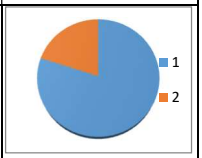
5) Do you think that Prosecutor appointments must be in tandem with judicial appointments to maintain high standards of conduct in their conduct under Code of Criminal Procedure 1973?

R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Yes	No	Total	Yes %	No %	Pie Chart
Yes	Yes	Yes	No	No	No	Yes	No	No	Yes	5	5	10	50%	50%	

Blue – Yes
Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to" Do you think that Prosecutor appointments must be in tandem with judicial appointments to maintain high standards of conduct in their conduct under Code of Criminal Procedure 1973?". That 50% of the respondent agreed with the view of such appointment and the rest 50% of the respondent was against such scheme of things.

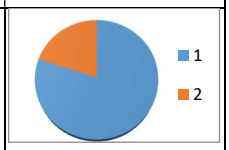
6) Do you think that the investigating agency should be accountable to the Prosecutor for shallow investigation?

R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Yes	No	Total	Ye %	No %	Pie Chart
Yes	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	8	2	10	80%	20%	

Blue – Yes
Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to" Do you think that Prosecutor appointments must be in tandem with judicial appointments to maintain high standards of conduct in their conduct under Code of Criminal Procedure 1973?". That 50% of the respondent agreed with the view of such appointment and the rest 50% of the respondent was against such scheme of things.

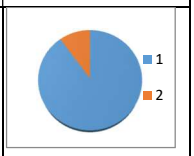
7) Do you think that a complete overhaulment of Code of Criminal Procedure 1973 is needed from adversarial system to inquisitorial system?

R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Yes	No	Total	Yes %	No %	Pie Chart
Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	No	Yes	8	2	10	80%	20%	

Blue – Yes
Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to" Do you think that a complete overhaulment of Code of Criminal Procedure 1973 is needed from adversarial system to inquisitorial system?" That 80% of the respondent answered in affirmative and the rest 20% of the respondent negated the idea of any sweeping changes to the Code of Criminal Procedure Code 1973.

8) Do you think that a cognizable crime which is non bailable and prescribes punishment over seven years must be only investigated by specialized investigating agency?

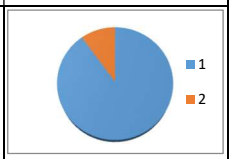
R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Yes	No	Total	Yes %	No %	Pie Chart
Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	9	1	10	90%	10%	

Blue – Yes

Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to "Do you think that a cognizable crime which is non bailable and prescribes punishment over seven years must be only investigated by specialized investigating agency?" That 90% of the respondent was of the view that investigation of heinous crime must be conducted by a specialized agency be it a dedicated investigating agency or specialized unit within the police itself and 10% of the respondent negated the above view expressed by their own colleagues.

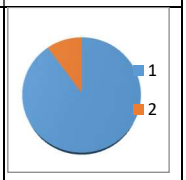
9) Do you think that there must be a comprehensive witness protection scheme under Code of Criminal Procedure 1973?

R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Yes	No	Total	Yes %	No %	Pie Chart
Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	9	1	10	90%	10%	

Blue – Yes
Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to "Do you think that there must be a comprehensive witness protection scheme under Code of Criminal Procedure 1973?" That 90% respondent was of the view that there needed to be a comprehensive witness protection scheme while 10% respondent found the idea not suitable for the cause

10) Do you think the Prosecutor should be given a discretionary power to take a call whether to prosecute or not to prosecute at the commencement of trial?

R 1	R 2	R 3	R4	R5	R6	R7	R8	R9	R 10	Yes	No	Total	Yes %	No %	Pie Chart
Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	9	1	10	90%	10%	

Blue – Yes

Red – No

That as manifested from the above graphical representation when the question to the set of 10 (ten) number of prosecutors was asked as to "Do you think the Prosecutor should be given a discretionary power to take a call whether to prosecute or not to prosecute at the commencement of trial? That 90% respondent was for the discretion call for the prosecutors while 10% respondent was against any such idea whatsoever.

VI. Conclusions and Suggestions

That the findings of the pilot survey throw light to a very illuminating problem that has surfaced within the working of the prosecutors. That the survey reveals that the prosecutors feel under powered while prosecuting under the Code of Criminal Procedure 1973. That they want a complete and sweeping change under Criminal Procedure Code 1973, with power such as to take part in conducting investigation. The prosecutors want to make the investigating agency accountable to them for any shallow investigation. That overwhelming number of respondent/prosecutors were of the view that heinous crime (offences which are non bailable & prescribes punishment over seven years), must be investigated by a specialized investigating agency be it a separate one or within the police itself. That majority of respondent/prosecutors was also of the view of a comprehensive witness protection scheme and that for giving the prosecutors with the discretionary call whether to prosecute an accused or not after a charge sheet has been filed. That though most of the prosecutors suggested to the fact that they

face no amount of hindrance in working freely from the dictates of police or executive or any pressure whatsoever. That contrastingly 90% of them want more enabling powers and 80% prosecutors want complete overhauling of the Code of Criminal Procedure.

The main objective of criminal justice system is to deliver fair justice to the victim of offence and also to deter and reform the criminals. In other words, we can define criminal justice system as the system of law enforcement that is directly involved in apprehending, prosecuting, defending, sentencing, and punishing those who are suspected or convicted of criminal offence. The criminal Justice System in India is a legacy of the British. Fair and expeditious justice delivery warrants a change now. The investigation is the backbone of the fair and accurate justice delivered following the process of trial in criminal justice system, but there are several questions raised on the investigation done by the Police authority more often than not for their shallow investigation. The main objectives of criminal justice system must be delivery of fair justice as no any criminal could be spared and no any innocent person could be convicted. Criminal justice process must follow the principle of natural justice.

The investigation of a criminal case, however good and painstaking it may be, will be rendered fruitless, if the prosecution machinery is indifferent or inefficient. One of the well-known causes for the failure of a large number of prosecutions is the poor performance of the prosecution. In practice, the accused on whom the burden is little engages a very competent lawyer, while, the prosecution, on whom the burden is heavy to prove the case beyond reasonable doubt, is very often represented by persons of poor competence, and the natural outcome is that the defence succeeds in creating the reasonable doubt on the mind of the court. The most notorious problem in the functioning of the courts, particularly in the trial courts is the granting of frequent adjournments on most flimsy grounds. This malady has considerably eroded the confidence of the people in the judiciary. Adjournments contribute to delays in the disposal of cases.

That to conclude one must say that the Indian court particularly the criminal prosecution side is infested with plethora of problems and faces myriad challenges. To suggest a few measures which will go in at least in functioning of prosecutors more freely and independently are as follows;

1. That the appointment of Prosecutors in the lower rung of the judiciary, up to the District and Sessions Court must be in tandem with judicial appointment.
2. That the condition regulating their service must be to ensure the fact that the prosecutor can work freely without any executive or political interference.
3. That there must be due training programme for the prosecutors for enabling them for betterment and enhancing their prosecuting skills and logic.
4. That each district must be clustered and must be under separate Directorate of Prosecution, for better monitoring of the prosecution in district and sub divisional courts.
5. That the office of the Directorate of Prosecution in the state must be segregated and its jurisdiction must be streamlined into separate territorial jurisdiction in the state and each directorate of prosecution must not cover more than five districts.
6. That each office of the Directorate of Prosecution spread over the state must comprise, not only seasoned, experienced lawyers or prosecutors but legal scholars, retired judges of criminal courts and a man well versed in modern gadgets and technology to arrest modern day crime emanating from the use of technology.
7. That for a shallow investigation the investigating officer or for that matter for an incompetent prosecution the prosecutor as the case may be must be liable and accountable to the office of Directorate of Prosecution.
8. That Directorate of Prosecutors office in state must be given a constitutional sanctity or statutory guidelines, much in the line of Comptroller and Auditor general making it answerable before the state assembly and submitting its report annually to the state assembly.

Excavating the Role of Digital Twins in Upgrading Cities and Homes Amidst 21st Century: A Techno-Legal Perspective

Dr. Jayanta Ghosh[1]
Oishika Banerji[2]

Abstract

Considering factors like technological up-gradation, digital awakening, sustainability, and smart living with machines, the concept of smart cities and smart homes have stepped in with the helping hand offered by digital twins in this era of the 21st century. Aiming to connect physical objects with virtual ones, digital twins using bi-directional connectivity helps maximize the potential of a city, pushing it to grow beyond its capabilities. A rise in the use of virtual simulation technologies reflects the importance of digital twin technology in today's complex world. With different countries around the world adopting the concept of smart cities and homes to address various issues, the question is who addresses the detriments of walking in with this new adaptability, and who will be liable in situations of mishappening? The Narendra Modi government has initiated the birth of smart cities in India, thereby mending ways for Amravati to become the first city born out of digital twin technology. Walking in with the great potential to transform urban governance and increase urban metabolism, digital twins powered with Artificial Intelligence, the Internet of Things, 5G, blockchain technology have made a significant place in a man's daily life. A feasible device for urban planning, the subject of digital twins is divergent enough to have an exhaustive coverage. Therefore, there lies room for further development, study, and implementation of this technology. One must not forget that paralyzed laws and regulations welcoming new sets of challenges possessed by the revolutionary digital twins have been in the spotlight of discussion for some time now. Channelizing the same stands utmost in the era of smart living with the help of a

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well-planned legal framework to address issues arising from the claws of this technology.

Keywords: Digital twins, smart cities, smart homes, IoT, Big Data, Artificial Intelligence

I. Introduction

Aiming to connect physical objects with virtual ones, digital twins using bi-directional connectivity helps maximize the potential of a city, pushing it to grow beyond its capabilities. A rise in the use of virtual simulation technologies reflects the importance of digital twin technology in today's complex world. A common misconception about "Digital Twin" is that it is a simulation process that makes use of the potentials exerted by physical models, sensors, and operational history data, among other things, to initiate the integration of information from multiple disciplines, physical quantities, scales, and probabilities. As a result, the digital twin may be thought of as a virtual replica of a physical product in a virtual environment. The mirror body serves as a reflection of the physical entity product's whole life cycle. One cannot ignore the fact that there are currently various theories and understandings concerning the concept of digital twins. Therefore, the term could not be decorated with a consensus definition. However, the elements that constitute digital twins include physical entities, virtual models, data, connections, and services.[3] The 21st century has been ornamented with technological applications involved in the up-gradation of a man's life. The advent of digital twins has been a boon for developing smart cities[4] and homes across the globe. Followed by this, it goes without saying that the developed countries will be a few steps ahead in implementing smart cities and homes when placed in comparison with developed or developing countries. Nevertheless, India has been able to utilize technology in building smart cities to a significant extent. To summarize, the digital twin is the driving machinery to create an inevitable

[3] Li Deren, Yu Wenbo, and Shao Zhenfeng, *Smart city based on digital twins*, Springer Link (March 29, 2022, 9:30 PM), https://link.springer.com/article/10.1007/s43762-021-00005-y.

[4] DR. Jayanta Ghosh And A. Nanda, Legal Implication Of Blockchain Technology In Public Health, Book Chapter 16 in Digital Health Transformation With Blockchain And Artificial Intelligence, (Publisher CRC Press, Taylor and Francis 2022).

trend of tech transformation aiming to help cities realize real-time remote monitoring, thereby allowing more excellent, effective decision-making.[5]

II. Digital Twins and Smart Cities

Any city that uses the updated form of digital technology to improve its infrastructure, services offered, and the lives of its people are considered a smart city under this definition. When a step forward to the broader interpretation of smart cities is made, it can be interpreted as a socio-technical identity that encompasses economic, social, political, and environmental perspectives.[6] The notion of a smart city has slowly developed from static 3D modeling to digital twin technology, mixing dynamic digital technology with a static 3D model to create a new concept for smart city development.[7] It may thus argue that the digital twin city is an alternative implementation of the digital twin idea at the city level.

Using this program, you may create a massive, interconnected system that connects the real world with the virtual world, allowing the two to map and interact in both directions. Physical cities can be matched to their "twin cities," resulting in patterns of cohabitation and integration in the physical and digital dimensions. Building a digital twin city relies heavily on data as well as a solid technical base as well. Instead of big urban data created continually from different sensors and cameras all around the city daily, the latter refers to the digital subsystems that the city's management departments are gradually building to answer daily demands.[8] The British government proposed the Smart London Plan to upgrade the lives of their citizens and the overall development of the capital city. Working on the same track is another smart city plan recognized by Singapore Intelligent Nation, which was brought up in 2015 to consider Singapore as a smart nation eventually. The strategy focusing on four core areas, namely industry, open government system, access of information, and engagement,

[5] Tianhu Deng, et al., *A systematic review of a digital twin city: A new pattern of urban governance toward smart cities*, Science Direct (June. 25, 2022, 8:45 PM), https://www.sciencedirect.com/science/article/pii/S2096232021000238.

[6] Mervi Hämäläinen, *Smart city dvelopment with digital twin technology*, Research Gate (July 17, 2022, 9:30 PM), https://www.researchgate.net/publication/342715735_Smart_city_dvelopment_with_digital_twin_technology.

[7] *Id.* at 3.

[8] *Id.* at 3.

generated by New York to step forward as the "world's most digital city" demands a special mention here. Followed by this, the particular emphasis of the Chinese President Xi concerning modernization of the government system and the governance must not be ignored in the context of smart cities and smart homes.[9]

Research conducted by Angelidou (2017)[10], that involved the examination of smart city plans designed for implementation in 15 major cities across the world, revealed that there exists coordination between the upper and the lower layers of a smart city which helps in the efficient functioning of these kinds of cities. The concept of smart cities and the role of digital twin technology in implementing the idea has been discussed hereunder from different lenses.

A. The New Applications of a Smart City: All One Needs to Know

Smart cities alone cannot function unless the applications that form an integral part of the entire set of smart cities are not considered. As a city grows, its inhabitants will help it gain notoriety and build its structure by using applications that make life simpler and better for everyone. This will lead to more individuals participating in the city-wide promotion of knowledge and analysis to help the city operate better in real-time. Smart Cities' focus on social and environmental capital rather than just technology fosters a more holistic vision of cities. Managing urban growth by promoting economic competitiveness, improving social cohesion, and assuring their inhabitants' enhanced quality of life is essential to being smart.

Smart city critical infrastructure (SCCI) provides residents with the security of knowing that essential services, including public transit, communications, electricity and water distribution, hospitals, and schools, would continue to be available even in an emergency. Infrastructures such as gas stations and power

[9] *Id.* at 4.

[10] Margarita Angelidou, *The Role of Smart City Characteristics in the Plans of Fifteen Cities*, IDEAS, (July 17, 2022, 9:30 PM), https://ideas.repec.org/a/taf/cjutxx/v24y2017i4p3-28.html.

plants are among the key infrastructures. Other critical infrastructures include hospitals and transportation.[11]

Administration in a Smart City

As big data and integrated platforms emerge the urban business environment is fast changing. These platforms might be viewed as monopolies owing to their network effects. Priorities such as avoiding unfair competition, ensuring consumer protection, and social equity must be revisited to be addressed.[12] One such endeavor to improve smart city governance is the recent growth in research into the idea of smart governance.[13] As technology's role in city functioning has grown, smart governance forces government agencies to reconsider their responsibilities in these data-rich cities. To upgrade traditional administrative systems (such as e-government) to the city level, smart governance can use various smart technologies (such as big data, the Internet of Things (IoT), and Artificial Intelligence (AI)). These technologies can streamline city operations, make better decisions, and improve the quality of life for citizens. Smart city governance, on the other hand, is characterized by a technocratic, supply-oriented approach to city government. The importance of technology in data collection and knowledge production is heavily emphasized to make government operations smarter and automate urban system activities. A technology-driven, digital approach to solving urban problems is frequently seen as a universal answer.[14]

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[11] Shruti, Prabhat Kumar Singh, and Anurag Ohri, *Towards Developing Sustainable Smart Cities in India*, International IJEAT (Nov 22, 2022, 2:40 PM), https://www.ijeat.org/portfolio-item/B3653129219/.

[12] Seunghwan Myeong, et al, Smart City Strategies—Technology Push or Culture Pull? A Case Study Exploration of Gimpo and Namyangju, South Korea, MDPI (Dec 24, 2020, 3:45 PM), https://www.mdpi.com/2624-6511/4/1/3/htm.

[13] S.P. Chakrabarty, Jayanta Ghosh and S. Mukherjee, "Privacy Issues of Smart Cities: Legal Outlook". In: Chakraborty C., Lin J.CW., Alazab M. (eds) Data-Driven Mining, Learning and Analytics for Secured Smart Cities. Advanced Sciences and Technologies for Security Applications. Springer, ISBN: 978-3-030-72139-8 Cham (2021).

[14] Huaxiong Jiang, Stan Geertman, and Patrick Witte*, Smart urban governance: an alternative to technocratic "smartness"*, ResearchGate (Nov. 4, 2022, 2:30 PM), https://www.researchgate.net/publication/345678222_Smart_urban_governance_an_alternative_to_technocratic_"smartness".

Public participation in urban development promotes a more democratic and legitimate decision-making process, but it also acts as an intelligence-gathering tool for the government. Citizen knowledge and expertise are crucial for setting goals and allocating finite resources, and they go hand in hand with the strategic understanding of enterprises. Citizens' participation has proved difficult to come by. Therefore, cities are turning to new information and communication technologies (ICTs) to see if they might help boost public participation.

Disaster Management in a Smart City

There are four significant competencies in developing resilient cities that are redefining the paradigm of smart cities. These are: plan/prepare; absorb; recover and adapt. Beyond the idea of pure prevention and hardening, resilience may be viewed as a proactive strategy to improving infrastructures' ability to prevent harm before disruptive events, reduce suffering during disruptive events, and increase recovery capabilities after the events. Traditional approaches to risk management, on the other hand, do not take dependencies and related cascade consequences into account. Resilience management takes risk management a step further by bringing together a system's temporal capacity to absorb and recover from destructive events and adapt as a result of those events. Resilience complements traditional risk management by utilizing adaptation and mitigation techniques.[15]

Disasters are complicated. Therefore, creating a smart city environment is crucial for increasing resiliency while also increasing public awareness. A sensor tier is in charge of receiving and updating information about reality from sensors; a database tier gathers information from relevant domain resources, and a system architecture consists of four levels. This tier is responsible for examining the continually updated conditions and making emergency decisions. The alert tier is in charge of notifying and warning residents who live in the high-risk region. This layer is also responsible for providing decision support.[16]

[15] IPCC, Special Report of the Inter-Governmental Panel on Climate Change, Managing The Risk of Extreme Events and Disaster To Advance Climate Change Adaptation (2018), https://www.ipcc.ch/site/assets/uploads/2018/03/SREX_Full_Report-1.pdf.

[16] Aravindi Samarakkody, et al, *Technological Innovations for Enhancing Disaster Resilience in Smart Cities: A Comprehensive Urban Scholar's Analysis*, Research

Controlling Traffic and Accidents in a Smart City

Advanced Traffic Management Systems (ATMS) and Advanced Traveler Information Systems (ATIS) to efficiently monitor and regulate traffic flows will be a critical component of future smart cities. To enhance the overall functioning of the traffic system, the ATMS/ATIS is used, for instance, by lowering emissions, noise, and travel times. Most ATMS/ATIS systems use data taken from loops and radar detectors to arrive at a fixed point (eulerian). Eulerian sensors have the potential to collect data in terms of speed, flow, and occupancy. The drawback that accompanies these sensors is the inadequacy of providing a trajectory-based measurement that enhances traffic flow behavior. Nevertheless, tracking large-scale mobility patterns can be carried out by these sensors.[17]

Implementing varying time delays for red, green, and yellow at different intersections and places might be an excellent answer to this problem. It is recommended that the wait at crossings with large traffic volumes be greater than the delay at intersections with low traffic volumes. Emergency vehicles like ambulances and fire engines might stay trapped for hours when there is a traffic bottleneck. Estimating OD matrices from this data has recently become increasingly popular. The difficulty of obtaining access to this sort of data from cellular providers has previously been a limiting issue. Orange recently published a study data set on cellular networks, which piqued the interest of academics and practitioners throughout the world. This might help researchers learn more about the data source's potential while making it more straightforward for other cellular service providers to contribute their data.[18] Many cities across the world have already installed a considerable number of heterogeneous traffic surveillance devices. Data collected from these sensors isn't enough to enhance road users' knowledge (such as trip time) or give highway authorities the tools they need to manage traffic.[19]

Gate (Nov. 4, 2022, 2:30 PM), https://www.researchgate.net/publication/372949356_Technological_Innovations_for_Enhancing_Disaster_Resilience_in_Smart_Cities_A_Comprehensive_Urban_Scholar's_Analysis.

[17] Andreas Allström, et al, Traffic management for smart cities, (Nov. 4, 2022, 2:30 PM), http://www.diva-portal.org/smash/get/diva2:975199/FULLTEXT01.pdf.

[18] *Id.* at 12.

[19] *Id.* at 13.

Economy in Smart City

When the rural economy was replaced by the urban economy, which now accounts for a significant portion of GDP, what defines economic progress in smart cities arose. What distinguishes it from other forms of urban economic activity? Is conventional urban economic theory and practice still viable in a smart city economy, or do we need to look at novel theories and practices for smart city economic development?

A 21st-century city is equipped with a high-speed communication center along with a robust information and communication technology (ICT) infrastructure that links it in real-time to other cities across the world. Desktop computers have evolved into laptops and slates, with wearable devices like mobile phones and other gizmos following suit. Metropolises serve as economic growth engines, and they have a significant impact on both the local and national economies. Furthermore, cities function as hopeful beacons for a wide range of individuals, both skilled and unskilled. These people are drawn to cities in search of more significant opportunities for work and living standards. Compared to their rural equivalents, cities have more substantial infrastructure and services, supporting their agglomeration economies and the associated creative and technological production process. Cities can fulfill these many tasks.[20]

Unprecedented urban economic growth is occurring, yet many employees in emerging nations are trapped in precarious (commonly referred to as informal) employment. In many ways, the growth of urban economies is hampered by a scarcity of qualified employees, especially those with technical education and training. As part of the broader issue of sustainable development, economics is intertwined with social and environmental considerations in urban development. Cities must thus be designed with an atmosphere conducive to human transformation via lifelong learning if they are to be justified.

Addressing Man's Needs in a Smart City

Urban systems should work better in smart cities since they encourage sustainable development and improve the quality of daily living.[21] Water is a need. Water use varies from house to house since the individual demands of the residents

[20] *Id.* at 13.
[21] *Id.* at 14.

determine it. The amount of water used varies by season. An IoT device[22] is installed in the water tank of every home in the smart city, and it sends notifications to residents' mobile phones when there is a pipeline problem, such as an overflow or leak, or when the water supply is sour or unsafe drink. The company uses IoT devices to detect pipeline leaks. The Internet of Things gadget also regulates water flow to tanks containing drinking water and sour water through valves. The IoT gadget is immediately attached to a charger powered by the house's electrical system.[23] Cities will be zero polluting and self-sustaining if renewable energy sources are correctly utilized to generate power. Only when the standard of living for its residents improves can a city be considered smart. It need more dispersed, linked, and intelligent infrastructure for smart power.[24]

Cities are getting smarter and more manageable thanks to the development of various infrastructures and amenities. Multiple situations (e.g., smart homes, community health centers, and smart hospitals) and scenarios can make use of its ability to assist smart healthcare systems (e.g., abnormal behavior monitoring, disease prevention and diagnosis, clinical decision-making, prescription recommendation, rehabilitation, and post-marketing surveillance).[25] While organizations in the healthcare industry were still thinking about whether digitizing their patient and medical and health personnel records would be the right call or not, a consistently growing number of technologies and innovations were already being introduced in the background. One of such is Big Data Analytics.[26]

There are several drawbacks to current wastewater management methods, such as SCADA (Supervisory Control and Data Acquisition) systems. As a result, water utilities have developed more efficient and intelligent wastewater systems to satisfy the growing demand for freshwater.[27]

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[22] Jayanta Ghosh, *Powerplay of Artificial Intelligence upon Intellectual Property Law*, Vol. 11 No. 1 (Part III), INDIAN JOURNAL OF LAW AND JUSTICE, March 2020, p 84 – 99.
[23] *Id.* at 15.
[24] *Id.* at 16.
[25] *Id.* at 17.
[26] *Id.* at 18.
[27] T.M. Vinod Kumar, and Bharat Dahiya, Smart Economy in Smart Cities, Research Gate (Jan 5. 2022, 4:30 PM),https://www.researchgate.net/figure/Smart-Cities-

a. A Sound Information Security Guarantee Mechanism

The concept and initiative of a Smart City are still in development, and the frameworks in mind of the many stakeholders may change from one Smart City to the next. Policy formulation is critical from the standpoint of security since it helps stakeholders understand "what kind of security policy should be developed for a Smart City as a whole," "what kind of security standards should be required," and "what kind of organizational structure should function.". The Personal Information Protection Law, the Basic Law for Promoting Public-Private Data Utilization, the General Data Protection Regulation, and business laws/guidelines in each area should be considered while establishing Smart Cities policies.

b. The City Information Model (CIM)

Euro step Group developed Share-A-space, the software on which CIM is built. Instead of gathering information from several sources and consolidating it into one collaborative hub, CIM will achieve its goal if all needed information is always readily available and up-to-date. The significant finding is that the municipality may use CIM as a substitute tool in their job.[28] Because of the necessity for evidence-based and collaborative planning and decision-making in urban planning and decision-making, the idea of Smart Cities is driving the digitization of urban development. 3D models, Digital Twins, Urban Analytics and Informatics, Geographic Information Systems (GIS), and Planning Support Systems are enabling this digital transition (PSS). City Information Modelling (CIM) is a new term used to describe the convergence of these disparate technology forces.[29]

Maturity-Model-Source-140-p-7-Note-KPI-key-performance-indicators_fig25_306924920.

[28] *Id.* At 12.

[29] Jorge Gill, *City Information Modelling: A Conceptual Framework for Research and Practice in Digital Urban Planning*, ResearchGate (Dec 5, 2022, 3:25 PM), https://www.researchgate.net/publication/346548523_City_Information_Modelling_A_Conceptual_Framework_for_Research_and_Practice_in_Digital_Urban_Planning

c. Smart Farming

When it comes to building and integrating IoT features like linked devices, gateways, and apps into digital platforms, cloud-based digital platforms have become standard. Platforms in the cloud make it possible to manage IoT services' creation, distribution, and evolution. Rural agricultural countries benefit from innovative ideas that are helping agriculture become more efficient and thriving on a day-to-day basis. In reality, sensors, IoT connections, and self-driving cars were all developed on a farm, and they're all now part of smart cities. They are using real-time data from a network of sensors, smart grids in the city supply power exactly when and where it's required. Smart relays and switches automatically redirect energy around issues while monitoring electricity use and immediately report shortages or outages. This technology is being implemented to make the electric grid more robust and dependable while also consuming less energy. Modern agriculture uses similar technologies and resource optimization techniques. Several new technologies are available to farmers that provide them with precise information on every aspect of their business, from the moisture in the soil to the number of nutrients and salt.[30]

Traditional agricultural practises can't compete with the efficiency of modern farming. Small farmers in rural and urban areas have a tough time integrating the digital and physical infrastructures. Agri start-ups can reach all of these farmers and make it a practical and cost-effective choice. Kisan Suvidha, a government-funded app, gives farmers access to real-time weather data, market prices, dealer information, and more. On the app, you can also see rates in your immediate neighborhood and across India at a glance. Agri-tech start-ups may assist farmers in obtaining crop insurance and institutional finance by evaluating various data, including that provided by Bhuvan, the ISRO Geo-platform. India's Agri industry will continue to thrive even after Covid, thanks to the efforts of these IT agencies and government programmers.

[30] Bayer Contributor, *What Smart Cities Are Learning from Smart Farms,* Forbes (Nov 27, 2022, 3:45 PM), https://www.forbes.com/sites/bayer/2019/11/27/what-smart-cities-are-learning-from-smart-farms/? sh=955c6bda

B. Addressing Data Fairness and Equity in Smart Cities

Engineers are building a cyber-physical world where ubiquitously networked devices, things, and processes can uncover previously unimaginable prospects through the continuous amalgamation of diverse technologies. Digital technologies and artificial intelligence (AI) offer new chances to transform information into actionable insights, establishing a balance between social, environmental, and economic prospects because of the rising ubiquity of these devices across society. As a result, smart city design, building, and planning may offer these benefits. With machine learning (ML) approaches, we're capturing and processing more data at a faster rate than ever before. This has implications for everything from water and energy management to traffic and autonomous cars. Smart objects that aren't relevant to and useable by everyone would, at best, inconvenience a significant section of the population if they're produced or distributed. However, using ML approaches to create services that ignore socio-cultural, economic, or political diversity increases the risk of developing a more segregated and discriminatory society.

As cities increasingly rely on automation and machine learning, municipal administration must maintain a high degree of transparency. Similarly, they will have to disclose any intentions behind the provided services publicly, the nature and scope of any collected data, the context in which the information is repurposed and used to decide how services are delivered (and to whom) and, finally, the reasoning behind such decision-making will be similar to GDPR's various requirements. The curtain must be lifted from big data analytics and intelligence.

III. Digital Twins and Smart Homes

Using internet-connected gadgets, a smart home is where appliances and systems, including lighting and heating, can be remotely monitored and managed. [31] Shortly, digital twins will revolutionize production by reducing costs, monitoring assets, streamlining upkeep, and enabling the development of linked goods. Although it's not a new concept, the digital twin model quickly makes its way into

[31] Tech Target, https://www.techtarget.com/iotagenda/definition/smart-home-or-building (last visited Oct. 6, 2022).

fields like manufacturing and construction. One of the driving forces is the Internet of Things (IoT). Digital twins in a non-academic, industrial setting.[32]

A. Role of IoT

The Internet of Things (IoT) is critical in the development of smart houses. Almost any household item may be connected to the Internet via the Internet of Things (IoT). Using IoT, you can keep tabs on and operate any connected device, wherever you are or what time it is. Using different sensors and video feeds, a smart house can keep tabs on the environment around it. Monitoring is critical because it keeps tabs on every activity in a smart home, which is essential for taking any other action or making any other decisions. Monitoring the temperature of a room and providing an alarm to the user to turn on the air conditioning.

B. Smart Home Applications

Home automation includes smart home applications. Smart Homes are about much more than just turning gadgets on and off and on and off again. With these apps, we get a sense of being physically there with and manipulating things. Smart door lock, smart switching off of lights and fans, and smart refrigerator are some of the uses we're considering.[33] These smart home applications can be enhanced in the future to meet our changing requirements and make our surroundings more comfortable and welcoming. While knowing your family is secure is essential, an automatic door lock system ensures that you are alerted when the door is locked or unlocked so that you can close it and grant permission to someone attempting to gain in from your office. Many people find it tedious to keep an eye on their groceries and get hungry for the food that has been consumed. Thus smart refrigerators alert you when food is running low.

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[32] I-scoop, https://www.i-scoop.eu/internet-of-things-iot/industrial-internet-things-iiot-saving-costs-innovation/digital-twins/ (last visited Oct. 6, 2022).

[33] Gopinath V, Yallamanda Ch, et. al, *The Journey of Big Data: 3 V's to 3 2 V's,* ResearchGate (Mar. 27, 2022, 9:29 PM), https://www.researchgate.net/publication/357649275_The_Journey_of_Big_Data_3_V's_to_3_2_.

IV. Role of law in governing the digital twins for smart cities and smart homes

Legal machinery is the one tool to address challenges possessed by the digital twin technology in the presently developing smart cities and homes. Due to their dynamic nature, digital twins offer different dangers that must be addressed through the contract (or contracts) that support them. Any digital twin project might run into legal issues, such as the following:

Intellectual property rights: There are specific essential concerns about intellectual property rights in the digital twin realm, such as: Does your digital twin use the intellectual property rights of third parties? What rights do you have to utilize them in the digital twin in the way you want to? Who owns the intellectual property in creative new works generated when creating a digital twin?

Data use rights: What data do you plan on utilizing in your digital twin, and do you have ownership of it? If not, do you have permission from the data's owner to use it as intended in the digital twin? You should keep it in mind even while using open-source data, which may have usage restrictions. Projects involving the creation of digital twins may face difficult decisions about who is responsible for what aspects of the endeavor.

Privacy and data protection: Is it legal for you to utilize personal information gathered from a digital twin, even if you possess the data to do so?

Cyber security: In terms of privacy and data protection, data collected by mechanical sensors may pose less of a threat, but growing connection also carries with it the danger of new security flaws. Who is in charge of safeguarding the data, and who is exposed to the threat of a cyber-event?

Malicious use: While digital twins have several advantages, they may also be used for malevolent ends, mainly if they are made publicly available. Ransomware or even terrorist attacks might take advantage of digital twins to cause the most harm or disruption. What safeguards are in place to guard against malicious usage, and who is responsible if any damage is done as a result? Digital twins are expected to grow in importance for infrastructure and governance in the future, which means hostile actors may decide to attack digital twins directly. GDPR Art. 6 demands consent of the information provider or data subject as a

pre-requisite to collect information and processing under GDPR. At the same time, IT Rules Rule 5 guarantees the lawfulness of data processing as a natural method of limiting ill-intentioned usage.

Responsibility for data quality: How will you ensure the data is correct, and who is in charge of doing so? How suitable is the data used in your digital twin to simulate a mission-critical system for mission-critical systems? This is especially important if the digital twin is going to pull data from various places and systems.

Liability: Is there anything you can do if your digital twin doesn't work? To what extent can you recover a mistaken investment choice based on a digital twin's model if you can prove the digital twin was wrong? When a digital twin has numerous interconnected components or subsystems, these dangers become much more significant. It is a requirement under Section 43A IT Act, 2000 and Rule 8(1) IT Rules, 2011 that damages caused by data infringement be compensated and that responsibility is exempted under specific situations. Section 72A of the IT Act of 2000 and Article 83 of the GDPR improve these provisions. Both provide provisions for financial penalties for infractions.

Integration risk: Is legacy infrastructure going to be a problem when incorporating digital twin technology? Who is in charge of any risks associated with the integration?

Connectivity and availability: When things go wrong, such as power failures, software bugs, or delays in deployment, it will be challenging to achieve the overarching aim of interconnectivity. When will outages have legal repercussions, if any?

Assurance, governance, and trust: Getting people to believe in new technologies is essential for adoption. Who is responsible for ensuring that a digital twin or IoT platform is operating as intended?

Standardization: Digital twin interoperability is hampered by the absence of a standardized technique for modeling them. What interoperability standards will be used in a digital twin?

Ongoing maintenance: Digital twin planning, pricing, and contracting must account for unavoidable continuous administration and maintenance due to software upgrades, physical asset changes, and enhancements to the digital twin.

The digital twin's entire life cycle cost will be dominated by the cost of maintenance and administration, much like with their physical counterparts.[34]

A. Addressing challenges

Numerous difficulties must be overcome to create a smart house that uses a digital twin method. The following are some of the most typical roadblocks to making a smart twin house:

Data privacy: The sharing of residential data poses a serious threat to individual privacy. The data will be sold to industry vendors via data administrators and cloud service providers. Up to 80% of the market might be restricted due to privacy and security concerns.[35] There are three privacy rights provided to the data owner by IT Rules, 2011, Articles (14-18), Art. (20-22), and Art. 7(3) of GDPR: the right to correction, the right of information, and the right to withdraw permission (Rule 5(6), Rule 5(3), Rule 5(7)).

Security: Smart twin solutions' security is gravely jeopardized. Because the solution's price must be raised, the market's value and demand will be reduced. It is required that the Common Data Protection Security Practices include the implementation of internal policies and security audits and adherence to a voluntary code of conduct and certification mechanisms under Rule 4 of the IT Rules, 2011.

Hardware: The upkeep of smart homes necessitates many more sensors, actuators, and controllers. This gear will be expensive, both to buy and to use in delivering smart solutions [34].

Connectivity: The architecture and protocols that link devices to the cloud or network are connectivity. Both virtual and physical products are becoming interconnected [35]. We could use sensors and a virtual representation of the house to keep tabs on where it is at all times.[36]

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[34] Lexology, https://www.lexology.com/library/detail.aspx?g=dda9e40b-f8ed-4ee0-96ea-4848711dd4c2 (last visited Oct. 6, 2022).

[35] Gopinath V, Yallamanda Ch, et. al, *The Journey of Big Data: 3 V's to 3 2 V's,* ResearchGate (Mar. 27, 2022, 9:29 PM), https://www.researchgate.net/publication/357649275_The_Journey_of_Big_Data_3_V's_to_3_2_V's.

[36] *Id.* at 35.

B. Data Protection Laws

If used as intended, a digital twin may simply be used to store data on the design and construction of a given asset. When it's developed to its full potential, a digital twin can include virtual projections of nearly everything, posing new problems. Data ownership, causality, and responsibility are just a few of the topics that might be controversial and difficult to sort out. Companies are under more pressure to comply with data privacy rules, such as the EU's recently implemented GDPR. Art.5 of GDPR, read with Art 4 and 8 of the statute vis a vis Rule 5 of IT Rules, 2011, functions with the similar objective of Collecting data for a lawful purpose as specified in the legislations with prior consent from the original owner.[37]

In terms of privacy and security, the GDPR is the strictest law in the world. For all its European origins, the GDPR imposes duties on companies worldwide that collect or target data about EU citizens.[38] Those who commit less severe infractions may be subject to a punishment of up to €10 million, or 2% of the previous financial year's worldwide annual revenue, whichever is greater. Among the things they look for are infractions of the rules controlling:

1. Companies that collect, control, or personal process data (controllers) and those hired to do so (processors) are both subject to the same set of standards regarding data protection, the lawful basis for processing, and other considerations. These are the articles you, as a company, should read and follow.
2. Bodies tasked with certifying organizations (Articles 42 and 43): Accredited bodies are required to carry out their evaluations and assessments in an objective and transparent manner.
3. As outlined in Article 41, entities recognized as having the necessary knowledge must demonstrate their independence and adhere to established procedures when processing complaints or alleged infractions in an unbiased and open way.

[37] *Id.* at 43.

[38] Ze Shi Li, *Complying with the GDPR in the Context of Continuous Integration* (Mar. 29, 2022, 9:25 PM), https://dspace.library.uvic.ca/bitstream/handle/1828/11676/Ze_Shi_Li_MSc_2020.pdf?sequence=3&isAllowed=y.

A punishment of up to €20 million may be levied for more significant infractions, or 4% of the company's worldwide annual revenue for the previous financial year, whichever is greater.

1. Articles 5, 6, and 9 provide the fundamental processing concepts. Legal, fair, and transparent data handling is required. To guarantee its security, personal information must be acquired with a purpose in mind, be kept accurate and up to date, and be treated accordingly. Organizations can only handle data if they fulfill one of Article 6's six legal justifications for doing so. Specific categories of personal data, such as ethnic origin, political convictions and religious beliefs; union membership; sexual orientation; and health or biometric data, are also banned unless under specified circumstances. In addition,
2. An organization must have evidence to establish that data processing is justified based on a person's permission (Article 7).
3. Articles 12-22: Rights of those who have provided personal data It is in everyone's interest to know what information a company collects and how they use it. The right to receive a copy of the data gathered, the right to amend the data, and the right to erase the data are also available. A person's data can be transferred to another organization if they so want to do this.
4. Articles 44-49: Data Transfers to International Organizations and Third-Country Recipients the European Commission must approve a country or foreign organization as providing a sufficient degree of protection before an organization may transmit any personal data there. The actual transactions must be protected.

The Information Technology Act of 2000 (IT Act) and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 are the Indian rules that govern online data protection. The IT Act was enacted to give “legal recognition for the transactions carried out through electronic data interchange and other means of

an electronic communication."[39] Chapter IX establishes civil culpability, whereas Chapter XI establishes criminal liability. Unauthorized access to or damage to a computer, computer system, or network is punishable by fine and compensatory damages under Section 43 of Chapter IX of the Act. The evidence presented in this chapter is critical to proving criminal culpability under Chapter XI Section 66.

C. Addressing the Threat to Privacy in Smart Cities and Smart Homes

Privacy is the soft target for any digital threat because everything confidential holds importance, value, and worth which is the juicy prey for cyber hackers. As has been mentioned previously, intellectual property has a vital role to play in this digital world. Using digital twins to build smart cities allows hackers to construct and reverse-engineer a specific piece of intellectual property, avoiding the requirement for their in-house research and development. If your digital twin were to put this at risk, the financial and public relations fallout would be immense.[40] GDPR signals Europe's commitment to the privacy and security of personal data at a time when more people are relying on cloud services and data breaches are regularly occurring.[41] Rule 7 of IT Act, 2000 and Art. (44 - 50) of GDPR obligates that data transfers will be allowed only if the receiving party offers the same level of data protection, which behaves as a shield to ensure privacy amidst rising cyber offenses. The redressal mechanism provided by both the Indian IT legislation and GDPR expressed in Rule 5(9) of IT Act, 2000 read with Section 72A of IT Act, 2000 and Art.77, 78, 79, 82 of GDPR respectively, ensure justice to the aggrieved party through different redressal mechanisms. By permitting data processing on legality grounds and categorizing sensitive personal data as to what it must be inclusive of, both the legislations have tried to secure privacy by encrypted means.

Under Section 43A of the Information Technology Act, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 stipulate a privacy policy alongside reasonable security practices and procedures for security practices under the

[39] A.M. Toli and Niamh Murtagh, *The Concept of Sustainability in Smart City Definitions*, frontiers (June 2, 2022, 11:15 AM), https://www.frontiersin.org/articles/10.3389/fbuil.2020.00077/full.
[40] *Id.* at 43.
[41] *Id.* at 23.

legislation. The rules state that the privacy policy must be posted on the company's website and made available to the public. It must specify the types of data gathered, the purposes for which they were collected, and the recipients of the information. Personal information can only be gathered legally via a contract, according to this policy. Rule 8 explains what constitutes a reasonable security practice or process for the Act. Two requirements must be met before an entity is judged to have adhered to reasonable security policies and procedures:

1. Standard and best practices for information security have been applied if and

2. Information security policies and a thorough program have been put in place. For data protection, this document should include management and technical controls and operational and physical security measures.

Security standards must be IS/ISO/IEC code of best practice or codes officially authorized and notified by the Central government, according to Rule 8. Every year, organizations are required to conduct an audit of their processes and procedures to ensure compliance. Organizations that can successfully show they've put in place specific security procedures will be exempt from paying damages under Sec.43A if they suffer unjust loss or gain due to a failure in data protection.[42] Article 21 under Part III of the Indian Constitution, 1950 guarantees the right to privacy as a fundamental right for the residents of India. Therefore, it is the sole responsibility of the respective states and the government to protect their citizens' privacy.

V. India and the Influence of Digital Twins in Building Smart Cities and Smart Homes

According to what has been said before, digital twinning is a driving force in manufacturing processes, helping to replicate systems and making it easier to discover and forecast the probable causes of application failure. As a result, digital twinning has been proven to be a more cost-effective method of managing ups and downs. Digital manufacturing has undergone radical change due to the

[42] Maysoun Ibrahim, et. al, *Paving the way to smart sustainable cities: Transformation models and challenges*, ResearchGate (Dec, 2022, 10:04AM), https://www.researchgate.net/publication/307851827_Paving_the_way_to_smart_sustainable_cities_Transformation_models_and_challenges.

Internet of Things (IoT), which includes both industrial and consumer IoT. *"IoT unlocks solutions for gaining visibility into manufacturing at the shop floor level through dashboards as well as providing a control mechanism for processes in the shop floor. Factories become smart and paperless, and operations can be monitored remotely. Precise predictability in running a factory and visibility to the operations are other highlights,"* said Karthikeyan Neelakandan, associate Vice President, Infosys Ltd. Using programmable logic controllers, the procedure may be made possible. India may expect to benefit from digital manufacturing in cost savings, agility, operational efficiency, improved safety, and increased utilization.[43] Being a developing country, India has adopted digital twin technology slowly but steadily, whose reflection will be discussed hereunder. It is notable to mention that the current government ruling in India has shown promising efforts towards adaptation of digitalization in the everyday lives of their citizens. Various applications are also going into the market, which is booming with customers consuming such applications. As technology sneaks into the democratic nation, all have been relatively well till now.

A. Cityzenith's Smart World Pro

Amravati, the capital of Andhra Pradesh, is the first Indian city to use digital twin technology. On January 22-25, a 3D model of the city will be revealed more than 3,000 miles away at the World Economic Forum annual conference in Davos utilizing Cityzenith's Smart World Pro software. As the CEO of Cityzenith, Michael Jansen, has spoken, "everything happening in this capital city will be scenarios in advance to optimize output." Put simply, the digital twin technology will help Amravati get updated concerning what it has to offer when put in the same line with other Indian cities. An IoT/Industrial IoT digital twin uses sensors, drones, and other IoT/Industrial IoT equipment to gather data and uses sophisticated analytics, machine learning, and artificial intelligence to acquire real-time insights into the physical asset's performance, operation, and profitability. This type of technology is expected to become more essential in the development of smart cities across the world and the resolution of critical public health, safety, and environmental concerns.[44]

[43] *Id.* at 51.

[44] Smart Cities World, https://www.smartcitiesworld.net/special-reports/special-reports/the-rise-of-digital-twins-in-smart-cities (last visited June. 6, 2022).

B. Greenfield cities vis a vis Brownfield cities

There are difficulties in increasing urbanization of cities, including poverty expansion, social stress, urban pollution, and a lack of natural resources. Demands for environmental and technical development are also increasing as a result of this. To remain viable, cities must find ways to deal with the tremendous urbanization that is occurring. As a result, many local governments and other organizations are launching Smart Sustainable City (SSC) programmers to deal with the problems that come with increasing urbanization.

The Narendra Modi-led NDA government in India recently announced the beginning of the Smart City Mission, as part of which 100 smart cities would be built across the nation. A greenfield city is a city that is entirely new from the ground up. Brownfield cities are those that were created by repurposing existing urban areas. This notion, however, is not original. On the Delhi-Mumbai industrial corridor, the government, for example, focuses on constructing five brand-new cities. Because big greenfield towns are challenging to build in modern-day India due to the scarcity of vacant land, greenfield cities tend to be tiny. GIFFT, Gujarat's international finance and technology city (greenfield smart city), will be India's first. Chandigarh is regarded as the country's first "greenfield" metropolis, having been built from scratch. Chandigarh was built to serve as the provincial capital's administrative center. Durgapur Airport, India's first privately funded greenfield project.[45]

VI. Conclusion

the digital twin technology has spread its claws over the development of smart cities and homes, going towards the global transformation of infrastructure, utilization of resources, addressing significant concerns of the countries such as climate change, lives of the people, administrative structure, and governance. More to say, the role of digital twin technology from the city governance perspective reveals that the former helps facilitate the virtual image of the latter, thereby improving governance alongside city development initiatives.[46] Although its functions and usage overbuilding in smart cities and homes speak a lot about it. But it is noteworthy to mention that the lack of specificity surrounding digital

[45] Prop Tiger, https://www.proptiger.com/kolkata/behala/greenfield-city-project-llp-greenfield-city-phase-ii-1948465 (last visited Oct. 6, 2022).
[46] *Id.* at 3.

twin technology welcomes new challenges frequently, which subsequently becomes difficult for the existing legal framework to handle and govern. With the rising importance of privacy and security of confidential informations smart cities, along with upgraded applications, require stringent legislation that can curb mala fide activities and function to safeguard the privacy and security of the individuals residing in such cities. As the scope for research, development, and awareness associated with digital twin technology continues to live on amidst the 21st century, complete reliance on digital twin technology cannot be made. And therefore, precautions and challenges preventive mechanisms must be adopted.

Vol. 14 No. 2 ISSN: 0976-3570

Analyzing the Motivational level among the employees of Urban and Rural Local Bodies in West Bengal

Dr. Debarshi Nag[1]

Abstract

Several research studies are being conducted world over for the past three decades on the concept of Public Service Motivation (PSM) among employees involved in the public sector. This concept of PSM was put forward by American scholars Perry and Wise in the early 90's and has since been a major topic of research by several scholars. Unfortunately, however this topic did not catch the attention of Indian scholars who for a long time attached more attention to the implementation part of administration and chose to remain virtually blind towards the human resource factors of the public sector employees. Based on a survey conducted among employees engaged in several Blocks and Municipalities across the length and breadth of West Bengal and then measuring the feedback received based on an indigenous 28-point questionnaire, developed on the line of Perry's 24-item Public Service Motivation scale, which is measured by Likert's Scale of grading 1 to 5, several conclusions were reached. The study suggested that most of the employees are responsible citizens and strive hard to improve the living standards of their community through various schematic interventions and work extremely hard, often beyond their normal working hours, in order to meet the administrative and schematic targets. Some constructive measures such as periodical training programs on specific skill development, reforming the existing mechanism of pay and allowances and developing a sense of pride among them for serving the society could go a long way in improving their performance which in turn will prove beneficial for the society in the long run.

Keywords: Motivation, Work culture, Political interference, Recognition, Promotional prospects, Benefits.

[1] WBCS (Exe.), OSD to Hon'ble MIC, WRI&D & Environment Department, West Bengal.

I. Introduction

Motivating the workforce of a government organization is perhaps the greatest challenge for the bureaucrats in the present times. Advent of e-governance, increasing complexities of administration, allotment of huge funds to the Local Bodies for development in the recent years, rising intolerance and corruption in politics and implementation of numerous schemes transparently and under strict vigil from several agencies within a tight schedule have led to a situation where the presence of skilled manpower is essential for any Government Department, especially at the implementing position i.e. in the Rural and Urban Local Bodies. It is even more important in the case of these Bodies which involve direct public interaction and political intervention at several stages of implementation of these Government schemes effectively at the ground level[2].

In India, a Community Development Block comprises of a predominantly rural area which is earmarked by the Panchayat & Rural Development Department of the concerned State. This Block consists of several Gram Panchayats which act as the local administrative unit for several villages. The Block is administratively managed by a Block Development Officer who is aided by several other officials. However, the actual task of public interaction and scheme implementation is done by the numerous staff at the Block and Gram Panchayat level. These employees are mostly recruited through written examinations conducted by the Public Service Commission or various Recruitment Boards of the concerned State. The actual development of a Block in terms of infrastructure creation and reaching of schematic benefits to the deserving beneficiaries, thus leading to the social and economic upliftment of the Block in the real sense, is dependent to a large extent on the performance of these Government employees who work at the ground level. The employees in the Panchayati Raj Institutions (or Rural Local Bodies) include some officials, engineers and clerical staff including Data Entry Operators (DEOs), all of whom are brought under the purview of the present study.

Even though the first Municipality in India was started in Madras in 1688, it was the 74th Constitutional Amendment Act, 1992 that conferred the constitutional validity upon the Urban Local Self Governments which are mostly in the form of Municipal Corporations or Municipalities. The Government employees who are

[2] DHARAMPAL, PANCHAYATI RAJ AS THE BASIS OF INDIAN POLITY, (Rashtrothana Sahitya 2001)

engaged in these Urban Local Bodies are either engaged through competitive examinations held by the concerned Municipal Service Commissions or are recruited by the District Administration through various written examinations which are conducted from time to time. The employees engaged in the Municipalities fall under three categories – officials, engineers, clerical staff, accountants, and Data Entry Operators. There is also a large number of contractual staff who are employed for various schemes but since their tenure is uncertain, they are not brought under the purview of this study.

II. Motivation among Employees

Manpower is the most important asset of any organization and the study of employee motivation assumes a great significance to judge its effective performance. Motivation in workplace is a complex and multi-dimensional phenomenon and has far reaching implication on the human resource development policies of any organization. In this context, Public Service Motivation (PSM) may be considered as an important tool to assess the level of motivation among the employees. Public Service Motivation refers to a general altruistic motivation to serve the interests of a community of people, a state, a nation, or humankind i.e. individual motives are largely, but not exclusively, altruistic and grounded in public institutions[3] (Perry & Wise, 1990). Recent research studies have established the fact that the employees engaged in Public Sector possess a higher level of motivation and job satisfaction compared to their counterparts in the Private Sector. This is despite the fact that they get comparatively lower pays and work under intense pressure from both the political and the social ends. Substantial studies on employee motivation in Public Sector have been carried out in the United States and in the countries of Europe. Even researchers from Asian countries like China and Philippines have made significant contribution in this field. However Indian researchers have lagged behind in this field of research despite the fact that this country boasts of a significant public sector workforce which turns out to be approximately 22 million as on date. It is an irony that though more than 50 percent of this workforce is working at the ground level in various sectors, their contribution or

[3] James Perry & Wise, LR, The Motivational Bases Of Public Service, (Indiana University, Bloomington 2001).

welfare is preferably ignored as they lack a powerful lobby to influence any State Government to look into their case with due importance.

III. Research Methodology

The researcher has taken recourse to the quantitative method of determining the motivational patterns of the employees of Local Bodies by using the 28-point questionnaire as the research tool. The present study has been conducted on 400 Local Body employees presently engaged in 30 Community Development Blocks (out of a total of 342 CD Blocks) and 14 Municipalities (out of a total of 118 Municipalities) covering all the districts of West Bengal (Table 1). Out of these, 347 respondents replied to all the queries posed in the questionnaire and also shared their details properly. The employees belonging to the 7 Municipal Corporations are purposely left out of the purview of this study because they have some special characteristics and advantages which are similar to any Government Department in the Secretariat and are quite distinct from those of the rest of the Local Bodies.

Table 1

List of Blocks & Municipalities where the survey was conducted	
Name of State	**Name of Community Development Block**
West Bengal **(30 CD Blocks & 14 Municipalities)**	Sitalkuchi, Falakata, Kurseong, Rajganj, Barjora
	Kalimpong-II, Harirampur, Keshiary, Habibpur, Ghatal
	Bolpur Sriniketan, Krishnaganj, Narayangarh, Moyna, Baruipur
	Jamboni, Gaighata, Baghmundi, Minakhan, Hemtabad
	Panchla, Basanti, Pursurah, Bagnan, Salanpur
	Bhatar, Kakdwip, Haroa, Bishnupur, Domjur
	Name of Municipality
	Rajpur Sonarpur, Arambagh, Kalimpong, Medinipur
	Suri, Bansberia, Balurghat, Kalyani, Barasat
	Buniadpur, Egra, Jhargram, Kandi, Mekhliganj

For the purpose of the study, the researcher has deliberately chosen those employees who have been appointed by the Public Service Commission or Municipal Service Commission of the State i.e. they are directly recruited through an open competitive examination by following a definite and standard procedure. All the employees are directly related to public interaction and play an important

part in devising the policies for schematic implementation on a regular basis during their entire work period i.e., the researcher has consciously avoided the back office employees.

For the purpose of survey, an indigenous 28-point scale has been devised which resembles Perry's 24–point PSM questionnaire but the nature of the questions is different. This is because there are certain issues which are unique to a region and has to be understood and measured so as to give a fair idea of the motivational patterns among the employees engaged in the local Bodies across the State. So, it can safely be concluded that the 28-point scale which has been employed in this present research study is universally accepted as a fairly reliable scale to measure the level of motivation among public sector employees.

Table 2

Understanding the motivational patterns among employees of Local Bodies
Statement/Parameter
1. I always strive to serve my community through my profession
2. I am seriously concerned with all the occurrences in my society
3. I consciously try to contribute some value-added services to the beneficiaries
4. I feel pained to see the hardships of the poor and needy
5. I deliver all the Government Schemes with equal sincerity even though I might doubt its efficacy
6. I believe that every citizen can contribute something worthwhile to the society
7. I respect my profession and always strive to raise the standards of service delivery
8. I am satisfied with the benefits associated with my service
9. I always mix with the common people while serving them
10. I give more importance to serving the society than the financial benefits of my job
11. I feel good when any scheme implemented by me benefits the society for a long period of time
12. I feel proud when my organization gives recognition to my efforts in any manner
13. I believe that I am providing all the basic amenities to my family satisfactorily
14. I feel inspired when the common people praise my efforts to serve them
15. I try to study all the schemes carefully so as to implement them effectively at the ground level
16. I am satisfied with the work culture and working conditions at my workplace
17. I always try to follow the directions of my superior officers sincerely
18. I always maintain an amicable relationship with my co-workers

19. My family supports me in my endeavour to serve the society better
20. I read various periodicals related to Government schemes in order to understand them better
21. I select beneficiaries strictly based on the scheme parameters without getting tempted or intimidated
22. I maintain a cordial and workable relation with politicians
23. I take an active part in the Employees' Union to demand my service rights and benefits
24. I contribute write-ups to Department journal to share my schematic delivery experiences with others
25. I believe that regular training programs will be beneficial for implementing schemes
26. I could maintain my work-life balance properly throughout my career
27. Local Body employees should be given opportunities for promotion through Departmental exams
28. Local body employees should be given similar pay benefits as regular Government employees

The responses were invited in the form of a five-point scale where "1" stands for Strongly Disagree while "5" stands for Definitely Agree (Table 2). Apart from the questionnaire, the respondents were requested to fill in a form which contained several details regarding their age, length of service, departmental position, gender, educational qualification and nature of work (Table 3). The entire survey was conducted within a time period of one month during which no major political or social events or changes took place nor were any new schemes declared by the Government. Thus, it can safely be assumed that the responses received from the participants are free from any partisan attitude that might have crept up during the course of the survey.

Table 3

Details of respondents (n = 347)			
Variables	**Characteristics**	**N**	**%**
Gender	Male	219	63.11
	Female	128	36.88
Age	30-40	124	35.73
	41-50	87	25.07
	51-60	136	39.19
Nature of work	Engineer	109	31.41

	Accountant	31	8.93
	Clerk	207	59.65
Educational level	10+2	98	28.24
	Graduate	153	44.09
	Post-Graduate	96	27.66
Departmental position	Clerk/Assistant/Junior Engineer	114	32.85
	Section Head/Assistant Engineer	183	52.73
	Secretary/Executive Assistant/ Deputy Secretary/ Official	50	14.41
Tenure of service (in years)	5-10	64	18.44
	11-20	82	23.63
	21-35	201	57.92

Before conducting the research study, the following steps were taken in order to get authentic results from the survey-

1. All the respondents have been contacted personally and the theme of the research study has been explained to them.
2. All the respondents were provided with a brief leaflet in which the objective of the survey, the description of the process and the significance of carrying out such a study has been described in brief.
3. The survey is conducted via Google forms so that the identity of the respondent remains anonymous.
4. Every attempt has been made to extract the honest response from all the participants to the maximum possible extent.
5. None of the offices in which the respondents are currently employed have been provided with the individual responses so as to safeguard the interests of the respondents.
6. Every attempt has been made to devise the questionnaire in such a manner so that it is free from any bias whether personal, political or any specific social factor.
7. Out of the 400 participants who were personally contacted and sent the questionnaire over mail, the responses of 347 participants were considered for the final study (86.75%). The responses of 44 participants

were either partial or erroneous while 9 participants did not respond even after repeated persuasion.

Table 4

Statements	Strongly agree	Agree to an extent	Neutral/No opinion	Disagree to an extent	Strongly Disagree
1	285	62	0	0	0
2	159	118	70	0	0
3	87	231	56	0	0
4	94	139	114	0	0
5	67	134	112	34	0
6	81	145	52	69	0
7	304	43	0	0	0
8	37	126	58	112	14
9	231	109	7	0	0
10	104	98	103	42	0
11	272	75	0	0	0
12	192	155	0	0	0
13	47	68	81	151	0
14	301	46	0	0	0
15	44	58	127	95	23
16	38	50	79	164	16
17	147	189	11	0	0
18	203	134	10	0	0
19	62	251	29	5	0
20	51	127	22	108	39
21	24	45	101	82	95
22	76	126	97	43	5
23	39	255	53	0	0
24	14	91	0	214	28
25	286	49	12	0	0
26	41	82	102	49	73
27	153	108	14	27	45
28	109	127	111	0	0

IV. Findings of the Research Study

Each of the statements which represent a motivation pattern is discussed in detail in the light of the results obtained from the 347 respondents through the questionnaire. This is deliberately done to choose those patterns which had the highest impact on the respondents.

S1: I always strive to serve my community through my profession – The best part of a Government job is that each and every employee serves his community through every professional action that he performs. This is all the more evident in the case of an employee of a Local Body because he works at the ground level and interacts directly with the beneficiaries in particular and the society in general. He takes pride in the fact that he acts as a catalyst in the development process and most of the community members respect him. So, it is evident that the majority of participants find this parameter to be a strong motivating factor in their profession[4].

S2: I am seriously concerned with all the occurrences in my society – An overwhelming majority of the employees engaged in the Local Bodies are members of the same community to whom they deliver their services or start living with them for obvious ease of conveyance. So, most of them are affected in some way or the other when some significant changes or incidents take place in the society where they reside and work as well. However, a small portion of employees opted to stay indifferent as they either stay far or belong to a different societal segment.

S3: I consciously try to contribute some value-added services to the beneficiaries – Most of the functions performed by the employees of Local bodies are predominantly basic in character such as collecting taxes and applications over the counter, planning the schematic works in a site, visiting a locality to identify beneficiaries based on certain parameters and conducting essential campaigns such as immunisation programs. However, there is a scope to help the beneficiaries by explaining them how to fill up a form, how to apply for certain schematic benefits and how to satisfy certain parameters to qualify for a specific scheme. This parameter is supported by those employees who are in a position to

[4] ANIL CHAUDHARI & DIPIKA, PANCHAYATI RAJ SYSTEM IN INDIA: ISSUES AND CHALLENGES, (ABD Publishers 2019).

add some more value to their services while the others remained indifferent. So, this parameter may be considered as moderately motivating in character.

S4: I feel pained to see the hardships of the poor and needy – As mentioned previously, most of the employees of Local Bodies either belong to or stay in the same community where they are employed and so they try to help the poor and the needy through whatever benefits the Government can provide. However, there are several restrictions which impede universal support as there are strict quotas for the widows and the aged and other restricting parameters for helping the poor and disabled. Some employees have limited access to decide the beneficiaries while the others do not have any function in this exercise. So, while a segment of the employees has supported this parameter, the others have exercised a neutral opinion to this claim.

S5: I deliver all the Government Schemes with equal sincerity even though I might doubt its efficacy – This is an extremely sensitive aspect as a significant number of government schemes are actually meant to appease the voters though they are proclaimed to have certain social benefits. This entails wastage of funds from the Government coffers which is blatantly evident to the employees at the grass root levels and so a section of them disapproves such acts and try to act in an indifferent manner in such cases. However, this is not always possible due to professional obligations and so this parameter has received a lukewarm acceptance[5].

S6: I believe that every citizen can contribute something worthwhile to the society – There are certain lofty assumptions which are generally nursed by the Civic Society but a few of them do not match the reality at the ground level. It is a fact that most citizens work hard to earn their living and deserve the benefits of the social schemes but a small section of citizens behave otherwise. They are lazy but are quick enough to grab the benefits of each and every social scheme to which they may be remotely related, influence the relevant Local Body by political means to serve their petty interest and even grab undeserving benefits at the cost of depriving the needy. Occasionally, the employees of Local Bodies remain mute

[5] BUDDHADEB GHOSH & GIRISH KUMAR, STATE POLITICS AND PANCHAYATS IN INDIA, (Manohar Publications 2020).

spectators to such deplorable acts and so this parameter has got some negative response as well.

S7: I respect my profession and always strive to raise the standards of service delivery – Over the past two decades, the number of Government schemes have increased three times while the strength of employees has declined to one-third of its sanctioned strength. This has made the work of employees of Local Bodies very tedious. Added to this is the introduction of e-governance and Right to Services Act (2013) which has prompted quick and seamless delivery of service benefits to the citizens. So, the standard of service delivery has improved several times over and obviously, this parameter has received an astounding response and may be considered as a powerful motivational parameter.

S8: I am satisfied with the benefits associated with my service – The salary and other benefits of the employees of West Bengal are far less compared to their compatriots in the Central Services. The employees engaged in the Local Bodies are not entitled to certain benefits which the State Government employees receive. A small number of veteran employees who work in higher posts may get a comparatively decent salary and may have accepted this proposition. But the sizeable majority of the junior employees are potentially dissatisfied with their salary and benefits. So this parameter has received a significant negative response and may be considered as a negative motivational pattern.

S9: I always mix with the common people while serving them – This is a universal requirement for almost all the employees engaged in the Local Bodies as they work at the grass root level and mandatorily need to interact with the local people on a daily basis as a part of their professional requirement. This parameter has predictably received a stupendous response and together with S14 forms the most important positive motivational parameter in this entire research study.

S10: I give more importance to serving the society than the financial benefits of my job – This parameter has evolved a mixed response among the lot of respondents as most of them consider that it is their duty to serve the society. However, as mentioned in S8, the perks and allowances of the respondents are quite low. This is the reason why a portion of them feel that they are sacrificing their personal benefit while serving the society while another portion has expressed their disgruntlement towards their financial benefits. So, this may be treated as a negative motivational pattern for the entire group.

S11: I feel good when any scheme implemented by me benefits the society for a long period of time – There are several Government schemes which when implemented successfully results in providing certain basic amenities to the community members as well as aid in their livelihood. Any employee who has contributed some professional effort and belongs to the same community takes pride in the fact that the scheme has yielded its desired result. This is a strong motivational pattern as is evident from the unanimous response in its support. It is almost an exactly contrasting pattern to S5 where the respondents had expressed their dissatisfaction towards implementing several futile schemes which take a heavy toll on the state exchequer.

S12: I feel proud when my organization gives recognition to my efforts in any manner – This parameter has received a lot of support from the respondents because every employee within an organization craves for some kind of recognition for his hard work. This recognition may be in the form of a certificate or a small memento which has insignificant monetary value but inspires him to strive further to raise the benchmark of service delivery. In the Local Bodies, the administrators (SDO, Chairman, BDO) are the competent authority to determine the parameters of recognition and it solely depends upon their own spirit of teamwork and enthusiasm as to how they will reward the competent employees. Such a reward process also arouses a healthy competition among the employees to make more effort which is in turn beneficial, for the organization in particular and the community in general, in the long run.

S13: I believe that I am providing all the basic amenities to my family satisfactorily – A sizeable majority of the respondents are not satisfied with their salary and other service benefits and believe that it is very difficult to sustain their families with such a meagre amount and provide them with all the basic amenities in life. With the advent of commercialization in the society in the modern era, the prices of all commodities have taken a steep upward turn while the salaries of these employees have failed to match with this pace and this has taken a heavy toll on the purchasing capacity of these employees. Apart from a few senior employees whose salaries are comparatively higher due to the higher pay scale, almost all the employees have expressed their unanimous dissatisfaction to this parameter. Hence, this parameter may be treated as a potentially negative motivational pattern.

S14: I feel inspired when the common people praise my efforts to serve them – The employees of the Local Bodies perform the essential functions of governance at the ground level and are the agents of delivering all the schematic benefits to the deserving beneficiaries. It is therefore apparent that most of the community members hold these employees in high esteem and they command a certain amount of respect in the society by virtue of their position. This is perhaps one of the most important reasons why an employee continues in this service in spite of several disadvantages and may certainly be considered as an important positive motivational parameter[6]. No doubt, this parameter also received an overwhelming support from the respondents in this survey.

S15: I try to study all the schemes carefully so as to implement them effectively at the ground level – The social schemes of the Government have significantly increased in the past decade from 15 to 42 and with the advent of technology and e-governance, each of these schematic details are required to be updated in the earmarked website on a regular basis. This requires an in-depth expertise about the details of each scheme and the employees of the Local Bodies mandatorily require having a working knowledge about them. However, the immense work pressure on these employees makes it difficult for them to study such schemes and so it turns out to be a negative motivational pattern for most of the respondents.

S16: I am satisfied with the work culture and working conditions at my workplace – Contrary to the popular belief about Government employees, those engaged in the Local Bodies do not have any fixed working hours and even have to work on weekends quite often. However, they lack the basic infrastructure to a great extent compared to those employed in the Secretariat and District level. Even though these employees are mostly permanently posted in one office throughout their service tenure and share a good relationship with their colleagues, the work pressure and lack of amenities forced a majority of the respondents to cast their negative vote towards this parameter. So, the absence of a comfortable working condition may be considered as a negative motivational pattern in this case.

S17: I always try to follow the directions of my superior officers sincerely – The employees of any Local Body remain fixed while the administrators, both elected

[6] PATIL & ASHA RAMAGONDA, COMMUNITY ORGANIZATION AND DEVELOPMENT: AN INDIAN PERSPECTIVE, (Prentice Hall of India 2018).

and officially posted, keeps on changing after a certain period. This makes the head of Office to be dependent on these employees to a great extent as they deliver all the services and are familiar with the administrative functioning of that office. On most occasions, the relationship between the superior officers and the staff remain cordial which serves the mutual benefit and so most of the respondents have given a positive vote to this parameter and has chosen it as an important motivational pattern.

S18: I always maintain an amicable relationship with my co-workers – The employees of Local Bodies work in the same office throughout their entire service tenure. This makes them mentally attached to their office and colleagues and they share a personal relationship with each other. They take part in marriage ceremonies, help each other during medical emergencies and collectively put pressure on the administration to exact their demands. This is a very important parameter which gives a lot of mental strength and support to the employees and has aptly been voted as an important positive motivational pattern.

S19: My family supports me in my endeavour to serve the society better – Most of the employees engaged in Local Bodies belong to or stay in the same community where they work. As mentioned in S14, the community members treat them with respect and their families enjoy an upper status. Since the members of the extended family of such employees belong to the same social set up, they take pride in this fact and in spite of the meagre salary and other paltry service benefits received by an employee, they continue to support him morally and mentally in his endeavour to serve the society through his profession. This is again a positive motivational pattern and has been supported by most of the respondents.

S20: I read various periodicals related to Government schemes in order to understand them better – During the regime of the Left Front Government in West Bengal, it was a common practice to make both the party leaders and the Government staff literate about the various schemes and programs of the then Government by publishing monthly journals by various Departments. The articles were penned by eminent bureaucrats, social thinkers and economists and served as interesting as well as knowledgeable piece of data. However, with the change of regime and introduction of several schemes which serve only to appease the masses without any long-term development, the present regime turned a cold shoulder to such Departmental journals fearing honest criticism from several quarters. The journals, in turn, either stopped abruptly or are published in a

careless manner and the quality of articles as well as authors has gone down pathetically. So, most respondents have stopped reading the journals and have expressed their apathy towards this parameter. This may well be treated as a negative motivational parameter.

S21: I select beneficiaries strictly based on the scheme parameters without getting tempted or intimidated – The employees engaged in Local Bodies throughout India take pride in the fact that they have served as the agents of positive development and harbingers of administrative success of this great Nation since her Independence. Most of these employees have a strong integrity of character and have collectively prevented misuse of Government funds as well as schematic allocations in the past. Unfortunately, in the present times, an unholy nexus between the political leaders cutting across party lines and the senior bureaucrats have resulted in widespread corruption and undue and unethical political intervention in all affairs. Beneficiary selection is one of the most important criteria for the success of any scheme and must be done after proper enquiry. Unfortunately, in present times, the influential lobby within the ruling regime gives a list of beneficiaries who are either their own family members or party cadres and most of them fail to meet the criterion for selection. With the silent approval of administrators and covert support from the Head of Office, the employees of Local Bodies are indirectly forced to create lists of undeserving beneficiaries. This process undermines their honest efforts and drains them mentally[7]. This is the reason why a majority of respondents have expressed their pain by voting against this important parameter and it may be treated as a negative motivational parameter.

S22: I maintain a cordial and workable relation with politicians – Politics and administration are the most unlikely of members in a democratic family. Since politicians have a limited tenure and rarely have any influence once they are out of power, they try to extract the maximum possible benefit in every form during their tenure. In the absence of the strong and conscious control and monitoring from the Government and party leadership, these politicians may a mockery of administration to extract their personal interests. Most of the respondents become a mute spectator to such mayhem and corruption and have little to do other than

[7] GEORGE MATHEW, PANCHAYATI RAJ: FROM LEGISLATION TO MOVEMENT, (Concept Publishing 1994).

accept all the system. So, it is a fact that even though most of them are forced to maintain a cordial relationship with the political entities, they behave in a superficial manner with the political class and nurse a deep grudge of annoyance and hatred towards them. This is again a negative parameter though it has evoked a mixed response in this research survey due to the obvious fear of negative backlash from those presently in power.

S23: I take an active part in the Employees' Union to demand my service rights and benefits – Forming Employees' Union and demanding the justified rights from the Government is one of the basic entitlements of an employee. Since the promotional prospect of an employee of a Local Body is dim, only a handful of them are able to reach the Gazetted scale. These organizations play a vital role in shaping the mentalities and aspirations of the employees in general and serve as a positive motivational pattern as it gives power to the employees to get united and raise their voices against any unfair treatment and more importantly, to demand their service rights and benefits.

S24: I contribute write-ups to Department journal to share my schematic delivery experiences with others – Till two decades ago, there existed a class of Local Body employees who were thoroughly conversant in both the administrative and service rules and Acts and at times, even the superior officers sought their advice before taking crucial decisions. These employees gained experience mostly due to their erudite nature and though they may not be very hard working, they were extremely meticulous in their approach and handled the strategic files. Most of them contributed regularly to the Government periodicals and studied them regularly. With the advent of internet and extreme work pressure as well as staff shortage, this class of employees are gradually declining. The employees of the present generation neither get time to concentrate on these journals nor do they have the interest to do so and as a result, both the standard of authors and chapters are declining with every passing day. It is evident that most of the respondents have shown their extreme apathy to this parameter and so it may safely be removed from the consideration of the present study.

S25: I believe that regular training programs will be beneficial for implementing schemes – Conducting in-service trainings for the employees is one of the most vital components of the administration. This is all the more strategic in case of Local Body employees who play a pivotal role in implementing the various Government programs and schemes at the ground level within a strict time

schedule. Every District has an earmarked District Training Centre (DTC) with residential facility under the District Panchayat & Rural Development Cell. State Institute of Panchayat & Rural Development (SIPRD) & Administrative Training Institute (ATI) are the apex institutes for training on various administrative matters concerning Panchayati Raj Institutions and Public Administration respectively. Most employees get an opportunity of training in DTCs once in several years which serve the dual purpose of getting accustomed to the various administrative and schematic matters and interacting with the employees of other Local Bodies. Most of the respondents have voted in favour of this parameter and so it may be treated as yet another strategic motivational pattern.

S26: I could maintain my work-life balance properly throughout my career – This parameter has predictably evoked a mixed response because of the fact that while the employees who were engaged in the Local Bodies two decades ago could enjoy a specific working schedule with optimum leaves and holidays, the comparatively newer ones are subjected to a strict work schedule under severe pressure. As mentioned in S15, S16 & S24, there is a shortage of staff due to retirement and no new recruitment, increase in number and purview of schemes and a strict timeline to execute the work. So, while a small section of senior employees has voted in favour of this parameter, a majority of young employees have voted against it.

S27: Local Body employees should be given opportunities for promotion through Departmental exams – There is extremely limited opportunity for career development for the employees serving in Local Bodies. The employees who are recruited in Municipalities as Lower Division clerks, accountants and typists (Data Entry Operators) requires serving for at least fifteen years to become eligible for promotion to Upper Division Clerk, Senior Accountant or Typist Supervisor. Only one employee becomes the Senior Head Clerk after almost three decades of service provided the post becomes vacant. In case of Panchayats, the Gram Karmee could be promoted to Gram Sahayak and in rare cases to Deputy Secretary. The posts of Panchayat Secretary, Executive Assistant, Nirman Sahayak (Technical Assistant), Samity Audit & Accounts Officer and Data Entry Operators have no promotional prospect save a special increment after every decade of service. Interestingly, a section of the senior employees who were promoted based on their seniority in service has voted against this proposition as they do not want to study and sit in examinations anymore. So most of the

respondents have voted in favour of this proposition and this may be treated as an extremely positive motivational pattern if it is implemented properly.

S28: Local body employees should be given similar pay benefits as regular Government employees – There are some administrative limitations to impose S27 as the number of vacancies is extremely limited and every office has a handful of staff compared to the Government departments at the Secretariat. However, the pay scales of these employees may be raised after a specific time period (Career Advancement Scheme) rather than some simple increments after each decade of service. This will make their pay at par with the employees serving at the Directorates. This parameter has evoked a huge amount of positive response as most of the employees have favoured a raise in pay and so this parameter may be treated as an important motivational pattern[8]. However, a section of the employees has reserved their comments as they are sceptical whether the Government will at all take any steps in this regard.

V. Discussing the Positive Parameters

The maximum positive votes received in this survey under question is the proposition that all Local Body employees respect their profession and try their level best to raise the standards of service delivery. All the basic amenities enjoyed by the citizens of this country are provided to them directly by these employees and so they are often termed as the "real agents of governance" in our society. Most employees consider it their duty to help the community members in various possible ways to enable them to get some schematic benefit or the other and derive a lot of satisfaction from it and so the respondents supported the pattern stated in S1. This corroborates the proposition of S14 which states that the employees feel proud and elated when they are praised by the common people for their good deeds. Most of the fresh recruits and mid-career employees are interested to receive trainings from subject experts on various administrative issues and schematic details as they have to carry out the functions first-hand. They have several queries in their mind regarding the execution of schemes which need to be addressed appropriately for the successful implementation of all the schemes at the ground level. So, it is obvious that most respondents supported this

[8] Rao & C Nagaraja, Urban Governance In India, (Gyan Books 2016).

parameter (S25). Since most of the Local Body employees either belong to or reside in the same community where they work, the benefits of any constructive scheme such as a rural road, Health Centre, Anganwadi Kendra, water tank, small bridge, culvert or minor irrigation cannel are enjoyed by them as well. They take pride in the fact that they had played a crucial role in the execution of those "successful" schemes which has helped to develop the community and sometimes even act as a source of direct and indirect livelihood (S11). It is highly improbable that the employees of Local Bodies will be able work in isolation while executing their Government functions. On the contrary, they mandatorily need the active and actual support from the various stakeholders of the community in order to deliver the schematic benefits and so they maintain a very close liaison with the community members (S9). Any employee derives a lot of mental satisfaction and inspiration when his hard efforts are given due recognition by his organization (S12). Every District Administration recognises the efforts of the employees engaged in the Local Bodies under its jurisdiction based on several parameters and the deserving employees are usually awarded on special occasions such as Independence Day, Republic Day and National Voters' Day. Since there is almost no scope of transfer for employees of Local Bodies (apart from special grounds such as critical health condition of self or close family member), the entire workforce stays together for several decades till anybody retires on superannuation. It is therefore quite obvious that most employees develop an extremely cordial relationship with each other extending to their personal lives (S18) and stand by each other in times of hardship. This also explains the fact why such employees remain associated with Employees' Union to a larger extent (S23) and demand their rights more vociferously, cutting across political differences, compared to the employees of secretariat and Directorate Services (S23). Finally, these employees exhibit a greater extent of loyalty and efficiency towards their superiors and the administrators (both political and official) because they work directly under the control of the later which is not the case of Secretariat and Directorate employees (S17).

VI. Discussing the Negative Parameters

Since the last few decades, there has been a virtual upsurge of Government schemes at the Panchayat and Municipal levels which target predominantly individual beneficiaries. This ranges from providing free foodgrains, allotment of

homes, Health benefits and even cash benefits to students and women. This has led to the rise of a lot of corruption and nepotism in the beneficiary selection process and the political leaders who are at the helm of power consciously force the Local Bodies to accept their list. The Local Body employees who are actually supposed to draw such lists after proper enquiry feel insulted and dejected and are liable to become victims as they are the signing authority against such a illegally concocted list in case of any audit survey. This serves as an extremely negative motivational pattern and so most employees have expressed their dissatisfaction regarding this proposition (S21). With the advent of technology and e-Governance aspects, it has become essential to provide the latest electronic gadgets and internet facilities to the offices of Local Bodies. Unfortunately, however, lack of funds and lack of positive administrative intervention has led to an acute shortage of such devices in most offices which has made it extremely difficult for the employees of Local Bodies to execute their official functions in time. This factor, along with the undue political interference, has made the work atmosphere unhealthy and so most employees have expressed their concern and stated it as a negative parameter (S16). The proposition regarding working hours has also been seriously hampered because of the above reason and extreme pressure from the District administration which is why most employees are quite unhappy with their present work-life balance, also given the meagre salary which they get in return (S26). The promotional prospects of the Local Body employees are extremely bleak and so the pay scale rise takes place just twice or thrice in their entire service tenure. This fact, along with the paltry salary of Government employees at lower levels, has made it a negative motivational pattern (S8).

VII. Suggestions

The real India stays in her villages and small towns. These residents decide who will form the State Government, how the society will develop and what decisions will be taken by the Nation while formulating her Public Policy and governance. No doubt, the employees who are serving the Local Bodies are the silent and yet strategic crusaders in this constant strive towards progress and development of the Nation. The Government, both at the Centre and the State, should take some worthwhile measures to increase the motivational patterns of these employees. To start with, the undue political interference should be dealt with strongly and every schematic execution should be made more transparent and stricter and audited

regularly. The pay and other benefits of the employees should be improved as much as possible with a more practical Career Advancement Scheme. Schematic and administrative training programs should be more frequent and can even be conducted online. The offices should be more equipped with essential gadgets and internet facility to enable e-Governance. It should be kept in mind that no development of the nation will take place unless the lot of employees serving in Local Bodies are empowered in the true sense of the term by elevating their positive motivational patterns and doing away with the negative ones, to the maximum possible extent, as they represent the real face of community development.

Trial of "Offences Arising Out of Violation of Human Rights"- A Study on the Human Rights Courts of Gujarat (India)

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Abstract

The Protection of Human Rights Act, 1993(the 'PHRA') came into force on 28th September 1993 and is the primary legislation for protecting Human Rights in India. The PHRA aims to provide better human rights protection to the people by setting up Human Rights Court(s) (HRC) for providing speedy trial of "offences arising out of violation of human rights". The PHRA, however, does not define or lay down the "offences" that can be construed as arising out of violation of human rights. The paper aims to understand the phrase "offences arising out of violation of human rights" through the interpretation adopted by the Higher Courts of India. Seeking guidance therefrom the authors enlist some of the "offences" within the Indian Penal Code, 1860 which the HRC(s) can try as "offences arising out of violation of human rights". Furthermore, to determine whether the failure to list the offences impedes the practical operation of the HRC(s), the paper conducts an in-depth study of the cases filed before the HRC(s) in the State of Gujarat. Besides that, the authors conduct a survey among the advocates who practice in these courts, to determine their understanding of the phrase "offences arising from violations of human rights," since they're a layperson's first point of contact within the judicial system. The authors conclude that the failure to codify the nature of offences triable before the HRC(s) causes confusion among advocates, undermining the institution's potential. The PHRA should therefore be amended to include the offences that can be tried before the HRC(s).

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Key words: Human Rights Courts, Human Rights Offences, Human Rights, Human Rights Violations, The Protection of Human Rights Act, 1993.

I. Introduction

India has a long history of valuing human rights. A brief examination of the Indian freedom movement reveals that the constant trampling of people's rights and liberties was the major driving force behind the freedom struggle.[3] The Constitution Assembly, which was formed to create a comprehensive framework for guiding and governing the country after independence, thus paid special attention to the protection of every citizen's inherent rights.[4] As a result, the final draft of the Constitution of India (the 'Constitution') included a fundamental framework for a rights-based regime guaranteeing a vast majority of rights enshrined in the 1948 Universal Declaration of Human Rights (UDHR).[5] Part III, titled "Fundamental Rights," of the Constitution contains justiciable civil and political rights such as the right to life and liberty, the right to equality, the right to an individual's dignity, and so on.[6] The Directive Principles of State Policy (DPSP) in Part IV, on the other hand, include the non-justiciable economic and social rights such as the right to work, right to shelter etc. Although not legally binding, the DPSP are regarded as critical to the country's governance.[7] In fact with a liberal approach adopted by the Hon'ble Supreme Court many of the rights

[3] RAM MANOHAR LOHIYA, THE STRUGGLE FOR CIVIL LIBERTIES 40 (Foreign Department AICC, 1936); Miloon Kothari, *Remembering India's Contribution to the Universal Declaration of Human Rights*, The Wire (2018), https://thewire.in/rights/indias-important-contributions-to-the-universal-declaration-of-human-rights.

[4] Manish Kanadje, *Analysis of the Constituent Assembly Debates,* PRS Legislative Research (Nov. 25, 2019), https://prsindia.org/files/policy/policy_vital_state/PRS_Constituent_Assembly_Debates_Final.

[5] Dr. Anant Kalse, *Human Rights in Constitution of India,* Commonwealth Parliamentary Association (Dec. 30, 2016), http://mls.org.in/books/H-2537%20Human%20Rights%20in.pdf.

[6] INDIA CONST. art. 12- 35.

[7] INDIA CONST. art. 36 - 51.

within the DPSP have been interpreted as such to be included within the right to life under Article 21.[8]

In addition to the Constitutional provisions, the Parliament has passed numerous supplementary human rights laws in accordance with International Human Rights instruments such as the *Prevention and Prohibition of Sexual Harassment Of Women At Workplace Act, 2013, Persons With Disabilities Act, 1995, The Prohibition Of Child Marriage Act, 2006 e*tc.[9] The PHRA, however is the primary piece human rights legislation, amongst them all. It represents India's strongest affirmation of its commitment to human rights as key to the country's well-being, progress, and integrity.[10] It aims to provide *"better protection of human rights in the country and matters connected with and incidental thereto".*[11] To accomplish this goal, the PHRA establishes two very distinct forums :-

1. The Human Rights Commissions, i.e. The National Human Rights Commission (NHRC)[12] at the Centre and the State Human Rights Commission(s) (SHRC)[13] at the State level, and,
2. The HRC (s) [14] - an enforcement machinery within the cadre of criminal courts, at the district level.

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[8] Devdatta Mukherjee, *Judicial Implementation of Directive Principles of State Policy: Critical Perspectives,* 1(1) IJLPP 14,15 (2014) http://docs.manupatra.in/newsline/articles/Upload/8CEA8CDA-BCBD-4D03-B8EF-8C3E8FFD21E4.1-b_Constitution.pdf.

[9] NATIONAL HUMAN RIGHTS COMMISSION, A HANDBOOK ON INTERNATIONAL HUMAN RIGHTS CONVENTIONS 264-265 (NHRC, 2012),https://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf.

[10] NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2007-08 14 (May 27 2009), https://nhrc.nic.in/sites/default/files/NHRC-AR-ENG07-08_0.pdf.

[11] The Protection of Human Rights Act, 1993, Preamble, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

[12] The Protection of Human Rights Act, 1993, § 3, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

[13] The Protection of Human Rights Act, 1993, § 21, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

[14] The Protection of Human Rights Act, 1993, § 30, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

The two forums have been provided with very distinct functions within the Act. A perusal of the Act depicts that the Commission(s) have been accorded with duties manifold.[15] The primary duty being to raise public awareness around human rights and to protect human rights by inquiring or investigating rights violations committed by public servants and ultimately recommending corrective measures to the concerned government.[16] The HRC(s), on the other hand, have the sole responsibility of bringing to trial complaints involving *"offences arising from a violation of human rights"*.[17] That is to say that whenever an offence is committed at the backdrop of a human rights violation (HRV), it can be tried before the HRC(s). The legislature established these courts because it believed it was critical to resolve such cases as soon as possible as they involved violations of human rights.[18] Furthermore, designating district courts as HRC(s) aids in the decentralisation of the Human Rights Protection network by making access to justice a working reality for the people.

Regrettably, the failure of certain states to establish HRC(s), as well as the presence of a few inherent flaws within the Act, has become a major impediment in the functioning of the courts. The PHRA under Section 30, states that the HRC(s), shall try *"offences arising out of HRV"*. It however does not elaborate upon the meaning of the aforementioned phrase nor does it identify the offences which stem from a HRV. Thus creating a knotty situation for the judicial officers to comprehend.[19]

The issue at hand was first addressed by the NHRC in its annual report from 1996-97. The NHRC under the Chapter titled HRC(s) distinctively made a recommendation to the government to elaborate upon the ambiguity relating to the offences that could be tried by the HRC(s).[20] Yet again, the same was

[15] The Protection of Human Rights Act, 1993, § 12, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.
[16] *Ibid*.
[17] *Supra* n.12.
[18] K.Dhamodharan v. R.V.Narbabi, CRL.O.P.(MD).No.4529 (2006).
[19] Tamilnadu Pazhankudi Makkal Sangam v. The State of Tamilnadu, 1997 MLJ (Cri) 655 Madras.
[20] NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 1996-97 57 (1997), https://nhrc.nic.in/sites/default/files/Annual%20Report%201996-97.pdf.

reiterated by the NHRC in its subsequent reports from 1998 -2007[21] in the following words:-

> *"A continuing impediment to the proper functioning of these Courts has, however, been the lack of clarity as to what offences, precisely, can be classified as human rights offences. The Commission has proposed a precise amendment to Section 30 of the Protection of Human Rights Act, 1993, but in the absence of any action being taken on that proposal, these Courts have not been able to adequately discharge the purpose for which they were designated."*[22]

Regrettably, due to the government's failure to implement its recommendations concerning the HRC(s), the HRC(s) are not mentioned in the NHRC's annual reports from 2007 to 2019. After a 13 year reticence, the NHRC's most recent annual report i.e. the 2019-2020 report, mentions the HRC(s). Wherein, it once again recommends to the government to lay down procedure as well as the offences and the appropriate punishments for the HRC(s).[23] The recommendation is currently under consideration by the Ministry of Home Affairs (MHA).[24]

The present contribution thereby delves into the complexities of the issue and attempts to clarify it in light of the Hon'ble Madras High Court's (HC) interpretation and by pursuing an extensive study within the HRC(s) of Gujarat. In doing so, the author(s) divide the paper into five primary parts. The paper begins by setting the introduction and the focus for the study. The paper then examines how the Courts have applied their mind in interpreting the phrase i.e. *"offences arising out of HRV"*. Taking cues from this, the authors investigate the categories of HRV complaints received by the NHRC in order to identify

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[21] *Ibid* 56; NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2001-2002 137 (2002); NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2002-2003 166 (2003); NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2003-2004 164 (2004); NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2010-2011 139 (2012).

[22] NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2001-2002 137 (2002), https://nhrc.nic.in/sites/default/files/Annual%20Report%202001-2002.pdf.

[23] NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2019-2020 238 (2021), https://nhrc.nic.in/sites/default/files/AR_2019-2020_EN.pdf.

[24] *Ibid*.

corresponding offences within the Indian Penal Code, 1860 (the 'IPC') to such violations.

The paper thereafter, explores the HRC(s) of Gujarat to understand whether the omission to enlist the offences poses a hindrance in the functioning of the courts. The author(s) analyse the data sourced from the e-Courts website to determine the number of cases filed, outcome of the cases and the nature of the offences for which the cases were filed before the HRC(s). Aside from that, the author(s) truly believe that since the advocates represent the parties in court, their knowledge of the law is critical for the country's effective implementation of human rights. If the advocates who serve as a layman's first point of contact are unaware about the existence of HRC(s) or about the offences for which these courts are designed, the establishment of these courts is rendered useless. The authors therefore additionally conduct an empirical study amongst advocates selected at random *(n =100)* practising in District and Sessions court of Gujarat on their understanding of the phrase *"offences arising out of violation of human rights"*. To gather the information the author(s) used a Likert scale questionnaire followed by an open-ended question segment based upon the respondent's answer. The final section of the paper contains the authors' concluding remarks and suggestions for improvement.

II. Limitation(s) of the Study

1) To identify the categories of HRV, the authors limit their study to human rights complaints filed before the NHRC only.
2) To identify the offences that may arise from HRV the authors limit their study to the IPC only.
3) To examine the understanding of the phrase *"offences arising out of HRV"*, amongst the advocates practising in District and Sessions courts, the authors limit the survey to four districts only: *Ahmedabad, Gandhinagar, Surat, and Vadodara*.

A. Human Rights Courts - Protection of Human Rights Act, 1993.

The PHRA spreads across eight (8) chapters and 43 sections. The NHRC/SHRC(s) are discussed in 34 of the 43 sections of the PHRA, which detail

their composition, functions, powers, and finances. Whereas only three sections of the PHRA, deal with HRC(s).

HRC(s)

Section 30 of the PHRA states that *"each State Government (SG), in consultation with the Chief Justice of their respective High Court, may designate the Court of Sessions in each district of the State as a HRC"*.[25] The goal of establishing such courts is to speed up the prosecution for the *"offences arising out of HRV"*.[26] At present the following 23 states and 06 Union Territories (UT) have designated HRC(s) in accordance with Section 30, PHRA. (see fig.1)

States:

Andhra Pradesh, Bihar, Chhattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Meghalaya, Mizoram, Odisha, Punjab, Rajasthan, Sikkim, Tamil Nadu, Telangana, Uttar Pradesh, Uttarakhand, West Bengal.

Union Territories:

Jammu and Kashmir, Delhi, Dadra & Nagar Haveli and Daman & Diu, Chandigarh, Puducherry, and Andaman &Nicobar Islands.

Fig. No. 1: States and UT(s) with Human Right Court(s)

(source: primary)[27]

Special Public Prosecutor (SPP)

Because the HRC(s) is a Court of Sessions which requires a trial to be conducted by the Public Prosecutor (PP), Section 31 of the PHRA requires the State

[25] *Supra* n.12.
[26] *Ibid*.
[27] Data retrieved through RTI Application No. NHRCM/R/E/22/00927 dated 20.11.2022.

Government (SG) to either designate a PP or appoint an experienced advocate of at least seven years as a SPP.[28]

Special Investigation Team (SIT)

Furthermore, under Section 39, PHRA the SG has the power to form one or more SIT(s) to conduct investigation and prosecution of offences brought before the HRC(s).[29]

Miscellaneous Provisions

Besides this, the PHRA confers powers to the Central Government (CG) and the SG to make rules to carry out the provisions under the PHRA,[30] which axiomatically apply to the HRC(s). However, to date barring the state of Karnataka[31], no rules of practice for the HRC(s) have been formulated by either the CG or the SG(s). The authors opine that the Karnataka State Government's rules can serve as a foundation for the Central Government to develop similar rules with necessary modifications for every HRC(s). This can aid in achieving a sense of uniformity among the HRC(s), which at present follow different procedural requirements[32].

A quick read of the rules enlightens us about the functioning of the HRC(s), and we discover the following:

1) How a complaint can be filed before a HRC,

2) Who can file and against whom can such a complaint be filed,

2) The Procedure followed by the court on taking cognizance of the complaint,

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[28] The Protection of Human Rights Act, 1993, § 31, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

[29] The Protection of Human Rights Act, 1993, § 37, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

[30] The Protection of Human Rights Act, 1993, § 40-41, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

[31] The Karnataka Government in 2006 exercised powers conferred by § 41 of the PHRA, 1993 by Notification No. Law 11 HRC 2006 (Part), Bangalore, dated 25.01.2006, passed the "Karnataka State Human Rights Courts Rules, 2006", Data retrieved through RTI application no. dated 23.01.2023.

[32] The Registrar v. The State of Gujarat, Cr.MA No. 7874 (2012); also see Rasiklal M. Gangani v. Government of Goa through Chief Secretary, W.P.No.537 (2003).

3) The Nature of the trial followed by the court.

B. Karnataka State Human Rights Courts Rules, 2006

According to the rules, a victim of a HRV has the right to file a private complaint against a public servant who has committed or aided in the commission of such an offence.[33] The complaint can be either filed by him himself, or he can authorise an NGO, a legal representative, or a public person to do so on affidavit.[34] Following that, the court may either conduct an inquiry or authorise a police officer with a rank no lower than Superintendent of Police to conduct an investigation.[35] The investigation should be completed within 15 days, with the possibility of further extension.[36] The rules further state that the nature of the trial before the HRC(s) should be by the provisions of the Code of Criminal Procedure, 1973 (CrPC) governing sessions trials.[37] However, to continue with the trial, the court must seek appropriate sanction in accordance with Section 197, CrPC based on the findings of the investigation/inquiry.[38] The said request must be disposed of within 30 days of receiving communication from the Court.[39] Once the sanction has been obtained from the appropriate authority, the trial should be conducted daily and should be prioritised over any other trial that ensued against the accused [40]

The rules, however, remain silent as to the offences which can be tried by the HRC(s) or on elaborating on the meaning of the phrase *"offences arising out of HRV".* The rules simply state that -

> *"The Court shall try all offences of a violation of human rights and, while trying an offence of violation of human rights, may charge and try and accused for any other offence which may*

[33] Karnataka State Human Rights Courts Rules, 2006, § 6(1).
[34] *Ibid*.
[35] Karnataka State Human Rights Courts Rules, 2006, § 6(2).
[36] *Ibid*.
[37] Karnataka State Human Rights Courts Rules, 2006, § 6(6).
[38] Karnataka State Human Rights Courts Rules, 2006, § 6(4).
[39] *Ibid*.
[40] Karnataka State Human Rights Courts Rules, 2006, § 7.

have been committed by the accused in the course of the same transaction in one trial for every such offence."[41]

III. The Quandary over the Offences Triable By the HRC(S)

The PHRA empowers each SG to establish HRC(s) for the conducting trial of cases wherein an offence in furtherance of an HRV has been committed.[42] On a cursory reading of the provision, the language used by the drafters appears straightforward, implying that the HRC(s) can prosecute any "offence" arising from an HRV. However, unlike the other special acts, PHRA does not expressly list the offences that the special court may try. This impediment in the functioning of the HRC(s) was first highlighted in 1997, when the first Human Rights complaint was filed before the HRC of Erode, Tamil Nadu.[43] According to the petition, the Special Task Force (STF), which was formed to apprehend the sandalwood smuggler Veerappan, was torturing and illegally detaining the tribals in the area, thereby violating their human rights.[44] However, due to a lack of clarity on the jurisdiction and the precise nature of offences, the complaint could not be tried by the court and therefore the petition was returned by the presiding officer of the said HRC.[45]

To bring attention to the issue, the People's Union for Civil Liberties (PUCL) wrote a letter to Justice V.R Krishna Iyer (former judge of the Supreme Court of India), outlining the ambiguities regarding the jurisdiction and procedures to be followed by HRC(s).[46] In response, Justice Iyer, forwarded the letter to the Madras HC's then-Chief Justice, Justice K.A Swamy, requesting that a bench be formed to consider the viability of the HRC(s).[47]

[41] Karnataka State Human Rights Courts Rules, 2006, § 3-4.
[42] *Supra* n. 12.
[43] *Supra* n. 17.
[44] *Ibid*, para 7.
[45] *Ibid*, para 7.
[46] *Ibid*, para 9.
[47] *Ibid*, para 10.

A. Hon'ble Madras High Court on the Scope of HRC(s).

As a result, the Madras HC took on record a *suo moto* Criminal Revision petition under Article 227 of the Indian Constitution.[48] A communication in this regard was also forwarded to the NHRC and the Attorney General of India to place their views upon the issues framed by the court.[49] The petition addressed a total of 25 issues concerning the HRC(s). Out of which two issues expressly pertained to the phrase *"offences arising out of violation of human rights"*.[50] The said questions/issues were as follows:-

> *"(1) Whether it can - on the face of the statutory provisions under Sec.2(1)(d) defining 'Human Rights' and Sec.30 of P.H.R.A. dealing with Constitution of HRC(s) for trial of offences, arising out of HRV - be stated that there is no clear guidance in P.H.R.A. as to what can be regarded as 'offences arising out of violation of Human Rights'? , and*
>
> *(2) Whether there is any need or desirability to amend P.H.R.A. and specify the offences, arising out of HRV, which can be tried by HRC(s) ?"*[51]

Replying to the aforementioned issues, the court opined that due to the presence of clear indicators already present within the provision there was no requirement of amending the provision.[52] It ruled that while the PHRA does not specifically enumerate the human rights offences, it does give us a hint as to what 'offences' could be construed as those springing from a HRV.[53] To feed into the soul of the phrase one must first appreciate the meaning of the two definite indicators i.e. *'offence'* and *'human right'* and a combination of the two would result in a practical understanding of the phrase.[54]

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[48] Tamil Nadu Pazhankudi Makkal Sangam v. Government of T.N, Crl.R.C.No.868 (1996).

[49] S*upra* n.18, 57.

[50] NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 1997-98 131 (1998), https://nhrc.nic.in/sites/default/files/Annual%20Report%201997-98.pdf.

[51] *Supra* n.17.

[52] *Ibid*.

[53] *Ibid*.

[54] *Ibid*.

An "*offence*" is –

> *"any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871 (1 of 1871)".*[55]

"*Human Rights*" are –

> *"the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India".*[56]

"An offence arising out of HRV" would thereby mean –

> an act or omission, punishable by law for the time being in force, which emanates from the rights relating to life, liberty, equality, and dignity of an individual and nothing else.

However, the court additionally stated that–

> *"It is only such violations of 'Human Rights' as embodied in International Covenants, treatise etc., either incorporated etc., either incorporated in the Constitution, as justiciable right or incorporated or transformed in municipal law, at the instance of the instrumentalities of the State that get attracted the jurisdiction of the High Court under Art.226 or the Supreme Court under Art.32 of the Constitution. The violation of such rights, if occurred at the instance of private individuals, there is no other go for the affected individual, except to seek his remedies under the ordinary law of the land".*[57]

By doing so the Hon'ble Court restricted the definition of the phrase to "public servants". Thereby defining *"offences arising out of HRV"* to mean –

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[55] Code of Criminal Procedure,1973, § 2(n).
[56] The Protection of Human Rights Act, 1993, § 2(1)(d), as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.
[57] *Supra* n. 17.

> *"an act or omission on the part of the instrumentalities of the State, that is to say, public servants, punishable by law for the time being in force, as relatable to life, liberty, equality and dignity of the individuals and nothing else".*[58]

The authors believe that the primary reason for doing so could be to adhere to the spirit of the law i.e. the PHRA. Using the NHRC/SHRC as a model, one can clearly note that the commissions are only authorized to hear complaints filed against public servants and therefore, by following a functional interpretation of the PHRA the same could be applied to the HRC(s). However, the author(s) opine that in order to avoid confusion, Section 30 should expressly state the limitation, as is done in Section 12 of the PHRA, 1993.[59]

IV. Identifying the Offences that Arise Out of Violation of Human Rights

A conjoined reading of section 2(1)(d), PHRA, 1993 and Section 30, PHRA, 1993 helps to blur the ambiguity surrounding the phrase *"offences arising out of HRV"*, nevertheless it cannot be said that the anomaly within the section is completely removed. The authors note that the phrase is secondary in nature. To identify the 'offences', one has to look at the various categories of HRV(s). Only on enlisting the said HRV(s), can one identify the complementary offences punishable by law for the time being in force. It, therefore, becomes bifurcated. First, there must be a rights violation, and second, that violation must give rise to an 'offence'.

Keeping the definition of the phrase as laid down by the Madras HC[60], as a point of reference, the authors categorize the HRV complaints filed before the NHRC through a secondary analysis of the annual reports of the NHRC. The authors subsequently seek guidance from the IPC to ascertain which HRV the HRC(s) may speedily prosecute as *"offences arising out HRV".* The rationale behind selecting the complaints filed with the NHRC is to keep the goal of only investigating HRV committed by public servants.

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[58] *Ibid*.

[59] The Protection of Human Rights Act, 1993, § 12, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

[60] *Supra* n. 17.

A. Human Rights Violation Complaints Filed before the NHRC

The NHRC publishes its annual report highlighting the number of complaints received by the Commission for the respective calendar year, the investigations made by the commission, and its recommendations to the government.[61] In doing so, the commission categorises the complaints into different groups according to the nature of the human rights such as : Civil and Political Rights, Right to Health, Right to Food, Right to Education, Rights of Scheduled Tribes, Scheduled Castes and Other Vulnerable Groups, Rights of Women and Children, Rights of Elderly Persons, and Rights of Persons with Disabilities.[62] It then reports some of the cases received as illustrations during that year under each heading.[63] After analysing the illustrative cases depicted in the NHRC's Annual Reports from 2014 to 2020, the authors identified the following HRV(See Table No. 1) :-

Table No.1: Complaints for HRV Filed Before the NHRC

(Source: Secondary Data Analysis of the NHRC Annual Reports)

Children	Exploitation Of Children Child Labour Child Marriage Child Prostitution Child Trafficking Custodial Violence In Juvenile Homes Harassment Of Child Educational Institutions Resorting To Physical Punishment Child Sex Slavery
Environment	Public Health Hazards

[61]The Protection of Human Rights Act, 1993, § 20, as amended vide the Protection of Human Rights (Amendment) Act, 2019 No. 19 of 2019.

[62]NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2015-2016 35-216; NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2016-2017 38-140; NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2017-2018 43-141; NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2018-2019 34-153; NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT 2019-2020 39-199, https://nhrc.nic.in/publications/annual-reports.

[63] *Ibid*.

	Environmental Pollution Environmental Hazard Negligence on Part Of Public Officials
Health	Medical Negligence Medical Misconduct Denial Of Adequate Healthcare Violation Of The Legal Rights Of Physically And Mentally Challenged
Labour	Bonded Labour Forced Labour Exploitation Of Labour Hazardous Employment Slavery
Police	Custodial Death In Police Custody Unlawful Arrest/ Detention Negligence By Police Officials Torture In Police Custody False Implications Illegal Gratification Rape In Police Custody Police's Failure To Take Lawful Action Fake Encounter By Police Sexual Harassment Undue And Excessive Use Of Force Non Registration Of FIR
Prison	Custodial Death To Prison Custodial Rape Harassment Of Prisoners Negligence In Taking Lawful Action Custodial Torture In Judicial Custody Sexual Harassment Deprivation Of Legal Aid

SC/ST/ Minorities	Caste Discrimination Sexual Assault Manual Scavenging Physical And Verbal Harassment Torture Forced Labour
Women	Exploitation of Women Sexual Assault Forceful Abortion Sexual Harassment At Workplace Outraging The Modesty of A Women Non Registration of FIR Discrimination Against Women Immoral Trafficking
Other(s)	Non Payment of Pensionary Benefits Abuse By Educational Authorities Electrocution Cases - Negligence By Public Authorities Misuse of Public Funds

An examination of the complaints filed with the NHRC reveals that HRV were committed by state agents such as police, health professionals, educational institutions, government department, and so on. The HRV were committed either directly by the state through the active participation of its agents or indirectly by the state's failure to prevent or respond to such violations. It is to be further noted that complaints for rights violations before the NHRC arose from both, civil and political rights as well as economic and social rights.

A perusal of the IPC discloses that not all HRV have a corresponding offence within the code. However, direct violations involving physical abuse, such as "custodial crimes" and "crimes involving abuse of power," can be easily traced within the IPC. For instance, Chapter 16 of the IPC addresses penalties for any type of bodily harm against a person, from a minor assault to the infliction of death. Specific sections of the IPC also include offences committed as a result of power abuse, such as malicious prosecution, intimidation, unlawful arrest, and so on. Following this line of reasoning, the writers list some of the potential "offences" which could result from HRV. The list, however, is not exhaustive

both within the IPC and in relation to the other Special Acts (see Table no. 2 below).

Table No. 2: Human Rights Offences

(Source: Secondary Data Analysis of the NHRC Annual Reports)

HRV	Description of the Offence (Indian Penal Code, 1860)
Assault/ Excessive Use of Force	350[64], 351[65],354[66],354B[67], 354C[68], 355[69]
Corruption	403[70], 409[71]
Custodial Death	300[72]
Custodial Rape/ Rape/ Gang Rape	375[73], 376 C[74], 376D[75], 377[76]
Forced Labour	374[77]
Human Trafficking	370[78]
Intimidation	383,[79]389,[80]503[81]
Malicious Prosecution/ False Implication	166[82], 167[83], 211[84], 219[85]

[64] Criminal Force.
[65] Assault.
[66] Assault or criminal force to woman with intent to outrage her modesty.
[67] Assault or use of criminal force to woman with intent to disrobe.
[68] Voyeurism.
[69] Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.
[70] Dishonest Misappropriation of Property.
[71] Criminal Breach of Trust by Public Servant, or by banker, merchant, or agent.
[72] Murder.
[73] Rape.
[74] Sexual Intercourse by a Person in authority.
[75] Gang Rape.
[76] Unnatural offences.
[77] Unlawful compulsory labour.
[78] Trafficking of Persons.
[79] Extortion.
[80] Putting person in fear or accusation of offence, in order to commit extortion .
[81] Criminal Intimidation.
[82] Public servant disobeying law, with intent to cause injury to any person.
[83] Public servant framing an incorrect document with intent to cause injury.
[84] False charge of offence made with intent to injure.
[85] Public servant in judicial proceeding corruptly making report, etc., contrary to law.

Negligence/ Medical Negligence	304A[86], 166B[87]
Non -Registration of FIR	166A[88]
Sexual Harassment	354A[89],
Torture	307[90], 321[91], 322[92], 324[93], 326[94], 326A[95], 330[96], 331[97]
Unlawful Arrest/ Detention	220[98], 340[99], 345[100], 348[101]

B. Status of Human Rights Courts in the State of Gujarat

In exercise of the powers conferred by Section 30 of the PHRA the Government of Gujarat in concurrence with the Chief Justice of the High Court of Gujarat, specified all the Court of Sessions for every district within the State as an HRC by *Notification no. GK/2002/16/SPC/ 1094/VIP-226/D dated 24th May, 2002.*[102]

C. Cases Filed Before the HRC(s) of Gujarat

According to the data depicted in Fig. No. 2 below, a total of *110 cases* have been filed before the HRC(s) of Gujarat from 2002 to 2022. The said 110 cases have been filed in only *08* (eight) districts i.e. *Bhavnagar, Gandhinagar, Gir Somnath, Jamnagar, Junagadh, Morbi, Rajkot and Surat* out of the 32 districts (see Fig. No.

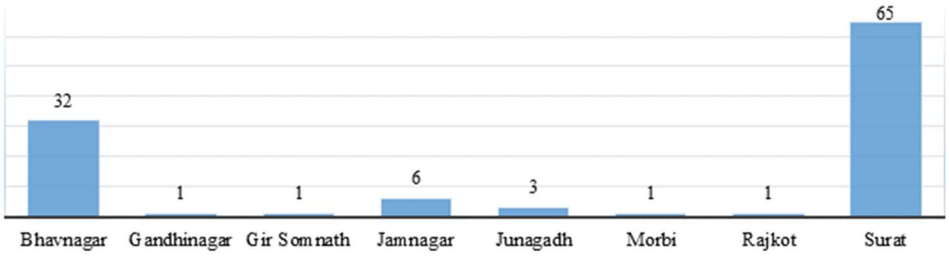
[86] Causing Death by Negligence.
[87] Punishment for non-treatment of victim.
[88] Public servant disobeying direction under law.
[89] Sexual Harassment.
[90] Attempt to Murder.
[91] Voluntarily Causing Hurt.
[92] Voluntarily Causing Grievous Hurt.
[93] Voluntarily Causing Hurt by dangerous weapons or means.
[94] Voluntarily Causing Grievous Hurt by dangerous weapons or means.
[95] Voluntarily Causing Grievous Hurt by use of acid, etc.
[96] Voluntarily causing hurt to extort confession, or to compel restoration of property.
[97] Voluntarily causing grievous hurt to extort confession, or to compel restoration of property.
[98] Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.
[99] Wrongful Confinement.
[100] Wrongful confinement of person for whose liberation writ has been issued.
[101] Wrongful confinement to extort confession, or compel restoration of property.
[102] Data Retrieved through RTI application No. RTI/102021/55-A/D, dated 29-10-2021.

2 below). Inferring that the HRC(s) of the other 24 districts have not been operating at all. The yearly statistics of the HRC(s) in Fig. 3 below further depict that no cases were received by the HRC(s) in any of the districts from 2002 to 2010. The number of cases filed however increased from 2012 to 2016 (except 2015), with the highest number of cases filed in 2013 and 2014, at 25 and 28, respectively (see Fig. No. 3 below). According to data from the Gujarat SHRC, the commission has received a total of 47340 complaints as of January 2023, 960 of which are related to alleged cases of custodial deaths.[103] The authors note that in light of the significant number of complaints regarding custodial deaths, which are legitimately triable by the HRC(s) as an *"offence arising out of violation of human rights,"* the miniscule number of cases that have been brought before the HRC(s) looks ambiguous. The aforementioned concern is further supported by a comparison between the number of complaints submitted to the NHRC each year from the State of Gujarat and the number of cases that are brought before the HRC(s) of Gujarat (see Fig. No. 4 below).

As a result, the authors consider it necessary to delve deeper into the issue to truly understand as to why fewer complaints are filed before HRC(s). To do this, we must assess the 110 cases that have been presented before the HRC(s).

Fig. No. 2: Total No. of Cases Filed Before the HRC(s) of Gujarat from 2002 -2022

(Source: Secondary Analysis of the Data Sourced from the E- District Courts Website)



[103] see Gujarat State Human Rights Commission, Statistics. https://gshrc.gujarat.gov.in/statistics.htm.

Fig. No. 3: Cases Filed Before the HRC(s) of Gujarat *per year* from 2002 - 2022

(Source: Secondary Analysis of the Data Sourced from the E- District Courts Website)

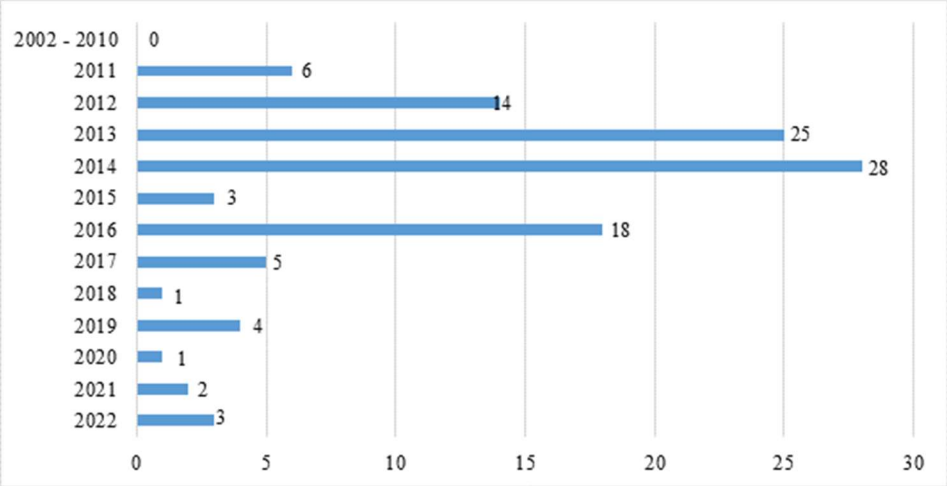
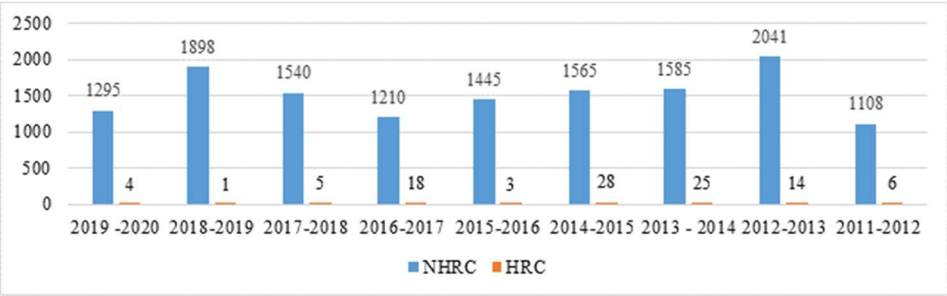


Fig. No. 4: Comparison Between the No. of Cases Filed Before the HRC(s) Gujarat and the NHRC from Gujarat from 2011 -2019

(Source: Secondary Analysis of the Data Sourced from the E- District Courts Website and NHRC Annual Reports)



D. Status of the Cases Filed Before the Human Rights Courts of Gujarat

Fig. No. 5: Outcome of the Cases Filed Before the HRC(s) of Gujarat per year from 2002 -2022

(Source: Secondary Analysis of the Data sourced from the E- District Courts Website)

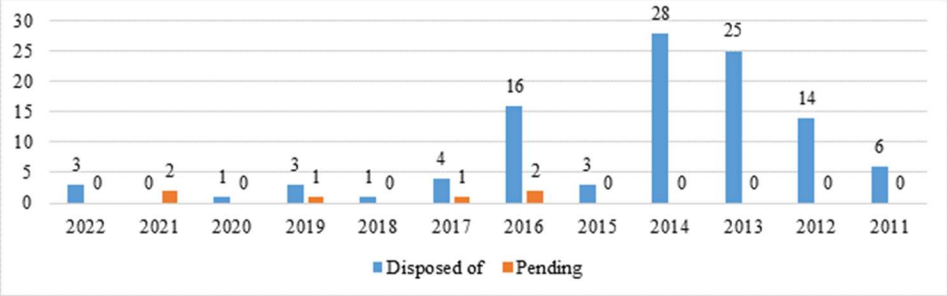
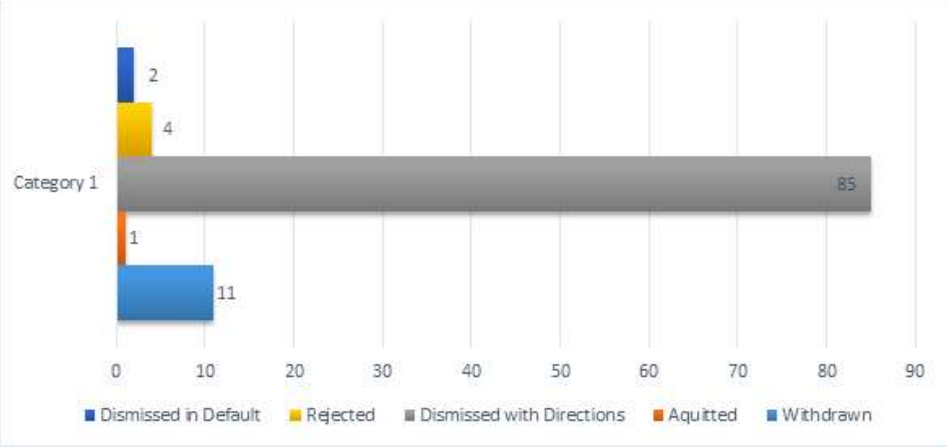


Fig. No. 6: Nature of Disposal of the Cases Disposed of by the HRC(s) of Gujarat from 2002 -2022

(Source: Secondary Analysis of the Data Sourced from the E- District Courts Website)



When it comes to the status of the complaints received by the HRC(s), out of the 110 cases, presently 103 cases stay disposed of, and 07 (seven) pending before the HRC(s) (see Fig. No. 5 above). The authors further note that only 01 (one) out of the 103 cases resulted in an acquittal, while the other 102 were decided solely at the preliminary stage without a complete hearing. (see Fig. No. 6 above). As a result, no convictions have been obtained to date. The nature of disposal of the 102 cases is classified into four major categories (see Fig. No. 6 above): -

- Dismissed in default,

- Rejected,
- Dismissed with directions, and
- Withdrawn.

02 (two) complaints filed with the HRC were dismissed in default, which means that the complaint was dismissed because the complainant failed to appear before the court despite repeated notices to do so (see Fig. 6 above). *04* (four) complaints filed with the HRC(s) were out rightly rejected. The court additionally stated that a direct complaint to the HRC(s) that bypasses the authority of the SHRC or the NHRC is not maintainable, as these commissions have primary authority to investigate HRV. The remaining *02* (two) complaints were rejected because the prosecution failed to obtain sanction for prosecution from the relevant authorities as required by Section 19 of the Prevention of Corruption Act, 1988 (see Fig. 6 above). Whereas the complainants in *11* complaints refused to pursue the complaint due to compromise or settlement between the parties through mediation (see Fig. 6 above).

Most of the cases i.e. 85 however were dismissed with directions by the court (see Fig. No. 6 above). The Courts in the 85 cases ruled out in their respective orders that the concerned HRC did not have the original jurisdiction to entertain the complaint and as a result directed the complainants to approach the appropriate forum. The decision for doing so was based upon the concurring judgements of the Hon'ble Bombay High Court and Madras High Court in the case of, *Rasiklal M. Gangani v. Government of Goa through Chief Secretary*[104] and *K. Dhamodharan vs R.V.Narbabi*[105] respectively. The Hon'ble HC(s) observed that because the PHRA is silent regarding who may take cognizance of a complaint for a human rights offence, the rules within the CrPC get automatically attracted.[106] As a result a Sessions Judge who is barred from taking direct cognizance of a complaint in accordance with the Section 193, CrPC would not be able to take direct cognizance of a human rights complaint put before it (HRC(s) being the Court of Sessions).[107] In accordance with Section 209 CrPC,

[104] Rasiklal M. Gangani v. Government of Goa through Chief Secretary , W.P No. 541 of 2003.
[105] *Supra* n.16.
[106] *Ibid*.
[107] *Ibid*.

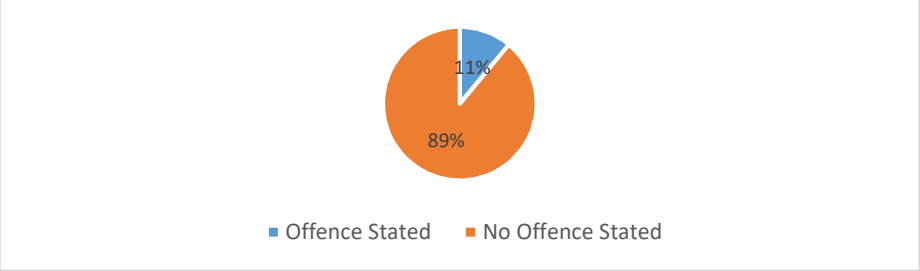
the complaint must therefore be first presented to a magistrate, who after taking cognizance can then commit the same to the Court of Sessions i.e. the HRC for trial.[108]

The author(s) observe that *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and The Protection of Children from Sexual Offences Act, 2012* are two special Acts similar to the PHRA, which provide for the designating the Court of Sessions in each district as a special court to try the offences under the respective act(s).[109] However, unlike the PHRA the aforementioned Act(s) expressly empower the special judge to take direct cognizance of the offences under the respective Act(s).[110] The author(s) observe that as a result of the refusal to grant the HRC(s) original jurisdiction, the fewer complaints that do manage to reach the HRC(s) are also dismissed. As a result, it is a major impediment to the HRC 's ability to provide an effective remedy to victims of HRV.

E. Identifying the "Offences" From the Complaints Instituted Before the HRC(s) of Gujarat

Fig. No. 7: Cases in which the Offence was Stated in the Complaint Before the HRC(s)

(Source: Secondary Analysis of the Data Sourced from the E- District Courts Website)



[108] *Supra* n. 16.
[109] The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, § 14; The Protection of Children from Sexual Offences Act, 2012, § 28.
[110] The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, § 14; The Protection of Children from Sexual Offences Act, 2012, § 33.

The disclosure of the nature of an offence or the crime is one of the main requirements at the pre -trial stage. Unless and until an offence is disclosed, the trial process does not commence.[111] On analysing the complaints received by the HRC(s) of Gujarat, the authors disclose that only a mere 11% of the cases i.e. out of the *110* complaints only *12 complaints,* clearly identified the nature of the offence which was committed against the background of the HRV (see Fig. No. 7 above). The author(s) thereby opine that even if the power to take direct cognizance as court of original jurisdiction is bestowed to the HRC(s), the failure to identify and attach an offence would be a continuous stumbling block for the HRC(s). The authors further observe that the failure to attach an offence within the complaints clearly indicates that the applicants struggled to identify the offence for a particular HRV. Another possibility is that the absence of the offences within the PHRA misled the applicants about the HRC's authority and purpose. As a result, they mistook the HRC for a public law court, having powers similar to those of the High Court and Supreme Court under Articles 226 and 32, respectively.

Nonetheless, the writers made note of the complaints that listed the specifics of the offence and used that information to compile a list of the offences (see Table No. 3 below). The complaints cited three core statutes: *the Indian Penal Code, 1860, the Transplantation of Human Organs Act, 1994, and the Prevention of Corruption Act, 1988*.

Table No. 3: Offences for which complaints were filed before the HRC(s) of Gujarat

(Source: Secondary Analysis of the Data Sourced from the E- District Courts Website)

Sections	Description of the Offence
Indian Penal Code, 1860	
Section 114	Abettor present when offence is committed
Section 116	Abetment of offence punishable with imprisonment—if offence be not committed
Section 120	Concealing design to commit offence punishable with imprisonment
Section 120A	Criminal Conspiracy

[111] Inference drawn from Section 226, Code of Criminal Procedure, 1973.

Section 142	Being member of unlawful assembly
Section 146	Rioting
Section 149	Every member of unlawful assembly guilty of offence committed in prosecution of common object
Section 166	Public servant disobeying law, with intent to cause injury to any person
Section 166 A	Public servant disobeying direction under law
Section 321	Voluntarily causing hurt
Section 340	Wrongful confinement
Section 346	Wrongful confinement in secret
Section 350	Criminal force
Section 351	Assault
Section 354	Assault of criminal force to woman with intent to outrage her modesty
Section 357	Assault or criminal force in attempt wrongfully to confine a person
Section 375	Rape
Section 376B	Sexual intercourse by husband upon his wife during separation
Section 377	Unnatural Offences
Section 435	Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees
Section 440	House-trespass
Section 441	Criminal trespass
Section 503	Criminal intimidation
Section 504	Intentional insult with intent to provoke breach of the peace
Transplantation of Human Organs Act, 1994	
Section 18	Punishment for removal of human organ without authority
Section 19	Punishment for commercial dealings in human organs.
Section 19 A	Punishment for illegal dealings in human tissues.
Prevention of Corruption Act, 1988	
Section 7	Public servant taking gratification other than legal remuneration in respect of an official act
Section 8	Taking gratification, in order, by corrupt or illegal means, to influence public servant
Section 9	Taking gratification, for exercise of personal influence with public servant.
Section 11	Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant.
Section 13	Criminal misconduct by a public servant.

V. Findings of the Survey

The study was conducted amongst the advocates practising in the District and Sessions Courts of Gujarat. Accordingly, the following objectives were framed for the study: -

i. To examine the awareness amongst the advocates about the existence of the HRC within their district, and

ii. To determine their understanding of the expressions *"Human Rights"* and *"Offences arising from HRV"*.

The data for the study was collected through a survey using a mixed scale questionnaire (Dichotomous and Likert scale). Wherein the Likert Scale questions were further followed by an open-ended question segment based on the respondent's response.

The information was gathered from four districts: *Ahmedabad, Gandhinagar, Vadodara, and Surat.* The questionnaire for the survey was distributed manually amongst 100 respondents. The demographics of the respondents is shown in Fig. No. 8. The data collected was examined using frequency analysis with the SPSS software (version 29.0.1.0(171)). The responses of the respondents to the questions at the frequencies are shown below from Fig No. 9 and Fig. No. 10 using clustered bar graphs.

Fig. No. 8: Respondents' Demographics

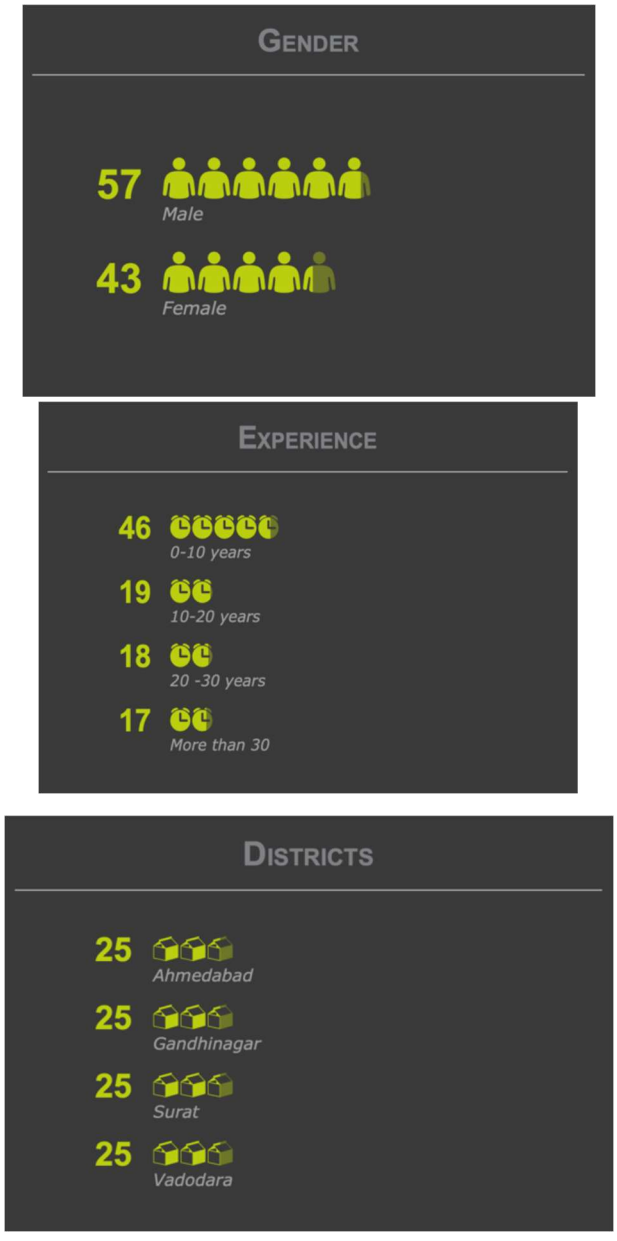


Fig. No. 9: Source (Primary, Survey Data)

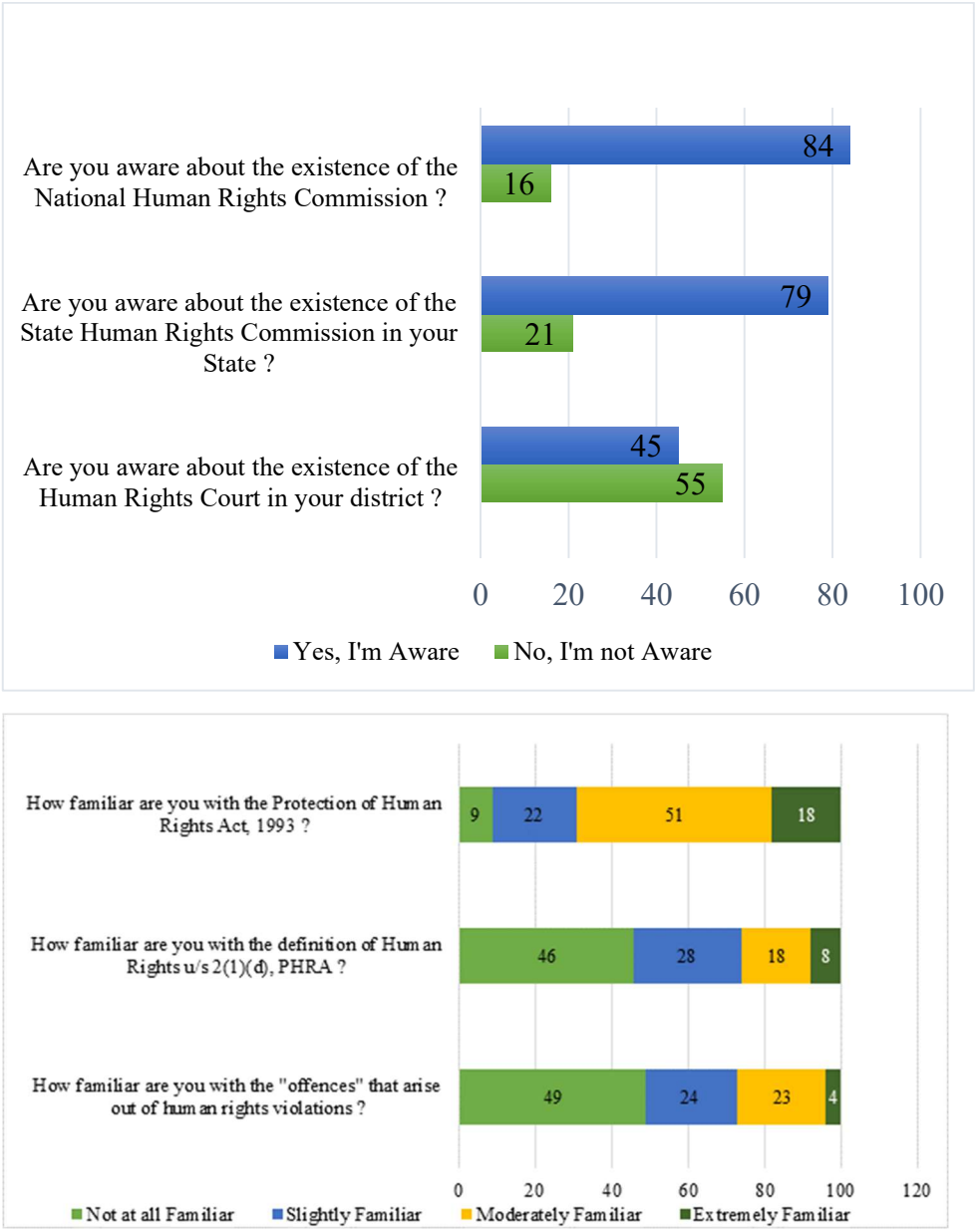


Fig. No. 10: Source (Primary, Survey Data)

The survey questions are divided into two segments, each with three questions. The first segment describes the advocates' knowledge about the existence of three key institutions, namely the NHRC, the SHRC(s), and the HRC(s), which cater to the protection of human rights in the country. The authors opine that advocates are the link between the common man and the judiciary. And therefore, as an officer of the court every advocate must we aware of all the remedies that are available to a victim of rights violation.

The data depicts that 84% and 79% of total respondents (n= 100), were aware about the existence of the NHRC and the SHRC respectively (see Figure No. 9 above). On the other hand, a quick second glance of the data reveals that merely 45% of the total respondents (n= 100), were aware of the existence of an HRC in their district (see Fig. No. 9 above). It can therefore be concluded that the awareness amongst the advocates about the existence of the HRC(s) is extremely low. This is particularly unfortunate because, unlike human rights commissions, the HRC is the only institution with full adjudicatory powers and the ability to issue a binding judgement.

The second segment of the survey focuses on the advocates' knowledge about the PHRA and their understanding of the phrases "Human Right" and "Offences arising from HRV", used within the PHRA. The authors opine that to file a complaint before the HRC one is required to know about the nature of the HRV as well as the nature of the offence committed against his or her client.

The data depicts that 51% of total respondents (n= 100), were *moderately familiar* with the PHRA and merely 9% respondents were completely unfamiliar with the PHRA (see Fig. No. 10 above). However, when questioned on their understanding of the expression “Human Rights”, a majority of the respondents i.e. 46% of the total respondents (n= 100) said that they were *not at all familiar* with the definition of “Human Rights” as laid down within the PHRA (see Fig. No. 10 above). Similarly, most of the respondents i.e. 49 % of the respondents (n= 100), said that they were not at all familiar with the offences that can be said to arise from HRV (see Fig. No. 10 above). In fact, those who were to some extent familiar (24% - slightly familiar, 23% - moderately familiar and 4 % - extremely familiar) with the phrase, were asked to enlist at least 4 (four) offences that can be said to arise from HRV (see Fig. No. 10 above). Wherein out of the 51 respondents only 2 could list the offences. The two respondents enlisted the offence of *medical negligence, rape, and murder* within the IPC as those arising

out of HRV. The authors conclude that, the advocates practising in the District and Sessions Courts of Gujarat were not at all familiar with the definition of human rights as well as the offences which could be tried by the HRC(s). The fact that most of the advocates were unaware of the 'offences' triable by the HRC(s) indicates a significant hindrance in the HRC's functioning.

VI. Conclusion and Suggestions

The goal of enacting the PHRA was to offer the people of the country with a stronger and a decentralized human rights protection system. The act directs the respective governments to establish two independent institutions i.e. a national and the state commissions to that end. Furthermore, the State Government(s) are obligated to designate the Court of Sessions within each district of a state as HRC(s) to expedite the prosecution of HRV-related offences. The concept of HRC(s) is remarkable given the numerous instances of HRV that one hears about on a regular basis. An offence committed in the background of the violations tends to increase the severity of the breach. As a result, such an incident must be duly investigated and the perpetrator be brought to justice. The proper functioning of the HRC(s), which belong to the cadre of criminal courts gains importance. Additionally, the fact that the HRC(s) are to be set up within every district helps in accessing the courts.

At the end of the study on the HRC(s) of Gujarat, the author(s) however conclude that though novel in approach, a few hurdles continue to impede the aim of “speedy justice” by the HRC(s).

i. To begin, the authors observed that the premises of the District and Sessions Courts fail to put up a sign board communicating as to which court is designated as an HRC(s). As a result, it is obvious that a common person or practising lawyer would be unaware of the Court of Session's designation as an HRC.

ii. Furthermore, the lack of knowledge around the offences relating to HRV and the procedure to be followed by the HRC renders the notion of decentralization ineffective in practice. This additionally leads to the filing of frivolous complaints outside of the special court's jurisdiction. Resulting in wasting of both the court's time as well as the victim’s in his/her pursuit of justice.

iii. The Act directs for designating the Court of Sessions as an HRC(s). The fact that HRC(s) are not separately established puts an additional burden upon the Courts of Sessions who already bear the burden of cases waiting on their docket. Once again, admonishing the right to a speedy trial.

The author(s) find it regrettable that, even after 30 years of enactment of the PHRA the HRC(s) have not yet taken of as expected. This is more astonishing due to fact that the NHRC has itself repeatedly urged for modifications to the PHRA. However, the same have not been implemented. Resulting in the deplorable functioning of the HRC(s).

The following are the suggestions put forth by the author(s) for the better implementation of provisions relating to the HRC(s):-

i. Section 30, PHRA should amended to specify the powers and function of HRC(s). The CG should further enact the rules governing the functioning of the courts.

ii. Section 30, PHRA should be amended to replace the word "designate" by "establish", thereby directing the SG to establish independent HRC(s) to exclusively deal with HRV– related offences.

iii. The PHRA should be amended to include a list stating the nature of the offences and the punishments. The PHRA should also define the expression *"Offences arising out of Human Rights Violation"*.

iv. The PHRA should be amended to extend original jurisdiction to the HRC(s), allowing the special judge to take immediate cognizance of the offences.

In conclusion the author(s) opine that the provisions of the PHRA are in desperate need for an amendment for bringing the HRC(s) in action. As a result, the author(s) make an impassioned plea to the country's legislature to act as soon as possible for the sake of stronger human rights protection.

Vol. 14 No. 2 ISSN: 0976-3570

The Swachh Bharat Paradox: Issues and Challenges of Manual Scavengers with Special Reference to the COVID-19 Crisis

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Abstract

Despite the enactment of successive legislations in 1993 and 2013, the dehumanising occupational practice of manual scavenging still persists in India. As members of the Dalit community, manual scavengers continue to confront issues such as marginalisation and gross violation of their dignity. This paper critically examines the socio-legal status of manual scavengers in India by assessing key determinants including the legislative and regulatory measures, the role of the judiciary and civil society, as well as the widely celebrated Swachh Bharat Abhiyan. Additionally, the paper provides an empirical analysis of the struggles faced by manual scavengers as frontline workers during the unprecedented humanitarian crisis of COVID-19.

Keywords: Manual Scavengers, Swachh Bharat Abhiyan, COVID-19, Sanitation, Marginalisation

I. **Introduction**

Presently, depending on the state of sanitation infrastructure in a given area, human faecal waste management may necessitate different approaches. In rural

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Acknowledgements

I dedicate this article to the civil society initiatives working tirelessly to eradicate the menace of manual scavenging. I am particularly grateful to Mr. Bezwada Wilson, National Convener, and Dr. Renu Chhachar, National Coordinator at Safai Karamchari Andolan. Without their mentorship and steadfast guidance, this article could not have been brought to fruition.

Funding

The author received no financial support for the research, authorship and/or publication of this article.

areas with suboptimal infrastructure, faecal waste might need regular collection from community or private latrines, while in more developed regions, pit-latrines or septic tanks may only require cleaning every few months. Therefore, some level of human intervention is practically essential throughout the sanitation chain to perform critical tasks, without which a health crisis may ensue.

Upon tracing the history, it surfaces that prior to the establishment of a well-developed sanitation infrastructure, manual cleaning of excreta was prevalent in many countries, including Malaysia, China, Haiti, and South Africa. However, such work was not delegated to specific social groups or genders. In contrast, the grim reality in India is that such tasks have been exclusively assigned to a single social group, known by various names such as *Valmikis, Bhangis, Methars, Thoti, Lalbegi, and Chuhra*[2]*,* among others.

In India's diverse communities and cultures, the stigmatised occupation of sanitation work has consistently fallen upon members of the lowest caste strata. The term 'Safai Karamchari' is a widely used Hindi reference for both sweepers and manual scavengers. It encompasses individuals who manually clean and dispose of human excrement with their bare hands from community or private insanitary latrines[3], septic tanks, sewers, and even railway tracks. Although different studies approach the problem from varying perspectives, there is a general consensus that the practice of manual scavenging is widespread in various forms across India. Within this debate, a fundamental issue that frequently arises is the distinction between 'sanitation work' and 'manual scavenging'[4]. According to international organisations such as the ILO and WHO, among others, "sanitation work" broadly refers to cleaning, maintaining, operating, or emptying any step of the sanitation process, including septic tanks, sewers, insanitary latrines, or sludge treatment plants. This category often encompasses sweepers,

[2] J. H. HUTTON, CASTE IN INDIA: ITS NATURE, FUNCTION AND ORIGINS. BOMBAY: INDIAN BRANCH, (Oxford University Press, 1963).

[3] "Insanitary Latrine*"* has been defined as "a latrine which requires human excreta to be cleaned, or otherwise handled manually, either in situ, or in an open drain or pit into which the excreta is discharged or flushed out." — As defined under S. 2(1)(e), The Prohibition of Employment of Manual Scavengers and Their Rehabilitation Act, No. 25 of 2013.

[4] Annapurna Waughray, *Caste Discrimination and Minority Rights: The Case of India's Dalits*, vol. 17, no. 2, INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS, 2010, pp. 327–353.

as well as dry waste and garbage workers[5]. In contrast, the 2013 enactment[6] to eliminate and permanently prohibit manual scavenging narrowly defines the term as applying only to a smaller segment of people engaged in cleaning, carrying, disposing, or otherwise handling human excreta without proper equipment and safety gear. In fact, multiple field studies reveal that government officials typically consider manual scavenging to be strictly limited to practices carried out at dry/insanitary latrines. However, in practical terms, it may be challenging to categorise and confine manual scavenging within such a strict definition.

II. **Issues and Challenges: Ostracism, Social Ridicule and Deteriorating Health**

At its core, manual scavenging is essentially forced labour. Women involved in this practice in rural India receive approximately 30 rupees per month per household for manually cleaning excreta using the traditional broom and basket method. Often, compensation takes the form of leftover food and discarded clothing[7]. In urban areas, while wages are seemingly higher, they are still barely enough for basic survival. For example, for a day's work of cleaning septic tanks, men earn paltry sums of around 250 to 300 rupees.

In addition to living in abject poverty, sanitation workers endure severe physical hardships due to constant exposure to harmful gases, filth, and excreta. Commonly diagnosed health issues include asthma, hepatitis, anaemia, impaired hearing, vision loss, hair and skin infections, and various types of cancer. In a country with an average life expectancy of around 69 years[8], sanitation labourers' life expectancy is less than 50, with common causes of death including asphyxiation, drowning in manholes, cholera, tuberculosis, meningitis, lung

[5] *Ibid.*

[6] The Prohibition of Employment of Manual Scavengers and Their Rehabilitation Act, No. 25 of 2013

[7] Uma Chakravarti, *from fathers to husbands: of love, death and marriage in North India*, in Hossain, ed. Honour: Crimes, Paradigms and Violence against Women, Zed Books London, 2005.

[8]Asaria M, Mazumdar S, Chowdhury S, et al Socioeconomic inequality in life expectancy in India BMJ Global Health 2019.

cancer, etc[9]. However, the most harrowing challenge they face is the psychological trauma resulting from continuous engagement in such dehumanising tasks. It is widely known that sewage workers often resort to alcoholism, as they feel compelled to intoxicate themselves to cope with the unbearable stench surrounding them. The glaring irony is that despite the prevalence of these health issues among the community, they are neither provided with health insurance benefits nor any kind of safety equipment[10].

Moreover, it is crucial to recognise the predominant factor behind such a brutal form of oppression in modern times – pervasive violence[11]. Communities of manual scavengers in contemporary India face constant threats of physical and verbal abuse, a grim reality that plagues their daily lives[12]. Additionally, they also confront the risk of social exclusion and ostracisation due to their perceived 'indignity'. In villages and smaller towns, their dwellings are situated on the outskirts, adjacent to garbage dumps, while in cities, they are forced to reside in substandard tenements and slums. Numerous reports indicate that the majority of cleaning staff who succumbed to COVID-19 in the National Capital Territory (NCT) of Delhi, comprised of sanitation workers sweeping streets and handling biomedical and other waste materials with little or no proper equipment or training. In addition to the risks posed by infection and previously mentioned issues, the frequent lockdowns and other restrictions implemented since the pandemic's onset have left a large population of manual scavengers, who are informal workers that migrated from rural to urban areas seeking employment opportunities, without transportation, ration, or food availability. This situation led to a mass exodus of sanitation workers, along with other informal labourers. As they travelled hundreds of kilometres on foot, reports emerged of widespread starvation, exhaustion, dehydration, police brutality, fatal accidents, and suicide.

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[9] HARSH MANDER, RESOURCE HANDBOOK FOR ENDING MANUAL SCAVENGING; INTERNATIONAL LABOUR ORGANISATION; ILO DWT for South Asia and ILO Country Office for India. (New Delhi: ILO, 2014).

[10] Rajeev Kumar Singh, *Manual Scavenging as Social Exclusion: A Case Study,* Vol. 44, No. 26/27 ECO. & POL. WEEKLY, (Jun. 27 2009), pp. 521-523.

[11] *Ibid.*

[12] Rinkesh (2018). What is manual scavenging? Retrieved from https://www.conserveenergy-future.com/causes-effects-solutions-manual-scavenging.php.

However, no official death tolls for these informal workers have been published to date[13].

III. **Tracing the Past: Sociocultural History of Manual Scavengers in India**

Pre-Independence — To truly understand the plight of contemporary manual scavengers, it is essential to examine their deep-rooted and complex history. The caste system in India, dating back to the Vedic period, has divided communities based on Hindu philosophy into a distinct hierarchical order, where people are assigned an occupation by virtue of their social status at birth. Although the term is commonly used today, it originates from the Latin word 'Castus' which means '*chaste*' or '*pure*'. The Portuguese first used this term in the early 16th century to denote the social stratification of Hindus into four distinct classes (*chaturvarna*), each with its own set of duties and privileges[14]. Within this hierarchy, various interpretations of 'purity' and 'pollution' have emerged, with Brahmins considered the purest and primarily involved in religious and ritualistic occupations. At the other end of the social spectrum were the Dalits or 'untouchables', who were specifically employed for work regarded as the most polluted, both literally and spiritually – such as handling carcasses, bodily fluids, faecal matter, and performing other menial jobs such as barbering and cobbling[15]. Spatial and social segregation also became significant, as Dalits were expected to maintain physical distance from spaces occupied by 'purer' members of society, thus preventing the 'pollution' of vital elements of nature such as water and air. As a result, issues of marginalisation and exclusion became an intrinsic part of the social fabric in India.

During the colonial era, efforts to improve public health, hygiene, and sanitation were primarily focused on British cantonment and residential areas, while native

[13] Singh, A. & Unnikrishnan, A. (2020). Why manual scavengers in India haven't got their rights despite laws, judiciary intervention. Retrieved from https://theprint.in/opinion/why-manual-scavengers-in-india-havent-got-theirrights-despite-laws-judiciary-intervention/371140/.

[14] A. N. Bose*, Evolution of Civil Society and Caste System in India*, 3 INTERNATIONAL REVIEW OF SOCIAL HISTORY 97–121 (1958).

[15] *Ibid.*

quarters were largely neglected[16]. This situation forced locals to rely on manual scavengers for sanitation maintenance, thereby reinforcing the existing social divide in an urban context. Residential waste and street litter were managed either by "hereditary sweepers" or "municipal cleaners", both of whom belonged to the lowest caste groups. The occupational hazards faced by manual scavengers were further exacerbated by pervasive discrimination. As their work was classified as an essential public service, it prevented them from seeking alternative employment or unionising for higher wages. Scavenger communities were also compelled to live in the most densely populated, dirty, and unsanitary areas of the city, where they faced frequent eviction and displacement during various urban renewal projects[17].

Efforts by the community to demand change, rehabilitation, or upliftment, including strikes in Haridwar, Delhi, and Bombay, were met with punitive measures. For example, legislations like the Municipal Act of 1900 stipulated that hereditary sweepers could be fined in cases of dereliction of duty or refusal to clean sanitary waste[18]. Similarly, in some regions, municipal authorities required sanitation workers to provide a minimum notice of two months before leaving their work, with violations resulting in imprisonment, fines, or both. Several urban settlements even passed legislations to completely municipalise scavenging work in order to prevent workers from earning additional income by selling night soil. Such attempts accelerated during the early 20th century, and the caste system was portrayed in a glorified, paternalistic light[19]. Mahatma Gandhi reintroduced the caste system to the Indian masses through his democratic and nationalist ideals, with the aim to facilitate the smooth functioning of society by assigning critical roles to all classes in the process of welfare and development. Although he condemned all forms of discrimination, he celebrated the concept of manual scavenging as a form of service to the larger public. In stark contrast to Gandhian ideology were the views of Dr. Bhim Rao Ambedkar, a Dalit himself, who pioneered the movement against caste-based stratification in India. He strongly

[16] Rosalind Ohanlon, *Caste, and its Histories in Colonial India: A reappraisal,* 51 MODERN ASIAN STUDIES 432–461 (2017).
[17] *Supra* Note 2 at 65-68.
[18] *Supra* Note 2 at 73.
[19] Bezwada Wilson, Why is it so Difficult to Free India of Manual Scavenging? Kafila, Dec. 22, 2017, http://kafila.org/2017/12122/why-is-it-so-difficult-to-free-india-of-manual- scavenging.

believed that as long as the caste system persisted, 'outcastes' would always exist in society, and therefore vehemently opposed any such hierarchical order. Ambedkar advocated for the 'Annihilation of Caste' and argued that Gandhi's claims were merely empty rhetorics meant to appease the masses[20].

Post-Independence - The discord regarding the status of manual scavengers persisted long after India gained independence, and was driven primarily by social activism and vote bank politics. This led to the establishment of several expert commissions, which suggested that a fair balance of technological interventions and social reform would significantly reduce the need for manual intervention with faecal waste, thereby transforming this social evil into a regulated service[21]. In 1949, the Barve Committee in Bombay focused on making recommendations for improving the living conditions and establishing minimum wages for manual scavengers. At the national level, in 1953, the first-ever Backward Classes Commission was established, which described the practice as inhumane and suggested that a complete overhaul through mechanisation must pave the way for change. Subsequently, the Malkani Report in 1961 recommended improvements in technology and infrastructure to eliminate the need for manual cleaning and address the issue of human dignity violations[22]. However, the subsequent efforts were inconsistent and did little to meaningfully uplift the community. Recognising these shortcomings, the governments in the 1990s began to shift from paternalism towards legal safeguards.

Consequently, in the year 1993, the *Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993*[23] came into force, which deemed the practice as inhumane and unjust. The act criminalised the employment of manual scavengers but not the act of manual scavenging itself. In other words, while the demand for labour was outlawed, the surplus 'supply' still needed to be addressed through alternative vocations and skill-building programmes. The Union Government launched the Low-Cost Sanitation Scheme

[20] Raj S. Gandhi, *The Practice of Untouchability: Persistence and Change*, Vol. 10, No. 1, HUMBOLDT JOURNAL OF SOCIAL RELATIONS, Race & Ethnic Relations: Cross-Cultural Perspectives, pp. 254-275.
[21] *Ibid.*
[22] Government of India, Report of Scavenging Conditions Enquiry Committee (Ministry of Home Affairs,
1980).
[23] Act No. 46 of 1993.

to reduce the demand for manual scavenging by demolishing and converting insanitary latrines. Another significant development at this time was the formation of the National Commission for Safai Karamcharis, a governmental watchdog to investigate the maltreatment of sanitation workers. However, these attempts were not entirely effective in addressing the issue. The sanitation infrastructure remained suboptimal, and water supply was highly inadequate, which ensured that there was no reduction in the demand for manual scavengers. Instead, the demand was driven underground. This resulted in the further amplification of casteism and socio-economic deprivation, as manual scavengers continued to perform the same work, but now without any legal protection since the practice had been outlawed.

IV **Continuing Mandamus - Role of Courts and Civil Society Organisations**

During the latter half of the 1990s, civil society initiatives and courts began to take charge, as earlier reforms had been proven ineffective. Several cases were filed that challenged the legal status of manual scavenging and questioned the ameliorative measures taken by the State. In the early 2000s, a coalition of 30 NGOs initiated a campaign to educate and raise awareness among manual scavengers, encouraging them to seek alternative livelihoods and offering assistance during the transition. The *Rashtriya Garima Abhiyan*[24], or the National Campaign for Dignity, was a particularly noteworthy effort toward the upliftment of women from the scavengers' community. This campaign provided skill-building initiatives and support for women seeking alternative employment, helping them transition away from manual scavenging. In 2003, Bezwada Wilson founded the Safai Karamchari Andolan (SKA), a non-profit organisation that initiated a nationwide movement to raise awareness and fight against the practice of manual scavenging[25]. Wilson and his team moved a case to the Supreme Court of India, seeking protection for manual scavengers across the country. The case,

[24] Rashtriya Garima Abhiyaan (2013). Retrieved from http://www.mfcindia.org/main/bgpapers/bgpapers2013/am/bgpap2013h.pdf.

[25] Shivam Vij, *How Bezwada Wilson Liberated Lakhs Of Manual Scavengers In India*, HUFFINGTON POST, *India Edition* (2017, January 23). https://www.huffingtonpost.in/2016/07/27/how-bezawada-wilson-liberated-lakhs-of-manual-scavengers_a_21439738.

titled *Safai Karamchari Andolan & Ors. V. Union of India*[26], became a landmark judgement that took 11 years to be adjudicated and was regarded as a 'Continuing Mandamus' on the subject. This meant that the court could be approached to order concerned State authorities to provide details on the implementation of the law and the overall status of scavengers for any given area, ensuring continued monitoring and progress in addressing the issue. The primary objective of a Public Interest Litigation (PIL) like this was to put pressure on authorities at both the Union and State levels to acknowledge and account for the ongoing manual scavenging activities in their jurisdictions. The 'identification' process was crucial because only when accurate numbers were determined could the beneficiaries of the law be provided with justice. Often, these numbers were conveniently concealed or manipulated.

Subsequent proceedings in the case revealed that there were significant discrepancies in the estimates of people engaged in manual scavenging. The 15th Census report disclosed that over one million households in the country did not have flush-based latrines and still relied on manual scavengers. The same report also revealed that Indian Railways, a functionary of the Government, was the largest employer of manual scavengers in the country. The need for a more accurate identification process became paramount to ensure proper legal protection and support for these marginalised communities. These shocking revelations led to continued agitation by NGOs, ultimately resulting in the enactment of the 2013 Act — Prohibition of Employment as Manual Scavengers and their Rehabilitation Act (PEMSR), 2013[27].

The Act expands upon the 1993 law by not only prohibiting the employment of manual scavengers in dry latrines but also broadening the scope to include those working in open drains, pits, sewers[28], and septic tanks[29]. The offence under the

[26] Safai Karamchari Andolan v. Union of India 2014 (4) SCALE 165, https://main.sci.gov.in/jonew/judis/41346.pdf.

[27] Act No 25 of 2013.

[28] A "sewer" shall be taken to mean "an underground conduit or pipe for carrying off human excreta, besides other waste matter and drainage wastes." — As defined under S. 2(1)(q), The Prohibition of Employment of Manual Scavengers and Their Rehabilitation Act, No. 25 of 2013.

[29] A "septic tank" shall mean to be "a watertight settling tank or chamber, normally located underground, which is used to receive and hold human excreta, allowing it to

2013 Act has been made cognizable and non-bailable in nature. Moreover, as the title suggests, the Act mandates authorities to rehabilitate the community in alternative vocations, provide them with housing, organise training programmes, and implement other social welfare measures. Another significant aspect of the Act is its requirement for employers to provide protective gear to sanitation workers. This comprehensive approach aimed to address the challenges faced by manual scavengers in India more effectively than previous legislation. However, the Act contains some noticeable inconsistencies. Section 2(1)(g) states that if protective gear is provided, the worker would not be considered a manual scavenger, which is a flawed assumption as it and completely disregards the question of human dignity. Moreover, the responsibility to provide such safety gear rests with the employer. However, most municipal cleaning tasks are outsourced, and this responsibility then falls on private employers, who may not feel obligated to comply with the said provision. This loophole potentially acts as an easy escape route for the continued exploitation of manual scavengers and a lack of adherence to safety standards, therefore further exacerbating the problem. It is argued here that the legislative imagination of how to eradicate manual scavenging largely falls short of a holistic understanding. The provision under the 2013 Act which lays down that providing safety gear converts a manual scavenger into a sanitation worker attempts to give legal legitimacy to untouchability and ignoring that the scavenging activity still remains 'manual' in nature.

Another critical issue is that of the handling of these cases in a summary manner, which could compromise the gravity of the offence and the issue at hand. As per the Code of Criminal Procedure (Cr.P.C.) 1973, a summary trial is conducted only for non-cognisable offences. However, under the present act, this practice is termed as cognisable and non-bailable, which is ironic. Additionally, the act fails to prescribe a specific timeline for the conversion of insanitary latrines into sanitary ones, providing an easy escape route for offenders.

V. **Appraisal - Political Reality versus Ground Reality**

Although the enactment of the PEMSR Act of 2013 has been a significant step forward, the practice of manual scavenging continues to persist in various forms.

decompose through bacterial activity." — As defined under S. 2(1)(p), The Prohibition of Employment of Manual Scavengers and Their Rehabilitation Act, No. 25 of 2013.

According to numerous reports, there have been no convictions under the Act of 2013[30]. The efforts towards rehabilitation under the PEMSR Act were largely ineffective due to ambiguity regarding funding sources, land allocation for housing, and other factors. The 2013 Act also provided for One-Time Cash Assistance (OTCA) to manual scavengers, comprising an allowance of Rs. 40,000, along with vocational training facilities to enable smooth and swift rehabilitation. Low-interest loans of up to Rs. 15 Lakh were also facilitated. Unfortunately, however, the National Safai Karamchari Finance Development Corporation (NSKFDC) reported that in over three years, only about 5,602 people benefited from such initiatives[31].

In 2014, the newly elected Modi Government made headlines for their ambitious initiative called the *Clean India Campaign or Swachh Bharat Mission (SBM)*. The main objective of this mission was to make India open-defecation free by constructing over 10 million toilets across the country. The planned construction of toilets ranged from pit-latrines to pour-flush latrines, which worked manually or mechanically to ultimately collect excreta in a collection tank or unit. In addition to emphasising individual toilet construction, the SBM also highlighted the Indian Railway's programme on bio-toilets. This program aimed at implementing ecological sanitation methods to ensure that no human excrement was disposed of onto railway tracks[32]. While the SBM made progress in achieving its goal of broader toilet coverage, the issue of manual scavengers remained unaddressed. The State failed to consider the need for a comprehensive improvement in sanitation infrastructure, without which the necessity for manual cleaning would persist. The reason is simple — *a constructed toilet did not necessarily mean it was a functional toilet*[33], as there was no efficient drainage system in place. Waste collected in pits or collection units required periodic

[30] Dash, D.K. (2019). Not a single conviction in deaths of sewer cleaner: Govt. The Times of India. Retrieved fromhttps://m.timesofindia.com/india/not-a-singleconviction-in-deaths-of-%20sewer-cleanersgovt/amp_article show/70746688.cms

[31] MDGs and Dalits: A Status Report, NACDOR.

[32] Guidelines for SBM (Gramin), 2014, and Guidelines for Nirmal Bharat Abhiyan, 2012.

[33] JK Raju v State of Andhra Pradesh, Writ Petition (Civil) No. 631/2004 (Supreme Court of India, Order of 27 January 2015).

emptying and cleaning, ensuring that the demand for manual scavengers remained high.

Furthermore, the SBM treated household owners not as right-holders but as duty-bearers responsible for constructing sanitary latrines within a stipulated period, whereby non-compliance with the requirements could lead to sanctions. For instance, in several districts, BPL card holders were only permitted to get ration if they furnished proof of constructing a toilet at their premises. The 'Practitioner's Guide' under the SBM, though actively condemning the practice of manual scavenging, did not prescribe any clear measures for its eradication[34]. In 2017, the Central Government responded to widespread criticism that the manual scavengers issue was being side-lined under the SBM, claiming that OTCA had been provided to 92% of manual scavengers. However, this claim was soon debunked by reports revealing that only 8% of the existing population of scavengers had been identified.

VI. **The COVID-19 Catastrophe and Manual Scavengers**

The COVID-19 pandemic brought with it an unprecedented humanitarian crisis, putting essential services in the spotlight and celebrating those who provided such services as 'Covid Warriors'. However, the workforce that continued to remain neglected even during these challenging times was the community of manual scavengers and other sanitation workers. On Sunday, March 22nd, 2020, when the entire country responded to the Government's plea and paid a glorious tribute to healthcare professionals and other frontline workers, there was absolutely no acknowledgement for the Safai Karamcharis[35], who compromised an indispensable pillar working at the frontline. Throughout the pandemic, they dealt with medical and non-medical waste while ensuring that toilet spaces were cleaned and faecal sludge was cleared. Even during a time when the world at large faced curfews and lockdowns, the sanitation workforce continued to work diligently, risking not only their own lives but also those of their family

[34]Swacch Bharat Abhiyan Urban,https://swachhbharaturban.gov.in/writereaddata/Mission_ objective.

[35] Torgalkar, V. (2020). *Sanitation Workers on the Frontlines of the Pandemic Are Overlooked, Unprotected*. https://theswaddle.com/covid-19-spreads-india-sanitation-workers-unprotected/.

members'[36]. Manual scavengers and sanitation workers were responsible for picking up garbage and cleaning sanitary waste without access to water for washing hands, at a time when sanitisers and disinfectant sprays were top-selling consumer goods among the masses. Being in the middle of the COVID-19 chaos, they were compelled to work in hospitals and quarantine centres, yet the appalling irony remains that they neither received extra training nor support in terms of personal protective equipment (PPE), tools, machinery, etc. On the contrary, they were further ostracised, owing to the hazardous conditions in which they had been working. Unfortunately, the nature of their job left them with little choice, as without them, the entire public health and sanitation chain would come to a catastrophic collapse[37].

In a study conducted by WaterAid, it was revealed that sanitation workers globally, including manual scavengers in India, were undervalued, unprotected, and neglected during the pandemic. Some of the key findings of the study were as follows:

1. 26% of sanitation workers interviewed worked for an additional 2-6 hours every day.
2. Despite working longer hours, approximately half of the sanitation workers experienced a reduction in wages during the pandemic.
3. Almost 40% of sanitation workers in Bangladesh lacked access to clean water or hand-washing facilities at their workplace.
4. In Nepal, one-third of sanitation workers did not receive any PPE while working.
5. In Burkina Faso, 80% of sanitation workers found their protective equipment unsuitable, which heightened the probability of accidents.
6. Over 50% of respondents in Pakistan and Nepal were denied access to social security during the pandemic.

In India, the situation has been particularly grim, with the majority of sanitation workers in Assam, Maharashtra, Delhi, and Madhya Pradesh being deprived of even the basic tools and protective gear. Unlike other frontline workers, they were

[36] Chugh, A., Bisht, A., Sarma, N., Koushik, S., Harsana, P. & Khan, S. (2020). Living On the Margins: An interpretative study of Sanitation Workers amidst COVID-19. Vantage: Journal of Thematic Analysis, 1(2): 127-153.
[37] *Ibid.*

not given preferential vaccination, health insurance, or any specific safety training or instructions. One of the most pressing concerns was the decrease in income, which resulted in their inability to provide for their families and meet their everyday expenses.

Amid the pandemic, manual scavengers were left with few options to support themselves and their families. Many turned to alternative means of income, such as becoming "bone scavengers", as reported in a joint study by the World Sanitation Workers' Alliance and the South Asian Sanitation Labour Network (SASLN). This practice involved collecting and selling human bones, particularly in West Bengal where death tolls were high. The bones were sold to traders and then to calcium manufacturers. Odisha and Rajasthan also had a significant number of manual scavengers who turned to bone scavenging for incomes as low as Rs. 200. Although bone scavenging has existed in India for decades, it gained momentum during the pandemic. The manual scavengers' community was trapped in a state of abject poverty and chronic hunger, with no tangible alternatives for livelihood. Another business model that rapidly grew during the pandemic was the sale of human tissues and bones to sanitation workers in hospitals. The tissues and bones were further sold to medical students and institutes for research purposes. This arrangement was feasible for bone smugglers as they only had to pick up bones packed in sacks, which were left at dumping sites by manual scavengers under piles of garbage[38]. In a desperate attempt to earn a living, manual scavengers were also constrained to take up illegal employment at butcher shops to collect animal carcasses and leftover flesh, to be sold to animal feed factories where ground-up bones were an essential raw material.

VII **Interview Excerpts**

The researcher interviewed **Dr. Renu Chhachar**, the **National Coordinator** of **Safai Karamchari Andolan (SKA)**, who has been actively involved in advocating for the rights of manual scavengers. Dr. Chhachar has led the justice movement forward through several campaigns and by conducting policy research

[38] Desai, D. (2021). 282 deaths in last 4 years: How Swachh Bharat Mission failed India's manual scavengers. The Print. Retrieved from https://theprint.in/india/282-deaths-in-last-4-years-how-swachh-bharat-mission-failed-indias-manualscavengers/354116/.

aimed at the development and upliftment of this marginalised community. During the interview, Dr. Chhachar discussed the highly disproportionate impact of the COVID-19 crisis on the manual scavenger community and emphasised the urgent need for policy interventions to address their plight. Excerpts from the interview are as under –

Ma'am, can you share your insights about how the pandemic affected manual scavengers?

Response - It was a heart wrenching scenario, as manual scavengers were responsible for picking garbage and cleaning sanitary waste without access to water for washing hands, at a time when sanitisers and disinfectant sprays were the top-selling consumer goods among the common populace. Sanitation workers were right in the middle of the covid-chaos, and were compelled to work in hospitals and quarantine centres. The appalling irony remains that they neither received extra training, nor support in terms of personal protective equipment (PPE), tools, machinery, etc. On the contrary, they were further ostracised, owing to the hazardous conditions that they had been working in. Unfortunately, however, the nature of their job left them with little choice, as without them the entire public health and sanitation chain would come to a catastrophic collapse.

In your opinion, how efficient was the Government's response to mitigate the COVID crisis particularly with reference to sanitation labour?

Response – The deprivation brought was multi-faceted, and the pandemic has caused a fatal blow to the marginalised communities in particular. Despite manual scavenging was banned by successive legislations in 1993 and 2013, the political will to eradicate this social evil has been missing pre and post pandemic. It is disheartening to see that in the financial year of 2022-23, only INR 70 Crore was allocated for self-employment schemes for sanitation labour, and the reduction has been significant each year since COVID. Violence has been on an all-time high, particularly for women. So it is safe to say that the response mechanism of the Government has been far from adequate.

Please shed light on the work carried out by your organisation during the pandemic to protect and promote the interests of manual scavengers.

Response – The pandemic further diminished the already minuscule means of livelihood for members of the Dalit community. Given the unprecedented state of

affairs, Safai Karamchari Andolan, under the leadership of Wilson Sir, along with other NGOs and networks, actively took up the responsibility of facilitating relief distribution to assist people in battling the humanitarian crisis that had unfolded. The International Budget Partnership (IBP) extended their support in providing relief to over 1000 households across Tamil Nadu, Telangana, Andhra Pradesh and Delhi. Women leaders were identified in several settlements across the said states, who led the distribution in smaller localities, so as to ensure a wider reach.

How would you review the steps undertaken by SKA and other organisations in order to facilitate rehabilitation of scavengers into other vocations?

Response - We have seen that even though the state of affairs are equally grim for all, yet women are often found to be more vulnerable due to lack of socio-economic security. With that in mind, SKA has actively been involved in providing assistance to women workers to access the Government's entitlements and schemes, with a sole objective of making them financially independent. The reason is simple - getting alternative jobs often becomes challenging because of the overall stagnation in labour market, as well as the deep-rooted caste bias. In such a scenario, the only viable and long-term solution is to promote education among the students of marginalised communities. For instance, the PMS Scheme, which is the largest scheme aimed at providing financial aid at senior secondary level is designed in a poor fashion, and heavily lacks transparency and accountability. In such a case, we take it upon ourselves to chalk out the loopholes in public service delivery and pave the way for inclusive and responsive governance at the grassroots level.

Ma'am, in your opinion, what immediate and long-term changes need to be brought about to address the gaps in public service delivery?

Response - It is important for Dalit women to be seen by the government as more than just a vote bank. Rather, they should be viewed as the unrealised potential of India's workforce which could serve as drivers of economic growth. It is essential that innovative as well as entrepreneurial skill-building activities are carried out periodically. In addition, the government urgently needs to address the issue of lack of representation and leadership from within the community in order to give them a voice to raise their concerns.

VIII. **Conclusion and the Way Forward**

On the basis of the foregoing study, it may be concluded that despite various attempts over the past 120 years to regulate manual scavenging, the issue remains deeply entangled with caste-based discrimination and deplorable working conditions. The idea of impurity associated with this work has led to widespread indifference towards the struggles of Safai Karamcharis and the hazards. Efforts to address the problem have varied depending on the political climate, but have often failed due to inadequate enforcement mechanisms and persistent social stigma. During the British era, municipalities allowed discriminatory practices to thrive under the guise of 'customary practice', and attempts to break free from caste-based labour pools were met with resistance. Post-independence, political interventions were made to formalise the practice, but they proved ineffective in eradicating it. Although the 2013 Act has brought about some legislative reform and discussions about introducing technology to upscale sanitation infrastructure, the dignity debate remains unanswered. As a result, deeply entrenched discrimination continues to persist. Despite the claims of SBM, there is still a wide demand for sanitation labour, which clearly shows the need for reforms that not only put a blanket ban on the exploitative practice by civic bodies or private entities but also address the hopes and aspirations of the Safai Karamchari community at large. This means providing dignified working conditions, education for their children, healthcare, and housing.

At the level of the Central Government, it is imperative that initiatives are taken to Identify all individuals currently engaged in manual scavenging and those who have engaged in the practice since it was outlawed under the 1993 Act, so they may even claim the benefits under the 2013 Act. For this, conducting surveys jointly with communities engaged in manual scavenging and civil society organisations may reap the desired outcomes. In addition, it is essential for effective implementation of the law that the authorities establish a transparent, centralized, and easy-to-use online database which every eligible individual may access and independently track the status of their applications for all relevant government schemes.

At the State and District levels, it may be useful to run helplines that can be used by individuals presently or formerly engaged in manual scavenging to identify themselves for being included in the list, and report coercion or threats, if any, from the community or their families, in order to obtain rehabilitative assistance.

Also, the Government can play a proactive role by generating awareness on public health through campaigns on sanitation, including the health and human rights consequences of the persistence of manual scavenging and open defecation. Additionally, they may involve the youth in clean and healthy village campaigns and bestow recognition upon villages and districts for their exemplary performance in changing sanitation facilities and habits.

As an interim measure, the immense potential of the practice of 'Ecological Sanitation' can be tapped into, so as to address the unsafe practices associated with manual scavenging. Ecological sanitation or *EcoSan* refers to a host of technologies that are based on recycling human excreta in a way that takes advantage of its chemical composition, thereby preventing it from polluting water systems and making it safe for human handling. The primary methods of EcoSan include urine separation, composting, and biogas production, which involve processing excreta and making it an agriculturally valuable sludge.

The practice of manual scavenging is a catastrophe that must end. It is the worst surviving form of untouchability and plagues the lives of millions in our country. To truly become a Swachh Bharat in every sense of the term, it is necessary to view this issue as a national one rather than one specific to a particular community.

Vol. 14 No. 2 ISSN: 0976-3570

Navigating the Path to Justice: An Empirical Analysis of Access to Justice for the Elderly through Maintenance Tribunals in Kolkata

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Abstract

Older adults comprise a particularly vulnerable group in the Indian society, who often receive the shorter end of the stick as our society does not have the adequate social security nets for their well-being. Over the years, the gradual erosion of the cultural norm of filial piety has undermined their status in the family, leading to a decline in their physical, mental, and emotional well-being. To ensure that their plight is not further exacerbated by their limited access to legal resources and institutions, the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 was passed with the objective of preserving and upholding therights and dignity of the elderly and for holding the State accountable for their welfare. Under the Act of 2007, 'Maintenance Tribunals' are established for providing the elderly with necessary support for resolution of disputes in an expeditious, inexpensive and hassle-free manner. The focus of this Article is to assess the efficacy of the Maintenance Tribunal in meeting the critical needs of older adults and to evaluate their role in ensuring access to justice. To conduct this research, an empirical study was undertaken adopting an ethnographic approach at the Maintenance Tribunals established at Kolkata. By analyzing the perspectives and experiences of the functionaries who are involved in the implementation of the law, the study aims to provide valuable insights into the effectiveness of the dispute resolution forum within the broader legal framework, pinpointing specific areas that require improvement for strengthening the efficacy of the legal system and fostering greater accessibility to justice for the elderly.

Keywords: Access to Justice, Elderly persons, Maintenance Tribunals, Role of Law

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I. Introduction

The Indian society, for as long as it has been in existence, has almost always looked up to our elderly population with reverence, seeking their wisdom, blessings, and advice. Off late, however, a paradigm shift in the perception of senior citizens has been observed, with the elderly being at the receiving end of this changed outlook. Family as a unit has witnessed a radical change in its traditional narrative; the concept of living with and caring for the aged in the family has undergone a sea change. The elderly, once perceived as the nucleus of power in the family and a source of wisdom and inspiration in a traditional joint-family set-up, are now considered to be dispensable liabilities in the new family order. Increasing disconnect between intervening generations due to differences in their respective world views can be mostly accounted for this tectonic shift in the family structure. The gradual erosion of filial piety and the resulting change in the overall perception of the elderly owing to the new family order has been found to be detrimental to the physical, mental, and emotional well-being of the elderly in the family, who are already vulnerable, suffering from a sense of insecurity and a diminishing sense of self-worth owing todeclining cognitive and motor functioning and dwindling financial resources in old age. In such a precarious situation, it is undisputed that where there is already a lack of adequate social security nets for the elderly in our society, limited access to laws and legal institutions can make matters worse for them. The value of access to justice cannot be overstated; it serves as a pivotal instrument in shielding the elderly from manifold forms of abuse, exploitation, and discriminatory practices and helps in optimizing the emancipatory potential of the legal machinery of the State in the advancement of human rights of elderly persons. By offering impartial, affordable, efficient, harmonious, and expeditious dispute resolution mechanisms, access to justice not only reinforces the capacity of the elderly to articulate their perspectives and assert their entitlements but also fosters accountability of the State in safeguarding theentitlements and well-being of elderly persons.A welfare State therefore cannot choose to adopt a ‘sitting on the fence’ approach when it comes to the crucial matter of bridging the gapand enhancing access to justice, especially considering the vulnerable state of older adults in contemporary times. Realizing the necessity to establish and reinforce legal protection, fifteen years back, a comprehensive set of measures were introducedin India with the passing of the Maintenance and Welfare of Parents

and Senior Citizens Act, 2007, (hereinafter referred to as the MWPSC Act). The objective of this legislation to create a robust framework which ensures that parents and senior citizens receive the necessary support and carein the form of maintenance from children[3]and in certain circumstances, relative(s)[4], enabling them to maintain a decent standard of living[5]Most importantly, it envisages the institutionalization of a mechanism for resolution of disputes in a speedy, inexpensive and hassle-free manner through'Maintenance Tribunals,'[6]established in every sub-division of each district in a State. Assessing the efficacy of this dispute resolution forum in accommodating the critical and felt needs of the elderly and examining the impact of its therapeutic role in empowering them is the central theme of this research article. Concurrently, the article intends to undertake a meticulous examination of the legal framework underpinning the Tribunal's functioningto ascertain its adherence to the indispensable requisites for effective access to justice, encompassing the elements of protection of legal rights, legal awareness, provision of legal assistance,fair resolution of disputes, and enforcement of decisions.

II. **Method**

For carrying out the study, an empirical analysis was primarily conducted through the adoption of an ethnographic approach. Qualitative data was collected from thetwo functional Maintenance Tribunals in the district of Kolkata[7], West Bengal,with interview and participant observation being the primary tools of data collection. To encompass a broad spectrum of diverse perspectives and experiences on the operational dynamics of the Maintenance Tribunal and to gain insight about the various challenges in implementation of the law, the Presiding Officers and the Maintenance Officers were interviewed through a structured interview schedule having both close and open-ended questions. Prior to the interview, written consent for voluntary participation was obtained, after an explanation was offered about the nature and objectives of the study. Field notes

[3]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.2(a)
[4]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.2(g)
[5]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.4(2)
[6]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.7(1).
[7]It is to be noted that the district of Kolkata is not further divided into sub-divisions, and the jurisdiction of the Maintenance Tribunals at Kolkata is with respect to the corresponding areas of Kolkata, falling under forty-eight police stations.

were taken during the interview. The Tribunals had been kind enough to grant permission to witness a few proceedings to understand the nature and complexities of the cases dealtwith by it. Access to the physical copies of the complaint letters and final order sheet of the Maintenance Tribunal in case of decided matters in the preceding three years was granted for the purpose of reading and document analysis, after a written undertaking was submitted that the original names and addresses of the complainants would not be reproduced elsewhere. Besides conducting the qualitative study,the present research also entails a doctrinal analysis of the provisions set forth in MWPSC Act and the West Bengal Maintenance and Welfare of Parents and Senior Citizens Rules, 2008 (hereinafter referred to as WBMWPSC Rules), which form the cornerstone of the regulatory framework that governs the functioning of the Tribunal.

III. Decoding the Dynamics of Maintenance Tribunals: Understanding the Structural Framework, Powers and Functions

To address the concerns of aggrieved parents and senior citizens, the MWPSC Act mandates that the States are required to establish Maintenance Tribunals in every sub-division throughout India within six months from the initiation of the Act.[8]The Maintenance Tribunal is a quasi-judicial body, headed by an officer of the rank of Sub-Divisional Officer or higher within a State[9]to adjudicate and decide upon the matters relating to maintenance of parents and senior citizens.In this context, 'maintenance'[10] encompasses the provision of fundamental necessities such as food, clothing, accommodation as well as medical assistance and treatment. Senior citizens (who are sixty years and above of age) and parents (regardless of age) who are incapable of sustaining themselves through their own income or possessions have the right to seek redress from the Maintenance Tribunal by initiating proceedings claiming maintenance from their children, encompassing both son and daughter, married or unmarriedor even grandchildren who are not minors.[11]Furthermore, childless senior citizens who are unable to maintain themselves can legally claim means of sustenance from any relative

[8]*Ibid.*

[9] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.7(2).

[10]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.2(b).

[11]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec 4(1).

possessing ample means to support such senior citizen[12], provided such relative currently possesses the senior citizen's property or is anticipated to inherit it in future.[13]In case of multiple relatives, the determination of the maintenance amountis proportionally based on their respective shares of the inherited property; the higher amount would be paid by the relative inheriting the larger share of the property.[14]The obligation of maintenance of parent/senior citizens extends to ensuring that the claimants receive the standard of care that meets the requirements for leading a 'normal life'.[15]

A parent or a senior citizen can submit an application of maintenance,[16]at that place where they themselves, or their children or relative(s) as the case may be, currently reside or where they last resided. In case of incapability of the parent or senior citizen to do so personally,the application can be made on their behalf by any other person or organizationauthorized by them.[17] The Maintenance Tribunal may also take cognizance, suomoto.[18] It is to be noted that the pre- requisite condition of initiating an application for maintenance is that the said parent or senior citizen must be incapable of sustaining themselves financially through their own income or assets. In case of a parent, who is also entitled to initiate such a claim under the applicable provisions of the Code of Criminal Procedure, 1973[19] in the Court of a Judicial Magistrate, First Class, it is at their discretion to file the application in either of the forums. It is to be noted that the parent cannot seek relief under both laws concurrently.[20]

The application for maintenance can be directed against multiple individuals.[21] If the parent is having two sons, maintenance can be claimed from any of them.[22] If a mother stays with one of her sons, she can claim maintenance from her other

[12]*Ibid.*
[13]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec 4(4).
[14]*Ibid*.
[15]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec 4(2).
[16]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Section 5.
[17]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.5(1)(b).
[18]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec. 5(1)(c).
[19] The Code of Criminal Procedure,1973, Sec. 125.
[20]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.12.
[21]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec. 5(5).
[22]Mahendra Kumar v. Gulab Bhai and Anr. [2001 Cri LJ 2111].

son as well.[23] The children/relative(s) however have the option of impleading other persons having the liability of maintenance.[24]The MWPSC Act bars legal practitioners to participate in proceedings before a Maintenance Tribunal[25]; however parents or senior citizens have the option to be represented by Maintenance Officers[26] designated by the respective State Government.[27]

The Maintenance Tribunalbears the legal obligation to conduct hearings with utmost expediencyand reach a resolution by completing the proceedings within a stipulated time-frame of 90 days commencing from the date of serving notice to the opposing parties[28] (children/grandchildren/relatives, as applicable). Nevertheless, in exceptional circumstances the Tribunal may exercise its discretion to grant an extension upto 30 days.[29] Additionally, the Tribunal is vested with the authority to allow the provision of interim allowances to the claimant during the ongoing proceedings.[30] Prior to holding an inquiry for determination of the amount of maintenance, both the parties are to be notified and heard.[31]

It is to be noted that the Maintenance Tribunal possesses a distinctive authority that combines the powers of both a civil court and a criminal court. When it comes to ensuring the presence of children or relatives in the Tribunal, it is empowered the authority of a Judicial Magistrate of First Class under the Code of Criminal Procedure, 1973. The evidence is recorded in the presence of the children/relatives, following the prescribed procedure for summons cases,[32] however if it found that the children/relatives are deliberately evading service or absconding from the hearings, the Tribunal can proceed ex parte.[33]During its inquiry for gathering evidence under oath, for ensuring the presence of witnesses and for enforcing the submission of documents, material objects, and for other

[23] D Shanmugham v. Pottiammal [1996 Cri LJ 2984]
[24] *Supra* note 20.
[25]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec. 17.
[26] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.18(1).
[27]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec. 18(2).
[28]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec. 5(4).
[29]*Ibid.*
[30]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.5(2).
[31]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.(3).
[32]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.6(4).
[33]*Ibid.*

essential matters, the Maintenance Tribunal possesses the powers of a civil court.[34]During the enquiry, the Maintenance Tribunal has the option to seek the assistance of individuals possessing specialized knowledge or expertise in relevant matters pertaining to the resolution of the claim of maintenance.[35]Significantly, prior to the hearing, the Maintenance Tribunal can also choose to refer the application to a Conciliation Officer to facilitate a prompt and peaceful resolution of the dispute in question.[36] The Conciliation Officer is obligated to present his findings within a month and if the dispute is resolved amicably the Maintenance Tribunal will issue an order that accurately represents the resolution of the matter.[37] Upon the completion of the enquiry, the Maintenance Tribunal is authorized to issue a maintenance order directing children or relatives to pay a monthly maintenance sum, not exceeding Rs.10,000,[38]for the support of parents or senior citizens who are unable to sustain themselves.[39] The Tribunal is required to ensure that such payment is received by the claimants within 30 days following the issuance of the maintenance order.[40] Such orders can however be modified or revoked in the event of change in circumstances or the discovery of factual errors from proven misrepresentation or mistake and the Tribunal may alter the maintenance allowance accordingly.[41] It is to be acknowledged that an order of maintenance granted by the Maintenance Tribunal carries the same weight[42] as maintenance orders issued under the Code of Criminal Procedure, 1973.[43] A complimentary copy of the maintenance order ought to be provided to the parent or senior citizen which can be enforced in any location against the concerned individual by any Maintenance Tribunal, as long as the identities of the parties and the non-payment of allowances or expenses are verified satisfactorily.[44] In the event of children or relatives refusing or failing to

[34]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.8(2).
[35]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.8(3).
[36]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec. 6(6).
[37]*Ibid*.
[38] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.9(2).
[39]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.9(1).
[40]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.13.
[41]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.10.
[42]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.11(2).
[43]The Code of Criminal Procedure, 1973, Sec.128.
[44]*Ibid.*

comply with an order without a valid reason, the Tribunal is authorized to issue a warrant for imposing fines as a penalty for each violation of the order, and in caseswhere fines remain unpaid even after warrant is enforced, the Tribunalhas the power to sentence the defaulter to imprisonment for a period of one month or until the outstanding payment is made.[45]Additionally, the Tribunal may order the payment of simple interest on the principal amount, which can range from a minimum of five percent to a maximum of eighteen percent[46].

If the parent/senior citizen is not satisfied with the decision of the Tribunal, they can choose to initiate an appeal to the Appellate Tribunal within a span of 60 days from the original order, although the deadline may be extended if a justifiable explanation as to the cause of delay is furnished by the appellant.[47] The Appellate Tribunal is obliged to convey its decision in writing within a month of receiving the appeal,[48] and the decision holds ultimate legal authority, having a binding effect on both parties involved.[49]

It is important to highlight that in addition to awarding maintenance, the Maintenance Tribunal possesses an exclusive authority to nullify agreements pertaining to the transfer of property by gift or other means, initiated by a senior citizen after the enactment of the MWPSC Act.[50] This authority comes into effect if the transfer in question was based on the transferee's pledge to fulfill the basic needs and essential requirements of the senior citizen after the transfer. However, if the transferee deliberately breaches his commitment, the Maintenance Tribunal has the authority to view the transfer as being influenced by fraudulent, coercive or undue means, and is empowered to annul such agreement. This provision is in contrast to the law enumerated in the Specific Relief Act, 1963[51] which specifies

[45] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Section 5(8).
[46]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.14.
[47]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.16(1).dg.
[48]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.16(5)(1).
[49]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.16(5)(5).
[50]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec.23.
[51] The Specific Relief Act, 1963, Sec.31

that cancellation of a registered instrument (document) can be done only by the institution of a suit on that behalf.

IV. Delving into the Inner Workings of the Maintenance Tribunals at Kolkata: Key Findings from Field Research

The key findings/outcome yielded from the field research in Kolkata regarding the functioning and limitations of Maintenance Tribunals in addressing the challenges faced by the elderly are discussed below:

A. Multi-natured Disputes: Capacity and Limitations of Maintenance Tribunal in Addressing Complex and Composite Cases

Based on the analysis of cases collected from the Maintenance Tribunals during our field study, three distinct patterns of petitions filed by parents/senior citizens are observed, viz., petitions seeking maintenance from children/relatives, petitions for the restoration of property conveyed to children/relatives and petitions seeking protection from elder abuse. It was observed that petitions involving cases of elder abuse[52], followed by petitions seeking for the declaration of transfer of property as void and demanding the subsequent restoration of property were more frequently brought before the Maintenance Tribunal,while the numbers of petitions with the exclusively prayer for monetary assistance were less in number.

Challenges Experienced in Addressing Instances of Elder Mistreatment and Abuse

Responding to the question about the challenges they face in dealing with cases of mistreatment and abuse of elderly persons, the Presiding Officers at the very outset acknowledged that most of the petitions that they come across are flooded with grievances against elder abuse, specifically highlighting psychological mistreatment and neglect, which in their opinion has become a pervasive social menace. However, it was interesting to note the assertion of the Presiding officers

[52]The World Health Organization defines elder abuse as*"a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person,* https://cnpea.ca/en/resources/reports/327-the-toronto-declaration-for-the-prevention-of-elder-abuse (last visited June29, 2023).

who opined that they were not specifically empowered by the MWPSC Act/ WBMWPSC Rules to adjudicate cases relating to elder abuse. It was affirmed that although the Maintenance Tribunal strives to ensure the safety and welfare of older adults by engaging the services of police, the scope of their jurisdiction, as determined by the MWPSC Act, was confined to awarding maintenance (in monetary terms) and declaration of transfer of property as void in certain cases. The excerpts from a hearing witnessed by us in a particular case of a septuagenarian petitioner, demanding the eviction of her son and his spouse on the ground of mistreatment and mental harassment, are narrated below:

The petitioner, a widow aged about 75 years, *contended that her son (who was self-employed) and daughter-in-law (a housewife) were residing in her house, which is her self-acquired property. She contended that ever since the marriage of her son, there has been a constant source of discord and disharmony in the family as the behavior of her son and her daughter-in-law was extremely disrespectful, uncaring, and aggressive. The atrocities of the daughter-in-law kept increasing day by day, and her son paid no heed to her when she complained that she was being mistreated in her own house. Rather he suggested that she should relocate to an old age home now so that both parties can live their life peacefully. On being probed about more details by the Presiding Officer of the Tribunal, the petitioner claimed that the couple gradually began insisting upon transferring the house in their name and when she refused to do so, her son started ill-treating her, while her daughter-in-law went to the extent of threatening her that unless her demands were acceded to, she would arrange to put her mother-in law behind bars by lodging false criminal cases against her.*

These allegations were out-rightly denied by her son and daughter-in-law, who are the opposite parties in the said case. The petitioner, however, contended that her son and his wife abused her on a daily basis making her life miserable, which has resulted in serious deterioration in her mental and physical health. Considering the above situation, the petitioner prayed for their eviction, so that she can lead a peaceful life in her house with dignity, without being forced to accommodate any person who mentally harasses her. The petitioner had not claimed maintenance as she deposed that she was capable of maintaining her expenses from the 'pension money' that she received, being a retired teacher of a government school in West Bengal.

The Presiding officer explained that since she was able to maintain herself, and no 'transfer of property' was effected in the said case, the tribunal cannot promulgate an order of eviction directing any party to leave his/her present place of stay under the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. While disposing of the case, which was conceived as more of a 'family dispute' by the Tribunal, the Presiding Officer, however, reprimanded the opposite parties saying that it is their 'duty to respect' and 'take care' of the petitioner and issued a warning that 'strict action' would be taken in case of a second complaint, as they would be under the surveillance of the local police station henceforth. Although the petitioner was assured that she would not be further troubled and harassed by her children, in the event of which she would get the required help and assistance from the local police station, the sense of dissatisfaction and dejection was evident on the face of the petitioner, as the Tribunal expressed its inability to provide for the exclusive relief prayed by her in the present circumstances.

The limited capacity of the Tribunal in adjudicating cases of elder abuse was however lamented as a drawback of the law, as they unanimously agreed that the plight of the elderly suffering from abuse- often remains unaddressed. Upon reviewing the case records, it was observed that in many such cases where the remedy sought was relief from abuse, rather than monetary assistance, cases were dismissed labelling them as 'family disputes', citing that the Maintenance Tribunal is an inappropriate forum for adjudication of such matters. In cases where the petitioners (complainants of abuse) were women, they were directed to seek the assistance of 'Protection Officers'[53]designated under the provisions of the Protection of Women from Domestic Violence Act, 2005, while men were often left without recourse for justice. This finding assumes great significance, especially in the absence of a specific law in India catering to the needs of the abused elderly, and raises a host of questions that needs to be addressed to facilitate access to justice for older adults. Besides, the notion that maintenance is restricted to merely fulfilling the economic needs of the elderly is a narrow and misconstrued interpretation taken by the Maintenance Tribunals and is problematic on several grounds, adversely affecting the rights of older adults.

Problems Encountered in Handling Cases on the Restoration of Property

[53]The Protection of Women from Domestic Violence Act, 2005, Sec. 2(n).

It was deciphered from the field study that one of the most frequently reported complaints coming to the Tribunals were those whereby senior citizens sought eviction of children/relatives and demanded the restoration of property. These complaints were grounded on the claim that their property had been transferred on the condition that the recipient would provide for their basic needs and essential amenities, but the condition was subsequently violated by the transferee deliberately.[54]

While this provision empowers officials to pass orders in favour of senior citizens, declaring a registered document involving the transfer of property to be null and void if the conditions incorporated in the document are defied, it was noted that in terms of implementation of this provision, the Maintenance Tribunals find themselves perplexed while dealing with such cases.

First, confusion arises over the expression 'on condition' occurring in Section 23(1)[55] of the said Act. If the condition subsequent did not form part of the recital in the deed of transfer, the concerned officials showed reluctance in declaring such a document to be void, merely because the 'condition' is not incorporated in the document. Needless to say that this is evidently injuring the interest of the affected senior citizens, and thereby avowedly against the government's intent. Secondly, even if the condition subsequent is explicitly mentioned in the transfer deed, the transfer is rendered void only when there is concrete evidence of a visible breach. It is crucial to acknowledge that emotional well-being is a fundamental aspect of basic amenities. For instance, providing a house to a senior citizen for residence has no significance if the living conditions are not conducive to their safety, well-being, and dignity. Unfortunately, mental abuse and neglect, which often lack in tangible evidence or visible indications, go unnoticed and are not acknowledged by Maintenance Tribunals. As a result, the conveyance of

[54] *Supra* note 53

[55] Section 23(1) of The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 provides,*Where any senior citizen who, after the commencement of this Act, has by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.*

property is not deemed invalid as there is insufficient proof to establish the violation of the express condition relating to the provision of basic amenities.

Another veritable problem as appearing from the field survey is that in cases where the transfer has been declared as 'void', eviction of children/relatives is difficult solely based on such declaration. Indeed, the eviction of a person from an immovable property is not a matter of joke or fun. The Code of Civil Procedure, 1908 contains exhaustive provisions outlining procedures for evicting a person from an immovable property. Even a trespasser cannot be dispossessed otherwise than in due course of law. The MWPSC Act or the WBMWPSC Rules do not shed light on how the transferees are to be evicted after the document is rendered void. It was found in the absence of specific guidelines, the concerned officials are hesitant or rather reluctant to ensure eviction apprehending, and not unjustly, that such actions (in the absence of any specific provision on that behalf) are very likely to cause a severe breach of peace, ultimately leading to law and order problem and social unrest. It was highlighted that this is an area where incorporating certain provisions in the law becomes imperative to remove ambiguity and things would be made easy for the concerned officials to perform the job backed by clear-cut legal provisions to support them.

Monetary Cap in Award of Maintenance

With regard to cases purely relating to maintenance claimed from children/relatives, the key informants gave the feedback that the upper ceiling of Rs 10,000 per month which is fixed by the MWPSC Act is relatively low and needs to be revised. The award of maintenance should meet the needs of parents/senior citizens which must be assessed employing a uniform, scientific methodology and should be proportionate to the paying capacity of children.

It was disclosed that maintenance is mostly claimed from children, although in a few cases, grandchildren were roped in. However, the case of claiming maintenance from relative(s) who has inherited /would be inheriting property was non-existent. This observation indicates the lack of awareness regarding the provisions of the Act whose benefits can be availed by senior citizens who are unmarried or do not have offspring. It was reported that the situation is critical for parents/senior citizens claiming maintenance from their married daughters who are unemployed and typically dependent on their husbands.

Another revelation uncovers the fact that not a single case of maintenance was registered against children/relatives by parents/senior citizens residing in old age homes, despite there being no legal restrictions against entertaining such cases.

B. **Infrastructure Bottlenecks and Workforce Scarcity**

The research findings have brought to light that the Maintenance Tribunals at Kolkata basically function as a single-member entity, presided over by a civil servant, who assumes the herculean task of functioning as a one-man army. It is to be noted that such an officer is entrusted with an array of additional administrative responsibilities in the district administration, thereby making it difficult for him to devote his undivided attention to the intricacies of the tribunal. There are no specific and dedicated staff exclusively assigned for the Tribunal. The existing staff members were also found to be insufficiently trained regarding their assigned roles and responsibilities in the Tribunal.

Besides, it was observed that the infrastructure of the tribunal was inadequate to effectivelycater to the unique requirements of the elderly population. The proceedings were held in the respective chambers of the Presiding officers which were not necessarily located on the ground floor and the absence of conveniently located lifts, wheelchair accessibility, a designated waiting area with restroom and other age- friendly facilities, etc was noticed.

C. **Maintenance Officers and Conciliation Officers**

So far as Kolkata is concerned, Maintenance Officers were appointed in both Tribunals. It was noted that for the rest of the subdivisions in different districts of West Bengal, except Kolkata, in case there is no Maintenance Officer appointed, the District Programme Officer, Integrated Child Development Service (DPO, ICDS) under the Directorate of Social Welfare is supposed to act as the Maintenance Officer. Findings highlight that in one of the tribunals in Kolkata, the Maintenance Officer was the sole authority entrusted with the dual function of conducting an inquiry as well as representation of the senior citizens in those matters. While in the other tribunal taken up for the study, the services of various officers like the Block Development Officer(BDO), Block Relief Officer (BRO), Block Welfare Officer (BWO), Child Development Project Officer(CDPO),

Deputy Magistrate and Deputy Collector(DMDC) was utilized to conduct an inquiry. In certain cases, the involvement of police in the process of inquiry was also observed, which the Presiding Officers claimed to be non-satisfactory. Noteworthy feature is that all these officials, especially those working at the block level, were already overburdened with a plethora of responsibilities and lacked exclusive training and expertise in the specific subject matter.

An interesting finding revealed from the field study is that in none of the Tribunals, there were designated conciliation officers. The MWPSC Act states that in the event of the conciliation officer's unavailability, the Maintenance Officer can act in a dual capacity; however, the WBMWPSC Rules recommend that the conciliation officer may be an eminent social worker having expertise in gerontology or the representative of any Non-Government Organization working for the causes of elderly. It was understood that an informal arrangement of conciliation however existed in practice, where the conciliation process was attempted or facilitated by the Presiding Officer of the Tribunal in appropriate cases. As to the question of why conciliation officers were not appointed yet, the key informants could not give a satisfactory reply.

D. Constraints in adhering to the stipulated 90-day period for disposal of cases

As to the question of whether the expeditious disposal of cases within the stipulated 90-day period is feasible or not, it was stated by the key informants that despite their utmost efforts, disposal of cases within 90 days of receipt of the application has become a challenging task, owing to the dearth of adequate infrastructure and insufficiency of staff. The task of securing the attendance of children/relatives who deliberately evade appearance before the Tribunal was another factor cited for causing an inevitable delay. An observation made in this context is the reluctance of the Maintenance Tribunals in deciding cases ex-parte, except in exceptional circumstances. When probed further, the key informants expressed that the rationale behind this cautious approach was to safeguard the rights of children/relatives, who, they believed, are already prejudiced for not having the right of appeal in appellate tribunals in the event of an adverse verdict.

E. Enforcement of Orders

When questioned regarding the existing mechanisms for supervising the enforcement of verdicts by the Maintenance Tribunal, the key informants

acknowledged that the Tribunal is devoid of adequate mechanisms for overseeing the implementation of verdicts. It was asserted that this deficiency stems from the Tribunal's understaffing. Presently the Tribunals require the petitioners to re-approach them in cases of non-compliance with the orders by the other party. Although the MWPSC Act prescribes penalties for non-compliance with orders, it was noted that not a single case of non-compliance was reported.

F. **The Conundrum of Legal Representation**

The MWPSC Act categorically prohibits the engagement of lawyers in representing parties in proceedings before the Maintenance Tribunal to expedite the process for dispute resolution with minimal costs. However, on a perusal of the case records, the involvement of lawyers was evident as most of the applications and supporting documents were drafted by lawyers. It was mentioned that there is an inherent inclination on the part of both parties to engage the services of a lawyer, even after an explanation is provided to them about the non-requirement of adherence to any formal procedure in the hearing. The exclusion of lawyers was held to be justified by the key informants on the ground that lawyers mislead senior citizens with a tendency to prolong litigation for their vested interests. However, an intriguing aspect was pointed out by one of the Presiding Officers who opined that in certain cases, the absence of legal representation in hearings made it challenging for senior citizens to effectively articulate their thoughts and perspectives, and this indirectly impedes the expeditious dissolution of the dispute. In this context it is to be noted that although the Maintenance officer is obligated to represent parents/senior citizens upon request, it was informed that it is extremely challenging for a single Maintenance Officer, when confronted with several cases, to deliver effective services to all.

G. **The Detrimental Impact of Non-Genuine Cases**

An interesting finding from the field research is that the Maintenance Tribunals are vexed with the problem of dealing with a plethora of fabricated cases. The key informants have pointed out how parents/senior citizens are often manipulated by ambitious children who, prompted by sibling rivalry, use and misuse the forum for settling a score with siblings. There is also a concerning trend of parties resorting to this tribunal for the swift resolution of property disputes as they find this forum a convenient, less costly, and less cumbersome alternative to the traditional judicial system. The potential of exploiting this forum for perpetuating

harassment and victimization of the daughter-in-law was not ruled out, and quite a few cases were discussed where the intervention of the Tribunal was sought with the ulterior motive to evict the daughter-in-law from the matrimonial house or for pressuringher to withdraw complaints of domestic violence.

One of the Presiding Officers noted how instances of fake cases foster contempt and disregard for the elderly and fuel ageist attitudes toward them. Further the negative impact of spurious complaints on hampering the interests of genuine petitioners in their quest for justice was deliberated upon. It was observed that by increasing the workload and diverting the attention and resources of the already overburdened limited manpower on false and frivolous cases, the resolution of legitimate disputes takes a backseat. This not only impedes access to justice for senior citizens but also erodes public trust in the credibility and integrity of the forum and the justice delivery system as a whole, in the long run.

H. **Additional Observations**

Other notable empirical insights that emerged from the study are that none of the Maintenance Tribunals had initiated a suo-moto case. The number of caseswasfew in number where interim maintenance was provided during the pendency of the case before the Tribunals. There was only one instance where, for a senior citizen who did not have a safe habitat to reside in, the arrangement of shelter was made in a State-run old age home while the proceedings were ongoing in the Tribunals.

V. Concluding Insights: Overcoming Challenges and Charting the Way Forward for Enhanced Effectiveness

The observation of the operations and proceedings of Maintenance Tribunals in Kolkata has provided valuable insights into the challenges and limitations faced by the Tribunals in facilitating meaningful access to justiceand calls for a more comprehensive and inclusive approach and targeted improvements in the law to ensure effective dispute resolution and access to justice for older adults in India.

One key finding is the limited capacity of Maintenance Tribunals in addressing cases of elder abuse as a result of which the plight of the older adults often goes unheard. This requires clarifying the jurisdiction and role of the tribunals in dealing with such cases to provide necessary protection and relief to vulnerable

senior citizens. In our opinion, the contention that the Maintenance Tribunal completely lacks the capacity to adjudicate cases of elder abuse is flawed. Maintenance is a broader concept encompassing a wide range of assistance, other than mere financial support, for preserving the overall well-being and dignity of the elderly and thereby empowering them to lead a dignified life. Elder abuse on the other hand is fundamentally opposed to the concept of maintenance as it undermines the health, well-being, dignity, and rights of older adults. Therefore, provision for maintenance is intrinsically linked with safeguarding the elderly against abuse for unless there is a guarantee ofprotection against abuse, all other services and opportunities to lead a good quality of life are likely to become meaningless. The Maintenance Tribunals are therefore required to interpret laws broadly and in a harmonious manner. We believe as the Maintenance Tribunals are manned exclusively by administrative personnel rather than judicial officers, there is an inherent limitation in their ability to navigate intricate legal nuances which hinders the broad interpretation of laws. To address this constraint, upon consideration of the challenges faced in the interpretation and application of the law due to the lack of legal proficiency among Presiding Officers, it was opined in *M. Venugopal v. The District Magistrate cum District Collector,*[56] that entrusting the task of adjudication to individuals with a background in law is more prudent for the optimal performance of the Maintenance Tribunal in achieving the intended objective of the MWPSC Act. In our opinion, while the addition of a legal member is a favorable option rather than the complete overhaul of the Tribunal, we further propose the introduction of comprehensive training programs designed to equip tribunal members with the requisite legal expertise and understanding for bolstering their competence to engage in an expansive interpretation of laws and act judiciously. It is hoped that the implementation of all-encompassing training and sensitization programs would be instrumental in optimizing the operational efficacy of the adjudicating system. However, clarity on the powers and jurisdiction of the Maintenance Tribunals in addressing cases of elder abuse is envisaged, which can be achieved either by amending the MWPSC Act or by the issuance of appropriate guidelines to the Maintenance Tribunals by the State Government in this context. Additionally, a comprehensive road map that ensures the safety and security of senior citizens by safeguarding

[56] (Madras): 2014(5) CTC 162: 2015(1) DMC 202:2015(3) CivilLJ 45: 2014(59) R.C.R.(Civil) 5:2014(2) C.W.C.

their lives and possessions, as envisioned in the MWPSC Act, needs to be framed and implemented by all State Governments,[57]as this could serve as an effective strategy in preventing physical, mental, sexual and financial abuse of senior citizens. The case of *Manmohan Singh v. Union Territory, Chandigarh (P&H)*[58] underscored the dire necessity of proactive steps by the respective State Governments in framing comprehensive rules and procedure for establishing a robust enforcement mechanism for securing and preserving the lives and assets of senior citizens. Effective coordination between the district administration and the Maintenance Tribunal is crucial for a cohesive and effective response in addressing elder abuse, both in domestic spaces as well as in institutional settings. However, on a perusal of the WBMWPSC Rules, 2008, it came to our attention that they were bereft of explicit guidelines for the district administration on safeguarding the person and property of senior citizens. To address this critical void, a revision of the normative framework of the WBMWPSC Rules by incorporating specific provisions in this context is strongly recommended.

Secondly, the necessity to address the challenges pertaining to the effective enforcement of the provision for the restoration of property is evident. In cases of transfer of property by senior citizens, the fact that there is no requirement to explicitly mention in the deed of transfer about the obligation of children/relatives to care needs to be clarified to avoid confusion.[59] It is also found that the application of this provision to seek eviction of children/relatives owing to ill treatment[60] is limited to situations where there is actual transfer of property and tangible evidence of a breached condition. In cases where there has been no actual transfer, there is no recourse for elder abuse. Similarly, the restoration of property is not feasible in cases of mental abuse or neglect, where visible signs to support such claims are absent. Besides, even in cases where the transfer is declared void, therestoration of the property through evicting the trespasser solely on the basis of such declaration, without initiating a suit in a civil court is rarely feasible. As legal frameworks are missing to accommodate these nuances, necessary

[57]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Sec22(2).
[58][2016(1) R.C.R.(Civil) 838].
[59]Radhamani v. State of Kerala (Kerala) [2016(161) AIC 624].
[60]Sunny Paul v. State NCT of Delhi (Delhi) [2017(2) R.C.R.(Civil) 404].

amendments in law and clear guidelines to Maintenance Tribunals are required for the effective implementation of the provision.

Further, it is crucial to reconsider the existing cap on maintenance that can be paid under the MWPSC Act, which is deemed insufficient. The revised amount needs to be equitable and rational, aligning with the accepted standards of living for older adults.

With regard to the challenges of workforce shortages, it has been noted that aallocating all pivotal roles to a single entity needlessly overburdens the concerned official impeding his efficiency, while the practice of randomly assigning tasks to disparate officials who are ill-equipped in the subject matter and are already overwhelmed with excessive workload unfolds an equally perilous scenario. In the given circumstances, the compelling requirement to amplify staff equipped with comprehensive and rigorous training is emphasized to ensure the expeditious execution of tasks for the smooth functioning of the Tribunal and timely disposal of cases.The present moment also calls for the augmentation of existing infrastructure, to impact the ability of older adults to access dispute resolution forums.Age-friendliness of the Maintenance Tribunals can be enhanced throughthe implementation of pro-active steps catering to the distinct needs of the elderly like the strategiclocation of the Tribunal on the ground floor for unfettered accessibility, equipped with other amenities like conveniently located waiting areas, restrooms, wheelchair access, drinking water and other facilities ensuring their optimal ease and convenience. Theintroduction of parallel facilities for online filing of petitions and a paradigm shift in the record-keeping practices through the digitization of records with each petitioner being assigned a distinct case ID number, ensuring a more streamlined follow-up process is also recommended.

It has been observed that alternative dispute resolution methods such as conciliation and mediation have been underutilized and the MWPSC Act and WBMWPSC Rules currently lack consistency in the provision for the appointment of conciliation officers. A consistent and unified approach to resolve this discrepancy is suggested to make the best use of restorative justice solutions, which is apparently more effective in such cases rather than resorting to a criminalized approach. Another intriguing question that came up to our attention is regarding is the implication of the total exclusion of lawyers. The concern that the exclusion of lawyers can potentially result in the denial of legal assistance for

senior citizens is not unwarranted, considering the workload constraints of the Maintenance Officer who serves as the sole authority to represent senior citizens on their request. Besides, as older adults often face difficulty in navigating the legal system and articulating their legal needs, the importance of legal assistance as an element of access to justice cannot be underestimated. In our opinion, alternative solutions like leveraging the resources of legal aid clinics of law schools could be explored in this context, which can also play an instrumental role in the dissemination of legal awareness amongst older adults about their rights. Further considering the reported increase in the instances of non-genuine cases as brought to light by the key informants, we advocate for the imposition of stringent measures to thwart the exploitation of the provisions outlined in the MWPSC Act for personal or vested interests. Given the significance of preserving the sanctity and credibility of the dispute resolution forum, the implementation of this measure becomes crucial. Last but not the least, the necessity of having a robust system to effectively monitor the progress and implementation of orders is strongly emphasized, so that the cases of non-compliances are effectively followed-up and intended outcomes are achieved without any further delay.

For an effective justice delivery system, it is envisioned that reforms within the normative framework and enhancements in the capacity of adjudicatory bodies to deliver equitable remedies catering to the specific needs of disadvantaged groups are imperative. The existing gaps in the capacities of both rights holders and duty bearers to effectively assert their rights and fulfil their obligations respectively must be bridged by law and the justice system must yield enforceable outcomes promptly and without excessive costs. Ultimately, by extending the provision of access to justice to all members of the society, we promote equality, fairness, and the protection of fundamental rights of all and lay the foundation for a just and harmonious social fabric, which leaves no one behind .

An Exploratory Study of Unmanned Aircraft Systems Regulations in India and the Challenges Ahead in Evolving Aviation Ecosystem

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Abstract

The skies over central New Delhi in India were lit up by a spectacular display of over a thousand Unmanned Aircraft Systems (UAS) on the 75th republic day celebration in January 2022. The usage of UAS or drones, as commonly referred to, has gained momentum worldwide, including in India, signifying its importance in the aviation ecosystem. The advancement of technology and large-scale investment has fast-tracked the proliferation of UAS in civil, commercial, and military domains. The government of India and national aviation regulators are continuously working to provide a concrete regulatory framework to support the growth of the UAS sector and minimize the risk emerging from the operation of UAS. A recent step towards the same was taken by passing Drone, Rules 2021. The UAS ecosystem is still in its initial stages of development with uncertainties in privacy, safety, data protection, and governance issues. This paper aims to provide an overview of the UAS regulations in India and their implications for the UAS ecosystem. The paper highlights how such rules will affect civil and commercial UAS usage and its implication on the rights of individuals.

Keywords: Drone Rules 2021; UAS operations; Privacy; Risk; Safety; Security

I. Introduction

The world is assimilating varied changes brought by the technologies introduced by the Fourth Industrial Revolution. Unmanned aircraft systems (UAS) have been operational in various forms for ages in the military domain. The UAS application in civil and commercial environments is a much recent phenomenon. The

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unmatched characteristics, payload capacity, and low flying ability make it a reliable platform for multipurpose scenarios.

The UAS market is set for incredible growth to generate a massive economic and export ecosystem for countries to monetize the UAS ecosystem, including India.[3] The drone design, manufacturing, and service sectors have grown exponentially, incredibly fast-tracked by the Covid-19 pandemic.[4] The UAS has been used to supply vaccines and medical supplies to remote areas.[5]

The UAS ecosystem is presently catering to a) monitoring industrial and infrastructure projects, including road construction and bridge life viability[6], b) in the agriculture domain for spraying pesticides and monitoring crop patterns[7], c) in disaster management for the survey, planning, and rescue missions[8], d) in forest and wildlife management for animal census and tracking wildlife movement and

[3] Krishnankutty, P., Why India's drone market could become a multi-billion-dollar industry in next decade, The Print, July 23, 2021, https://theprint.in/india/governance/why-indias-drone-market-could-become-a-multi-billion-dollar-industry-in-next-decade/700817/ (last visited on June 25, 2022).

[4] Martins, B. O., Lavallée, C., & Silkoset, A., "Drone Use for COVID-19 Related Problems: Techno-solutionism and its Societal Implications" *Global Policy*, *12*(5), 603-612,2021, https://doi.org/10.1111/1758-5899.13007 (last visited on June 16,2022).

[5] UNICEF, *Unmanned aircraft systems: product profiles and guidance,* October 11, 2019, https://www.unicef.org/supply/reports/unmanned-aircraft-systems-product-profiles-and-guidance (last visited on June 25, 2022).

[6] Hammad, A. W. A., da Costa, B. B. F., Soares, C. A. P., & Haddad, A. N., "The Use of Unmanned Aerial Vehicles for Dynamic Site Layout Planning in Large-Scale Construction Projects", *Buildings*, *11*(12), 11-17,2021 https://doi.org/10.3390/buildings11120602 (last visited on June 12,2022)

[7] Sylvester, G. "E-agriculture in Action: Drones for Agriculture" Food and Agriculture Organization of the United Nations, https://www.fao.org/3/i8494en/i8494en.pdf (last visited on June 25,2022)

[8] Tusnio, N., & Wroblewski, W, *The Efficiency of Drones Usage for Safety and Rescue Operations in an Open Area: A Case from Poland*, *Sustainability*, *14*(1), 2021, https://doi.org/10.3390/su14010327 (last visited on June 25, 2022).

detecting poachers[9], e) in media and journalism for covering large scale events,[10] f) in law enforcement for tracking, surveillance, crime detection, and investigation, g) and for recreational purpose.

In such widespread and diverse applications, it becomes necessary to have a clear regulatory framework to minimize conflicts that might affect the safety and rights of individuals. The UAS regulations must balance the challenges without compromising ethics and safety while allowing the required operational flexibility for sustained growth of the UAS ecosystem. India's Ministry of Civil Aviation has constantly updated UAS regulations since the first guidance regulations passed in 2018 to accommodate technological advancements and contemporary issues. The recent Drone Rules 2021[11], enacted to liberalize and accelerate the UAS ecosystem, is one more step in that direction. The rapid growth in UAS technology and widespread use necessitates a review of the regulatory policies to understand the technology perspective, rights of individuals, the role of stakeholders. The UAS ecosystem will need perfect synergy in policies, legislations, technology development for efficient operability of UAS.

The following article helps stakeholders understand the recent UAS regulations enacted by the Ministry of civil aviation, India, and the broad regulatory framework governing the Indian UAS ecosystem. The first section discusses the technological aspects and historical development of India's UAS ecosystem and regulations. The paper then discusses relevant provisions of Drone Rules, 2021. The third section discusses the impact of new rules and challenges ahead for the UAS ecosystem. The paper's final section has global developments ending with the conclusion.

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[9] López, J. J., & Pázmány, M. M, "Drones for Conservation in Protected Areas: Present and Future", *Drones*, *3*(1),2019, available at: https://doi.org/10.3390/drones3010010 (last visited on June 16,2022)

[10] Hamilton, J. F, *Drone Journalism as Visual Aggregation: Toward a Critical History*, *Media and Communication*, *8*(3), 64-74, 2020, https://doi.org/10.17645/mac.v8i3.3117 (last visited on June 12, 2022).

[11] PIB Delhi, "Ministry of Civil Aviation notifies liberalised Drone Rules", 2021, August 26, 2021, https://pib.gov.in/PressReleseDetailm.aspx?PRID=1749154 (last visited on June 23,2022).

II. Development of UAS Ecosystem and Regulations in India

The UAS technology has steadily developed in a user-friendly pattern making its usage and deployment relatively effortless. The UAS has various categories and sizes, including fixed-wing, rotary blade propulsion mechanisms, which can be deployed in an environment for commercial cargo-carrying to sustained aerial monitoring operations[12]. The UAS presently has enhanced speed, endurance, and payload carrying capacity, including autonomous flight features. The UAS now has an advanced onboard communication and navigation system, which helps it accomplish the designated mission accurately.[13] The endurance of drones has increased by introducing efficient onboard battery systems. The type of battery pack used varies for the sector and mission-specific parameters. The initial UAS operation was based on visual line of sight (VLOS), meaning the UAS operator always maintained visual eye contact with UAS during the operation. The majority of UAS operations in the future will be beyond visual line of sight (BVLOS), which needs robust communication with ground control.[14] There has also been the integration of drone technology into the existing aviation technology ecosystem. This is to accommodate drone traffic with the current manned air traffic management system. Further UAS are being installed with onboard sensors to detect and avoid obstructions. The UAS can also auto-return to its home base or launch pad in case of malfunction or loss of communication.

The Defence Research and Development Organisation (DRDO) and Indian defence forces have been working on various UAS platforms since 1980. The instances of recreational drone usage and unregulated use of UAS by civilians led

[12] M. Hassanalian, & A. Abdelkefi, "Classifications, applications, and design challenges of drones: A review, Progress in Aerospace Sciences", *Progress in Aerospace Sciences*, *91*, 99-131, 2017, https://doi.org/10.1016/j.paerosci.2017.04.003 (last visited on June 16, 2022).

[13] Isik, O. K., Hong, J., Petrunin, I., & Tsourdos, A., "Integrity Analysis for GPS-Based Navigation of UAVs in Urban Environment", *Robotics*, *9*(3),2020, https://doi.org/10.3390/robotics9030066 (last visited on June 12,2022)

[14] Politis, E., Panagiotopoulos, I., Varlamis, I., & Dimitrakopoulos, G, "*A survey of UAS technologies to enable Beyond Visual Line Of Sight (BVLOS) operations"*, Adacorsa, available at: https://adacorsa.automotive.oth-aw.de/index.php/publications-2/scientific-publications/120-a-survey-of-uas-technologies-to-enable-beyond-visual-line-of-sight-bvlos-operations (last visited on June 23, 2022).

the Directorate General of Civil Aviation (DGCA) to enforce a ban on the use of UAS in October 2014.[15] Similarly, the Directorate General of Foreign Trade (DGFT) also banned the import of UAS from abroad. The DGCA recognizing the importance of UAS, simultaneously opened the consultation process with stakeholders to formulate suitable rules calling suggestions from the general public. The draft guidelines[16] were published in April 2016, setting the stage for the first official regulatory framework for the use of UAS in India. After several rounds of discussion, on 27-August-2018, the Government of India introduced the Civil Aviation Requirements for Remotely Piloted Aircraft Systems (CAR 1.0).[17]

The CAR 1.0 introduced a contactless digital framework named Digitalsky Platform[18] along with unmanned traffic management protocols. The Digitalsky platform would act as a one-stop forum for registering all categories of UAS, including UAS pilots and UAS owners. The regulator intended to track and authorize all the UAS flights within the civilian airspace. The platform would remotely approve all the fights once the pilots apply for prior digital authorization without paperwork or bureaucratic approvals. The regulations exempted nano drones from flying without prior consent, subject to certain conditions. The CAR 1.0 introduced the classification of drones based on weight and payload carrying capacity. The UAS categories were as follows starting with a) Nano, having a payload capacity of less than or equal to 250 grams, b) Micro, having a payload capacity of more than 250 grams but less than or equal to 2 kilograms, c) Small, having a payload capacity of more than 2 kilograms but less than or equal to 25 kilograms, d) Medium, having a payload capacity of more than 25 kilograms but

[15] PIB, "Rules for Commercial use of Drones", August 4, 2015, https://pib.gov.in/newsite/PrintRelease.aspx?relid=124316 (last visited on June 25, 2022).

[16] PTI, "DGCA releases draft guidelines for unmanned flying devices", Mint, April 27, 2016 https://www.livemint.com/Politics/bAB3DaJLWsn3B5G5AfGS7N/DGCA-releases-draft-guidelines-for-unmanned-flying-devices.html (last visited on June 23,2022).

[17] PIB, "Government announces Regulations for Drones, August 27, 2018, https://pib.gov.in/newsite/printrelease.aspx?relid=183093 (last visited on June 25,2022)

[18] "Digitalsky Platform", Welcome to DigitalSky, available at: https://digitalsky.dgca.gov.in/home (last visited on June 05, 2022).

less than or equal to 150 kilograms, e) Large, having a payload capacity of more than 150 kilograms.[19]

The CAR 1.0 granted Indian citizens, Indian-owned or controlled corporations, and Corporations controlled by the Indian government to register for Unique Identification Number UIN. This rule indirectly put a blanket ban on foreign nationals and foreign corporations to own UAS in India. The CAR 1.0 also provided a separate Unmanned Aircraft Operator Permit (UAOP) for entities offering UAS service as operators. The training requirements under CAR 1.0 was bestowed upon flight training organization certified by DGCA. The UAS operator must have attained the minimum age of 18 years to be eligible for attending and achieving qualification as a certified UAS operator.[20] The curriculum mandated both theoretical and practical aspects to be tested as parameters to achieve the tag of the UAS pilot. The training standards were designed to equip the UAS pilot to manage contingent situations.

The flight restrictions for UAS operations under CAR 1.0 were divided into three segments. The first zone was a no-fly zone where UAS operations were restricted. The second zone was controlled airspace where flying was permitted based on prior permission. The remaining zone was uncontrolled airspace where authorization was not mandatory was UAS operations. The controlled airspace operations mandated continuous communication with drone ATC during and before launch authorization. The onus was on the UAS operator to comply with local policy and risk assessment to be carried out before each UAS operation. The CAR 1.0 granted DGCA powers for suspension/cancellation of UIN and UAOP for any violations. In case of a breach of penal law codified under the Indian Penal

[19] Jhunjhunwala, R., & Dwivedi, S. "Flying Drones In India Legal From 1 December 2018! Indian Aviation Ministry Unveils The National Drone Policy, 2018 - Transport - India." Mondaq, September 9, 2018, https://www.mondaq.com/india/aviation/733820/flying-drones-in-india-legal-from-1-december-2018-indian-aviation-ministry-unveils-the-national-drone-policy-2018 (last visited on June 25,2022).

[20] Tavawalla, H., & Pundir, A., "Here is how restrictive laws will stifle drone industrys" Business Standard, January 21, 2018, https://www.business-standard.com/article/companies/here-is-why-restrictive-laws-will-stifle-drone-industry-118012100007_1.html (last visited on June 25, 2022).

Code,1860, the local police would be authorized to charge the UAS owner and operator for such individual violations.

The Government of India further issued AIP Supplement 164 of 2018 issued by the Airports Authority of India (Airports Authority of India, 2018) and the DGCA RPAS Guidance Manual issued on 3 June 2019. In its consultative approach, the government of India released the draft Unmanned Aircraft Systems (UAS) Rules. After receiving industry recommendations and comments from stakeholders, the government notified the UAS Rules, 2021.[21]

The UAS Rules 2021 carried the same rules for weight categorization as CAR 1.0 but allowed the classification of nano drones into higher weight categories if their flight characteristics matched heavy drones. The UAS were categorized based on flight characteristics starting with a) Aeroplane, a UAS which is power-driven deriving lift primarily from an aerodynamic reaction, b) rotorcraft, a UAS which depends on power-driven motors to derive sufficient lift, c) Hybrid UAS, UAS having flight capabilities using engine power, with ability to carry out vertical take-off, vertical landing, and slow speed flight. The rules further allowed UAS to be categorized as on control system starting with a) Remotely piloted aircraft system (RPAS), a UAS controlled by the remote pilot, b) Model remotely piloted aircraft system, a UAS with a maximum weight of 25 kilograms used on designated premises as VLOS flight for educational purposes, c) Autonomous System, UAS which do not require the remote intervention of pilot for flight management and performance.[22]

The process for registration under UAS Rules 2021 allowed body corporates and associations registered in India and will need to have a principal place of business within India. The rules further allowed DGCA to ask companies to secure security authorization from the central government on a case-to-case basis. The registration paved the way to obtain a unique authorization number (UIN) for

[21] Ministry of Civil Aviation, Home, Directorate General of Civil Aviation, https://www.dgca.gov.in/digigov-portal/?page=jsp/dgca/InventoryList/RegulationGuidance/Rules/The%20Unmanned%20Aircraft%20System%20Rules/UAS%20Rules,%202021.pdf (last visited on June 25, 2022).

[22] Kukade, T., Majumdar, A., & Tavawalla, H., "Drone regime in India significantly liberalised: Entry of foreign players permitted", Nishith Desai Associates, https://www.nishithdesai.com/NewsDetails/4815 (last visited on June 25, 2022).

UAS owner importer, manufacturer, and operator valid for up to ten years. The manufacture and import of the UAS prototype also required prior permission of DGCA. The regulator was allowed to impose additional technical and safety standards for importing UAS. The DGCA would also issue a special unique prototype identification number to track and monitor all categories of prototypes.

The manufacturing quality and airworthiness protocol was introduced in UAS Rules, 2021. DGCA would issue the certificate of Airworthiness to manufacturers or importers who fulfill the technical and safety requirements. The DGCA is also empowered to designate labs to carry out such testing based on parameters. The DGCA would also monitor the oversight mechanism to ensure safety parameters for the entire UAS ecosystem. The UAS operators must adhere to rigorous maintenance and repair protocols. There was an additional requirement of keeping a detailed record of all the maintenance carried out on UAS based on which certificate will be issued for resumption of UAS after repair and overhaul. The rules also specified No Permission-No Takeoff (NPNT), geo-fencing, anti-collision system, GNSS as standard equipment to UAS operational requirements. The area of restricted operation of UAS was established and enlarged with a specific mandate of creating a no-fly zone of 5 kilometers in major airports of metropolitan cities. The no-flight restriction for all other airports and military installations was specified at 3 kilometers. Additionally, a 25-kilometer buffer zone was created from all border areas, LAC, LOC, AGPL included as a point of reference. The ministry of home affairs, India, has been bestowed with powers to notify a no-fly zone of 2 kilometers around an area of strategic importance as notified from time to time.[23]

The government for structured growth of UAS ecosystem also introduced Unmanned Aircraft System Traffic Management (UTM). The government would allow organizations to apply and receive a license subject to successfully submitting all the manuals, technical requirements, and checks to function as UTM for ten years. The UAS Rules also facilitate the establishment of Drone Ports. These ports will be designated for landing, take-off, repair, service, and

[23] PSL Release, *The Unmanned Aircraft System Rules, 2021*, PSL Advocates and Solicitors, https://www.pslchambers.com/wp-content/uploads/2021/07/The-Unmanned-Aircraft-System-Rules-2021.pdf (last visited on June 23, 2022).

commercial operations. The rules also opened the research and development arena for selected Startups, authorized UAS manufacturers, higher education institutions in the realms of Science and Technology, and government-backed R&D organizations.

The UAS Rules, 2021 has brought measures to penalize both individuals and organizations for violating provisions UAS Rules, 2021. The penalties under the rules were in the range of ten thousand Indian rupees to one lakh Indian rupees for individuals. Based on their size, the organizations will be penalized two hundred to four hundred percent of the fines levied on the individual for the same violation. The UAS Rules 2021 also allow for the compounding of offenses at a rate of a hundred percent to five hundred percent of the amount so specified for an individual. The amount levied compounding of offenses in matters of organization are based on the number of employees and can be up to four hundred percent of the amount so specified for an individual for the same violation. The fines under UAS Rules 2021 for large organizations would amount to heavy penalties for each infringement.[24]

III. Drone Rules, 2021 – A Liberalized New Era for UAS Ecosystem

The UAS Rules, 2021, was perceived by industry stakeholders as restrictive, with a considerable burden of procedure and paperwork that would affect the UAS ecosystem's growth. The Government of India notified drone Rules, 2021[25] as a liberalized regulatory framework to make India a global drone hub by 2030. The rules make mention of the UAS Promotion Council, which will create a network ecosystem that will promote incubators for the development of UAS, create a business-friendly environment, and engage policymakers and academia. The Ministry of civil aviation, India, reiterated that the digital sky platform would act as a single-window clearance without any other clearance requirement from other governmental departments.

[24]T Deol, *No drones around international airports, Rs 5 lakh fine - Govt's new rules for flying UAVs*, THE PRINT, March 13, 2021, https://theprint.in/india/no-drones-around-international-airports-rs-5-lakh-fine-govts-new-rules-for-flying-uavs/621191/ (last visited on June 25,2022).

[25] PIB Delhi, *Ministry of Civil Aviation notifies liberalised Drone Rules*, 2021, Aug. 26, 2021, https://pib.gov.in/PressReleseDetailm.aspx?PRID=1749154 (last visited on June 23,2022).

The drone rules 2021 retained the classification of UAS by weight methodology but increased the coverage of the maximum weight limit for large UAS now increased up to 500 kilograms. Any UAS above 500 kilograms will be subject to the provisions and mandate of the Aircraft Act 1934. The restrictions imposed on the classification of nano drones were also removed, restoring classification only based on weight rather than flight characteristics. The new regulation sallowed foreign companies to own and operate drones in India, retracting the blanket restrictions as part of rules since 2018. Further, the import of UAS will be regulated by the director-general of foreign trade (DGFT), and import clearance from DGCA has been omitted. The process of receiving type certification for a specific drone was simplified for the manufacturer, with the timeline for the issue of such certificate fixed to a maximum of 75 days from the time of submission of application. The micro or small UAS drone pilot operation has been exempted from licensing formalities under present rules.

The airspace under Drone Rules 2021 was segregated into three zones marked as red, yellow, and green.[26] The Government of India is authorized to change, reduce or increase the airspace under each of the above zones. The classification starts with a) Green zone, which is a zone within the territorial expanse of India with a vertical distance of 400 feet, not designated as the yellow or red zone, and in the case of the operational airport, a reduced vertical distance of 200 feet with 8km and 12km lateral distance b) Yellow Zone, which is a zone within the territorial expanse of India above 400 feet in the green zone and vertical distance of 200 feet with 8km and 12km lateral distance in green zone which will require prior flight authorization for UAS operation from designated controlling authority c) Red Zone, which is a zone within the territorial expanse of India where flight operations are authorized only with permission of Central Government. The UAS operators will require prior permission to fly in the yellow and red zone, but no authorization is needed for green zone flights. The government will publish all

[26] Sarkar, D. (2021, September 27). *India now has an airspace map for drones: Here's how to check where you can fly your drone*. Times of India. Retrieved February 5, 2022, from https://timesofindia.indiatimes.com/gadgets-news/india-now-has-an-airspace-map-for-drones-heres-how-to-check-where-you-can-fly-your-drone/articleshow/86558519.cms (last visited on June 17, 2022).

the air space maps accessible to all individuals.[27] The central government will evaluate and reclassify the extent and boundaries of each zone as per requirement. Under challenging circumstances, it can classify certain areas as a red zone for ninety-six hours. In addition to this drone, corridors will be carved out by the regulator UAS operation in the cargo delivery domain.

The Drone Rules 2021 allow for the testing of UAS cargo operations under the supervision of DGCA. The rules expressly prohibit the carrying of arms and ammunition. Further, the rules mandate specific adherence to Aircraft (Carriage of Dangerous Goods) Rules, 2003, and operators must verify that none of UAS carry any dangerous goods. The operator of UAS is further bestowed upon the duty to report an incident and accident within forty-eight hours of such event on the digital sky platform. The liberalized aspect of Drone Rules, 2021, is also focused on the UAS research and development arena. The rules have exempted type certification, UIN, and remote license requirements for recognized research organizations within the controlled facility in the green zone. The Drone Rules, 2021, have specified safety features, namely NPNT, geo-fencing, strobes but has not made it mandatory for the time being. The government may notify the provisions in the future. In the matter of Insurance coverage, the rules require third-party insurance for UAS operations to cover the potential damage to life and liberty. The Drone Rules, 2021 refer to the Motor vehicles Act,1989, and rules made thereunder for UAS insurance policy and claims.[28]

IV. Impact of Regulations and Challenges Ahead

The new Drone rules 2021, along with the PLI scheme of 2021, will help in the growth of the UAS ecosystem. The new liberalized rules have eased compliance

[27] Mukul, P, "Airspace map of India: How drone operators can check the flying zones", The Indian Express, September 28, 2021, https://indianexpress.com/article/explained/explained-drone-airspace-map-india-7536736/ (last visited on June 25,2022).

[28] DAS, K., & Arshad, M. "As drones take off under fresh rules, insuring their flight still has a host of teething troubles", THE ECONOMIC TIMES, https://economictimes.indiatimes.com/prime/fintech-and-bfsi/as-drones-take-off-under-fresh-rules-insuring-their-flight-still-has-a-host-of-teething-troubles/primearticleshow/87288034 cms (last visited on July 11,2022).

and procedural hurdles of UAS Rules 2021, but the challenges posed by increased UAS will affect UAS operations.

The provisions related to UAS operational safety, namely NPNT, geo-fencing, strobe lights, have not been made mandatory yet under Drone Rules 2021. The rules have not mentioned a timeframe for implementation but mention a six-month compliance window once the central government notifies the safety provisions. In addition to that, UAS, like any other system, is prone to cybersecurity risk. The UAS are vulnerable to hacking, unauthorized access, spoofing, and jamming.[29] The design and manufacturer must account for such contingencies to eliminate the risks. The Quality Council of India must mandate audits to ensure the integrity of components and systems before granting certificates. The airspace safety and security protocols are also of prime importance as the same helps in securing safe passage of both manned and unmanned aircraft within the regulated airspace. The government has issued a National Unmanned Aircraft System Traffic Management Policy Framework for secure drone traffic management.[30]

The Supreme Court of India recognized has the right to privacy of individuals. The court's judgment allows the assertion of one right to private space devoid of any intrusion. The operation of UAS with sophisticated payloads can capture data which may include audio, video, picture, a pattern of movement, and biometric information. The privacy bill of 2011 was last the legislative attempt that discussed the right of individuals against the capture of personal data. Rule 27(h) of UAS Rules 2021 had introduced the element of privacy protection. The provision mentioned that it should be the duty of the UAS operator to ensure the privacy of persons and property. Further, Rule 38(2) of UAS Rules 2021 restricted

[29] Madan, B. M., Banik, M., & Bein, D, *Securing unmanned autonomous systems from cyber threats*, Vol. 16(2), JOURNAL OF DEFENSE MODELING AND SIMULATION: APPLICATIONS, METHODOLOGY, TECHNOLOGY, 119-136,2016, https://doi.org/10.1177%2F1548512916628335 (last visited on June 16,2022).

[30] Kundu, R., "Govt notifies drone traffic management policy", Mint, Oct. 26, 2021 https://www.livemint.com/news/india/india-notifies-traffic-management-policy-for-drones-11635254607202.ht ml (last visited on June 16, 2022).

imagery and data capture. The Drone Rules 2021 have omitted both provisions leaving a complete void in the regulatory framework.[31]

The right to privacy is sacrosanct, and data collected by UAS might conflict with the same. The rules have no mention regulating the collection use, transfer, and deletion of data collected by UAS. The Indian Parliament is deliberating and discussing the draft Data Protection Bill in line with the European Data Protection Regulation to secure data.[32] The Personal Data Protection Bill, 2019 (PDP Bill) was returned to the parliamentary committee, which has suggested amendments and renamed the bill The Data protection Bill 2021.[33] The suggestion includes the inclusion of personal and non-personal data. The UAS regulatory framework must note the same for preparing the stakeholders to adhere to its implication on UAS operations. The issue of data localization and cross-border data transfer also needs clarity with financial regulatory body RBI mandating the same for all the financial data.[34]

The UAS operation also brings forth the surveillance capabilities employed by law enforcement authorities.[35] The Indian law enforcement authorities have also

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[31] D. Somayajula, *Eye in the Sky'- India's Drone Operations and Privacy Concerns*, Vidhi Centre for Legal Policy, July 31,2021, https://vidhilegalpolicy.in/blog/eye-in-the-sky-indias-drone-operations-and-privacy-concerns/ (last visited on June 17, 2022).

[32] A. Konert, & M. S Baryla, *The Impact of the GDPR on the Unmanned Aircraft Sector*, *Air and Space Law*, *46*(4), 517-544, 2021, https://kluwerlawonline.com/journalarticle/Air+and+Space+Law/46.4/AILA2021030 (last visited on June 25,2022).

[33] N. Dhavate, & R. Mohapatra, *A look at proposed changes to India's (Personal) Data Protection Bill*, International Association of Privacy Professionals, January 5,2022, https://iapp.org/news/a/a-look-at-proposed-changes-to-indias-personal-data-protection-bill/ (last visited on July 02,2022).

[34] FE Online, RBI reiterates its stand on data localisation; says, payment data of Indian customers to remain in India, THE FINANCIAL EXPRESS https://www.financialexpress.com/economy/rbi-reiterates-its-stand-on-data-localisation-says-payment-data-of-indian-customers-to-remain-in-india/1619933/ (last visited on June 18,2022).

[35] Bentley, J. M. "Policing the Police: Balancing the Right to Privacy Against the Beneficial Use of Drone Technology", Vol 70(1), HASTINGS LAW JOURNAL, 249-296,(December,2018) https://repository.uchastings.edu/hastings_law_journal/vol70/iss1/6/ (last visited on July 15,2022).

started deploying UAS for surveillance operations.[36] The Drone Rules 2021 empower the Central Government to exempt certain UAS operations from safeguards of UAS regulations. The measures for privacy are presently non-existent in the present regulatory framework. The UAS, with its unique ability to hover, extend endurance, and low atmosphere flying capabilities, may also be employed in the future for persistence surveillance. If surveillance is necessary, the question arises whether there is a need for a warrant from a judicial authority, as in the case of a search warrant.[37] The use of UAS may be justified as an urgent measure or under challenging circumstances to bypass the permission needed to initiate surveillance. The autonomous UAS is carrying out surveillance and capturing data also pose a grave risk to the privacy and data of the individual.[38] The protocol to access, review, transfer, and delete also need to be established to reduce the risk of misuse and tampering.

In matters of the right to peaceful enjoyment of property, individuals are protected from unlawful interference in the form of trespass. The UAS with size, horizontal and vertical flight envelope, endurance, payload, ease of launch, and recovery makes it a contentious issue in matters of trespass.[39] The aspect of minimum reasonable vertical height for operating UAS without encroaching or disturbing the peace of individuals on the ground needs further clarity. The manner of flight, recurrence, and place of UAS use will also play an essential role in deciding the appropriate thresholds for trespass. In addition to that overlap between public and

[36] S. Das, & N Chandra, *Drones come in handy for police in enforcing lockdown,* Mint, April 6, 2020 https://www.livemint.com/news/india/drones-come-in-handy-for-police-in-enforcing-lockdown-11586196187231.html (last visited on July 09,2022)

[37] G. S. McNeal, W Goodwin,., & S.Jones, *Warrantless Operations of Public Use Drones: Considerations for Government Agencies,* FORDHAM URBAN LAW JOURNAL, *44*(3), 703-723,2017 https://ir.lawnet.fordham.edu/ulj/vol44/iss3/4 (last visited on June 16,2022).

[38] Finn, R. L., & Wright, D, "Privacy, data protection and ethics for civil drone practice: A survey of industry, regulators and civil society organisations", *Computer Law & Security Review*, *32*(4), 577-586,: https://doi.org/10.1016/j.clsr.2016.05.010 (last visited on June 18,2022).

[39] H. B. Farber, *Keep Out! The Efficacy Of Trespass, Nuisance And Privacy Torts As Applied To Drones*, GEORGIA STATE UNIVERSITY LAW REV, *33*(2), 359-409, 2017 https://readingroom.law.gsu.edu/gsulr/vol33/iss2/3 (last visited on June 18, 2022).

private property, flight time, right of passage, the intent of the UAS operator will also be necessary for determining the charge of trespass.[40]

The UAS operations moving towards heavy cargo trails will bring the operator's liability to the forefront. The Drone Rules, 2021 has significantly reduced the penalties and liability imposed by UAS Rules 2021. Further, the insurance principles to the UAS ecosystem have been aligned to the Motor vehicles Act 1989, which might be inadequate considering the aerial operations and dangers posed by life and property on the ground.[41] If contested in a court of law, the cases in the future may bring the dimension of applicability of strict liability principle and penal liability of the operator. The UAS operations will also be open to offenses under the Indian Penal Code, 1860. The incident reporting to DGCA and local law enforcement inquiry may create bottlenecks with multiple investigations initiated simultaneously.

V. Global Developments in UAS Regulation

The UAS operations worldwide have accelerated, especially after the covid 19 pandemic, with countries revising the regulatory framework to cope with the ever-increasing diverse UAS ecosystem.

The European Union (EU) has introduced a common regulatory framework for all its member from January 1st, 2021, with a two-year transition period to adopt regulations.[42] The new framework operates on classification based on risk profile, namely a) open, b) specific c) certified. All drones will fall into the limited open category till the finalization of the regulatory framework in the interim period. The registration formalities also provide scope for synchronization of UAS

[40] T. A. Rule, *Airspace in an age of drones*, BOSTON UNIVERSITY LAW REV, *95*(1), 195-208, 2015, https://www.bu.edu/bulawreview/files/2015/02/RULE.pdf (last visited on June 17,2022).

[41] K. DAS, & M. Arshad, *As drones take off under fresh rules, insuring their flight still has a host of teething troubles*, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/prime/fintech-and-bfsi/as-drones-take-off-under-fresh-rules-insuring-their-flight-still-has-a-host-of-teething-troubles/primearticleshow/87288034 .cms (last visited on July 11,2022).

[42] Group One Air, *New EASA Drone Regulations | 2021 Updated*, https://www.grupooneair.com/new-easa-drone-regulations/ (last visited on June 12, 2022).

operation in member states, even if the drone is registered in another member state or outside EU member states.

In the United States of America, the Federal Aviation Administration (FAA) has introduced The Operation of Unmanned Aircraft Systems over People Final Rule, which became effective on April 21, 2021.[43] The rules allow the operation of UAS over people and in night conditions subject to restrictions. This is to effect liberalized framework to improve the UAS ecosystem. The FAA is also enforcing the Remote ID for UAS identification and location tracking from 2023 onwards

In Asia, The Civil Aviation Authority of Malaysia introduced three new civil aviation directives, which would be effective from March 1st, 2021, to meet the emerging challenges of the UAS operation.[44] The Malaysian Civil Aviation Regulator had introduced regulations in 2016 for Small unmanned aircraft, Small unmanned surveillance aircraft, Unmanned aircraft systems of more than 20 kilograms. Additionally, a permit is also required for commercial operations from the Director-General of Aviation. The first directive of March 2021, CAD 6011 Part (I), introduces the establishment, procedure, rules, and administration of the Remote Pilot Training Organization. The second directive, named Agricultural Unmanned Aircraft System Operations, focuses on a niche area of agriculture numbered CAD 6011 Part (II). The final directive Special Unmanned Aircraft System Project, numbered CAD 6011 Part (V), is a liberalized framework to encourage drone investors, innovators, production capacity to form a robust ecosystem and drone hub in Malaysia.[45]

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[43] FAA, *Operations Over People General Overview. Federal Aviation Administration*, https://www.faa.gov/uas/commercial_operators/operations_over_people/ (last visited on May 27, 2022).

[44]CAAM "UNMANNED AIRCRAFT SYSTEM", https://www.caam.gov.my/wp-content/uploads/2021/03/ CAD-6011-I-RPTO-1.pdf (last visited on July 17, 2022).

[45] Ministry of Transport Malaysia, Media Release Minister of Transport Malaysia, https://www.mot.gov.my/en/News/Media%20Release%20YBM%20MOT%2025%20February%202021-%20Launch%20of%20New%20Unmanned%20Aircraft%20Systems%20(UAS)%2025022021.pdf (last visited on June 25,2022).

VI. Conclusion

The Indian regulatory authorities, with notification of Drone Rules, 2021, have taken the appropriate path for encouraging investors and developing a robust UAS ecosystem. The Drone Rules, 2021, have clarified timelines and reduced the procedural hurdles under UAS Rules, 2021. The regulatory framework with the motto of the liberalized pathway has certain shortcomings. The Ministry of Civil Aviation, India, must provide a clear timeline for installing safety parameters such as NPNT, Geo-fencing, and strobe lights that have been presently not notified. The Drone Rules, 2021, have omitted the reference to privacy protection, which must be addressed. The UAS stakeholders must plan and carry out a suitable risk assessment analysis to understand how to manage the vast data collected by UAS operators, especially UAS operators working as commercial service providers. UAS use by law enforcement also brings important issues to the forefront. The risk for warrantless tracking and surveillance will lead to grave infringement of the fundamental right of individuals. The data protection authority of France enforced a ban in 2021 on UAS use by police, which highlights the risk and conflict yet to emerge in this domain. The issue of trespass and the right to peaceful enjoyment of the property will also be contentious, with Drone Rules 2021 only classifying air Zones and not the manner of UAS operation. The problems arising from UAS flights at low heights, especially in urban areas, are yet to be addressed. The Drone Rules, 2021, have mentioned the aspect of insurance for third-party liability. Still, the same must consider the additional risk arising from adverse incidents of large commercial UAS, which are being tested for commercial cargo operation. In case of trespass or unauthorized use of UAS, the aspect counter-drone protocol in civilian airspace also needs clarity about who is allowed to intercept and take down rogue drones. The past year has also seen the use of UAS for carrying out attacks on civilian and military installations. The risk of proliferation of such large UAS, which can be tampered with to carry out violent attacks, must also be investigated as presently counter-drone devices are deployed near strategic installations only. The Drone Rules, 2021 has simplified the digital sky platform under the aegis of DGCA. Still, there is a further need for a specialized division to track and monitor activities and incidents related to UAS within India. The UAS ecosystem will grow at a sustained rate with increased use within civilian airspace. The Drone Rules, 2021 is a positive step, but the challenges must be discussed and addressed in consensus with UAS stakeholders.

Vol. 14 No. 2 ISSN: 0976-3570

Pre-Natal Diagnosis and Judicial Forums: The Application of Transformative Constitutional Values in the Medical Termination of Pregnancy Act, 1971

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Abstract

Termination of pregnancies by itself is an extremely sensitive issue and is even characterized as an offence within Sections 312-316 of the Indian Penal Code. However, legally sanctioned exceptions have been created in the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the "MTP Act"). Whenever congenital malformations are detected in a foetus, the relaxation of the upper statutory limit set by the MTP Act becomes the subject of intense debate. When the permissible statutory period elapses, writ petitions to judicial forums may become the last refuge of couples who wish to terminate pregnancy.

Many experts question the legal legitimacy of such a relaxation since the time limit set by the statute is unambiguously precise with no scope for exceptions save for a few statutory conditions. However, the authors argue that there are certain eventualities in cases like these, which can form a class by itself and which the MTP Act doesn't take into account. The authors shall proffer new medico-legal arguments using broader constitutional values and suggest changes in the MTP Act to keep it in consonance with newer conceptions of 'mental health' and 'reproductive autonomy'.

It is stated at the outset that the purpose of this article is to further enrich the medical jurisprudence on pre-natal technologies by using principles of laws discussed in Courtroom decisions. The paper shall provide a critique of the legal insights and Court precedents which have shaped discussions on the legal challenges faced in pregnancy cases where the presence of foetal anomalies forces the parents to make difficult choices regarding the continuation of their pregnancies. It is maintained that the domain of this paper shall be limited to

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legal principles and decisions pertaining to the Indian jurisdiction. The technical and biological variables behind the causation of genetic disorders shall be beyond the scope of this paper.

Key words: Prenatal diagnosis, Foetal anomalies, Medical Termination of Pregnancy (MTP) Act, Genetics, Medico-legal

I. Introduction

Petitions[3] filed across High Courts and the Supreme Court of India by prospective parents often demand a relaxation on the permissible statutory period for abortion under the Medical Termination of Pregnancy Act 1971[4] to prevent the birthing of a child who may be born with severe congenital and/or physical anomalies. A perusal of the relevant sections in the MTP Act lays down that permission to carry out the termination of a pregnancy could be allowed in a limited number of situations. However, with the notification of the new amendment, the statutory time limit doesn't have to be strictly adhered to if there is detection of 'substantial foetal abnormalities.' However, which case comes within the bracket of 'substantial foetal abnormalities' is left to the discretion of the Courts.

Indeed, there have been precedents laid by the Apex Court of India where the statutory period had elapsed, yet the abortion petitions were allowed owing to the detection of foetal anomalies- albeit under limited and specific circumstances. In *Tapasya Umesh Pisal* v. *Union of India*[5], the Hon'ble Apex Court had considered the question of granting permission for termination of pregnancy of 24 weeks for saving the life of a woman and held that when there is a grave danger to the pregnant woman's own physical and mental health, an abortion petition is to be accepted. It was taken into account that the baby would not grow into an adult and therefore the Court deemed it fit to allow the petition.

[3] Akshi Chawla, 'Why 243 Indian Women Had To Ask a Court For Permission To Abort' (*Business Standard*, September 5, 2020) <https://www.business-standard.com/article/health/why-243-women-had-to-ask-a-court-for-permission-to-abort-says-report-120090500257_1.html> accessed 01 February 2021.

[4] Medical Termination of Pregnancy Act, 1971, Sections 3-5.

[5] *Tapasya Umesh Pisal* v. *Union of India* [2018] 12 SCC 57.

In *A* v. *Union of India*[6], the Hon'ble Apex Court had an occasion to consider granting permission for medical termination of a pregnancy, that had surpassed 25/26 weeks. The Court found that the foetus was causing grave danger to the mother's life and was suffering from incurable medical conditions as a result of which the petition was admitted. It was further observed that the foetus would not survive outside the womb and there was no point in continuing with the pregnancy. In *Mamta Verma* v. *Union of India*[7], the Hon'ble Apex Court had occasion to consider the question of termination of pregnancy during the 25th week of a pregnant woman, apprehending danger to her life after discovering that her foetus was diagnosed with a defect that leaves foetal skull bones unformed and such a condition was untreatable. It was certain to cause the infant's death during or shortly after birth, and the condition was also known to endanger the mother's life. Likewise, the matter was admitted.

In *S. Jayanthi v. Union of India*[8], the petitioner's pregnancy had crossed 26 weeks, yet it was observed that even if the child is born, the chances of its survival are remote, and it is not possible to predict the longevity of its life span even after numerous surgeries. Going by the current stream of interpretations, statutory relaxations by way of Courtroom petitions are primarily allowed in cases where life outside the womb is incompatible or the condition of foetal impairment is causing danger to the mother's life since the mental anguish would be too severe for the birth-giver. It still begs the question- What constitutes 'mental anguish' in the event of detection of foetal anomalies? Why does mortality alone define the causation of mental anguish from the viewpoint of the Courts? What exactly is included within the ambit of 'substantial foetal abnormalities'? Would these petitions still hold water if there is no harm to the physical health of the mother and yet the foetus has a significant chance of being born with physical and mental challenges with no threat to the longevity of its life? There is a certain class of abortion seekers which is caught in the middle of these questions, and which do not exactly fall into the bracket of 'substantial foetal anomalies'.

The conundrum goes into the technicalities of law and bioethics and reaches the core of issues like reproductive agency. In such cases where there is no mortality risk, even the statutory period of 24 weeks is not considered amenable to

[6] *A* v. *Union of India* [2018] 14 SCC 75.
[7] *Mamta Verma* v. *Union of India* [2018] 14 SCC 289.
[8] *S. Jayanthi* v. *Union of India* [2019] SCC OnLine Mad 2078.

relaxation as the sense of urgency gets stripped if there is absolutely no danger to the health of the mother or the foetus. Placing a limit on the number of eventualities under which abortion petitions are acceptable negates the experiences of those who without any fault on their part end up reaching the judicial forum(s) after the statutory limit for abortion has been crossed and yet do not find themselves in the bracket of 'substantial foetal abnormalities'. For example, a Supreme Court bench headed by the former Chief Justice, Sharad Arvind Bobde rejected a petition in which the mother, a resident of Alibaug, Maharashtra, belonged to a lower-middle-class family. The foetus was diagnosed via an antenatal confirmatory test at 22 weeks with Trisomy 21, a chromosomal aberration more commonly known as Down Syndrome. The couple already had a differently abled child in the family, knew the hardships of bringing up such a child, and thus, wanted an abortion after receiving the confirmatory reports.[9]

Further costs and risks are attached to the confirmatory tests which are conducted if the first results are indicative. The process of getting conclusive confirmatory tests along with the initial screening tests mostly crosses the 20-week limit put forth by the unamended MTP Act. Combined with this is the socio-economic background of the couple involved who not only had limited access to medical resources but also suffered from considerable lack of awareness. They originally hailed from rural habitats with little exposure to the trappings and technicalities involved in approaching the judicial and medical forums. This added two weeks to their delay. Cases take time to get filed and then reach the bench for adjudication. Since the Supreme Court judges are not medical experts, they often order another set of medical reports to invite the comments and opinions of medical experts in the field, furthering the delay. During the 26th week of the pregnancy, the bench rejected the abortion petition as the statutory period had elapsed and the foetus, though afflicted with 'Down Syndrome' didn't cause any threat to the mother's health or to its own lifespan.[10]

Similarly, in another shocking example, Patna High Court denied an abortion of a 26-week-old foetus of an HIV-positive rape victim as the Court felt that it was the responsibility of the Court to keep the child alive. The victim appealed to the

[9] Somashekhar Marutirao Nimbalkar and Dharti Sanjay Patel, 'The Medical Termination of Pregnancy Act: Need To Keep Pace With Technology' (2018) Indian Journal of Medical Ethics 4(1) <https://ijme.in/articles/the-medical-termination-of-pregnancy-act-need-to-keep-pace-with-technology/?galley=html> accessed 02 February 2021

[10] ibid

Supreme Court which heard her plea but denied her an abortion citing similar reasons. It is quite probable for the above-mentioned factual matrix to repeat itself, especially in a country like India where there is an acknowledged disparity[11] in the access to socio-economic resources and health forums. Parental autonomy in countries like India is not an unqualified right. However, by recognizing that there are couples which encounter legitimate bottlenecks in access to resources and information, medico-legal bioethics can constitutionally justify the relaxation of the statutory period in certain contexts using the humanitarian aspect of Article 21. This is where the 'criminal' connotation of the 'Victorian era'[12] Indian Penal Code becomes an antiquated conceptualization of abortion and hurts in cases where the humanitarian intervention of Article 21 is desperately needed.

The explanations drafted for Section 3(2) of the MTP Act with all its expansive interpretation, do not take note of all eventualities under which the relaxation may be permitted. While the provision talks about the importance of recognizing mental health as an important facet in the termination of pregnancy, Explanation I[13] describes the mental anguish caused to a woman in case the pregnancy has arisen out of rape while Explanation II refers to the anguish caused by unwanted pregnancies due to the failure of any device or method used for the purpose of limiting children. Both Explanations are laudable additions, however, the legal description of extremely important terms like 'good faith'[14] and 'mental health'[15] does not make it entirely clear whether the anguish caused by the mere detection of congenital anomalies is a ground grave enough to relax the upper limit for abortion set by the MTP Act 1971.

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[11] Rural Health Statistics (2019-20), Ministry of Health and Family Welfare, Government of India, 2021.

[12] David Skuy 'MACAULAY AND THE INDIAN PENAL CODE OF 1862: THE MYTH OF THE INHERENT SUPERIORITY AND MODERNITY OF THE ENGLISH LEGAL SYSTEM COMPARED TO INDIA'S LEGAL SYSTEM IN THE NINETEENTH CENTURY (1998) 32(3) MODERN ASIAN STUDIES CAMBRIDGE CORE <www.cambridge.org/core/journals/modern-asian-studies/article/abs/macaulay and-the-indian-penal-code-of-1862-the-myth-of-the-inherent-superiority-and-modernity-of-the-english-legal system-compared-to-indias-legal-system-in-the-nineteenth-century/6A9889BD636F246801F478CF04079DFF> accessed 03 February 2021.

[13] Medical Termination of Pregnancy Act 1971, Section 3(2)(b)(ii), Explanation I and II, what constitutes as a mental injury.

[14] *Ibid*, an opinion formed in good faith over what constitutes 'mental injury'.

[15] *In the High Court on its own Motion* v. *The State of Maharashtra*, Suo Moto Public Interest Litigation No. 1 of 2016; Bombay High Court 20 September 2016, in which the Courts acknowledged how the explanatory notes on 'mental health' in the statutes are insufficient to tackle other possibilities.

Ordinarily, any criterion unrelated to a woman's aspirations and wishes dictating the continuation of a pregnancy is considered a regressive interference with her bodily autonomy.[16] Public law/constitutional litigation in medicine[17] has often enlarged the scope of legislative instruments by framing the issue of access to medicine or any procedure on a rights-based model. This allows the Courts to pave the way for a kind of medical access which couldn't be occasioned by statutory laws alone. For medicine in particular, public interest petitions filed over the years have been instrumental in securing a host of positive orders including providing 'special treatment to children in jails, addressing pollution hazards, casting away inhuman conditions in aftercare homes, securing health rights for mentally ill patients, providing immediate medical attention to injured people, ensuring corruption less operation of blood banks and medical programmes'[18] etc. It is for this reason that bioethics and constitutional litigation must be read and analyzed in consonance owing to the huge bearing that the latter has on the former. None of these orders would be legally enforceable under the provisions of directive principles of the State. Therefore, the humanitarian aspect of Article 21 has the ability to triumph when the appropriate factual matrix desires it to do so.

In such a scenario, the authors argue that legal principles can influence medical bioethics in order to come up with a comprehensive interpretive solution for solving the legal conundrum and that far from being instances of judicial activism, the relaxation of statutory upper limit in the MTP Act can, in fact, be legally justified with the help of medical bioethics. It shall also be argued that the newly amended Medical Termination of Pregnancy Bill 2021[19] with its liberal additions still falls short of addressing the bottlenecks in the un-amended legislation.

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[16] ibid.

[17] Poorvi Chitalkar and Varun Gauri, 'A Qualified Hope: The Indian Supreme Court and Progressive Social Change', (2019) THE RECENT EVOLUTION OF PUBLIC INTEREST LITIGATION IN THE INDIAN SUPREME COURT (2019) 77-91 Cambridge University Press <https://www.cambridge.org/core/books/abs/qualified-hope/recent-evolution-of-public-interest-litigation-in-the-indian-supreme-court/1C267D85579009978BA46F536235761E> accessed 04 February 2021.

[18] K. Mathiharan, 'The Fundamental Right to Health Care', (2016) 13 (123) INDIAN JOURNAL OF MEDICAL ETHICS, <https://ijme.in/articles/the-fundamental-right-to-health-care/?galley=html> accessed 04 February 2021.

[19] The Medical Termination of Pregnancy Act 2021, Amendment Sections 3-5.

II. Expanding Constitutional Litigation in Medicine

A. Article 21: A Critical Underutilised Tool

The importance of constitutional litigation in medicine is extremely indispensable. It is important to understand the history of Article 21 and its importance in medico-legal argumentation to realize how its expansive interpretation has often enlarged the access to socio-economic rights guaranteed within the Constitution. The original intent of Article 21 was to act as a procedural safeguard against improper exercise of power by State instrumentalities.[20] It was, therefore, characterized as a negative right which prevented the State from taking steps which transgress fundamental rights. Public law litigation and its relentlessness opened a floodgate for an immense expansion of Article 21. Prior to its judicial expansion, socio-economic obligations were not considered as 'justiciable'[21] as the negative rights protected under Article 21. Socio-economic rights were therefore dependent on the overall development of a State and the strength of its resources and could only be 'progressively realized'[22] but Article 21 and its continued re-interpretation paved the way for socio-economic obligations to be characterized as rights which could be demanded from the State through enforcement of public interest petitions. It is for this reason that constitutional litigation must be paid attention to in medical bioethics owing to its huge bearing in medico-legal cases.

The Medical Termination of Pregnancy Act 1971 has also been ceaselessly qualified by the right to health paradigm which emanates from Article 21.[23] However, aspersions are cast with respect to the threshold with which it must be qualified in any given case. Accepting reproductive autonomy into the domain of 'right to health'[24] also means accepting the pitfalls and limitations which are put on fundamental rights. Furthermore, adding 'substantial foetal anomalies'[25] to the statute without clearly contextualizing the threshold of its application leads to

[20] Dr. Gyanendra Kumar Sahu, 'AN OVERVIEW OF ARTICLE 21 OF THE INDIAN CONSTITUTION', (2017) 3(3) INTERNATIONAL JOURNAL OF LAW, < https://www.lawjournals.org/archives/2017/vol3/issue3/3-3-31> accessed 05 February 2021.

[21] Justiciable- subject to trial in a Court of law.

[22] Sahu (n 18).

[23] *Suchita Srivastava* v. *Chandigarh Administration* (2009) 9 SCC 1.

[24] Mathiharan (n 16).

[25] Medical Termination of Pregnancy Act 1971, Section 3 (2B)

further conflict wherein the subjective values of High Court judges as well as the people constituting the medical board become the deciding factors in adjudication.

The prerogative exercised by High Court judges as well as the due weightage given to the opinions of medical practitioners makes it anything but a rights-based law. Anxious parents find themselves dangling in a stage of pregnancy nearer to the statutory limit placed for termination of such a pregnancy. Furthermore, since the Court ruling may move either way, approaching legal mechanisms can prove to be an unbearably daunting task. The newer waves of constitutional/public law litigation as well as a nuanced medico-legal argumentation can help entangle such eventualities which ought to be cleared by a constitutional bench and yet haven't been addressed by the Apex Court in a holistic manner. The fundamental importance of making 'reproductive choices' becomes incumbent on the building of steady structures of information symmetry and access to medical services. In such a scenario, socio-economic factors, access to information and other 'positive rights'[26] shall be considered equally to ensure 'reproductive justice'.[27] It is for this reason that the authors would go on to argue that by merely looking at 'whether the statutory limit has been breached or not' a very myopic and hyper-technical interpretation emerges which doesn't have all the answers. Therefore, the Courts need to appreciate the factual background of every case and exercise their discretion in a careful and calibrated way. The factual illustration laid down at the beginning of the paper is one such example where a rigid interpretation of the statute follows the letter of the law but not its spirit. Although the termination of pregnancy was disallowed, it wasn't 'reproductive justice'.

III. Precedents

In criminal law jurisprudence, self-preservation[28] is one of the exceptions to the acts of criminal aggression. In other words, any action done with the purpose of causing 'criminal harm' can be condoned by the State if done for the prevention of more grievous harm. Acts committed in pursuance of self-preservation or

[26] Sandra Fredman FBA, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (Oxford University Press, 2008)

[27] Adam Conti, 'Drawing the Line: Disability, Genetic Intervention and Bioethics' (2017) 6 (1) Laws, MDPI <https://www.mdpi.com/2075-471X/6/3/9> accessed 05 February 2021.

[28] Indian Penal Code 1860, Sections 96-106.

defending oneself become notified exceptions to such offences. The conception that abortion is an inherent 'crime' which is merely allowed to exist in the form of exceptions is a problematic way to characterize its position in the field of law. It takes away from it the rights-based model in which it has been encouraged to be seen.

The reason why such an observation requires contemplation is that it places a very decisive and certain limit on the number of eventualities under which the abortion petitions must be accepted. Such an interpretation narrows down the complexity of situations in which termination of pregnancy is invoked whenever congenital afflictions are detected. For invoking a successful abortion petition, the nature of congenital afflictions should be such that the self-preservation of either the mother or the foetus is threatened. However, abortion is also a rights-based issue guaranteed by Article 21 of the Constitution and any factors external to the agency and aspirations of a woman shouldn't be the only factors influencing the right to invoke it.

There are notable conditions mentioned in the Explanations to Section 3 of the MTP Act 1971 that act as exceptions to the 'crime of abortions' but there are two very important conditions which are without any threshold and have to be determined by the context and circumstances surrounding the pregnancies i.e., the severity of the mental anguish occasioned by the pregnancy as well the 'substantial' risk of foetal impairment and congenital malformations. One needs to ask what happens to the scope of these provisions when the 20–24-week statutory period has been crossed. The recent amendments to the Medical Termination of Pregnancy Act in 2021 are certainly progressive and raise the upper limit set for allowing termination of pregnancy which partly alleviates the problem.[29] However, as long as the aforementioned highlighted issue remains unanswered, the Courts are missing out on developing a more well-defined and thoughtful medico-legal jurisprudence. By refusing to shed light on the constitutional principles applicable to the issue, Courts are implicitly accepting that such a termination of pregnancy shall be allowed only if, either the life of the mother is in danger (self-preservation), or if the child so born would have to undergo medical procedures which have 'high morbidity' or 'high mortality', or if it is certain that the child shall not grow into an adult and is afflicted with such

[29] World Health Organization, 'India's Amended Law Makes Abortion Safer and More Accessible' (April 2021)

glaring biological defects that life outside the womb would be completely incompatible. It is contended by the authors that the relaxation of the upper statutory limit could also be constitutionally justified under certain facts and conditions which have nothing to do with the above-stated eventualities.

A Pratigya Campaign study[30]of MTP cases between 2016 and 2019 showed that Courts primarily rely on medical board opinions, which take into account various factors including the severity of afflictions detected in the foetus. With a diverse composition of the boards as well as a lack of uniform jurisprudence on abortions, it will be impossible to reach a decision quickly, and this could result in pregnancies reaching advanced gestational age before termination is permitted. It makes it even more pertinent for our Courts and jurists to start changing their approaches to ensure complete reproductive justice. Therefore, it is befitting that the medico-legal principles push towards the acknowledgement that even with the installation of required infrastructure there could be instances where abortion seekers are plagued by institutional limitations with respect to access and awareness (as described in the illustration in the beginning). Being mindful of these socio-economic realities would greatly benefit couples who reach the judicial forum later than what is allowed simply owing to the difficulty of their circumstances. Such a realization would help the Court to be cognizant of such delays while deciding abortion petitions. Courts are a vehicle for change and have the prerogative to act as protectors of bodily autonomy and bestow beneficence on individuals who need it.

IV. **Justifications**

With the enactment of the Medical Termination of Pregnancy Act 1971, India had become one of the first few countries to legalise abortion on moderately liberal grounds. In fact, the legislature has gone a step further by raising the gestational limit from 20 weeks to 24 weeks based on the recommendations of various stakeholders. However, it is the contention of the authors that more exceptions need to be carved out in order to accommodate as many eventualities as possible by giving due regard to the factual background of every petition and ascertaining

[30] Anubha Rastogi and Raunaq Chandrashekar, 'Assessing the Judiciary's Role in Access to Safe Abortion', A Pratigya Campaign Study for Gender Equality and Safe Abortion Report, (May 2019-August 2020).

the socio-economic condition of every couple. The most important hallmarks of ethics lie in protecting the values of 'autonomy, beneficence and justice'[31]. Couples who untimely reach the judicial forum through no fault of their own- either owing to a late diagnosis or lack of access- deserve the utmost beneficence from the authorities. By only focusing on the fact that the gestational period has been crossed, a very narrow interpretation emerges on a very complex subject.

While it is still difficult to bring a uniformed and streamlined method of interpretation, it will bring a much-needed interpretive relief to focus on factors other than the ending of gestational period and instead shifting focus on other medico-legal issues which the courts have ignored before: -

A. Qualifying Article 21- Judicial Activism

As explained above, Article 21 is more than the sum of its words. It is a certified protection from State interference which includes not only ensuring 'animal existence'[32] but rights which go beyond that and include other facets. The expression 'life' has a more nuanced conceptualization under this provision. The facet of reproductive autonomy not only includes the right to procreate but also the right to abstain from procreating under any condition. This includes a refusal to procreate as well as the refusal to go through with any pregnancy after a procreative act.[33] The term 'life' under the provisions includes its literal definition as well as the factors incidental to its adequate sustenance. In other words, an 'inhibition against its deprivation extends to all those limbs and faculties through which life is enjoyed'.[34] It is in this context that late-term abortions in the face of congenital anomalies must be appreciated.

However, the conditions mentioned in the MTP Act 1971 allow for such a termination subject to the gestational periods of the pregnancy. It is here, that Article 21 becomes limited in application. It operates within reasonable restrictions. Its application should not be inconsistent with the law of the land. If a statute places a definitive and unambiguous limit on the set of conditions

[31] Somashekhar Marutirao, PATEL, (n.38).
[32] *Kharak Singh* v. *State of UP*, 1964 SCR (1) 332.
[33] Bhavish Gupta and Meenu Gupta, 'THE SOCIO-CULTURAL ASPECT OF ABORTION IN INDIA: LAW, ETHICS AND PRACTICE' (2016) 140-150 INDIAN LAW JOURNAL REVIEW < https://ili.ac.in/pdf/p10_bhavish.pdf> accessed 02 March 2021.
[34] *Munn* v. *Illinois*, (1877) 94 US 113.

required for admission of a petition, then the law of the land has to be followed. This was the principle used in the '*Nikita Mehta*'[35] case where the Court refused to relax the statutory limit imposed by the statute and explained that such an interpretation would be 'usurpation of authority' by the judiciary. It is contended that the enhanced interpretation of Article 21 now has several precedents to support it and the statutes have the ability to be qualified and relaxed using public law litigation. This is not judicial activism but context-specific application of a law where there is unintended ambiguity. Furthermore, constitutional principles have always had the mandate to discriminately apply the law of the land in pursuance of a legitimate objective[36] (reservation of minorities for instance). In support of the above, the authors contend that the usage of Article 14 is something the Courts have ignored in such situations.

Article 14 of the Constitution is written as the 'equality before law doctrine'[37]. However, it is also much more than that. Although it ensures that no special privilege is to be meted out in favour of anyone, it also demands an equal application of law for similarly placed individuals.[38] A more detailed explanation of 'equal protection of law'[39] entails that there is an obligation on the State to bring forth equality using the instruments of constitutional prerogatives and making room even for unequal application of law for varying needs of different classes or sections of people who by virtue of their situation require differential treatment. Article 14 is fundamentally important from the perspective of medical ethics since it paves the way for differential application so long as there is a legitimate classification in pursuit of a legitimate objective.

The All-India Rural Health Statistics (2018-19)[40] indicate that there are 1351 Gynaecologists and Obstetricians in community health clinics in rural areas

[35] *Nikhil Datar* v. *Union of India*, SLP (C) 5334 of 2009.

[36] Equality before law and equal application of law-Article 14, Constitution of India.

[37] Ibid.

[38]Marc Galanter, 'Equality and "Protective Discrimination" in India' (1961) 16 (42) RUTGERS LAW REVIEW <https://heinonline.org/HOL/LandingPage?handle=hein.journals/rutlr16&div=8&id=&page=> accessed 05 March 2021.

[39] Ibid

[40] Statistics Division, Ministry of Health and Family Welfare, Government of India, 'All India Rural Health Statistics' (2018-2109)

across India, and the shortfall is 4002, i.e., there is a 75% shortage of qualified doctors. It is, therefore, inconceivable that our State machinery should operate under the presumption that every individual's diagnostic circumstances shall be similar and timely. The MTP Act 1971, by prescribing a limit of 24 weeks assumes certain conditions to be met. The prescription of a limited gestational period assumes that there is a timely diagnosis at all times and that every parent goes through the required medical procedures without any problems whatsoever.

The host of situations including late diagnosis, socio-economic roadblocks in access to healthcare or other such delays which don't flow from the willful negligence or laxity on the part of the parents could easily form a classification which is distinct from the natural assumptions of the statute. The said classification of patients should be constitutionally allowed to have statutory relaxation from the strict 24-week period provided under the statute. The purpose of such a classification is legitimate and in pursuance of the statute's intention of protecting the right to refuse the continuation of unwanted pregnancy and at the same time it retains the legitimacy of parameters set by the law. Therefore, using the social and situational realities of different factual backgrounds, the Courts can be more cognizant of medical ethics while adjudicating such petitions.

B. Enlarged Perspective on Mental Health

A reproductive justice framework which doesn't properly integrate the contours of mental health would never be complete or comprehensive enough. The connotation of 'mental health' in the MTP Act 1971 is currently operating in an extremely limited and narrow way. The Act mentions that the grounds for seeking an abortion get strengthened if the continuation of a pregnancy causes grave injuries to a woman's mental and physical health. However, disallowing abortions in cases of no 'immediate threat'[41] to the life of the mother follows the logic that injury to mental health is grave enough only in cases where either the mother's life is in danger, or the life span of the foetus is likely to be short.

<https://main.mohfw.gov.in/sites/default/files/Final%20RHS%202018-19_0.pdf> accessed 05 March 2021.

[41] Tapasya Umesh Pisal v. Union of India (2018) 12 SCC 57.

However, mental health is a much more complex subject[42] and injury to mental health could be uniquely specific to an individual's circumstances and experiences. A short foetal life is not the sole ground where the Court can decide that there is a 'grave injury' to mental health. Not being in a mental space where one can provide the requisite lifestyle and nourishment needed for bringing up a congenitally afflicted child is as much an injury to mental health as is any other factor.[43] There may not be a threat to anyone's life but raising a child with congenital afflictions could subject a mother to poor mental health throughout her life.[44]

In the Supreme Court case pertaining to the Maharashtra family discussed above, the foetus was afflicted with Down Syndrome where the Court opined that 'everybody knows' that children with Down Syndrome are undoubtedly less intelligent but 'they are fine people'. The Court's reasoning is devoid of any scientific and social appreciation of the facts at hand. Parents of children with chronic diseases have also been reported to have poor mental and physical health[45]. Furthermore, this was a family with limited financial resources and didn't have the required emotional resolve to bring up another child afflicted with Down Syndrome. The economic and social costs of bringing up a child diagnosed with Down Syndrome are significantly higher than the costs of bringing up regular children.[46] Such children are also at a higher likelihood to develop other conditions[47] which albeit can be corrected but require immense resources and can take an emotional toll. A lot of literature available on this subject is from the developed countries where State-sponsored insurance schemes run more

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[42] Ankush K Khanna, Anusha Prabhakaran, Priyanka Patel and others, 'Social, Psychological and Financial Burden on Caregivers of Children With Chronic Illness: A Cross-Sectional Study (2015) 82(11) INDIAN JOURNAL OF PEDIATRICS < https://pubmed.ncbi.nlm.nih.gov/25976615/> accessed 06 March 2021.

[43] Veena Johari and Uma Jadhav, 'Abortion Rights Judgement: A Ray of Hope' (2017) 2(3) INDIAN JOURNAL OF MEDICAL ETHICS https://pubmed.ncbi.nlm.nih.gov/28279947/ accessed 10 March 2021.

[44] Khanna, Prabhakaran and Patel (n 40).

[45] ibid.

[46] Sheree L Boulet, Noelle-Angelique Molinari, Scott D Grosse, and others, 'HEALTH CARE EXPENDITURES FOR INFANTS AND YOUNG CHILDREN WITH DOWN SYNDROME IN A PRIVATELY INSURED POPULATION' (2008) 153(2) THE JOURNAL OF PEDIATRICS < https://pubmed.ncbi.nlm.nih.gov/18534234/> accessed 10 March 2021.

[47] Johari and Jadhav (n 41).

efficiently.[48] The added burden of approaching a judicial forum itself could be a significant cause of mental stress and anguish for the mother.

Socio-economic standing of a couple should have a much larger bearing on the Court's interpretive values regarding 'mental health' and 'good faith'. The interpretation of mental health should move away from a one-dimensional interpretation to a more diverse and comprehensive vantage point which acknowledges that grave injuries to mental health need not arise only from a specific set of straight-jacketed circumstances. A threat to the petitioner's life shouldn't be the only circumstance where mental injury should be considered grave enough. Instead, focus must be put on a much more comprehensive frame of analysis. Therefore, by adding explanatory notes to provisions like 'mental health' and 'good faith', the legislature should begin constructing the meaning of these words in its complete sense and reduce uncertainty as much as possible by accommodating even more eventualities that the statute has missed out on.

V. Reproductive Justice

Bioethics deals with the emerging legal and ethical conundrums which stem from the advances made by medical technologies which are in need of 'critical assessment'.[49] The authors disagree with the proposition that what constitutes the 'best life' shall always be looked through the lens of whether there is a detection of foetal anomaly or not. The key issue here is prioritizing certain decisions based on the intensely personal situations of couples who approach the judicial forums and do not conceive the life of a disabled foetus to be anything less than a full-value human. The purpose of this paper is instead to bring attention to neglected eventualities and socio-economic conditions which reasonably justify abortion using existing constitutional prerogatives and their application to medical bioethics.

The 'human rights model'[50] is the type of intervention which acknowledges that a person shall be seen as something more than a sum of their medical characteristics and with complete human dignity. At the same time, it strives to

[48] ibid.
[49] Conti (n 25).
[50] ibid.

achieve a delicate balance between the competing interests of disability advocates as well as the proponents of reproductive autonomy. The justifications built around these abortions should never stem from the reasoning that the tutelage of inalienable rights under Article 21 must be available only to those who have no foetal impairment. On one hand, we have the idea that eradicating disease can alleviate suffering and thus lead to more happiness while on the other hand limiting the conception of human life to a set of genetic characteristics is anything but a dignified conception of human life.

This paper in no way proposes that every termination of pregnancy where detection of genetic disabilities takes place is a cruel judgement or an affront to the dignity of lives which are impaired by such genetic limitations. The authors hold that it is possible to make space for a more nuanced appreciation of circumstances in assessing situations where reproductive agency is stifled by circumstances beyond a couple's control. By shifting the framework from the opposite extremity and re-orienting it towards the idea of 'reproductive justice'[51], the Courts and the legislature would be able to write their opinions on a broader spectrum and not see these issues in a myopic way which can significantly decrease the contradictory judgments if not eliminate them. The reproductive justice framework includes not only procreative freedom dictated by a woman's aspirations but also the right to have children in a healthy, safe, and dignified environment. Reproductive justice is an acknowledgement of the intersectionality of various political contexts and social realities. It has to acknowledge 'that we make reproductive decisions within a social context, including inequalities of wealth and power.'[52]

Therefore, petitions where relaxation of the upper limit is demanded in a landscape where the level of infrastructure and societal intervention to accommodate the disabled community is admittedly abysmal, every individual will have to face the socio-economic realities of the situation and make decisions on whether they can cope with it or not. Once we acknowledge this disparity, there is an increased expectation from the State to not keep its role limited to

[51] Samuel R Bagenstos, 'Disability and Reproductive Justice' (2020) 14 (2) Harvard Law and Policy Review < https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2020/11/Bagenstos.pdf> accessed 12 March 2021

[52] Stefanija Giric, 'Strange Bedfellows: Anti-Abortion and Disability Rights Advocacy' (2016) 3(3) JOURNAL OF LAW AND THE BIOSCIENCES https://academic.oup.com/jlb/article/3/3/736/2654254 accessed 12 March 2021.

'allowing' or 'constraining' reproductive autonomy on a case-to-case basis but also to acknowledge its affirmative role under 'Article 21' and other constitutional prerogatives towards ensuring steady support to all stakeholders so that they have the necessary economic, social and political power to exercise reproductive autonomy in their best interest.

A steady focus towards ensuring that the most comprehensive information is available to women which presents a realistic description of the life they will be raising along with 'non-directive'[53] and 'non-coercive' counselling can only happen in situations where there is a timely diagnosis, availability of resources and the couples are economically and socially aware in a way to understand the implications and contours of these eventualities. It is also true that these ideals can only be 'progressively realized' and until then the Courts as well as the legislature shall vigilantly follow the precedents being set out in every case and be on the lookout to amend and modify our statutes to keep pace with these advancements.

VI. Conclusion

The constant analysis has enabled legislature to increase the gestational limit from 20 weeks to 24 weeks which is laudable and has been described as a welcome move. However, based on the discourse described in the earlier sections of the paper, a continued overhaul and modification of our statutes shall immensely benefit future couples who would find themselves approaching the judicial forum(s). The Courts need to start with slightly lengthier judgements and detailed explanations of the statute so that the contradictions can be kept at the lowest level possible. Moreover, the Courts shall be presented with a more comprehensive factual matrix surrounding the pregnancy which a couple is going through. If the issue remains limited to merely 'whether the presence of foetal anomalies warrant a relaxation of the upper limit set in the statute' then it shall lead to a mechanical application of law and could lead to unjust outcomes for couples who find themselves in different circumstances and socio-economic conditions.

Such a relaxation if warranted by the facts at hand, should not be seen as a judicial overreach as argued by the authors and that Articles 14 and 21 have been

[53] Conti (n 25).

recognized as constitutional instruments for ensuring a comprehensive right to health even in the absence of a statute for right to health (unlike the Right to Education). In furtherance to this, the interpretive system should move away from a unidimensional outlook on 'mental health'. Based on the prevailing precedents, the Courts' conception of 'mental health' points towards a trend whereby mental injury is considered grave enough in cases where either the mother's life is in danger or in cases where the offspring is likely to have a short and painful lifespan. For making such an opinion, a woman's actual and/or reasonably foreseeable environment shall also be considered. MTP Amendment Act 2021 is a very significant step towards ensuring dignity, autonomy, confidentiality, and justice for women who need to terminate pregnancy. Replacing the archaic conception of abortion to keep up with medical advancements is a great step forward to ensure that women across India get access to safe abortions.

Vol. 14 No. 2 ISSN: 0976-3570

Limited War in India-Pakistan: Revisiting the 24 years of Kargil War

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Abstract

In May 1998, the two most important South Asian states overtly conducted their nuclear tests and thus marked the beginning of an era of nuclearisation in the sub-continent. This overt nuclearisation within the region led to a sense of optimism among scholars and policymakers which almost completely ruled out the possibility of an all-out war between India and Pakistan. However, exactly after a year the Kargil War erupts between India and Pakistan- a war that was fought between two 'nuclear power states' and since then has completely changed the equation and definition of 'warfare' between the two most important and strategically volatile states of South Asia.

The year 2023 marks the 24th anniversary of the Kargil War, and the present paper makes an attempt to apprise the lesson that both India and Pakistan have learnt in the post Kargil War era, with specific reference to the techniques and modus operandi of warfare. Questioning the very definition of 'war' as developed during the Cold War era, this paper will try to look into pertinent issues how warfare between India and Pakistan has undergone a qualitative change in the post-nuclearisation phase. A closer scrutiny of the nature of war that took place in Kargil points to the fact that there exists a space below the nuclear threshold of both India and Pakistan that can be exploited for conducting a 'Limited War'- a theoretical prism that refutes the claim made by nuclear pessimists that any war between new nuclear nations will escalate to a nuclear level. Using qualitative methodology as its framework, based on the secondary literature and insights of

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interviews of policy analyst and experts the paper wishes to contribute a new debate within the discourse of India-Pakistan Relations.

Keywords: *Limited Warfare; Kargil; India; Pakistan; Nuclearisation; South Asia; Stability-Instability.*

I. Introduction

After the Ussuri River clashes between China and the Soviet Union in 1969, the Kargil war, stands out to be the second instance where two nuclear powers engaged in a direct military confrontation with each other.[3] On one hand the war not only dashed all hopes and optimism of stability and status-quo under a nuclear umbrella, instead it also proved the prognosis of the strategic pessimists that possession of nuclear weapons cannot determine the directions of low intensity conflicts that occur at the sub-conventional level.

Although there exists a plethora of literatures on reading and understanding the Indo-Pakistan Relations in the backdrop of Kargil War using the prism of deterrence stability paradox. However very few studies and scholar have tried to interpret on the nature of the 'war' and 'warfare' that shaped the relation between the two neighboring nuclear states of South Asia after 1999. Using the theoretical framework of 'Limited War', this study attempts to map the qualitative change and lesson learnt by India and Pakistan in the post-nuclearisation phase and especially after the Kargil episode. The paper is divided in 4 major sub-sections: the first section intends to conceptualizing the concept of Limited War, section two, of the paper provides a brief discussion of the India-Pakistan relation and the third section deals with Kargil episode and its analysis using the Limited War framework, finally the concluding section makes an unbiased an critical analysis of the basic methodological assumptions and the lessons learnt by India-Pakistan after the 24 years of Kargil War.

[3] Lavoy, Peter. (2009). Introduction: the importance of the Kargil conflict. In Peter Lavoy (Ed.), *Asymmetric Warfare in South Asia: The Causes and Consequences of the Kargil Conflict.* Cambridge: Cambridge University Press, 1.

II. Origins of Limited War Strategy

As Clausewitz says "war is a continuation of policy by other means",[4] where nations before the advent of nuclear weapons, were ready to risk war or even engage in it for a stake they felt was high enough to justify any action that protects and defend the national interest. Advent of nuclear weapons completely changed this equation in the understating of warfare, the destructive potential of nuclear weapons as witnessed during the end of Second World War had transformed the nature and conduct of warfare in a significant manner. Nuclearisation of the world and the risks associated with nuclear escalation compelled one to pause and question whether the interest at stake is worth the potential cost of a calibrated and cautious use of force.[5] It is here where the idea of Limited Warfare takes its shape in the discourse of realpolitik and global politics. British military historian and strategist Sir Basil Henry Lidell Hart was one of the first advocates of limiting war and its destructive potential in the atomic age commented that "where both sides possess atomic power, total warfare makes nonsense" and any unlimited war "waged with atomic power would make worse than nonsense; it would be mutually suicidal."[6]

Limited War, as a strategy has its roots in the rivalry between the US and the Soviet Union during the Cold War period. In the 1950s, the ascendancy of weapons of mass destruction and the decline of political use of war as an instrument brought forth a new set of challenge for the United States as it searched for an effective strategy to deal with a nuclear armed Soviet Union. The dilemma that US policymakers grappled with was how to deter the Soviet Union who had challenged the nuclear monopoly of the US by acquiring the retaliatory capacity to target the US homeland.[7] The US had the option of massive retaliation but its effectiveness in deterring the Soviet challenge came under scrutiny as the threat of all-out war had lost its credibility with the growth of the power of modern

[4] Strachan, Hew & Andreas Herberg-Rothe. (2007). Introduction. In Hew Strachan & Andreas Herberg-Rothe (Eds.), *Clausewitz In The Twenty-First Century.* Oxford: Oxford University Press, 7.
[5] Sethi, M. (2009). *Nuclear Strategy: India's March Towards Nuclear Deterrence.* New Delhi: Knowledge World, 293.
[6] Hart, B.H. Lidell. (1947). *The Revolution in Warfare.* New Haven: Yale University Press, 99.
[7] Garnett, J. (1975). Limited War. In John Baylis (eds.), *Contemporary Strategy: Theory and Practice.* New York: Holmes & Meier Publishers, 115.

weapons.[8] Even while the strategy of massive retaliation continued to evolve in the mid-1950s, Bernard Brodie and William Kaufmann questioned its utility as a strategy to deal with the Soviet Union. According to Kaufmann, as both the US and the Soviets possessed the ability to destroy each other's power centers through the use of nuclear weapons, the former had to accept the parity of capabilities or risk mutual extinction.[9] Henry Kissinger, a strong voice in the school of thought that spoke against the strategy of massive retaliation had pointed out its failure in averting the Korean War, the loss of northern Indo-China, the Soviet-Egyptian arms deal or the Suez crisis. He remarked that "a deterrent which one is afraid to implement when challenged ceases to be a deterrent."[10]

It was under these circumstances that the concept of Limited war came into being and was viewed as the best alternative to massive retaliation strategy. As the US was faced with a choice between an all-out war and defeat without war, the option of Limited war provided a middle-path. It was considered to be the most viable medium of using force that carried minimum risk of nuclear escalation. Limited War offered the prospect of bringing military means and policy aims into a much closer relationship which had been the case for many years. As a matter of fact Limited war offered these benefits at a cost far smaller than a modern nuclear conflict would entail.

A. The Core Features of a Limited War

A review of the existing literatures of Limited War that emerged during the Cold War helps us in delineating its core premises in the writings of the following scholars.

Firstly, Robert Endicott Osgood in his book *Limited War: The Challenge to American Strategy* defined Limited War as "one in which the belligerents restrict the purposes for which they fight to concrete, well defined objectives that do not demand the utmost military effort of which the belligerents are capable and that can be accommodated in a negotiated settlement… The battle is confined to a

[8] Kaufmann, W. (1956). Limited Warfare. In William Kaufmann (eds.), *Military Policy and National Security.* Princeton: Princeton University Press, 102-136.
[9] Kaufmann, Limited Warfare, 107.
[10] Kissinger, H. (1957). *Nuclear Weapons and Foreign Policy.* New York: Council on Foreign Relations, 134.

geographical area and directed against selected targets- primarily those of direct military importance. It demands of the belligerents only a fractional commitment of their human and physical resources. It permits their economic, social and political patterns of existence to continue without serious disruption."[11] Osgood mentioned that Limited wars are fought for ends that do not demand the complete subordination of the adversary's will and employs means that are far less than the total military resources of the belligerents. The civilian life and the armed forces of the belligerents remains largely unharmed.[12]

Secondly, Morton Halperin stated that a Limited War is a military encounter between two opposing sides where the "effort of each falls short of the attempt to use all of its power to destroy the other."[13]

Finally, according to Kissinger in a Limited War, the entire weapons system of the warring sides can be employed but only against specific targets.[14]

Based on these definitions one can derive the basic characteristics of a Limited War or draw a war fighting model that differs from the classical conventional war.

1. Limited War between two nuclear-armed nations should be fought for specific political objectives that do not involve the complete annihilation of the adversary.[15] Any unlimited objective that aims at total destruction of the adversary both politically and militarily would escalate a Limited War. In other words, attempts at threatening the existence of the enemy would remove the psychological balance that makes it profitable for both sides to keep the war limited and increase the losing side's dependence on the resort to the use of nuclear weapons that will ultimately lead to deterrence breakdown.[16]

[11] Osgood, R. (1957). LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY. Chicago: The University of Chicago Press, 1-2.
[12] Osgood, R. (1979). LIMITED WAR REVISITED. BOULDER: Westview Press, 3.
[13] Halperin, M. (1963). LIMITED WAR IN THE NUCLEAR AGE. New York: John Wiley & Sons, 2.
[14] Kissinger, NUCLEAR WEAPONS AND FOREIGN POLICY, 139.
[15] Ibid, 140.
[16] Ibid, 145.

2. It must be understood that Limited War cannot be a means of bringing about radical alteration in the distribution of power or favourable resolution of outstanding disputes. The terms of victory should be short of unconditional surrender of the adversary and give it a chance to negotiate on a reasonable basis.[17] Thus, the objectives should be minimal and should hold the conflict within the desired limits.
3. The objectives of a Limited War should be determined by the political class and the military should have a minimal role in it. It is because the objectives in a Limited War are primarily political and not purely military, the political leadership must assume the responsibility for defining the framework within which the military are to develop their plans and capabilities.[18]
4. The whole conduct of Limited War, its strategy, its tactics, its termination must be governed by the nature of a nation's political objectives and not by independent standards of military success and glory.[19] The military will be able to act only after it receives meaningful instructions and parameters. This is in sharp contrast to an all-out war where limits are set by military considerations and also by military capacity.
5. In a Limited War, the sole purpose of the armed forces is to serve the nation's political objective.
6. Apart from limiting the objectives, it is also important to convey to the other side, both explicitly and implicitly, that the side that initiates the conflict does not intend to escalate it into an all-out war. Diplomacy plays a vital role at the beginning and during the course of a Limited War. [20]
7. A Limited War can be kept limited only when there is a clear understanding on both sides regarding its nature. Going by this logic, Limited War presupposes a cooperative adversary. It is based on a tacit bargain not to exceed certain restraints. The desire to keep the war limited has to come from both sides. The absence of cooperation during actual conflict will increase the chances of it escalating to the nuclear level.

[17] Chandran, S. (2005). LIMITED WAR: REVISITING KARGIL IN THE INDO-PAK CONFLICT. New Delhi: India Research Press, 20.
[18] Kissinger, *Nuclear Weapons and Foreign Policy,* 141.
[19] Osgood, *Limited War: The Challenge to American Strategy,* 22.
[20] Kissinger, H. (1962), THE NECESSITY OF CHOICE: PROSPECTS OF AMERICAN FOREIGN POLICY. New York: Anchor Books, 67.

8. Both sides will have to exercise deliberate restraint in the use of military capabilities. Only a portion of the overall/maximum military power that the belligerents are capable of should be employed in a Limited War. The emphasis is on the avoidance of the use of thermonuclear weapons. Even if the entire available weapons system is utilized, it should be geographically confined to a particular area and its impact on civilian life should be minimal. For example, Brodie mentioned that strategic bombing could be done in a discriminate manner so as not to target the cities.[21]

Thus using these parameters as the yardstick to define and understand the nature of a 'limited warfare' under a nuclear umbrella the next section of the paper tries to locate the shifting nature of bilateral relations between India and Pakistan in the post nuclearisation era.

III. History of India-Pakistan Conflict: 1947-1999

Since Partition and Independence, India-Pakistan relations have been marked by a series of wars, armed confrontations short of war, diplomatic and military crises, and periodic firefights along the Line of Control (LoC) in Jammu and Kashmir.[22] Pakistan, conceived of as 'a homeland' for Muslims of British India, was established in two wings, East and West Pakistan, separated by more than a thousand miles of Indian territory. Except a shared religion there was nothing to unite its diverse population composed of Pashtuns, Punjabis, Sindhis, Baloch and Bengalis. Hence, lacking a positive national identity which is unique and distinct from Indian culture, Pakistan defined itself negatively in terms of opposition to India. As Pakistan was established to prevent the 'Hindu Congres' from dominating Indian Muslims, hostlity to 'Hindu India' became one of the cornerstones of its national ideology, alongside Islam and the Urdu language. Resistance to 'Hindu India' became the glue that was meant to bind Pakistan together.[23]

The dispute of Jammu and Kashmir which has remained unresolved since 1947 is a manifestation of the national-identity driven opposition between India and

[21] Brodie, B. (1959), STRATEGY IN THE MISSILE AGE. Princeton: Princeton University Press, 310.
[22] Kalyanaraman, S. (2023), *India's Military Strategy: Countering Pakistan's Challenge.* New Delhi: Bloomsbury, 50.
[23] Ibid.

Pakistan. To state briefly, the dispute has its roots in the process of British colonial disengagement from the subcontinent. Two classes of states existed in India at the time of independence and partition. One were the states of British India and the other were the princely states. The princely states enjoyed nominal independence for so long they recognized the paramountcy of the British Crown. The subjects of defence, foreign affairs and communication were left to the British to decide upon.[24] The last Viceroy, Lord Mountbatten had declared that the princely states were free to join either India or Pakistan based upon their demographic composition and geographic location.

There were almost 565 princely states in India at the eve of independence but Kashmir posed a unique problem as it was a Muslim majority state ruled by a Hindu monarch- Maharaja Hari Singh and was geographically contiguous to both India and Pakistan. When Hari Singh dithered over the decision to accede to either India or Pakistan, the latter took the opportunity to launch a military campaign that aimed to wrest the province from India. Pakistan had sent regular troops along with local tribesmen to incite a revolt against Hari Singh's rule. Just as the rebels aided by Pakistan were about to enter Srinagar, Hari Singh appealed to India for help. Prime Minister Jawaharlal Nehru agreed to help but on the condition that the maharaja had to sign the Instrument of Accession to India. The Maharaja did accede to India and Nehru immediately sent forces to quell the tribal revolt aided and assisted by Pakistan. Thus began the first war between India and Pakistan in 1947.[25]

The war came to an end with a UN brokered ceasefire on January 1, 1949 with Pakistan keeping one-third of the province and the rest remained with India. Since then the issue has remained a bone of contention between the two neighbours. Kashmir was also the site of the second India-Pakistan war that took place in 1965. Operation Gibraltar (followed by Operation Grand Slam) was launched by Pakistan in August 1965 as yet another attempt to seize the territory of Kashmir from India by the use of force. The war ended in a stalemate after the Soviet Union

[24] Ganguly, S. (2016). *Deadly Impasse: Indo-Pakistani Relations at the Dawn of a New Century.* Cambridge : Cambridge University Press, 3.
[25] Arshed, Tanwir; '*China Factor in India Pakistan relations: A Review;* Journal of Politics and Governance; 2014; Volume:3 Issue:04

brokered a ceasefire through the Tashkent Agreement in 1966.[26] India's decisive victory against Pakistan came in the 1971 war that resulted in the dismemberment of Pakistan as its eastern wing broke away to form an independent nation known as Bangladesh.

Undoubtedly, the 1971 war had established the superiority of India vis-a vis Pakistan when it came to conventional warfare. Realizing this fact, Pakistan decided to build an indigenous nuclear capability that would compensate for its inferiority in conventional warfare against India. Coupled with its nuclearization program, Pakistan also adopted the strategy of proxy war against India under the supervision of General Zia-ul-Haq in the late 1970s. Throughout the 1980s, Pakistan was complicit in providing material assistance to the insurgency movements that were taking place in the Indian provinces of Punjab and Kashmir.[27] Pakistan's incipient nuclear capability prevented India from undertaking any large scale military operation to curb the growing menace of militancy especially in the Kashmir valley.[28] Indian policymakers found itself in a quandary in the 1990s, they grappled to find an answer to Pakistan sponsored militancy in Kashmir. As diplomatic options got exhausted, the only way India could dissuade Pakistan from pursuing the policy of proxy war was to chalk out a military strategy that entailed minimum chances of escalation to the nuclear level.[29] The quest for this strategy was on until Kargil happened.

IV. Kargil War

In May 1999, India and Pakistan got engaged in a war in Kargil, a disputed territory along the Line of Control in Kashmir. The war was fought on the heels of the famous Lahore Declaration of February 1999, an outcome of Indian Prime Minister Atal Bihari Vajpayee's visit to Lahore almost a year after India and Pakistan conducted their nuclear tests in May, 1998. It produced much optimism regarding the development of a peaceful and stable relationship between India and Pakistan in future. However, in three months it became clear that even when

[26] Paul, T.V. (1994). *Asymmetric Conflicts: War Initiation by Weaker Powers. New York: Cambridge University Press,* 111.

[27] Ganguly, *Deadly Impasse,* 8.

[28] Pardesi, M. (2009). Nuclear Optimism and the 1990 India-Pakistan Crisis. In Sumit Ganguly & S. Paul Kapur (eds.), *Nuclear Proliferation in South Asia: Crisis Behaviour and the Bomb.* Oxon: Routledge, 71.

[29] Chandran, *Limited war,* 28.

the Lahore process was underway, around 800 well-armed soldiers of Pakistan had crossed the LoC and intruded inside 5-15 kilometers of Indian territory in Kargil. [30]The infiltration was spread along a 150 kilometer stretch on the Himalayan ridges facing Dras, Kargil, Batalik and the Mushko valley.

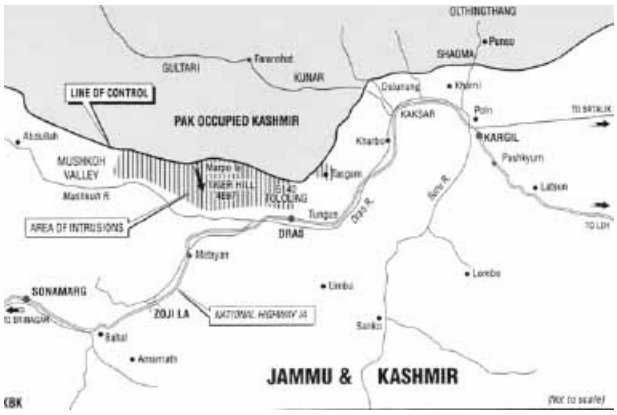

Fig: Karigil: From Surpise to Victory by V.P Mallik; Harper Collins; 2012

Pakistan denied any involvement in the infiltration and described it as a handiwork of local mujahideens. The initial reaction from the Indian side was one of surprise and shock. It took India almost a month to discover the scale of the infiltration and that the infiltrators were actually soldiers of Pakistan's Northern Light Infantry (NLI) who had occupied Indian territory in the garb of mujahideens.[31] India refused to accept the *fait accompli* and responded with cautious use of force. The war finally came to an end on 4th July, 1999 after Pakistan considered it prudent to pull out its troops from Kargil in the face of mounting casualties and international pressure.

[30] Hagerty, D. (2009). The Kargil War: An optimistic assessment. In Sumit Ganguly & S. Paul Kapur (eds.), *Nuclear Proliferation in South Asia: Crisis Behaviour and the Bomb.* Oxon: Routledge, 101.

[31] Rana, S and Wirtz, J. (2009). Surprise at the top of the world: India's systemic and intelligence failure. In Peter Lavoy (Ed.), *Asymmetric Warfare in South Asia: The Causes and Consequences of the Kargil Conflict.* Cambridge: Cambridge University Press, 211

However a constructive analysis of the crisis from both sides of the border will help the readers to understand and evaluate the situation in a more methodical manner.

A. **The Pakistani Perspectives**

The Kargil War had its origins in a history that long predated the nuclear tests of 1998. The area around Dras and Kargil has been contested by India and Pakistan in their first war over Jammu and Kashmir in 1947-1948. The ceasefire line that then divided the state ran roughly west to east, ending beyond Kargil at map grid reference NJ9842. In the 1949 Karachi Agreement, India and Pakistan stated that from point NJ9842, the ceasefire line should continue "thence north to the glaciers". There appeared to be no need to demarcate the area beyond as it was an uninhabited expanse of high mountains, snowfields and glaciers. Though the ceasefire line was mapped in gretater detail by India and Pakistan after the end of 1971 war and renamed as the Line of Control (LoC) it stopped at the same point as before after running for 740 kms from the international border.[32]

A struggle for the control of the glaciated area beyond was started off by India in the late 1970s. The biggest of the glaciers there is the Siachen glacier which is 76-km long and lies at a point where territory held by India, Pakistan and China meet. In 1978, India sent a military mountaineering expedition to explore Siachen after it learnt that Pakistan was issuing travel permits to foreign mountaineering expeditions to Siachen. The glacier was shown in international maps as a part of Pakistani territory. India's expedition to Siachen in 1978 was soon followed by Pakistan as it dispatched its own troops and by 1984 both countries were secretly preparing to send troops to occupy the passes in Saltoro ridge. India was the first to do so by sending soldiers before the winter had lifted.[33] Pakistani military realized that once ground was lost in such high mountains it could not be regained without a major offensive.

After making a number of unsuccessful efforts to evict Indian forces, the military leadership of Pakistan concluded that instead of mounting a major offensive to counter India's seizure of Siachen which they were unable to do so far, a parallel

[32] MacDonald, M. (2017). *Defeat is an Orphan: How Paksitan Lost the Great South Asian War.* Haryana: Penguin, 51.
[33] Ibid.

operation elsewhere along the disputed boundary in Kashmir had the potential of scuttling India's ability to sustain its actions in Siachen. Pakistan's plan was to sieze territory at Kargil and gain control of movement along National Highway 1A, so that the major logistical supply route to Siachen got disrupted or damaged. The desire for redemption of Pakistan's Northern Light Infantry (NLI) and Army X Corps, who had been responsible for the defence of Siachen Glacier in 1984 was another reason accounting for Pakistan's offensive in Kargil.[34] Hence, for Pakistan, Kargil was a payback for India's decision in 1984 to stake its claim to Siachen glacier.

Furthermore, the Kargil operation was also a way for Pakistan to re-energize the waning anti-Indian insurgency in Kashmir during the late 1990s as New Delhi's effective counterinsurgency efforts had led to a decline in the number of anti-State activities in the Valley. Also the Kashmir issue had been off the international radar screen for almost a decade. After India and Pakistan had confronted each other in the Kashmir crisis of 1990, little had transpired to support Pakistan's continuing demand for a "just" settlement of the Kashmir issue. Pakistan's relationship with USA had suffered a dent following the Soviet exit from Afghanistan in 1989 and Washington's invoking of the Pressler Amendment to the Foreign Assistance Act in 1990.[35]This meant isolation for Pakistan in the global state of affairs. As the decade was nearing its end, leaders in Pakistan felt that there was an increasing need to remind the world that Kashmir was not a settled dispute and the Kargil operation would serve that purpose. The planners of Kargil hoped that the international community would be ready to mediate in the Kashmir dispute once the region could be portrayed as a potential nuclear flashpoint after the 1998 tests. Therefore, apart form seizing territory from India, Pakistan's main motive was to extract international support for its claims over Kashmir and to settle the dispute in terms that were favourable to Islamabad.

Politically, Pakistan hoped to present before New Delhi a qualitatively new and more challenging military threat that would force it to the negotiating table from a position of weakness. Most importantly, Pakistani planners relied heavily on its nuclear deterrent capability, assuming it to be a shield behind which it can conduct

[34] Joeck, N. (2009). The Kargil War and Nuclear Deterrence. In Sumit Ganguly & S. Paul Kapur (eds.), *Nuclear Proliferation in South Asia: Crisis Behaviour and the Bomb.* Oxon: Routledge, 119.
[35] Ibid.

limited probe along the Line of Control without calling into action any large-scale retaliatory attack by India. The Pakistani Army also saw Kargil as a way of asserting its supremacy over the civilian authority in Islamabad. Then Army Chief of Pakistan, General Pervez Musharraf did not take lightly the interference of Prime Minister Nawaz Sharif in the internal affairs of the Army especially the growing bonhomie between Sharif and the commander of ISI Directorate General Khawaja Ziauddin Ahmed.[36] Through the Kargil incursion, Musharraf wanted to remind the people in Pakistan and the whole world that the Pakistani Army was the final arbiter of both internal as well as external affairs of the country and it could not be pushed away by a civilian Prime Minister.

B. **India Response**

Undoubtedly Pakistan's move in Kargil had surprised India but instead of treating the incursion as a *fait accompli*, Indian troops launched a rapid and forceful counter-attack. However, it soon became clear to the senior Indian Army leadership that the Army alone could not accomplish the task of evicting the infiltrators from the occupied areas. The Pakistani troops were placed in strategically advantageous positions in the heights of Kargil as a result of which the Indian forces trying to scale extremely high altitudes became easy targets for Pakistani snipers. After enduring substantial casualties, and overcoming initial hesitation over the use of airpower in fear of uncontrolled escalation, the Cabinet Committee on Security ordered the deployment of Indian Air Force (IAF) assets in Kargil. Thereafter, the IAF ground attack aircraft Mirage-2000, MiG- 21, MiG-23 and MiG-27 began targeting the intruder's positions.[37] The political leadership had strictly ordered the Indian operations to be restricted to the Indian side of the LoC.

Though New Delhi remained resolute against crossing the Line of Control, it had kept the options for escalation open as the armed forces were ordered to prepare for the possibility of all-out war if the infiltrators did not pull out. This meant that not only was India prepared to strike hard in Kargil, if required it could open other fronts across the LoC and the International Border. In Mid-June, the Indian navy in the Arabian Sea was asked to stay alert and contain Pakistan's naval assets if

[36] Ibid, 120.
[37] Chandran, *Limited War*, 59.

the Kargil War escalated.[38] Indian mechanized and artillery divisions had advanced to forward positions all along the international boundary in Gujarat, Punjab and Rajasthan. All of India's armed services were on high alert. These moves of India were matched by Pakistan as it made similar preparations for war along the Punjab frontier. There were also reports that Pakistan was readying its missile launch sites at the Tilla Ranges and if the account of American official Bruce Riedel is to be believed then the Pakistanis were preparing their nuclear weapons for possible deployment.[39] Reports say that India too activated all three types of nuclear delivery systems and kept some weapons ready to be mated with delivery vehicles at short notice.[40]

V. Understanding Kargil from the Prism of Limited War

Was Kargil a limited War? To answer this question one needed to look at its various dimensions; whether the protagonists had limited objectives, whether the use of force was limited and whether both sides showed deliberate restraint when it came to controlling escalation.

A. Decoding the Objectives and Crisis Behaviour of Pakistan

The objectives that Pakistan sought to achieve by initiating the Kargil War have already been discussed. The primary objective of reviving the militancy in Kashmir and keeping it alive at bilateral and international levels was neither territorial nor military instead it was political. Holding the heights in Kargil was a tactic and not the objective of the plan. The same logic applies to the interdiction of NH- 1A. Pakistani infiltrators had no intention of holding the heights permanently and radically alter the status-quo of LoC.[41] The strategic objectives, tactics and terrain were chosen carefully by the planners of the Kargil infiltration so that the entire conflict could be kept limited without escalating to an all-out war.

[38] Baweja, H. (1999). "Slow but steady", *India Today International*, 21.
[39] Riedel, B. (2002). *American Diplomacy and the 1999 Kargil Summit at Blair House. Policy Paper Series.* Centre for the Advanced Study of India: University of Pennsylvania, 8.
[40] Chengappa, R. (2000). *Weapons of Peace: The Secret Story of India's Quest to Be a Nuclear Power.* New Delhi: Harper Collins, 437.
[41] Chandran, *Limited War,* 77.

Pakistan also showed elements of restraint in its behaviour during the course of the war. Pakistan's strategy of sending regular soldiers in the garb of mujahideens was not something new in Kargil, in fact it has been a pattern in the 1948 and 1965 wars as well. Hence, the possibility of a nuclear escalation cannot account for the policy of subterfuge utlized by Pakistan in Kargil. But the significant difference in Pakistan's Kargil venture and its previous ventures in 1948 and 1965 lies in its decision to not back the failing covert operation in Kargil by sending in official support. In previous cases, when the covert Pakistani operations began to fail , Pakistan stepped up its official support by sending in the army but in Kargil it left its soldiers to fend for themselves against the superior Indian air and land power. Pakistan decided against sending in its airforce.[42] This decision of Pakistan could have been conditioned by the lack of external support as it was being blamed by most of the major powers, especially the US for the aggression in Kargil. A further escalation could have been a diplomatic blunder for Islamabad. Militarily too, Kargil was a lost cause and any further escalation could have made matters worse. Notwithstanding the effect of these factors on Pakistani decision-making, the fear of nuclear conflagration in the event of an escalation largely contributed in limiting Pakistani actions.

B. **Deciphering Indian Response**

The sole objective of India once it realized the nature and scope of the Kargil intrusion was to drive away the intruders. The Indian response was measured and the use of force was restricted to the areas where the infiltration occurred. Irrespective of occasional threats, the military operations were not extended to other sectors along the LoC or the international boundary although military logic dictated that it would have been tactically prudent to do so in order to divert Pakistan's attention from Kargil. One of the main reasons why India deliberately chose not to cross the LoC despite pressures from within was to hold the high moral ground so that the international community was convinced that the conflict was initiated by Pakistan and India was only trying to defend its territory. But

[42] Rajagopalan, R. (2005). *Second Strike: Arguments about Nuclear War in South Asia.* New Delhi: Penguin, 112-113.

apart from that India also did not want the conflict to escalate. Pakistan's nuclear capabilities largely factored in the minds of the Indian decision-makers.[43]

The way in which India responded to the Pakistani infiltration in Kargil also pointed to a departure from the approach which New Delhi took in previous wars with Pakistan. While in Kargil no strikes were authorized across the border, during the 1965 war when General Ayub Khan's military regime had sent Pakistani regular forces disguised as dissidents into the region believing that India would lack the determination to spread the conflict beyond the disputed territory, his assumptions were proved wrong by the resolve shown by India who despite its weak military position after the 1962 war with China, had extended the conflict beyond the international boundary.[44] It became clear that conducting *blitzkrieg* operations like India did in the 1971 war and threatening to occupy large swathes of Pakistani territory was no more a possibility in the nuclear backdrop. The presence of nuclear weapons had induced caution and restraint in Indian actions during the Kargil war.

C. **Third Party Intervention**

A factor specific to the India-Pakistan conflict that prevented Kargil from escalating into an all-out conventional or nuclear war was timely diplomatic intervention by the US. Top ranked US State Department officials like Deputy Secretary of State Strobe Talbott and other prominent personalities like commander-in-chief of the US Central Command General Anthony Zinni talked with leaders of both India and Pakistan and urged them to observe restraint.[45] For the first time in the history of India-Pakistan conflict, the US had identified Pakistan as the agressor in Kargil. US President Bill Clinton took personal interest in defusing the crisis and it was his meeting with Prime Minister Nawaz Sharif on July 4 that ultimately paved the way for the withdrawal of infiltrators from Kargil. The original concept of limited war did not include the factor of third party intervention within its gambit because both the US and Soviet were superpowers who had bilateral arrangements in place to defuse crisis situations.

[43] Ibid.
[44] Sethi, M, *Nuclear Strategy,* 302
[45] Hagerty, Devin, *Nuclear Proliferation in South Asia,* 106.

India and Pakistan are not superpowers and they usually lobby for third party support (this applies more to Pakistan) in the course of any conflict.

Almost all the necessary features of a Limited War as described by its theorists were present in the Kargil War along with one added dimension of third party intervention. Both sides had well-defined objectives that were political in nature and did not threaten the existence of either of the two nations, quite remarkably both showed restraint in their actions and confined it to a specific geographic area and despite occasional signalling of nuclear use neither side acted upon it. As is the case with Limited War, the outcome is either limited success or limited defeat, for Pakistan the success lay in reviving the Kashmir issue internationally though it was not in accordance with its wishes and the army coming to power via a military coup in the aftermath of the war. In case of India, the objective of driving away the infiltrators was fulfilled but militancy received a renewed vigour in the valley.

VI. Lessons Learnt

A. The Indian Outlook

Indian reaction and response after the Kargil war may be mapped in the following categories:

Firstly: It was the Kargil War that made India realize that a Limited War along the LoC was not only possible rather the only viable option post nuclearisation of the region. It reinforced the perceptions of the advocates of Limited War in India that space existed under the nuclear umbrella to fight a short and sharp war against Pakistan and eventually win it. This was evudednt from speeches and articulation of diplomats and leaders especially after the Kargil War. The then Defense Minister of India, Mr. George Fernandes; in January 2000 stated that "Nuclear weapons did not make war obsolete. They simply impose another dimension of the way warfare could be conducted. The Kargil War was therefore handled within this perspective with obvious results."[46] Jasjit Singh who was another proponent of the Limited War theory mentioned that there was a need to think about how nuclear weapons have impacted the conduct of conventional wars and arrange the force structure accordingly for the future. According to Singh as

[46] Menon, P. (2018). *The Strategy Trap: India and Pakistan Under the Nuclear Shadow.* New Delhi: Wisdom Tree, 168.

nuclearization had rendered 'total war' unthinkable, 'Limited War' must necessarily be central to the military input into decision making.[47] The impact and lesson form Kargil War so far reaching that even the Chief of Army Staff General V.P. Malik became a leading propagator of the limited war concept in the India-Pakistan conflict. He asserted that nuclear weapons had neither eliminated nor reduced the risk of the outbreak of hostilities and in future there was greater likelihood of limited wars taking place and that too without any warning.

General Malik firmly believed in the possibility of a limited conventional war between India and Pakistan provided both the protagonists climbed the escalation ladder carefully and in a controlled manner.[48] The Indian viewpoint on Limited War could thus be gauged from these statements, considerable optimism existed on the successful conduct of a limited war against Pakistan. This optimism was based on the premise that strategic stability created by the presence of nuclear weapons allowed India to use force at the tactical conventional level (stability-instability paradox). It also assumed cooperative behaviour from Pakistan who would have litttle incentive in escalating the war to nuclear level given the massive political, human and economic costs that came with it.

Secondly: The need to reorient India's war fighting strategies vis-a-vis nuclear Pakistan manifested itself in the form of a new doctrine known as Cold Start which is arguably the first of India's limited war doctrine articulated by the Indian Army in 2004. The trigger point for crafting this doctrine came from India's experience in Operation Parakram, the massive military mobilization undertaken by India on the international border and the LoC in Kashmir as a response to the terrorist attack on the Indian Parliament in December 2001. India combined both military and diplomatic pressure in what is known as 'coercive diplomacy' with the objective of forcing Pakistan to take action against the terrorist groups operating from its soil. But soon India came to learn about the limitations of such a large scale military mobilization when it came to coercing a nuclear armed adversary. Though the Pakistani President Pervez Musharraf acceded to some of

[47] Singh, J. (2000). Dynamics of Limited War. *Strategic Analysis,* 24(7), 1205.
[48] Khan, K. (2012). Limited War Under the Nuclear Umbrella and its Implications for South Asia. *Stimson Center,* 7.

the demands made by India, the overall terrorist infrastructure remained intact in Pakistan. Also, the slow pace of troops mobilization by India allowed the international community to step in and prevail upon India to grant General Musharraf an opportunity to prove his sincerity in curbing cross-border terrorism. Through the Cold Start doctrine India sought to bring speed of action in its military operations that was lacking in Operation Parakram. The fundamental idea of Cold Start was to have a ready, mobile lethal force of eight integrated battle groups capable of mounting an offensive with support from the Air Force.[49] The basic motive of this doctrine was to cut short the long time taken for preparing the forces and quickly advance into enemy territory for shallow penetration attacks. Effective as it looks on paper, the implementation of the Cold Start doctrine on ground would require accurate planning and considerable doubt exists whether India possess the capability to do so.

Furthermore, the risks involved in operations where integrated battle groups had to enter Pakistani territory were high as such large military formations could easily become the target of enemy forces placed strategically in the border areas. Also Pakistan would never take lightly the prospect of Indian forces crossing the international border to occupy or grab a chunk of its territory. In other words, an Indian attack modelled on the Cold Start Doctrine won't be perceived by Pakistan as a Limited war and the chances of it responding in kind would be high. The question remains that what would be the Indian reaction if their forces are faced with the prospect of a retreat, will they accept it or use added forces to defeat the Pakistani resistance. The second option will obviously lead to a spiral of violence that no side originally intended.

Thirdly: We haven't witnessed any sort of implementation of the Cold Start Doctrine until now not even after the Novemeber 2008 terrorist attacks in Mumbai that created huge public outcry for a decisive military action against Pakistan. But in recent times India has chosen a low-risk strategy known as 'surgical strikes' in which small formations of Special Forces are entrusted with the task of

[49] Ladwig, Walter C. (2007/08). A Cold Start for Hot Wars? The Indian Army's New Limited War Doctrine. *International Security,* 32 (3), 158-165.

conducting cross-LoC strikes on the terrorist infrastructure in Pakistan Administered Kashmir. These strikes are pre-emptive in nature as it seeks to neutralize the threat of an impending terrorist attack in India. In the recent past, India has employed this proactive strategy against Pakistan on two occasions, one was after the terrorist attack in the Uri army camp in 2016[50] and the the other was in the wake of the Pulwama attack in February 2019 that claimed the lives of 40 CRPF jawans.[51] Both the attacks were traced to be organized by terrorist groups that operated from Pakistan.

While India opted for ground based operations during the Uri surgical strikes, it rolled out a different approach after the Pulwama attack by targeting terrorist camps in Balakot through aerial operations. This was the first time that Indian Air Force had enetered Pakistani territory since the 1971 war. It was a demonstration of India's resolve that it was no longer willing to accept terrorist attacks on its military personnel without a counterpunch that raised the costs for Pakistan in sustaining its strategy of cross-border terrorism. For India the strategy of executing such punitive strikes across the border certainly provides a way to respond to terrorist attacks when emotions run high and therefore reduces the reputational costs for the political establishment.

These punitive strikes were very limited in scope and the sole target was terrorist bases. India deliberately chose to avoid targeting any civilian or military asset of Pakistan as that carried the potential of escalting the conflict. Combined with these military actions India also utilized its diplomatic options carefully like it did during Kargil. India was quick to convey its modest intentions to the Western capitals as soon as the strikes were conducted. This helped India garner support for its actions and Pakistan being pulled up for not taking appropriate measures to curb the menace of terrorism emanating from its territory.

Hence, instead of employing force based on the Cold Start doctrine, India thought it prudent to consider using those arms of the military that offered maximum efficiency in executing calibrated military operations and also the flexibility

[50] 4 hours, choppers and 38 kills: How India Avenged the Uri Attack. *Economic times Online.* Accessed on July 3, 2023.
[51] Khajuria, R. (2019). CRPF Jawans killed in Pulwama Terror Attack were Returning from Leave. *Hindustan Times*.

required to de-escalate at will. For example, the use of air power has more advantages than army operations because the former offers flexibility of disengagement while showing resolve at the same time. Land forces promise little when it comes to controlling escalation because once engaged the army cannot be expected to withdraw unless it achieves victory or a ceasefire is agreed upon.[52]

B. Pakistani Outlook

Firstly: Pakistan paid heavily for its adventurism in Kargil and the opprobrium it faced from the international community for using force to alter the status-quo made it realize that Kargil like operations won't be viable in future. But at the same time Pakistan did not foreclose the option of successfully calibrating the heat of insurgency in Kashmir and also expanding the violence to other parts of India. Pakistan believed that it was their overt nuclear status that prevented India from escalating military operations in the Kargil War. Hence, in future the scope for organizing proxy war remained open as Indian options of retaliation were constricted owing to Pakistan's low nuclear threshold and ambiguous nuclear redlines. Pakistan has consistently refuted the claim that there exists a space below its nuclear threshold which can be exploited by India to conduct a limited conventional war. They strongly believe that their offensive posture of nuclear first-use discounts any possibility of India conducting a war, in that case even a limited one.

Secondly: In order to make the threat of nuclear escalation look credible, the Pakistanis have gone for what is known as Full Spectrum Deterrence (FSD) once India started to deliberate upon the Cold Start Doctrine. This involves the building and deployment of low yield battlefield or tactical nuclear weapons (TNWs) that would be delivered by short-range missiles like the *Nasr* that against advancing Indian forces on Pakistani soil.[53] Deploying TNWs make Pakistan's threat of using nuclear weapons for battlefield purposes look more credible and denies India the option of using its conventional forces against Pakistan. So far India has downplayed the TNW threat by expressing doubt whether Pakistan is actually to going to act upon it and risk a massive/assured nuclear retaliation from India.

[52] Sethi, M, *Nuclear Strategy,* 310.
[53] Ahmed, M. (2016). Pakistan's Tactical Nuclear Weapons and Their Impact on Stability. *Carnegie Endowment for International Peace.*

With regard to Pakistan's first strike nuclear policy, it is unlikely that Islamabad will consider using nuclear weapons first until and unless it faces an existential threat from India. Surely, the punitive strikes by India does not threaten Pakistan's territorial integrity in any way and therefore the denial from Pakistan that they ever took place. The fact that Pakistan did not acknowledge or respond to the Uri surgical strikes, gives us the impression that though it is easy to threaten nuclear retaliation it is that much difficult to translate the rhetoric into action.[54]

VII. Conclusion

Kargil was a watershed moment in India-Pakistan conflict, it was symbolic of the transformation that nuclear weapons had necessitated in the conduct of war. It proved to the world that two nuclear armed nations were capable of fighting a conventional war within confined limits that made the fear of nuclear escalation redundant. The sole purpose of India's nuclear weapons was to deter the threat of nuclear coercion or blackmail from its adversaries. Therefore, when it came to deterring low intensity conflicts like the Pakistan sponsored proxy war, India's nuclear weapons had no role to play as such. But at the same time the option of using decisive conventional force against nuclear armed Pakistan also became extinct owing to the threat of escaltion to an all-out war. Throughout the 1990s, India had been in search of a military strategy that allowed it to deal with cross-border terrorism in Kashmir without bringing the use of Pakistani nuclear weapons into the equation. In this context, the Kargil War of 1999 convinced Indian politicians and military officials about the utility of 'limited war' as an alternative option to contain the threat of proxy war emanating from Pakistan. Kargil displayed the essential features of a limited war as defined by its theorists in the Cold war period.

Since Kargil, we notice a change in the trajectory of using force by India against Pakistan. In the absence of a large scale military attack that threatened the territorial integrity of Pakistan, New Delhi has now become more inclined towards conducting calibrated strikes inside Pakistani territory with the sole objective of destroying the growing terrorist infrastructure there. India has so far been able to judge the Pakistani nuclear redlines to perfection. On the other hand Pakistan's threat of using TNWs has been confined to the level of rhetoric only.

[54] Jacob, H. (2018). *Line On Fire: Ceasefire Violations and India-Pakistan Escalation Dynamics.* New Delhi: Oxford University Press, 43.

But does this mean that the option of using limited force is completely free from the dangers of escalation? Even though deliberate nuclear escalation is unlikely owing to the unimaginable political, economic and military costs that it will entail, the threat of inadvertent escalation remains. As Clausewitz had mentioned that any war due to its inherent nature of moving towards the extreme is not free from the possibilities of escalation. Besides, specificities of the India-Pakistan conflict distorts some of the basic assumptions of limited war concept. In the India-Pakistan context, conveying unilateral limitation of political and military objectives to the adversary is a difficult task and failure to do so will lead to misinterpretations by the adversary. If an outcome goes against the military and political interests of Pakistan it cannot be expected to avoid escalating a conflict. Unlike in the Kargil War, it would also not be possible for India to convey the geographical limits of its operations in every conflict, operational contingencies will prove to be a barrier in this case. Moreover, the lack of trust that prevails in India-Pakistan relations due to lack of bilateral diplomacy, can pose problems for communication during a conflict. Limitations stated can be distrusted or ignored.[55]

Though theoretically the scope of political objectives can be kept limited but in a situation of war, it is always the military realities that rule over political objectives and the dilemma of escalation remains. It is possible that inadvertent escalation may result from the sheer momentum of military operations where due to the fog of war, clarity of communications is missing. If large scale operations end up damaging some of Pakistan's nuclear assets or the delivery vehicles then it might contemplate using them before it loses all.[56] Geographical proximity between India and Pakistan also makes flight time of missile short and offers little scope in terms of warning and reaction. Limited wars might not stay limited if opportunistic field commanders take the initiative. Military success can increase their appetite and lead to an expansion of political objectives which is not mandated by their civilian or military supervisors. In Kargil, Pakistan ended up fighting more than it actually wanted. The operation in Kargil grew bigger than it was planned when the NLI soldiers crossed LoC and set up several posts along the originally identified watersheds without detection.[57] So the assumption that

[55] Menon, P, Strategy Trap, 171.
[56] Ibid, 172.
[57] Jacob, H, *Line on Fire,* 42.

political objectives will always be able to define battlefield behavior needs to be questioned.

In Kargil both countries were ready for escalation despite being aware of each other's nuclear capabilities. The competition in risk taking by both India and Pakistan finally ended with Pakistan backing off but there is no guarantee that this will happen every time in future. The imbalance in civil-military relations in Pakistan complicates the situation. As noticed in Kargil, the military leadership was not in agreement with Sharif's decision of withdrawing troops, what if Musharraf remained adamant on his point of carrying on the fight in Kargil, what would India have done in that case? Third party intervention might have played a stellar role in defusing crises between India and Pakistan so far but it cannot be taken for granted. Intervention won't be automatic and would be conditioned by the circumstances of the confrontation. If Washington or any other external power is late to intervene in a crisis then it won't be able to influence its course substantially. Both during the Uri surgical strike and the Balakot airstrike, the US played the role of a reluctant mediator and entered the crises late.[58] All these factors combine to create a picture that limited war is not a risk-free strategy even though it may be the best option for India at the moment when it comes to dealing with cross-border terrorism in a nuclearized environment.

[58] Noor, S. (2021). Pulwama/Balakot and The Evolving Role of Third Parties in India-Pakistan Crises. *South Asian Voices. Stimson Center.*

Vol. 14 No. 2 ISSN: 0976-3570

Judicial Opinion on Whether Personal Law is a "Law" under Article 13 of the Constitution of India

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Abstract

India is a land of religious pluralism. Every religion has its own set of customs and rituals. Personal law may apply to either a group or an individual. It is applied based on the faith or the religion, which an individual chooses to practice and profess. In India, there have been migrations and invasions by varied foreign rulers, which have led to multiple set of personal laws. Some practices of these religions are discriminatory on the ground of gender. Contemporary India witnesses the upsurge of feminist legal responses on the concerns of gender inequality in religious laws. Beginning from the Constituent Assembly Debates to the formation of the Constitution of India and then the unclear varying judicial pronouncements in relation to the personal laws by the Indian judiciary have made the topic of personal laws dynamic. In this context, it is imperative to understand the concept of personal laws as it prevails today. This article looks into the location of personal laws within the structure of Article 13 of the Constitution of India.

Keywords: Article 13, Constitution of India, Gender, Judiciary, Personal Law, Religion

I. Introduction

In the late eighteenth century, the term 'personal laws' was first introduced in the Presidencies of Calcutta, Bombay, and Madras. During this time, the pre-colonial, non-State arbitration forums were transformed into State-regulated adjudicative systems. The transformation was taking place, firstly, through the introduction of a legal structure based on English courts, which were adversarial in nature (Anglo-Saxon jurisprudence). Secondly, through the principles of substantive

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law, which were evolved and administered in these courts, (Anglo-Hindu and Anglo-Mohammedan laws).[2]

II. Evolution of Personal Laws in India

India has diverse multi-cultural and multi-religious societies.[3] Before the advent of the British rule, the personal laws for the Hindus, Muslims and the Jews prevailed in India. In the beginning years of their stay in India, the British officers implemented the policy of non-interference in relation to the personal laws of the people of India. The British government supported Warren Hasting's policy of preserving the Hindu and Muslim law. It was supported by, Sir Michael Jones, the judge of the Supreme Court of Calcutta (1783-1794). India's colonial past is an evidence to the historical stories of personal laws in India. Muslim invasion of India began in 711 A.D., and their rule existed parallel with the British and the Hindu rulers until 1857.[4] Centuries of political vicissitudes and socio-economic upheavals did not affect the Hindu and Muslim laws. During the six hundred years of Muslim rule, the state in India did not interfere much with the Hindu law. Further, in two hundred years of British dominion, the significant portion of Hindu and Muslim personal laws, enjoyed immunity from the State.[5] There were two diverse opinions in respect to the relationship between the State and the personal laws. One view held that there is a strict division between the State and the religion. The other view held that for the social reform and welfare of the community at large the State is empowered to override the personal laws through judicial intervention and proper legislations.[6]

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[2]FLAVIA AGNES, Personal Laws The Oxford Handbook of the Indian Constitution, (Sujit Choudhry et. al., eds., 2016, (Sept. 8, 2021, 8:01 PM). https://www.oxfordhandbooks.com/view/10.1093/law/9780198704898.001.0001/oxfordhb-9780198704898-e-5.

[3] T. MAHMOOD, FAMILY LAW REFORM IN THE MUSLIM WORLD, 167 (Bombay, N.M. Tripathi, 1972).

[4] *Ibid.*

[5] D. K. Srivastava, *Personal Laws And Religious Freedom,* 18 J. INDIAN L. I., 551, 551-553, (October-December 1976), https://www.jstor.org/stable/43950450.

[6] SN JAIN, *Judicial System and Legal Remedies*, in JOSEPH MINATTUR ed., THE INDIAN LEGAL SYSTEM 134 (Oceana Publications, N.Y., 1978).

Non-interference policy of the British led to uninterrupted practice of personal laws in India. The Hindu and Muslim pattern of judicial administration continued for a reasonable period of time. As the British started consolidating their status in India, they altered the civil and criminal laws as per their design. However, the Hindus and the Muslims enjoyed complete sovereignty in their religious matters.[7] The British were well aware that the religion was a sensitive issue, interference with which could jeopardize their trade and political stability in India.[8] Furthermore, being Christians they were well accustomed to the boundaries of the State and the Church[9] and followed the doctrine of duality.[10]

B. The Neutrality of British towards the Hindu and Muslim law

The Mayor's courts were established at Calcutta, Bombay and Madras in 1726. These courts had no jurisdiction to decide upon the matters relating to the religion or castes for the Indian people. The Charter of 1753 excluded the Indians from the purview of the Mayor's courts. It directed that the Indians themselves should determine such disputes. The Mayor's court intervened only when both the parties to the dispute consented for the matter to be decided by the court.[11] In 1772, Warren Hastings, the first Governor General of India, laid down that in the "suits of marriage, inheritance, caste and other religious usages the law of Quran with respect to Muslims and those of the Shastras with respect to Hindus should be followed."[12] Sir Michael Jones, a judge of the Supreme Court of Calcutta (1783-1794), proposed to have complete digests of Hindu and Muslim laws, after the model of Justinian's inestimable pandects.[13] In 1792 and 1794, he published his translation of the Muslim law of Succession and Ordinances of Manu respectively.[14] With the aid of the translated script, the Englishmen could both explain and adjudge upon the personal laws.

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[7] M. P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY, 697, (Lexis Nexis, 2011).
[8] J. M. SHELAT, SECULARISM- PRINCIPLES AND APPLICATION, 75 (N. M. Tripathi 1972).
[9] DONALD EUGENE SMITH, INDIA AS A SECULAR STATE 275 (Princeton University Press 1963).
[10] *Ibid.*
[11] SRIVASTAVA, *supra* note 5, at 575.
[12] JAIN, *supra* note 7 at 90.
[13] *Id.* at 705.
[14] *Ibid.*

C. Reformation and Restructuring of Personal Laws by the British Rulers

In the beginning of the nineteenth century, the state of affairs in India was uneven. There was a need for synchronized laws in relation to the governance of people in matters of personal laws and civic life. The British thought it would be prudent to codify the laws in order to achieve certainty and uniformity.[15] They decided which practices would have the effect of social force and which practices would come under the umbrella of law. Every practice had to pass a three-step litmus test of 'clarity, certainty and definitiveness' in order to continue as a norm for the natives. This mandate by the Privy Council was greek to the Hindus and Muslims. Their traditions and custom were "not of a nature to bear the strict criteria imposed by British lawyers."[16] The law officers, i.e.: the Shastris and Maulvis, were responsible for translating and interpreting the religious texts relating to the personal law.[17] The decisions were made based on collective mode of science and logic, different from the local practices. The natives were subjected to the western conception of Hindu jurisprudence. The creation of an all India legislature and the appointment of a Law Member as well as a Law Commission by the Charter Act of 1833 influenced the codification of the laws in India. The second reason, which influenced the codification, was Sir Jeremy Bentham's suggestion to codify the laws in India.[18] Sir Donald Eugene stated that India had become the testing ground for the Benthamite principle of codification.[19]

D. Shift from Neutrality to Legislation

The nineteenth century witnessed a shift of the British rulers from neutrality towards the personal laws in order to bring about social transformations. This had dual effect on the Hindus. The learned sections of the people of the Hindu society

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[15] JAIN, *Supra* note 7 at 600.

[16]Marc Glanter, *The Displacement of Traditional Law in Modern India,* XXIV J. of SOC. SCIENCE*S* 65, 68-70 (1968), https://doi.org/10.1111/j.1540-4560.1968.tb02316.x

[17]Gautam Bhatia, *Personal Laws and the Constitution: Why the Tripal Talaq Bench should Overrule State of Bombay v. Narasu Appa Mali*, Indian Constitutional Law and Philosophy (May 8th , 2017) https://indconlawphil.wordpress.com/2017/05/08/personal-laws-and-the-constitution-why-the-tripal-talaq-bench-should-overrule-state-of-bombay-vs-narasu-appa-mali/

[18] Terry DiFilippo, *Jeremy Bentham's Codification Proposals and Some Remarks on Their Place in History*, 22 BUFF. L. REV. 239 (1972), https://digitalcommons.law.buffalo.edu/buffalolawreview/vol22/iss1/13.

[19] EUGENE, *supra* note 9, at 275.

supported these reformations whereas the fanatic Hindus were not appeased about such changes and considered them as an intervention upon their religious sentiments. The British Government passed the legislations relating to marriage, succession, inheritance and caste system. The acts passed were the Hindu Inheritance (Removal of Disabilities) Act, 1928; the Hindu Law of Inheritance (Amendment) Act, 1929; the Hindu Women's Rights to Property Act, 1937; the Hindu Widow Remarriage Act, 1856; the Arya Marriage Validation Act, 1937; the Hindu Wills Act, 1870; the Indian Majority Act, 1875; the Child Marriage Restraint Act, 1929. As far as Muslim Law is concerned the laws legislated were more of restoration of the beliefs of orthodox Muslims rather than reformation. The three statutes passed by the British were the Wakf Act, 1913, the Muslim Personal Law (Shariat) Application Act, 1937 and the Dissolution of Muslim Marriage Act, 1939.

To remove the vices of gender inequality from the personal law practices the British shifted from neutrality towards the Hindu and Muslim laws. The Rau Committee was appointed in 1941 with the purpose of codifying the Hindu law. Throughout the process of codification, there was repercussion relating to the codification of divine law by a section of the Hindu society.[20] Muslims considered the Hindu Code Bill as a precursor of a Muslim code.[21] However, the committee presented its final report along with the Hindu Code Bill to the Cabinet. The bill was introduced in the Central Legislative Assembly in 1947. Concurrently, India got its independence from the two-century-old colonial rule.[22] The Constituent Assembly assembled to make laws for the nation with full rigour.

III. Is Personal Laws 'Laws' under Article 13 of the Constitution of India?

Article 13 of the Indian Constitution explains that any law in contradiction with the Part III of the Constitution of India shall be declared unconstitutional. Any law legislated by the Central or the State legislatures contrary to the letter and spirit of the Constitution is struck down as void. All the pre and post laws have to clear the litmus test in order to be effective in the land. Article 372 of the Constitution of India talks about the operative effectivity of any law existing

[20] U. C. SARKAR, EPOCHS IN HINDU LEGAL HISTORY, 350 (Vishveshvaranand Vedic Research Institute 1958).
[21] SRIVASTAVA, *supra* note 5, at 580.
[22] See Indian Independence Act, 1947.

immediately before the enactment of the Constitution of India.[23]. According to Salmond, "the law is the body of principles recognized and applied by the state in the administration of justice". An analogy can be derived between the Salmond's definition of law and personal laws as 'laws in force'. In *Kripal Bhagat v. State of Bihar*[24] the Apex Court observed that the aim of the law is to give legal effect to the sections of an act in its entirety. Thus, any rules, though it may not be statutory, has the force of law till the time it is enforced by the Court.

In the case *Assan Rawther v. Ammu Umma,*[25] Justice Krishna Iyer stated that, "Personal law so called is law by virtue of the sanction of the sovereign behind it and is, for the very reason, enforceable through Court. Not Manu or Muhammad but the Monarch for the time makes Personal law enforceable. Since, it is the state's legislative authority that is the basis of personal law, there is no reason why it cannot be subjected to the Constitution, just like other actions of the state."[26]

It may be well stated that a Statute empowers the applicability of the personal laws and gives them the legal effect. Section 2 of the Shariat Act, 1937 states that in all the questions of personal laws the governing law will be the Muslim Personal Laws. Thus, it gives a legal effect to the personal laws and fulfils the condition laid down under Article 13 of the Constitution of India. Personal laws include both the codified and the uncodified laws. To the extent that personal laws include codified laws they are "laws" under Articles 13 and 372. Irrespective of the fact that they are pre or post the Constitution, they continue to be in force. The change of the sovereign does not affect the laws passed by the previous sovereign. They continue as laws unless repealed or treated as void under Article 13 of the Constitution.

[23] INDIA CONST. art. 372.
[24] Kripal Bhagat v. State of Bihar, 1970 SCR (3) 233.
[25] Assan Rawther v. Ammu Umma, (1971) KLT 684.
[26] *Ibid*.

A. Is Personal Laws 'Laws in Force' under Article 13 of the Constitution of India

The discussion in the prestigious courtrooms over the issues of personal laws being 'Laws in force' under Article 13 dates back to the year of 1952.[27] It was the first of its kind.

The concern raised in the Narasu's case was regarding the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. The pivotal question in Narasu's case was related to the validity of the Bombay Prevention of Bigamous Hindu Marriages Act, 1946. The issues raised was whether the Act is in contravention of the Articles 14, 15 and 25 of the Indian Constitution. There was a discrimination between a Hindu and a Muslim male in respect of their right to engage in polygamy. Article 25 of the Constitution was argued, on the ground that the Act infringed the right of the Hindus to practice polygamy, which formed the part of the Hindu custom. The right to profess, practice and propagate one's religion guaranteed under Clause 1 of Article 25 is subject to the restrictions. The State has the authority to legislate regulatory or restrictive laws, which may be associated with religious practice. Justice Chagla in the judgment of the said case drew a meticulous distinction between 'religious faith and belief' and 'religious practices'. In an interesting case of Davis v. Beason[28] Justice Field stated, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[29]

While referring to the question whether personal laws 'are' or 'are not' 'laws' or 'laws in force' as per Article 13(3)(b) of the Constitution of India Justice Chagla made a reference to the literal interpretation to the S. 112 of the Government of India Act, 1915. Further, he stated that special and separate mention of Article 17[30] and 25(2)[31] shows the clear intent of the framers of the constitution that they have dealt with the personal laws in specific cases and have otherwise kept it aloof. Justice Ganjendra Gadkar in his concurring judgment stated that personal laws do not belong to the 'laws in force' mentioned under article 13(3)(b). He

[27]State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[28] Davis v. Beason, 133 U. S. 333 (1890).
[29] *Ibid.*
[30] INDIA CONST. art. 17.
[31] INDIA CONST. art. 25, cl.2.

observed that the explicit forbiddance of the practice of untouchability under article 17 would have been invalid as a sine quo non to article 13(1). It may be said, that he overstretched the application of the dangerous master[32] *expression unios exclusion alterius* which as per his understanding lead to the exclusion of personal law from the purview of article 13.

Both the judges in the Narasu's Case[33] held that the Courts could not invalidate the personal laws if they are opposing to the fundamental rights. The reason stated for this argument was that personal laws were not 'laws in force' under the definition of Article 13 of the Constitution of India. Therefore, both the judges held the personal laws immune from any type of constitutional challenge.

Justice Chandrachud in the Sabrimala Case[34] stated that the judges in the Narasu's case had missed the broad scope ascribed to the term 'laws in force'. Instead, it would have been wise to assign an inclusive definition to the term 'laws in force'. Therefore, any practice having the force of law in the territory of India is interpreted within 'laws in force'. In P. Kasilingam v. PSG College of Technology[35], J. Agarwal, described the word 'includes' to incorporate the points which are understood in the sense to include generic meaning as well as the extended meaning of the clause. Justice Jain[36] agreed on the judgment delivered in the Kasilingam's case. He held that the word 'include' further adds to the meaning. The defined term has a specific meaning but its size is extended accentuating further significance, which may or may not include its general meaning.

In the Sabrimala case[37], Justice DY Chandrachud explicitly stated that the judgment given in the Narasu Appa Mali Case was based on flawed reasoning. Constitution is dynamic and was drafted with the intent that it can change as per the changing times of the Indian society. The framers of the elephantine constitution wanted to put forth detailed provisions regarding every aspect of governance of the state. In doing so, it is palpable that there may be overlapping

[32] U.O. I v. B.C. Nawn and Ors. 1972 84 ITR 526 Cal.
[33] S*upra* note 27.
[34] Indian Young Lawyers Association v. The State of Kerala, 2018 SCC OnLine SC 1690.
[35] P. Kasilingam v. PSG College of Technology, 1981 AIR 789.
[36] Bharat Cooperative Bank (Mumbai) v. The Union, (2007) Insc 318.
[37] *Supra* note 34.

provisions.[38] Chief Justice Harilal Kanai in A.K. Gopalan v. State of Madras[39] observed that same affects would have been given to all the pre and post constitutional laws contrary to the part III of the Indian constitution even in the absence of Article 13 (1) or 13 (2) as it were after the incorporation of the same. The narrow judgment delivered by J. Chagla and J. Gajendragadkar left a deep wreck to the gender discriminatory aspects of personal laws which were not ameliorated (until 2018), as the personal laws according to their judgment, do not qualify the test of 'laws' or 'laws in force' under Article 13 of the Indian Constitution. The tapered approach given in the case of Narasu laid down impediments on the dynamism and transformative vision of the constitution.

IV. Judicial Pronouncements

The Constitution of India does not specifically states an elaborate definition of personal laws. It is under article 246[40] read with List III, Entry 5[41] of the seventh schedule of the Indian Constitution that empowers the Parliament and the State legislatures to legislate laws with matters relating to the specific aspects of personal laws such as 'marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition'. Post Narasu's judgment the Indian Supreme Court[42] and the High Courts in a series of cases delivered their judgments taking the judgment delivered in Narasu as an advisory stare decisi. For stance the Allahabad High Court[43], Madras High Court[44] and the Kerela High Court[45] adhered to the Narasu's judgment religiously stating that personal laws are not impressionable to the Part III of the Constitution. On the flipside, there were judgments where the personal laws were tested on the yardstick of the

[38] As said by Chief Justice Chandrachud in the Special Courts Bill Case, AIR 1979 SC 478.
[39] Harilal Kanai in A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
[40] INDIA CONST. art. 246.
[41] Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
[42]Krishna Singh v. Mathura Ahir, AIR 1980 SC 707.
[43] Ram Prasad v. State of Uttar Pradesh, AIR 1957 ALL 411.
[44] Srinivas Aiyar v. Saraswati Ammal, AIR 1952 MAD 193.
[45] P.E. Mathew v. Union of India, AIR 1999 KER 345.

fundamental rights and the judges asked for the reconsideration of the judgment of Narasu stating that interpreting Article 13 in regards to the personal laws have been a misnomer. It was judicial cherry picking which was adopted.[46] Precisely, in cases concerning personal laws, the courts have adopted a policy approach, rather than a legalistic approach.[47] Whenever the personal laws were challenged either on want of modern approach or on incompatibility with fundamental rights the courts have by or large adopted an equivocal attitude.

A. Cases where it was held 'Personal Laws are Immune from Judicial Scrutiny'

The apex court in the case of *Maharshi Avdhesh v. Union of India*[48] dismissed the petition for seeking the declaration of Muslim Women (Protection of rights on Divorce) Act, 1986 as void on the grounds of being in violation of Articles 14 and 15 of the Indian Constitution. The Supreme Court held that codified and uncodified both the types of personal laws cannot be tested on the constitutionality of the personal laws.

Again, in the year 1997, the Court did not interfere on the biasedness done to the women through the religious laws.[49] The Court stated it to be the domain of legislative action. However, the remark made by Justice R. Nariman in the Triple Talaq Case is worth taking cognizance. He did not deem it relevant to decide upon validity of the Narasu Judgment in the Triple Talaq case, however he had urged upon the necessity to revisit the judgment of Narasu in an appropriate case in future.[50]

B. Cases where it was held 'Personal Laws Need to Conform to Part III of the Indian Constitution'.

The Supreme Court in the enumerated cases, have tested the personal laws on the gauge of the constitutional provisions. In the year 1985, the Apex Court of India gave a ray of hope to the Muslim women by making them eligible to obtain

[46]GAUTAM BHATIA, *Personal Laws and the Constitution: Why the Triple Talaq Bench should Overrule State of Bombay v. Narasu Appa Mali*, Indian Constitutional Law and Philosophy (May. 8, 2021). https://indconlawphil.wordpress.com/tag/narasu-appa-mali/.
[47] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 920 (LexisNexis 2010).
[48] Maharshi Avdhesh v. Union of India, 1994 Supp (1) SCC 713.
[49] Ahmedabad Women Action Group & Ors. v. Union of India, 1997 3 SCC 573.
[50] *Supra* note 34.

maintenance under Section 125 of Cr. P.C., 1973.[51] The judgment termed the section as secular and defined its essence as prophylactic in nature cutting across the barriers of religion.[52] The Supreme Court applying the Heydon's rule[53] interpreted 'wife' under Clause b of Explanation to section 125(1) as including the Muslim women also. It established that the section 125 overrides the personal law in case of conflict between the two.[54]

In Anil Kumar Mahasi case[55] the Supreme Court expressed its favour in regards to the additional grounds given to the women under the Indian Divorce Act, 1869. It stated that due to the nature of vulnerability of women, they required special protection and it shall be permissible. Next, in the year 2001, in Danial Latifi's case[56] the constitutional validity of the Muslim Women (Protection on Divorce) Act, 1986 was challenged. The Court recognized the claim of the women for equal and dignified treatment, particularly in cases of marriage.[57] In the year 2003[58] the Supreme Court struck down a pre constitutional law, Section 118 of the Indian Succession Act, 1925 applicable to the Christians and Parsis as unconstitutional.

On 11th of May, 2017 was an opportunity, a missed one, to untie the shackles of the judgment delivered in the year 1951.[59] The Supreme Court commenced to hear the arguments on the petition concerning, inter alia, the constitutional validity of the Muslim divorce process generally known as the 'Triple Talaq'. The majority in the Triple Talaq case held that the instant, unilateral and irrevocable divorce by way of triple talaq is not an essential religious practice rather it is against the basic tenets of the teachings of Quran and violates the Shariat Act, 1937. It was held to be bad in both, theology and law.[60] However, the question on Personal Laws coming under the purview of Article 13 as 'Laws' or 'Laws in

[51] Mohd. Ahmad Khan v. Shah Bano Begum & Ors. (1985) 2 SCC 556.
[52] *Ibid.*
[53] Heydon's Case, (1584) 76 ER 637.
[54] *Supra* note 51 ¶ 9 and 10.
[55] Anil Kumar Mahasi v. Union of India, 1994 5 SCC 704.
[56] Danial Latifi & Anr v. Union of India, (2001) 7 SCC 740.
[57]EXPRESS WEB DESK, *What is Shah Bano case,* The Indian Express (Aug. 23, 2017, 14:05 PM), https://indianexpress.com/article/what-is/what-is-shah-bano-case-4809632/.
[58] John Vallamattom v. Union of India, 2003 6 SCC 611.
[59] Shayara Bano v. Union of India And Ors, (2017) 9 SCC 1.
[60] Reiterating the view held in Shamim Ara v. State of U.P., (2002) 7 SCC 518 and holding the case as the law applicable in India.

Force' remained unanswered. The socio-politico factors in India also add towards the progressive and regressive patterns in the personal laws of India. Amongst these patterns, most of them juxtapose antagonistic equality status to the women of our country.

On 29th September, 2018 the historic judgment of Sabrimala[61] was delivered. The issues raised were whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 was unconstitutional. Next, whether the age-old custom of not allowing the Hindu women aged between 10 to 50 (menstruating group) years of age to visit the Sabrimala temple and worship deity Ayyappa was in violation of their fundamental rights. The judgment struck out the rule as violating the fundamental rights and held it as unconstitutional. The ratio of 4:1[62] delivered the judgment.

Chief Justice Dipak Mishra held that the superstitions, dogmas and exclusionary practices are separate and distinguished from the core of the religion.[63] Justice Chandrachud held, "Immunising customs and usages, like the prohibition of women in Sabarimala, takes away the primacy of the Constitution."[64]

There is a distinction between superstitious part and an integral part of the religion. The test is to scrutinize if the removal of that part in question leads to the significant change in the religion. Only, then can it be termed as the integral or an essential part of the religion or else it is simply superfluous in nature.[65] It stated that it is the fundamental right of the Hindu female devotees to enter the temple, worship the deity and offer prayers.

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[61] S*upra* note 34.

[62] Chief Justice Dipak Misra, Justice Ajay Manikrao Khanwilkar, Justice Rohinton Nariman, Justice D.Y. Chandrachud gave the majority decision and Justice Indu Malhotra gave the dissenting judgment.

[63] Krishnadas Rajagopal, *Sabarimala verdict, 'Ghost of Narasu' is finally exorcised*, The Hindu (Sept. 29, 2018, 9:15 PM).
https://www.thehindu.com/news/national/justice-chandrachud-ends-the-unchallenged-reign-of-a-bombay-hc-verdict/article25074175.ece.

[64] *Ibid.*

[65] The Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282.

The Supreme Court in the Sabrimala case[66] overruled the Narasu Appa Mali[67] case and conceded the metamorphic character of the Constitution. It is a 'living document' and demands progressive interpretation and reformative approach. It is a barefaced and flagrant judgment. The Supreme Court adopted an interventionist perspective by upholding equality and freedom of right to religion of worship for all the individuals. Right to religion under the Constitution provides for the freedom of practice and propagation of religion suiting to one's religion. The same set of articles also provide for the State to regulate these practices to bring about any reformation. Under Article 25(2)(b) the State may even throw open Hindu temples for the all classes of people to worship.[68] The judgement upheld the sanguine angle of the Constitution in upholding the dignity, equality and liberty of the individual.

In the case of National Textile Workers Union v. P.R. Ramakrishnan[69], Justice PN Bhagwati stated, "We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values."[70] The Supreme Court's verdict has gone ahead in scrutinizing the veracity of such claims and set standards thereby ameliorating the gender-biased discrimination.

Personal laws deeply impact the milieu of an individual and affects one's civil status. Therefore, any associated feature of a religious nature neither can be veiled nor be granted constitutional immunity.[71] The Constitution acknowledges every individual as the basic unit of itself and demands us to see all legal system from the 'prism of individual dignity.'[72] The majority judges in

Post Sabrimala's judgment the big picture of personal laws under Article 13 of the Indian Constitution stands crystal clear. The long awaited rectification materialized after a lot of clamor. Yet, there are many pathways to unfold in doing

[66] *Supra* note 34.
[67] *Supra* note 27.
[68] Ayesha Jamal, *Sabarimala Verdict: A Watershed Moment in the History of Affirmative Action (*Oct. 30, 2020).
https://www.theleaflet.in/sabarimala-verdict-a-watershed-moment-in-the-history-of-affirmative-action/#
[69] National Textile Workers Union v. P.R. Ramakrishnan, 1983 SCR (3) 12.
[70] *Ibid.*
[71] *Supra* note 61 ¶ 395.
[72] *Ibid.*

complete justice to all the injustices against women, which were and are committed every day in the name of theocratic customs and practices.

V. Conclusion

The underlying basis of all personal laws, regardless of religion is, 'Men and Women are not equal'. There exists a discrimination for marriage, inheritance and guardianship of children. In such a scenario, it is an impediment to hold onto the age-old beliefs and traditions of the personal laws, which are a hindrance to today's growth and betterment. It is imperative that they meet the vision of ensuring dignity, liberty and equality enshrined in the Constitution.[73] The objective of the Constitution is to protect the people from the oppression by the society in the form of patriarchy and communalism.[74]

It is also true that some of the embryonic practices of the personal laws were gender biased from the infancy but have been carrying on during the primitive days due to the painful silence of the women. Personal laws are of ancient origin and it is plausible that they do not conform to the neo approach to some of the fundamental rights or the modern set up of the society. Therefore, there must be ex abundanti cautela while applying the age-old traditions conforming them to the dynamism of the present need of the society. The laws, which are patriarchal and discriminatory against a women, whether it is related to marriage, divorce or even maintenance must be brought under the perusal of the Part III of the constitution. The exclusion of personal laws from the judicial scrutiny was inappropriate. The judiciary has a significant role to play. Reformation can happen only when we have more of the people who believe in the women sensitive personal laws. For instance, polygamy in the Hindus was penalised when the majority of the Hindu population believed polygamy to be against the right to equality and supported the pro-women move. The Sabrimala judgment is a step forward taken towards removing the fetters of gender discrimination. The Supreme Court went ahead and decided upon the 'essential practice' of the religion.

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[73] RAJAGOPAL, *Supra* Note 63.

[74] Deeksha Sharma ET. AL, *Article 13: A Bête Noire in the Indian Constitution? (*Apr. 30, 2020, 10:30 AM).
https://www.jurist.org/commentary/2020/04/sharma-behl-indian-constitution-article-13/.

The Sabarimala judgment succoured the doctrine of social inclusivity by archly interpreting into the meaning of 'life and liberty' under Article 21 of the Constitution of India. The judgment has opened the gates to raise voices against the patriarchal personal laws, which exist despite being in violation of the fundamental rights. The legal approach projected through the Sabrimala pronouncement has reconsidered the status of the upright affinity between the State and its subjects. In today's India of 21st Century, what seems more important is to talk about gender just laws and equity rather than to follow the age-old gender biased philosophies of Hindu scriptures or Quran.

NOTES AND COMMENTS

Regulating Artificial Intelligence under Data Protection Law: Challenges and Solutions for India

Paarth Naithani[1]

Abstract

As India moves toward enacting a comprehensive data protection legislation, it becomes essential to examine the possible application of India's proposed data protection law to the use of Artificial Intelligence (AI). The various challenges posed by AI to data protection principles and data principals' rights need to be examined. The need for data maximisation in the use of AI challenges the principle of collection limitation. The difficulty in anticipating the processing purposes of AI challenges the principle of purpose limitation. With a brief introduction to AI and data protection law in India, the paper examines the compatibility of various data protection provisions under India's Digital Personal Data Protection Act, 2023 with AI. The paper also provides recommendations for data protection regulation of AI. The paper proposes the need to hold data fiduciaries accountable using Data Protection Impact Assessments, Codes of Practice and Security Measures. Besides, there is a need to define the fiduciary duty of care between the data principal and data fiduciary. There is a need recognize data protection by design and default and the Right against automated decision making. Technical solutions need to be explored, but at the same time, AI must not be over-regulated. Lastly, there is a need for flexibly interpreting the provisions of the proposed data protection law.

Keywords - Artificial Intelligence, Data Protection Law, Data Protection Act, 2021, India, Regulation, Rights, Principles

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I. Introduction

As the name suggests, Artificial "Intelligence" (AI) is a technology that is "intelligent". AI is considered "intelligent" because it performs tasks which require intelligence such as perception and decision making.[2] AI analyzes data through algorithms to detect patterns and make predictions.[3] AI can be used for providing better services and also for profiling, tracking, and targeting individuals.

Today, AI technology has applications in various sectors.[4] Individuals use products and services which are powered by AI.[5] Personal assistants such as Siri, Alexa, and Google Assistant use the AI technique of voice recognition and natural language processing.[6] Predictive text used in products such as Gmail and Google Search works on the AI technique of machine learning.[7] Facial recognition used to identify persons in photos on Social Media uses machine vision.[8] Product recommendations and personalised advertising on Facebook and Amazon make use of AI to find patterns and profile individuals.[9]

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[2] Defense Science Board, *Report of the Defense Science Board Summer Study on Autonomy* (Jun. 2016), https://www.hsdl.org/?view&did=794641.

[3] Paul Scharre, Michael C. Horowitz, and Robert O. Work, *What Is Artificial Intelligence,* JSTOR (Jun. 1 2018) http://www.jstor.org/stable/resrep20447.5.

[4] NITI Aayog, *National Strategy for Artificial Intelligence*, INDIAai (Jun. 13, 2019) https://indiaai.gov.in/research-reports/national-strategy-for-artificial-intelligence.

[5] Bernard Marr, *The 10 Best Examples Of How Companies Use Artificial Intelligence In Practice*, Forbes (Dec. 9, 2019) https://www.forbes.com/sites/bernardmarr/2019/12/09/the-10-best-examples-of-how-companies-use-artificial-intelligence-in-practice/?sh=497bbed77978.

[6] Sakshi Gupta, *Natural Language Processing Use Case – How Do Personal Assistant Apps Work?*, Springboard Blog (Jun. 10, 2020) https://www.springboard.com/blog/data-science/nlp-use-cases/.

[7] Yonghui Wu, *Smart Compose: Using Neural Networks To Help Write Emails*, Google AI Blog (May 16, 2018) https://ai.googleblog.com/2018/05/smart-compose-using-neural-networks-to.html.

[8] *Machine Learning and Facial Recognition*, PXL Vision (Jan. 21, 2021) https://www.pxl-vision.com/en/blog/machine-learning-and-how-it-applies-to-facial-recognition-technology.

[9] Mike Kaput, *AI in Advertising: Everything You Need to Know*, Marketing Artificial Intelligence Institute (Mar. 10, 2022) https://www.marketingaiinstitute.com/blog/ai-in-advertising.

AI is also used to draw inferences and interpret Big Data. Big Data is high-volume-velocity-variety information that is obtained real time and is processed using Machine Learning.[10] The processing of Big Data using AI is referred to as Big Data Analytics.[11]

Data protection is an area of law which aims to regulate the processing of personal data. It aims to protect informational privacy, which is a part of the right to privacy[12] recognised as a fundamental right under the Constitution of India.[13] Data protection is gaining significance and India has enacted a comprehensive legislation on data protection.[14]

Earlier, a proposal for comprehensive data protection framework was made by the Srikrishna Committee.[15] The proposal was accompanied by a draft data protection legislation, the Personal Data Protection Bill, 2018 (PDP Bill, 2018).[16] The PDP Bill, 2018 was revised and tabled in the Parliament with considerable changes as Personal Data Protection Bill, 2019 (PDP Bill, 2019).[17] The PDP Bill, 2019 was sent to a Joint Parliamentary Committee (JPC) for its recommendations. The JPC then released its report and proposed the Data Protection Bill, 2021 by amending the PDP Bill, 2019. Next, a new draft data protection framework, the Digital Personal Data Protection Bill, 2022, was released for public consultation. Finally, an updated version of the Digital Personal Data Protection Bill, 2022 has become law in India and is titled the Digital Personal Data Protection Act, 2023 (hereinafter DPDP).

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[10] *Big data, artificial intelligence, machine learning and data protection*, Information Commissioner's Office https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf.
[11] *Id.*
[12] Preamble, Data Protection Bill, 2021.
[13] Justice K.S. Puttaswamy and another v. Union of India, AIR 2017 SC 4161.
[14] The Digital Personal Data Protection Act, 2023.
[15] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, *A Free and Fair Digital Economy Protecting Privacy, Empowering Indians*, Ministry of Electronics and Information Technology, https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf
[16] The Personal Data Protection Bill, 2018 (India).
[17] Anurag Vaishnav, *The Personal Data Protection Bill, 2019: How it differs from the draft Bill*, The PRS Legislative Research Blog (Dec. 27, 2019) https://prsindia.org/theprsblog/personal-data-protection-bill-2019-how-it-differs-draft-bill.

In the background of the increasing significance of both AI and data protection law, it is important to examine the possible application of the DPDP to AI.

II. AI and Data Protection

The discussions on AI and data protection in India find mention in the NITI Aayog Strategy Paper,[18] NITI Aayog Approach Paper[19] and the Srikrishna Committee Report[20]. These discussions have identified the conflict between data protection and AI. For instance, there is the issue of AI causing discrimination and harm to data subjects.[21] There is the possibility of emotional and economic harm when sensitive personal data is used with AI.[22] There is a need for explainability of AI.[23] India can learn from the global standard on data protection which is the EU General Data Protection Regulation[24] (GDPR). The following sub-sections examine the possible issues in the application of the DPDP to AI.

There is discussion on data protection concepts such as 'notice and consent' and personal data, data protection principles such as transparency, collection

[18] NITI Aayog, *National Strategy for Artificial Intelligence*, INDIAai (Jun. 13, 2019) https://indiaai.gov.in/research-reports/national-strategy-for-artificial-intelligence.

[19] NITI Aayog, *Appraoch Document for India Part 1- Principles for Responsible AI*, INDIAai (Feb. 24, 2021) http://indiaai.gov.in/research-reports/responsible-ai-part-1-principles-for-responsible-ai.

[20] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, *A Free and Fair Digital Economy Protecting Privacy, Empowering Indians*, Ministry of Electronics and Information Technology, https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf

[21] Amber Sinha and Elonnai Hickok, 'The Srikrishna Committee Data Protection Bill and Artificial Intelligence in India'<https://cis-india.org/internet-governance/blog/the-srikrishna-committee-data-protection-bill-and-artificial-intelligence-in-india>19 Jun. 2021.

[22] NITI Aayog, *Appraoch Document for India Part 1- Principles for Responsible AI*, INDIAai (Feb. 24, 2021) http://indiaai.gov.in/research-reports/responsible-ai-part-1-principles-for-responsible-ai.

[23] NITI Aayog, *National Strategy for Artificial Intelligence*, INDIAai (Jun. 13, 2019) https://indiaai.gov.in/research-reports/national-strategy-for-artificial-intelligence

[24] General Data Protection Regulation (EU).

limitation, purpose limitation, data quality and retention limitation, and data protection rights such as the Right to be forgotten and the Right to data portability.

A. AI and Personal Data

The DPDP applies to the processing of digital personal data.[25] The DPDP defines personal data as "any data about an individual who is identifiable by or in relation to such data."[26] Unlike the Data Protection Bill, 2021, the DPDP does not define profiling, sensitive personal data and non-personal data. The Data Protection Bill, 2021 (hereinafter Bill) had clarified that personal data "*shall include any inference drawn from such data for the purpose of profiling*."[27] Profiling had been defined as the analysis or prediction of behaviour, attributes or interests through the processing of personal data of data principals.[28] The Bill had defined sensitive personal data to include health data, biometric data, genetic data and religious or political beliefs.[29] Sensitive personal data is a special category of personal data which requires a higher level of protection and has been recognized as a separate category of personal data under the EU GDPR. The Bill had also distinguished personal data from non-personal data.[30] Non-personal data is "*data other than personal data*".[31] Non-personal data includes anonymized data, which is data that has been put through technical processes which make it difficult to identify a person.[32]

Although there is an absence of clarification by the DPDP that personal data includes inferences drawn for profiling, the wording of the DPDP definition of personal data suggests that it does. Personal data has been defined an "any data" from which the individual is identifiable, and inferences drawn from profiling are data from which the individual can be identifiable. AI is used to make inferences from existing data which are used for profiling.[33] The data inferred through

[25] Section 3, DPDP
[26] Section 2(t), DPDP
[27] *Id.*
[28] Clause 3(37), Data Protection Bill, 2021.
[29] Clause 3(41), Data Protection Bill, 2021.
[30] Clause 3(28), Data Protection Bill, 2021.
[31] Clause 3(28), Data Protection Bill, 2021.
[32] Clause 3(2)-(3), Data Protection Bill, 2021.
[33] Panel for the Future of Science and Technology, *The impact of the General Data Protection Regulation (GDPR) on artificial intelligence*, European Parliament (Jun. 2020)

existing personal data using AI would constitute personal data as per the definition of personal data. Thus, even data inferred by AI must be regulated under the provisions of the DPDP as it applies to the processing of personal data.[34]

Although the DPDP does not define non-personal data and therefore does not make a distinction between personal data and non-personal data, the distinction between personal data and non-personal data is essential as the two categories of data would be regulated under different frameworks. AI challenges the distinction between personal data and non-personal data. AI challenges the distinction because AI makes it possible to identify individuals even from anonymised data sets.[35] AI can link datasets and recognise patterns in data leading to persons becoming identifiable from the data.[36]

Although the DPDP does not make a distinction between personal data and sensitive personal data, this distinction is important as sensitive personal data has a higher risk of harm to privacy. AI blurs the line between personal data and sensitive personal data. AI can be used to make sensitive inferences about a person. For instance, even health data can be inferred from data sets on shopping databases

B. AI and Notice and Consent

The DPDP requires that the data fiduciary must give the data principal notice about the personal data processed and the purposes of processing.[37] The notice must be given before or at the time of collecting personal data. [38] The Bill also provides for consent as a legal ground of processing.[39] The Bill requires consent

https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf

[34] Section 3, DPDP.

[35] Rekha Jain and Viswanath Pingali, *India's non-personal data framework: a critique*, 9 *CSIT* 171 (2021).

[36] Robert Walters and Matthew Coghlan, *Data Protection and Artificial Intelligence Law: Europe Australia Singapore - An Actual or Perceived Dichotomy?*, SSRN (Feb. 18 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503392

[37] Section 5, DPDP

[38] *Id.*

[39] Section 4, DPDP

to be free, informed, specific, clear, unconditional, unambiguous and capable of being withdrawn.[40]

First, notice and consent are not practical when it comes to Big Data analytics. Big Data analytics is used to make correlations such as between people's lifestyle and credit worthiness.[41] Notice about the purpose of processing cannot be provided at the time of collecting personal data because of unforeseeable correlations.

Second, consent cannot be valid when the nature of the analysis done by AI is opaque.[42] In such cases, consent cannot be informed as the purpose of processing is unknown and the scope of processing is indeterminable.

Third, even when a person explicitly denies consent to the processing of his personal data, it is possible to make inferences about the person by drawing extrapolations from connected and related persons.[43] Thus, in an era of machine learning where group profiling is possible, it is difficult to opt out[44] or withdraw consent.

C. AI and Transparency

The provision on notice under DPDP requires information to be made available to the data principal.[45] Unlike the Bill, the DPDP does not require information to be provided about the "*fairness of algorithm or method used for processing personal data*".[46] An absence of such a provision in the DPDP is concerning as it should to be transparent to the data principal how AI is used to process their personal data.

The problem is exacerbated as transparency is a challenge with AI . It is difficult to look into the black box of AI. The black box effect is the inevitable opacity

[40] Section 6, DPDP.
[41] *Big data, artificial intelligence, machine learning and data protection*, Information Commissioner's Office https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf
[42] *Id.*
[43] Matt Bartlett, *Beyond Privacy: Protecting Data Interests in the Age of Artificial* Intelligence, 3 Law, Tech & Hum 96 (2021).
[44] *Id.*
[45] Section 5, DPDP.
[46] *Id.*

which makes it unlikely to understand and explain AI's working.[47] Besides, the logic of machine reasoning is difficult to explain in human terms.[48] It is also difficult to trace the outcome of the AI.[49] When it comes to unsupervised learning (a kind of AI), it is difficult to explain its working as there is a lack of data labels and relationships which can help explain the processes behind AI.[50]

D. AI and Purpose Limitation

While the DPDP does not explicitly recognize the purpose limitation principle, the DPDP states in section 6 that consent must be given for a specified purpose. The DPDP further states in section 6 that consent shall be "limited to such personal data as is necessary for such specified purpose." Previously, the Bill had recognized the purpose limitation principle which requires that personal data must be processed for consented purposes or purposes incidental or connected to the consented purposes.[51] The data principal's reasonable expectations regarding the use of the data need to be considered.[52] Personal data must also be processed in a fair and reasonable manner while ensuring privacy.[53] Purpose limitation implies that voice recordings used by Siri and Alexa should not be used to extract biometric findings.[54] Purpose limitation also implies that fitness trackers must not become pharmacy shops.[55]

AI challenges the purpose limitation principle. First, when AI is used to process data, the purpose cannot always be specified. The purpose may be unknown or

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[47] *Big data, artificial intelligence, machine learning and data protection*, Information Commissioner's Office https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf

[48] Lilian Mitrou, *Data Protection, Artificial Intelligence and Cognitive Services: Is the General Data Protection Regulation (GDPR) 'Artificial Intelligence-Proof'?*, SSRN (Jun. 3, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386914

[49] *Id.*

[50] Matthew Humerick, *Taking AI Personally: How the E.U. Must Learn to Balance the Interests of Personal Data Privacy & Artificial Intelligence*, 34 Santa Clara High Tech. L.J. 393 (2018).

[51] Clause 5, Data Protection Bill, 2021.

[52] *Id.*

[53] *Id.*

[54] Robert Walters and Matthew Coghlan, *Data Protection and Artificial Intelligence Law: Europe Australia Singapore - An Actual or Perceived Dichotomy?*, SSRN (Feb. 18 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503392

[55] *Id.*

undecided at the time of processing. Second, AI can be used to process data for multiple purposes. AI makes it possible to re-purpose and multipurpose data for initially unknown and wide-ranging purposes.[56] Thus, AI challenges the notion of purpose being limited to the specified purpose or incidental purposes.

E. AI and Collection Limitation

While the DPDP does not explicitly recognize the collection limitation principle, it states in Section 6 that consent must be given for a specified purpose and consent must be limited to data necessary for specified purpose. As per the Bill which had recognized the principle of collection limitation, only that data must be collected which is necessary for processing purposes.[57] First, AI challenges collection limitation because it requires a massive amount of data to make accurate inferences. "*With few exceptions, more data is better than less, and there is almost never enough.*"[58] Second, collection limitation is challenged by AI because it is usually not possible to predict what data would be relevant for the AI.[59] This makes it difficult to limit the amount of data collected for training the AI

F. AI and Data Quality

The DPDP provides in Section 12 the right to correction and erasure, which allows the correction of inaccurate or misleading personal data, the completion of incomplete data and the updation of personal data. Previously, the Bill required that the quality of personal data must be maintained by ensuring completeness, accuracy, up-datedness and non-misleading nature of the data.[60]

Data quality is essential for maintaining the accuracy of the output of AI. If inaccurate data is input into the AI, it could lead to inaccurate inferences and

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[56] Lilian Mitrou, *Data Protection, Artificial Intelligence and Cognitive Services: Is the General Data Protection Regulation (GDPR) 'Artificial Intelligence-Proof'?*, SSRN (Jun. 3, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386914

[57] Clause 6, Data Protection Bill, 2021.

[58] Christopher Kuner, Fred H Cate, Orla Lynskey, Christopher Millard, Nora Ni Loideain, and Dan Jerker B Svantesson, *Expanding the artificial intelligence-data protection debate*, 8 International Data Privacy Law 289 (2018).

[59] Lilian Mitrou, *Data Protection, Artificial Intelligence and Cognitive Services: Is the General Data Protection Regulation (GDPR) 'Artificial Intelligence-Proof'?*, SSRN (Jun. 3, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386914.

[60] Clause 8, Data Protection Bill, 2021.

biased decisions about a person.[61] Bias can result because of incomplete or outdated data being input into the AI. Bias in AI can also be a result of unrepresentative training data.[62] Bias in AI can be a result of using attributes such as gender without tracking how they are being considered by the AI.[63] Thus, it is essential to maintain data quality as the output of the AI depends on the data quality of training data and data input into the AI

G. AI and Retention Limitation

The Bill provided the principle of retention limitation which requires that data must not be retained beyond the period necessary to satisfy processing purposes, after which the data must be deleted.[64] The DPDP provides in Section 8 for an obligation on the data fiduciary to erase personal data when the data principal withdraws consent or when it is reasonable to assume that specified purpose is not being served anymore.

AI challenges the principle of retention limitation because it is not feasible to delete the data once it has been processed for the purposes for which it was collected.[65] Organisations may want to use the data for development and deployment of AI which may carry potential benefits.[66] One does not know when data would become relevant for processing by AI. Data fiduciaries would have an interest in storing data for a longer time so that it can be used when it becomes relevant.

H. AI and the Right against Automated Decision Making

The DPDP lacks a provision on the Right against automated decision making including profiling. Such a provision is present in the GDPR. The GDPR provides data subjects (data subjects is the term in the EU and data principal is the term

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[61] KOAN Advisory and Digital India Foundation, *Handbook on Data Protection and Privacy for Developers of Artificial Intelligence (AI) in India: Practical Guidelines for Responsible Development of AI*, DSCI (Jul. 2021) https://www.dsci.in/sites/default/files/documents/resource_centre/AI%20Handbook.pdf
[62] *Id.*
[63] *Id.*
[64] Clause 9, Data Protection Bill, 2021.
[65] Christopher Kuner, Fred H Cate, Orla Lynskey, Christopher Millard, Nora Ni Loideain, and Dan Jerker B Svantesson, *Expanding the artificial intelligence-data protection debate*, 8 International Data Privacy Law 289 (2018).
[66] *Id.*

used in India) the right not to be subject to decisions taken solely on the basis of automated processing including profiling, which have a legal effect or other significant effects on the data subject.[67] An example is e-recruiting practices which use AI to shortlist applications. In such cases, data subjects also have the right to be informed of the existence of automated decision making, meaningful information about the logic of the automated decision making, and the significance and envisaged consequences.[68] For instance, in e-recruiting through the use of AI, the data subject should be informed of the kind of AI used to make a decision, the data input into the AI, and the possible consequence of the use of AI. The data subject should be informed, for example, that Machine Learning was used to input his personal details such as name, age, gender, marks, and experience into AI and the envisaged consequence could be that the job application may be rejected by the AI. Data subjects in the EU also have a right to obtain human intervention and a right to contest the decision made using AI.[69] In e-recruiting through the use of AI, the data subject has a right to have a human review the decision taken by the AI.

India's Bill merely required that information must be provided to the data principal about the "*fairness of algorithm or method used for processing of personal data*".[70] This clause has been removed from the DPDP. In fact, India's DPDP lacks a right to contest decisions taken by AI, right to obtain human intervention when AI makes decisions and the right not to be subject to automated decisions including profiling.

I. AI and the Right to Data Portability

The DPDP does not provide for a right to data portability. The Bill had provided the right to data portability which is the right to have personal data accessed and transferred to another data fiduciary in a structured, machine readable, and commonly used manner.[71] The data includes data that has been provided by the

[67] Article 22, GDPR.
[68] Article 13, 14 GDPR.
[69] *Id.*
[70] Clause 23, Data Protection Bill, 2021.
[71] Clause 19, Data Protection Bill, 2021.

data principal to the data fiduciary, data relating to any profile on the data principal and data generated while providing services or goods.[72]

AI is used for profiling and also for generating data in the course of providing goods or services. Under the right to data portability, such data needs to be shared with the data principal and other data fiduciaries. The requirement of sharing profiling data and data generated while providing goods or services may come in conflict with the data fiduciaries' trade secrets and intellectual property.

J. AI and the Right to be Forgotten

As per the Bill, the Right to be forgotten requires that personal data must be restricted in processing and disclosure when a person withdraws consent to the processing of personal data.[73] The right can come in conflict with the working of AI. Theoretically, if a person withdraws consent and the AI still continues to function through its learnings from previously learned behaviours, the data protection law would be violated.[74]

Under the DPDP, there is no explicit mention of the right to be forgotten. There is the right to erasure under Section 12 that allows the data principal to make an erasure request. Section 12 requires that the data fiduciary must erase the data "unless retention of the same is necessary for the specified purpose" or for a lawful purpose. But if AI is made to forget the data and the learning it has done from the data by erasure of the data, the functioning of AI would be affected.[75] This would make it difficult for the AI to function optimally.[76]

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[72] *Id.*
[73] Clause 20, Data Protection Bill, 2021.
[74] Matthew Humerick, *Taking AI Personally: How the E.U. Must Learn to Balance the Interests of Personal Data Privacy & Artificial Intelligence*, 34 Santa Clara High Tech. L.J. 393 (2018).
[75] Lilian Mitrou, *Data Protection, Artificial Intelligence and Cognitive Services: Is the General Data Protection Regulation (GDPR) 'Artificial Intelligence-Proof'?*, SSRN (Jun. 3, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386914
[76] *Id.*

III. Possible Solutions

One possible solution is to hold data fiduciaries accountable.[77] As per the Bill, significant data fiduciaries intending to use new technologies or carry out processing having risk of significant harm should undertake a Data Protection Impact Assessment (DPIA) prior to the processing.[78] But such a provision that requires carrying a DPIA for using new technologies is missing in the DPDP.

Significant data fiduciaries are data fiduciaries that may be notified by the Central Government by assessing relevant factors including risk to rights and volume and sensitivity of data being processed.[79] A DPIA should be required when AI is used[80] because the use of AI systems carries a risk to rights of the data principal. Studies suggest that the use of AI may lead to discrimination.[81] AI can also be used to make evaluative decisions about an individual which could lead to denial of a benefit.[82]

As per the Bill, a DPIA includes an assessment of potential harm to data principals and measures for mitigating, minimising and managing risks.[83] A DPIA would include a systematic description of the processing, identifying risks to individuals and measures to reduce risk.[84] The description of processing would include describing data flows, stages of processing by AI, and effects on individuals.[85] The risks should be identified and could be categorised according to the likelihood of occurrence and severity of impact on data principals.[86] These risks could

[77] Clause 10, Data Protection Bill, 2021.
[78] Clause 27, Data Protection Bill, 2021.
[79] Section 10, DPDP
[80] Robert Walters and Matthew Coghlan, *Data Protection and Artificial Intelligence Law: Europe Australia Singapore - An Actual or Perceived Dichotomy?*, SSRN (Feb. 18 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503392
[81] Frederik Zuiderveen Borgesius, *Discrimination, Artificial Intelligence and Algorithmic Decision-Making* , Council of Europe (2018) https://rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73
[82] Clause 3(23), Data Protection Bill, 2021.
[83] Clause 27, Data Protection Bill, 2021.
[84] Simon Reader, *Data Protection Impact Assessments and AI* , Information Commissioner's Office (Oct. 23 2019) https://ico.org.uk/about-the-ico/media-centre/ai-blog-data-protection-impact-assessments-and-ai/
[85] *Id.*
[86] *Id.*

include the risk of discrimination and impact on fundamental rights.[87] The mitigation of such risks must be planned early in the AI lifecycle.[88] The DPIA must be a live document which is regularly reviewed and re-assessed.[89]

Other than DPIA, the Bill had recognized Codes of Practice to promote data protection good practices and facilitate compliance.[90] The Codes of Practice may include various matters such as measures of ensuring data quality, the exercise of rights by data principal, standards of security safeguards and manner of carrying out DPIA.[91] These Codes of Practice can also cater to a specific sector. For example, a Code of Practice on the use of AI by the healthcare sector could include guidelines on demonstrating that data is collected and processed in a fair and lawful manner.[92] But the DPDP does not recognize Codes of Practice.

An obligation on the data fiduciary under the DPDP is to implement necessary security safeguards.[93] As per the Bill, these measures include taking necessary steps to prevent data misuse, and unauthorised access, disclosure and modification.[94] The data fiduciaries must implement necessary security safeguards when they use AI.

Another solution is to interpret the proposed relationship between data fiduciary and data principal. Presently, the DPDP does not define the fiduciary nature of the relationship or what it would entail. It is unaddressed whether the fiduciary duty means the entire set of obligations contained in the DPDP.[95] It is also unaddressed whether there is an additional duty of care to be undertaken by the

[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Clause 50, Data Protection Bill, 2021.
[91] *Id.*
[92] National Health Service UK, *A guide to good practice for digital and data-driven health technologies*, UK Government (Jan. 19 2021) https://www.gov.uk/government/publications/code-of-conduct-for-data-driven-health-and-care-technology/initial-code-of-conduct-for-data-driven-health-and-care-technology.
[93] Section 8, DPDP.
[94] Clause 24, Data Protection Bill, 2021.
[95] Smitha Krishna Prasad, *Information Fiduciaries and India's Data Protection Law*, Data Catalyst (Sept. 2019) https://datacatalyst.org/wp-content/uploads/2020/06/Information-Fiduciaries-and-Indias-Data-Protection-Law.pdf.

data fiduciaries.[96] Thus, a duty of care to protect privacy[97] can be provided especially when AI is used. This is important because the individual may not be in a position to understand complicated algorithms or the consequences of their use.[98]

Another solution is data protection by design and default. The underlying ideas of data protection by design and default are - privacy as a default setting, privacy embedded into the design, end-to-end security to ensure protection during the full lifecycle, respect for user privacy and transparency.[99] The products which incorporate AI and processing operations must be designed in such a manner that privacy protections are considered right at the beginning.[100] By default, the highest privacy protections must be ensured in the use of AI.[101] But, the DPDP does not explicitly recognize data protection by design and default.

Other technical solutions must also be explored. For example, the model of explainable AI can be used to make AI transparent. The solution is an easily explainable model of the decision-making process, and a way of ascertaining the attributes and weightage given to each attribute by the AI.[102] The outcomes of the AI must be measured for different attributes to assess whether there is bias against any given attribute.[103] To maintain data quality and avoid bias in the use of AI, the representativeness of the data input into the AI must be ensured.[104]

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[96] *Id.*

[97] Matt Bartlett, *Beyond Privacy: Protecting Data Interests in the Age of Artificial* Intelligence, 3 Law, Tech & Hum 96 (2021).

[98] *Id.*

[99] Information Commissioner's Office, *Data protection by design and default,* https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/data-protection-by-design-and-default/

[100] European Commission, *What does data protection 'by design' and 'by default' mean?* , https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/what-does-data-protection-design-and-default-mean_en

[101] *Id.*

[102] KOAN Advisory and Digital India Foundation, *Handbook on Data Protection and Privacy for Developers of Artificial Intelligence (AI) in India: Practical Guidelines for Responsible Development of AI*, DSCI (Jul. 2021) https://www.dsci.in/sites/default/files/documents/resource_centre/AI%20Handbook.pdf

[103] *Id.*

[104] *Id.*

While the above solutions for regulating AI are essential, over-regulating AI may not be the appropriate solution. Over-regulating AI could limit and stagnate AI research and use of AI for beneficial purposes.[105] AI technology must be allowed to flourish and some flexibilities are essential. First, the DPDP provides exemptions for research or statical purposes.[106] Thus, there is a possibility that the use of AI for research purposes may be exempted from provisions of the Bill. At the same time, there is a need for certain safeguards. These safeguards were recognised by the Bill and include the principle of necessity, avoiding the risk of significant harm, avoiding specific decisions or directed actions and the requirement of de-identification as per Codes of Practice. [107]

Second, the Data Protection Board of India could create a Sandbox for encouraging innovation in AI and machine learning or emerging technology, a possibility recognised by the Bill.[108] Sandbox has been defined as live testing in controlled or test regulatory environments of new products or services.[109] Sandbox implies that regulatory relaxations may be provided for a specified time for limited testing purposes.[110] The relaxations could be from data protection principles and data protection obligations.[111] Sandbox addresses the fear that data protection requirements may impede the development of AI technologies.

While the PDP Bill, 2019 stated that the Authority "shall" create a Sandbox, the DP Bill, 2021 has replaced the word "shall" with the word "may".[112] This indicated that Sandbox may be given at the discretion of the Authority. Now, the DPDP does not have a Sandbox provision. The Board should consider Sandbox

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[105] Matthew Humerick, *Taking AI Personally: How the E.U. Must Learn to Balance the Interests of Personal Data Privacy & Artificial Intelligence*, 34 Santa Clara High Tech. L.J. 393 (2018).
[106] Section 17, DPDP.
[107] Clause 38, Data Protection Bill, 2021.
[108] Clause 40, Data Protection Bill, 2021.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] Joint Committee on The Personal Data Protection Bill, 2019, *Joint Committee on the Personal Data Protection Bill, Report of the Joint Committee on the Personal Data Protection Bill,2019*, http://164.100.47.193/lsscommittee/Joint%20Committee%20on%20the%20Personal%20Data%20Protection%20Bill,%202019/17_Joint_Committee_on_the_Personal_Data_Protection_Bill_2019_1.pdf

especially for small and medium enterprises that may benefit from increased innovation.[113]

Third, there is a need to rethink the fundamental principles of data protection. These principles may be inadequate to regulate AI and may also restrict AI development if they are given a strict interpretation.[114] The challenge posed by AI to personal data can be addressed by considering the risks of the re-identification of anonymized data. Once re-identified, anonymized data must be governed by all the data protection provisions.[115] The challenge posed by AI to collection limitation principle can be addressed by incorporating the safeguards of pseudonymisation and masking techniques without a reduction in the data.[116] The challenge posed to purpose limitation principle by AI can be addressed by having a flexible idea of processing for incidental purposes.[117] A safeguard can be provided that risks of significant harm must be avoided while repurposing and explicit consent must be taken for action directed to individuals.[118] To reconcile the Right to be forgotten with AI, the possible solution is to isolate or delete strands of AI's learning.[119] But, isolation of learning is not possible in the case of

[113] Lilian Mitrou, *Data Protection, Artificial Intelligence and Cognitive Services: Is the General Data Protection Regulation (GDPR) 'Artificial Intelligence-Proof'?*, SSRN (Jun. 3, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386914

[114] Christopher Kuner, Fred H Cate, Orla Lynskey, Christopher Millard, Nora Ni Loideain, and Dan Jerker B Svantesson, *Expanding the artificial intelligence-data protection debate*, 8 International Data Privacy Law 289 (2018).

[115] Panel for the Future of Science and Technology, *The impact of the General Data Protection Regulation (GDPR) on artificial intelligence*, European Parliament (Jun. 2020) https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf

[116] *Id.*

[117] *Id.*

[118] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, *A Free and Fair Digital Economy Protecting Privacy, Empowering Indians*, Ministry of Electronics and Information Technology, https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf

[119] Matthew Humerick, *Taking AI Personally: How the E.U. Must Learn to Balance the Interests of Personal Data Privacy & Artificial Intelligence*, 34 Santa Clara High Tech. L.J. 393 (2018).

Robert Walters and Matthew Coghlan, *Data Protection and Artificial Intelligence Law: Europe Australia Singapore - An Actual or Perceived Dichotomy?*, SSRN (Feb. 18 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503392

AI such as neural networks.[120] Thus, the possible solution is for the Right to be forgotten to allow retention of information up to the point the Right has been requested.[121]

IV. Conclusion

As India has now enacted a data protection legislation, the potential challenges presented by AI need to be considered. The proposed solutions are that India could provide a fiduciary duty of care on the data fiduciary towards the data principal. The Data Protection Board of India could recognize data protection by design and default. Technical solutions must be explored such as designing AI in a manner that rights such as the Right to correction and the Right to be erasure are provided from the beginning and irrespective of the kind of AI.[122] Codes of Practise must be used to define data protection standards for use of AI in specific sectors. India also needs protect data principals from automated decision-making including profiling. Lessons can be learnt from the EU which provides the right to contest decisions made by AI, the right to obtain human intervention and the right not to be subject to automated decision-making affecting the individual.[123]

Data protection rights must be protected throughout the processing life-cycle of AI - both at the time of development of AI and also while employing AI for making decisions.[124] At various stages of processing, there is also a need for qualified human oversight to ensure that rights are respected and negative effects for individuals are avoided.[125] There is also a need for transparency by providing

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[120] Matthew Humerick, *Taking AI Personally: How the E.U. Must Learn to Balance the Interests of Personal Data Privacy & Artificial Intelligence*, 34 Santa Clara High Tech. L.J. 393 (2018).
[121] *Id.*
[122] European Data Protection Board and European Data Protection Supervisor, *Joint Opinion 5/2021on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)*, EDPB (Jun. 18 2021) https://edpb.europa.eu/system/files/2021-06/edpb-edps_joint_opinion_ai_regulation_en.pdf
[123] Article 22, GDPR
[124] Lilian Mitrou, *Data Protection, Artificial Intelligence and Cognitive Services: Is the General Data Protection Regulation (GDPR) 'Artificial Intelligence-Proof'?*, SSRN (Jun. 3, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3386914
[125] *Id.*

information to the data principal about the logic of the AI, the scope of processing, and legal basis for processing at various stages of processing.[126]

While data protection is essential, there is also a need to ensure that the development of AI technology is not hindered. AI technology has potential benefits which can lead to the progress of society. Thus, a delicate balance needs to be established between protecting privacy and data protection while allowing AI technology to develop.

[126] *Id.*

Vol. 14 No. 2 ISSN: 0976-3570

Sedition: Prince Closing Up on Kingship

Guru Prasad Singh[1]

Abstract

In May 2022, the Hon'ble Apex Court recently ordered that the colonial-era sedition law under Sec. 124A of the Indian Penal Code should be kept in abeyance until the Centre has reconsidered it. In this context, it becomes pertinent to submit that the history of the law relating to sedition in India is very tainted. The law that was once used to prosecute some of our greatest freedom fighters still exists today in our statute book. In free India, when some of the High Courts had started declaring the law's unconstitutionality, it was finally the turn of our Apex Court to show up and uphold its constitutionality. The survival of this provision in free India in the paradigm of parameters set out in Part III of the Constitution is a fascinating and problematic story. This research work traces the origin of Sedition Law in the Indian Penal Code and also elaborates upon its survival in the post–constitutional regime. There has been a drastic increase in Sedition cases recently, and suppressing dissent and discourse during Covid-19 has reminded us of the misuse of this law against one of our greatest freedom fighters, viz. Bal Gangadhar Tilak. Is it a situation where the saw given to the carpenter to cut a piece of wood has been used to clear the entire forest? In light of the Apex Court's stand that it is high time we have to decide the limits of sedition, this research paper would be a needful inquiry into the same.

Keywords: Sedition, Colonial, Freedom Struggle, Free Speech, Constitutionalism.

I. Origin of the Law of Sedition: An Erroneous Omission

It will be pertinent to point out that the draft prepared by Lord Macaulay in 1837 did contain a provision penalizing Seditious conduct against the Government of East India Company. It was in the background of the Great Revolt of 1857 that the need was felt to immediately enact and enforce the Penal Code. The Penal

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Code that was enacted in 1860, however, needed to be added with this provision, which was there in the original draft. In 1870, the Bill, which finally inserted the provision on sedition, was introduced by Sir James Fitzjames Stephen. Stephen has stated that the provision was erroneously left out due to 'some unaccountable mistake' of someone.[2] However, the other theory suggests that by that time, since it had lost its relevance as an offence in England, it was intentionally excluded. [3]

The original law on sedition was as follows: "Whoever by words either spoken or intended to read or by signs or by visible representation or otherwise excites or attempts to excite feelings of disaffection to the Government established by law in British India shall be punished with transportation for life or for any term to which fine may be added or with imprisonment for a term which may extend to three years to which fine may be added or with fine.".[4] In 1898 an amendment was further done by renumbering it as Sec. 124A of the Indian Penal Code. The law was introduced in the immediate backdrop of the Wahabi Movement in the late 19th century. It was purported to be an effective tool to suppress dissent and curb nationalist tendencies from getting developed.[5] The Wahabis were traveling from village to village and propagating the idea of Jihad against the British government. This was finally discovered in 1863 after one such significant case comes to their acknowledgment.[6]

II. A Tool to Suppress Freedom Struggle

The anxiety of the British regime against the growing nationalist tendencies was apparent by the end of the 19th Century. The newly introduced Sedition Law was misused against some of our greatest freedom fighters. The first case on sedition seems to be the Bangabasi Case. In this case J. C. Bose was charged for sedition

[2] A. Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India,* (Penguin Random House, Gurgaon, 2017).
[3] N. Saksena and S. Srivastava, "An Analysis of the Modern Offence of Sedition" 7 *NUJS Law Review* 121 (2014).
[4] C. SINHA, THE GREAT REPRESSION: THE STORY OF SEDITION IN INDIA, (Penguin Random House, Gurgaon, 2019).
[5] S. Kumar, "Is Indian sedition law colonial? JF Stephen and the jurisprudence on free speech" 58(4) THE INDIAN ECONOMIC & SOCIAL HISTORY REV 477-504 (2021).
[6] J. Stephens, *The Phantom Wahhabi: Liberalism and the Muslim Fanatic in mid-Victorian India,* 47(1) MODERN ASIAN STUDIES 22-52 (2013).

based upon his criticism of the Age of Consent Bill. The Bill was treated as interference by the British Regime in personal and religious matters.

Notably, the cases against Bal Gangadhar Tilak need to be specially mentioned. There were three sedition cases against Lokmanya Tilak. The first case concerned the articles he wrote in Kesari in the background of the murder of the Plague Commissioner Rand. The link was drawn between his speech and the associated Crime. The fact that may be noted is that the Plague in Pune led to enacting the Epidemic Diseases Act, 1897. This Act gave vast discretionary powers to the Plague Commissioner. These powers were widely misused, and dissent and criticism could be perceived as a natural consequence of such misuse.[7] Nonetheless, the fate of such speech was meted with a Sedition case. He was tried again in 1908 and was represented by MA Jinnah. Nevertheless, his application for bail was rejected, and he was sentenced to six years. The Second Sedition Case against B. G. Tilak pertains to the unrest that had crept into the Bengal Partition's aftermath. The link between bomb attacks and his writing was drawn, and he was held guilty of sedition.[8] The Third Sedition Case was pertaining to the lectures that he had publically delivered. The central theme behind the lectures was attaining swaraj through constitutional methods.[9]

Likewise, in the backdrop of the Chauri Chaura incident, Mahatma Gandhi was also charged with sedition based on specific articles he wrote in Young India.[10] Mahatma Gandhi pleaded guilty to his charge against Sedition.[11] He stated Sec. 124A as the "prince among the political sections of IPC designed to suppress liberty of the citizen ."Moreover, "affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give fullest expression to his disaffection so long as it does not contemplate, promote or incite to violence".[12] In the same way we can see that many other great names

[7] S. Kamra, *Law and Radical Rhetoric in British India: The 1897 Trial of Bal Gangadhar Tilak*, 39(3) JOURNAL OF SOUTH ASIAN STUDIES 546-559 (2016).
[8] M. Mukherjee, *Sedition, Law, and the British Empire in India: The Trial of Tilak (1908*), Vol. 16(3) LAW, CULTURE & THE HUMANITIES, 454-476 (2020).
[9] *Emperor v. Bal Gangadhar Tilak*, (1917) 19 BOMLR 211.
[10] S. KAMRA, THE INDIAN PERIODICAL PRESS AND THE PRODUCTION OF NATIONALIST RHETORIC 99-126 (Palgrave Macmillan, New York, 2011).
[11] B. Sexton, “The Trial of Gandhi” 16(3) *Current History (1916-1940)* 440–444 (1922).
[12] A. G. NOORANI, INDIAN POLITICAL TRIALS, 1775-1947 235 (Oxford University Press, New York, 1974).

like Ali Brothers, Annie Besant, Bhagat Singh, J. Nehru, etc. which were associated with Indian struggle for Independence had to face Sedition Charges.

III. The Inherent Discrimination

It must be pointed out that from its very inception, sedition per se seems to suffer from the inherent bias and discrimination of the Colonial Regime. At that time, India was a British Colony, and the applicable law in England was the common law. In due process, when the laws were codified in India, the same provided these colonized countries as a testing ground for the later adoption of those laws in England.[13] The inherent bias and discrimination can be manifested by comparing the ambit of the sedition law, which was introduced in India, vis-a-vis the limited or the Strict Sedition law applicable in Britain. In England, the offense was insignificant as compared to a felony and also the imprisonment was up to two years. However, in India, it was introduced as a law not only having a wider ambit, but when it came to punishment, it could attract transportation for life.

By the first half of the 19th century, only if there was incitement to violence did it attract the Sedition charge, as then in England, it was narrowed down in scope and application. Justice Fitzgerald had accordingly stated that in sedition there is a tendency to incite insurrection and rebellion.[14] However, in ***Bangabasi Case,***[15] it was the broader law of sedition that was applicable. In this case, Chief Justice Petheram pointed out that "a feeling contrary to affection, in other words, dislike or hatred," would be seditious and included disloyalty towards the government. Therefore, in India, the safeguard of 'incitement to violence' was not made applicable; even the slightest amount of invoking disaffection against the British Government would be treated as Seditious.

In *Queen Empress v. Bal Gangadhar Tilak,*[16] **Justice Starchey** stated that the gist of the offense is contained in exciting certain bad feelings towards the government. It does not necessarily connote the idea of exciting mutiny, rebellion,

[13] A. SINGH, SEDITION IN LIBERAL DEMOCRACIES, (Oxford University Press, New Delhi, 2018).
[14] R. v. Sullivan, (1868) 11 Cox CC 44.
[15] *Queen Empress v. Jogendra Chunder Bose And Ors.*, (1892) ILR 19 Cal 35.
[16] (1897) I.L.R. 22 Bom. 112.

or actual disturbance. It is immaterial to assess whether any disturbance was caused or not by such seditious conduct.

It is against this inherent bias and discrimination when Mahatma Gandhi is quoted saying that Sec 124A is "the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen."[17] He also described it as the "Sword of Damocles" hanging over the freedom movement.[18]

IV. Continuation of the Law in Independent India

In the pre-independence era, there seemed to be a conflict between the Federal Court and the Privy Council as far as the scope and ambit of the Sedition Law were concerned. This becomes a solid basis where the delimited scope of Sedition Law has to be examined in free India. In *Nihrendu Dutt Majumdar v. Emperor,* [19] Federal Court resorted to the strict law of sedition. The charge of sedition would be attracted in those limited cases only where there was incitement to violence. This was in tandem with the applicable law in England. It was emphasized that 'public disorder' or the 'likelihood of public disorder' was an essential element to be observed in such cases. [20] However, in *Emperor v. Sadashiv Naryan Bhalerao,*[21]the Privy Council overruled the decision of the Federal Court. It reiterated the wider law of sedition that was used as a colonial tool to suppress nationalism and the law that was used to convict some of the great freedom fighters like B. G. Tilak. It clearly stated that Nihrendu's Case proceeded on a wrong construction of Sec. 124A. Precisely, because of the Privy Council 'incitement to violence' was not the deciding parameter in adjudging a case on sedition. Exciting feeling of enmity would be sufficient to constitute the offence of sedition.

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[17] S. B. KHER (ed.), THE LAW AND THE LAWYER BY M. K. GANDHI, (Navjivan Publishing House, Ahmedabad, 1st edn., 1964).
[18] Publications Division, Ministry of Information and Broadcasting, Government of India, 46 *The Collected Works of Mahatma Gandhi*, (2000).
[19] 1942 F.C.R.38.
[20] A. K. Mukherjee, "THE FEDERAL COURT AND THE LAW OF SEDITION IN INDIA" 5(1) *The Indian Journal of Political Science* 94-104 (1943).
[21] 1947 SCC OnLine PC 9.

When India gained independence, Part III of the Constitution ensured Fundamental Rights to its individuals. Accordingly, those laws that were inconsistent with Part III would be treated as Eclipsed by the Constitution. The irony is that the very law which was used as a tool to suppress India's struggle for independence was debated to be included as a reasonable restriction to Free Speech under Art. 19(2). However, due to the initiative undertaken by a renowned lawyer, K. M. Munshi, who also took part in the freedom struggle, sedition as one of the grounds for restricting free speech was struck down in the Constitution's Final Draft. It was worth taking into account how the Sedition law was misused and abused to stifle dissent and criticism to warrant its exclusion as a reasonable restriction.[22]

Since sedition was not a restriction in Art. 19(2); likewise, 'public order' was not mentioned as grounds for restricting speech under Art. 19(2) It was only after the case of Romesh Thapar v. State of Madras,[23] it was inserted in Art. 19(2) thorough 1st Constitutional Amendment. In this case, Romesh Thapar had challenged a decision by the Madras Government which banned his journal, Cross Roads, arguing that the ban imposed based on "public safety" was very broad and violated his right to free speech and expression. The Court noted that such expansive restrictions were unconstitutional and that only narrow restrictions on freedom of expression were permitted.

V. Chilling effect on Free Speech and the *Kedarnath* Judgement

The exclusion of sedition as a reasonable restriction had subjected the law to constitutional scrutiny. Even some of the High Courts had started declaring the law unconstitutional as it produced a chilling effect on the right to free Speech. Notably, in *Ram Nandan v. State,*[24] the Allahabad High Court declared the law as unconstitutional. It also *interalia* quoted a case of Punjab High Court[25] which had also declared it as unconstitutional.

[22] K. Singh and Vikram Singh, *Fourth Estate in the Constitutional Ambit: Analyzing Free Speech under Democracy*, 4 INDIAN JOURNAL OF LAW AND JUSTICE (2013).
[23] 1950 SCR 594.
[24] AIR 1959 All 101.
[25] AIR 1951 Punjab 27.

The ongoing controversy was finally settled in the leading case of *Kedarnath v. State of Bihar*,[26] wherein the constitutional validity of Sec. 124A was finally upheld. It was held that 'public order' and 'security of State' in Art. 19(2) save Sec.124A and 505 of the Penal Code from the vice of unconstitutionality. It is interesting to note that had the Apex Court resorted to the wider application of the law taken by the Privy Council in Sadashiv Narayan's case, the same would not have passed constitutional scrutiny. Instead, it resorted to the Federal Court's stricter view of the law and upheld its validity. Therein, the principle that there must be 'incitement to violence' gained popularity. It can be quoted as under:

"It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and consistent with the fundamental right of freedom of speech and expression. When the words, written or spoken, have the pernicious tendency or intention of creating public disorder or disturbance of law and order, the law steps in to prevent such activities in the interest of public order. So construed, the section strikes the correct balance between individual fundamental rights and the interest of public order."

The question now arises when the controversy is settled and the law was seen as having appropriate safeguards which protect criticism without giving any 'incitement to violence.' However, there is a tendency to misuse this law in the old colonial fashion. Recent times have proved that it has immense potential for misuse, and the safeguards given in the explanation are not paid due attention while instituting cases under sedition. This in turn, suppresses dissent and creates fear, ultimately producing a chilling effect upon the right to free speech.

[26] 1962 AIR 955.

Current Context: Using the Saw to clear entire Forest

Keeping in view the ***Kedarnath Judgment*** the law was supposed to be used sparingly and in rare cases only. However, the recent year-wise data retrieved from NCRB database from the year 2014-2020 discloses the grim picture of the issue.[27] These recent sedition cases include some of the popular cases including the *Patidar Agitation, Jat Agitation, Pathalgadi Movement, Citizenship Amendment Act Protests, Cases in COVID-19, Hathras Case,* etc. The data provided by National Crime Records Bureau shows that sedition cases which were 47 in 2014 increased to 93 in 2019, hence, there was an enormous 163% rise in Sedition cases. However, the conviction is a mere 3% in such cases. This demonstrates that the state authorities are using the sedition laws arbitrarily to raise an alarm amongst the citizens and is significantly suppressing dissent by creating a fear in the minds of the people. This produces a chilling effect on the right to free speech. Given below is the retrieved data:

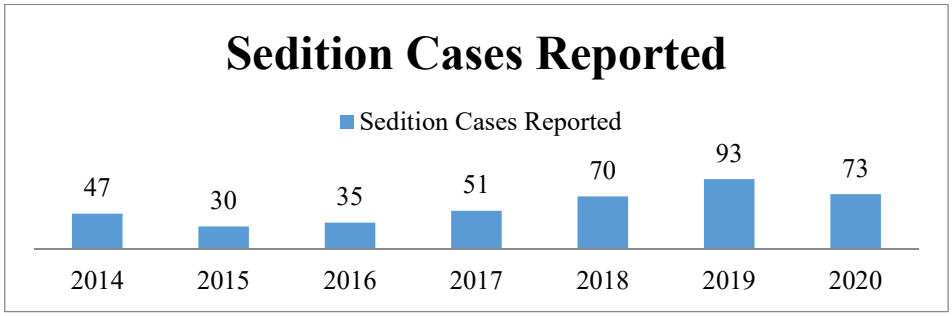

Figure 1: ***Sedition Cases:2014-2020 National Crime Records Bureau, Crime in India Statistics.***[28]

Apart from the fact that as compared to the previous regime, the number of cases has substantially increased. Another disturbing issue is its frequent use even in those cases which were issues of national importance and were under wider public

[27] National Crime Records Bureau, "Crime in India 2014 statistics" (2014); National Crime Records Bureau, "Crime in India 2015 statistics" (2015); National Crime Records Bureau, "Crime in India 2016 statistics" (2016); National Crime Records Bureau, "Crime in India 2017 statistics" (2017); National Crime Records Bureau, "Crime in India 2018 statistics" (2018); National Crime Records Bureau, "Crime in India 2019 statistics" (2019); National Crime Records Bureau, "Crime in India 2020 statistics" (2020);
[28] *Id.*

scrutiny. The situation is even worse if we are to rely on the data presented by Article 14, which is the subject of ongoing research.[29] According to them, many more actual cases exist than in the NCRB data.

Chief Justice of India, Justice N. V. Ramana, while hearing a plea challenging the constitutionality of the Sedition Law, questioned the need to keep this law, which was blatantly misused to suppress our freedom struggle. An environment persists, which creates fear in the public's mind against such misuse by law enforcement agencies. Recently, the law has been misused on several occasions, which has caught the media's attention. These include the cases against activists such as Binayak Sen, Arundhati Roy, Disha Ravi, Vinod Dua, people opposing the Citizenship amendment, people protesting against farm laws, etc.

The most problematic aspect of the law remaining in the statute book is that when a case is filed under sedition, the lower courts do not thoroughly examine the charge, and securing bail becomes very difficult. This, in turn, contributes to an environment of fear as people might end up behind bars even for those speeches that seek to criticise policies of the government without inciting violence. By the time a person would get bail it would be too late to undo the damage already caused.

In the times of pandemic, a crisis appearing similar to those during British Rule seemed to have emerged. Some people who raised their voices against the government's handling of the situation were welcomed by Sedition charges. Famous Jornalist, Vinod Dua, was accordingly criticizing the government's handling of the pandemic and also he had highlighted the plight of migrant laborers during the crisis. Based on his video an individual from Himachal Pradesh filed Sedition case against him stating that the Journalist was spreading misinformation. Finally, Vinod Dua had to approach the Supreme Court, wherein his FIR was finally quashed. In Vinod Dua v. Union of India [30] the Hon'ble Bench composing of Justices U. U. Lalit and Vineet Saran stated:

> *"... a citizen has a right to criticize or comment upon the measures undertaken by the Government and its functionaries, so long as he does*

[29] K. Purohit, "Our New Database Reveals Rise In Sedition Cases In The Modi Era", *Article14,* https://www.article-14.com/post/our-new-database-reveals-rise-in-sedition-cases-in-the-modi-era (last visited on 22nd January, 2022).
[30] 2021 SCC OnLine SC 414.

> *not incite people to violence against the Government established by law or with the intention of creating public disorder; and that it is only when the words or expressions have pernicious tendency or intention of creating public disorder or disturbance of law and order that Sections 124A and 505 of the IPC must step in."*

Another popular case involved the airing of an interview of a rebel YSR Congress MP criticising the handling of the Covid situation. The coercive action against two news channels was challenged before the Supreme Court. While staying the sedition cases against them, the Apex Court restrained the arrest of those individuals who were involved in showing grievance concerning the pandemic issue. Justice D. Y. Chandrachud in M/S Aamoda Broadcasting Company v. State Of Andhra Pradesh[31] observed that it is the time when the limits of Sedition has to be properly defined. It was observed *inter alia*:

> *"we are of the view that the ambit and parameters of the provisions of Sections 124A, 153A and 505 of the Indian Penal Code 1860 would require interpretation, particularly in the context of the right of the electronic and print media to communicate news, information and the rights,even those that may be critical of the prevailing regime in any part of the nation"*

VI. Conclusion

It may be relevant here to submit that, at the very outset, the fundamental problem associated with Sedition Law is the wide and improper definition. The expressions which form the operative part is "brings or attempts to bring into hatred or contempt" and "excites or attempts to excite disaffection."What speech will actually be treated as 'bringing hatred' or 'exciting disaffection' is subject to numerous interpretations. The inherent scope within the Sedition Law to interpret it in different ways creates a grey area that acts as a cogent tool to suppress dissent and thereby creates a chilling effect on free speech. This scope of Sedition Law is inherent in its very definition, which the law enforcement agencies can easily put to misuse by incriminating individuals on such flimsy grounds. Since there is no clear indication within the law that precisely delimits what 'words, signs, or visible representation' would actually be Seditious, the situation becomes

[31] 2021 SCC OnLine SC 407.

intensely problematic. The explanation, which seems to insulate positive criticism without inciting violence, does not operate as a working safeguard against such abuse and misuse as witnessed in these recent cases.

The Rights guaranteed under the Constitution are the very foundation of a modern liberal democracy. Sedition Law produces a chilling effect on the rights enshrined in the Constitution, and it is high time the judiciary proactively stepped in and read down the scope of this colonial-era law. There should be strict instructions that should be mandatorily followed by law enforcement agencies while instituting a case under Sec—124A of the Indian Penal Code.

Book Review

Zafar Mahfooz Nomani (Ed.) INTELLECTUAL PROPERTY RIGHTS AND PUBLIC POLICY. New India Publishing Agency, New Delhi, 2019, xxx+268 pp., ₹ 1,595/- (hardcover). ISBN: 978-93-86546-49-4

The book *Intellectual Property Rights and Public Policy*[1] edited by Zafar Mahfooz Nomani is an embodiment of the intellectual property (IP) and social implications of public policy discourse and knowledge governance in India. The edited volume is the product of extensive research on intellectual property and subsumes digital divide, social exclusion and community knowledge support. The author provides social dynamics of the intellectual property as well as the legal justifications for preserving to foster social cohesiveness and unity. The author of the book enunciates as to how intellectual property has developed from a method of patenting to include anything that the community's creative mind is capable of imagining and expressing for public good. In order to support a multidisciplinary approach and resolving challenges pertaining to intellectual property, the author places an emphasis on the socio-legal implications of IPR in other fields such as medicine, engineering, biotechnology, cyber law, human rights. The book dedicates four section on copyright, patent, trademarks cybercrime etc. and signifies discursive research in the social domain of IP. The book has the seal of approval by Justice K.G. Balakrishnan, Former Chief Justice of India. His Lordship in his forwarded remarked this book as:

> The object of the book being creative and innovation being hallmark of knowledge economy [and] leads a keen inquiry into the frontiers of intellectual property laws and their governance in India.

The book is divided into 4 sections followed by 12 chapters that explain intellectual property laws in simple lucid and scholarly foreseen to readers of social sciences, public administration and governance.

[1]ZAFAR MAHFOOZ NOMANI, INTELLECTUAL PROPERTY RIGHTS AND PUBLIC POLICY (New India Publishing Agency, New Delhi, 1st Edition 2019).

Avtar Krishen Koulan eminent scholar of international trade law and intellectual property, in his article *Intellectual Property and Public Policy Under TRIPS Agreement and Beyond* phase out IPR in connection with the TRIPS agreement. It explained how the IPR Policy 2016 played a vital role as a competition regulator, economic tool as well as a marketable financial asset. This chapter emphasizes the move from a collectively held knowledge domain to one that defines "individual exclusive rights in knowledge and creativity, giving way to the negative right notion. It also traces the jurisprudential grounds behind major intellectual property notions from ancient to present times."

S.K.Verma having expertise in international IP law in his article *Legal Challenges to Copyright and Patent in India: Public Policy Perspective* talks about India as a member of the World Trade Organization and party to the TRIPS Agreement, must align its IP laws accordingly. The Indian government must balance the requirements of its citizens with patent holders' rights while drafting and implementing legislation for domestic and foreign filing of patent applications.[2] In regard to the Novartis Case, the definition of patent teleologically interpreted and its implication on health and access to medicine Indian patent statute has specific provisions, which are covered beneath Section 3, that "make patentable subject matter such as a) pharmaceutical drug derivatives; b) stem cells; c) diagnostic methods and kits; d) isolated DNA sequences; e) computer-related inventions, etc." Therefore, these inventions undergo further scrutiny by the Indian Patent Office. The guidelines on patenting software, biotech, and pharmaceutical inventions, however balances patent holders with social developments.

Imtiaz Ghulam Ahmed, an expert in the field of jurisprudence, in his article *Jurisprudential Justification and Practical Implications of Intellectual Property Rights* explore how intellectual property has become vital for the rapid pace of technical, scientific, medical innovation and social good in contemporary socio-legal polemics. It became relevant in changing global economic climate and business models. The intellectual property is important to value and growth and India has passed many new laws to protect intellectual property rights (IPRs) to

[2]*Id. at* 17.

meet WTO requirements (TRIPS)[3]but trickle-down effects is yet to reflect in social plane.

Azim B. Pathan has drawn on environment law perspective in energy sector is article on *Techno-Legal Dimensions of Carbon Emissions and Climate Change: An IPRs Perspective. It* focuses attention on how climate change pressures agriculture at a time when more food is needed for a growing world population. It exhibits about climate change and intellectual property rights diametric by highlighting the climate change laws like *United Nations Framework Convention On Climate Change*, 1992; *Kyoto protocol*, 1997; *The Bali Road Map*, 2007; *The Cancun Agreement*, 2010; *Durban Outcomes*, 2011; and *Doha Climate Gateway* 2012. It further highlights the need for climate change-related technology and the technology transfer and climate change. Intellectual property and technology transfer have also been discussed.

The article *Law and Practice of Neighbouring Rights under Copyright Law* by GurusharanVarandani draws IP in Labour Law perspective. It explores how copyright protects all human inventions, regardless of form, substance in IP prospective. This initial protection requires no formal procedure as long as the work is original. Copyright and neighbouring rights cannot be severed from one another and given their own distinct legal framework. The interest in IPR has been growing on a global scale, to the point where the WIPO and the WTO are cooperating on issues of protection and putting pressure on member nations to bring their domestic laws into line with lucrative international commitments. This demonstrates that neighbouring rights are going toward a more stringent legal framework in order to enhance them and are acquiring a legal character as a result.

The article *Poverty Human Rights and Intellectual Property Regime: An Appraisal of Farmer Rights to Food* delineates on intellectual property and its fundamental benchmarking of plant variety law in the context agriculture, farming sector and vital driver of economic progress. The conventional IPR rules fail to preserve farmers' traditional knowledge and contributions due to their restricted criteria-based protection and rigid rights framework. The author analyses the theory supporting IPRs over plant genetic resources and their effects on farmers' customary rights v*is a vis* private property rights and inclusionary rights ideas are

[3]*Id. at* 48.

also significant.[4] The libertarian and egalitarian theories of farmers' right in conventional IPR regulations logically are also analysed. State sovereignty, informed consent, and equitable benefit-sharing notions are in extricable synchronised in the paper.[5] This article argues that farmers' economic incentives compared to multinational breeders are not equitable or justiciable under the realm of rights framework.

Sajid Zaheer Amani in his article *Remedies Relief and Payment under Patent Infringement: A Critical Analysis* highlights the doctrinaire limits, of Anton pillar order and Bolar provision. It examines the nature of remedies given to the patent's inventor in the form of money recompense-permanent relief,[6] lost profits and a reasonable royalty.[7] It functionally examines the monetary relief on account of profits and limitations on the grant of reliefs.[8]

The article on *Right to Health & Access to Medicine in the Context of Intellectual Property and Sustainable Development* addresses the global health scenario and the international legal perspective.[9] It also focuses on the human rights perspective and the relationship between patenting and health. In Novartis' patent claim for the anti-cancer medicine Glivec in India as a case study. It also shows how high pricing for patented drugs violates health rights by making critical drugs inaccessible to most people, especially the poor. The case raises problems of drug patenting, generic drug survival, and access to medications, which are crucial to the right to health, a human right, and a constitutional right in many nations. It also clarifies the stance of the government with regard to the powers delegated to the National Pharmaceuticals Pricing Authority within the framework of *National Pharmaceuticals Pricing Policy*, 2012 and *Drug Pricing Control Order*, 2013.

Faizanur Rehman in his article *Patenting Jurisprudence in Biotechnology Law: A Comparative Perspective* talks about competition and trade defining today's world. It also subsumes biotechnology industry rose in the 1970s when biological

[4] *Id. at* 98.
[5] *Id. at* 105.
[6] *Id. at* 120.
[7] *Id. at* 127.
[8] *Id. at* 132.
[9] *Id. at* 142.

techniques like recombinant DNA, cell culture, and genetic engineering were developed in Cohen and Boyer postulates.

S. S. H. Azmi in his essay on *Information Technology and Cybercrime Problem and Prospects* dealt with the meaning, origin, and development of cybercrime in the pragmatic discourse of law enforcement, penalties and punishment. He also talks about how an investigation of cybercrime and its requisite forensic is done. It also deals with the crime in foreign territory followed by transitional context.

Rahman Mittal an expert in cyber law in his article *Copyright Protection of Website Content: Legal Challenges* discusses that the website is soaked in information, much of it with varying degrees of copyright protection. In fact, the reality is that almost everything on the news is protected by copyright law. It mainly deals with the right of an e-business and linking it with other sites that provide the user with the merchandise.[10] It focuses on judicial recognition of linking and in-line linking. Through the use of in-line linking, a web page is able to generate a new web page by calling upon various elements that are located on other web pages or servers. In addition, web browsers make it possible for web publishers to segment pages using frames. A website may have one or more frames, each of which is a customizable window within the site that allows users to see content from another website.

The article on *Regulatory Mechanism and Challenges in Controlling Cyber-crime* authored by Justice Ram Prakash Sethi confronts with the challenges to cyberspace and the foundation of copyright law. The challenges of cybercrime and the enforcement of cybercrime are quite essentials for containing the digital violence free society.

The extensive literature reviews were conducted by the authors of this book in each and every contributors' papers. The reading is made more enjoyable in socio-legal milieu of Indian society. The inclusion of carefully crafted preface at the beginning of the book is quite sobering and appealing. The volume is a one-of-a-kind pilot study indicating specific case laws and field study which pricks readers for meaningful insight. The subject matter; and a subject index at the end of the book is neatly drafted. It serves ready reckon for future researcher to embark on public policy discusses of IP in India. The hardbound edition is reflective of

[10] *Id. at* 198.

publishing standards in type setting, formatting and editorial acumen. However, the price of the book is higher and it is requested to publisher to switch for to paper back and e-book model for wider readership and audience. The boredom of reading can be alleviated somewhat with the help of social components. It's probable that the author has previous experience working in the field of protecting biological resources using intellectual property. But this research makes a substantial contribution to the advancement of intellectual property jurisprudence in public policy and social context in India.

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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.

Published by University of North Bengal,
Raja Rammohunpur, P.O. North Bengal University,
Dist. Darjeeling, West Bengal, India
Pin- 734013
Phone Nb.: (0353) 2776 307, 2776 310, 2776 325
Fax: (0353) 2776 307, 2699 001
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