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MESSAGE FROM THE PATRON

Maharashtra National Law University, Nagpur has always endeavoured to push the envelope in legal research and education by striving not only for excellence but also for ingenuity. As the promotion of academic research is at the heart of the vision and mission of the University, it has contributed significantly towards the advancement of legal research in India in merely seven years of its establishment. The academic strides made by the University would not have been possible without the proficient tutelage of Hon'ble Shri Justice B.R. Gavai, Judge, Supreme Court of India, and Chancellor of the University, for which the University owes him eternal gratitude. Under the erudite leadership of the Hon'ble Chancellor, the University has constantly pursued its academic vision and mission and worked tirelessly to promote the standards of legal research not only in India but across the globe.

Contemporary Law Review (CLR), which is the flagship journal of the University, has been conceived with the objective of promoting critical legal thinking and writing and encouraging law students and legal professionals towards original thinking and writing. The present issue of CLR holds a special place in my heart as it is a tribute to Late Prof. (Dr.) Shirish Deshpande, Professor at Maharashtra National Law University, Nagpur, left for his heavenly abode on February 10, 2021.

Prof. Deshpande, apart from being a prolific teacher in areas of law such as Constitutional Law, Jurisprudence, Administrative Law, Human Rights, Interpretation of Statutes, Intellectual Property Rights, and Disability Law, was also a humanitarian, a champion of the human rights of persons with disability, and a dear friend. His academic achievements are too many and too noteworthy to be listed here, but there is no gainsaying that he touched the lives and minds of his students, and was an icon and a source of inspiration to all. Notably, in recognition of his contribution to the welfare of persons with disability, he had been conferred with the Maharashtra State Government Disability Welfare Award, 2001 and was nominated as a member of the Braille Council of India constituted by the National Institute of Visually Handicapped under the aegis of Ministry of Social Justice and Empowerment, Government of India.

The present issue of CLR, like the previous issues, brings to its readership a collection of intellectually enriching and thought-provoking contributions made by academicians, lawyers, legal researchers, and law students, in honour of the academic vision of Prof. Deshpande. These academic writings not only undertake scrupulous analysis of the selected topic but also make plausible suggestions to address issues and challenges that are highlighted therein and represent the homage of the University to the rich academic legacy of Prof. Deshpande. The contributions are wide-ranged and encompass topics at the intersection of law and philosophy, law and economics, and also issues relating to customary laws which do not always figure generously in mainstream legal deliberations. Research in law today, in order to be effective, should be multidisciplinary, and the present issue of

CLR has richly contributed to such research by including academic writings with a multidisciplinary approach.

I must congratulate the Editorial Board of the journal for selecting for publication contributions from diverse areas of law, and discussing various issues of contemporary significance. I extend my sincere gratitude to the Hon'ble members of the Editorial Advisory Board for extending their able guidance to the members of the Editorial Board. I am also grateful to each member of the Editorial Board of faculty colleagues for their meticulous efforts in ensuring that original contributions are selected for publication thereby upholding the academic credibility of the journal. I extend my sincere thanks to the contributors whose scholarly contributions have made the culmination of the present issue of the journal a reality. I hope that the present issue of the journal evokes interest among a wide range of readership, including law students, research scholars, academicians, legal professionals as well as everyone enthusiastic about discovering novel and intriguing aspects of the law. Reviews and feedback from the readership are highly cherished by the Editorial Board of CLR, as they would encourage the Board to strive for bettering the quality of legal research with each issue.

Vijender Kumar

EDITORIAL

In the research paper titled "*The Relevance of Swami Vivekananda's Philosophy to Understand the Constitution of India as Secular Spiritualism*", the author, Dr. Varsha V. Deshpande attempts to unpack certain axioms from Vivekananda's philosophy and extrapolate them for a richer understanding of the Constitutional provisions in India. The author tries to demonstrate how some of the insights of Swami find an eloquent reflection within the Constitutional text while some others can be gainfully employed for enriching the Indian Constitutional experiment. This paper is also an attempt in relating the tenets of Vivekananda's philosophy to the different approaches adopted by the Indian Courts in certain cases which are significant in contemporary times.

In the research paper titled "*Transformative Constitutionalism for Preserving Constitutional Values in Contemporary India: A Critical Analysis*", the author Mr. Sumit Bamhore observes that laws governing constitutional democracy, like India, must also adjust and evolve regularly for the overall development of the nation. The article examines the elements of constitutionalism in light of the constitutional values envisaged under the Constitution of India. Further, it analyses the transformative character of constitutionalism in India. The paper also elucidates the role of the judiciary in ensuring the implementation of transformative constitutionalism for the protection of constitutional values in India.

In the research paper titled "*Deciphering Women's Right to Inheritance Under Customary Laws Within Constitutional Contours*", the authors Dr. Gitanjali Ghosh and Mr. Shishir Tiwari points out that the customary laws governing inheritance and succession are largely inegalitarian and do not treat women at par with men. Khasi and Mizo tribes of the North East are governed by their customary laws which have been partially codified, and in this article, the authors make an analytical study of the inheritance rights of women under the Khasi and Mizo customary laws. Additionally, the article addresses the conflict between the constitutional guarantee of equality and the perceived immunity enjoyed by personal and customary laws *vis-à-vis* the same.

In the research paper titled "*Patentability of Embryonic Stem Cell-Related Inventions: Emerging Issues and Challenges*", Ms. Rashi Upadhyay discusses the utility of human embryonic stem cell lines for research purposes. Human embryonic stem cell research has created controversy about the use of human embryos in research and therapy, and human embryonic stem cell patents raise similar concerns. This technology is considered a medical breakthrough in different ways and some countries provide entire support for research on this, while others lack explicit policies, resulting in the majority of research being led by private actors without support or assistance from the government. The author compares the laws pertaining to the regulation of embryonic stem cell research in different jurisdictions and puts forward certain modifications to the patent system so as to accommodate the patents involving human cell lines.

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In the research paper titled "*Gender Disparity in Bureaucracy: An Indian Prospective*", the author Ms. Rajeshwi Pradhan identifies that despite the country celebrating seven decades of independence, women are still held back by the clutches of sexual politics even in such elite institutions. The number of women in civil services increases at a very slow pace. The author also tries to understand the challenges faced by women in bureaucracy and attempts to highlight sexual politics in bureaucracy and the discriminatory factors faced by women in civil services.

In the research paper titled "*Criminalisation of Marital Rape in India: Issues and Challenges*", the author, Ms. Ashwini Kelkhar attempts to critically comment on the existing legal framework governing rape laws in India in light of the prevention of marital rapes through a feminist perspective. Furthermore, the paper analyses various facets of marital rape with reference to its impact on the marriage and individual autonomy of a woman. The paper also examines the scope and impact of the criminalisation of marital rape in India and provides suggestions to safeguard the interest of married women.

In the research paper titled "*Disability and World at Work: An Inclusive and Sustainable Discourse*", the author Dr. Anuja S. observes that the Disability Rights Movement since its emergence has emphasised the vulnerability arising from exclusive policies and approaches. The author explains the rights-based approach guaranteed by UNCRPD, 2006 coupled with the vision of the Decent Work Agenda and ILO'S Disability Inclusion Strategy plays a crucial role in the inclusivity and sustainable discourses improving the world at work for everyone. A disability rights framework is explored through this article, as driven by the potentialities of a transformative regime, in moulding a conducive work atmosphere for persons with disabilities.

In the research paper titled "*Lifting the Judicial Veil: Analysing Whether the Time Ripe for Judicial Accountability*", Mr. Advaya Hari Singh identifies that there is a lack of clarity on the contours of accountability for the judiciary and on the mechanisms to ensure it. This research paper seeks to clear the haziness which surrounds the subject by analysing the concept of accountability both as a definition and as a necessity for the judiciary. It also examines the judicial accountability landscape of India and the ways it has been (or not) implemented.

In the research paper titled "*Incarcerating Fair Trials: Trial by Media and Administration of Justice*", the authors Mr. Shivam Tripathi and Mr. Abhinav Saxena assert that it becomes imperative to prevent trials by media from taking over the criminal justice system. Thus, the overarching point is that courts in the country must prevent any flagrant disregard of an individual's civil rights, and an attempt is made in this article to assess the ramifications of media trials *vis-à-vis* the right to a fair trial. The article aims to explore the idea of a media trial from multiple perspectives, with an intent to put forth the existing structure of the law and solutions to issues therewith.

In the research paper titled "*Derivative Action Suits in India: A Less Used Weapon in the Hands of Shareholders*", the author Dr. Padma Singh discusses the meaning and concept of derivative action suits, and investigates the recognition of derivative action suits in Indian jurisprudence, and tries to ascertain the reasons

behind why a very few derivative action suits are filed in India. Despite the fact that Derivative Action Suits have been recognised judicially in India, the number of such suits is still very low as there exist a number of constraints both procedural and substantive. Moreover, the availability of alternative remedies and other ancillary factors make the initiation of derivative actions unattractive.

In the research paper titled "*Potentiality of Alternate Dispute Resolution in the Field of Goods and Services Tax*", Dr. Vidya V. Devan opines that due to the high technicalities and intricacies of Tax Laws, India had rarely tried Alternate Dispute Resolution (ADR) mechanisms to resolve the tax disputes. Expeditious solutions to disputes are the need of the hour in this 21st century, and India can never remain stagnated in this regard. Many countries in the world have adopted ADR mechanisms to solve tax disputes. Through this paper, the author analyses the possibilities of applying ADR mechanisms in the field of indirect taxation in India.

In the research paper titled *"Godmen Phenomenon in Contemporary India: A Socio-Legal Analysis",* the authors Dr. Rajeev Dubey and Dr. Praveen Mishra observes that with the rise and growth of new religious movements, there has been a tectonic shift in the religious landscape of India. This article reflects on the shift and contradiction in the religious landscape with the emergence of the Godmen phenomenon. Further, while analysing social factors which facilitate the growth of Godmen phenomena, the authors outline the legal implications of people falling prey to Conmen. The responsibility of the secular state towards protecting its citizens from falling prey to Conmen has also been critically analysed.

In the research paper titled *"Rising Cyber Crimes Against Women and Its Causes"*, the author Mr. Raju N. Gaikwad observes that cyber crimes against women are showing an increasing trend for the last 10 to 15 years, and the entire society is affected by this phenomenon. In his research paper, the author attempts to focus on the nature of cybercrimes that are frequently encountered and the major constraints in detecting and investigating cyber crimes against women in India.

In the research paper titled *"Legislative and Reformative Approaches to Combat Trafficking of Women and Children in India"*, Dr. Bir Pal Singh observes that trafficking is one of the worst forms of human exploitation in which both women and children become safe targets. There are various socio-cultural and socio-economic factors responsible for the trafficking of women and children in economically poor countries of the world. India is also facing such problems being a developing country. In this article, the author attempts to highlight the efforts taken in India for protecting and restoring the rights of victims of trafficking.

In the "*Disability Jurisprudence in Reference to Case of V. Surendra Mohan v. State of Tamil Nadu*", the authors, Abhimanyu Paliwal and Vanjul Sinha analyse the case of *V. Surendra Mohan v. State of Tamil Nadu*, decided by the Supreme Court on 22 January 2019. The case deals with a person with blindness who wants to appear in the interview for the recruitment of Civil Judge Junior Division, and his pursuit of justice and equality. The paper highlights the dichotomy of the judiciary in India which is hesitant to apply the same standards of responsibility and accountability, that it expects all the other institutions to behold. It points out the injustices that a person with disability faces in society, where even the judiciary

seems to be against him, thus making him a truly disabled man. This article seeks to analyse the effect of laws on persons with disabilities and how far we accommodate the disabled population in the mainstream fold.

(Editorial Committee)

THE RELEVANCE OF SWAMI VIVEKANANDA'S PHILOSOPHY TO UNDERSTANDING THE CONSTITUTION OF INDIA AS SECULAR SPIRITUALISM

Varsha V. Deshpande♣

Abstract

Swami Vivekananda's philosophy is infused with unique dynamism. It reflects an unusual blend of eastern and western thinking. This blend has also deeply informed the process of Constitution making in India. Though Vivekananda was primarily a religious leader, he did not advocate a monopoly of his own faith. His ideas of universal religion amidst pluralism and the integration of the secular and the sacred are the most fascinating aspects of his theory. This paper is an attempt to unpack certain axioms from Vivekananda's philosophy and extrapolate them for a richer understanding of the Constitutional provisions in India. It tries to demonstrate how some of his insights find an eloquent reflection within the Constitutional text while some others can be gainfully employed for enriching the Indian Constitutional experiment. This paper is also an attempt in relating the tenets of Vivekananda's philosophy to the different approaches adopted by the Indian Courts in some cases of seminal significance in contemporary times. The paper concludes on the note that Vivekananda's philosophy has been timelessly relevant and its vitality lies in that it furnishes us with deeper insights and suggests more inclusive ways of mediating differences, particularly those grounded in religion.

Keywords: Constitution, Equality, Religion, Pluralism, Secularism, Sacred.

Introduction

Swami Vivekananda was a religious leader whose mission in life was to introduce to the western world the wholesomeness of the Vedanta philosophy,[1] as also to de-construct all misconceptions that the West harboured about Hinduism. But he was unique in that, he did not look at religion as an empty doctrine of idealism. His greatest contribution lay in simplifying religion for the masses and in boldly condemning blind adherence to dogmatic practices and rituals. Vivekananda's philosophy was infused with unique dynamism. This was perhaps because his thinking was structured upon inspirations he drew from overwhelmingly diverse sources. While his predecessor social reformers like Rammohan Roy, Debendranath Tagore, and others left deep imprints on his mind, he exposed himself quite early in life, to the powerful and influential writings of

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1 Swami Chetanananda (ed.), SWAMI VIVEKANANDA-VEDANTA: VOICE OF FREEDOM, 1st ed. 1987.

Western philosophers like Hume, Kant, Darwin, Herbert Spencer, Mill, and others. To top this all, there was his most revered Master Sri Ramakrishna Paramhansa who ignited the spark of spirituality in him. All the Western philosophies focussed more on man's capacity of reason. All these theories also addressed material well-being as an important pursuit of human life and existence. But Swami Vivekananda asserted that the keynote of Indian life was not "rationality" but it was "spirituality"[2]. Since his ideology was constructed upon a fine fusion of eastern and western thoughts, Swami Vivekananda was uniquely positioned to present a philosophy that was an unusual amalgam of ancient and modern thinking. While he was an ardent advocate of spiritual enrichment, he did not discard, nor derogate the importance of material prosperity. He wanted to reconcile spirituality with material advancement, faith with reason; science with mysticism, and service to men with absorption in God.[3]

This blend of eastern and western thoughts has deeply informed the process of Constitution-making in India. It is in the Constitution that one finds the finest expression of Swami Vivekananda's idea of combining the best of the east and the west. The Directive Principles of State Policy are an attempt toward securing material well-being and raising the standard of living of the masses. The Preamble and Fundamental Rights in Part III echo the Constitution's commitment to strive for realizing the transcendental principles of equality and justice, respecting the values of liberty and freedom, and of fostering brotherhood and fraternity which Swami Vivekananda so eloquently invoked by emphasising the principle of universalism. Hence it is worth exploring the philosophy of Swami Vivekananda to find clues for an innovative understanding of the Constitution.

Constitution as a Code of Spiritualism

This paper is an attempt to demonstrate how Swami Vivekananda's philosophy can be used to understand the Constitution of India as a code of secular spiritualism. However, it would be apposite to point out how, in the first place, is the Constitution of India a document of spiritualism. The word 'spirituality' has not been precisely defined anywhere; in fact, it is a term that defies any universally accepted definition. It has different connotations in different religions and cultures and its meaning has also expanded and developed over time. But in any case, it involves an appeal to the spirit or the soul as opposed to matter or physical things. For some, it involves God, for others the mental aspects of the worldly life and for some, it denotes the realms of the inner self. In short, spirituality denotes something that is not susceptible to any objective tests, verification, or proofs; it is rather a matter of subjective experience. It is intangible as opposed to the material or the worldly; it refers to the metaphysical and is thus necessarily transcendental. The path to experience this transcendental goal is guided by religion and hence spirituality is a religious process of reformation.

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2 Advaita Ashram, SELECTIONS FROM THE COMPLETE WORKS OF SWAMI VIVEKANANDA, 1st ed. 1986, pp. 278-79.

3 M L Burke, SWAMI VIVEKANANDA IN AMERICA: NEW DISCOVERIES, 1st ed. 1958, p.608.

The Constitution of India is born out of the deep-felt passion of the founding fathers to lead India to the realization of certain transcendental values. Notions of equality, justice, liberty, freedom, etc. prominently radiate transcendental values. Not only does the Preamble make a vocal commitment to realizing each of these; but in Part III, Part IV, and Part IVA, the Constitution also delineates the path to experience and realize them. In this sense then, the Constitution of India is a living code of national spiritualism. While religion supplies a guide for the spiritual enrichment of an individual; the Constitution of India is a guide to the spiritual enrichment of the nation. It is in this sense of transcendentalism that the word 'spiritualism' has been used in this paper in the context of the Constitution.

This paper argues that though Swami Vivekananda was an outright religious leader, a careful evaluation of his philosophy reveals that he was also secular. One can locate in his philosophy a unique blend of the religious and the secular. This, in particular, offers good insight for working under the Constitution that is at once secular, and which also guarantees the right to freely practice religion within a pluralistic state. His philosophy is infused with ideas of universalism and equal respect for all creeds, which idea permeates the secular spirit of the Constitution. He blends the religious and the secular, and also talks of a universal religion amidst pluralism. He vehemently spoke about education,[4] the importance of cultivating scientific temper[5], of upliftment of the backward classes[6] as well as women empowerment[7]. This reveals that in Swami Vivekananda's philosophy, though there is a passionate desire to preserve the religious heritage and culture of India, this desire is, at the same time, laced with modern, scientific thinking. His philosophy was relevant in his own times; it influenced our process of Constitution-making[8] and it continues to remain relevant even in the present 21st century. Hence this paper attempts to draw certain lessons from his philosophy for enriching constitutional jurisprudence in India.

Swami Vivekananda on Universal Religion and Pluralism

Swami Vivekananda believed that religion is the "constitutional necessity of the human mind".[9] Devoid of religion, humanity will be destroyed. He had a deep appreciation for intellectual and scientific progression but he equally strongly believed that such growth must be rooted in strong moral foundations. It is religion alone that brings about the inculcation of values and cultivation of culture. Without these religious foundations, all material prosperity will wither away. Religion for him, was an indispensable element of human life. Hence, he advocated a synthesis

4 *Supra* n. 2, pp. 481-487.

5 Swami Samarpananda, "*Swami Vivekananda and Science*", January 7, 2017, https://samarpanananda.blogspot.com/2017/01/swami-vivekananda-and-science-short.html, (visited on April 26, 2022).

6 *Supra* n. 2, p. 167.

7 *Ibid,* pp. 228-232.

8 Constituent Assembly Debates on 25 November, 1948; on 29 November 1948; on 6 December 1948; on 19 November 1949; manupatrafast.com/pers/personalized.aspx, (visited on April 26, 2022).

9 *Supra* n. 2.

of material science of the West with *Vedantic* knowledge of the East. While he was eager to share with the West the priceless ancient spirituality of India, he wanted to bring to India, science and technology from the West.[10] Vivekananda attempted to preach religion in the most pragmatic way; knowing well that no religion can be taught to people with hungry stomachs. Hence a decent standard of living, in his estimation, was a pre-condition to a meaningful engagement with religion.

Swami Vivekananda was a firebrand ambassador of Hinduism and so one finds in his lectures and writings an emphatic pride of Hinduism but never for once did he assert that other religions are false. Despite his mission of popularising Hinduism in the West, never did he make out a case for monopoly of his own faith. Thus, when the Swami stood to represent his faith before the World Parliament of Religions in Chicago, his aim was to introduce to that assembly the inherent greatness and richness of the Hindu philosophy, and not to demand monopoly by denigrating any other faith. In that, he remained a champion of equal respect for all religions, which is the essence of the secular commitment of the Indian Constitution.

Swami believed in the tremendous life power that all great religions of the world possess. The fact that no great religion has died out yet, bears testimony to this. If only one religion were true and others all false, then by this time they would have all died.[11] He however dreamt of one universal religion for all humanity. But here he did not mean religion as Hinduism, Islam, Christianity, or Buddhism. His idea of universal religion was an uncommonly genius one. He spoke of a universal religion amidst vibrantly thriving pluralism. No single religion can claim that it alone has all the truth. All religions in fact, even amongst themselves have developed so many sects, and with time, these sects have only multiplied. Swami Vivekananda sees in this variation, a sign of life. He said, "*... any attempt to bring all humanity to one method of thinking in spiritual things has been a failure and always will be a failure*"[12], for, we cannot make everyone conform to the same set of ideas. "*Ifeveryone thought alike then there would be nothing to think and*", he says, "*we would all be like Egyptian mummies in a museum looking vacantly at one another's face*"[13]. There would then be perfect peace and harmony but it would only be peace and harmony in the grave. Just as whirlpools and currents form only in rushing streams, he said, it is this variance in thoughts, variance in ways, and means of achieving the same goal that keeps religion alive. "*Unity in variety*", he said, "*is the plan of the Universe*",[14] (or rather also pluriverse, in his sense). Here, one sees in the Swami, an advocate of pluralism. One sees in him a staunch democrat who not only accepts that fundamental disagreements exist but also endorses these disagreements to be natural and considers them to be the oxygen of democratic ways of thinking.

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10 Gambhirananda, HISTORY OF THE RAMAKRISHNA MATH AND MISSION, 1st ed. 1957, p. 102.

11 *Supra* n. 2, pp. 360-361.

12 *Ibid,* p. 363.

13 *Id.,* pp. 363-64.

14 *Id.,* p. 381.

It is not difficult to relate this philosophy to the Constitution of India which also accepts pluralism as a way of life. By endorsing its commitment to "liberty of thought, expression, belief, faith and worship" the Constitution indelibly stamps its approval to pluralism. It also guarantees that all persons are 'equally' entitled to the freedom of conscience and the right to freely profess, practice and propagate religion. By investing this right equally in all, the Constitution creates space for different religious ideologies to concurrently flourish. At the same time, it discards any claims of religious monopoly by people of any faith. In an age that is plagued by increasing religious fanaticism, this pluralistic philosophy of Swami Vivekananda furnishes a vital insight. It recognizes the fact, that perfect balance in religions is an impossibility and that clashes are a natural outcome of differentiation. But when these clashes surface, the Swami reminds us that friction can be lessened by recognizing the natural necessity of variation.[15] It is important to bear in mind that all variations in religious ideologies ultimately lead one to the same common goal.

Vivekananda makes a pertinent point when he asserts that these variations in religious outlooks are not contradictory, though they are apparently understood to be so. He says that every religion has an inner soul and that soul may differ from the soul of another religion. Different they are, but not contradictory; they rather are supplementary. "*Each religion takes one part of the great universal truth and spends its whole force in embodying and typifying that part of the great truth. This is therefore, addition and not exclusion*".[16]The points of view may apparently seem contradictory but they lead to the same thing. He gives an example of a man journeying towards the sun and he takes a photograph of the sun at every stage of his journey. When he returns, he has a number of photographs to look back on. No two photos are alike and yet each one of them is a photograph of the same sun. So, it is with religion. The paths chosen may be different, philosophies, mythologies, and rituals may be different, and yet each lead to the same goal. Every individual should choose the path best suited to his tastes and inclinations, without hampering another's journey on his chosen path. The key word then is acceptance.[17] Religion and intolerance are incompatible ideas. The Swami, however, wants us to go even beyond toleration. Toleration smacks of blasphemy according to him, for, it signifies that I know you are wrong, and yet I am allowing you to live. He denounces such a spirit and says that 'acceptance' rather than tolerance should be the watchword[18]. Thus, by universal religion, he does not mean everyone adhering to the same set of doctrines. He rather means a religion where all these variations are allowed to flourish in harmony. Once we see the transcendental unity underlying all religions, the empirical diversities in their respective paths will fade into insignificance. All the divergent radii will definitely converge at the same center. At this center, all differences will automatically cease. However, until we converge, each should be allowed to travel uninterrupted along his own chosen

15 *Id.*, p. 163.
16 *Id.*, p. 365.
17 *Id.,* p. 373.
18 *Ibid.*

radius. This is Swami's idea of a universal religion which is not contrary to pluralism but blossoms best amidst pluralism.

To make this plan of religious harmony workable, he suggests certain things. He appeals mankind to abide by the maxim "*do not destroy, but build*."[19] He says, "*help others if you can, but if you cannot, then atleast do not injure*".[20] "*Do not say anything against another's convictions. Take man where he stands, and from there give him a lift*".[21] "*Accept another's faith as equally true and do not interrupt in his chosen ways*".[22]If one carefully looks through this plan of religious harmony as suggested by the Swami, it has far-reaching implications in understanding the futility of some contemporary religious conflicts of our times. In the present hatred-torn age of religious conflicts and intolerance, Vivekananda's exhortations "do not destroy but build", "acceptance rather than toleration" furnish a refreshing insight and endure as powerful antidotes to communal violence and religious hatred. Regardless of religious faiths, we shall all ultimately reach the same goal. An understanding of this transcendental unity helps us conceptualize these conflicts in the right frame and devise more inclusive ways of mediating differences.

Swami Vivekananda on the Synthesis of the Sacred and the Secular

The sacred–secular dichotomy has, in some part, been already covered in the preceding section. By demolishing the popularly misconstrued contradiction between universal religion and pluralism, Vivekananda classically demonstrates his secular commitment through equal respect for all religions. Yet in addition, it is fascinating to see how he negotiates the tensions between the sacred and the secular in other dynamic ways. It is interesting to study how he integrates the sacred and secular to draw a functional inter-relation between the two.

Admittedly, Vivekananda's primary aim was never to preach and propagate secularism *per se.* His main preoccupation was with religion. But his great contribution lay in making religion receivable and easy for all, by propagating practical Vedanta. His innovative re-interpretation of the Vedanta philosophy helped conceive a marked shift in the conceptualization of religion from something metaphysical to altruistic service.[23] This approach was unique to Vivekananda and in this, he was in fact "*secularizing the non-secular*"[24]. Service to mankind was given the ultimate premium in his philosophy and thereby he converted this spirit of service to man (secular) into a religious action (sacred). Self-liberation (*mukti*) was the ultimate aim of religion. But notice how he infuses the sacred and secular by advocating secular means for the achievement of sacred goals. In his '*karma yoga*', he makes service to mankind a route for realizing *mukti*. Thus, one sees that while the goals are non-secular, they can be achieved through secular actions. This

19 *Id.,* p. 384.
20 *Ibid.*
21 *Id.*
22 *Id.*
23 Jagatdeb Jayanti, THE SECULAR AND THE RELIGIOUS WITH SPECIAL REFERENCE TO THE PHILOSOPHY OF SWAMI VIVEKANANDA, http://hdl.handle.net/10603/119119, (visited on April 26, 2022).
24 *Ibid.*

synthesis that the Swami brought about was indeed fascinating. Commenting on the secular ideals of Swami Vivekananda, a writer notes as follows:

> *The sanctification of the secular and the secularisation of the religious implies two related innovations. One is to dissociate prevalent religiosity from its pristine forms. The other is to isolate within pristine forms its essential and non-essential aspects. Vivekananda's attempt to modernise Hinduism admirably succeeded on both these counts*.[25]

For Swami Vivekananda, devotion did not mean sentimental non-sense.[26] He did not approve of a religiosity that cared little for uplifting humanity and helping make men self-sufficient. He spoke boldly enough that he was prepared to give up religion if that came in his way of reaching out to his brethren.[27] He also did not approve of religion that tolerated and perpetuated poverty. One cannot miss noticing his secular ideals here.

Thus, in his philosophy there is no watertight compartmentalisation of the sacred and secular; there is in fact a confluence of the two. He wants the spiritual to be a yardstick for measuring the success of the secular. He appreciated non-secular thoughts but demanded secular actions. And finally, he asserted that it is only the truly religious man who can practice true secularism. Thus, religiosity according to him is the only necessary and sufficient condition for being secular.

Vivekananda on the Anti-Social Exclusion Practice

Historically India has seen a brutal form of anti-social exclusion on the ground of caste. Swami Vivekananda never hesitated to speak about the weaknesses of Indian society and the need to adopt the right approaches from others. He denounced caste-based divisions and inequalities. In doing so he advocated equality for all. He was very critical of the exploitative Brahmins who almost perpetuated caste divides and corrupt practices in the name of religion. About the caste system, he believes that there was initially only one caste, *i.e.*, the Brahmins. It is only with a difference in occupation that they went on dividing themselves into different castes. This, he says, is the only true and rational explanation of the caste system[28]. Thus, caste to him was nothing beyond an occupation-based categorization. But eventually, these caste divides got too much cemented within our social structures and created a graded inequality that denied equality of status and opportunity, especially to those on the lowest rung of the ladder. The hierarchies and the fighting over caste, he believes, only divided us, weakened us, and degraded us all the more.[29] Caste discrimination, in his evaluation, is one of the important reasons behind people's conversions to other faiths. He is openly critical about the dehumanising treatment that was given to a Pariah by not allowing him to pass through the same street as the high caste man. He forcefully spoke in opposition to

25 *Id.*, p. 185.
26 Advaita Ashrama, THE LIFE OF SWAMI VIVEKANANDA, 7th ed. 1965, p. 507.
27 *Ibid.*
28 *Supra* n. 2, pp. 283-284.
29 *Ibid.*

the allowance of such wicked and diabolical customs.[30] In one of his lectures he observes:

There is a danger of our religion getting into the kitchen. We are neither Vedantists, most of us now, nor Puranics, nor Tantrics. We are just 'Dont – touchists'. Our religion is in the kitchen. Our God is the cooking pot, and our religion is, 'Don't touch me, I am holy. If this goes on for another century, every one of us will be in a lunatic asylum.[31]

One encounters here, his powerful condemnation of the notions of purity and pollution in the context of caste. Notions of pollution will have to be abandoned to bring back purity within religion. A reflection of this manifests itself in the shape of Article 17 of the Constitution of India which abolishes the practice of untouchability. The solution to the social inequalities perpetuated by the caste system, he suggests, is not by bringing down the higher, but by raising the lower up to the level of the higher. This methodology is endorsed by the affirmative action plan that the Constitution of India sets out.[32]

Relating Swami Vivekananda's Insights to Constitutional Jurisprudence in India

There are some good reasons to unpack certain axioms from Vivekananda's philosophy and extrapolate them for a richer understanding of the Indian constitutional provisions and the constitutional philosophy in general. This section of the paper reflects upon the aforesaid crucial insights furnished by Swami Vivekananda's philosophy and tries to now relate them to the Indian Constitution. Some of his insights supply us with a rationale for explaining the shape that certain constitutional provisions took in India and others can be gainfully employed for fostering an innovative understanding of this Constitution.

- As pointed out before, Swami Vivekananda vehemently brought forth the importance of variation and said that unity in variety is the plan of the universe. He considers the existence of fundamental differences to be natural and suggests that we locate the unity underlying the differences. Democracy which is the core value undergirding our Constitution rests on the belief that the tones of society are many and varied and that they must be blended to fashion a sense of wholeness. The task of bringing about that unison amidst the diversity of beliefs, opinions, identities, etc., is the task of the Constitution. The Constitution of India celebrates the diversity of beliefs, cultures, languages, religions, etc., while at the same time, seeks to unite all persons of different faiths and backgrounds with the singular identity of being Indian. It thus shapes our sense of self as 'Indians'. The powerful opening words of the Constitution 'We, the people of India' bear eloquent testimony to the unifying chord of the Constitution. The enunciation of liberty, equality, and fraternity as mutually reinforcing values fortifies the

30 *Id.,* p. 285.
31 *Supra* n. 2, p. 167.
32 Article 15(4) and 16(4) of the Constitution of India 1950.

'unity in diversity' principle. The Preamble also mentions 'unity and integrity' of the nation.

- Vivekananda's emphasis on respect for divergent views and beliefs and acceptance of these differences manifests itself not just in the Constitutional text. The prior process of Constitution-making was also injected with these principles. The Constituent Assembly comprised of distinguished members who held widely diverse and differing views. They vehemently opposed each other during the deliberations in the Assembly and yet showcased the highest degree of regard and respect for each other and each other's views. The Assembly deliberations embraced a culture of constructive criticism on grounds that were thoroughly intellectual. This depicts one of the finest reflections of Vivekananda's exhortation. In modern times this is best described as a component of constitutional morality. The principle of constitutional morality recognizes this plurality in its deepest form.[33]

This insight from Vivekananda's philosophy also prominently brings out the importance of the right to dissent in deliberative democracy.

- Vivekananda's thesis was that religion/spirituality is the epicenter of Indian life. India's re-generation was possible only through the spiritual route. It is in recognition of this principle that India officially adhered to secularism when she adopted her own Constitution. Our founding fathers knew that secularism was the only way for preserving religion. However, the model of secularism that India adopts is quite peculiar. She did not incorporate the American formula of complete separation between the state and religion. Recall here that Swami Vivekananda did not advocate water-tight compartmentalisation of the religious and the secular; he rather brings about a synthesis of the two. India rejected a complete separation between the secular state and the religious core and took rather to a 'state interventionist' model of secularism. This germinated out of an understanding that in India the state could not remain dissociated from religion. Consequently, there are positive as well as negative expectations from the State in religious matters. It allows the state to regulate certain secular activities associated with religion[34] and to initiate social reforms through legislation[35] (positive expectations); also, it commands the state to strictly abide by the principle of non-discrimination on the ground of religion[36] (negative expectations). Thus, the Indian Constitution does not create a walled separation between the religious and the secular, but only ensures that the two are always in a dynamic and fluid dialogue. One can understand this model of secularism as an extrapolation of Vivekananda's theory of integrating the secular and the sacred.

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33 Pratap Bhanu Mehta, WHAT IS CONSTITUTIONAL MORALITY, SEMINAR 615, November 2010.

34 *Supra* n. 32, Article. 25(2)(a).

35 *Ibid*, Article 25 (2)(b).

36 *Id.*, Article 15 (1).

- Further, Swami wanted a person to be religious in his thoughts/beliefs but secular in his actions. This belief-practice dichotomy that he drew is reflected in Article 25 of the Constitution. This article grants all persons the freedom of conscience (beliefs) and at the same time subjects the right to freely practice religion (actions) to the regulatory power of the State, should the same offend the equal rights of others. It can thus rightly be said that Swami Vivekananda's philosophy finds a luminous expression in the secular Constitution of a profoundly religious Indian state.
- When Swami gives his practical plan for religious harmony, he exhorts us to follow our own system of beliefs without ridiculing or condemning the beliefs or practices of another sect/religion. Employing this doctrine from his ideology one can perhaps supply a partial justification to the dissenting opinion of Indu Malhotra J. in the *Indian Young Lawyers Association and Others v. State of Kerala*[37] (in short, *Sabarimala*)on the limited question of maintainability of the petition. It was an admitted fact on record that the petitioners in the instant case were not themselves the devotees of Lord Ayyappa. Not being so, Swami's philosophy requires them to refrain from challenging the practices of another faith. This was the line of thought adopted by the dissenting judge in holding the petition to be non-maintainable.[38] Notice what the learned judge observes:

> *To determine the validity of long-standing religious customs and usages of a sect at the instance of an association/interveners who are involved in social developmental activities, especially activities related to the upliftment of women and helping them become aware of their rights would require this court to determine religious questions at the behest of persons who do not subscribe to this faith. The right to worship claimed by the petitioners has to be predicated on the basis of affirmation of a belief in the particular manifestation of the deity in this temple.*[39]

She further goes on to observe, "*Permitting PILs in religious matters would open the floodgates to interlopers to question religious beliefs and practices, even if the petitioner is not a believer of a particular religion, or the worshipper of a particular shrine....*"[40] This argument, however, risking repetition, is on the limited point of maintainability, without touching on the merits of the issue and also momentarily leaving aside the purely legal principle of liberalization of locus standi in public interest litigations.

If the same *Sabarimala* judgment is evaluated on its merits, however, then Swami's thesis can be perhaps extended to offer justification for the majority decision instead. It has been pointed out in the earlier section how Vivekananda condemned the 'purity and pollution' notions in the context of caste-based exclusions. In the instant case, there wasn't an exclusion that was caste-based but

37 (2019) 11 SCC 1.
38 *Ibid,* p. 256.
39 *Id.*
40 *Id.*

an exclusion that was gender-based. It wasn't entirely gender-based either, as it did not exclude women as a class. It involved an exclusion of menstruating women in the age group of 10-50 years who were prohibited from entering the precincts of the Sabarimala temple. But what one cannot fail to see is that this exclusion was essentially grounded on the same notions of purity and pollution that Swami Vivekananda had condemned in the context of caste. Given his overall rejection of religious dogmas, love for scientific outlook and urge for bringing about women upliftment, there is a strong reason to believe that Vivekananda would have denounced such exclusion. This then explains the judgment of Chandrachud J. in extending the application of the untouchability clause in Article 17 to such exclusion of women. Vivekananda's insights are directed at de-constructing the 'form' in order to be able to look at the 'substance' concealed within the form. This is evidenced for example by his urge to look at religion as a wholesome attitude of 'acceptance' of another's faith beyond mere 'toleration'. This is a brilliant example of looking at substance rather than just the form. One can impulsively extrapolate this insight for understanding the Constitution of India as a commitment to secular spiritualism. It helps us to see beyond the text of the Constitution (form) to discover its true spirit (substance). The doctrine of basic structure which is tall standing constitutional canon seeks to frustrate any legislative attempt at demolishing or destroying the core ethos of the Constitution. But in identifying what constitutes this ethos, it expects the judiciary to look at the substance rather than the form. Though the word structure seems to apparently belong to the vocabulary of 'form' rather than 'substance', yet what constitutes a part of the basic structure can be best identified by reference only and only to the substance and spirit underlying the Constitution. This insight has been endorsed by the Supreme Court of India in the *M. Nagrajv. Union of India*[41]case where the learned judge observes:

> *It is important to note that the recognition of the basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole. These principles are part of Constitutional law even if they are not expressly stated in the form of rules*.[42]

Thus, one has to look beyond the letter of the law in order to discover its true spirit; which is the self- same insight that can be derived from Vivekananda's philosophy.

Further, Swami Vivekananda was able to innovate his practical Vedanta only by focusing on the substance rather than the form. He simplified religion, and made it receivable and understandable to the ordinary masses; for he knew all too well that religion was meant *for* people. Ridden with complexities and empty dogmatism, religion would only distance people away from gaining insights into its real teachings. Hence, he vehemently opposed dogmatic practices in the name of religion and discarded them outrightly in order to help people see the real substance

41 (2006) 8 SCC 212

42 *Id*.,pp. 242, 243.

of religion. This ideology of Vivekananda, when applied to the landscape of our contemporary legal culture, seems to endorse transformative Constitutionalism. Too formalistic an approach to judicial interpretation is inconsistent with transformative constitutionalism. When there is a far stretched focus only on the formal letter of the law, without engaging in its substance we tend to obscure the fundamental reality that law too exists *for* the people, for securing justice for them. Hence adherence to excessive formalism in interpreting the law often defeats the ends of justice which precisely, the law is meant to uphold.

As succinctly put by J. Pius Langa, "*at the heart of a transformative Constitution is a commitment to substantive reasoning, to examining the underlying principles that inform laws themselves and judicial reactions to those laws. Purely formalistic reasoning tends to avoid that responsibility.*"[43]

Finally, Vivekananda's desire to build a society grounded in the principle of equality is prominent in all his writings. Whether it is equality between religions or castes or between man and man. Notice what he once said, "For our own motherland, a junction of the two great systems, Hinduism and Islam, Vedanta brain and Islam body is the only hope".[44] For a staunch preacher of Hinduism to talk of the junction of the two almost rival faiths (as popularly perceived) was something revolutionary.

Also, the Swami exhorted to entire humanity that "each soul is potentially divine. The goal is to manifest this divinity....". This exhortation of Vivekananda became indelible in public memory. When he says that *each* soul is potentially divine, he means just every soul, regardless of religion, caste, creed, or gender. Embedded in this, is the transcendental principle of equality to which our Constitution is committed. By postulating this he demolished the so-called superior and exclusive claim of the Brahmans to realize the divine.

Conclusion

Swami Vivekananda presented to the world a timelessly relevant philosophy that dynamically embraced not just religion, but science, politics, culture, and several other tentacles of human thought. It has impacted the process of our Constitution-making and Constitutional interpretation as well. The judges of the modern-day have often derived strength from Swami Vivekananda's teachings, which is reflected in the fact that courts have lavishly cited the Swami in several judgments.[45] An exploration into the core and deeper principles underlying his philosophy demonstrate their contemporary relevance to the Indian constitutional experiment. Several present-day constitutional interpretations, even where they lack a conscious reliance on Vivekananda's philosophy, still enable a researcher to

43 Justice Pius Langa, "*Transformative Constitutionalism*", STELLENBOSCH LAW REVIEW, Vol. 17, 2006, p. 537.

44 *Supra* n. 2, p. 416.

45 *Ismail Faruqui v. Union of India* (1994) 6 SCC 360 at p.378; *S R Bommai v. Union of India* AIR 1994 SC 1918 at pp. 2015-17; *Ms. Aruna Roy v. Union of India* AIR 2005 SC 3226 at p. 3188; *P A Inamdar v. State of Maharashtra* AIR 2002 SC 3176 at p. 3254; *Maneka Gandhi v. Union of India* (1978)1SCC 248 at p. 334.

establish*a posteriori* nexus with his teachings. This testifies that the vitality of his thoughts has still remained un-dissolved.

The transcendental values of equality, justice and freedom that Swami Vivekananda robustly postulated in his philosophy, also illumine as the core principles of the Indian Constitution. The constitutional principle of fraternity is seen as the common thread in Vivekananda's philosophy throughout. His broader conception of religion and most importantly his effortless integration of the seemingly paradoxical ideas of the secular and sacred, as also of universal religion and pluralism remain by far, the most fascinating aspects of his theory. Facilitating the creation of an enabling climate that allows core religiosity to blossom to its best without letting it mutate into debilitating fanaticism is a great challenge of our times. But embedded in Vivekananda's philosophy are several insights that can help us meet this challenge. The larger ideas underlying substantive equality and affirmative action find an explicit expression in Swami's teachings. His crusade against untouchability as well as against the discrimination and exploitation of women resonate as some of the powerful objectives of our Constitution for the creation of an egalitarian society. Hence one notices that Swami Vivekananda's philosophy had a perfect blend of religiosity and rationality that can help us navigate through certain puzzling questions in constitutional interpretation. But it is important that the tenets of his philosophy should be correctly understood; and that they must be so understood by both – the individuals as well as officials of the State. They can then be gainfully employed to redeem the society of many vices and help usher in an era of constructive re-generation of our polity. His philosophy can be used for (to use a term presently in currency) 'sanitizing' the mindset and attitude of the society. What he wants everyone i.e., state as well as individuals to follow is simply the religion of humanity. Because of its exuberance and practical outlook, Vivekananda's philosophy transcends the limits of time, place and culture and becomes one of imperishable vitality in this contemporary age too. In the present times of institutional formalism there is an irresistible temptation to re-formulate his clarion call, as "*every institution of the State is potentially just. The goal must be to manifest this spirit of justness within*".

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TRANSFORMATIVE CONSTITUTIONALISM FOR PRESERVING CONSTITUTIONAL VALUES IN CONTEMPORARY INDIA: A CRITICAL ANALYSIS

Sumit Bamhore♣

Abstract

It is a universally accepted notion that the society must strive for development, and it can be improved only when it adopts and accommodates the social change through recognising and acknowledging the need for transformation. Therefore, the laws governing constitutional democracy, like India, must also adjust and evolve regularly for the overall development of the nation. In pursuit of this, the Constitution of India offers the provisions providing the fundamental rights and duties of an individual with the scope of modifications for accommodating the needs of modern society. Thereby, it has an ability to transform which makes it a living document for continuously shaping the lives of the people. However, in order to completely comprehend the ideology of transformative constitutionalism, it is essential to understand the principles and elements of constitutionalism, since the mere availability of the constitution does not indicate the existence of constitutionalism. Therefore, the paper examines the elements of constitutionalism in the light of the constitutional values envisaged under the Constitution of India. Further, it analyses the transformative character of constitutionalism in India. Finally, it elucidates the role of the judiciary in ensuring the implementation of transformative constitutionalism for the protection of constitutional values in India.

Keywords: Constitutional Morality, Constitutional Values, Constitutionalism, Social Change, Transformative Constitutionalism.

Introduction

The rules and laws are the natural outcomes of civilisation, and their existence is evident in the human existence from the beginning of civilisation. Although there were civilisations that believed in authoritarian rule, but the orderly civilisations favoured peace and respected natural rights and considered the natural law as the origin of all legal order. These principles of natural law happen to be the fundamental basis for ensuring justice and safeguarding the freedom of the people.[1] Therefore, it will not be an exaggeration to say that the relation between law and the development of society are interlinked and they are two sides of the same coin, wherein change in the law changes the society and *vice versa*. Essentially, the law

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1 John Finnis, NATURAL LAW AND NATURAL RIGHTS, 2nd ed. 2011, pp. 260-290.

is an immeasurably wide concept which consists of a broad range of ideas, beliefs, theories, principles, and concepts; however, the idea of justice is the most significant and vital constituent of the concept of law. This assumption is based on the fact which advocates that without attainment of justice the law cannot be effective and successful. Hence, the interconnection between laws made by the people, of the people and for the people with the idea of justice is most essential for the development of the society.[2]

In the contemporary society, where the concept of democracy and liberty are prevailing, it is must to ensure the mass understanding of rights and duties of an individual. It can be realised when society embraces social change by acknowledging the desires and requirements of an individual. The continuous efforts toward the constant evolution of the society are required to ensure the achievement of such evolution successfully. Therefore, it is expected that laws governing affairs of the nation must ensure social stability and augment the growth of society by addressing the desires and requirements of the changing society.[3] In short, it is essential that laws governing the affairs of the nation must transform with the change in society. In pursuit of this, the framers of the Constitution of India have incorporated various provisions for providing rights and duties of an individual towards the constitutional goal, which needs to be interpreted in a manner to accommodate the changing needs of the society.[4] This has presented a transforming ability to such provisions in the light of constitutional values which has been referred to as transformative constitutionalism.

In order to completely comprehend the ideology of transformative constitutionalism, it becomes extremely important to develop a sense of understanding in relation to the principles and elements of constitutionalism. The contribution of Greek philosophers is not significant in conveying the idea of constitutionalism,[5] but the Roman legal system understood and emphasised the distinction between *Lex* and *Jus*.[6] The Greek philosophers while describing the concept of law have emphasised the State made law, while the Roman legal system is based on the belief that State made laws need to comprise the element of justness and fairness. Subsequently, the common law transformed and acquired a modern shape in the light of changing socio-legal and political scenarios. This has led to the foundation of the idea of constitutionalism. In the Indian context, it is believed that there are three distinctive connotations to the constitution i.e., 'constitution as a text', constitution as law which is termed as constitutional law, and 'constitution as

2 Amartya Sen, THE IDEA OF JUSTICE, 1st ed. 2009, pp. 321-354.

3 Sougata Talukdar, "*Constitution and its Importance to Bring Social Change in India*", INDIAN JOURNAL OF LAW AND JUSTICE, Vol. 11 No. 1, 2020, pp. 89-103.

4 Part III and IV A of the Constitution of India.

5 C. Perry Patterson, "*The Evolution of Constitutionalism*", MINNESOTA LAW REVIEW, Vol. 32 No. 5, 1948, pp. 427-457.

6 Max Radin, "*Fundamental Concepts of the Roman Law*", CALIFORNIA LAW REVIEW, Vol. 13 No. 3, 1925, pp. 207-228.

an ideology' or 'vision of the nation' which is termed as constitutionalism.[7] In connection to this belief, the term constitutionalism is expected to differ for the State and those who are ruled by the State.

Constitutionalism

The constitution of any sovereign nation is the foundation for the fundamental laws governing the nation. It preserves the essential principles that guides the internal affairs of the nation.[8] Therefore, the constitutional democracies all over the world indicates the emphasis on spirit of law, which is unanimously believed to be the ability to ensure justice. This spirit of law is the driving force that influenced the founding fathers to infuse such qualities and features into the Constitution of India with the vision of making India a 'sovereign', 'socialist', 'secular', and 'democratic''republic' nation.[9] The text of the constitution depicts not only a document but also a moral and legal system that establishes the powers and limitations of governance, which is able to represent popular desire. Therefore, it is inevitably, the product of popular consent or the will of the people. In a strict sense, the constitution is a legal document that provides the mechanism for governing the interrelation between various organs of the State by offering a system of checks and balances to ensure protection against the abuse of power.[10] However, the importance of the constitution for the nation is extended much beyond merely providing a system of checks and balances.

The existence of a constitution does not inherently imply that a nation has constitutionalism. Although, the constitution provides a mechanism for governing the interrelation between various organs of the State, by limiting the authority of the State and the Government, constitutionalism sets the boundaries within which the rights of the citizens are safely preserved. To ensure citizens' rights are preserved, constitutions of some countries uphold parliamentary sovereignty, while some have evolved and prioritised judicial review within their rights-infringing policies for ensuring the protection of the rights.

Constitutionalism provides the parameter for examining the legitimacy of the government action. It helps in ensuring that the government actions adhere to pre-determined legal standards. Therefore, constitutionalism refers to a government that derives its legitimacy from the law. The goal of constitutionalism is to ensure that power is exercised in accordance with specific ideals and to prevent the misuse of

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7 Upendra Baxi, "*Outline of a "Theory of Practice" of Indian Constitutionalism*", Rajeev Bhargava (ed.), POLITICS AND ETHICS OF THE INDIAN CONSTITUTION, 1st ed. 2008, pp. 92-118.

8 Shree Ram Chandra Dash, "*The Constitution and Constitutionalism in India*", THE INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 34 No.1, 1973, pp. 7-40.

9 Tosanbha Marwein, "*The Sovereign Socialist and Secular Nature of the Indian State as introduced in the Preamble to the Indian Constitution*", JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH, Vol. 6 No. 7, 2019, pp. 16-19.

10 Luciano Da Ros and Matthew M. Taylor, "*Checks and Balances: The Concept and its Implications for Corruption*", DIREITO GV LAW REVIEW, Vol. 17 No. 2, 2021, pp. 1-30.

power by any constituent of the system.[11] Therefore, power is explicitly spread throughout the political system to create a system of checks and balances. Accordingly, power is distributed between the legislative branch, the executive branch, and the judiciary, with each branch administering within its authority and acting as a check on the others. Through this mechanism, constitutionalism aids in the creation of space for freedom within society, and simultaneously addresses the question of the limit for desirable freedom.

The term 'constitutionalism' has no clear definition; however, from the above discussion, constitutionalism undoubtedly indicates that government is only lawful if it adheres to the constitutional values. In an attempt to define constitutionalism, Louis Henkin explained the essential elements of constitutionalism i.e., (i)government according to the constitution; (ii) separation of power; (iii) sovereignty of the people and democratic government; (iv) constitutional review; (v) independent judiciary; (vi) limited government subject to a bill of individual rights; and (vii) controlling the police. In addition, he also highlighted the vital qualities of the constitutional design i.e., (i) rule of law; (ii) fundamental rights; (iii) democracy; (iv) separation of powers; (v) judicial review; and (vi) judicial independence.[12] Therefore, the constitution includes certain aspects of underlying goals and pledges toward achieving social order and using these vital qualities of the foundational text as a source of bringing about and constructing a just and equal society.

The main characteristic of constitutionalism is that the rule limiting the power of the government must be established in some form, either by statute or the creation of constitutional provisions. To put it another way, those having powers are legally limited, such as government agencies, and they must not have the legal authority to change or eliminate such limitations at will. Constitutionalism is founded on the belief that government officials in a democratic society are not free to do whatever they want, in whatever way they want; rather, they must follow the legal constraints on their power and processes outlined in the supreme constitutional law of the society.There must be a set of institutional procedures in place to protect against violations of the constitutional provisions in letter and spirit. Therefore, the rule of law might be considered to be the touchstone of constitutionalism. All government institutions, the commercial sector, and civil society are built on the foundation of the supremacy of the constitution and the establishment of rule of law. Hence, assuring equal distribution of benefits among the society at large, the availability of the constitution, and adherence to the rule of law are the key factors that ensure protection to the life of an individual, security to his/her property, sanctity to the contract, and protects the citizen from the arbitrary actions of the government by abusing the power.

Therefore, constitutionalism offers an institutional foundation for the rule of law, it strikes an appropriate balance between the rule of law and the rule of person,

11 Susan Alberts, "*How Constitutions Constrain*", COMPARATIVE POLITICS, Vol. 41 No. 2, 2009, pp. 127-143.

12 Louis Henkin, "*Constitutionalism, Democracy and Foreign Affairs*", INDIANA LAW JOURNAL, Vol. 67 No. 4, 1992, pp. 879-886.

it gives a minimum guarantee for justice with fair and equitable treatment, and it itself gets protected by the rule of law. It is a concept that expresses legal constraints on the use of governmental authority as well as adherence to the constitution, the rule of law, and, as a result, the will of the people.[13] It is a primary concern and ultimate purpose of constitutional ethos to eliminate authoritarianism, anarchy, and discrimination. Therefore, constitutionalism is an attempt to provide the elements of constitutional values which acts as a guiding force for striking such balance.

Constitutionalism in India

The Constitution of India was conceived and developed in a particular socio-economic environment, which provided both its guiding ideology and operational instrumentalities. According to the Constitution of India, inequality, hierarchy, and discrimination is manifested as much by State action as they are by societal sanctions, community traditions, and private relationships.[14] Thus, it not only acts as a focal point of struggle that stimulates the connections between the State and an individual but also as a normative framework for structuring the relationships among individuals within the society. Further, after nearly a century of colonial authority and oppression, India constructed and conceptualised a set of essential rights. These rights are enshrined in the Constitution of India as fundamental rights which is allowing independent India to promote and ensure justice, liberty, equality, and fraternity to all its citizens. These rights and privileges are intended to transform the personality of an individual and in order to do so, they must be compatible with the consistent fluctuation of the personality of an individual. This supposition is based on the belief that human nature is conflicting with the idea of stability, it strives for superior life with a continuous scope of improvement and aspires for social transformation and advancement. Therefore, constitutionalism in the Indian context reflects a set of ambitions and goals, which can be traced from the present status of affairs of the governmental organs as well as the history in the wake of enacting the preamble to the Constitution of India. These aims and goals are justice, liberty, equality, and fraternity that extends towards making India a sovereign, socialist, secular, republic, and democratic nation.[15] In pursuit of this, the Constitution of India specifies the specific ends such as fundamental rights and socio-economic rights, which serve as a complementary factor to achieving the ultimate goals which are specified in the preamble to the Constitution of India.

Basic principles and elements that are manifested under the Constitution of India are sovereign, democratic and republic character of the nation; social, economic, and political justice; Liberty of thought, belief, and expression; equality of status and opportunity; and fraternity assuring the dignity of the individual and the unity as well as integrity of the nation.[16] Further, the Constitution of India

13 C.L. Ten, "Constitutionalism and the Rule of Law", Robert E. Goodin (eds.), A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY, 2nd ed. 1993, pp. 493-502.

14 Articles 14, 15, and 16 of the Constitution of India.

15 Preamble to the Constitution of India.

16 Part III of the Constitution of India.

stipulates that any legislation that conflicts with the constitutional provisions and basic principles of the Constitution of India is invalid.[17] This signifies that in India, constitutional supremacy prevails wherein no law or action of the governmental organ can violate the provisions of the Constitution of India. However, the framers of the Constitution of India, unlike other liberal constitutions of the time, did not believe that restricting governmental authority and defending individual liberty were the fundamental or sole objectives of the constitution. Instead, they had envisioned the mission and vision i.e., to end injustice, bias, and discrimination within the nation.

The Constituent Assembly enacted the Constitution of India as a normative system, requiring all officials working under it, to emphasis on the smooth functioning of the system of governance in accordance with the social engineering requirements of the nation.[18] The Constitution of India is based on a liberalism ideology, having democracy as its functional manifestation. Through the Constitution of India, the rule of law has been carefully nurtured, and free, neutral, and independent courts have been established not only to uphold the rule of law but also to settle disputes between government departments and between the government and the people.[19] Further, the Constitution of India is drafted in such a manner that an amending power was included in its provisions for any future amendments, due to the dynamic and transitional society in India. As a result, the Constitution of India can be defined as being both rigid and flexible. Therefore, there are certainly accepted modalities for modifying the provisions under the Constitution of India.[20] However, there are ways other than the defined method for amendment of the Constitution of India such as conventions, practices, usages, customs, and judicial interpretation, which influence the actual implementation of the constitutional system and constitutional values without changing the constitution's phraseology. Therefore, when the social change or functioning of social dynamics is impeded from the Constitution of India, it creates a situation for the amendment of the constitutional text. Hence, it provides that, to avoid the danger of a conscious revolution, the Constitution of India may be changed to accommodate the desires of the people at a given time.

Therefore, in order for a constitutional democracy to progress in all aspects, the legislation that governs it must adapt and evolve through time. A law that does not change with the time is as ineffective as a lifeless branch on a tree that is not only inactive but also limits the growth of the tree. Therefore, it is the responsibility of constitutional courts to interpret the provisions of the Constitution of India by recognising the true purpose of extension of justice to all sections of the society. Based on logical inference, it may be concluded that the Constitution of India has

17 Article 13 of the Constitution of India.

18 M.P. Chengappa and Vineeta Tekwani, "*An Analysis of Transformative Constitutionalism with Special Reference to Sexual Minorities in India*", INDIAN JOURNAL OF LAW AND JUSTICE, Vol. 10 No. 2, 2019, pp. 162-178.

19 Indrani Kundu, "*Constitutionalism to Transformative Constitutionalism: The Changing Role of the Judiciary*", INDIAN JOURNAL OF LAW AND JUSTICE, Vol. 11 No. 2, 2020, pp. 347-369.

20 Article 368 of the Constitution of India.

two facets: (i) its potential to transform, which confers it with the character of an organic document, and (ii) its power to impact the lives of individuals in society on a continuous basis. Hence, it indicates that the Constitution of India has an intrinsic principle of transformation which allows it to uphold the notion of transformative constitutionalism in India.

Constitutionalism and Constitutional Morality in India

The citizens of India have a duty to observe the constitutional morality in which they respect the authority of constitutional institutions, knowing that they are subject to the rule of law and public scrutiny, and that their liberties are protected. However, constitutional morality is an ambiguous concept, because it is not defined as a concept in the Constitution of India or any other laws. It is pursued as a non-rule standard which indicates that it is treated more as a guideline than a regulation. Its essence may be understood from the arguments of the constituent assembly during the formation of the Constitution of India.[21]

Constitutional morality is an anticipated norm of behaviour or even obligations due to performance from the individuals within a legal system. Accordingly, the term constitutional morality is interlinked with such behavioural standards or duties of an individual. As a result, individuals and institutions have a responsibility to ensure that the legal system operates in a coherent and consistent manner in accordance with the fundamental principles and goals of the constitution.[22]

Constitutional morality requires adhering to the values enshrined under the Constitution of India and refraining from acting in a way that would be opposed to the rule of law or arbitrary in nature. It serves as an essential element that facilitates the understanding of the constitutional goals by acting as a prism through the framework of the Constitution of India towards the moral values.[23] Furthermore, moral values depend on the evolution of traditions and conventions. It persists and expands when the general public as well as those in charge of governmental institutions adhere to the constitutional constraints without deviating from the constitutional values and goals, thereby reflecting the institutional integrity and constitutionalism. Resultantly, the more than an obviously abstract dedication to the rule of law connects constitutional morality and constitutionalism. Constitutional morality encompasses a wide range of qualities, including establishing a pluralistic and inclusive society while adhering to other constitutional principles. While the idea of constitutionalism permeates and trickles

21 Ananya Chakravarti, "*Constitutional Morality in the Context of Indian Legal System*", INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, Vol. 3 No.2, 2020, pp. 64-73.

22 Bruce P. Frohnen and George W. Carey, "*Constitutional Morality and the Rule of Law*", JOURNAL OF LAW AND POLITICS, Vol. 26 No. 1, 2011, pp. 497-529.

23 Rohit Sharma, "*The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment*", NUJS LAW REVIEW, Vol. 2 No. 3, 2009, pp. 445-454.

through the operation of the State by incorporating constitutional morality for the benefit of each and every citizen of the State.[24]

The soul of the Constitution of India is the idea of constitutional morality, which may be found in the constitutional goals and objectives and the provisions that protects the individual dignity.[25] Constitutional morality seeks to develop a sense of brotherhood among diverse population of India, which includes people of many classes, races, beliefs, cultures, castes, and sections. It entails effective coordination between conflicting interests of many individuals and administrative collaboration to resolve them amicably and without confrontation among the various groups working to achieve their goals at all costs. For example, in a pluralistic society and secular democracy like India, constitutional morality reflects that the citizens have the freedom to practice their faith according to principles of their respective religion. It makes no difference whether the practice is logical or rational. To ensure that no one's religious convictions are obliterated or injured, constitutional morality necessitates the harmonisation or balance of all such rights. As a result, constitutional morality appears to have been used to aid in the interpretation of both constitutional provisions and constitutionalism. However, the concept of constitutional morality must be placed within the context of Constitutionalism in order to be effective in interpretation, because there is a risk of applying constitutional morality and constitutionalism improperly in the absence of precise clarification. In addition, the notion of social change and constitutional transformation must be seen as a natural extension of constitutional morality.

Transformative Constitutionalism in India

Transformative Constitutionalism is a doctrine that recognises the changing nature of society and recognises the need to update the Constitution to keep up with such changes.[26] The institutionalised violation of rights by the State is primarily responsible for the shift from constitutionalism to transformative constitutionalism. The term 'transformative constitutionalism' is often associated with South African constitutional law wherein Dikgang Moseneke, the then Deputy Chief Justice of South Africa stated that "*...it is perhaps in keeping with the spirit of transformation that there is no single understanding of transformative constitutionalism*".[27] Basically, if one of the fundamental aims driving a constitution is the transformation of its society, it is considered to be transformational. It is crucial to recognise that the transformation sought is not just about securing basic socio-economic and political rights, but also about achieving the holistic and larger goal

24 M.P. Singh and Ravi P. Bhatia, "*Foundation and Historical Evolution of Indian Constitutionalism*", THE INDIAN HISTORICAL REVIEW, Vol. 35 No. 1, 2008, pp. 173-207.

25 Sujit Choudhry et al., "*Locating Indian Constitutionalism*", Sujit Choudhry et al. (eds.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 1st ed. 2016, pp. 1-13.

26 Pius Langa, "*Transformative Constitutionalism*", STELLENBOSCH LAW REVIEW, Vol. 17 No. 3, 2006, pp. 351-360.

27 *Ibid*, p. 351.

of eliminating grassroots inequalities in terms of access to means, opportunities, education, livelihood, justice, and so on.

Transformative Constitutionalism envisions a process that considers the constitution as a tool to bring about social change from an unjust past to a democratic future. On the same note, an American academician Karl Klare coined the term 'transformative constitutionalism' as "*a long-term project of constitutional enactment, interpretations, and enforcement committed to... transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction*".[28] A different vision of the process of transformation that has been provided in pursuit of the ideal of transformative constitutionalism is that this process should not be seen as having any specific end, because if transformation is considered as a temporary event, it is expected that it will be accomplished at some time, and the process will come to an end. In addition, it also needs to be realised that the reform process is ongoing, with no specific endpoint in mind or else there will be no room in the transformational vision under the constitution for the possibility that things may be different or that there might be more options and more complex alternatives.

In Indian context, the philosophy of transformative constitutionalism offers the potential and aspiration to reform the society in order to fulfil the constitutional objectives of justice, liberty, equality, and fraternity as stated in the Constitution of India, in letter and spirit.[29] The best way to understand this expression is to use a pragmatic lens and staying connected with contemporary realities. Since, not only had India struggled with colonialism, but also with social problems such as untouchability, caste discrimination, and gender inequity, which had existed in India since ancient times.[30] As a result, India in post-colonial era was highly conscious towards the need to address variety of significant issues, such as poverty, illiteracy, as well as historical injustices such as untouchability and gender discrimination. Therefore, the desire to overcome the colonial history of India and to establish a new social and political order based on democratic values was the major motivating factor for the framing of Constitution of India.[31] Therefore, the Constitution of India emphasised the importance of universal human rights,

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28 Karl E. Klare, "Legal Culture and *Transformative Constitutionalism*", SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS, Vol. 14 No. 1, 1998, p. 150.

29 Preamble to the Constitution of India states that "*WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation…*".

30 Anurag Bhaskar, "*'Ambedkar's Constitution': A Radical Phenomenon in Anti-Caste Discourse?*", CASTE: A GLOBAL JOURNAL ON SOCIAL EXCLUSION, Vol. 2 No. 1, 2021, pp. 109-131.

31 M.P. Singh, "*Mapping the Constitutional Vision of Justice and its Realisation*", JOURNAL OF NATIONAL LAW UNIVERSITY DELHI, Vol. 3 No. 1, 2015, pp. 1-15.

equality, and non-discrimination, recognising the benefits of legal reform as a catalyst for social change and the necessity of rights in overcoming harsh inequalities of colonial India.

The Constitution of India explained as radical document that safeguards the existing hierarchical systems while providing freedom. As a result, it is the State's responsibility to ensure that transitions should keep pace with societal development. Hence, the two key features of transformative constitutionalism are: (i) it aims to achieve substantial equality by recognising and eradicating all forms of discrimination as they may have existed or may develop in the future; and (ii) it advocates for the full realisation of human potential within the context of 'positive social interactions' rather than 'interactions with the State'.[32] This demonstrates the prevalence of transformative constitutionalism in both the public and private spheres.

The Constitution of India under various provisions dealing with the fundamental rights,[33] epitomises its transformative goal. It encompasses the aspirations of people with the principal objective of justice, equality, liberty, and fraternity. It aims to develop a sovereign, socialist, secular, democratic, republic nation. Further, it promotes the ideas of equality, non-discrimination, freedom of speech and expression, movement, association, freedom of religion, personal liberty, and abolishment of untouchability. As a result, the constitution contains an underlying goal of establishing a new social order through political power. The primary goal of the constitution is to improve society by making it more progressive and inclusive, and this goal is a cornerstone of transformative constitutionalism. Therefore, the Constitution of India is transformative in nature as it envisions emancipation and is based on the belief that large-scale social change within a democratic system may be achieved through the process and instrumentality of legislation.

The distinction between transformative constitutionalism and constitutionalism is that in transformative constitutionalism, the essential function of the State is to carry out the emancipation mission and to strive for advancing constitutional principles such as liberty, equality, and fraternity.[34] In India, the judiciary is the institution that recognises this societal transformation and ensures justice. It plays a critical role in balancing societal interests with societal reforms by interpreting the Constitution of India in a way that societal interests become increasingly

32 Indira Jaising, "*Transformative Constitutionalism- A Post-Colonial Experiment*", THE LEAFLET: CONSTITUTION FIRST, July 22, 2019, https://theleaflet.in/transformative-constitutionalism-a-post-colonial-experiment-indira-jaising/, (visited on March 10, 2022).

33 Articles 14, 15, 16, 19, and 21 of the Constitution of India.

34 Preamble to the Constitution of India provides these constitutional principles wherein it states that: *WE, THE PEOPLE OF INDIA, having solemnly resolved…to secure to all its citizens: JUSTICE…LIBERTY…EQUALITY…and to promote among them all FRATERNITY….*

significant.[35] As a result, transformative constitutionalism necessitates the development of jurisprudence that is consistent with the transformative goal as it requires an awareness of the making of the Constitution of India, the history of the nation, and the struggles of the marginalised section of the society. Therefore, it is not an exaggeration to say that post-colonial constitutionalism exemplifies the commitment of the judiciary towards human rights.

Judicial Role Towards Transformative Constitutionalism in India

The power of interpretation of the constitutional provisions provides the scope to the judiciary for instilling life to the black text of law. It needs to observe dual responsibilities i.e., (i) promoting and preserving constitutional values by innovatively interpreting the text of the Constitution of India while continuing to remain within the scope of the legislation and acknowledging the constitutional mandate wherein it vouch for separation of power. As an intermediary between the people and the other organs of the State, the courts have been given the authority to assess legislation and governmental actions against the framework of the Constitution of India.[36] Therefore, it makes judiciary a crucial organ as it has the responsibility of not only interpretation but also protection of the constitutional values. In doing so, judges must liberally interpret the constitution while also using judicial review to correct the social injustices of the past. Furthermore, it is tasked with ensuring that a constitutional document in India remains relevant even in the modern society. Hence, to maintain its position and fulfil its responsibility, it takes on a more assertive role through the recognition and application of transformative constitutionalism. As a result, in recent years, the jurisprudence surrounding transformative constitutionalism has grown significantly.

The role of the Indian judiciary in promoting transformative constitutionalism can be found by analysing various judicial pronouncements, such as in *Indian Young Lawyers Association v. State of Kerala*,[37] the Supreme Court of India stated that "*The Constitution is marked by the transformative vision. Its transformative potential lies in recognising its supremacy over all bodies of law and practices that claim the continuation of the past which militates against the vision of a just society…This view demands that existing structures and laws be viewed from the prism of individual dignity*".[38]Further, Hon'ble Shri Justice Deepak Mishra, the then Chief Justice of India, interpreted the right to freedom of religion in the light of constitutional morality, which fundamentally deals with the freedom of religion of an individual, and stated that "*The term 'morality' occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, section or religious sect may perceive the term to mean…the term morality naturally implies constitutional*

35 Sanskriti Prakash and Akash Deep Pandey, "*Transformative Constitutionalism and the Judicial Role: Balancing Religious Freedom with Social Reform*", INDIAN JOURNAL OF LAW AND PUBLIC POLICY, Vol. 4 No. 1, 2017, pp. 108-120.

36 Anil Kumar Dubey, "*Legislative Role of Judiciary in India: A Critical Appraisal*", ILI LAW REVIEW, Summer Issue 2019, pp. 80-97.

37 (2019) 11 SCC 1.

38 *Ibid*, p. 39.

morality…".[39]Hence, the Supreme Court of India emphasised that individual dignity is central to liberal constitutionalism because the Constitution of India is founded on the principles of justice, liberty, equality, and fraternity, and all constitutional provisions, including religious freedom, must be interpreted in such a way that individual dignity is preserved. The court applied transformative constitutionalism in the light of constitutional goals and aimed to put an end to gender discrimination within the society.

In this case, it was found that entering the Sabarimala shrine is a part of fundamental rights[40] and denying the right to worship, to any particular group, of a religion or denomination constitute its violation. Therefore, it was held that denying the entry to women between the age of 10-15 years at the Sabarimala temple is a violation of their religious freedom. Such explanation of religious freedom transforms a provision that was frequently used by religious groups to continue unjust discriminatory practices into a tool for reformation and transformation for the society in the light of constitutional goal of the nation.

In *Shayara Bano v. Union of India*,[41] the Supreme Court of India noticed that the practice of triple talaq allows a man to divorce his wife by pronouncing 'talaq' three times in one sitting without his wife's consent. Therefore, it recognised that such practice was discriminatory and against the constitutional goal of gender equality. However, as the practice was argued to be the part of the essential religious practice of the Muslim religion, the court analysed the essentiality of the practice and while terming it as non-essential the court stated that "*The Holy Quran has attributed sanctity and permanence to matrimony. However, in extremely unavoidable situations, talaq is permissible. But an attempt for reconciliation and if it succeeds, then revocation are the Quranic essential…In Triple Talaq, this door is closed, hence Triple Talaq is against the basic tenets of the Holy Quran…Thus the practice of Triple Talaq cannot be considered as integral to the religious denomination…*".[42]Further Hon'ble Shri Justice R.F. Nariman, the then Judge, Supreme Court of India opined that "*…it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it.*"[43] Therefore, the Supreme Court of India acknowledged that the practice of triple *talaq* was violative of the constitutional goal and held that such practices cannot be protected under the aegis of right to freedom of religion guaranteed under Constitution of India. Hence, by declaring the practice of triple *talaq* unconstitutional, the judiciary has not hesitated to play the role of reformer rather than only that of transformer.

In *Joseph Shine v. Union of India*,[44] the Supreme Court of India has relied on the belief that one of the primary reasons for the evolution of provision for adultery

39 *Ibid*, p. 22.
40 Article 25 of the Constitution of India.
41 (2017) 9 SCC 1.
42 *Ibid*, p. 7.
43 *Ibid*, p. 13.
44 (2019) 3 SCC 39.

into its current form was that it resonated with value system of the society. However, with the evolution of modern Indian society in the realm of Constitution of India, the concepts of liberty, equality, and autonomy began to evolve. These ideas are no longer just ideas; they have taken the form of rights, which are the most fundamental to meaningful human existence. In light of such belief, it was stated by the court that "*Though women are exempted from prosecution under Section 497, the underlying notion upon which the provision rests, which conceives of women as property, is extremely harmful…Section 497 also premised upon sexual stereotypes that view women as being passive and devoid of sexual agency…Such an understanding of the position of women is demeaning and fails to recognise them as equally autonomous individuals in society.*"[45] Hence, the court held that Section 497 of the Indian Penal Code 1860 and Section 198(2) of the Code of Criminal Procedure 1973 is violative of the constitutional provisions[46] and therefore are unconstitutional. Finally, it struck down Section 497 of the Indian Penal Code 1860, which criminalised adultery for men in the absence of consent but not for women on the ground that the provisions were discriminatory, arbitrary, and violative of a woman's dignity and agency. Therefore, the court interpreted the law with recognising the autonomy of women and helped in transforming the society which suggests that the days of wives being invisible to the law and living in their shadows of their husbands are long gone.

In *National Legal Service Authority v. Union of India*,[47] the Supreme Court of India has recognised equal rights of the transgender community as citizen of India. Prior to this landmark judgement, the Indian society was lacking in gender awareness, and it exhibited from the attitude of the society as well as the legislatures. Therefore, the society never recognised the need for ensuring a legislative framework for the protection of the individuals those are not identified either male or female. The ignorance from the society was not only a denial for the rights of such individuals but it was creating a situation for constant physical and mental violence against them. In addition, these community has also been denied participation in various social, religious, and political activities. Therefore, while deliberating on the rights of the transgender, the court recognised transformative constitutionalism in the first place and stated that "*Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result of social reality.*".[48] Further, in relation to the equal rights of the transgenders in India, it was expressed by the court that "*As Transgenders in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of constitutional rights…the directive principles are required to be given new and dynamic meaning with the inclusion of transgenders as well…this is the recognition of their right to equality…*".[49]Therefore, the judgement explicitly stated

45 *Ibid*, p. 47.
46 Articles 14, 15(1) and 21 of the Constitution of India.
47 (2014) 5 SCC 438.
48 *Ibid*, p. 454.
49 *Id*.

that India would implement a system in which people could choose between the three genders, namely male, female, or transgender and realised the need for transformation for adequately addressing the present and future needs of the society in the light of constitutional goal.

In *K.S. Puttaswamy v. Union of India*,[50] the Supreme Court of India has established that privacy is a right that is constitutionally protected under the provision[51] of Constitution of India. The court held that the absence of an express constitutional guarantee of privacy does not necessarily imply that there is no protection for privacy under the constitutional framework in India. Further, the Court expressed that "*Like other rights which form part of the fundamental freedoms protected by Part III, including right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights…an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just, and reasonable.*".[52] Therefore, the court also cautioned that privacy is not an absolute right, and that any invasion of privacy must follow a legal procedure that is fair, just, and reasonable. Further, it also provided that in order to consider an invasion of life or personal liberty, certain conditions must be met i.e., "*(i) legality, which postulates the existence of law; (ii) need, defined in terms of legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.*"[53] The unanimous decision on privacy in this case reaffirms the fundamental constitutional principles and exemplifies the tenacity of dignitarian liberalism. Therefore, through applying the transformative constitutionalism, this judgement has reshaped the scope of fundamental rights.

In addition, the courts have clarified that the inclusion of sexual orientation is within the ambit of privacy and is undoubtedly protected under the Constitution of India wherein the court stated that "*Sexual orientation is an essential attribute of privacy… Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual…The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights…*".[54]Therefore, the interpretation of the court in this case and in NALSAcase,[55] has laid down the necessary foundation for decriminalisation of consensual sexual relationships among the same-sex adults.

In *Navtej Singh Johar v. Union of India*,[56] the Supreme Court of India asserted that Section 377 of the Indian Penal Code 1860 as unconstitutional, so far as it criminalises the consensual sexual relationships between the homosexual. The court stated that "*Section 377 does not criminalise particular people or identity or*

50 (2017) 10 SCC 1.
51 Article 21 of the Constitution of India.
52 (2017) 10 SCC 1, p. 39.
53 *Ibid*.
54 (2017) 10 SCC 1, p. 422.
55 *National Legal Service Authority v. Union of India* (2014) 5 SCC 438.
56 (2018) 10 SCC 1.

orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conducts, regardless of gender identity or orientation."[57] Therefore, the decision effectively decriminalised homosexuality in India by reinterpreting provisions of an archaic law, and upheld the constitutional rights of all citizens, regardless of gender identity or sexual orientation. Thus, the idea of a transformative constitutionalism was observed in the judgment by realising progressively rights of the LGBT community. The decision prioritised constitutional morality over social morality and norms. The significance of this case lies in the fact that the repercussions of how we address social conflict in our times will reverberate far beyond the narrow alleys through which they are explored. Further, the court expressed that "*…the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism. The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution…*".[58] Therefore, by analysing the decision in the light of transformative constitutionalism, it allows an opportunity to comprehend and experience the key philosophy of the Constitution of India. In addition, it also helps in examining the black text of the supreme law of land which speaks of justice and equality for even the most remote members of the community. Hence, in this case, the court recognised and unleashed the transformative capability of the Constitution of India that are originally imagined and fought for by the founders of the Constitution of India.

Thus, the judiciary has been crucial in bringing about the necessary radical change in the country's socio-political status. In cases brought before it, the judiciary has taken a fairly pragmatic approach in light of the changing nature and needs of society. Finally, through its decisions, it has attempted to strike a balance between constitutional morality and social morality. It also played a vital role in ensuring progress of the society by recognising and applying the transformative constitutionalism for the protection of constitutional values in India.

Conclusion

India is a pluralistic society in which various social groups, despite cultural differences, coexist peacefully.[59] Therefore, unknowingly people are nonchalant towards their constitutional and legal rights, as a result of such peaceful coexistence. However, the Constituent Assembly has visioned few constitutional goals, based on which it has drafted the Constitution of India. Although, the legal existence of the Constituent Assembly was owed to the colonial regime, but the Constitution of India declared sovereignty of the nation. The Constitution of India, like many other constitutions, is a 'power-map' that denotes the powers of its

57 *Ibid*, p. 308.

58 *Id.*, p. 56.

59 Mohammed Khalid, "*Cultural Pluralism in India: Protecting a Symbol of national Identity*", Vimal Vidushy (ed.), REVAMPING INDIAN SOCIETY IN THE ERA OF MODERNISATION: ISSUES AND DILLEMAS, 1st ed. 2016, pp. 111-115.

various authorities, organs, and institutions. However, it proclaims that the Constitution's goals and aspirations are to promote social, economic, and political justice, which suggests that it goes a step further and includes a transformative component. As a result, it gives each generation the freedom to decide for themselves what the Constitution means to them, to interpret the Constitution according to their own desires while remaining within the permissible limits of constitutional norms.

In the light of opinion of the constitutional courts in India, transformative constitutionalism and constitutional morality are mutually reinforcing paradigms, both leading to a more comprehensive set of rights protected under the Constitution. They are aimed at furthering and supporting the specified goal of transformation that is envisioned under the Constitution of India. Although, the constitution guarantees certain fundamental rights which are essential for the human existence, but the courts have played an important role to interpret it liberally, with a constructive and pragmatic approach by recognising and emphasising the constitutional morality, which is nothing but application of the transformative constitutionalism by the courts in India. However, in the context of application of transformative constitutionalism, the judiciary must be more proactive in putting the constitutional goals into practice through pragmatic means while preserving a balance of constitutional, social, and religious principles.

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DECIPHERING WOMEN'S RIGHT TO INHERITANCE UNDER CUSTOMARY LAWS WITHIN CONSTITUTIONAL CONTOURS

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Abstract

Personal laws govern intestate and testamentary succession in India. Succession among tribal communities is governed by their own customary law, most of which is uncodified. Customary laws governing inheritance and succession are largely inegalitarian and do not treat women at par with men. Khasi and Mizo tribes are also governed by their customary laws which have been partly codified through laws passed by State Legislatures. It is given that laws enacted cannot be in violation of fundamental rights guaranteed by the Constitution of India. However, the same is not entirely true for the said customary inheritance laws. In the light of the aforesaid background, the paper makes an analytical study of the inheritance rights of women under the Khasi and Mizo customary laws. Additionally, the paper addresses the conflict between the constitutional guarantee of equality and the perceived immunity enjoyed by personal and customary laws vis-à-vis the same.

Keywords: Customary Laws, Inheritance, Women, Constitution of India.

Introduction

Personal laws govern succession in India, both intestate and testamentary. When it comes to tribal communities, succession amongst them is governed by their own customary law, most of which is uncodified. Irrespective of whether a tribe is matrilineal or patrilineal, their customary laws governing inheritance and succession are inegalitarian and evidence of denial of equal rights to women.

Two such bodies of customary laws are those governing the *Khasis* and *Mizos* respectively[1]. They had unwritten laws governing them for a long time, parts of which were codified through subsequent legislative enactments. Generally, when laws are enacted, it is a given that the constitutional mandates including those of equality will be upheld. However, the same necessarily is not true for the said laws, particularly with regard to the provisions relating to inheritance. It is worth mentioning at this juncture the reasons behind zeroing down to *Khasi* and *Mizo* customary inheritance laws. As the authors hail from northeast India, they have closely observed the stated tribes which led to the genesis of this research. Additionally, as the *Khasi* and *Mizo* tribes are matrilineal and patrilineal tribes,

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1 Customary Law of *Khasi* and *Mizo* Tribe.

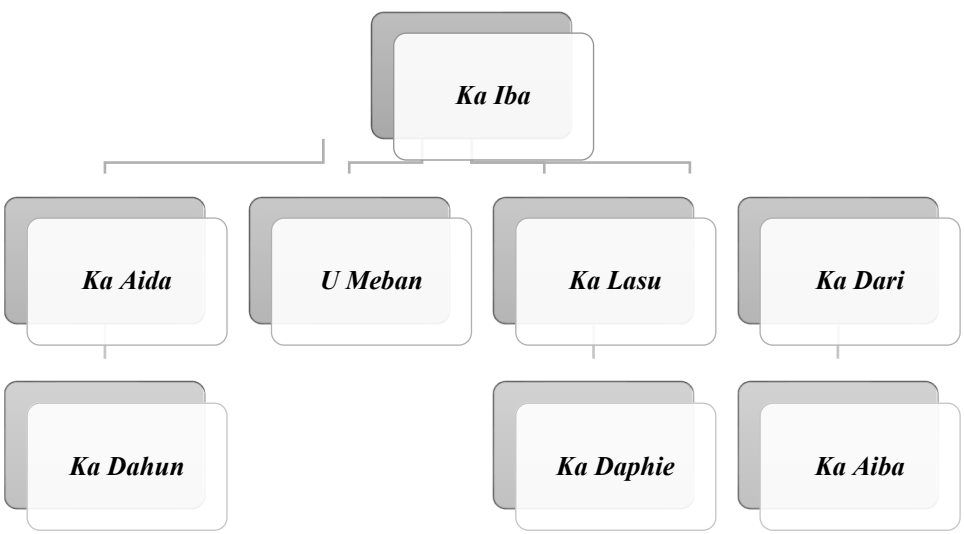
respectively, the effects of matrilineal and patrilineal society in the formulation of such customary laws become a possibility. Lastly, they are two of the few tribes who are striving to usher in changes with respect to affording equal inheritance rights.

Thus, this paper seeks to delve into this conundrum in depth. The paper first makes an analytical as well as a critical study of the customary inheritance laws governing the *Khasi* and the *Mizo* tribal communities while highlighting the rights enjoyed by women under the said laws throughout. The paper then discusses at length the conflict between customary laws with the help of several judgments delivered by the Apex court as well as different High Courts. Lastly, the paper juxtaposes *Khasi* and *Mizo* customary inheritance laws vis-à-vis the Constitution of India not only in terms of their standing apropos fundamental rights but their special status under the Constitution of India as well.

Khasi Customary Inheritance Laws

For the purposes of inheritance, *Khasis* consider two kinds of property *viz*. ancestral property (*nongtymmen*) and self-acquired property (*nongkhynraw*). Self-acquired property is further categorised as property acquired before marriage (*kamai iing kur*) and property acquired after marriage (*kamai iing khun iing tnga*).[2]

Since the *Khasis* are a matrilineal tribe, the ancestral property passes down in the female line. The mother passes the ancestral property to the youngest daughter (*ka khadduh*) who passes it on to her youngest daughter, and so on. In case there is no one to take in the youngest daughter's family, the property is inherited by the next youngest daughter of the mother, and so on.



'*Ka*' denotes female. '*U*' denotes male.

2 A. S. Khongphai, PRINCIPLES OF KHASI LAW, 1st ed. 2011, pp. 13-14.

In the given family tree, the property will pass down after *Ka Iba*'s death to her youngest daughter *Ka Dari* and after her, to *Ka Aiba*. If there is no youngest daughter of *Ka Aiba*, it will be taken by *Ka Iba*'s next youngest daughter *Ka Lasu*and so on.

It is to be noted that if the mother wants, she may give property to her other daughters, not necessarily equal shares, usually when they get married but the lion's share is always reserved for the youngest daughter. Whatever property she gives to the other daughters, that passes on from them to their youngest daughters as already explained above. There is no concept of partition whatsoever. The most striking part of the inheritance laws is that the sons are not entitled to any share in the ancestral property.

Apropos inheritance of self-acquired property, the rules are different not only on the basis of whether the property was acquired before or after marriage but also on the basis of whether the deceased was a male or female. If a female leaves behind property acquired before marriage, it is taken by her mother and in her absence, by her nearest female clan (*kur*).[3] As far as a female's property acquired after marriage is concerned, the rules are the same as in the case of devolution of ancestral property. However, if she has jointly earned it with her husband, he gets to inherit it and not her children.[4]

In a case where a male leaves behind the property that he had acquired before his marriage, his mother inherits, and where the mother is not there to take, the nearest female *kur* inherits such property. As far as a male's property acquired after marriage is concerned, if there are children, his wife succeeds. However, where he has not left behind children, his *kur* succeeds to one half and his wife succeeds to the other half.[5]

Mizo Customary Inheritance Laws

The *Mizo* customary laws have undergone several stages of changes. Therefore, they can be divided into four stages, *viz*., classical *Mizo* customary laws, *MizoHnam Dan* 1957, *Mizo Hnam Dan* 2005 and the *Mizo* Marriage, Divorce and Inheritance of Property Act 2014. The *Mizo* word for inheritance is *rokhawm*.[6]*Hmeichhia in Rokhawm* means inheritance by women.[7]

Classical Mizo Customary Laws

As the *Mizos* are a patrilineal tribe, the property devolves in the male line. Women were traditionally considered to have no right to inherit property. They get to inherit in exceptional cases where there are no males to inherit. If a husband dies leaving behind his widow and minor sons and daughters, his widow hasto approach her husband's male relatives to take care of her deceased husband's property until

3 Sir Keith Cantlie, NOTES ON KHASI LAW, 1st ed. 2008-09, p. 17.
4 *Ibid*, p. 15.
5 *Id.*, p. 21.
6 N. E. Parry, A MONOGRAPH OF LUSHAI CUSTOMS AND CEREMONIES, 1sted. 1998, p. 82.
7 *Ibid,* p. 88.

her sons attain age of majority.[8] The daughter gets to inherit only when there is no such male relative. The widow inherits when there is no daughter as well. Comparatively speaking, women are placed at the bottom of the chain of inheritance where daughters are placed just above widows, *i.e.*, her mother.[9]

Mizo Hnam Act 1957

Rule 109 of the *Mizo Hnam* Act 1957 deals with inheritance. The nearest male relative of the deceased inherits his property and accordingly, the order of preference is as follows:[10]

- His son. If he has multiple sons, then, his youngest son;
- If he has not left behind sons, his brother;
- In he has not left behind a brother, the nearest male relative;
- In the absence of near male relatives, a woman, *i.e.*, his daughter or wife; and,
- If all of the above are not present, distant kinsmen.

It might seem that the youngest son takes the cake but his right to inherit is coupled with the obligation to care for his parents till their death. In case he fails to discharge this obligation, whoever among his brothers is willing to fulfil the said obligation shall inherit. However, if the father, during his lifetime, distributes his property among his children, they will inherit shares according to his wishes.

As far as women's rights to inherit is concerned, the general rule is that they cannot inherit. Daughters may inherit if her deceased father has not left behind any sons. However, similar to the rule for sons, the youngest daughter is the preferred heir.[11] Widows also generally do not inherit from their deceased husband. However, the deceased has not left behind any children, his widow may be given a share by the Court as they deem fit and proper. To put it succinctly, daughters and widows are both excluded from inheritance if the deceased is survived by a son.

Mizo Hnam Dan 2006

Mizo Hnam Dan 2006 basically echoed similar idea. Apropos women's rights to inherit, there were changes, albeit still inegalitarian. It provided that if an unmarried daughter who lives with her parents is the bread earner of the family, she is entitled to a share on the death of her father.[12] If the deceased has not left behind any son, but is survived by a daughter, she inherits.[13] If the deceased has left behind his widow and daughters but no sons, his widow becomes the head of the family.

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8 Gitanjali Ghosh and Sarasu Esther Thomas, DE-CONSTRUCTING INHERITANCE RIGHTS OF WOMEN UNDER TRIBAL CUSTOMARY LAWS: A COMPARATIVE STUDY OF KHASI AND MIZO TRIBES, 1st ed. 2020, p. 74.

9 *Ibid*, p. 78.

10 Rule 109(2) of The Mizo Hnam Dan 1957.

11 *Ibid*, Rule 109(10).

12 Rule 181(2) of The Mizo Hnam Dan 2006.

13 *Ibid*, Rule 180(2)(c).

After her death, the daughter who lives in her parent's house is entitled to inherit.[14] If the deceased is survived only by his widow, she will inherit but subject to the conditions laid down under Rule 184.[15] It provides that for a wife (*nupui*) to claim her husband's (*pasal*) property (*ro*), it must be proven that their marriage had been conducted as per the Mizo customary laws as laid down under Rule 36.[16] Further, it provides that the widow has to be *nu thianghlim,* i.e., virtuous and capable of taking care of the household, otherwise, she shall not inherit.[17]

Mizo Marriage, Divorce and Inheritance of Property Act 2014

The current Mizo law governing inheritance is codified under Section 31 of the Mizo Marriage, Divorce, and Inheritance of Property Act 2014. The inegalitarian provisions continue to exist under this statute as well.

The father is considered to be the head of the family. On his death, his widow assumes the position of the head of the family, provided she maintains her chastity and takes care of her minor children. She has to get a no objection from her major children to act as head of the family. If the children have attained majority, she needs to obtain no objection from the children to continue as the head of the family.[18]

The widow and the sons (those who are not *Indang*[19]) of the deceased share his property equally. However, his youngest son will inherit an extra share subject to the condition that he takes care of his family members.[20] If the deceased has left behind sons of a pre-deceased son, the share that would have been taken by such pre-deceased son had he been alive would be taken by his sons.[21] What is to be noted at this juncture is that an unmarried daughter who has been taking care of her parents and siblings and is the main bread earner of the family will also inherit a share equal to that of her mother and brothers.[22]

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14 *Id*., Rule 181(3).

15 *Id*., Rule 181(5).

16 *Id*., Rule 36 provides that "a man and a woman can enter into a valid marriage if both of them have attained the age of majority and do not have any other surviving spouse. The man's elders (*palai*) go to the woman's house with the proposal to which her family agrees. After the bride price is given by the man to the woman's family pursuant to which the marriage is solemnized by a person empowered to do so. If a man and woman elope, or live together as a married couple, it shall not be recognized as a valid marriage irrespective of how long they have lived as a married couple."

17 *Id*., Rule 102.

18 Section 31(1) of The Mizo Marriage, Divorce and Inheritance of Property Act 2014.

19 *Ibid*, Explanation to Section 28 provides that "*indang* means a son or daughter leaving his/her father's house for independent and separate establishment or family which is accepted by the head of family." Explanation to Section 34 of TheMizo Marriage, Divorce and Inheritance of Property Act 2014 provides that "for the purpose of inheritance, the son even if married or unmarried daughter living in another village, town or city or in a foreign country for employment, service or profession is not *indang*."

20 *Id*., Section 31(2).

21 *Id*., Section 31(3).

22 *Id*.

If the deceased has not left behind any sons, his widow and unmarried daughters inherit equally.[23] His widow inherits entirely in the absence of sons and unmarried daughters.[24] If the widow is also absent along with sons and unmarried daughters, it is only then that the married daughters get to inherit equally.[25]

It is to be noted here that if the deceased's sons and daughters from a previous marriage were living with him at the time of his death, they shall manner in like manner as the sons and daughters from the existing marriage.[26] In cases where such children from a previous marriage were not living with him, they can inherit only when the deceased has not left behind sons or daughters or wife from the existing marriage. However, his wife from the previous marriage shall not inherit.[27]

The statute has introduced a progressive aspect by recognizing illegitimate children as heirs, although neither are they treated at par with legitimate children nor are illegitimate sons and daughters treated equally. If the deceased has not left behind sons, daughters (unmarried or married), widow, then, the youngest illegitimate son will inherit the property. If he is not present, the youngest illegitimate daughter gets to inherit. In her absence, the brothers and sisters of the deceased inherit whereby youngest brother gets an extra share.[28]

Coming to situations where the deceased was unmarried at the time of death, the rules of inheritance are the same irrespective of whether the deceased was male or female. The father is the one who inherits the property of his unmarried son or daughter. If he is not there to inherit, the mother gets to inherit. If neither parent is living, the youngest brother of the deceased inherits and, in his absence, the youngest sister inherits. If the deceased has left behind children, his sons shall inherit and only when there are no sons, his daughters get to inherit.[29]

Conflict Between Customary Law and Fundamental Rights

Before addressing the complexities, we should first decipher the meaning of 'law' and 'law in force' provided under Articles 13(3)(a) and (b) of the Constitution of India. They read as follows:

> *In this article, unless the context otherwise requires, —*
>
> *(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;*
>
> *(b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.*

23 *Id*., Section 31(4).
24 *Id*., Section 31(6).
25 *Id*., Section 31(7).
26 *Id*., Section 31(5).
27 *Id*., Section 31(8).
28 *Id*., Section 31(9).
29 *Id*., Section 31(10).

Article 13(3)(a) comprises an inclusive definition of law thereby providing it with a wide ambit. This has been done so that its interpretation is not restricted to legislative enactments thereby bringing within its fold, custom, or usage having the force of law, *inter alia*. However, it must be noted that Constitutional amendments do not fall within the ambit of Article 13(3)(a).[30]

Article 13 of the Constitution of India clearly states that any 'law' which is not in consonance with fundamental rights is void. Thus, the validity of legislation, ordinance, order, rule, regulation, custom, usage etc. can be tested on the touchstone of fundamental rights.[31]

> *13. Laws inconsistent with or in derogation of the fundamental rights*
>
> *(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*
>
> *(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.*

In order to answer whether those customary laws which are not in consonance with fundamental rights should be declared void or not, we need to first answer another question, *i.e.*, whether personal laws can be interpreted as 'law' under Article 13 of the Constitution of India?

This question has been deliberated upon in several cases decided by courts in India. Courts have looked at whether the Hindu law or personal laws governing other communities are 'law' under Article 13. Courts have also adjudged upon matters where such laws have been challenged in terms of their inconsonance with fundamental rights. While on the one hand, there are judgments where personal laws were held to be outside the purview of the Part III of the Constitution of India, on the other hand, there are also those wherein personal laws were held to be within the purview of Part III of the Constitution of India.

Apropos judgments where personal laws were held to be outside the purview of the Part III of the Constitution of India, a thorough scrutiny of the judgments delivered by courts clearly show that an evasive approach has been taken by them while deciding such cases. The courts seem to not interfere keeping in mind the feelings of the communities governed by such laws. Essentially, two approaches taken by the courts are distinctly visible in this regard.[32]

The first approach is where courts have decided that the personal laws being challenged were not contrary to fundamental rights. The second approach is where courts have declined to rule that personal laws come under the scope of Article 13

30 *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461.
31 *Ibid*.
32 M.P. Jain, INDIAN CONSTITITIONAL LAW, 7th ed. 2014, p. 676.

as a consequence of which such laws cannot be challenged if they are not in consonance with fundamental rights.[33]

In the *State of Bombay v. Narasu Appa Mali*,[34] the validity of the Bombay Prevention of Hindu Bigamous Marriages Act 1946 was being deliberated upon as it was challenged to have been contravening fundamental rights guaranteed under Articles 14, 15, and 25 of the Constitution of India. Chagla C.J. and Gajendragadkar J. held that "personal law was not included in the 'law' referred to in Article 13(3)(a) and was not the 'law in force' saved by Article 373(2) and defined in Article 13(3)(b)." They further held that the expression 'laws in force' in Articles 372(1) and (2) does not include personal laws as they cannot be interpreted as authorizing the President to interfere with the personal law of any community.

Chagla C.J., in the instant matter, stated that the Legislature has to espouse the welfare of the State and frame policy to that end and it is not upon the Courts to interfere with their decisions. While supporting the stance taken by Chagla C.J., Gajendragadkar J. observed that the Indian Constitution has recognized the existence of these personal laws as they are dealt with under Schedule VII List III Entry 5. However, he opined that personal law does not find a place under Article 13 as the framers of the Constitution wanted to leave it outside the ambit of Part III.

This stance of the Bombay High Court has been adhered to in several other judgments delivered by various High Courts and the Supreme Court as well.

In *Maharishi Avadhesh v. Union of India*,[35] the Supreme Court, *inter alia*, dealt with a petition seeking to declare the Muslim Women (Protection of Right on Divorce) Act 1986 void as it was violative of Articles 14, 15, 38, 39, 39A and 44 of the Constitution of India. The Supreme Court dismissed the petition clearly stating that "these are all matters for legislature."

In *Ahmedabad Women Action Group v. Union of India*,[36] writ petitions were filed as public interest litigation before the Supreme Court, *inter alia*, to declare polygamy under Muslim law void as it is violative of Articles 14 and 15. They also sought that the practice of Muslim men giving unilateral Talaq to his wife without her consent and without resorting to the judicial process of courts be declared void since it offends Articles 13, 14, and 15 of the Constitution of India. While outrightly refusing to take cognizance, the Supreme Court observed that the instant writ petition wholly involved issues pertaining to State policy which don't concern the Court. They also referred to precedents where it has been held in similar cases that the remedy does not lie with the Courts but elsewhere.

In *Madhu Kishwar v. State of Bihar*,[37] the Court refused to declare that customary laws of inheritance governing tribals were Articles 14, 15 and 21 of the Constitution of India and held that "each case must be examined and decided as

33 *Ibid*.
34 *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom. 84.
35 *Maharishi Avadhesh v. Union of India* 1994 (supp) 1 SCC 18.
36 *Ahmedabad Women Action Group v. Union of India* AIR 1997 SC 3614.
37 *Madhu Kishwar v. State of Bihar* AIR 1996 SC 1864.

and when full facts are placed before the Court." To put it in the words of K. Ramaswamy, J.:

> *However, much we may like the law to be so we regret our inability to subscribe to the means in achieving such objective. If this be the route of return on the court's entering the thicket, it would follow a beeline for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the Hindu Succession Act and the Indian Succession Act as models. Rules of succession are, indeed susceptible of providing differential treatment, not necessarily equal. Non-uniformities would not in all events violate Article 14. Judge-made amendments to provisions, over and above the available legislation, should normally be avoided. We are thus constrained to take this view, even though it may appear to be conservative for adopting a cautious approach, and the one proposed by our learned brother is, regretfully not acceptable to us.*

In *P.E. Mathew v. Union of India*,[38] Section 17 of the Indian Divorce Act 1869 which requires a decree for dissolution of marriage passed by a District Judge to be confirmed by a three-Judge Bench of the High Court was challenged on the ground that it was as arbitrary, discriminatory and in violation of Articles 13(1), 14, 15(1) and 21 of the Constitution of India. While the Kerala High Court agreed that the procedure laid down under Article 17 resulted in prolonged agony of the affected parties and that amendment was required, they did not declare it *ultra vires*. They clearly stated that they would not go contrary to the decision given by the Supreme Court in the *Ahmedabad Women Action Group v. Union of India*.[39] They held that personal laws are not laws as defined in Article 13(1) and that the remedy lies with the Legislature. They opined that apropos the instant matter if amendment is required, State has to take necessary steps.

A different trend is visible in those judgments wherein personal laws were held to be within the purview of Part III of the Constitution of India, thereby meriting discussion.

In *Srinivasa Iyer v. Saraswathi Ammal*,[40] the Madras Hindu (Bigamy Prevention and Divorce) Act 1949 was challenged as being violative of Articles 14, 15 and 25 of the Constitution of India. However, the Court decided whether the personal law of the Hindus was 'law' within the meaning of Article 13(3)(a) or 'law in force' within the meaning of Article 13(3)(b) and Article 372(3) did not merit consideration. The Court held that since there is no difference between the expression 'existing law' and 'law in force', therefore, personal law would be 'existing law' and 'law in force'. They arrived at this as custom, usage and

38 *P.E. Mathew v. Union of India* AIR 1999 Ker 345.
39 AIR 1997 SC 3614.
40 *Srinivasa Iyer v. Saraswathi Ammal* AIR 1953 Mad 78.

statutory law are so inextricably mixed up in personal law that it would be difficult to differentiate personal law from them.

In *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh*,[41] the Madras Hereditary Village-Offices Act 1895 was sought to be declared void in so far as it was not in consonance with Articles 14 and 16 of the Constitution of India. The Constitution Bench of the Supreme Court observed that 'law' under Article 13 includes custom or usage having the force of law and, therefore, "even if there was a custom which has been recognised by law…that custom must yield to a fundamental right."

In *Sant Ram v. Labh Singh*,[42] the question in consideration was "whether after coming into operation of the Constitution of India, the right of pre-emption is contrary to Article 19(1)(f) read with Article 13 of the Constitution, or is it saved by Article 19(5)?" The Court decided that a customary right of pre-emption was void under Article 19(1)(f). While doing so, the Supreme Court observed thatcustom and usage having the force of law in the territory of India must be held to be within the purview of 'all laws in force'.

In *Madhu Kishwar v. State of Bihar*,[43]Sections 7, 8, and 76 of the Chhota Nagpur Tenancy Act 1908 were sought to be declared *ultra vires* Articles 14, 15, and 21 of the Constitution of India as the said customary law denied inheritance rights to tribal women solely on the basis of sex. Although the Court did not provide the sought relief by stating that declaring tribal customary laws as violative of Article 14 would create a state of chaos in existing law but the following observation was also made:

> *Though the customs of the tribes have been elevated to the status of law, obviously recognized by the founding fathers in Article 13(3)(a) of the Constitution, yet it is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental rights.*

This discussion reveals a contradiction in the judicial stand. Given the feelings of communities and the sensitivity of the issues involved, the Courts have steered clear of adjudging these laws *vis-à-vis* fundamental rights thereby pushing the ball in the court of the Legislature.[44] Thus, it is evident that no uniform stand has been taken by Indian courts while faced with the question of what prevails when personal and customary laws are in conflict with the fundamental rights.

Khasi and *Mizo* Customary Inheritance Laws *Vis-À-Vis* Constitution of India

Apropos the issue of consonance of *Khasi* and *Mizo*customary laws of inheritance with the fundamental rights guaranteed under the Constitution of India is concerned, the analytical discussion so far makes it evident that the Indian judiciary has not dealt with it with finality.

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41 *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh* AIR 1961 SC 564.
42 *Sant Ram v. Labh Singh* AIR 1965 SC 314.
43 *Madhu Kishwar v. State of Bihar* AIR 1996 SC 1864.
44 *Supra* n. 32 at p. 919.

However, there is another facet to this discussion arising within the contours of the Constitution of India that merits discussion since it has ramifications on any efforts to make changes in *Khasi* and *Mizo* customary laws of inheritance. As provided under Article 244(2), several States have been bestowed special status by their inclusion in the Sixth Schedule to the Constitution of India. Meghalaya and Mizoram are two such States. Additionally, Mizoram has been provided with special provisions under Article 371G of the Constitution of India.

In the context of Meghalaya, Paragraph 3(1)(h) of the Sixth Schedule to the Constitution of India provides powers to the *Khasi* Hills Autonomous District Council to enact laws pertaining inheritance of property. Paragraph 12A(1), however, states that if there is a conflict between the laws made by the District Council and those made by the Legislative Assembly of Meghalaya, the latter shall prevail.

As far as Mizoram is concerned, Article 371G(a)(ii) of the Constitution of India provides that "any law enacted by the Parliament of India pertaining *Mizo* customary law and procedure shall be applicable to Mizoram only subject to a resolution being adopted by the Legislative Assembly of Mizoram to that effect."

It is pertinent to note at this juncture that "Intestacy and Succession" are listed under Entry V of the Concurrent List in the Seventh Schedule to the Constitution of India, thereby empowering the Parliament as well as the State Legislatures to enact laws on it.[45] But in the case of Meghalaya and Mizoram, as the above-discussed provisions show, any attempt at amending *Khasi*and *Mizo* customary laws on inheritance has to be undertaken by the respective Legislative Assemblies of Meghalaya and Mizoram.

Conclusion

Achieving gender equality in all fields is *sine qua non* for the empowerment of women. Similarly, the economic empowerment of women is essential to the overall achievement of women's empowerment. The right to inherit property is an invariable facet of economic empowerment and therefore, the existence of inegalitarian inheritance laws is an unfortunate fetter placed on the path of women's empowerment.

Goal 5 of the 'Sustainable Development Goals' seeks to achieve gender equality and empower all women pursuant to which it has imposed several targets for States. Out of these targets, quite a few are instrumental in terms of egalitarian inheritance rights for women, *viz*., ending all forms of discrimination against all women; ensuring their full and effective participation in decision making in political, economic, and public life; ensuring equal opportunities for leadership; undertaking reforms in national laws to provide equal inheritance rights; and adopting and strengthening policies and legislation for the promotion of gender equality and women empowerment.

Thus, it is pertinent that inegalitarian inheritance laws which discriminate between women and men on the basis of their gender should be done away with. In

45 Article 246(2) of the Constitution of India.

our opinion, the courts have missed out on the opportunity to strike down such laws by declaring them as violative of the fundamental rights guaranteed under the Constitution of India. The legislature should do away with these historical inequalities suffered by women if truly seeks to fulfil both its international and national legal as well as moral obligation to ensure gender equality and achieve women empowerment.

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PATENTABILITY OF EMBRYONIC STEM CELL-RELATED INVENTIONS: EMERGING ISSUES AND CHALLENGES

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Abstract

Biotechnological innovations and intellectual property are interrelated. An important biotechnological innovation of recent times is the use of human embryonic stem cell lines for research purposes. Embryonic stem cells are derived from the blastocyst stage of a human embryo, and this procedure renders the embryo nonviable, this technique brings numerous legal, ethical, and moral dilemmas. This technology is considered as a medical breakthrough in different ways and some countries provide entire support for academics on this, while others lack explicit policies, resulting in the majority of research being led by private actors without support or assistance from the government. Human embryonic stem cell research has created controversy about the use of human embryos in research and therapy, and human embryonic stem cell patents raise similar concerns. The research paper is divided into five parts. The first part provides an introduction to embryonic stem cells. The second part looks at the benefits and uses of human embryonic stem cell research. The third part analyses moral and legal concerns with regard to embryonic stem cell research. The fourth part analyses the laws of various countries which currently advocates human embryonic stem cell research. The fifth part summarises the findings and evaluates some of the proposed modifications to the patent system to address the issues raised in the article.

Keywords: Human Dignity, Human Embryonic Stem Cells, Patent.

Introduction

> *Nothing that you do in science is guaranteed to result in benefits for mankind. Any discovery, I believe, is morally neutral and it can be turned either to constructive ends or destructive ends. That's not the fault of science.*
>
> - Arthur W. Galston

Stem cell technology is a fascinating and rapidly expanding research field with enormous medicinal possibilities. Human stem cells, in particular, have sparked a lot of academic curiosity, and their clinical and therapeutic potential has generated a lot of optimism and hype. However, ethical concerns and regulatory limits regarding human stem cells have shaped the progress of regenerative medicine and drug discovery. Despite the fact that the legal protection of life sciences discoveries

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through patents has long been recognised, it continues to be a source of contention around the world. This is true especially for patents involving human stem cells, namely human Embryonic Stem Cells (hESCs).[1] Recent court decisions restricting patents based on hESCs in Europe and barring natural goods from patent protection in the US, for example, are likely to have had an impact on patent protection for several human stem cell products. In most major nations, however, methods for treating or diagnosing diseases in people are generally not patentable.[2] While it is unclear to assess how patentability restrictions are affecting the human stem cell market, it is clear that developers of stem cell-based goods or processes, whether academics or enterprises, must adapt their research and commercial strategies to the patentability restrictions.[3]

Human embryonic stem cells (hESCs) were successfully extracted, grown, and partially described from blastocysts by the stem cell researchers of the University of Wisconsin in 1998.[4] Despite the fact that the Wisconsin Alumni Research Foundation (WARF) patents are already extensively licensed, the issues they raised may eventually be buried by more subtle, but more persistent problems.[5] In general, Adult or Somatic Stem Cells (SSCs) and Embryonic Stem Cells (ESCs) are the two types of stem cells. ESCs are particularly intriguing for medical study because they are pluripotent, which means they can develop into almost any form of tissue and are far more malleable than adult stem cells. They can divide indefinitely without losing their genetic structure, and they provide a glimpse into the earliest stages of human developmental biology.[6]

Adult or SSCs, on the other hand, are obtained from fully formed tissues or organs, but their capacity to differentiate or generate unique tissue types is limited.[7] The use of stem cells in tissue repair and replacement is essentially based on their pluripotent[8] and totipotent[9] characteristics. It is a technology that allows for the production of patient-specific stem cells and tissues. This increases the likelihood that the repair and/or replacement given by such tissues will be accepted by the body's immune system. This therapeutic component of stem cells has been found to

1 Alice Yuen-Ting Wong and Aurélie Mahalatchimy, "*Human Stem Cells Patents-Emerging Issues and Challenges in Europe, United States, China, and Japan*", THE JOURNAL OF WORLD INTELLECTUAL PROPERTY, Vol. 21, 2018, p. 1.

2 *Ibid.*

3 *Id.*

4 Audrey R. Chapman, "*The Ethics of Patenting Human Embryonic Stem Cells*", KENNEDY INSTITUTE OF ETHICS JOURNAL, Vol. 19 No. 3, 2009, p. 262.

5 Karl Bergman and Gregory D Graff, "*The Global Stem Cell Patent Landscape: Implications for Efficient Technology Transfer and Commercial Development*", NEW BRAUNFELS, Vol. 25 No. 4, 2007, p. 419.

6 *Supra* n. 4.

7 Antoinette F Konski and Doris J F Spielthenner, "*Stem Cell Patents: A Landscape Analysis*, NEW BRAUNFELS, Vol. 27 No. 8, 2009, p. 722.

8 Pluripotent cells, such as embryonic stem cells, can give rise to all of the cell types that make up the human body.

9 Totipotent cells have the ability to produce all cell types in the body, including extraembryonic (placental) cells. The only totipotent cells are embryonic cells within the first few cell divisions after fertilisation.

be helpful in the treatment of a number of malignant and non-malignant disorders, including diabetes, Parkinson's disease, and cancer.[10]

Benefits and Uses of Stem Cell Research

Benefits

The hESCR may also lead to treatments and possibly cures for devastating diseases for which there are currently no adequate therapies, such as spinal cord injuries, type 1 diabetes in children, nervous system diseases such as Parkinson's disease, Alzheimer's disease, and multiple sclerosis, primary immunodeficiency diseases, bone and cartilage diseases, and some types of cancer.[11] Furthermore, many scientists and doctors hope that research on hESCs, as well as other types of pluripotent stem cells, may pave the way for clinical therapy to repair and replace diseased tissues and organs.[12]

Making stem cell products available to users, either as therapy for patients or as specific stem cell derivatives to pharmaceutical companies for drug testing and research, often requires the manufacturer's ability to commercialise and profit from the product. It is doubtful that the product will be produced even if there is no profit potential. The commercialisation of stem cells has a wide range of possible applications and several people have already done so.[13] These can range from providing a one-of-a-kind services to a customer (for example, a pharmaceutical company may produce a variety of 'cell-based screening platforms' for neural, cardiac, liver, vascular, and blood cells for drug toxicity testing) to selling a stem cell-based 'drug' as a therapeutic product (e.g., vials of cells to be used for treating a specific disease).

Despite the significant research and development efforts made by large and small biotechnology establishments to create stem cell products in the past, the risks in this area remain very high.[14] There are no assurances that the products will fulfill regulatory standards, be viable, or have customers by the time they are ready for sale. When the initial excitement about stem cells' potential in regenerative medicine faded at the turn of the century, several stem cell companies went bankrupt or stopped producing stem cell products.[15]

Uses

The stem cells may be useful to learn more about how a complex organism grows from a fertilized egg. Scientists can see stem cells proliferate and grow more specialised in the lab, producing skin, bone, brain cells, and other cell types.

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10 Singh and Associates, "*Patentability of Stem Cell Technology - Intellectual Property – India*", MONDAQ, https://www.mondaq.com/india/patent/808130/patentability-of-stem-cell-technology, (visited on February 21, 2022).

11 S*upra* n. 4.

12 *Ibid.*

13 Christine Mummery et al. STEM CELLS: SCIENTIFIC FACTS AND FICTION, Chapter 15 (*Patents, Opportunities, and Challenges: Legal and Intellectual Property Issues Associated with Stem Cells*), 2nd ed. 2014, p. 394.

14 *Ibid.*

15 *Id.*

Understanding what governs normal development will require identifying the signals and mechanisms that decide whether a stem cell continues to replicate itself or differentiates into a specialised cell type, and which cell type it differentiates into.[16] Abnormal cell division and differentiation are responsible for some of the significant medical disorders, including cancer and birth abnormalities. A deeper understanding of the genetic and molecular regulation of these processes could lead to new insights into how diseases develop and therapeutic options. The purpose of stem cell research is to achieve this.[17]

Stem cells have the potential to heal and replace damaged cells. This characteristic is already being utilised to treat severe burns and to help patients with leukemia and other blood problems rebuild their blood systems. Stem cells may also hold the secret to restoring cells lost in a variety of other deadly diseases for which no long-term therapies exist. Now, donated tissues and organs are commonly used to replace damaged tissue, but the need for transplantable tissues and organs far exceeds the supply. If stem cells can be instructed to develop into specific cell types, they could provide a sustainable source of replacement cells and tissues for disorders like Parkinson's, heart disease, and diabetes. This is an intriguing idea, but there are still huge technological obstacles to overcome, which will require years of diligent investigation.[18]

Stem cells can be used to study diseases. It can be challenging to access and examine the cells that are destroyed in disease in many circumstances. Stem cells that are either infected with the illness gene or modified to include disease genes are a feasible option. Scientists could employ stem cells in the lab to replicate disease processes and learn more about what goes wrong.[19]

Stem cells have the capacity to be utilised in clinical trials to evaluate new medical treatments. Animal testing would be unnecessary since new medications could be tested for safety using specialised cells grown in large numbers from stem cell lines. This method has already been used with other cell lines. Cancer cell lines, for example, are used to test potential anti-tumor drugs.[20]

Ethical and Legal Concerns

Ethical Issues

Human Embryonic Stem Cell research, on the other hand, has been found to be ethically and politically contentious due to the procedure of harvesting this type of stem cell, which results in the destruction of the embryo. For those who believe that the embryo has a high moral standing and that nascent human life must not be sacrificed for research, this result presents ethical difficulties. These ethical concerns, however, are not shared by all ethicists or people of faith. Many people,

16 "*Types of stem cells and their uses*", EUROSTEMCELL, https://www.eurostemcell.org/types-stem-cells-and-their-uses, (visited on February 22, 2022).
17 *Ibid.*
18 *Supra* n. 16.
19 *Ibid.*
20 *Id.*

especially religious leaders, believe that embryos should really be treated with dignity but not given all of the privileges and status that humans have. Others place a greater emphasis on their moral obligation to heal and alleviate the suffering created by injury and diseases.[21]

The ethical discussions regarding human Embryonic Stem Cell Researches (hESCRs) and the patentability of human Embryonic Stem Cell Lines (hECSLs) revolves mainly around the question of the embryo's legal and moral position. The legal status of the human embryo is largely concerned with the ethical issues that arise when the embryo is destroyed by HESCRs.[22] The argument that hESCRs are unethical, it based on the opinion that the embryo is an aspect of human development. According to this opinion, the embryo stage, which is a part of human growth such as the phases of pregnancy, infancy, childhood, adolescence, adulthood, and old age, is also a human being.[23]Embryos are whole human beings, at the early stage of their maturation. The term 'embryo', similar to the terms, 'infant' and 'adolescent', refers to a determinate and enduring organism at a particular stage of development. Just as you and I once were infants, so too were you and I once were embryos. Each of us came into being as an embryo and developed by an internally directed and gapless process from the embryonic into and through the foetal, infant, child, and adolescent stages, and into adulthood with our determinateness and unity fully intact.[24]Humans are being instrumentalised by using human embryos to treat diseases. Humans, on the other hand, should be a goal in themselves, not a means to an end. This viewpoint is known as a "non-gradualist position."[25]

According to Immanuel Kant, human beings are dignified and have certain rights because they have the potential to be intelligent and autonomous creatures. This view justifies Kantian understanding of the concept of morality.[26] Similarly, the embryo deserves to be protected as it has the potential to become a creature of intelligence and autonomy. This perspective, which will be examined more under the sub-heading of Kantian moral philosophy, maintains that perhaps the embryo

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21 *Supra* n. 4.

22 Tansu Sayar Kanyış et al. NOVEL PERSPECTIVES OF STEM CELL MANUFACTURING AND THERAPIES, Chapter (*Patentability of the Human Embryonic Stem Cell Lines: A Legal and Ethical Aspect*), INTECHOPEN, https://www.intechopen.com/chapters/74179, (visited on February 20, 2022).

23 Wolfgang Wodrag, "*Human Stem Cell Research*", PARLIAMENTARY ASSEMBLY, http://www.assembly.coe.int/nw/xml/XRef/X2H-XrefViewHTML.asp?FileID=10259and lang=en, (visited on February 21, 2022).

24 Robert P George and Patrick Lee, "*Embryonic Human Persons. Talking Point on Morality and Human Embryo Research*", EMBO REPORTS*,* Vol. 10 No. 4, 2009, p. 305.

25 *Ibid.*

26 Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS, 11th ed. 2006, https://cpb-us-w2.wpmucdn.com/blog.nus.edu.sg/dist/c/1868/files/2012/12/Kant-Groundwork-ng0pby.pdf, (visited on February 21, 2022).

doesn't seem to have reason or autonomy, and therefore that possessing this potential is enough to benefit from human rights protection.[27]

According to the second viewpoint in the debate over the status of human embryos, they are more or less similar to a creature that should be protected and honored, but it lacks the traits of a fully-fledged baby. With each stage of development, the embryo's moral status improves. Once it is formed, it acquires the right to protection as a human and also to have rights. In this way of thinking, the embryo's moral status is not absolute but rather is linked to other moral factors. Comparing the potential and benefit of those other people's treatment determines an embryo's moral position at a certain stage of development. If the benefit sought is a higher level of 'goodness' than that of the embryo's destruction, then the embryo's destruction is not regarded as wrong. For hESCRs, this argument presents an ethical opportunity.[28]

Human Dignity

Following the question of whether or not the human embryo has the right to life, another issue to consider whether or not the human embryo possesses human dignity. The primary question is whether it is possible to talk about human dignity without talking about human life and if people do not accept the embryo's right to life, will they be able to honor it. The belief that the right to life and the right to human dignity should be considered separately was maintained.[29] "Specifically, right to life advocates claim that human life begins at fertilization, and, as a result, embryo research brutalizes us by sacrificing innocent life to uncertain therapeutic ends. Therefore, not only does the embryo or foetus have an absolute right to life, but there are no meaningful stages to demarcate its status from that of an actual person."[30] Human dignity exists everywhere human life exists, yet it is difficult to assert that human dignity does not exist where human life does not exist. The human embryo, on the other end, is respected since the future person's dignity is to be protected.[31]

Another view, which explains the relationship between human rights and human dignity in a similar manner, therefore, is based on the notion that the right to life and human dignity can exist independently and makes a distinction between human dignity and the right to life with regard to the status of surplus human embryos. In terms of regard for human life, the human embryo is valued. The right to life, on the other end, is judged irrespective of this factor and is only acknowledged after certain phases have been accomplished.[32] As a result, in some

27 Louis M. Guenin, "*Morals and Primordials*", SCIENCE, https://science.sciencemag.org/content/292/5522/1659.full, (visited on February 21, 2022).

28 *Supra* n. 23.

29 *Ibid.*

30 Stephen C. Hicks, "*The Right to Life in Law: The Embryo and Fetus, the Body and Soul, the Family and Society*", THE FLORIDA STATE UNIVERSITY LAW REVIEW, Vol. 9, 1992, p. 805.

31 *Supra* n. 23.

32 Steering Committee on Bioethics, "*The Protection of the Human Embryo In Vitro*", Report by the Working Party on the Protection of the Human Embryo and Fetus,

circumstances, general well-being takes precedence above respect for the human embryo's life. According to this viewpoint, the fact that an embryo could be destroyed for the benefit of society does not undermine the value of the human embryo. Even though it does not have the right to life, the human embryo has dignity. This point of view is based on the assumption that the value of humanity exceeds concern for the lives of human embryos which will be destroyed even under circumstances, and its opponents dismiss it as consequential.[33] This viewpoint has also been chastised for its inconsistency. It was said that if the embryo's life is honored, it should be granted human rights. The only way to tackle this difficult dilemma, is to limit in vitro fertilisation to fertilise the ovas which will be transported to the uterus. Only in this case is the human embryo not instrumentalised, so human dignity is protected, which is now impossible owing to the status of assisted reproductive technology growth.[34]

On the other hand, John Harris argues that embryos developed through IVF or miscarriages must be used rather than discarded. This thesis is founded on the "Waste Prevention Principle."[35] The alternative, wasting the resources, claims that there are significant moral grounds to use these resources wisely. He claims that if surplus embryos are going to be destroyed anyhow, it is not a bad idea to put them to good use. Harris even claims that organ and tissue transplantation from an aborted fetus is the same as organ and tissue transplantation from a deceased.[36]

Another point of view among hESCR proponents contends that perhaps the right to life is not an absolute right and that limitations on it may be imposed in order to discover remedies for incurable conditions. This concept is founded on the belief that a human embryo is a living human being. According to this position, there is a direct conflict of interest between the right to life of the human embryo and the treatment of patients seeking treatment, and treatment for serious diseases may be prioritised as a result of this conflict.[37]

Human dignity takes on new significance as an absolute law when people consider themselves as a means to an aim and respect all other persons equally. It transcends trends and individual characteristics to achieve a universal quality. "We cannot hold people responsible for their activities against their wills, just as we cannot hold a person who is used as a tool legally responsible for a passive act carried out by destroying his will over another."[38] Man, on the other hand, is responsible for what he does rather than what he endures.[39] However, she/he can be disrespectful to her/his own human dignity by acting counter to the value of her/his

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COUNCIL OF EUROPE, 2003, https://www.coe.int/t/dg3/healthbioethic/activities/04 human_embryo_and_foetus en/CDBI-CO-GT3(2003) 13E.pdf, (visited on February 22, 2022).

33 *Ibid.*

34 *Supra* n. 23.

35 John Harris, "*Stem Cells, Sex and Procreation*", CAMB Q HEALTHC ETHICS, Vol. 12 No. 4, 2003, p. 368-369.

36 *Ibid.*

37 *Supra* n. 23.

38 *Ibid.*

39 *Id.*

own species, of which she/he is a member. "A solid knowledge of this worth, and thus contemplating it with this understanding and valuing it at least as much as the value it finds in its own person, appears to be a condition for being understood with human dignity and being so precious. In this sense, any interference with the embryo's potential right to life, regardless of whether it violates human dignity or not, might be considered a violation of human dignity if it is antithetical to the value of the species of which a human being is a member."[40]

Legal Issues

Ownership

In the field of stem cell research, the topic of ownership is crucial. There is no existing law that specifically addresses a person's property rights in their own biological materials. A number of cases involving ownership interests in human organic material have given light on the issue.[41] The California Supreme Court concluded in *Moore v. Regents of the University of California*[42] that "a patient's property interest in his own excised cells was lost when the attending physician removed the patient's spleen as a therapy for hairy cell leukemia."

In *Davis v. Davis*,[43] a case of first impression, the Tennessee Supreme Court addressed "the issue of ownership rights in unused embryos.[44] Mr. Davis' desire to avoid fatherhood outweighed Mrs. Davis' desire to donate the frozen embryos to a third party," according to the Tennessee Supreme Court.[45] The court determined that "the frozen embryos were neither persons nor property, therefore it granted Mr. Davis a very limited property ownership stake in them, permitting him to decide on their fate."[46] Courts have been hesitant to recognise individual biological components as having ownership interests.[47] When one's own biological material is utilised for research, there is no statute protecting one's ownership rights.[48] As a result, when disagreements occur, state law is applied to determine the outcome of the cases.[49] It is interesting to note that the top courts of both the States in the US decided the question without invoking property law in two of the most important ownership cases.[50]

Privacy

Privacy is an issue to address for all sources of human stem cells unless they are utilised for autologous transplantation, in which the donor of the cells is also the

40 *Id.*
41 John A. Lee, Comment, "*The Ownership and Patenting of Inventions Resulting from Stem Cell Research*", SANTA CLARA LAW REVIEW, Vol. 43, 2003, pp. 600-601.
42 *Moore v. Regents of the University of California* 1990 (51) Cal. 3d 125.
43 *Davis v. Davis* 1992 (842) S.W.2d 588.
44 *Ibid.*
45 *Id*. at 604.
46 *Id*. at 597.
47 *Supra* n. 43.
48 *Supra* n. 42, at 621.
49 *Moore v. Regents of University of California* 51 Cal. 3d at 120; Davis, 842 S.W.2d at 588.
50 *Ibid*.

sole recipient. The genome in each one of the cells remains similar to the DNA of the original donor when embryos or adult cells are utilised to produce cell lines that will be cultivated indefinitely by the commercial organisation(s). In such cases, the informed consent of the cell donor will always be sought. Concerns about the anonymity of the cell line to be established, the time frame, the diversity of applications the cells can be utilised for, and, finally, the distinction between non-profit research and commercial exploitation will all need to be addressed in this consent. The donor relinquishes ownership of the cells to the institution that will manage them further in most informed consent agreements. However, the donor may retain rights such as the power to revoke consent for a particular use of the cells at any time or limit approval to noncommercial use.[51]

Rights and Interests of Donor

HESCs are body parts that can be removed from the body and contain their donors' personal information. Therefore, the personal rights of donors must be safeguarded under the hESCRs. Personal information and personal rights must be protected against illegal third-party access. Personal data of donors is safeguarded against disclosure and unauthorised use to the extent, in accordance with domestic and international laws. The Oviedo Convention[52] is an example of international regulations of this type. Article 5 of the Oviedo Convention states that:

> "*An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as its consequences and risks. The person concerned may freely withdraw consent at any time*."[53]

Article 22 of the Convention's is also relevant to the topic of this study according to which, "When in the course of an intervention any part of a human body is removed, it may be stored and used for a purpose other than that for which it was removed, only if this is done in conformity with appropriate information and consent procedures."[54] Applying the articles to the context of hESCRs, it can be concluded that the donors' informed consent should be obtained before the human embryo or the ova and sperms that make up the human embryo are extracted from them. The purpose, process, and prospective outcomes of the intervention should all be included in the informed consent. If the primary objective of the intervention was, say, to treat assisted reproduction but the objective has changed as a result of having surplus embryos, and the experts are willing to use the surplus embryos for hESCRs, they should obtain new informed consent from the donors and make the goal, process, and feasible conclusions of their new purpose clear. As can be shown, a patent application for hESCRs that incorporates hESCs obtained without

51 S*upra* n. 14.

52 Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine: convention on human rights and biomedicine (adopted by the Committee of Ministers on 19 November 1996), Council of Europe Convention of Biomedicine 1997.

53 *Id.*

54 *Id.*

the donor's informed consent will be rejected. If such a study is carried out, the donor's personal information, as well as his or her rights, will be honored.[55]

Personal rights are protected from third-party interference in the same way that they are protected from the individual themselves. The law of prohibition of financial gain implies the prohibition of financial gain from human organs due to the inalienable element of personal rights. Because a person cannot sell his or her parts of the body for research purposes, such research would be unpatentable. Under their personal rights, the donors' human body parts - in this example, their human embryos or hESCs - are protected as personal data. It is a necessity of human dignity that one cannot profit monetarily from one's own parts of the body.[56]

Patentability of Stem Cell Research

Many countries have long considered cell lines and genetically modified single cell organisms to be patentable subject matter.[57] In reality, the patenting of cells is involved in some of the early 'biotech' patent decisions, including the United States Supreme Court judgment in *Diamond v. Chakrabarty*.[58] To date, more than >2000 patent applications have been filed globally, claiming inventions involving both human and nonhuman stem cells. Embryonic stem cells are specified in >500 of these applications.[59] Several patents on stem cells have already been granted.[60]

Legal battles over stem cell patent rights are unavoidable, and they're only going to become worse as more possible applications emerge. As a result of the high stakes, extraordinarily wide claims are made in even the most basic inventions. It is still not clear that the counts in the case of human embryonic stem cells is the first description of persistent pluripotent cell lines in 1998, or the first description of cells arising from the inner cell mass of a five-day-old human embryo in 1994. Also, it is unclear that, whether or not the 1998 discovery, which was patented, was compromised by the 1994 publication.[61] Regardless of the fact that each region has its own patent system with its unique set of patentability criteria, most countries' patentability frameworks are built around five pillars: patentable subject matter, novelty, inventiveness, written description, and enablement.[62]

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55 *Supra* n. 23.

56 *Ibid.*

57 Timothy A. Caulfield, "*From Human Genes to Stem Cells: New Challenges for Patent Law?*", HEALTH LIBRARIES INC, Vol. 21 No. 3, 2003, p. 101.

58 *Diamond v. Chakrabarty* 1980 206 U.S.P.Q. 193.

59 European Group on Ethics in Science and New Technologies, "*Ethical Aspects of Patenting Inventions Involving Human Stem Cells"*, Opinion 16, EUROPEAN UNION, https://op.europa.eu/en/publication-detail/-/publication/687b0402-32b8-4b1a-905e-b7885d2a3eac, (visited on April 25, 2022).

60 Vicki Brower, "*Human ES cells: Can you build a business around them?*", NEW BRAUNFELS, Vol.17, 1999, p. 139.

61 *Supra* n. 14.

62 *Supra* n.1 at 2.

The scientific and legal communities have long debated whether stem cells, particularly those produced from human embryos, are patentable. For moral reasons, the European Patent Office (EPO) has declined to grant patents on stem cells derived from the death of human embryos. On the contrary, patents for the isolation and the use of human embryonic as well as other stem cells have already been granted by the United States Patent and Trademark Office (USPTO). Despite an expanding barrage of legal challenges, many US patents remain legitimate. Recent US court precedents, on the other hand, have dramatically narrowed the scope of patent eligibility in biotechnology.[63]

Obtaining a patent to protect intellectual property originating from research is a normal method in the biological sciences, as it is in many other fields, to ensure that any commercial exploitation ends in a certain form of financial benefit to the creator. It also protects companies that take the financial risk of developing a specific product on a patent from others that spend less but can clone a cheaper version of the product to market since they do not demand the same return on investment. Patenting biological discoveries, on the other hand, is not always seen as morally proper, and human embryonic stem cells are a prime example, with strong conflicting perspectives.[64]

In terms of India and the majority of other countries, they have voted for technology only if ethical means are adopted for obtaining embryonic stem cells. These ethical ways, such as employing human embryos created through in vitro fertilisation, aborted foetuses, and asexually produced human embryos for cell extraction, are not in any way against public order or morals, according to the researchers.[65] In some ways, India is fortunate in that the government is encouraging scholars in this field for the greater good of the country. Furthermore, there is nothing in the Patents Act 1970 that prohibits stem cell and related research from being patented. Therefore, stem cell technology is considered patentable, and a good number of patent applications are made every year and several are granted to bring in optimistic competition among the researchers.[66]

United States

In the United States, for example, the WARF was given a fundamental patent based on James Thomson's original cell lines, which is still in force. Methods for the derivation, propagation, and use of human embryonic stem cells are covered by this patent, which has a wide range of research and medical uses.[67] Unlike the European Union, United States (US) law does not prohibit the patenting of human

63 Sonya Davey et al. "*Interfacing of Science, Medicine and Law: The Stem Cell Patent Controversy in the United States and the European Union*", FRONTIERS IN CELL AND DEVELOPMENTAL BIOLOGY, https://www.frontiersin.org/article/10.3389/fcell.2015. 00071, (visited on February 20, 2022).

64 *Supra* n. 14.

65 "*Patent: Stem Cell Patent Debate Never Dies*", BANANAIP, May 2, 2011, https://www.bananaip.com/ip-news-center/stem-cell-patent-debate-never-dies/, (visited on April 25, 2022).

66 *Supra* n. 65.

67 *Ibid.*

stem cells on moral grounds. "Any new and useful process, machine, manufacturing, or composition of matter, or any new and useful improvement thereof," according to the US patent office.[68] Despite the fact that "Congress evidently expected that the patent laws would be granted wide scope," the US Supreme Court has created three exceptions to patent eligible subject matter: laws of nature, natural phenomena, and abstract ideas.[69]

To be eligible for patents, a type of human stem cell must not come under one of the three exceptions, the most important of which is the natural phenomena exemption. In *Diamond v. Chakrabarty*,[70]the US Supreme Court emphasised that an invention's mere existence does not disqualify it from patentability under Section 101(35 USC §101). To put it another way, just being alive does not qualify an innovation as a natural phenomenon. For the past thirty years, stem cells have been patented in the United States under this guise.[71]

In the case of government support of human embryonic stem cell research, the Dickey-Wicker Amendment of 1996 barred the use of federal monies for any study that destroyed or produced human embryos from 1996 to 2009.[72] President Barack Obama's Executive Order of 2009 enabled the funding of research that used embryos if the embryos were generated for reproductive purposes via *in vitro* fertilisation but were no longer needed for that purpose.[73]

United Kingdom

In Europe, the situation is different. In 2008, the European Patent Office issued the so-called WARF judgment, which cancelled a comparable European patent (EPO). According to EPO, the WARF decision was not intended to bar the patentability of stem cell innovations in general. Following the case of *Brustle v. Greenpeace*, which was heard by the European Court of Justice (ECJ) in October 2011, stem cell innovations in Europe are now at risk of being further restricted.[74] The ECJ decision, in this case, had an impact on Europe's stem cell industry. According to an ECJ judgment, inventions that include the destruction of human embryos are unethical and thus not patentable. All previously granted patents are still valid, however, they are not really enforceable in the case of human embryonic stem cells produced via embryo destruction. Since all Member States that have ratified the Treaty of Europe are bound by European Court of Justice judgments, which transcend national law, the worth of those assets has plummeted.[75]

While Greenpeace and some religious groups praised the decision, many scientific organisations believe it will bring an end to the European pluripotent stem cell industry, which was just getting started. The problem is that the business

68 35 U.S.C. §101.
69 *Diamond v. Diehr* 1981 450 U.S. 185.
70 1980 (447) US 303.
71 *Supra* n. 60.
72 Nicholas A. Zachariades, "*Stem Cells: Intellectual Property Issues in Regenerative Medicine*", STEM CELLS DEV, Vol. 22, 2013, p. 59.
73 *Ibid.*
74 *Supra* n. 14.
75 *Ibid*.

model of this industry is based on its ability to raise capital. Producing stem cell products is costly, thus protecting intellectual property is the best way to attract investors. If European stem cell startups are unable to obtain patent protection in Europe, it is unclear if investors will continue to invest in them. Similar technology could still be patented in other nations, such as Asia and the United States, increasing the likelihood that European stem cell companies will relocate outside of the EU, mostly owing to cost considerations. Interestingly, one of Directive 98/44 purposes was to protect and strengthen European biotech investments. "In the field of genetic engineering, research and development require a significant amount of high-risk investment, and only proper legal protection can make them profitable," the directive states. It is also unclear how this will affect the advancement of patient treatments or perhaps the pharmaceutical industry's research into the use of human embryonic stem cells in drug development and safety.[76]

In terms of patent protection and filing in biotechnology, Europe has shown a higher concern for ethical issues than the United States and has developed measures to address this within the European Patent Convention (EPC) system. The EPC, for example, has always barred 'morally offensive subject matter' from patent protection. The EPC was amended in 1999 to include provisions from European Community Directive 98/44/EC, also known as the 'biotechnology directive'. These principles define how 'morality' should be interpreted in the field of biotechnology. Rule 28(c) EPC, for example, specifies that European patents will not be awarded for biotechnological inventions that involve 'the use of human embryos for industrial or commercial objectives.[77]

India

To be patentable in India, inventions must meet the criteria of novelty and inventive step while also being outside the scope of Section 3 of the Patents Act, 1970. Section 3 adds to the patentability bar by listing inventions that are not patentable. As a result of this clause, the claim scope granted in India is frequently different from that given in other countries.[78] The Indian Patent Office's position on the patentability of inventions incorporating embryonic stem cells appears to have shifted over time. The modifications in the Manual of Patent Office Practice and Procedure reflect this shift in attitude. The use of human or animal embryos for any purpose was considered against public order and morality in the 2005 draft of the rules,[79] and patentability was disallowed. This restriction, on the other hand, was deleted from a later draft of the rules and has not reappeared ever since.[80]

Despite the change in rules, the Patent Office continues to raise the public order and moral objection to stem cell-related inventions under section 3(b) of the

76 *Id.*
77 *Id*.
78 Anand and Anand, "*Patenting Stem Cell Inventions in India- What to Expect?*", LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=2c392001-c830-49d4-9e1b-9c43ed249926, (visited on February 23, 2022).
79 Manual of Patent Office Practice and Procedure 2005.
80 *Supra* n. 73.

Patents Act (both methods and stem cell products). The most frequently mentioned concern is the risk of human embryos being destroyed. Even though the claims do not name embryonic stem cells, the specification acknowledges the possibility of using embryonic stem cells, and the prosecution history of various cases demonstrates that an objection based on public order and morals has been brought. Frequently, the objection is solved by removing all references to embryonic stem cells from the claims and disclaiming the use of embryonic stem cells in the functioning of the invention.[81]

The approach of seeing stem cell research as a threat to public order and morality, on the other hand, appears to be at odds with Indian policy. The National Guidelines for Stem Cell Research (issued by the Indian Council of Medical Research and the Department of Biotechnology under the Ministry of Science and Technology, 2017) outline the parameters under which stem cell research should be undertaken. The blastocysts used must be spare embryos, according to the requirements. The guidelines also allow for the creation of novel human embryonic stem cell lines from spare embryos, with certain committees' approval. These government standards allow for safe and responsible stem cell research, including embryonic stem cell research.[82]Furthermore, it is common knowledge that not every invention involving embryonic stem cells necessitates the killing of human embryos and that embryonic stem cell lines are used in a lot of research. As a result, the arbitrary imposition of objections under Section 3(b) must be changed.[83] While claims relating to techniques of isolating and propagating stem cells are routinely granted, it appears that the Indian Patent Office has never granted a single application with claims relating to stem cells in general.[84]

International Regulations

In establishing basic patentability requirements and exceptions, the European Patent Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights are important. The Directive on the Legal Protection of Biotechnological Inventions, which governs the general standards and exceptions for stem cell patentability, is particularly important to this study.[85]

The European Patent Convention, 1973[86] (The Convention, 1973) allows state parties to grant legitimate patents. Even though there is no specific legislation restricting the patentability of biotechnological inventions, general principles can be used to conclude. To be patentable under the Convention, 1973, an invention must meet the following criteria: novelty, inventiveness, and industrial application. Article 53 of the Convention includes unpatentable inventions. According to clause 53/a, patent protection cannot be awarded to "*inventions that violate public order or morality*." According to article 53/b, patent protection cannot be granted to "*plant or animal types or fundamentally biological methods for the production of*

81 *Ibid.*
82 *Id.*
83 *Id*.
84 *Id.*
85 *Supra* n. 23.
86 The European Patent Convention 2016.

plants or animals." Finally, according to article 53/c, European patents are not awarded to "procedures for treating the human or animal body by surgery or therapy, and diagnostic methods utilised on the human or animal body."[87]

Another international agreement on patentability is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Limits on the patentability of inventions are governed in TRIPs under Article 27. The Article is important because it provides a broad overview of the protection provided by patentability. According to the Article, practically all inventions are patentable, regardless of their location, exportability, or technological area, and can thus be released into commercial circulation alongside other trade products. There are, however, several exceptions to this broad regulation. 'Publicorder and morality' is the most crucial exception, which is also necessary for biotechnological inventions. Article 53 of the Convention has parallels with this TRIPs rule. Both restrictions should be examined because the concepts of public order and morality are open to interpretation. Biotechnological advancements should also be regarded in this view.[88]

Directive 98/44/EC of the European Parliament and of the Council on July 6, 1998 on the Legal Protection of Biotechnological Inventions, regulates the patentability of biotechnological research, particularly stem cells (the Directive, 98/44EC). The Directive, 98/44EC has been criticised for its lack of clarity and loopholes. The attribution of the Directive being blocked in a conflict that needs to be addressed produces difficulty in interpretation. As a result, contemporary technology and necessities should play a role in the Directive's interpretation.[89]

Conclusion

In the fields of regenerative medicine and personalised medicine, human stem cells have a lot of potentials. All forms of intellectual property, notable patents, must be used to protect stem cell innovations in a timely and comprehensive manner. Even though the field of human stem cells has been clarified by courts or recommendations in each location, complexity and uncertainty still exist. While there has been significant debate over the ethical, moral, as well as legal issues of employing stem cells as a possible treatment, the potential benefits are hard to ignore. Finding an alternative to the existing situation, wherein the embryo should be destroyed to acquire the stem cell, is preferable. Induced pluripotent stem cells (iPSCs) are a type of reprogrammed cell that can provide an alternative resolution. Adult stem cells are used instead of human embryos, and their characteristics are altered to match those such as human embryonic stem cells (hESC). Though experimental, if this new era succeeds, it will usher in a new era by providing a cure for several of today's incurable ailments. It doesn't seem too unethical to destroy an unfertilised egg to preserve the life of another being. This discovery has the potential to treat countless people and alleviate the suffering of those who suffer from possibly terminal diseases.

87 *Supra* n. 23.
88 *Ibid*.
89 *Id.*

In the absence of legal principles and well-defined rules, India's patentability law for stem cell research is still in its infancy. The Indian Patent Office has been examining these applications without having direct provisions of law in place, therefore the present procedures are in question. To foster innovation in all industries, it is critical to provide strong patent protection. While the Patent Office has changed its decision on stem cell patentability, and claims for methods of producing, culturing, and isolating stem cells, culture media for stem cells, and so on are now routinely granted, there is still a lot that can be patented but is not really. Researchers and industries must adapt their strategies to meet the difficulties, and practitioners should use a comparative approach to closely monitor the evolution of the patent landscape, from patent law to court rulings. It is fair to suggest that stem cell research is indeed a very promising field that has the potential to benefit the country's biotechnology sector. Giving appropriate intellectual property rights to such inventions should boost research on this subject.

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GENDER DISPARITY IN BUREAUCRACY: AN INDIAN PERSPECTIVE

Rajeshwi Pradhan[♣]

Abstract

Administrative branch is perhaps the most important aspect for a nation to achieve its goals and objectives. Therefore, the administrators who hold such important part in the functioning of the country must not only be one with calibre but also a strong spirit to carry on the management of affairs of the Government. Even though women have proved to be able administrators, yet the number of women is substantially low in the Civil Services. There are various factors that led to such dwindling numbers of women in the administration and this paper tries to highlight those factors. Despite the country celebrating seven decades of independence, women are still held back by the clutches of gender disparity even in such elite institutions. The number of women in civil services increase at a snail's pace. This present study is also to understand the challenges faced by women in bureaucracy and an attempt to highlight gender disparity in bureaucracy and the discriminatory factors faced by women in the civil services.

Keywords: Bureaucracy, Public sphere, Private sphere, Gender disparity, Women in Administration.

Introduction

Public administration means state-funded machinery, including agencies, policies and services charged with the management and implementation of laws, regulations and decisions of the government. It is considered as the most important functionaries for the implementation of programmes and policies of the government and development of the nation. Discharged with such ardent tasks, the civil servants of the country are selected through various competitive examinations on central and state-level of which women equally participate. Despite more than seventy years of independence, the number of women in the civil services that increase at a snail's pace every year, there is poor sex ratio in top bureaucratic positions and discrimination that woman civil servants have to face in their profession. Therefore, this paper tries to analyse two aspects. One is whether bureaucracy maintains and reproduces gender biases? And the other is whether gender balance is important for effective functioning of the government? Martha Nussbaum rightly points out that there is a "distinction between public and private that reproduces powerlessness in the realm of governance. She goes on to say that even though gender is a social construct and that wherever women lack are demonstrably no greater than those of men, yet the women in administration are

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looked at condescendingly by the male counterparts."[1] The strength of women in the civil services is not constant and varies every year. The governments of various nations have endorsed the 2030 Sustainable Development Agenda in the year 2015 and have envisioned various goals in order to achieve gender equality. For example, Goal 16 of the 2030 Agenda states "promoting just, peaceful and inclusive societies" and Goal 5 states "ensuring gender equality and women's empowerment." To achieve sustainable, prosperous and peaceful societies it is important to recognize gender equality and inclusive public administration.

The public institutions continue to be male dominated in most of the countries across the world. The participation of women in public administration varies considerably in the various countries and research by UNDP shows under-representation of women in bureaucratic positions. There is a sharp variation from 3% to 77% in participation of women in public administration of which the lowest is witnessed in the Arab countries. Considering the percentage of women in decision-making process, the highest is recorded to be in Latin America and the Caribbean and the lowest in Africa and it is just 20% of the countries that have reached parity in public administration's decision making.

In India, position of women in top bureaucratic position is no different, there are only a fraction of women in the Civil Services which is less than 20%. Though literacy rate is 87% in India, which is quite high there are fewer women who opt for civil services. Even if some fraction of women opts for such services it has come to light that they face a lot of challenges comparatively than their male counterparts. It must be ensured that women of calibre who have been able to secure such elite positions must not fall victim to gender disparity. This paper is an attempt to highlight gender disparity in bureaucracy and how it is affecting the women who enter into this field.

Diversity in bureaucracy not only ensures equal access and participation of women but also leads to effective working of the institution. It ensures an effective government and directly aids to the economic development fostering better governance and productivity. The administrative services in India are Central Services, State Services and All India Services. The focus for this study will be on women in the All-India Services, i.e., Indian Administrative Service, Indian Forest Service and Indian Police Service. These services are divided into different cadres based on states, some states have separate cadre while UTs and few states have common cadres.[2]This paper highlights gender disparity, focusing on dichotomy that has been created in the public and the private sphere.

Women in Administration- In the Past

It is very difficult for women to be released from the clutches of traditional and societal norms where they are considered to perform home-bound, non-paid chores

1 Martha Nussbaum, ESSAYS ON GENDER AND GOVERNANCE, file:///C:/Users/Dell/Downloads/essays_on_gender_and_governance%20(2).pdf (visited on June 2, 2022).

2 Jayasheela George, "*Women in Administration*", JOURNAL OF INTERNATIONAL WOMEN'S STUDIES, Vol. 12 No. 1, 2011, p. 151-156.

and their roles as wives and mothers and find contentment in the performance of such roles. This is mainly in conformity with the larger sections of the society. Confining women to these roles, will stifle their development and will never be able to realize their true abilities and potential as a human being. Therefore, women have been side-lined not only by the society but also by non-recognition of their true potential. This has been the reality since time immemorial living under the shadow of patriarchy. However, India has witnessed major changes in the number of women that have been entering in every field and profession. Even during the Mughal period, there were able women administrators like Razia Sultana, who was the only women monarch to ever rule Delhi, but after the advent of British, women were excluded from higher posts and services. Even the Government of India Act, 1935 prohibited women's entry into important class.

Initially, there were only two All India Services at the time of Independence, i.e., Indian Administrative Service and Indian Police Service. The competitive examination for these two services was held in 1948 for the first time and the central government removed the prohibition against women from entering the civil services slightly deviating from the British system. The Constitution of India ensures equality, but the Indian Administrative Service Rules, 1954 showed otherwise as discriminatory and disadvantageous to women. Though women were allowed to join the civil services, married women were totally barred from entering into the services. This privilege was only given to the unmarried woman and widows and the government reserved the right not to select a woman even if she qualified the examination process.

The Indian Administrative Service (Recruitment) Rules 1954 contained provisions that were biased and based on patriarchal norms such as, "married woman shall be entitled as of right to be appointed to the Service, and where a woman appointed to the service subsequently marries, the Central Government may, if the maintenance of the efficiency of the service so requires, call upon her to resign."[3] This rule was an epitome of how gendered the rules of the administration were even in independent India. The Supreme Court observed that the rule does not compel unmarried woman to resign if she marries subsequently and if the maintenance of efficiency of service required, the Central Government could call upon her to resign. Therefore, the Supreme Court was of the opinion that this rule does not compel women to resign on marriage. It was the discretion of the Government to call upon her to resign on the consideration that it has impaired the efficiency of the woman concerned.[4]

Anna Malhotra, the first lady IAS officer joined the services in the year 1951. The selection committee persuaded her to join the foreign services as they doubted whether she would be able to carry out her work well in the districts.

In 1954, the Government relaxed the restrictions on women that they could be asked to resign if their marriage interfered with the efficiency of the service. It was only in 1972 that Rule 5 (3) of the Indian Administrative Service (Recruitment)

3 Rule 5 (3) of the Indian Administrative Service (Recruitment) Rules 1954.

4 *Bombay Labour Union* v. *MS. International Franchises (Pvt) ltd* 1996 AIR 942.

Rules, 1954 was completely struck off. To have such provisions in elite profession till the seventies only depicts the oppression of women and how women were considered to be incompetent in carrying out administrative work. Despite the fact that women played a very crucial role in the Freedom Struggle and had a woman Prime Minister at that time, women were ill-considered for administrative jobs because of societal norms that woman fit well for domestic work.

Women in Administration-In Contemporary Times

The strength of women in administration have considerably increased over the years as is evident from the Civil Lists Published by the Department of Personnel and Training, Government of India, but it shows that the entry of women in the AIS is increasing at a snail's pace but the number also keeps fluctuating. In 1951 there was only one woman who entered the services and even after ten years, another woman entered the service in the year 1961. Since then, the number has increased yet the sex ratio of women compared to men in the administrative services is low.

The female secretaries working in the Government of India stands as only 12-13% as of October 2019. Out of the total 88 secretary-rank officials in the Central government, the number of female secretaries is as low as 11. Out of the 11 women secretaries it is astonishing that only few hold important portfolios like Preety Sudan who is the Secretary, Health and Vijay Thakur Singh, Secretary (East), Ministry of External Affairs, while most of the women are posted to departments and ministries such as disability, youth affairs, official languages and fisheries.[5]

The women officers working in the Central Government at the joint-secretary level consists of only 19.14% as of June, 2019. The participation of women is "abysmally low" in the administration. In 2018, out of 759 civil servants recruits only 182 were women. In 2017, only 24.05 % were women candidates. The number of women joining the civil services is very low as low as 25%.[6]

Presently, the percentage of women in civil services is very low primarily because their percentage is low right from the entry stage.[7] The percentage of women in the public service is abysmally low.

Dichotomy Between Public and Private Sphere

The reason why there is low percentage of women opting for civil services has a very strong root in creating stereotypical gender roles for men and women. This gender inequality is endorsing inequality in the administrative services and the result is the abysmally low percentage of women in civil services. In most cases, those women that make it to the civil services also fall victim to gender disparity.

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5 Sanya Dhingra, "*How the Indian Civil Services Continue to Remain a Boy's Club*," THE PRINT, https://theprint.in/india/governance/how-the-indian-civil-services-continue-to-remain-a-boys-club/307370/, (visited on February 10, 2021).

6 Shihabudeen Kunju, "*Number of Women Joining Civil Services is Less Than 25%*," NDTV, https://www.ndtv.com/jobs/upsc-cse-number-of-women-joining-civil-services-is-less-than-25-2196839 (visited on December 11, 2020).

7 VS Beniwal and Dr Bulbul Dhar James, "*Women in Public Administration: Prospects and Challenges*", JOURNAL OF PEDIATRIC AND ADOLESCENT GYNECOLOGY, Vol. 9 No.3, 2019.

Ulla Wischermann, in Feminist Theories on the Separation of the Private and the Public: Looking Back, has highly critiqued the dichotomy created between the public and private sphere. The boundaries between the public and the private must be dissolved. She further says that if this gender distinction could be dissolved then the relevance of private and public loses its meaning and also lays emphasis on counter-public sphere or alternative public sphere where the hegemonic public sphere where the men dominate could be critiqued and politicizing private sphere for it is there that women are oppressed the most.

Women's role has been subordinated. The considerable confusion in sex roles, sex differences and sexual character has led to the social inferiority of women on biological basis for all social behaviour that confirms the superiority of men. The invidiousness attached to women confirms that women do not belong to the rational world and as such it becomes extraordinarily difficult to make out a sex discrimination complaint in employment involving relativity of merit.[8]

Women are considered to belong to the private sphere that include nature and nurture both and men are considered to be part of the public sphere as they are considered to be more rational than the women. Therefore, this dichotomy that has been created between the private and the public sphere has led to the exclusion of women from the political public sphere. Women have been restricted to the confines of private sphere where she works out of love and remain oppressed and marginalized by the men. The dichotomy between public and private and another dichotomy between genders has led to critique by the feminists. This binary has led to stereotypical roles assigned to the individuals. However, if the dichotomy of gender could be dissolved then automatically the relevance of public and private loses its meaning.

Therefore, patriarchal norms have led to dichotomy of roles and therefore require further investigation. Gender roles are assigned to the individuals by the society and not by nature. Does stereotyping work in public and private sphere mean that the nature of that work is not flexible? The answer lies in understanding patriarchal power structure. Patriarchy is not a universal feature in the human society. The present-day gender role is not a natural one and it is actually the creation of "modernized" western society. The image of a Western European bourgeois male was that of a public figure. It was the men who handled finances and entered jobs and occupying the leadership positions in the society as well. On the other hand, women were limited only to the confines of the private sphere and her identity merged with her husband. "Biological act of giving birth is closer to nature than biological act fathering a child this is the foundation of Western Liberal tradition. Consequently, women were considered less rational and allocated childcare and household responsibilities. This difference only serves the conventional beliefs of liberalism."[9] This idea of gender roles in the present times is a product of modernized Western society and not a natural construct. It has been adopted from the middle-class society of Europe. The women are side-lined in the

8 Margaret Thornton, "*The Public/ Private Dichotomy: Gendered and Discriminatory*", JOURNAL OF LAW AND SOCIETY, Vol. 18 No.4, 1991, p 448-463.

9 *Ibid.*

private sphere where they remain oppressed by patriarchal structure. Though there are legislations for proscription in the public sphere but the domestic life is "immunity-accorded, the primary site of inequality for women."[10]This has led to the subjugation of women in the realm of necessity. It is also the point where the political debate departs and is not politicized. It is important that the experiences of the oppressed and the marginalized be articulated and politicized to bring about social transformation. Therefore, liberating the private would lead to development of human needs even at the cost of highlighting intimate issues. But if such intimate issues are in the public interest, then in that case "personal becomes political." Therefore, this distinction of private and public loses ground when the matter is political whether it involves the public sphere or private sphere.

Even if some women transgress into the public sphere, sex role, sex differences and sexual character has led to considerable confusion which has ultimately led to the subjugation of women. "It reproduces female powerlessness in the realm of governance and political life. Men brought up on the idea that women belong in the home and are fitted to be homemakers and reproducers find it difficult to accept the presence of women in political life. They tend to look at them condescendingly, thinking of them as interlopers into a sphere for which their abilities and training do not fit them. Thus, they are likely to suggest that women lack the mental and educational qualifications for political participation, even when women's lacks in these areas are demonstrably no greater than those of men. Attached to the idea that the public sphere belongs to them, men also may react with jealous hostility to the presence of women, which seems as if it must reduce the number of jobs and opportunities available to men"[11] and therefore women continue to encounter tremendous resistance in their efforts to gain more influence within the state. This binary construct in gender roles have side-lined the potential role of women in the public sphere. In India, even though the state has taken affirmative action strategy that has reserved one-third of the seats in panchayats, or local councils, but at the national level there is still enormous resistance to the full inclusion of women. Even when women are included, it is contended that they are frequently assigned "soft" portfolios that reflect traditional understandings of what is suitable for women: health and education.[12]

Challenges Faced by Women in Administration

The ratio of educated women has significantly increased over the years but there are fewer candidates who opt for civil services. It has been found out that there are only three women for every ten men in the UPSC. There are various reasons for low sex ratio of women that are flexible job options, societal norms, patriarch, unlimited working hours and political influence at workplace. Even when a small miniscule number of women make it to the bureaucratic positions, they are faced with a number of challenges despite having the same caliber as their male counterparts. Even though there is no biasness for entry into the civil services, yet there are biases faced by women civil servants in their day-to-day work. The

10 *Supra* n. 7.
11 *Supra* n. 1.
12 *Ibid.*

dualism of gender roles become evident even in bureaucratic institutions that manifests in the ambit of operation. Women encounter many "overt and covert glass-ceiling that hinders career of women."[13]

It includes a number of biases that work in the favour of their male counterparts. The challenges faced by women as administrators are discussed below:

- Difficult work not given to them even if its within their jurisdiction- it is not uncommon that certain departments and posts are reserved totally for the male civil servants and this is how gender role gets much more intensified even in elite profession like that of administration. As already discussed, women are not given important portfolios. "When they are included, they are frequently assigned "soft" portfolios that reflect traditional understandings of what is suitable for women: health, education, etc."[14] This gender-differential impact of public administration in development has exposed the fallacies of pretensions of gender neutrality. The institutionalization of women's interest only suggests that the administration is gendered.
- Selection bias in senior postings and promotions- even when most women are qualified for the post of cabinet secretary, most women were sidelined. It is astonishing that there is not a single woman in independent India that could rise to the rank of cabinet secretary, the top-most executive official and head of the civil services of the country.[15] A senior IPS officer, Rina Mitra, who was a competent candidate for the director of CBI was sidelined only over alleged technicality issue even though she was the senior-most officer who qualified all the essential criteria for the post. It is a common feeling amongst the female civil servants that there are strong biases that work against women even in bureaucracy.[16]
- Skewed intake ratio- the number of women in the civil services is comparatively very low due to which women do not make it to senior posts due to equally talented male counterparts who are greater in number. Therefore, women barely make it to top bureaucratic positions.
- Self- promotion and ability to form networks- the male counterparts are known to have a grip when it comes to self-promotion and ability to form networks. But this would be a bad way to make it to top portfolios and opposed to Weberian Bureaucracy which states that neither gender nor

13 *Supra* n. 7.
14 *Ibid.*
15 *Supra* n. 5.
16 Rina Mitra, "*This may be the last glass ceiling I encounter*", THE TELEGRAPH, https://www.telegraphindia.com/india/was-this-my-last-glass-ceiling-asks-rina-mitra-who-got-knocked-out-of-the-reckoning-for-cbi-top-job/cid/1683779, (visited on February 15, 2021).

other structures of domination which has no rational character have place in merit-based organization.[17]

- Sexual Harassment- there can be no exception for Sexual Harassment, not even elite profession like bureaucracy.

Even when women break the norms and secure their place in the administrative services, there are a lot more challenges that the women are faced with. The infamous "Butt slapping case,"[18] an insensitive remark made as if it is a mild incident of groping when it is a very grave act done by a person entrusted with the "duty of protecting women from harassment."[19] Mrs. Rupan Bajaj, IAS Officer of Punjab cadre accused Mr. KPS Gill, the then Director General of Police, Punjab for outraging her modesty in a party in the presence of a considerable number of people. Mrs Bajaj filed a suit against Gill with the help of her husband. This came to be a high-profile case involving such elite officials, nevertheless concerning a bitter battle for a woman in power who was exposed to ridicule. Even after years of legal battle, though the charges against the perpetrator was upheld, he was not sentenced to imprisonment but only payment of monetary compensation.

It is a glaring example of how the "judicial procedure is lenient towards the elites of the society."[20] The accused was convicted of outraging the modesty of women under section 354 and section 509 of the Indian Penal Code, 1860. The Court while giving its final remarks mentioned- "Before we part with this judgment, we wish to mention that in the course of his arguments, Mr. Sanghi, suggested that the matter may be given a quietus if Mr. Gill was to express regret for his alleged misbehaviour. That is a matter for the parties to consider for the offences in question are compoundable with the permission of the Court."

Every year women have been performing exceptionally well in the UPSC Civil Services Exams. The three toppers for UPSC Civil Services 2021 are all women,[21] still women fall victim to sexual harassment even in such elite institutions, forcing

17 Anne Marie Goetz, "*Gender and Administration*," IDS BULLETIN, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/9412/IDSB_23_4_10.1111-j.1759-5436.1992.mp23004002.x.pdf?sequence=1&isAllowed=y, (visited on June 2, 2022).

18 *Rupan Deol Bajaj* v. *KPS Gill* AIR309 SC 1996.

19 FPJ Bureau, "*The Heroine of MeToo Movement is Rupan Deol*", THE FREE PRESS JOURNAL, https://www.freepressjournal.in/analysis/the-heroine-of-the-metoo-movement-is-rupan-deol-deepa-gahlot, (visited on June 1, 2022).

20 *Supra* n. p. 18.

21 Notification-Government of India, PRESS INFORMATION BUREAU, Civil Services Examination, 2021, https://upsconline.nic.in/FR-CSM-21-engl-300522.pdf, (visited on June 2, 2022).

women officers to resign[22] and when the matter is reported, being subjected to humiliation.[23]

Conclusion

Stereotyping gender roles is breeding gender inequality which is again unconstitutional. Though there are no such rules that existed before in 1954 but yet women fall victim to gender stereotypes during operation in their field. Monopolized child-rearing is the psychological basis of male domination. Only if the society understands that the biological act of fathering is as closer to nature as biological act of giving birth. Shared parenting would be the solution to patriarchy but adoption of Western Liberal tradition has led to the foundation of such gender stereotyping.

The Supreme Court made a landmark judgment on women in army.[24] The court ruled that all women army officers are now eligible for permanent commissions, allowing them to be in the commanding roles. Even in meritorious institution like the defence, women are considered at par with the men. But for the past seventy years, the government has not considered a woman IAS officer for the post of Cabinet Secretary, the country's topmost post in bureaucracy. In a letter written by Subramaniam Swamy to the Prime Minister mentioned that till date no Prime Minister has selected a woman officer for this coveted post in bureaucracy, though there were senior-most women IAS officers available for the post equally competent as their male counterpart. Therefore, India is yet to welcome her first woman cabinet secretary, the country's highest post in the civil services.

As already mentioned, diversity in bureaucracy not only ensures equal access and participation of women but also leads to effective working of the institution. It is important to have adequate representatives especially the ones who are oppressed and marginalized in order to ensure the wellbeing of all people. There must be gender balance for the purpose of better administration. Even though women top the UPSC results and have been able to secure the top slots yet it has been observed that gender parity has still not been able to be achieved. Women's participation in the bureaucracy is important on a political viewpoint also.

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22 Asefa Hafeez, "*Haryana IAS Officer Rani Nagar Resigns Due to Workplace Harassment And Safety Concerns*," WOMEN'S WEB, https://www.womensweb.in/2020/05/ias-officer-rani-nagars-resigns-workplace-sexual-harassment-may20wk1sr/, (visited on June 2, 2022).

23 "*Women IAS Officer Lodges Sexual Harassment Complaint, Gets Harassed in Court*," DECCAN HERALD, https://www.deccanherald.com/content/493264/woman-ias-officer-lodges-sexual.html, (visited on June 2, 2022).

24 *Union of India* v. *Lt. Cdr Annie Nagaraja* SLP (C) Nos. 30791-96 of 2015.

CRIMINALISATION OF MARITAL RAPE IN INDIA: ISSUES AND CHALLENGES

Ashwini Kelkar[♣]

Abstract

The general belief that husband and wife become one entity after marriage, is imbibed in our society. Marital rape is an unfamiliar concept to a large section of society in India. However, it is imperative to recognise that when a husband sexually abuses his wife, it has a devastating impact on her physical, emotional, and psychological temperament. In India, the absence of law for the prevention and prosecution of marital rape has exacerbated the prevailing wretched situation of married women. This paper is an attempt to critically comment on the existing legal framework governing rape laws in India in light of the prevention of marital rape through a feminist perspective. Furthermore, the paper analyses various facets of marital rape with reference to its impact on the marriage and autonomy of a woman. Lastly, the paper examines the scope and impact of criminalisation of marital rape in India and provides suggestions to safeguard the interest of married women.

Keywords: Autonomy, Consent, Marital Rape, Marriage, Rape.

Introduction

> *Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house. However brutal a tyrant she may be unfortunately chained to, her husband can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.*
>
> -John Stuart Mill[1]

The above-mentioned views expressed by J.S. Mill reflect the position of a married woman wherein her individual identity unifies with the identity of her husband. However, over the centuries, women have been subjected to harassment and molestation in marital relationships. In contemporary society, marriage as an institution has been viewed and experienced by spouses through different changing perspectives. The present society focuses more on individual choice, and hence, the protection of the rights of a woman in a marriage becomes the focal point of debate. It has been accepted that the institution of marriage rests on the foundation of trust and respect for individual autonomy between spouses. Marriage is a union that preserves and protects the rights of husband and wife, both legally and socially.

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1 Linda Jackson, "*Marital Rape: A Higher Standard Is in Order*", WILLIAM AND MARY JOURNAL OF WOMEN AND THE LAW, Vol. 1 No. 1, 1994, p. 183.

Therefore, where the said equality is not protected, it tremors the very foundation of a marriage.

One such act which destroy marital purity is marital rape, which is the most disgraceful and abominable act by the husband to his wife. It is a misbelief that marriage imp the lies duty of a woman to protect the relationship by performing sexual activity even without her consent. This harassment can be linked to the conformist and patriarchal mind-set which gives rise to the subjugation of woman. The school of thought that oppose to recognise marital rape as an offence, considers that sexual activity is the only binding factor for marital sanctity and togetherness. However, they fail to realise the contemplation that having sexual pleasure is not the only key through which a marriage becomes successful, but treating a woman with dignity and respect are required to keep a marriage intact. Hence, every woman whether unmarried or married must have autonomy over her body and no one can interfere with the same.

A husband assumes his rights over the body and autonomy of his wife and therefore considers her as his own property. In addition, rape by strangers is frowned upon, rape by a husband in an intimate relationship is not even considered wrong. The notion that marriage gives a man right over a woman's body is foible and needs to be discouraged in our society. A woman should not be objectified but she should be respected and cherished equally like a man. It is also considered that the woman doesn't have the right to say 'no' in marriage as she is treated as the property of her husband. In India, women are seen through the lens of the status of their marriage.

The law has criminalised rape by strangers but not by a husband. The ironic situation can be linked to the conservative mindset of our society and the incompetency of the state. The confirmed belief of our society does not allow the sacredness of marriage to be in danger and therefore criminalising marital rape will be a threat to these established orthodox setups. Further, marital rape is committed under the veil of culture in India, and thus criminalising it has become arduous. Thus, there is a need for a stringent law for marital rape to protect the dignity of a woman by punishing the accused of marital rape. Currently, marital rape is not considered as an offence in India and hence, there is no punishment for the same. Thus, for the largest democracy of the world, it is the time the dignity of a woman in her marital relationship is respected and preserved. There have also been a movement wherein various authors have expressed their opinion in support of criminalising marital rape, and it has been proposed that by opposing criminalising marital rape, one must be termed a rape apologist.[2]

Significance of Marriage in Contemporary Society

Marriage as an institution has been recognised and accepted by society for ages. Marriage brings various rights to the spouses along with certain duties. In contemporary India, marriage is primarily based on the consent of the parties to the

2 Trisha Shetty, "*Don't be a Rape Apologist. Marital Rape is Rape*", THE PRINT, February 16, 2018, https://theprint.in/opinion/dont-be-a-rape-apologist-marital-rape-is-rape/35797/, (visited on March 20, 2019).

marriage under different personal laws. Marriage is considered a pure bond where two people decide to live their life together with utmost respect and dignity. When a woman marries a man, she puts her utmost faith in him. When two persons enter an institution of marriage, they both are to be treated equally by the law. However, woman in marriage has not been treated at par with the man due to several reasons. She has been a subject of discrimination due to patriarchal setup of the society in which man dominate the wills and wishes of women. However, due to several reforms in marriage laws over the years; women have been given importance with regard to their consent. Under personal laws, consent is significant at the time of marriage failing which may make the marriage voidable. However, after marriage is validly performed and a woman is forced to have sexual relations with the husband or raped by her husband, she has no recourse. Further, to save the sanctity of the marriage, a woman may choose to remain silent throughout her life due to the fear of her family and most importantly, the society.

Role of Consent in Marriage

Consent is quintessential in a marital relationship which is based on love and respect for the spouse. In sexual relations between husband and wife, the unequal stereotyping of gender equates to and justifies a man's desire for sexual pleasure and the woman's submission to his desires. If there is a lack of consent for sexual relations, it becomes a debatable aspect of married life. The laws relating to marriage exempt rape in marriage and legitimises the idea that women are not in a position to deny sexual relations under marriage. Further, the said legitimatisation puts such women through trauma resulting in a breach of their bodily integrity.[3] In such cases, the woman's consent is vitiated which leads to several psychological and physical health consequences. The idea of 'deemed consent' in a marriage and outside marriage is the fundamental categorisation for framing laws in India.[4] Though, there are several laws in which a person would be held liable if a sexual act is performed without the consent of a woman. However, similarly, if a sexual act is performed within legal wedlock by a husband, the same is not punishable. Therefore, the concept of consent varies depending on the marital status which needs to be addressed.

In the year 2018, Mr. Shashi Tharoor, Minister of Parliament, introduced a Private Bill in the Lok Sabha on Women's Sexual, Reproductive and Menstrual Rights Bill 2018 which has put forward the idea of criminalising marital rape.[5] He emphasised the concept that women need to take control of her reproductive as well

3 Melanie Randall and Vasanthi Venkatesh, "*The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*", BROOKLYN JOURNAL OF INTERNATIONAL LAW, Vol. 41 No. 1, 2015, p. 188.

4 Saumya Saxena, "*India Needs to have a Serious Conversation about Consent, Marriage and Marital Rape*", THE WIRE, January 19, 2018, https://thewire.in/gender/india-conversation-consent-marriage, (visited on July 15, 2019).

5 Shemin Joy, "*Make Marital Rape a Crime: Tharoor's Bill in Parliament*", THE DECCAN HERALD, January 1, 2019, https://www.deccanherald.com/national/make-marital-rape-a-crime-tharoors-bill-in-parliament-710844.html, (visited on December 16, 2021).

as sexual choices in marriage. Thus, the Bill seeks to scrap exception 2 to Section 375 of the Indian Penal Code 1860.

Marital Rape in India: A Conceptual Analysis

The word 'rape' is derived from the Latin origin which came from the word *rapine* or *rapere*. The said terms were associated with general wrongs like looting, destruction of property etc., however, later it came to be associated with sexual connotation and it was a theft implying molestation against the woman's guardian.[6] But with the passage of time, this definition of rape gained a new meaning where the offence is to be treated as only against the woman. Marital rape in the general sense means when a husband has sexual intercourse with his wife without her consent.

Earlier, the concept of marital rape was a legal nullity as it was considered that the right to own a woman lies in a man. Therefore, the right lies with the father before her marriage and to the husband after the marriage. The concept of marital rape was a legal nullity analogous to the inability to steal what one already owns.[7] Marriage in today's time is a partnership of equals, unlike in earlier times when the woman was subjugated by the man. However, in spite of the empowerment of women in various spheres, she is still being harassed physically and emotionally by her husband in a patriarchal society like India.

Marital rape is a tool by which a man devastates a woman's dignity and character to the core. The husband in marital rape turns from a loving and caring husband to a legal rapist. Thus, not criminalising marital rape gives a license to the husband to own his wife and have sexual pleasure without her consent. The misogynist men use women as their own property in any manner they want. A marital rape happens inside the four walls of the home and thus a woman is merely reduced to a status of an article being used for sexual purposes.[8] Although, the husband and wife reside in the same house and thus it becomes difficult for a woman to avoid sexual intercourse even if she doesn't want to have performed it. However, both of them have an equal say in marriage, and the assumption of the consent of any partner for sexual intercourse should be considered at fault. It is more shameful for a husband to rape his wife as she commits herself to him and therefore, he should respect her sexual choices by not compelling her in any manner.

The notion that husband and wife become one, and wife is under the authority of her husband is taken from the legal doctrine of coverture. The doctrine can be traced back to the common law in the UK. Sir William Blackstone in 1765 described the doctrine saying that the legal status of a wife is suspended once she is

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6 Stellina Jolly and M.S. Raste, "Rape and Marriage: Reflections on the Past, Present and Future", JOURNAL OF INDIAN LAW INSTITUTE, Vol. 48 No. 2, 2006, p. 279.

7 Morgan Lee Woolley, "*Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*", HASTINGS JOURNAL ON GENDER AND THE LAW, Vol. 18 No. 269, 2007.

8 Deepika Bahirwani, "*Behind the Closed Doors: Is Marital Rape no Rape?*", INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS, Vol. 1 No. 3, 2015, pp. 61-70.

married to a man. The wife is protected under the wing of her husband and therefore was known in French as a 'feme-covert'.[9] In this era, the doctrine of coverture was mostly abolished, but many laws from the British legal system have been adopted in India and the exemption to marital rape under Section 375 of the Indian Penal Code 1860 is also based on the doctrine of coverture. Nonetheless, Justice J.S. Verma committee report on amendments to criminal law has highly recommended that marital rape should be punished.[10] It also staunchly asserted that rape is a heinous crime and its gravity should not depend upon the marital status of a woman.

Marital Rape: A Disconnect from Rights of Women

Marriage in our society is considered a sacred union wherein the husband and wife become a single entity. It is believed that the adhesive factor binding the institution of marriage is the woman gratifying her husband and not denying him sexual pleasure. It must also be understood that privacy and preserving one's dignity should be a part of marriage, and privacy within marriage does not mean that the rights of an individual will not be respected.[11] It is also assumed that once a woman marries a man, she loses her right to consent over her body. It is obnoxious to say that a woman loses her right to consent after marriage. It must be kept in mind that marriage does not mean that a wife has given her implied consent to sexual acts. Marital rape is the most terrible act by a man to his wife, as she has to reside in the same house as her rapist and has to pretend that everything is alright in spite of experiencing the cruel instances of rape. Sexual relation without consent is the most unfortunate and extreme event which can happen to a woman. It is more traumatic for a married woman as her threads of faith and affection towards her husband are vitiated.[12]

The United Nations Population Fund conducted a survey in 2000, in which it was found that two-thirds of the married women were forced by their husbands for sexual pleasure.[13] Sexual relations without consent results in a lot of physical and mental issues. It disturbs the menstrual cycle of a woman thereby hampering her reproductive agencies and choices. Marital rapes stimulate feeling of betrayal, deep

9 Allison Anna Tait, "*The Return of Coverture*", MICHIGAN LAW REVIEW, Vol. 114 No. 99, 2016, p. 101.

10 "*Rape and Sexual Assault*", REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, January 13, 2013, p. 117.

11 Ankita Yadav, "*Understanding Marital Rape in India: A Discourse on Textual and Constitutional Perspective*", RAM MANOHAR LOHIYA NATIONAL LAW UNIVERSITY JOURNAL, Vol. 11, 2019, p. 91.

12 "*Marital Rape in India- A Socio-Legal Critique*", ROSTRUM'S LAW REVIEW, Vol. 3 No. 1, 2016, https://rostrumlegal.com/journal/marital-rape-in-india-a-socio-legal-critique/, (visited on December 16, 2021).

13 Deepika Bahirwani, "*Behind The Closed Doors: Is Marital Rape No Rape?*", INTERNATIONAL JOURNAL FOR LEGAL DEVELOPMENTS AND ALLIED ISSUES, Vol.1 No. 3, 2015.

disillusionment, and total isolation.[14] There may be situations when the wife is not well, or she is in her menstruation cycle, or for some other reason, she does not want to have sexual intercourse. In such situations, her choices should be respected, and she should have the right to say no. She may suffer from unbalanced and irregular menstruation, depression, anxiety problems, and in some cases physical damage such as bruises, vaginal injuries, etc. Sexual violence by a partner can also increase the risk of suicides among women. It also reduces the trust and attachment among the partners.[15]

Secondly, husband appropriates the decision making of the wife's body by having sexual intercourse at his desire without taking into consideration his better half's consent. *Thirdly*, it can also be assumed from the present position of women that they have different rights over their body before marriage and after marriage. This situation is so ironic and represents the atrocious mindset of our society. So, every time a man rapes his wife, it is the society who loses, as the basic human rights of a woman are not respected in such cases. Thus, it is a complete disconnect from the basic woman's rights and hinders her overall growth of her in a marital relationship. The National Family Health Survey 4 for 2015-16 revealed that 5.4 percent of women aged between 15 to 49 years were in many instances compelled to have sexual intercourse without their consent.[16] The data highlights and demands the urgent need to criminalise marital rape in India.

Present Laws for Protection of Women in Marriage

There are several laws in India to protect the rights of a woman in a marital relationship. However, there is no such law that punishes a husband for marital rape to his wife during the subsistence of their marriage. As per exception 2 to Section 375 of the Indian Penal Code 1860, when sexual intercourse is done by a man with his legally wedded wife, provided she is not below the age of fifteen years, is not rape.[17] There were several challenges to the said exception as it created an arbitrary categorisation of married girls below the age of fifteen and *secondly*, between fifteen to eighteen years. However, in the landmark judgment of *Independent thoughtv. Union of India*,[18] the issue before the court was whether sexual intercourse between a man and his wife in the case of a wife between 15 to 18 years

14 Morgan Lee Woolley, "*Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*", HASTINGS WOMEN'S LAW JOURNAL, Vol. 18 No. 269, 2007.

15 "*Why Society Should Talk About Forced Sex in Intimate Relationships, Too*", THE CONVERSATION, December 1, 2017, https://theconversation.com/why-society-should-talk-about-forced-sex-in-intimate-relationships-too-81716, (visited on May 18, 2019).

16 Sumi Sukanya Dutta, "*Family Health Survey Revives Debate on Marital Rape as Crime*", January 13, 2018, THE NEW INDIAN EXPRESS, http://www.newindianexpress.com/ thesundaystandard/2018/jan/13/family-health-survey-revives-debate-on-marital-rape-as-crime-1753112.html, (visited on May 18, 2019).

17 Exception 2 of Section 375 of the Indian Penal Code states that "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape".

18 (2017) 10 SCC 800.

of age is rape. The court held that exception 2 to Section 375 of the Indian Penal Code 1860 creates unnecessary and arbitrary confusion and thus the age mentioned under this exception was increased to eighteen years from fifteen years. The court further held that sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape. However, the court in this judgment took a very narrow view and dealt only with marital rapes of girls between 15 to 18 years of age. The court failed to consider that marital rapes of adults are also rape and those women also deserve equal rights and denying them the same is a gross violation of justice.

Recently, the union cabinet has cleared a Bill that makes the legal marriageable age of girls from eighteen to twenty-one years. Under the personal laws, presently, the age of girls to legally get married is eighteen years; however, if this bill receives the assent, then the minimum legal age for marriage for girls will be increased by three years. In such case, the issue which needs to be addressed is the need for an amendment in exception 2 to Section 375 of the Indian Penal Code 1860. The exception creates a class of married women as per their ages. So, the adult married women cannot fall under the said exception; however, if the age of marriage increases to twenty-one years, then necessary amendments have to be made in various legal provisions under the Indian Penal Code 1860, Prohibition of Child Marriage Act 2006 as well as under various personal laws.[19]

Section 376B of the Indian Penal Code 1860 deals with a provision when a husband has sexual intercourse with his wife during judicial separation without her consent. However, this Section only mentions forceful sexual intercourse during judicial separation and not otherwise.[20] In order for this provision to be applicable, there has to be a decree of judicial separation passed by a court of competent jurisdiction. When the decree has been passed, and if during that period the husband performs sexual intercourse with his wife without her consent, then he will be punished. However, the punishment provided under the said law is inadequate which is imprisonment between two to seven years, and not similar to punishment for rape in other provisions. Thus, the law has made a distinction in regards to punishment for rape within marriage and outside marriage without any intelligible differentia.

Section 498-A of the Indian Penal Code 1860 provides for a legal remedy in which a woman can file a complaint if she has been subjected to cruelty by her husband or his relatives. However, there has been a misuse of the said law in terms

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19 Apurva Vishwanath, "*Explained: Legal Implications of Enforcing Age of Marriage*", THE INDIAN EXPRESS, December 17, 2021, https://indianexpress.com/article/explained/legal-age-marriage-for-women-india-law-7676748/, (visited on December 18, 2021).

20 Section 376B of the Indian Penal Code 1860 states that: *Sexual intercourse by husband upon his wife during separation- Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.*

of filing false cases by the woman. In *Arnesh Kumar v. State of Bihar*, the Supreme Court held that as the offence under Section 498-A of Indian Penal Code 1860 is a cognisable and non-bailable offence, "*it has lent a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives*".[21]

The Protection of Women from Domestic Violence Act 2005 was passed by the parliament with the intent to provide legal remedies to a woman who is sufferer of domestic violence in a shared household. The said Act not only protects legally wedded wives but also a woman in a relationship in the nature of marriage.[22] This Act provides for civil remedies such as custody orders, protection orders, and residence orders. Thus, the Act mainly focuses on compensation for women and not criminal remedies. However, this is a piece-meal legislation in which women have no choice left apart from leaving her husband. Because, there are instances when a husband commits sexual intercourse with his wife without her consent, but he doesn't commit any violence. When there is no violence done by him, it is difficult to put it under the purview of the cases of domestic violence as well. Thus, in India, there is no specific law to deal with the cases of marital rape.

Concept of Marital Rape through the Judicial Lens

There have been various judgments by the courts which have advocated equal rights for a woman in marriage. In the case of *R v. R*,[23] the issue which came before the House of Lords was whether a husband can commit rape upon her wife. In this case, the couple was facing certain marital difficulties due to which the wife went to her parent's home to reside. While her parents were not at home, the husband lurked into her parents' house and attempted to commit sexual intercourse with her forcefully, and also assaulted her by hurting her neck. The decision was in favour of the wife and the husband was sentenced to three years' imprisonment for the attempted rape and 18 months' imprisonment to run concurrently in respect of the assault. Thus, this was a landmark judgment, as before this decision a woman's status was based on an implied consent theory enunciated by Sir William Hale in History of the Pleas of the Crown.[24] According to this theory, the wife's consent to sexual intercourse with her husband was irrevocable. The wife was considered a chattel, and she had to listen to her husband's wishes all the time and act according to that.

However, this status of wives changed after the case of *Rex v. Clarke*,[25] in which the court removed the common law fiction which was propounded by Hale and called it offensive and anachronistic. In *Nimeshbhai Bharatbhai Desai v. State*

21 2014 8 SCC 273.

22 Section 2(f) of the Protection of Women from Domestic Violence Act 2005 states that: "*a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family*".

23 [1991] UKHL 12.

24 (1736), Vol. 1, ch. 58, p. 629.

25 [1927] HCA 47.

of Gujarat[26]the court held that marital rape is not the privilege of a husband, but it is a violent act and injustice towards women in this form must be criminalised. The court has gone further to opine that keeping marital rape out of the purview of an offence gives encouragement to the men that wife rape is acceptable thereby leading to a destructible attitude. A rock-solid marriage stands on healthy sexual relations and not on perverted practices adopted by the husband. The significance of privacy in a marriage is also one of the aspects which need to be understood in its contemporary relevance.

In *K.S. Puttaswamy v. Union of India*, one of the landmark judgments on the right to privacy, the Supreme Court held that privacy is an intrinsic part of Article 21 of the Constitution of India which protects the life and liberty of a person.[27] Further, it was emphasised that "*if an individual permit someone to enter the house, it does not mean that other can enter the house and harm that person*".[28] Similarly, in a marital relationship consent for sexual relations by wife may not be there in all the circumstances. Thus, in such cases, her privacy, and her right to get not harmed in such relationship needs to be preserved.

In *State of Karnataka v. Krishnappa*, the Supreme Court emphasised the honour of a woman and held that rape is a dehumanising act that is an intrusion into her right to privacy and sanctity of a female. It is a serious blow to her honour and offends her self-esteem and dignity.[29] In *RIT Foundation v. Union of India*, wherein the two petitioners, i.e., All India Democratic Women's Association and RIT Foundation have filed a petition seeking that marital rape should be criminalised in India.[30] However, the respondents have raised certain concerns which are regarding the criminalisation of marital rape; *firstly*, a distinction between marital rape and marital non-rape should be specified; *secondly*, ensuring that marital rape does not become a phenomenon to destabilise the institution of marriage and it should not be used a tool against the husband; *thirdly*, the issue of relying on which kind of evidence for marital rape; *fourthly*, merely because foreign countries have a law on marital rape does not mean that India must follow the same; and lastly, it is important to know the opinion of state governments due to their diverse nature.[31] Thus, the matter is *sub-judice* which may decide the fate of marital rape and the concerned law in India.

In *XXX v. XXX*, the High Court of Kerala accepted marital rape as a ground of divorce albeit agreeing that it is not an offence as per the prevailing laws. The court held that "*A husband's licentious disposition disregarding the autonomy of the wife is a marital rape, albeit such conduct cannot be penalised, it falls in the frame of physical and mental cruelty*."[32]The court emphasised on the significance of marital privacy between a husband and wife which is inherent and if someone intrudes in

26 2018 SCC OnLine Guj 732
27 (2017) 10 SCC 1.
28 *Ibid*, p. 635.
29 (2000) 4 SCC 75, p. 82.
30 Writ Petition (C) NO. 284/2015.
31 *Ibid*.
32 2021 SCC OnLine Ker 3495, para 13.

that, then it will be considered as a breach of that privacy. Thus, the court widened the scope of divorce laws by going beyond the enumerated ground of divorce and including marital rape as one of the grounds.

In *Hrishikesh Sahoo v. State of Karnataka*, the High Court of Karnataka held that the entire petition is regarding the "*wanton lust, vicious appetite, depravity of senses, loathsome beast of passion, unbridled unleashing of carnal desire of demonishperversion*".[33] Further, the court stated in the epilogue of the judgment that the Constitution of India is the fountainhead of all the statutes which ensure equality under Article 14. Thus, if there is an exception for the husband under Section 375 of the Indian Penal Code, then in such cases, it runs counter to the principle of equality.[34] The judgment thus recognised the offence of marital rape by recognising the rights of women to be protected against the offence of rape in marriage also. An NGO, Men Welfare Trust has requested the Supreme Court of India to take cognizance of the said matter regarding marital rape.[35] The said NGO had earlier approached the High Court of Delhi against criminalisation of marital rape wherein they stated that a distinction has to be made between a marital and non-marital relationship in the light of consent and context in a marriage.[36]

Need for Criminalisation of Marital Rape: An Analysis

The need for criminalisation of marital rape is being debated and discussed for the past several years. But there are several challenges in enacting a new law or amending the law to inculcate marital rape as an offence. *Firstly*, it is significant to understand the societal perception of marital rape in India. The major challenge for enacting a new law for marital rape is the fact that society considers the union of husband and wife as one in which there is no compulsion or coercion of any kind. The said assumption thwarts the amendments in law due to lack of acceptance and awareness in society. Even the governments' stand on this issue has been against making it an offence so far, and the government has expressed that the concept of marital rapes cannot be made an offence in India as it will destroy the sanctity of marriage and will be harassment to the husbands.[37] However, in 2015, one of the committees appointed by the government also recommended that marital rape should be a punishable offence in India irrespective of the marital status of women, and the relationship between the perpetrator and victim should not be

33 2022 SCC OnLine Kar 371.

34 *Ibid.*

35 "*Marital Rape: Men's Rights Organization Writes to CJI For Taking Suo Motu Cognizance of Karnataka HC's Judgment*",https://lawtrend.in/marital-rape-mens-rights-organization-writes-to-cji-for-taking-suo-motu-cognizance-of-karnataka-hcs-judgment/, (visited on April 26, 2022).

36 "*Social aspects would have to be considered: Men Welfare Trust before Delhi High Court*", THE INDIAN EXPRESS, January 28, 2022, https://indianexpress.com/article/cities/delhi/social-aspects-would-have-to-be-considered-men-welfare-trust-before-delhi-high-court-7744508/, (visited on April 25, 2022).

37 Yatin Gaur, "*A Critical Analysis of the Constitutionality of the No-criminalisation of Marital Rape in India*", THE LEAFLET, September 10, 2021, https://theleaflet.in/a-critical-analysis-of-the-constitutionality-of-the-non-criminalisation-of-marital-rape-in-india/, (visited on September 25, 2021).

relevant.[38]However, so far, no amendment has been made regarding marital rape in spite of several challenges to the same.

Secondly, it is believed that if marital rape is made an offence in India, there will be a heavy burden of proof on the parties to prove or disprove the act. As the nature of offence will be within the boundaries of home, it may be a challenge to prove whether a marital rape has happened or not. Further, the critics point out to the fact that if marital rape is penalised, there are chances of it being misused by women. On the other hand, it needs to be understood that the difficulty in proving marital rapes should not make it lesser a crime and misuse of law is not an enough argument for not bringing a law on marital rape. Marriage should not take away a right from wife to file a case for marital rapes. Many people argue that marital rape law if enacted will be a tool in the hands of wife to take revenge from their husbands. Even if this fact is considered to be true in some cases, it does not mean that a separate provision should not be put forth.

Thirdly, there are several laws for prevention and protection of crime against women which are provided in personal and public laws of India. The statutes also grant remedies to the women who have been a victim of domestic violence under the Protection of Women from Domestic Violence Act 2005. The challenge is to establish the need for a separate legal provision or an amendment to the existing laws for the criminalisation of marital rape. The said Act only provides civil remedies to a woman and not any penal sanction. Further, a woman has a legal remedy of getting a divorce on the ground of cruelty if her husband sexually assaults his wife and commits intercourse without her consent. However, the said remedy itself is flawed in the context that the punishment for an act of marital rape should not be the granting of divorce but making it legally punishable. Getting a divorce means that the rapist husband will get scot-free and the only option available to the wife will be to file for a divorce. The issue in such cases is about the punishment and not divorce.

Fourthly, the challenge in enacting a separate law on marital rape may be in cases wherein the wife is not financially independent, and she also has a responsibility for child/children on her. In such cases, there are several challenges faced by this woman. The challenges are related to independence, and taking care of women financially and emotionally, and hence, the woman is under apprehension and thus agrees to have non-consensual sexual relations with her husband. One of the methods of asserting his domination over his wife's consent is the reason that she is not financially independent and unable to take care of herself on her own. In such situations, when the woman is absolutely powerless, she is compelled to fulfil the desires of her husband. Contrary to prostitution, sex where women are being paid for sex, the wife in marital rapes is paid for their well-being as they are not independent. The only difference lies in the fact that in marital rapes, the man and woman involved are married. Thus, this cycle of dependency on her husband continues making her life merciless and ruthless by her husband.

38 Pam Rajput, REPORT OF THE HIGH LEVEL COMMITTEE ON THE STATUS OF WOMEN IN INDIA, Government of India, Ministry of Women and Child Development, 2015, p. 308.

Fifthly, the criminalisation of marital rape has been in demand from several social activists, organisations working for social causes relating to women, and many other individuals. However, if marital rapes are criminalised, the legal framework has to be well-equipped to deal with the challenges which may happen due to the criminalisation. The issue which needs to be addressed on a larger level is in criminalisation of marital rapes, if the husband is found guilty of the said offence, will it lead to a dissolution of the marriage between the spouses, or will the marriage remain intact? It is imperative to understand the facets of criminalisation within the ambit of personal relationships.

When the criminal laws enter into the canvas of personal laws, the consequences may be fatal for the spouses and children. In 2019, a law was passed by the parliament criminalising triple *talaq* in India which was said to be path-breaking legislation to safeguard the interest of Muslim women. The Act specifies that if a husband pronounces triple *talaq* to his wife, the *talaq* shall be void and illegal, albeit the marriage will remain valid. If a woman files a complaint against the husband for his act of pronouncing triple *talaq*, he may be imprisoned as per the provision of the Act. Thus, the Act staunchly supports the rights of women who were discriminated and tortured, but if the husband goes to serve his sentence of imprisonment, and in cases wherein the woman is not financially independent, the criminalisation may have an adverse impact on that woman. Similarly, if marital rapes are criminalised in India, one of the devastating impacts maybe for a woman who has filed a complaint against her husband for the offence of marital rape. Therefore, the criminalisation of marital rape, if it is included within the ambit of criminal laws, may also jeopardise the interest of women due to various reasons. Further, the criminalisation of marital rapes may also endanger the property rights of a woman when the husband refuses to fulfil his marital obligations toward his wife. The inclusion of punishment within the domain of personal relationships may have a humongous impact on the spouses. The marital sanctity is shattered when a husband commits sexual intercourse without the consent of a wife. In such a scenario, even if the marriage remains valid as per law, the true spirit and essence of marriage may get dis-oriented. Marital rape leaves an indelible mark on the life of a woman and hence the issue needs to be resolved and scrutinised from various perspectives.

Lastly, if two individuals are living together in a live-in relationship which leads to a presumption of marriage, in such cases if the male live-in partner commits rape on his female live-in partner, the law is silent on this aspect. Though the male live-in partner will be covered under the relevant provisions of the Indian Penal Code; however, in a presumption of marriage, the individuals are not just living together but the society considers them husband and wife. The lawmakers should also consider the mentioned growing practice of live-in relationships and the issues and challenges surrounding such relationships in India.

Conclusion

Social changes don't happen overnight. They take generations to come.[39]

Women have been pursuing the vendetta of gender equality and it is time to address the cardinal principle of marriage, which is consent for preserving a woman's dignity. Marital rape is an inhuman act done by a husband with his wife. It is not an offence under the prevailing laws and thus it can also be called 'legal rape'. The idea that women too deserve their respect and dignity *via* making choices is still a novice to the patriarchal mindset of the Indian society. Women in a society or in a home need to be treated with utmost respect and dignity and denying the same to her is a gross violation of human rights. It has to be clearly understood that only sexual relations are not the glue that keeps a marriage intact. Marriage remains solid when both the partners carry mutual respect toward each other. Having a sexual relationship with a husband should be out of love and respect and not because of any obligation. Understanding each other's needs and desires in a marriage is the key that has to be imbibed in a relationship. The notion that a woman becomes the property of her husband once she marries a man needs to be discouraged and dumped into the dustbin of our history. Thus, the patriarchal mindset needs to change and then only a change will be witnessed in the laws for protecting the dignity of women.

Suggestions

There are inhibitions in society that restricts the idea of equality in a marriage. The practice and belief that it is only a male member of the family who earns the bread and butter need to be re-examined in light of contemporary changing notions of equality as enshrined under the Constitution of India. The societal mindset has changed to a certain extent and thus gender stereotyping needs to end at all levels, personal or public. It is imperative to acknowledge instances of sexual wrongs which happen in the personal sphere within marriage and discuss the same freely, with parents and family members. In cases of marital rape, a woman may feel that she is the accused as revealing about such acts by the husband may disrupt her family life; however, it needs to be assured by the society that the woman has utmost support from them. Gender-sensitivity training needs to be provided and necessary support services for women should be introduced as a matter of policy. Further, stereotypes and stigma against married women should be eradicated with the help of a national policy.[40]

The absence of effective and adequate legislation for marital rape in India causes several problems for women. The present governing laws protecting the rights of women are not enough in case of marital rape. Thus, there should be a stringent law that can effectively deal with the issue of marital rape. Exception 2 to

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39 Monica Sarkar, "*Marital Rape: Why is it Legal in India*", CNN, March 9, 2015, https://edition.cnn.com/2015/03/05/asia/marital-rape-india/index.html, (visited on June 11, 2019).

40 Krina Patel, "*The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change*", FORDHAM INTERNATIONAL LAW JOURNAL, Vol. 42 No. 5, 2019, p. 1543.

Section 375 of Indian Penal Code 1860 should be omitted and marital rape should be criminalised. Marital rape should not merely be a civil offence but a criminal wrong for which the penalty and imprisonment should be severe. The present laws are not efficient for punishing a person for the act of marital rape and thus having separate legislation is the best way to curb the ruthless practice. A new law should be enacted that can protect the rights of a woman from being harassed sexually. The offence should not be made a cognisable offence but a proper investigation has to be done before arresting a person. Th existing laws do not deal with marital rape and thus the man considers the woman as his own property. Further, special courts should be set up where all the cases of marital rape including sexual abuse and violence by a partner will be dealt. Sex education should be given in all the schools which will spread awareness about the repercussions of sexual violence against a woman. A woman should not be shunned by society merely because of an act in which she herself is a victim. Thus, awareness, immediate amendments in the law, and due diligence by the appropriate authorities for such acts can only be the way forward for the protection of the dignity of a woman in marriage.

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DISABILITY AND WORLD AT WORK: AN INCLUSIVE AND SUSTAINABLE DISCOURSE

Anuja S[♣]

Abstract

Decent paid employment is the core focus of our social identity in the present-day world. The Disability Rights Movement since its emergence has emphasised on the vulnerability arising from exclusive policies and approaches. The stark inequality is reflected as and when we discuss about persons with disabilities at work. Employment of persons with disabilities thus becomes a significant challenge. Workplace closures and ensuing lockdowns in 2020, leading to increased unemployment and huge wage cuts, the world all over, has made the persons with disability invisible in the workplace adaptability or inclusivity discussions. Revolutionising the industrial eco-system incorporating the need- based and rights-based approaches is the need of the hour. The rights-based approach guaranteed by UNCRPD, 2006 coupled with the vision of the Decent Work Agenda and ILOs Disability Inclusion Strategy plays a crucial role in the inclusivity and sustainable discourses improving the world at work for everyone. A disability rights framework is explored through this paper, as driven by the potentialities of a transformative regime, in moulding a conducive work atmosphere for persons with disabilities.

Keywords: Disability, Disability Rights Movement, ILO, Inclusiveness, UNCRPD.

Introduction

> *The severity of one's disability does not determine their level of potential. the greatest barriers that persons with disabilities have to overcome are not steps or curbs, it's expectations.*
>
> - Karen Clay

The persons with disability are labelled as unqualified and non-productive and the discrimination, violence, exploitation, and suppression mounts up alongside their impairments bearing a huge brunt and extra cost on their full productive life and subsistence. United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) 2006 describes a person with disability as those who are affected with long term physical, mental intellectual, or sensory impairments while when in interaction with various barriers structured within the society, is likely to lead to impediment/ hindrance to their full and effective participation on an equal basis with others.[1]This understanding of persons with disabilities, reflects the social

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1 Article 1, paragraph 2 of UN Convention on the Rights of Persons with Disabilities, 2006.

disability model/ construct viewing them as rights holders. This interface of persons with disabilities with the barriers, physical and environmental emanating from within society gets reflected by World Health Organisation[2]. The transformation from medical model to social model approach that leads to an inclusive and sustainability approach has invested much more potential in legislative and administrative understandings, both nationally and globally. Disability leads to stigmatic circumstances of inequality, oppression, discrimination, torture and the aftermath is the social invisibility that gets reflected in the discussions of law or policy making. It is here, the inclusivity perspective is brought into effect by the International Labour Organisation. Disability inclusion refers to promoting and ensuring the participation of people with disabilities in education, training and employment and all aspects of society and providing the necessary support and reasonable accommodation so that they can fully participate.[3]

For over a long time the medical model has dominated the formulation of disability policy for years. This restricts disabled people's opportunities to make choices, control their lives and develop their potential. Because the condition is "medical", a disabled person is seen to be prone to ill health and sick leave, is likely to deteriorate, and will be less productive than other able bodied, working colleagues. It reinforces helplessness and dependence leading to persons with disabilities as having lost significance at the world at work. Disability discrimination law clarifies the concept of the medical model and enables the employer to view them as rights-holders with immense potential contributions. Disability discrimination law thus endorses the social model of disability[4] and enables deconstructing the medical or individual model of disability and the stereotypes that come with it.[5]

The developmental and sustainability discourse views the structural and attitudinal barriers within the society as impediments to the development and growth of persons with disabilities. Equity is used as a potent weapon and tool to reach the goal of the equality model. This model prioritises the affirmative actions of the society/ state placing its goal on the satisfaction of the needs of the persons with disabilities. A sea change paradigm shift has taken place with the Human Rights articulation, as the policymakers have moved on from the mere provision of charitable services to ideals of guaranteeing self-determination, right to dignity, and self-respect. The UNCRPD,2006 which views persons with disabilities, as equally

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2 Matilde Leonardi et al. "*The Definition of Disability: What is in a Name*?", LANCET, https://www.who.int/teams/noncommunicable-diseases/disability-and-rehabilitation/ world -report-on-disability, (visited on May 2, 2021).

3 "*Disability Inclusion Strategy and Action Plan 2014-17*", INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/ documents/genericdocument/wcms_370772.pdf, (visited on May 02,2021).

4 Colin Barnes and Geof Mercer (eds.), IMPLEMENTING THE SOCIAL MODEL OF DISABILITY: THEORY AND RESEARCH, 1st ed. 2004.

5 Theresia Degener, "*The Definition of Disability in German and Foreign Discrimination Law*", Disability Studies Quarterly, Vol. 26 No. 2, 2006, https://dsq-sds.org/article/view/696/873, (visited on May 26, 2022).

competent with the able bodied and upholds persons with disability as right holdersbreathe in fresh impetus to ILO activities to promote equal opportunities for persons with disabilities in training, employment and occupation. The lack of equal employment opportunities for people with disabilities and if employed, the reluctance of employers to provide work conducive environment forms the root causes of the pervasive discrimination and exclusion of many members of this group.

Bridging the Gaps -Decent Work Agenda and Persons with Disabilities

The word decent denotes that work must be of acceptable quality in terms of income, working conditions, job security and rights.[6] The focus points addressed are poverty, inequality, and human dignity. This approach encompasses a set of values for evaluating policy and practice. As an aftermath of inhuman treatment by totalitarian regimes during 1930s and the World Wars that ensued there has been a paradigm shift in the goals of ILO starting from the 1919 to the 1990s. To draw a difference between the earlier conventions of ILO, the focus points were more working hours, need for safety net of unemployment compensation the need for safety and health measures to the workers so on and so forth. It did not distinguish between standards, decent work, and human rights. It prioritized the need to protect the dignity of the worker as a means of achieving social justice. Freedom from the vulnerability of the workers which was the motto emanating from the ILO's historic status got transformed into the new concerns like what kinds of work the people are into, how remunerative it is, to what extent it offers the security of a job and what rights workers enjoy at the workplace. This renewed emphasis on the repercussions that a vulnerable worker universally faces raises a new set of issues when it comes to employees with disabilities. The need felt by ILO at the end of twentieth century from its observation that there exists an ethical vacuum in which globalisation has grown and that had in effect culminated in the depletion of the social fabric within societies can be understood as the first starting point of acknowledging the concept of decent work.

The Universal Declaration of Human Rights stipulates the essence of decent working.[7] In 1998, ILO adopted a Declaration of Fundamental Principles and Rights at Work the first pronouncement expressly proclaiming a "human rights" orientation for the ILO. The adoption of this Declaration served as a catalyst to push forward the human rights agenda in international labour law and seemed to

6 Gillian MacNaughton and Diane F.Frey, "*Decent Work for All: A Holistic Human Rights Approach*", AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, Vol. 26 No. 2, p. 449.

7 Article 23 of the Universal Declaration of Human Rights states that: e*veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and join trade unions for the protection of his interests*.

herald a new boldness in the ILO's approach.[8] Realising that there is high inequity between and within the countries as to the distribution of gains of globalization and that it has resulted in negative and restrictive ramifications on the working class, ILO had embarked upon with the idea of decent work agenda recognizing the fact that each country has specific needs and conditions. The major focus was rendering a humanitarian face to the process of globalization. The major goals were reduction of unemployment and rectification of situation when workers are into appalling conditions i.e., subject to coercion and low wages, etc. The noble intention envisaged is to promote fair labour standards globally. In 1999, the ILO launched a new goal "Decent Work for All" which aims to secure decent work for women and men everywhere. The four strategic objectives are full employment, improved levels of socio-economic security, universal respect for fundamental principles at work and the strengthening of social dialogue.[9] It incorporates both the quantity and quality of work in which core labour standards are respected. The objectives of this agenda clearly reflect a paradigm shift as to the priorities and concerns of the new globalized regime.

Decent work involves treating all at work equally without discrimination, respecting dignity of human beings, promoting fairness in wages and rights at work ensuring safe working conditions with proper social security benefits, and effective collective bargaining scenario coupled with accountability by the Government. To attain decent work, respect for core labour standards as enshrined under the eight Core Fundamental Human Rights Conventions becomes essential. The Core Conventions are the Forced Labour Convention No.29 of 1930, the Convention on the Freedom and Protection of the Right to Organise Convention No.87 of 1948, the Right to Organize and Collective Bargaining Convention No.98 0f 1949, the Equal Remuneration Convention No.100 of 1951, the Abolition of Forced Labour Convention No.105 of 1957, the Discrimination (Employment and Occupation)Convention No.111 of 1958, the Minimum Age Convention No.138 of 1973, and the Worst Forms of Child Labour Convention No 182 of 1999. The Declaration on Fundamental principles and rights at Work,1998 reflects the commitment of ILO in reaffirming the obligation of its member states to respect, promote and realise principles concerning fundamental human rights enshrined under the Core Conventions with a specific rider clause irrespective and immaterial of ratification status, by virtue of their membership in ILO.

Bridging the gaps between the employees with disability and the Decent work agenda assumes significance in the context of ILO advocacy on inclusiveness for the persons with disability in 1955, the Recommendation concerning Vocational Rehabilitation of the Disabled, No. 99, stated "Whenever possible, disabled persons

8 Janice R. Bellace, "*Achieving Social Justice: The Nexus between the ILO's Fundamental Rights and Decent Work*", EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL, Vol. 15 No. 1, p. 6, http://heiinon line.org, (visited on June 19, 2016).

9 Gary S.Fields, "*Decent Work and Development Policies*", INTERNATIONAL LABOUR REVIEW, Vol. 142 No. 2, 2003, p. 239.

should receive training with and under the same conditions as non-disabled persons."

The year 1981 was commemorated by UN General Assembly as the International Year of Disabled Persons focussing on the theme of full participation and equality. This was followed up by a World Programme of Action for persons with disability,1982 based on active social life participation. Keeping in tune with the commitment of ILO in promoting social justice, the inclusivity concerns of persons with disability into the world at work is reflected through the ILO, Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) called for a policy on vocational rehabilitation (i.e., career guidance, training and placement) and employment based on the principle of equal opportunity, which exhorts each member states to formulate and implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons. The said policy intends ensuring that appropriate vocational rehabilitation measures are made available to all categories of disabled persons, and at promoting employment opportunities for disabled persons in the open labour market based on the principle of equal opportunity between disabled workers and workers generally. Equality of opportunity and treatment for disabled men and women workers are prioritised through this mandate. A conducive enabling environment for vocational rehabilitation, employment and skill training leading to placement services ought to be realised through the Convention. Equality as a right includes the reasonable accommodations and workplace adaptations required for persons with disability.

The underlying international standards dealt with under the Convention No.159 was brought down to practical levels through the Code of Practice on Managing Disability in the Workplace of 2001, which incorporated guidelines to employers having applicability to large, medium-sized or small enterprises, in the private or public sector, in developing or highly industrialized countries oriented towards adopting a positive strategy in managing disability related issues in the world at work. A safe and healthy employment of persons with disabilities based on good practices of occupational health and safety aspects was put in place even though it was not a legally binding instrument. Disability management strategy at work places leading to job adaptability aspect and the employee assistance programmes, designed in a singular or participatory model involving employers, work trial strategies to be adopted for persons with disability and focus on job retention of persons acquiring disability during the course of employment were the four pronged nuanced perspective flowing from the Code.[10] This Code of conduct addresses many stereotypical myths related to persons with disability at workplace and projects the kinds of discrimination and oppression unleashed against them.

Recommendation concerning Human Resources Development: Education, Training and Lifelong Learning, No. 195, 2005, is yet another mandate in the field speaking at length the need for inclusive discourse on persons with disability. It

10 "*Code of Practice-Managing Disability in the Workplace*", INTERNATIONAL LABOUR ORGANISATION, 2002 https://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/tmemdw-2.pdf, (visited on February 10, 2021).

focusses on promotion of access to education, training, and lifelong learning for people with nationally identified special needs, such as youth, people with disabilities, migrants, older workers, indigenous people, ethnic minority groups and the socially excluded.[11] The Disability Inclusion Strategy adopted by ILO is a benchmark development in this field that paves the way forward for mainstreaming the persons with disability through inclusive perspective.[12]It is an indigenous policy evolved by ILO on lines with the United Nations Disability Inclusion Strategy (UNDIS) accountability framework launched in 2019. ILO's Declaration on Social Justice for a Fair Globalization, 2008 acts as a triggering mechanism with its cross cutting theme based on principle of non- discrimination. Inclusive participation of men and women with disabilities and bridging the gaps in social protection programmes worldwide when it comes to able bodies and disabled bodies centered around a participatory approach in the world of work is its objective.[13] The three-pronged approaches adopted for the disability inclusion strategy by ILO are increasing employability, inclusive employment and enabling environment.

The overarching principle of ILO is the promotion of decent work in achieving social justice. While recognizing decent work for all ideology ILO commits itself to the understanding that decent work agenda would be realizable only if persons with disabilities, including those with physical, psychosocial, intellectual, or sensory impairments, are fully and meaningfully included in the world of work The Programme and Budget for 2020–21 focused more heavily on disability inclusion than previous programmes and budgets, in line with the ILO Centenary Declaration for the Future of Work, showcasing a human-centered approach with a dedicated output under outcome 6 on equal opportunities and treatment in the world of work for persons with disabilities and other persons in vulnerable situations.[14] SDG 2030 brings in a holistic approach to deal with the challenges arising from disability and world at work. The cultural changes and demographic shifts with its broader canvass of climate change issues leads to the reality of connecting the dots that invigorates new life into the idea of mainstreaming disability in the world at work.

Interface of Decent Work and Disability-Best Practices from Germany

The legal landscape in the German context offers an inclusive strategy in practical applicability of the Decent Work Agenda in the context of persons with disabilities at work. UN Convention on the Rights of Persons with Disabilities (UNCRPD) was signed by Germany in 2009. The right to equality and non-discrimination plays a cohesive role in the German Constitutional System (Constitutional law of the Federal Republic of Germany 1949), having been inspired from UDHR. The constitution prohibits discrimination on grounds of disability (Art. 3 III 2 Basic Law). A long journey has traversed from mandating equality of all human beings in 1949 to the inclusion of discrimination against

11 *Supra* n. 10.

12 *Ibid.*

13 *Id.*

14 "*ILO disability inclusion policy and strategy*" INTERNATIONAL LABOUR OFFICE, February 14, 2020, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_736276.pdf, (visited on February 08, 2021).

disabled persons in 1994.[15] In Germany, the mandate against discrimination towards disabled employees springs up from the General Equal Treatment Act 2006 (*Allgemeines Gleichbehandlungsgesetz*, AGG). Additional to this all-embracing direction, comes the German Social Code (*Sozialgesetzbuch* IX) that caters to special rights and protections envisaged for disabled employees.[16]

The legal safeguard envisaged under the General Equal Treatment Act protects the employees with disability from discrimination of diverse kinds. The terminology 'inadmissible' is used in the law regarding matters of discrimination like : conditions required for accessibility to employment and self-employment including the stages spread across the course of employment like the selection process, criteria's related to recruitment and promotion, working conditions, remunerative aspects, the conditions relating to dismissal of employees with disabilities, the strategies of entering into collective bargaining agreements, provisions related to termination of employment, trainings that are a preliminary and as well as the advanced level, practical work experiences, and membership and involvement in any worker's organizations.[17]

The employers are prohibited from advertising a vacancy in a discriminatory manner.[18] A three-pronged approach is taken into consideration in the context of discrimination like Affirmative, curative and preventive in nature. Affirmative actions are mandated from the end of the employers to take measures necessary to ensure protection against discrimination, a curative approach to take cognizance for unacceptability of such discrimination in a suitable manner, within the context of training, and to use their influence to prevent such discriminations in the future course reflecting preventive approaches. Remedial measures are also envisaged in situations where one employee discriminates against another employee. Employer is therein mandated to take appropriate actions or measures to put a stop to the discrimination (including cautioning, moving, relocating or dismissing the discriminating employee); and to take suitable, necessary and appropriate measures to protect the employee in question, where he or she is discriminated against by a third party in the course of his or her employment. In cases of discrimination, the aggrieved employees can opt in for different remedies like, Right to complain, Right to refuse work and also the Right to claim damages and compensation[19] for non-economic losses. Victimisation of employees for asserting their rights is prohibited[20]which creates a blanket protection to the employees in their need for a rights articulation.

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15 "*Guide to the General Equal Treatment Act*", FEDERAL ANTI- DISCRIMINATION AGENCY, https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/EN/publikationen/agg_wegweiser_engl_guide_to_the_general_equal_treatment_act.pdf?__blob=publicationFile, (visited on May 27, 2022).

16 Elisa Fiala, "*A Brave New World of Work through the Lens of Disability*", https://www.mdpi.com, (visited on May 27, 2022).

17 Section 2 of General Act on Equal Treatment 2006; Article 8 of the SEPA Accompanying Act 2013.

18 *Ibid*, Section 11.

19 *Id.*, Sections 13,14 and 15.

20 *Id.*, Section 16.

German Social Code,*Sozialgesetzbuch* (SGB) defines disabled persons as "individuals whose bodily functions, mental abilities or mental health are highly likely to deviate for more than six months from the state which is typical for their age and whose participation in society is therefore impaired".[21] People with disabilities varying in severity are offered protections like additional five days of holidays annually, dismissal subject to prior consent of appropriate authority, flexible work arrangements, right to elects ombudsperson to advocate in matters concerning disability and social protection measures like government subsidies.

The legal landscape of Germany offers fruitful suggestions for revamping the employment laws and workplaces, disabled-friendly and conducive. Fostering social inclusion through modeling of positive interactions with co-workers, employers, and assistance and service providers and creating special contexts for socializing is important for a more inclusive and enabling industrial eco-system for persons with disabilities that leads to one of the pillars of Decent Work Agenda i.e., Social Dialogue. Society and other stakeholders are held accountable and development policies and processes are to be strategized with a holistic understanding as to the person's differently abled epitomises social protection mechanisms. The debate about the rights of the disabled is therefore connected to a larger debate about the place of difference to be accorded within the society. Unlike the centrality of 'economic efficiency' in the welfare-based approach, the rights-based approach reflects a global consensus on the centrality of human dignity and equality in social and economic life and the non-negotiable accountability of states for fulfilling their obligations.[22]

Conclusion

A dramatic shift in perspective has taken place with the coming of the Convention on the Rights of Persons with Disabilities, 2006[23] which moves a step forward from the charity-based debate to the one based on rights articulation. Priority-based focus on inclusive technological revolutionary transformations coupled with skilling of persons with disability to meet the emerging challenges of labour market is the need of the hour. Inclusive and user-friendly workplaces with job adaptation mechanisms for persons with disability as groups meriting special attention leading to sustainable employment opportunities should be the core area to be focused upon. A participatory approach i.e., *Nothing about us without us*, the motto needs to be re-formulated in the new world order in the format of *Best Interest* of the persons with disability. The whole idea encompasses removing the attitudinal and environmental barriers thus leading to enhancement of freedoms and capabilities of disabled ones.

A momentous action plan ought to be designed around the world to make this ideal realistic. India has been taking its steps in the right direction in this regard. The Department of Empowerment of Persons with Disabilities, has launched the National Action Plan, in collaboration with the Ministry of Skill Development and

21 Section 3 of German Social Code *Sozialgesetzbuch* (SGB).

22 Pradeep Kumar, "*Panda-Rights –Based Strategies in the Prevention of Domestic Violence*", 2003, p. 14.

23 Article 27 of the UN Convention on the Rights of Persons with Disabilities.

Entrepreneurship on 21st March 2015 with an intention of skilling 2.5 million persons with disability over a period of seven years.[24] A National Policy on Disability Inclusion/Strategy at World in Work ought to be designed in lines with ILO standards. The anti- discrimination policy[25] and the Equal Opportunities Cell[26] paving a way forward for sound and supportive Human Resource practices, envisaged under the Rights of Persons with Disabilities Act 2016 has breathed in a new life to the legal mandate of materialising equality at practical levels. Supportive laws and policies for persons with disability lead to an enabling environment under the disability inclusion strategy of ILO. Reservation in the governmental jobs for persons with disabilities adds on to this understanding. Governmental schemes and programmes oriented towards vocational training and self- employment of persons with disabilities[27] and the mandate of extending social security[28], Insurance schemes[29] and provisions for rehabilitation[30],identification of posts and reservation for persons with benchmark disabilities[31] under the Act, reflects the goal towards social justice under the Act.

These affirmative actions materialises the action plan of ILO in line with the PROPEL project in Indonesia i.e., *Promoting Rights and Opportunities for People with Disabilities in Employment through. Legislation*, with coordinated efforts from all the stakeholders involving support advocacy and awareness-raising activities targeting the general public, and key stakeholders, such as media, training centers, recruitment and placement agencies, and civil society organizations which stands out as a landmark development and a best model practice globally. Vocational skills and rehabilitation centres for persons with disability, functioning under the aegis of the Leprosy Mission of India, courses offered by the National Institutes of Department of Empowerment of Persons with Disabilities and its affiliate bodies like National Handicapped Finance and Development Corporation (NHFDC) and Public Sector Undertakings like NTPC, BPCL, BEL, HAL[32] are illustrations of how the idealistic legislative intent of increasing employability gets materialised in the employment spaces.[33] Another welcome initiative in a developing economy, Bangladesh, marked with labour intensive employment sectors, ILO enacts its advisory role supported by EU, in a Technical Vocational Education and Training

24 "*National Action Plan for Skill Training of Persons with Disabilities (PwDs) – Need for Winning Leaps*", http://disabilityaffairs.gov.in/upload/uploadfiles/files/National Action PlanforSkillDevwebsiteversion.pdf, (visited on February 24, 2021).

25 Section 20 of Rights of Persons with Disabilities Act 2016.

26 *Ibid,* Section 21.

27 *Id.* Section 19.

28 *Id*. Section 24.

29 *Id.* Section 26.

30 *Id*. Section 27.

31 *Id.* Sections 33 and 34.

32 *Supra* n. 16, p. 2

33 American India Foundation, New Delhi, "*Best Practices in employment of persons with disabilities in the Private Sector in India-An Employer Survey*", 2015, https://aif.org/wp-content/uploads/2017/11/AIF_Best-Practices_Disability-Employment_2015.pdf, (visited on February 24, 2021).

Reform Project, on the development of a national strategy for the inclusion of persons with disabilities in skills training programmes.

A robust mechanism of fixing responsibility, constant monitoring of accountability mechanisms, and proper coordination with different sectors and stakeholders like Government, employers, employees, and trade unions needs to be put in place for an enabling environment to prevail. The disabilities occurring at work sites, the accountability, the compensation structure fixation, and suitable job adaptability options, speeding up rehabilitation all assumes importance when it comes to inclusivity and sustainable discourse. The temporary wage to compensate for losses during lack of enough job opportunities during the pandemic and times of distress during the time of persons with disabilities period of inactivity ought to be considered positively while working towards a right and need-based friendly inclusive employment policies and spaces[34] in tune with disability inclusion strategy of ILO. An inter-sectionalist approach emanating from the Disability Justice concept taking into account diversities within the persons with disability ought to be built within workplace policies and mechanisms.

Development for employees with disabilities is the aspiration of a better life – a life materially richer, coupled with a conducive working atmosphere with equality and dignity maintained – and an array of means to achieve that mission. Every human being, with no exceptions, is or has a self, in a sense that includes an awareness of being a human individual, capable of making choices that affect one's life and that of others.[35] Interlinking the rights-based approach with the concept of development promotes a conducive, inclusive, and sustainable discourse for persons with disabilities. The rights-based approach to development calls for a participatory, empowering, transparent, accountable, and non-discriminatory development paradigm that is based on universal, inalienable human rights and freedoms. The inclusive discourse on persons with disability intends empowerment, transforming their position and ensuring them accessibility to the rights articulation in the world of work and beyond. This perspective leads to a sustainable discourse bringing in experiences and skills of persons with disabilities onto the mainstream to make irreplaceable contributions to decisions, policies, and laws.

Whenever you are in doubt...apply the first test: Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself if the step you contemplate is going to be any use to him. Will he gain anything from it? Will it restore him to a control over his own life and destiny? True development puts first those that society puts last. - Gandhiji

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34 Leandro Despouy, HUMAN RIGHTS AND DISABLED PERSONS, 1st ed. 1994, https://www.un.org/esa/socdev/enable/dispaperdes4.htm, (visited on February 23, 2021).

35 Christian Bay, "*Self-Respect as a Human Right: Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community*", HUMAN RIGHTS QUARTERLY, Vol. 67, 1982.

LIFTING THE JUDICIAL VEIL: ANALYSING WHETHER THE TIME RIPE FOR JUDICIAL ACCOUNTABILITY

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Abstract

The Judiciary is unarguably the most revered organ of all the three organs of any polity. This venerable position flows from the important functions it performs as a guardian of the rule of the law. However, over the years, serious doubts have been cast over the insulation that the judiciary enjoys. Judicial independence, while still an essential feature of Indian democracy, has in recent times come under the scanner. In 2018, an incident that raised eyebrows was the press conference of the four senior-most judges of the Supreme Court over the alleged lack of transparency in case allotment by the Chief Justice; this was an incident that shook the confidence of even the staunchest supporters of the infallible Apex Court. Incidents like this have spurred discussions on the accountability of the judiciary and its equal role of responsibility in a democracy. However, this suggestion is fraught with complexities in both its formulation and implementation. There is a lack of clarity on the contours of accountability for the judiciary and furthermore on the mechanisms to ensure it. This article seeks to clear the haziness which surrounds the subject by analysing the concept of accountability both as a definition and as a necessity for the judiciary. It also examines the judicial accountability landscape of India and the ways it has been (or not) implemented.

Keywords: Accountability, Democracy, Integrity, Judicial Veil, Transparency.

Introduction

Accountability is an important feature of a democracy where the real authority to rule lies with the people who exercise this authority periodically through elections and other institutional mechanisms. It establishes a fiduciary connection between people as the principals and the elected representatives as the agents.[1] While it is easy to point out concrete examples of accountability for the legislature and executive, it is difficult to do so for the judiciary. This is because of a lack of a direct sense of entitlement to the judiciary which is present in the case of elected representatives. Moreover, the judiciary's sensitive adjudicative role precludes extensive interferences or review of its functions. However, is it possible to

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1 Mark E. Warren, "*Accountability and Democracy*", Mark Bovens et al. (eds), THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY, 2014, p. 39.

develop practices that strike the right balance between maintenance of judicial values and ensuring accountability?

The author attempts to answer the question in the four parts of this article. In Part I, the general understanding of democratic accountability before examining the conundrum of judicial accountability through a typology is analysed. In Part II, the author analyses various mechanisms which can ensure judicial accountability within the typology. Lastly, in Part III, a closer look is taken at the Indian experience by mapping both the historical failure of Justice Ramaswamy's impeachment motion and legal developments in the Indian context.

Uncovering the Different Faces of Accountability

Accountability means various things in a democracy. It can be explained as an actor's obligation to justify their conduct and open themselves to scrutiny.[2] It can be used to champion other values like transparency, efficiency, responsiveness, responsibility, and integrity.[3] Some academics have also explained accountability through a 'principal-agent' theory where the agent must be available for an evaluation of their performance based on some standard.[4]

At a basic level, periodic elections help implement accountability by enabling people to select their agents from available choices and to monitor the agent's activities so that their actions align with the voter's interests.[5] Other accountability-generating mechanisms include transparency in Parliamentary proceedings, accountability bodies that ensure constant regulation and monitoring of public activities, rules regarding disclosure of information such as the RTI Act in India, and the separation of powers between the three branches of the state, etc.[6]

Given the presence of a direct relationship with their elected representatives, people feel *entitled* to hold them accountable. This entitlement is almost non-existent for the judiciary. This absence of entitlement is because of the *judiciary's isolation* from the people. When the author uses the term 'isolated', the author do not mean an absence of association with the public,[7] but the absence of a *direct accountability relationship*. This absence may be explained by the judiciary's oversight function which makes the legislature and executive seem subordinate to it. But this deference comes at the cost of shielding the judiciary from any public scrutiny. Over the years, these concerns have led to demands for accountability of the judiciary.

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2 Mark Bovens, "*Analysing and Assessing Accountability: A Conceptual Framework*", EUROPEAN JOURNAL OF LAW, Vol. 13, 2007, p. 450

3 *Ibid,* p. 449.

4 Herbert Kitschelt, "*Democratic Accountability Situating the Empirical Field of Research and Its Frontiers*", https://sites.duke.edu/democracylinkage/files/2014/12/kitschelt.pdf (visited on April 20, 2022).

5 *Supra* n. 1, p. 45.

6 *Ibid*, pp. 47-48.

7 This view is fallacious as the Judiciary is the only institution with the closest association with people. It caters to each litigant personally as opposed to the other branches which interact with the people only at the time of elections.

Accountability is often seen as a control mechanism where the agent is accountable to a principal if the principal can exercise control over the agent.[8] But it is difficult using this language for the judiciary because of a competing value that occupies an important place: judicial independence. The independence of the judiciary is often seen as a *sine qua non* of a democracy.[9] Judicial independence ensures that judges can function without fear, favour, affection, or ill will from the parties in cases before them[10] However, this has led to judicial independence being considered antithetical to judicial accountability which involves answerability, something that may hamper the judges' ability to adjudicate fairly.

There are ways to reconcile both these values by designing mechanisms that are unique to the judiciary. However, in Part I, the reasons why judicial accountability is desirable are being explored. A strong reason is that the judiciary is unlike the other two organs of the state, and it should be equally accountable even if not in the same way as the other two organs. It also promotes rule of law by compelling judges to adhere to the standards of the law and to prevent them from being guided by extraneous factors.[11] It might also be a way to prevent a resort to "draconian and counter-productive forms of court control."[12]

A Typology of Judicial Accountability

A broad typology for judicial accountability can be found in the academic literature which explains it as three types of accountabilities: institutional accountability, behavioural accountability, and decisional accountability.[13]

Institutional Accountability

This focuses on the judiciary as an institution rather than individual judges and is centred around the performance of the judiciary as a branch of the government.[14] Rather than external oversight bodies which might be seen as interference with the judiciary, institutional accountability must flow from the judicial itself. The judiciary can publish annual reports covering the working of the Court, a number of cases that have been disposed and how far annual targets have been met.[15] It can also produce reports highlighting its performance gauged through the average time taken to dispose a case from filing to the judgment delivered, the time between

8 Arthur Lupia, "*Delegation and Its Perils*", K. Strom et al. (eds.), DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES, 2003, p. 35.

9 BN Srikrishna, "*Judicial Independence*", Sujit Choudhary et al. (eds.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 2016, p. 349.

10 *Ibid*.

11 Charles Gardner Geyh, "*Rescuing Judicial Accountability from The Realm of Political Rhetoric*", CASE WESTERN RESERVE LAW REVIEW, Vol. 56, 2006, p. 916.

12 *Ibid*, p. 916.

13 The first type of accountability relates to the institution of judiciary as a collective whole while the other two types target individual judges. *See* David Kosar, "*The Least Accountable Branch*", INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, Vol. 11, 2013, p. 242.

14 *Supra* n. 11, p. 917.

15 Andrew Le Sueur, "*Developing Mechanisms for Judicial Accountability in the UK*", LEGAL STUDIES, Vol. 24, 2004, p. 79.

filing and decision on application of leave to appeal and number of adjournments granted, etc. Electronic reporting in the form of audio/visual recordings and digital audio systems are instrumental in establishing transparency and in bridging the gap between citizens and the judiciary.[16]

While institutional accountability engenders respect and attraction of the Courts as efficient organs characterising justice and fairness for the citizens it is the individual judges who hold the ultimate say in deciding which cases to take up, how cases are to be decided and who finally render the verdicts which has an impact on parties to the dispute and in some nationally important cases on the citizens as a whole. The pivotal role that judges play has led to heightened demands for more individual accountability and the public debate remains centred around the types discussed in the next section.

Behavioural Accountability

Unlike institutional accountability, behavioural accountability targets judges' behaviour on and off the bench. A preliminary step is producing a common set of principles that should be followed by judges all around the world like the Bangalore Principles of Judicial Conduct, which focuses on values like independence, impartiality, integrity, equality, propriety, and competence and diligence.[17] However, agreements like the Bangalore Principles remain a guiding document without enforcement that rely more on the willingness of individual judges to follow them rather than on formal enforcement mechanisms.[18] Another way to ensure upright behaviour is to establish regulatory forums which enforce codes of judicial conduct. Judicial councils which exist in countries like Canada and the United States admonish judicial misconduct through sanctions like private or public censure, temporary suspension of a judge's caseload, and a request for voluntary retirement.[19]

Decisional Accountability

Decisional accountability focuses on the substantive content, form, layout, and comprehensibility of judicial decisions.[20] Judges may end up botching up judgments for reasons of intentional errors such as financial gains, favouritism, political, religious, racial, gender, or cultural bias.[21] While scrutiny of the substantive content of judgments remains contentious, there is consensus for monitoring the stylistic dimensions of judgments. These may include standards of

16 Georgia Haley and Agnes Said, "*E-Justice: Does Electronic Court Reporting Improve Court Performance?*", EURASIAN PERSPECTIVES, January 22, 2018, http://blogs.worldbank.org/europeandcentralasia/e-justice-does-electronic-court-reporting-improve-court-performance, (visited on April 20, 2022).

17 Greg Mayne, "*Judicial Integrity: The Accountability Gap and the Bangalore Principles*", Transparency International, GLOBAL CORRUPTION REPORT, 2007, p. 42.

18 *Ibid*, p. 43.

19 "*Judicial Accountability; A practitioner's Guide*", INTERNATIONAL COMMISSION OF JURISTS, Vol. 13, 2016.

20 *Supra* n. 13, p. 246.

21 *Supra* n. 11, p. 922.

coherence and reasoning for written judgments. As far as judgments that carry inherent flaws, their scrutiny can be left to the media, think tanks, academics, and the public. These informal mechanisms of review can also enhance the interaction between the judiciary and the public.

India's Interaction with Judicial Accountability

Historical Backdrop

India's experience with judicial accountability has been tumultuous with initial reservations about it to growing demands later. The Constituent Assembly in the early days exhibited a sense of deference to the Supreme Court judges when it felt that the power to remove them would be rarely used in history and the inclusion of such a provision was a mere formality.[22] Even so, Article 124(4) and (5) provided for the removal of a Supreme Court judge on grounds of 'proved misbehaviour or incapacity' and further empowered the Parliament to enact a law providing for the procedure for such removal. In response to this provision, the Parliament enacted the Judges (Inquiry) Act 1968 which provided for the procedure for the removal of a judge. The removal process could be initiated on the presentation of a motion in either House which if accepted by the Speaker or Chairman would be followed by the setting up of a committee to inquire into the allegations. This committee would include a judge of the Supreme Court, the High Court, and a distinguished jurist.[23] If the Committee found the allegations to be truthful, its report would be put to vote by both Houses in accordance with Article 124 (4) of the Constitution of India. While being a preliminary step towards ensuring judicial accountability through clear rules of procedure, the Act could not pass the crucial test of impeachment of Justice V. Ramaswamy. This incident exposed the weakness of the law to effectively dispose of a request for removal.

Justice Ramaswamy was accused of financial impropriety while he was Chief Justice at the Punjab and Haryana High Court. He was elevated to the Supreme Court in 1989 following which reports of his corrupt behaviour surfaced in 1990. This prompted Chief Justice of India Sabyasachi Mukherjee to constitute an internal committee headed by Justice B.C Ray to look into the allegations. The committee found the allegations to be untrue which in effect did not absolve the judge of any charges since this was merely a committee of initial inquiry and not the appropriate committee which was to be instituted under law. The speaker appointed committee was instituted after a motion was moved in the Lok Sabha in accordance with the Judges (Inquiry) Act 1968, and was admitted with 108 members supporting it.

If the inquiry were to indict Justice Ramaswamy it would be put to vote before the Houses which would be a precursor to the removal. While the committee found the Judge guilty on 11 of the 14 charges the House dealt a shameful blow to the report. This highlighted the dominant position of the Parliament in controlling the entire process. The motion to remove Justice Ramaswamy failed miserably when it

22 Bhairav Acharya, "*The Evolution of Judicial Accountability in India*", JOURNAL OF PUBLIC AFFAIRS AND CHANGE, Vol. 1, 2017, p. 81.

23 The Judges (Inquiry) Act 1968.

was met with 205 abstentions and 196 votes in its favour and could not pass muster constitutionally. Political considerations of the ruling party guided the rejection of the motion and exposed the deep-rooted troubles with the country's sole judicial accountability mechanism.

This case vindicated the view of the Constituent Assembly members that the provision for removal of a judge would be rarely used but did so in a different way. While they had based their opinion on the integrity and impeccable character of the judges as obviating the need to ever initiate a motion for removal, the truth was that the provision would never be used because of its complexity and difficulty in enforcement. One of the glaring shortcomings of the Act was the absence of a mechanism to aid the public in filing complaints based on their individual grievances. The mechanism also suffered from delays, inefficiency, and a negative public perception.[24]

The Road to Change

The Constitution (98th Amendment) Bill proposed to establish a National Judicial Council for the purposes of regulating the appointment of judges and further serving as a complaint mechanism for the public but it met with an early demise owing to the dissolution of the Lok Sabha. There were further discussions in official bodies like the National Advisory Council (now a defunct body) which released a concept paper on the establishment of a National Judicial Council composed of a mixed membership drawing from all three branches. The ongoing deliberations found a long-sought legitimacy when the government proposed the Judges (Inquiry) Bill 2006 which provided for the establishment of the National Judicial Council which would entertain complaints on the 'misbehaviour and incapacity' of Supreme Court and High Court judges. It dealt extensively with the composition of the council and the general procedure to address complaints including the complaints procedure, conduction of inquiry and most importantly imposition of 'minor measures' in cases that did not warrant removal.

The minor measures approach was a supplemental option available to the committee in cases where the misconduct on part of the judge was not grave enough for complete removal. These measures included issuing advisories, warnings, withdrawal of judicial work, requests for voluntary retirement, and public or private censure. The minor measures approach was certainly far more effective than an elaborate mechanism for removal in the establishment of a judiciary that is adherent to a behavioural code of conduct. When judges know any removal or disciplinary process will be dilatory and ineffective, they are not likely to regard judicial integrity as a desirable value. But efficient mechanisms are more likely to influence judicial behaviour.

A robust accountability mechanism may not only ensure "objective or

24 Justice S.D. Dave, "Judicial Standards and Accountability Bill 2010: Key Features", OBSERVER RESEARCH FOUNDATION, January 17, 2012, https://www.orfonline.org/research/judicial-standards-and-accountability-bill-2010-key-features/, (visited on April 21, 2022).

structural accountability" but also "subjective or personal accountability."[25] Pimentel doubts the efficacy of 'objective' accountability in ensuring judicial integrity because this is something that "comes from within" and is a result of the judge's predisposition to follow the right thing.[26] However, when I say that accountability mechanisms are instrumental in ensuring subjective accountability I mean that the very existence of a mechanism may cause certain 'immoral' judges to internalise ethical standards to follow.[27] The failure to enact the 2006 Bill into law meant that yet another chance at establishing transparency in the judiciary was squandered away. But this did not mean the pursuit for judicial accountability was also dealt a blow; another legislative expression was given to the concept through the Judicial Standards and Accountability Bill 2010 which unfortunately lapsed following the dissolution of the 15th Lok Sabha but not without leaving behind a foundation for future legislations on this issue.

The Bill provided for three bodies that would be instrumental in the processing of a complaint- the National Judicial Oversight Committee, Scrutiny Panel, and the Investigation Committee with different compositions and capacities. The Oversight committee which would act as the body of the first instance would be diverse in its composition with three judicial and two non-judicial members and would refer complaints to the Scrutiny committee which would further test the merits of the complaint. If the complaint was valid, the Inquiry committee would step in to investigate the matter and furnish its report to the Oversight Committee which would, depending on the gravity of the charges, either impose minor measures or recommend removal setting in motion Article 124(4) of the Constitution. The law was drastically different from the Judges (Inquiry) Act 1968 and contained a far more elaborate mechanism to deal with complaints and further behavioural accountability.

However, as with any publication, the Bill has met intense scrutiny with critics highlighting its glaring loopholes. The vague nature of the word 'misbehaviour' has led to a former Judge saying that it renders itself both over and under exclusive.[28] One of the most strident criticisms is that the composition of the Oversight body with the Attorney General as one of the members strikes at the root of judicial independence. The Attorney General is an important legal functionary who

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25 David Pimentel, "*Reframing the Independence V. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*", CLEVELAND STATE LAW REVIEW, Vol. 57, 2009, p. 16.

26 *Ibid*, p. 23.

27 The change of behaviour that the existence of a mechanism causes is graphically represented as a shift from quadrant C to quadrant B. Pimentel uses the graphical representation to highlight the problem of balancing independence and accountability mechanisms), *See*, *Id.* at p. 29.

28 Ajit Prakash Shah, "*Judicial Standards and Accountability Bill*", THE HINDU, March 29, 2011, https://www.thehindu.com/opinion/lead/Judicial-Standards-amp-Accountability-Bill/article14966449.ece, (visited April 21, 2022). Justice Shah feels that the under-inclusive nature of the word flows from the fact that the word 'means' is used and renders the word as exhaustive. The over-exclusive nature arises from the fact that even a late filing of the assets declaration constitutes misconduct.

regularly appears before the Court and therefore in an inquiry concerning judges of the Supreme Court, there is an evident conflict of interest.[29] Even though drawbacks continue to ail the Bill, it has still managed to provide some semblance of judicial accountability which may be appreciated as a preliminary step to restoring public confidence in the institution.

Formal judicial accountability mechanisms tend to largely focus on issues of behavioural accountability and the Indian experience has been no different; legislative expressions have been given to calls for disciplining the judges and this leaves questions of decisional and institutional accountability unanswered.

Decisional Accountability in India

While decisions of the High Courts and District Courts can be reviewed on appeal, there is no mechanism to review judgments of the Supreme Court. are taken care of by the higher courts on appeal, what happens to decisions of the Apex Court if they are publicly disliked or are antithetical to modern norms. One example is that of *Suresh Kumar Koushal v. Naz Foundation*[30] where the Court dealt with constitutional questions regarding the LGBT population, the most prominent one being the Constitutional status of Section 377 of the Indian Penal Code which made "carnal intercourse against the order of nature" a crime. In a highly controversial judgment, the Supreme Court reversed the decision of the Delhi High Court which had struck the section down in the earlier case.[31] What is pertinent to note here is that decisions like these highlight the judicial accountability mechanisms which exist to ensure decisional accountability where judges who have rendered judgments based on inadequate or flawed reasoning are taken to account. This does not happen through formal means like an accountability body but through the instrument of public criticism.

An author writing about the *Naz* judgment argued that- "It is imperative that the Court is taken to task, not only for this decision, but for all its other decisions whose results we might agree with as citizens, but whose reasoning is inexplicable at best and absurd at worst, using methods that violate every canon of judicial discipline."[32] The other judgment where public engagement played an important role in generating discussions on a Supreme Court verdict was that of *Subramanian Swamy v. Union of India*[33]which upheld the constitutionality of criminal

29 *Ibid*, *See* also Priyanka Majumdar, "*A Critique of the Judicial Standards and Accountability Bill 2012*", DR. RAM MANOHAR LOHIYA NATIONAL LAW UNIVERSITY JOURNAL, Vol. 9, 2017, p. 170. (Drawing attention to the possibility of a 'quid pro quo' situation occurring in cases in which the Attorney General is appearing before a judge against whom a complaint has been filed).

30 (2014) 1 SCC 1.

31 *Naz Foundation v. Government of NCT of Delhi* 2010 94 Crim. L.J.

32 Arghya Sengupta, "*The wrongness of deference*", THE HINDU, December 16, 2013, https://www.thehindu.com/opinion/lead/the-wrongness-of-deference/article5463126. (visited April 22, 2022). [What is not clear is whether decisions which defy common sense and understanding but which are well reasoned should be examined or judgments whose reasoning may be accepted but where the stylistic aspects reveal faults, examined].

33 (2016) 7 SCC 221.

defamation provisions and dealt a blow to the development of free speech.[34] These examples go to show how an atmosphere of public criticism and scrutiny can engage the citizens in assessing and monitoring even the highest court in the country.

Institutional Accountability in India

Behavioural and Decisional accountability go a long way in keeping judges responsible to ethical and professional standards in their conduct and legal writing. However, for litigants to be confident in the judiciary as a whole, mechanisms to check adventurous or immoral judges may not be enough. The manner in which the courts are being managed plays an important role in establishing legitimacy in the legal process. When a prospective litigant is aware that the case is going to be drawn out for an unimaginable duration, he is less likely to rely on formal processes like the courts. It is at this stage that institutional accountability becomes instrumental in furthering the ends of an effective judiciary both through its actors and its processes.

Institutional accountability would look at the performance of the courts on the whole with regard to indicators like allocation of cases, publications of annual reports, relations with the press, etc.[35] The publication of the roster system in wake of the recent controversy which brewed in the Supreme Court over this issue is an example of the ways in which this form of accountability can be established.[36] There have also been efforts at promoting transparency in court proceedings by making provisions for video recording cases that are heard at the Supreme Court.[37] It is here that judicial accountability acquires 'instrumental' value i.e. it serves to develop efficiency in performance and further transparency in functioning; both of

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34 This judgement was highly scrutinised and criticised; *See* Pratap Bhanu Mehta, "*Supreme Court's Judgment on Criminal Defamation is the Latest Illustration of a Syndrome*", INDIAN EXPRESS, May 18, 2016, https://indianexpress.com/article/opinion/columns/ supreme-court-criminal-defamation-law-subramanian-swamy-2805867 (visited April 23, 2022); Bhairav Acharya, "*Criminal Defamation and the Supreme Court's Loss of Reputation*", THE WIRE, May 14, 2016, https://thewire.in/law/criminal-defamation-and-the-supreme-courts-loss-of-reputation (visited April 23, 2022); incuriam/; Tunku Varadarajan, "*Judgment by Thesaurus*", THE WIRE, July 25, 2016, https://thewire.in/ law/judgment-by-thesaurus (visited April 23, 2022) [Criticising the obfuscating vocabulary used in the judgment].

35 "*Independence and Accountability of the Judiciary*", EUROPEAN NETWORK FOR COUNCILS FOR JUDICIARY, Vol. 5, 2014, https://www.csm1909.ro/ ViewFile. ashx?guid=97bea942-017a-43aa-a0ab-a9ff3522a79c%7CInfoCSM, (visited April 22, 2022).

36 "*Supreme Court Crisis: CJI Makes Public New Roster System for Allocation of Cases, but is it Enough to Resolve Impasse?*", FIRSTPOST, February 2, 2018, https://www. firstpost.com/india/cji-dipak-misra-makes-public-new-roster-system-for-allocation-of-sc-cases-four-senior-most-judges-assigned-important-cases-4331895.html, (visited April 22, 2022).

37 Krishnadas Rajagopal, "*SC Says it is Ready to Go Live, Centre Moots a TV Channel*", THE HINDU, July 10, 2018, https://www.thehindu.com/news/national/supreme-court-favours-live-streaming-of-court-proceedings/article24370456.ece, (visited April 23, 2022).

which bolster the image of the judiciary as a venerable institution.

Conclusion

Judicial accountability is increasingly being recognised as a desirable feature of democracies. In this article, the author have tried to highlight the different meanings of judicial accountability and the means through which it can be achieved. More specifically, light is thrown on India's interaction with judicial accountability. At a time when Indian courts are suffering from docket explosions, it is necessary to focus on developing accountability mechanisms for the judiciary. These mechanisms must be designed to strike the right balance between judicial accountability and judicial independence. But one thing is clear. The debate has shifted from 'why should there be judicial accountability' to 'how should there be judicial accountability'. This is a promising development both for the judiciary and Indian democracy.

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INCARCERATING FAIR TRIALS: TRIAL BY MEDIA AND ADMINISTRATION OF JUSTICE

Shivam Tripathi[♣] *and Abhinav Saxena*[♠]

Abstract

Throughout the course of history, media has had a vital role to play in the shaping of societies. This is essentially attributed to the fact that media often plays a comprehensive role in moulding public opinion. Having said this, the media being an independent organ, also owes a responsibility to the citizens to ensure that any opinion which is being presented through its platforms, is brought forth without fear or favour. While it is an indispensable duty at the end of media outlets, to speak truth to power and consequently call out for the perpetrators to be punished, this discharge can in no way act in a manner that is detrimental to the objectives of fair trial. Moreover, while media regulated by agencies of the state certainly acts as an impairment to the democratic process, the consequences of an unaccountable fourth pillar are far more damaging.

It, therefore, becomes imperative to prevent trials by media from taking over the criminal justice system. Thus, the overarching point that this submission brings to the fore, is that courts in the country must prevent any flagrant disregard of an individual's civil rights, and an attempt is made to assess the ramifications of media trials vis-à-vis the right to fair trial. The submission, therefore, aims to explore the idea of a media trial from multiple perspectives, with an intent to put forth the existing structure of the law and solutions to issues therewith.

Keywords: Administration of Justice, Criminal Justice System, Impairment of Judicial Process Media Trial.

Introduction

For a forceful and dynamic democracy, the ability to speak freely is of paramount significance. This is essential because it empowers an individual to seek accountability. Similarly, for freedom and liberty to flourish, the free press must flourish. It is only fair and free media that strengthens democracies. To this extent, the sustenance of democratic values in India is thereby greatly credited to the dynamism and freedom of the Indian press.

Courts in the country have thereby time and again, acknowledged, re-affirmed, and substantiated freedom of the press, establishing its pivotal role in a parliamentary democracy. When needed, courts have nullified administrative and legislative moves aimed at throttling freedom of the press, precisely because it was

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deemed crucial for the survival of a parliamentary democratic system as envisioned under the Constitution.[1] Moreover, free and fair media was accorded further protection by classifying it is as a key proponent of the right to know.[2] So much so, that any pre-censorship of the written content has since, been deemed unacceptable.

However, in recent times, the media's tendency to sensationalise cases has spawned spirited discussions between free speech and fair trial. In various high-profile litigations, through its constant reports, media today, generates much hype on matters before the courts, resulting in the exertion of an indirect influence over a trial, leading to situations where judgments might be delivered against individuals who may not have even committed the crime. Thus, while it becomes imperative to control this prejudicial impact of any sensational news coverage of a matter being litigated in court, it certainly cannot be pursued at the cost of undermining the freedom of expression guaranteed under Article 19(1)(a). Therefore, through the course of this submission, an attempt is made to inter-alia discover the balance between free speech and fair trials.

From Freedom of Press to Trial by Media: Origin and Underpinnings of the Term

The belief that a powerful media strongly influences an adjudication system, dates back to the advent of the printing press and perhaps much ahead. Popularized during the late 20th Century, the term media trial is primarily used to refer to the effect of newspaper or television coverage upon an individual's reputation owing to a larger perception created against him or her. The expression was introduced as 'Trial by Television' which first came to light in reaction to a broadcast of 'The Frost Program', hosted by David Frost, a British Television Host, on 3rd February 1967.[3] In the said broadcast Frost's antagonistically questioned a fraudster in an insurance scam, named Emil Savundra. Frost's adversarial line of questioning prompted certain concerns from ITV Network (a British television network) executives that such a line of questioning may influence Savundra's right to fair trial.[4] Since the term initially emerged as a colloquial term, therefore there hadn't been a comprehensive definition of the term as such.

However, common law jurisdictions, such as the United States and United Kingdom over time understood the role of media in prejudicing adjudicatory process in the garb of news. For instance, in the United States, in the aftermath of the then US President Bill Clinton's impeachment proceedings, media trials in the

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1 H. Singhvi "*Trial by Media: A Need to Regulate Freedom of Press*", BHARTI LAW REVIEW, http://docs.manupatra.in/newsline/articles/Upload/0158AEEE-1A16-473C-A41A-DB93A66000EB.pdf, (visited on November 8, 2020).

2 *Secretary, Ministry of I & B, Government of India v. Cricket Association of Bengal* 1995 (2) SCC 161; The apex court observed that right to acquire information from media is a derivative of freedom of speech.

3 A.G. Noorani, "*David Frost Case*", FRONTLINE, April 27, 2019, https://frontline.thehindu.com/the nation/david-frost-case/article10106624.ece, (visited on December 23, 2020).

4 S. Jeffries, "*Sir David Frost obituary*", THE GUARDIAN, https://www.theguardian.com/tv-and-radio/2013/sep/01/sir-david-fros, (visited on November 12, 2020).

United States came under strict scrutiny and a need for a higher standard of journalism was felt.[5] Similarly, in the United Kingdom, contempt of court regulations now prevents media from reporting on legal proceedings upon a formal arrest of a person being made. The simple objective that these contempt regulations tend to serve, is that they ensure that a defendant's trial is not impacted by adverse media reporting against him or her.[6] British Newspapers such as The Sun and Daily Mirror have been prosecuted under such contempt regulations.[7] Coming to India, the apex court in the case of R.K. Anand[8] made an attempt to define media trials. The court observed that the term was aimed at describing the effect of negative media coverage on an individual's reputation without having regard to any verdict made in a court, resulting in a scenario whereby an undertrial accused was already presumed as being guilty.[9]

In the course of the next few headings, as we delve deeper into the discussion on the impact of media trials, it must be firstly borne in mind that although media intervention has been greatly criticized in the recent years, there have still been numerous cases highlighting how the media has played a pivotal role in securing ends of justice. Thus, arguably, it is only by relying upon this balanced hypothesis, that can one actually evaluate whether, and to what extent, is trial by media justified. Consequently, in order to assess this issue from a holistic level, it becomes imperative to first examine the impact of media trials vis-à-vis two key parameters, i.e. Administration of Justice and Freedom of Speech.

Implications of Media Trial

Media Trial and Administration of Justice

Ensuring a fair trial is a sacramental judicial function. Obligations to provide a free and fair trial are enshrined under principle 6 of the 1985 UN Basic Principles on the Independence of the Judiciary, and Article 14 of the International Covenant on Civil and Political Rights. In contrast, Article 19(1)(a) to the Constitution of India bears testimony to the role of media in a democratic setup. Fortunately, the freedom accorded under Article 19(1)(a) too is not absolute and is bound by certain reasonable restrictions enunciated under clause 2 of this article.

Media, has a key role in shaping public opinions, but friction arises when media agencies conduct trials and take on a role, which undermines the adjudicative process, by passing verdicts long before a court has even passed its judgment. The problem worsens when media, takes on *sub-judice* matters and publishes opinions which are prejudicial to the interest of all parties concerned in the process. Relying, on a similar understanding the apex court in *State of*

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5 M. Gerhardt, "*Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*", MARYLAND LAW REVIEW, Vol. 60 No.1, 2001, p.32.

6 O Bowcott, "*Contempt of court rules are designed to avoid trial by media*", THE GUARDIAN, July 5, 2011, https://www.theguardian.com/law/2011/jul/05/contempt-court-rules-trial-media, (visited on December 23, 2020).

7 *Ibid*.

8 *R. K. Anand v. Registrar, Delhi High Court* (2009) 8 SCC 106.

9 *Ibid*, para 293.

Maharashtra v. Rajendra Jawanmal Gandhi[10], observed that media trials can not only lead to miscarriage of justice but such trials are also antithesis to the rule of law.[11]

There have been numerous instances throughout the history of Independent India, wherein media trials have caused impairment to the administration of justice. In order to reincarnate itself as a "public court", more often than not, media agencies have incarcerated the very spirit of a fair trial, which is the cornerstone of an effective criminal justice system and perhaps the rule of law.[12] By adopting the adversarial line of questioning in *sub-judice* cases, the media simply overlooks the golden principle of innocence and proof of guilt beyond a reasonable doubt.[13]

Thus, to simply put, media trials effectuate interference in the due course of justice, and therefore provisions of the Contempt of Court Act, are at times employed by the courts to ensure the administration of justice. The position of law on this issue has been effectively summed up by the Andhra High Court in its judgment in the case of *Y.V. Hanumantha Rao v. K.R. Pattabhiram*[14] wherein the high court observed that during pending litigation no individual can comment on it in a way which causes substantial prejudice to pending trial. Any comment made by an individual, even earnestly considering it as being true, would still make him guilty of contempt.[15] Thus, a publication that intends to poison the minds of the jurors, parties or witnesses, or even initiates an environment wherein it is difficult or impossible to administer justice, would simply amount to court contempt. The rationale here is simple; an editor cannot assume an investigator's role to prejudice either the court or any party associated with the process thereof.

Subsequently, in the case of *Sahara India Real Estate Corporation Ltd. v. Securities and Exchange Board of India,*[16] the apex court held that it has the power to order postponement of publication regarding a trial as a measure to ensure proper administration of justice.[17] The court further propounding the test for postponement of a publication observed that there must be the presence of a real and substantial risk to the effective administration of justice in order to allow postponement.[18]

The court further applied this principle in the case of *State of Maharashtra v. Rajendra Jawanmal Gandhi,*[19]and deprecated a magazine for publishing certain details which would interfere with the administration of justice. Furthermore, in the case of *Bijoyananda Patnaik v. Balakrushna Kar*[20] the apex court had previously

10 (1997), 8 SCC 386.
11 *Ibid*,para 37.
12 N. Tripathi "*Media Trial: An Impediment in Fair Trial*", JOURNAL ON CONTEMPORARY ISSUES OF LAW, Vol. 4 No. 10, pp. 63-81.
13 *Ibid*.
14 AIR 1975 AP 30.
15 *Ibid*, para 5.
16 (2012) 10 SCC 603.
17 *Ibid*, para 42.
18 *Id*., 46.
19 (1997) SCC (8) 386.
20 AIR 1953 Ori 249.

observed that in contempt cases no special exception can be granted to media agencies merely upon an argument that publication was intended for the benefit of the public. The court further observed that although publication of judicial proceedings is justified on grounds of public interest, however, certain restrictions in reporting *sub-judice* cases, as laid down by the Press Council Act, must also be adhered to.

This leads one to question, whether media agencies have a right to speculate the outcome of court proceedings, and whether such speculation would result in interference in the administration of justice. In response, a division bench of the Supreme Court in the case of *Venkatesh @ Chandra v. State of Karnataka*[21] disapproved of this increasing practice of television debates discussing upon various evidence adduced and other materials brought on record, by observing whether evidence that had been adduced was conclusive one or not had to be decided by a court and not by a public platform, and that any such discussion would result in direct interference in the administration of justice. Furthermore, Kerala High Court in its recent judgment[22] has categorically observed that publication on investigation leaks and conducting an analysis against an individual on the basis of such leaks is not protected under 19(1)(a). The court further observed that the media cannot be granted a right to speculate the outcomes of proceedings before a court.

The two key takeaways from this discussion are that firstly trial by media which tends to influence the juror or any party involved in the case thereof causes obstruction in the administration of justice. Secondly, such an obstruction in the administration of justice is punishable with contempt. This being said, the existing legislation, i.e. the Contempt of Courts Act, 1971 suffers from an inherent fault, as it fails to take into consideration any contempt that might arise during a pre-trial period. Under the present system, as per Section 3(2) of the said act, any publication would be contempt only when a charge sheet has been filed in the given criminal case. Accordingly, the 200th report of the Law Commission titled "Trial by Media: Free Speech vs. Fair Trial under Criminal Procedure" recommended that the initiation of a criminal case should begin from the point of the arrest of the accused and not later, at the time of filing of the charge sheet.[23] However, whether such recommendations will see the light of the day is yet to be seen.

Media Trial and Freedom of Speech and Expression

The International Convent on Civil and Political Rights came into force in 1966. The right to freedom of speech is enshrined in the Convent under Article 19. This means that every individual has the right to entertain and hold beliefs and opinions without restrictions and the liberty to search for, get, and effect data and concepts of all sorts, irrespective of territory. This freedom applies to all modes and forms of expression, whether it is through speaking, writing, art, theatre, or any other medium. As mentioned above, the Indian Constitution to ensures all people

21 Criminal Appeal Nos. 1476-1477 of 2018.

22 *T.N. Suraj v. State of Kerala*, WP (Crl.) No. 346 of 2022.

23 "*200th Report on Trial by Media*", LAW COMMISSION OF INDIA, 2006.

the right to freedom of speech and articulation under Article 19(1)(a). Enumerating the significance of Freedom of Press, the Apex Court has unequivocally stressed that the freedom of speech and articulation, undoubtedly, incorporates the freedom to advance ideas and concepts, which is bolstered by liberty to circulate. In the case of *Brij Bhushan v. State of Delhi*[24] the Supreme Court had thus observed that pre-censorships were restrictions to free press and that an individual certainly had the right to express his/her sentiments before the public and that any restriction in such an expression would annihilate the freedom of press.[25]

However, a question of interpretation comes up. The Constitution must be analysed and elucidated in a comprehensive manner and not in a constricted and punctilious way. Quite a few rights in the Constitution are primary and vital. Therefore, the Court must not be too clever and not analyse the Constitution's text literally while weighing the sense and words of those rights. In essence, the Court must analyse and elucidate the Constitution in a way to permit the people to savour their rights fully and subject to prescribed boundaries.[26]Thus, when it comes to the right to print and disseminate viewpoints, ideas, concepts, and beliefs through any media medium, it becomes obvious that the freedom of speech and articulation is subject to any boundary or restriction that could be levied under Article 19(2). A case in point is *Romesh Thappar v. State of Madras*[27] where the Court's first decision was acknowledged. Here, the court laid down that freedom of speech and articulation incorporates liberty of dissemination of concepts and ideas and that this freedom is guaranteed by the liberty of circulation.

Media Trial v. Right to Privacy

The right to privacy operates on a personal level. It acknowledges a person's right to be left undisturbed and alone as well as to keep the person's personal domain intact and unperturbed. Privacy and its protection have emerged as an issue in recent times. It is an outcome of the times when individualism is more valued in society. The right to privacy and the right to freedom of speech and articulation go hand in hand. On the one hand, a person may exert his/her right to know but on the other, that may infringe on another person's right to privacy. In recent times. the issue of privacy has come into the limelight because of the emergence and widespread embrace of electronic media. In such times a person may find his/her personal life exposed to the public gaze, jeopardising the very notion of privacy.[28]

This right to privacy has also gained acceptance in India as a facet fundamental to freedom. Thus, while privacy does not feature in the list of restrictions cited in Article 19(2) proclaiming the right to freedom of speech and articulation, still, the apex court has read in right to privacy within the ambit of fundamental rights by linking it to 'right to life' under Article 21 and the 'right to freedom of movement'

24 1950 SCR 605.

25 *Ibid.*

26 J. Singye, J. and R. Nanda, "*Media and Law: Issues and Challenges*", BHARATI LAW REVIEW, Vol. 4 No. 4, 2015, pp. 89-100.

27 AIR 1950 SC 124.

28 D. Krishnan, "*Trial by Media: Concept and Phenomenon*", INTERNATIONAL JOURNAL OF ADVANCED RESEARCH, Vol. 6 No. 3, 2018, pp. 889-901.

under Article 19(1) (d). The case of *Kharak Singh v. State of U.P.*[29] was the first ever instance dealing with the right to privacy. As it happened, the apex court was initially reluctant to acknowledge the right to privacy. They equated privacy with some personal quirk and rejected the claim on this ground. However, subsequently in the cases of *Sheela Barse v. Union of India*[30], *Prabha Dutt v. Union of India,*[31] and also in *State v. Charulata Joshi*[32], the Apex Court dealt with the rights of personal privacy with respect to journalists' prying into private lives. In all these litigations, the media scribes had asked the Supreme Court to allow them to talk to and take photos of inmates. The Court ruled that the scribes enjoyed no unrestricted right to talk to or take snaps of an inmate except with the inmate's permission, thus tacitly recognising the right to privacy.

Ineffective Regulatory Mechanisms: A Catalyst to the Media Trial Saga

The Press Council of India was founded under the Press Council Act, 1978, with the objective of maintaining the publishing standards of newspapers and agencies in the country and protecting and ensuring press freedom. The Council also has the authority to criticise.[33]Under Section 14(1) of the Press Council Act, 1978, the Council can act on a complainant's complaint about an erring news agency and *"warn, admonish or censure a newspaper"*, or direct the newspaper to, *"publish the contradiction of the complainant in its forthcoming issue."* However, how impactful are these steps in deterring biased reports or news segments from being printed is a point of debate, mainly because these steps are enforced only after the contentious issue has been published in print media and it is punitive in name only.

The lacunae in the Press Council's powers came into sharp focus in *Ajay Goswami v. Union of India.*[34] Section 14 of the Press Council Act 1978 invests the Press Council with limited powers. The Council can only caution, rebuke, or criticise news agencies or newspapers. it has no legal sway over electronic media, and it can only issue directions in matters that come before it for adjudication. Moreover, it enjoys no power or authority to enforce its directions or recommendations on the parties involved.[35]Thus, divested of punitive powers, the Press Council of India has been severely hobbled in checking the errant members of the press. In addition to the powers, the Press Council has put in place certain standards for journalistic discipline. These standards stress the imperative of exactness and being just and urge the press to avoid publication of inaccurate, material. The standards also stress on the necessity of taking great care when it

29 AIR 1963 SC 1295.
30 (1986) 3 SCC 632.
31 1982 SCR (1) 1184.
32 63 (1996) DLT 90.
33 Rahul Bharati "*Media Trial in India: Legal Issues and Challenges*", JETIRONLINE, https://www.jetir.org/papers/JETIR1811A32.pdf, (visited on December 20, 2020).
34 AIR 2007 SC 493.
35 Mohd. Aqib and Utkarsh Dwivedi, "*Judiciary and Media Trial: A Need for Balance*", INDIAN JOURNAL OF LAW AND HUMAN BEHAVIOR, Vol. 5 No. 2, 2019, pp. 155-161.

comes to censuring the judiciary, and urge scribes to be fair, impartial and just in their reporting. Unfortunately, these standards have no legal standing. The Press Council is also invested with criminal contempt powers to curb biased prejudicial news reports, but only with respect to pending criminal or civil litigations. However, this restriction fails to take into account the limit to which prejudicial coverage can affect dispensation of justice.[36]

Media's Struggle for Justice: The other side of the Coin

At the same time, though, the press has, undeniably, exerted a redeeming influence in orchestrating public backing in cases of stark injustice. The people were galvanised to take to the streets to clamour for justice in the murders of Jessica lal, Priyardarshini Mattoo and Nitish Katara which the media frenziedly campaigned for.[37] Even the TV channels through their various programmes pitched in for the public demand for justice.

***Priyadarshini Mattoo Case*:** The scion of a senior police officer, Santosh Kumar Singh was charged in 1996 with raping and heinously killing a young law student named Priyardarshini Mattoo. Three years later, he was cleared of the charge by a trial court which cited that his father had manipulated the evidence. However, in 2006 the Delhi High Court ruled he was guilty and imposed the death penalty because DNS fingerprints and other solid evidence had irrevocably established his guilt. In this case, none other than Justice Y. K. Sabharwal, who was the Chief Justice of India at the time, highly praised the media for galvanising the judiciary into action in the cause of justice.[38]

***Jessica Lal Murder Case*:** In 1999, another scion of a rich father, this time a politician, Manu Sharma was charged with murdering Jessica Lal. She worked as a bar maid and allegedly declined to serve him alcohol in a restaurant. So he killed her. Seven years later, after a long case, the court, citing lack of evidence, set free all those who were charged. The media's spirited outcry led to the reopening of the case. The newspapers and TV channels created public petitions to be sent to the President, which were signed by millions of irate citizens. The Delhi High Court took up a prosecution appeal, putting the case on fast track. The earlier Lower Court's ruling was found to be grossly faulty in law. In December 2006, declared guilty, Manu Sharma received life imprisonment.[39]

***Nitish Katara Murder Case*:** Another son of a politician of Uttar Pradesh, Vikas Yadav was charged with killing a business executive named Nitish Katara. The motive was attributed as honour killing, as Yadav's sister had relationship with Katara, and her family frowned upon the liaison. Several witnesses on both sides and including Bharti Yadav, the girl at the storm's center, retracted their testimonies. However, the media's relentless focus on the case and the accused

36 Amir Ali, and Mohd. Imran, "*Media Trial: A Hindrance in Dispensation of Justice*", JOURNAL OF LEGAL STUDIES AND RESEARCH, Vol. 2 No. 2, 2016, pp. 88-96.

37 J Singye and R Nanda, "*Media and Law: Issues and Challenges*", BHARATI LAW REVIEW, Vol. 4 No. 4, 2015, pp. 89-100.

38 *Santosh Kumar Singh v. State through CBI* 2010 (9) SCC 747.

39 *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)* 2010 (6) SCC 1.

ended up injustice being delivered in 2008 and for which the victim's mother profusely expressed her gratitude to the media.[40]

Thus while on one hand the courts have praised the role of media in the cause of justice. At the other spectrum, however, in Malegaon blast and Maria Susairaj cases, the media pointed the accusatory finger at innocent people, sacrificing the need for exactness and accuracy.[41] However, arguably nobody, even the judiciary and judges or other judicial members, are immune from making mistakes and erring, and it is at this juncture where media publication on an issue can prejudice the *sub-judice*. Thus, while the effective role of media in safeguarding democracies cannot be denied it is also imperative to strike a balance between the two considerations in order to ensure the effective implementation of justice.[42]

Media Trials: A Necessary Evil?

As has been deliberated upon the in the previous few paragraphs, in India, there has been a legacy of robust and committed free journalism. As a matter of fact, it is the press that has revealed some of the biggest scandals. For instance, the Bofors gun scandal and HDW (Howaldtswerke) marine case. Furthermore, it was the media that exposed Narasimha Rao paying hush money to the Jharkhand Mukti Morcha MPs with Buta Singh and Satish Sharma arranging the pay-out. Throughout independent India's history, the media has shown the light. In recent times, the media's attention has been focused more and more on Courts, and the litigations fought in them, a phenomenon that seems will remain for a long time.[43] A redeeming feature of the media's increased focus on courts has been that an increasing number of citizens have become more aware of their constitutional rights. The media's main grouse, however, is the *sub-judice* aspect of litigation. The media has contended that Courts have tended to enforce the *sub-judice* aspect too strictly during litigation proceedings, effectively scuttling any discourse on the issues being litigated, even if the issues generated intense public interest. The media contends that the *sub-judice* rule must be enforced only in those cases when there is a clear intent to impact the trial and not in other cases where the intent is absent.[44] Also, public interest plays a crucial role in putting limitations on the media when it comes to stings and trials. The courts tend to come down heavily on

40 National, "*Nitish Katara murder case: what you need to know*", THE HINDU, November 1, 2016, https://www.thehindu.com/news/national/Nitish-Katara-murder-case-what-you-need-to know/article15423924.ece, (visited on December 20, 2020).

41 J Singye and R Nanda, "*Media and Law: Issues and Challenges*", BHARATI LAW REVIEW, Vol. 4 No. 4, 2015, pp. 89-100.

42 Raghav Tankha, "*Where Does Press Freedom End and Trial by Media Begin?*", THE WIRE, September 30, 2020, https://thewire.in/media/press-freedom-trial-by-media-supreme-court, (visited on November 26, 2020).

43 D. Rameshkumar and D. Jayaprakash, "*Is Media Trial a Necessary Evil?*", PROTEUS JOURNAL, Vol. 11 No. 7, 2020, pp. 122-131.

44 *Ibid.*

the media when there is scant public interest or when there is self or orchestrated interest.[45]

Case Based Analysis: The Way Forward

Amidst discussion that has ensued through the previous paragraphs, a key issue for consideration, which perhaps is a solution to the saga of media trials is, the need to differentiate between a media trial and factual reporting of a criminal proceeding. Thus, it is at this juncture wherein the dictum of the apex court in *Romila Thapar v. Union of India*[46]highlights how a trial by media occurs only at a point wherein the media initiates its own parallel proceedings and influences the investigation or adjudication process. Thus, a reporting upon leaked information pending trial, if prejudicial to the interest of justice is undesirable.

Recently, in the year 2020, the Delhi High Court in its judgment in *Harper Collins Publishers v. Sanchita Gupta*[47], recognised the relevance of an individual's right to reputation and simultaneously observed that a discussion that is based on facts is not *ex-facie* malicious and consequently there cannot be any limitation imposed on such publication or discussion.[48] The judgment rendered by the Delhi high court in Harper Colins case, providing for a case to case base assessment of the factual content of is arguably a better approach, to begin with, in order to tackle the conundrum of media trials in the administration of justice.

Conclusion

Any institution is prone to be misused if it goes beyond its prescribed duties, responsibilities, and functions. However, sometimes such extra-judicial forays can even have positive effects. Media trials and sting operations can in this sense be termed as laudable, especially when they keenly monitor the investigation probes and operations of police personnel and those in power. At the same time, however, there must be certain judicious self-constraints over the field of their activity, and the significance of fair trial and court proceedings must be revered and stressed with a proper sense of decorum.

The media must be made to understand that whatever they print exerts tremendous influence over the readers. Hence, it behoves the media to reveal only the truth, and at the proper time. The print media is quite cognizant of various legal standards and ethical boundaries it has to adhere to. The electronic media, however, is still dabbling in dry runs about what to display and, more significantly, what to eschew displaying. Thus, in toto, while it is imperative for electronic media to place judicious self-constraints over the field of its activities, the judiciary in India must continue to preserve a 'totally free press', without any hazards, in order to live up to the constitutional mandate of free speech.

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45 D. Krishnan "*Trial by Media: Concept and Phenomenon*", INTERNATIONAL JOURNAL OF ADVANCED RESEARCH, Vol. 6 No. 3, 2018, pp. 889-901.

46 (2018)10 SCC 802.

47 FAO 168/2020 and CM APPL. 21973/2020.

48 *Ibid*, para 32.

DERIVATIVE ACTION SUITS IN INDIA: A LESS USED WEAPON IN THE HANDS OF SHAREHOLDERS

Padma Singh[♣]

Abstract

Derivative Action suits on one hand are regarded as methods of extorting money from corporations by disgruntled shareholders or entrepreneurial attorneys, while on the other hand, in some countries, they are lauded as being important weapons of accountability and corporate governance that may serve other important social goals as well. The objectives of current study are firstly to discuss the meaning and concept of derivative action suits, secondly to investigate the recognition of derivative action suits in Indian jurisprudence, and thirdly to ascertain the reasons behind filing of very few derivative action suits in India. Despite the fact that Derivative Action Suits have been recognised judicially in India, the number of such suits is still very low as there exist a number of constraints both procedural and substantive. Moreover, the availability of alternative remedies and other ancillary factors make the initiation of derivative actions unattractive.

Keywords: Companies, Derivative Action, Private Enforcement, Shareholders, SEBI.

Introduction

Suits based on derivatives are common in business litigation across the globe. Disgruntled shareholders or entrepreneurial attorneys may deride these methods in some countries as a means of extorting money from corporations; however, in other countries, they are revered as powerful tools for corporate accountability and governance that can serve a variety of important social objectives.[1] These divergent opinions on the utility of derivative lawsuits make it difficult to determine whether such a mechanism would be useful in India and under what circumstances it would be useful.[2]

In some ownership and institutional systems, derivative actions are more valuable, as we've discovered. The utility of derivative actions as an enforcement tool rises when there are more dispersed shareholders with worries about collective action and weaker institutional arrangements (e.g., uncertainty and delay in the court, high litigation costs, weak financial market(s). With a weaker institutional

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1 Romano Roberta, "*The Shareholder Suit: Litigation without Foundation?*", JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION, Vol. 7, 1991, p.55.

2 Vikramaditya Khanna, "*Enforcement of Corporate Governance in India: Steps Forward?*," NSE CORPORATE GOVERNANCE, https://www1.nseindia.com/research/content/CG_6.pdf, (visited on December 21, 2021).

framework and a shift toward more dispersed shareholders, the contemporary Indian scenario is ideal for derivative actions or for their functional equivalent. Derivative actions are used sparingly in India right now due to a variety of factors including lack of resources in the country as well as the cumbersome legal environment, which shall be dealt with at length in this research. While reform suggestions demonstrate a little increase in fondness for derivative actions, they do not go far enough in establishing a more lucrative derivative action regime gin India. In light of this, the author will make his own proposals for the enhancement of derivative action suit in India.

The author has split the research into five parts in order to facilitate a better understanding on the subject matter at hand. Part I of the research shall discuss what a derivative action is and why are these suits desirable. Part II shall address the derivative action in India including the reasons for the paucity of such suits. The recent developments and reforms that have been brought about in this field have been discussed in Part III of the research. To conclude, in Part IV, the author reiterates that derivative suits are an important tool to ensure higher standards of corporate governance and also sets out recommendations for establishing a statutory derivative suit regime in India.

Meaning of Derivative Action Suit

Derivative actions are a means by which the company's shareholders can seek redress against the company's directors and officers (or third parties implicated in any breach of duty) for wrongs committed by them against the company. These actions are specific kinds of lawsuit that are used to enforce company laws. Thus, we must first establish why it is necessary to enforce corporate laws and then determine whether the derivative suit's qualities are beneficial.

Relevance of Derivative suits in the Enforcement of Corporate Law

Enforcing corporate regulations and legislation pertaining to investor protection is critical since investors are more likely to deposit their money in companies and nations where they think the returns are both attractive and there are enough safeguards in place to make them feel comfortable about investing their money in companies that are located far away from them. Corporate laws, in addition to other statutes and private orders, give means of increasing this security. Naturally, enforcing these regulations is an essential part of ensuring security if corporations do not spontaneously comply with them.[3]

There are several mechanisms for enforcing the legislation. We concentrate on the two most general alternatives. To begin, there is public enforcement, which entails the imposition of civil or criminal fines through government-initiated processes. Second, there is private enforcement, which is civil litigation brought by victims of misconduct (or private parties) to seek monetary damages or an injunction.[4] Derivative suits are a subset of private enforcement.

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3 John C. Jr., "*The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control",* YALE LAW JOURNAL, VOL 1, 2001, p. 111.

4 Rafael, Florencio Lopez-de-Silanes and Andrei Shleifer, "*What Works in Securities Laws?*", JOURNAL OF FINANCE, Vol. 61, 2006, p. 1.

A great deal has been written on the ideal balance between public and private enforcement. Since that literature is extensive, only a few occasions are highlighted where private enforcement is better than government enforcement. One benefit of private enforcement is that victims typically have access to information about the crime that public enforcement officers may not have, such as who caused the harm and how it happened.[5] Victims who seek monetary compensation in civil lawsuits have an incentive to come forward with information, increasing the possibility that the perpetrator will be punished and rising deterrence as a result.

By compensating victims of governance malfeasance, private enforcement of corporate law has the potential to increase market liquidity. By refusing to invest because they fear they can't (or won't) recoup their losses, investors reduce the available liquidity in the market. This is particularly true when alternative techniques (such as diversification) are either too expensive or ineffective in mitigating the risks.[6]

Assuming private enforcement is sometimes beneficial, the question then becomes: When is a certain sort of private enforcement more beneficial than its alternatives? The derivative action and the direct suit are the two main forms of private enforcement available in the corporate environment.

Choosing the More Beneficial Method of Private Enforcement

Even though direct and derivative lawsuits have many similarities, the most important distinctions are: who brings the claim; who receives the remedies, if any; who pays the legal fees; and if there are any restrictions on employing a certain kind of lawsuit. Although a derivative suit represents a claim against a corporation, it permits all shareholders, who are implicitly damaged because of the harm to the business, to initiate a lawsuit in a single action. This might be a significant distinction. In certain jurisdictions, direct lawsuits may allow for aggregation.

Once we know when derivative suits' distinctive qualities are desired, we may ask whether bringing a derivative action is the best enforcement choice. The first feature of derivative cases is that they may only be brought against corporations for harms that have been inflicted on them directly. Because it is believed that corporate authorities may be unable to sue someone who has caused damage to the company, it is vital to enable someone else to sue on the company's behalf in order to defend the latter.[7] When is it most probable that this will occur?

It seems improbable that the controller will choose not to sue if the corporation she supervises is affected, at least at first glance. Furthermore, if the controller is causing damage to the business, it's likely that he or she is doing so in order to expropriate the minority, in which case filing a lawsuit looks like the best option. As a result, the value of a derivative litigation may be diminished in companies

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5 A. Mitchell and Steven M. Shavell, "*The Economic Theory of Public Enforcement of Law*", JOURNAL OF ECONOMIC LITERATURE, Vol. 38, 2000, p. 45.

6 Reiner H. Kraakman and Guhan Subramaniam, CASES AND COMMENTARIES ON THE LAW OF BUSINESS ORGANIZATION, 3rd ed. 2009.

7 Kraakman et al. THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 3rd ed. 2009.

under management when compared to a direct suit. In contrast, in companies with a dispersed ownership structure, shareholders confront a collective action dilemma that makes it simpler for management to expropriate the whole company, increasing the value of the derivative suit.[8]

Second, lawsuits brought directly or indirectly might be combined into a single action. When there are a large number of stockholders, this might be really beneficial. It's the typical collective action dilemma since each shareholder has a lesser interest, and therefore the expense of legal action may outweigh the rewards for that particular shareholder.[9] As a consequence, no shareholder will be motivated to pursue litigation.[10] Permitting stockholders to pool their claims, on the other hand, raises the stakes overall and may be worth the extra expense. Many minor stockholders may have comparable rights in derivative proceedings, so having this capability is advantageous.

Derivative suits also have the advantage of requiring the defendant company to bear the expenses of pursuing the claim rather than the plaintiff shareholders. This differs from shareholder lawsuits, in which the plaintiffs are required to pay their own legal fees. When might a government subsidy of legal fees be useful? If claim aggregation is permitted in the hopes of minimising collective action issues, then this extra cost subsidisation requires greater reason. On its own, this may be desired to overcome the collective action problem faced by tiny shareholders.[11]

Even with claim aggregation, a tiny shareholder is unlikely to organise a class of other shares to suit, according to one theory. Such tasks need the investment of time and resources; thus, an enterprising lawyer is more likely to accept the assignment. That attorney may, however, need some extra incentives to initiate such lawsuits, given the associated risks. By offering a share of the reward if the lawsuit is successful or contingency fees might encourage lawyers to take on riskier situations.

Cost subsidisation might also be justified by a country's overall institutional structure. The judiciary's efficiency and accuracy are two examples of such institutional conditions. As a result, if adjudication is delayed significantly owing to a backlog of cases, the benefits of suing will be diminished over time. Decreasing the current value of such profits, might dissuade lawsuits.

Subsidisation and claim aggregation, on the other hand, may have negative consequences. It's possible that shielding litigants from the expenses of litigation may encourage both legitimate and spurious lawsuits. Derivative suits feature a multitude of screens on them to address this problem, which are mostly missing from direct suits.[12] Substantive screens limit the kind of claims that may be made in

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8 *Ibid.*

9 Robert Thompson and Randall S. Thomas, "*The Public and Private Faces of Derivative Lawsuits*", VANDERBILT LAW REVIEW *,* Vol. 57, 2004*,* p. 174.

10 *Ibid*, p. 6.

11 Xiaoning Li., A COMPARATIVE STUDY OF SHAREHOLDERS' DERIVATIVE ACTIONS, 10th ed. 2007, p. 343.

12 *Ibid,* p. 7.

derivative lawsuits, while procedural screens limit who can bring these actions by limiting who can sue.

According to the findings, derivative litigation is preferable in cases where:

- Private enforcement is desirable.
- There are many small shareholders in a firm.
- Institutional conditions are such that cost subsidisation is valuable.

Applicability under Indian Scenario

Derivative lawsuits may seem to have little value in India since the majority of Indian companies are controlled rather than publicly held. It is possible that this perspective of ownership structure in India is outdated. The number of retail investors has grown as a result of recent public offerings of Indian company stocks, i.e., more dispersed shareholders. Indian enterprises will also get a boost from a new rule that mandates that at least 25 percent of its stockholders come from the public. Dispersed shareholders show that there is a rising need to safeguard regular investors from the acts of controlling shareholders and management.[13] Despite this, it seems that many companies will stay under the hands of their owners. Direct or derivative shareholder actions may, however, be used to attain this goal.

Direct action may be preferable where the major goal is the expropriation of the dominant owners since it provides for recovery in such circumstances. Because the controller stands to gain the most financially from a derivative action, minority shareholders are less likely to pursue it, and this may lead to them pursuing a direct action instead. Collective action issues arise if we assume that the majority of minority shareholders are widely spread.[14] If contingency fees are unavailable and some of the institutional criteria described above are present, it would make sense to examine derivative actions and the cost subsidisation they entail in order to solve this issue. It is well-known in the Indian legal system that there are issues with long delays. As a result, plaintiff shareholders may either quit or decline to launch a lawsuit in light of the long delays in the process. Derivative lawsuits may have a solid case when they are paired with the restriction on contingent payments in India and the probable mispricing of the stock markets.

Moreover, the expenses of litigating a shareholder claim in India go beyond the legal fees. Due to the English norm, the losing shareholders in direct litigation bear the winning side's legal fees.[15] Even if this does not dissuade big minority shareholders from suing, it may deter smaller minority shareholders from suing in the first place.

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13 George S., "*Can Independent Blockholding Play Much of a Role in Indian Corporate Governance?*", CORPORATE GOVERNANCE LAW REVIEW, Vol. 3, 2007, p.283.

14 Shaun J., "*Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunitie*", COLUMBIA BUSINESS LAW REVIEW, Vol. 3, 2007, pp. 800-832.

15 Avery W. Katz, "*Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*", JOURNAL OF LAW, ECONOMICS AND ORGANIZATION, Vol. 3, 1987, p. 143.

Also, in India, charges are not restricted to legal fees. In India, parties bringing derivative proceedings must normally pay stamp duty and court costs. While stamp duty and court costs are not common in certain jurisdictions, they are calculated ad valorem as a percentage of the claim. An ad-valorem finding may send legal expenses rising, thus rendering derivative litigation economically unviable. This is because smaller stockholders will not directly gain from a successful case. The rising number of minor shareholders in India may encourage derivative cases.

Small, scattered minority owners, the English law on cost-allocation, court expenses, the lack of contingencies, and the institutional issues provide a strong cocktail of reasons why a derivative litigation may be beneficial in India.[16] The author is now going to look into whether or not Indian law and practise allow shareholders to file derivative cases.

Derivative Action Suits in India

The Companies Act 2013 does not provide for a regulatory framework enabling shareholders of Indian firms to initiate derivative proceedings. However, this does not mean that the existence of derivative action claims is yet to be recognized under the Indian jurisdiction as the same stems from English common law concepts of Company Law, which have been relied upon in India. Although common law derivative lawsuits are available, we have encountered relatively few in India, and even fewer that were successful. In the previous 60 years, just a handful of derivative suits have made it to court, of which, only three were permitted to be pursued by shareholders, while the others were rejected for different reasons.

In India, where there are tens of thousands of corporations and roughly 30 million ongoing court cases, the lack of derivative lawsuits in the country appears odd. And the reason behind this is a combination of substantive legal and procedural limitations, as well as other circumstances, which make it very difficult to successfully initiate derivative lawsuits.

Procedural Impediments

In order to file a successful derivative case, plaintiff shareholders must first overcome a number of procedural obstacles. An examination of the 'clean hands' doctrine and the uncommon use of Order I Rule 8 of CPC in cases that seem to be derivative actions will be the subject of the author's research in this article.

Doctrine of Clean Hands.

Only if the action is for the interest of the business and not for personal gain is a plaintiff shareholder authorised to launch an action on behalf of the company.[17] Due to its ambiguous boundaries, the doctrine has caused a lot of problems in practise.[18] However, it has been claimed that the idea of 'clean hands' is

16 A. Mitchell, "*Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*", JOURNAL OF LEGAL STUDIES*,* Vol. 27, 1998, p. 519.

17 Barrett v. Duckett, B.C.C. 1995 1 362.

18 Jennifer Payne, "*Clean Hands in Derivative Actions*", CAMBRIDGE LAW JOURNAL,Vol. 61, 2002, p. 76.

misunderstood since the propriety of the shareholder should not matter in an action taken on behalf of the business if the benefit of such action is for the firm and not the shareholder filing the action.[19]

Order 1 Rule 8, Civil Procedure Code 1908.

For reasons unknown, one finds cases that really are derivative actions, being initiated under Order I Rule 8 of the Civil Procedure Code, which requires the court's authorisation before the suit may proceed.[20] The interested parties may seek to join the litigation at the cost of the plaintiff if such authorization is granted by the courts. In such circumstances, the firm is added as a proforma defendant even if no remedy is sought against it.[21] As seen, the fact that the firm is listed as a defendant in a derivative claim despite the fact that it is presumably a victim, is an unusual match. Representative suits, rather than derivative cases, are often referred to as Order I Rule 8 proceedings.

In spite of their resemblance in appearance, it is difficult to use one for the other in a meaningful way. Order I Rule 8 is analogous to claim joinder, which is a process through which comparable claims brought by similarly situated parties are consolidated into a single action to prevent duplication of litigation. It is not the goal of derivative proceedings to reduce the number of lawsuits, but rather to give a way to enforce commitments that may otherwise go unenforced.[22]

Substantive Impediments

Foss v. Harbottle is a common law concept that Indian courts prefer to follow in derivative actions, wherein a firm may only take action against a damage-doer if the harm has been done to the company. Because the shareholder has not personally been harmed, an individual shareholder does not have the right to file a lawsuit.

Foss v. Harbottle is sacrosanct in Indian courts, which makes it difficult for shareholders to take action against corporate wrongdoers via derivative proceedings. Allowing a minority shareholder to sue for damage caused to the firm would be futile if a majority of shareholders can approve the conduct that created the injury in the first place. This basically prohibits shareholders from suing the firm for damages.

Foss v. Harbottle, on the other hand, does contain a few exceptions to the norm that Indian courts have implemented on a very few occasions. These exceptions are:

***Ultra Vires* Transactions**

A shareholder-brought derivative case may proceed even if the alleged wrongdoing is illegality or an *ultra vires* transaction. This is because a majority of shareholders cannot ratify an ultra vires transaction or illegality.[23] If the majority

19 *Nurcombe v. Nurcombe*, WLR 985 1 370.
20 *Nagappa Chettiar v. The Madras Race Club*, 1949 (1) MLJ 662 (Mad).
21 *Jaideep Halwasiya v. Rasoi Ltd*., 2009 (1) Comp. Cas. 1 150 (Cal).
22 *Wallersteiner v. Moir* (No. 2), All ER 1975 1 849.
23 *Prudential Assurance Co. Ltd. v. Newman Industries Ltd*. (No. 1), Ch 1982 1 204.

shareholders do not force the corporation to take legal action, the company has no recourse. Consequently, derivative actions may be brought by minority shareholders.[24]

Matters Requiring Special Resolution

"If a matter requires the passage of a special resolution by virtue of the Companies Act or the articles of association, but the shareholders or other company insiders transact on the basis of an ordinary resolution, the rule in *Foss v. Harbottle* cannot apply. Such an action amounts to a violation of the legislation or the articles of association and is beyond the powers of the board to transact. Hence, minority shareholders would be prejudiced unless they are allowed to bring an action against wrongdoers on behalf of the company."[25]

Fraud on Minority

In this instance, the word 'fraud' is not used in its technical meaning, but rather in a broader equitable sense, referring to the minority's unjust discrimination. It entails the majority appropriating advantage at the cost of the minority. Shareholders pursuing a derivative case must establish that the majority shareholders or other insiders benefited from the alleged conduct, as well as that such advantage was achieved at the cost of the business or that the company suffered some loss or harm as a result of the alleged act.[26]

Fraud on minority exemption is applicable only when a shareholder can prove that the offender is in control of the corporation. It's because a wrongdoer in charge is unlikely to get the corporation to take legal action against him.[27]

Availability of Other Remedies

Derivative actions under common law are not barred by the presence of other remedies; yet, there are practical benefits for shareholders in initiating direct proceedings before venues other than the civil court. There are two types of alternative remedies available:

Oppression and Mismanagement Suits

There is an oppression remedy available to minority shareholders who can show that company affairs are being managed in a way that is harmful to the public interest or that oppresses any member, and there is a mismanagement remedy available where there has been a material change in the management or control of the business and it is probable that the company's affairs would be adversely affected as a result of such a change.[28]

In India, the remedy for oppression is comparable to the remedy for oppression offered to shareholders in other Commonwealth countries, where minority

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24 *Bharat Insurance Co. Ltd. v. Kanhaya Lal*, AIR 1935 Lah 792.

25 *Edwards v. Halliwell*, All ER 1950 2 1064 (CA).

26 Margaret, MINORITY SHAREHOLDERS' RIGHTS AND REMEDIES, 2nd ed. 2007, p. 136.

27 *BSN (UK) Ltd. v. Janardan Mohandas Rajan Pillai*, Comp. Cas. 1996 3 371 (Bom).

28 *Spectrum Technologies USA Inc. v. Spectrum Power Generation Company Ltd.,* DLT 2001 3 383.

shareholders may seek relief for unfair prejudice. Under Indian law, isolated instances of abuse are insufficient; there must be a pattern of behaviour or actions on the part of the majority shareholders that authorises a remedy in favour of minority owners.[29]

The remedy for mismanagement in Indian company law is distinct from that in English company law, and it has not been borrowed. If a corporation's board of directors has breached its fiduciary obligations, violated the company's memorandum of association, or if the irregularities in management have resulted in a loss of corporate substratum, the remedy of oppression may not be appropriate.[30] This remedy is closer to a derivative action than an oppression action to the degree that the corporation suffers a direct loss from this conduct.

Both oppression and mismanagement actions may be brought only by shareholders who own a significant ownership, either individually or collectively. An action for oppression and mismanagement must be brought before the National Company Law Tribunal (NCLT), a quasi-judicial entity, rather than the ordinary civil courts.

Action before SEBI

Shareholders of publicly traded firms have the option of filing a complaint with SEBI for oppression and mismanagement. Securitization and corporate governance are not the only areas where the Securities and Exchange Board of India (SEBI) has jurisdiction. Managerial or controlling shareholder dispute with minority shareholder conflict is typified by these latter corporate law issues. "It is SEBI's responsibility under this scheme to make sure that the interests of minority shareholders, such as institutional investors and retail individual shareholders, are protected from particular legal infractions."[31]

These laws allow SEBI the authority to impose fines, criminal prosecution, and other remedies such as suspension of trade and delisting for breaches of these statutes. It is possible to take action against listed corporations, its directors, officials, or shareholders. "SEBI's remedial powers are also broad, one of which is to make such order as may be appropriate in the interests of investors in securities and the securities market, which includes orders to debar defaulting persons from accessing capital markets and even to disgorge earnings or profits made from wrongful acts. In passing such orders, SEBI must have regard to 'the interest of investors, or orderly development of securities market."[32]

Minority shareholders in publicly traded corporations may not be taking derivative actions for the following reasons: SEBI's actions are more likely to be speedier and less expensive than those of the civil courts, which makes this approach more appealing to small shareholders. SEBI's powers have been enhanced in recent years in order to fashion various types of remedies, which makes this approach more attractive to small shareholders.

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29 *Shanti Prasad Jain v. Kalinga Tubes Ltd*., AIR 1965 SC 1535.

30 *S.M. Ramakrishna Rao v. Bangalore Race Club Ltd*., Comp. Cas. 1970 40 1154 (Kar).

31 *Thomas George v. KCG Verghese,* Comp. Cas. 1996 86 213 (CLB).

32 *Kesha Appliances P. Ltd. v. Royal Holdings Services Ltd*., (2005) 65 SCL 293 (Bom).

Other Constraints

Even if procedural and other hurdles were removed, derivative actions would remain uncommon in India due to the power and control shown by business families, which account for a significant share of Indian enterprises. Additionally, the expense of litigation and associated fees deters stockholders from bringing a derivative action.

Cultural Concerns

The cultural dominance of business families and the state in corporate ownership limits the ability of tiny minority shareholders to 'take on the establishment.' In family-owned enterprises, which include publicly traded corporations, the head of the family retains strong control over the company and major powers. It's unusual to criticise a patriarch's authority or style of operation.[33] In state-owned businesses, the main shareholder is frequently a prominent bureaucrat with political connections. The results include fewer litigation and slower development of judge-made law on business acts such as derivative claims.

Costs

According to English law, whomever loses a legal battle is responsible for paying the other party's reasonable legal fees plus his own. Indian courts are likely to award appropriate costs to the winning side, while individual retail shareholders taking lawsuits against giant firms are likely to face hefty expenses in the event that they fail to prevail in their litigation.[34] As a result, even if minority shareholders have a viable derivative claim against directors or other insiders of the firm, the rule on expenses operates as a deterrent against them.

Further reducing shareholder motivation to sue would be the existence of high court fees and the well-known delays in the Indian legal system, on top of these expenses. The delay in recovery, combined with the uncertainty of any recovery, would lower the actual worth of any projected judgment.[35]

Due to legal and procedural hurdles, the expenses of pursuing lawsuits and the lack of contingency fees, and the existence of alternative proceedings that seem to give remedies more rapidly than the Indian judicial system would through derivative actions, derivative actions in India are therefore relatively restricted.[36]

Recent Developments and Reforms

Prior to making suggestions, the author believes it is important to emphasise that many of the benefits of derivative litigation may be obtained via a shareholder direct suit in which the moving shareholder does not incur direct legal expenses and court fees. Although possible, such possibilities do not exist in India at the moment.

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33 SVIIB Students' Association of the Faculty of Business Administration, and Rotterdam School of Management, INDIA, CULTURE AND MANAGEMENT: THE ART OF DOING BUSINESS, 1st ed. 1989.

34 *Ibid*, p. 13.

35 *Id.*,p. 7.

36 *Id.*,p.13.

The Satyam scam, on the other hand, has prompted SEBI to use funds from its Investor Protection and Education Fund[37] to assist investors' groups recognised by it in pursuing legal action on behalf of investors in securities that are listed or are in the process of being listed. This is a direct-action case, not a case of corporate malfeasance that may lead to a derivative action. Non-listed firms are also excluded. An applicant must show that they have at least a presumptive case and that their actions are in the best interest of shareholders to get financing from SEBI. Only 75% of the costs incurred will be covered, with an absolute maximum of Rs. 2 million for Supreme Court cases and Rs. 1 million for lower courts. There will be no up-front payments; they are only refunds for expenses already spent.

Despite the fact that the SEBI financing mechanism does not apply to the conventional derivative case, this move demonstrates SEBI's willingness to help foster shareholder activism by addressing the cost problem, at least largely if not completely.[38] That SEBI funding under these circumstances is especially significant is that SEBI financing seems to be connected, even partially with the screening on the capacity to file such claims or gain some compensation for them as with derivative suits.

Furthermore, the J.J. Irani Committee, which undertook a review of Company Law, recognized the lack of an effective process for derivative actions and class actions.[39] The Committee, however, in its observations noted that though derivative actions and class actions have been judicially recognized in India, they still await to be incorporated into the statute. Pursuant to such observations, an attempt was made to include derivative action as a statutory remedy in the Companies Bill 2009. However, the Companies Act 2013 has failed to address this problem and has conveniently decided to exclude the derivative actions from the ambit of statutorily available remedies.

Conclusion

Derivative lawsuits are an important tool for achieving greater company governance. Given the expansion of the Indian capital markets and the rise in the number of small owners, a strong framework that allows derivative cases may be desirable. According to the author’s research on Indian law, derivative litigation is uncommon in India due to legal, economic, institutional, and cultural limitations. The derivative action method does not appear to have significant support in current Indian corporate law reform proposals. As a result, the author has the following suggestions to make.

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37 Regulation 5(2)(d) of The SEBI (Investor Protection and Education Fund) Regulations 2009.

38 The SEBI (Aid for Legal Proceedings) Guidelines 2009.

39 J.J. Irani, “*Report on Company Law*”, MCA, May 31, 2005, http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf, (visited on March 2, 2022).

To begin, a specific clause defining the boundaries of derivative cases should be included in the Companies Act 2013. If derivative claims were given statutory authority, the existing confusion surrounding common law derivative processes would be removed. Furthermore, the law should incorporate screening systems to ensure that only real lawsuits are taken into account.

Secondly, the procedure for dealing with derivative instances should be explained. The general joinder requirement should be eliminated under Order I Rule 8 of the Civil Procedure Code, so that plaintiff stockholders are no longer bound by it. As a result, a clear distinction will be made between direct and derivative litigation.

Lastly, there must be no misunderstanding regarding the costs of filing derivative claims. Shareholders who can establish a prima facie case at the interlocutory stage, rather than waiting for the issue to be resolved, should be entitled to monies from the corporation.

The legislation governing the obligations of business insiders such as directors and managers is a fourth issue that has to be clarified. It is past time to stop relying on common law to define director obligations and punish those who fail to fulfil them.

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POTENTIALITY OF ALTERNATE DISPUTE RESOLUTION IN THE FIELD OF GOODS AND SERVICES TAX

Vidya V Devan[♣]

Abstract

Tax system is the basis of economic status of country and it is the main source of revenue to the nation. Only a simple, efficient, administratively convenient tax system can benefit the Gross Domestic Product (GDP) of a country. Protracted litigation in tax matters and inordinate delay may create an impression that the system is not favourable to the tax payers and it may adversely affect the investments. High expense and procedural complexities in dispute resolution also add fuel to this. Due to the high technicalities and intricacies in Tax laws, India had rarely tried the Alternate Dispute Resolution (ADR) mechanisms to resolve the tax disputes. The 21st century witnesses tremendous conceptual as well as technological advancement in every walk of life. Expeditious solution of the disputes is the need of the hour. India can never remain stagnated. Many countries in the world like the UK, Australia, Canada, Brazil, and Singapore have adopted the ADR mechanisms to solve the tax disputes. This paper analyses the possibilities of applying ADR mechanisms in the field of indirect taxation in India.

Keywords: Advance Ruling, Alternate Dispute Resolution, Arbitration, Goods and Services Tax (GST).

Introduction

Tax is not of a new origin; it has existed for centuries. Instances of tax can be traced from 3000 BC in Egypt and thereafter, have been prevalent throughout the world. In India, there existed well-structured and principle-based taxation from the ancient period itself. Ancient scripts like *Manusmriti, Arthasastra*, *Mahabharata, and Shukraniti* depict virtuous principles to be followed by the king while collecting the tax from people. *Arthasatra* by Chanakya describes in detail, the principles to be followed while imposing the tax. These ideologies are witnessed in the canons of taxation advocated by Adam Smith in his work "Wealth of Nations", published in 1776 which are adhered to by the present taxation systems in the world.

In India, legislation based tax collection was commenced by the Britishers. From the 19th century, many enactments like the Sea Customs Act 1878, the Indian Aircraft Act 1934 etc., were enacted by the British Indian Government. As the main aim of Britishers was revenue generation, they levied high rates of tax. Each State in India had its own General Sales Tax Act which was enacted as per the power granted by the Government of India Act 1935.

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After independence, the Indian tax scenario was found to be complicated with numerous taxes and tax rates which were administered by various taxing authorities. There were different types of taxable events and taxes like the "manufacture" was taxed by the Central Excise Act, "Intra -State Sale and Purchase" was taxed by the Sales Tax Acts of each state, and "inter- state sale and purchase" was taxed by Central Sales Tax Act. Along with this, there were entry tax and luxury tax. The local self-government also enjoyed certain taxation powers like entertainment tax. Apart from this, the cess and surcharge were also levied. Conduct of business complying with the procedures of numerous authorities was a tiresome process which stultified the investment in the business, national as well as international.

Since its independence, India was keen on reforming the taxation system by reducing the rates of tax, enlarging the tax base, avoiding the cascading effects of tax, and so on. A series of tax reform committees were appointed and their recommendations were implemented to rationalize our taxation regime. Many of the committees suggested the Value Added Tax can eliminate the distortions of the system, and from 1986 efforts were initiated to implement the concept in the Indian tax system. First, it was introduced in the Central Excise in the form of Modified Value Added Tax (MODVAT) and then to Central Value Added Tax (CENVAT). In 1994, the 'services' were also taxed as they come up to 40% of the GDP. By 2005, all the states introduced the Value Added Tax (VAT) in place of General Sales Tax.

By 2000, an idea was formed to unify the indirect system by subsuming different types of indirect tax into a single tax called Goods and Services Tax (GST).[1]Goods and Services Tax was mooted by the then Government in 2006 which was originally conceived by the former Prime Minister Atal Bihari Vajpayee.[2]

The concept of Goods and Services Tax was introduced to the world by two persons almost simultaneously, by a German businessman Dr. Wihlem Von Siemens in 1918[3] and American economist T. S Adams somewhere between 1910 and 1921.[4] The GST was first implemented in France in 1954, now followed by more than 165 countries.

Taxation is an essential sovereign function and the power to levy tax is drawn from The Constitution of India, 1950.[5] As a federal State, the Constitution of India has elaborate provisions for the distribution of powers between the Centre and the State which were followed from the Government of India Act 1935. The legislative

1 Goods and Services Tax herein after referred to as GST.

2 "*FM Shri Arun Jaitley's reply on GST Bill in Lok Sabha*", BHARTIYA JANTA PARTY, August 8, 2016, https://www.youtube.com/watch?v=ynpmeB4U9CU, (visited on December 24, 2020).

3 James Kathryn, "*The Rise of the Value-Added Tax – Introduction*", April 1, 2015, pp. 15, 16, https://ssrn.com/abstract=2608748, (visited on December 25, 2020).

4 Thomas S. Adams, "*Fundamental Problems of Federal Income Taxation"*, THE QUARTERLY JOURNAL OF ECONOMICS, Vol. 35 No. 4, 1921, pp. 527-556.

5 The Constitution of India 1950.

powers and the taxing powers are clearly demarcated. Article 265 of the Constitution states that "No tax shall be levied or collected except by the authority of law". Authority to levy tax through proper legislations were derived from Article 245, 246, and 248 along with the three lists, Union List, State List and Concurrent list in schedule VII of the Constitution of India[6]. Till 2016, there were no entries upon which the Centre and the States enjoyed the concurrent power. The taxing powers of the Centre and States were specifically demarcated to avoid overlapping and confusions. The taxing power of the Centre was mentioned in the Union List from Entry 82 to 92 B and the States in State List Entry 45 to 63. There are no entries in the concurrent list that equally allow the Centre and the State to enact laws for the imposition of tax.

Hence, for the introduction of the Goods and Services Tax, it was essential that Centre and State should possess concurrent powers to impose tax. By Article 246A, inserted by The Constitution (One Hundred and First Amendment) Act 2017, the Parliament and the Legislature of every State, have power to make laws with respect to Goods and Services Tax imposed by the Union or by such State[7]. By Article 269A, the Centre reserved the exclusive power to tax the inter-state supply of Goods and Service Tax. Goods and Services Tax Council was created as per Article 279A, a constitutional body for ensuring the implementation and further working of GST.

After a prolonged effort of almost 17 years, overriding amid critical socio-economic and political challenges, the Goods and Services Tax rolled out from the midnight of 30th June 2017. As a federal State India adopted a dual model of Goods and Services Tax, where the Centre and the States can impose tax on the same transactions simultaneously.[8] The Goods and Services Tax is implemented through the legislations Central Goods and Services Tax (CGST), State Goods and Services Tax (SGST), Union Territory Goods and Services Tax, Integrated Goods and Services Tax (IGST), and Goods and Services Tax (Compensation to the States) Acts in 2017.

On introducing the new destination/consumption-based comprehensive Goods and Service Tax which will be imposed on all stages of value addition, the objectives behind it were to:

- avoid the rate war between the States and convert India into one market;
- restructure the system so as to provide a situation where there is an uninterrupted flow of input tax credit to avoid the cascading effects;
- reduce the tax burden on the ultimate consumer by passing on the benefit of input tax credit to consumers and also by reducing the rate of tax;

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6 Nitya Bansal, "*Federalism in India: Unitary, Quasi, Cooperative, Competitive*", LEGAL BITES, July 8, 2020, https://www.legalbites.in/federalism-in-india, (visited on March 20, 2022).

7 Article 246A of the Constitution of India1950.

8 *Understanding the Dual Model of GST,* CYGNET TAX TECH, September 6, 2021, https://www.cygnetgsp.in/understanding-the-dual-model-of-gst/, (visited on March 19, 2022).

- ease the compliance of administrative procedures;
- bring the entire system under the electronic compliance etc.

This perilous reform was unavoidable for India to make a progress at the international and national levels. Now the issue which has to be sorted out is, how to handle the disputes related to the tax.

Existing Tax Dispute Resolution Methods

The Goods and Service Tax (GST), the most extensive tax reform in the indirect tax regime which rolled out from July 01, 2017 is almost on the track by overcoming the initial confusion and dismay related to implementation. Now the issues which are to be addressed are the cases pending according to the prior Tax laws and to expeditiously deal with the disputes arising under the GST. Goods and Services Tax has adopted the dispute resolution methods in the legacy Acts like VAT Acts, Central Excise Act 1944, etc. without any change.

As the tax laws are highly complex, India rarely opted for the Alternative Dispute Resolution mechanisms instead it had incorporated many measures which have a gist of ADR mechanisms in the statute itself like the Advance ruling.

Dispute Resolution Procedure under Goods and Services Tax

GST provides for a self-assessment procedure, where the assessee makes a self-assessment of his/her transactions and files the return on monthly basis.[9] It is the responsibility of the assessee to furnish the particulars of the availed input tax credit in the returns. The concerned authority will scrutinise it and if not satisfied with the details, ask for an explanation. The adjudicating authority will issue an order after affording an opportunity of being heard, either demanding payment of tax due on that date or the input tax credit availed in excess.[10]

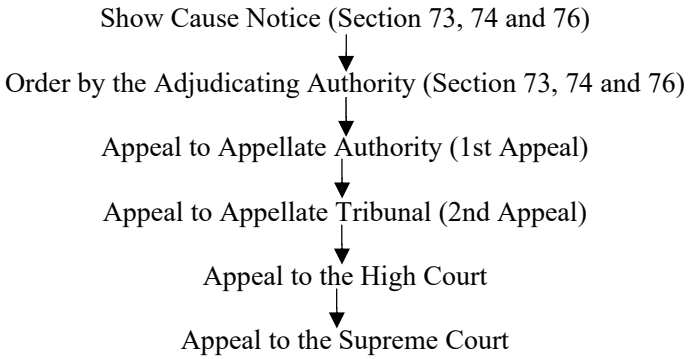
A person aggrieved by the order of the assessment officer can prefer the appeal to the commissioner (appeals), which is essentially a departmental appeal. The appeal from the appellate authority's order goes to the appellate tribunal.[11] Appeal from the Tribunal can be preferred to the jurisdictional High Court on the substantial question of law. From the order of the High Court, the aggrieved assessee can approach the Supreme Court of India.

9 Mihir Naniwadekar, "*Tax Disputes and Litigation Review*",February 23, 2022, https://thelawreviews.co.uk/edition/the-tax-disputes-and-litigation-review-edition-8/1215550/india, (visited on March 24, 2022).

10 *Ibid.*

11 Id., Goods and Services Tax Appellate Tribunal (GSTAT) for GST and Customs, Excise and Service Tax Appellate Tribunal (CESTAT) for customs and certain taxes replaced by GST.

Adjudicatory Mechanism Under Goods and Services Tax



However, this mode of traditional dispute resolution is quite time consuming, expensive and mired with procedural complexities. Contrary to other matters when the tax disputes are pending it has direct impact on the economic position of the country as great amount of revenue, which the State would have received will be due because of the pendency of the cases. As per the economic survey conducted in 2018 nearly 2,62,000 crores are due to the government which are stuck in various adjudicatory authorities. By the time it may be augmented.

Forum	Pending Cases	Tax amount involved in litigation (in crores)
Commissioner (Appeals)	44,574	13,000
Customs Excise and Service Tax Appellate Tribunal (CESTAT)	83,338	192,000
High Court	14,141	37,000
Supreme Court	2,946	20,000

Above is the data regarding the pending cases in the indirect taxes as of 31st March 2017 provided by an Economic Survey conducted in 2018.[12]

As on March 2019 the appeals pending in CESTAT (Customs Excise and Service Tax Appellate Tribunal), the High Court and the Supreme Court is 1,05,756.[13]

12 "*Tax Dispute Resolution in India Trends and Insights*", DHRUVA, https://dhruvaadvisors.com/insights/files/TaxDisputesResolutionIndia_v2.pdf., (visited on December 28, 2021).

13 "*Pendency of Indirect Tax Appeal Cases Down 61% in 2 Years: MOS Finance Anurag Thakur*", THE ECONOMIC TIMES, July 23, 2019, https://economictimes.indiatimes.com/news/economy/finance/pendency-of-indirect-tax-appeal-cases-down-61-in-2years-mos-finance-anuragthakur/articleshow/70346385.cms?from=mdr,(visited on April 27, 2022).

Now it is relevant to think about whether the traditional modes of dispute resolution continue to be effective going forward, or will newer mechanisms have to be introduced for the expeditious resolution of disputes.

Elements of ADR in Indirect Taxation of India

In the erstwhile Central Excise and Service Tax Laws, there was a forum called Settlement Commission. Settlement Commission used to effectively resolve the disputes and provided a speedy settlement for the tax disputes. Proceedings were drafted efficaciously so as to deal with different types of cases which is appropriate for Settlement. The proceedings under Settlement Commission are deemed to be judicial proceedings and are conclusive and binding.[14]

Under the Goods and Services Tax Act, the mechanism of Settlement Commission was not included. Either it did not provide any such similar forums to settle disputes. Instead, opportunity is provided for early settlement of the cases under Goods and Services Tax law for those who come forward for payment of tax and interest in the preliminary stage of the dispute.[15] Concessions in the amount of tax and interest are allowed to assessees who come forward for settlement.

Advance Rulings

Along with the adjudication procedure, Goods and Services Tax provides an Advance Ruling (AAR) mechanism. This gives the taxpayer a facility to get a decision in advance regarding the supply of goods or services so that they can plan their activities so as to keep their tax liability at a minimum.[16] AAR deliver decision on issues relating to transactions whether it amounts to supply or not, under which slabs the transactions are covered, the rule regarding the determination of time of supply and value of supply, permissibility of input tax credit, fixing the liability to pay tax, etc.[17] It is in the mode of advice or the clarification of a doubt which enables to avoid the dispute at a future date.

Objectives of advance ruling authority are to:

- "provide certainty in tax liability in advance in relation to an activity proposed to be undertaken by the applicant; [18]
- attract Foreign Direct Investment (FDI)
- reduce litigation
- pronounce ruling expeditiously in a transparent and inexpensive manner"[19]

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14 Rajendra Prabhu S P, "*Settlement of Disputes _ Possibilities in* GST", TAX GURU, April 15, 2020, https://taxguru.in/goods-and-service-tax/settlement-disputes-possibilities-gst.html, (visited on December 24, 2021).

15 *Ibid.*

16 *Supra* n. 12.

17 *Ibid.*

18 National Academy of Customs, Indirect Taxes and Narcotics, "*GST (Goods and Services Tax) Advance Ruling Mechanism in GST*", CBEC, https://www.cbic.gov.in/resources//htdocs-cbec/gst/advnc-rulin-mechanism-gst-20Jul.pdf, (visited on December 20, 2021).

19 *Ibid.*

Authority for Advance Rulings is a quasi-judicial body. It is chaired by retired judge of the Hon'ble Supreme Court of India. The Authority consist of the Chairman and two Members (with Additional Secretary rank, one representing the State and the other the Centre) with wide experience in technical and legal matters.[20] Sections 95 to 106 of Chapter XVII of Central Goods and Services Tax Act 2017 describe the Advance Ruling. According to these provisions, an Authority for Advance Ruling (AAR) can issue a binding ruling to an applicant.[21] The Advance Ruling given by the Authority can be appealed before an Appellate Authority for Advance Ruling (AAAR).[22] AAR and AAAR should issue the orders within 90 days from the date of receipt of the application.[23]

The aim of Authority for Advance Ruling (AAR) is to provide certainty to the taxpayer regarding his liabilities under Goods and Services Tax and also to provide an expeditious ruling which helps to maintain the smooth and transparent relationship between the taxpayer and administration that helps to avoid unnecessary litigation.[24]

One demerit of AAR is that the ruling of AAR is binding only upon the parties. Now there is an issue arising that AAR of different states is giving contradictory rulings, that may have a negative impact on the purpose of the Authority. Hence, the government is considering the possibility of establishing a Centralized AAR or four regional authorities to avoid the contradictory orders passed by the AAR of different states.

Bilateral Investment Treaties and International Arbitration

Bilateral investment treaties are created to ensure protection to both countries while conducting the business with each other. It contains several obligations which are to be followed by countries on a reciprocal basis. It is to provide safe business environment for the investors of one country while investing in another country and vice versa.[25] It is to encourage fair and equitable approach for investments, protection and security of investments. It also provides for the dispute settlement mechanism between the countries and between the host state and investor.[26] The Vodafone's case is an instance of arbitration award to the

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20 "*Authority for Advance Rulings: About the Authority*", CBIC, https://www.cbic.gov.in/htdocs-cbec/aar/auth, (visited on December 20, 2021). At present Mrs. Justice Ranjana P. Desai is the Chairman and Member (Customs) is yet to be appointed.

21 The applicant may be a person who is a registered taxable person or is liable to be registered.

22 *Ibid.*

23 Section 98(6), and section 101(2) of Central Goods and Services Tax Act 2017.

24 *Ibid.* "Presently the Government is evaluating the need for revamping the AAR mechanism by setting up either a Centralized AAR or four regional authorities in the wake of contradictory orders passed by AAR in different states".

25 *Id.*

26 Article 4(1) of Agreement between the Republic of India and the Kingdom of the Netherlands for the Promotion and Protection of Investments, https://www.dea.gov.in/sites/default/files/Netherlands.pdf., (visited on December 8, 2020).

Government of India, where India has to learn to provide safe investment opportunity to its investors.

Vodafone International Holdings BV (The Netherlands) v. Government of India[27]

In 2007, the British Mobile Company 'Vodafone' entered the Indian cellular telecommunication sector through a subsidiary of Hutchison Whampoa based out of the Cayman Islands. Vodafone bought the company through its Netherland-based subsidiary. In the acquisition of stake though, India was involved, it was happening outside India. The Indian Tax Authorities raised a capital gains tax demand on Vodafone of $3.79 billion inclusive of penalties. Aggrieved by the directions, Vodafone moved the High Court of Bombay but couldn't succeed. Vodafone appealed to the Hon'ble Supreme Court and it was ordered that no tax was due to the Revenue Department for a transaction that happened outside India's territorial limits and also observed that a share transfer of a non-resident entity had no taxation nexus to India. Indian Government in order to bring the transaction within the tax net amended the Income Tax, 1961 with the retrospective effect.[28] Vodafone moved for International Arbitration at Hague.[29]

The International Arbitration Tribunal ruled in favour of Vodafone and pointed out that the attempt by the Indian Revenue to tax Vodafone in the garb of retrospective legislation is in stark violation of the fair and equitable treatment protections guaranteed under Article 4(1)[30] of the Bilateral Investment Treaty between Netherlands and India. Furthermore, the Tribunal has directed the Indian Government to pay £4.3 million, which is inclusive of Vodafone's litigation costs.[31] Any further attempts by the Indian Government to impose tax and penalties on Vodafone would amount to a breach of its International Obligations and would severely hamper India's chance at the future prospects of Foreign Direct Investments.[32]

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27 PCA Case No. 2016-35. [Permanent Court of Arbitration]; *Vodafone International Holdings BV v. Government of India[I]* PCA Case No. 2016-35 (Dutch BIT Claim), ISLG, https://www.italaw.com/cases/2544, (visited on April 27, 2022).

28 The Finance Act of 2012 inserted explanation 5 to Section 9(1) of the said act by virtue of which all the transactions which derived value from the substantive assets in India, even though it involved a non-resident company became taxable by the Indian Revenue, https://www.indiabudget.gov.in/budget2012-2013/ub201213/mem/mem1.pdf, (visited on February 18, 2021).

29 Amol Verma, "*Vodafone Case: A lesson for India not to undermine the trust of its Foreign Investors*", TAXMANN, https://www.taxmann.com/research, (visited on February 15, 2021).

30 *Ibid*, p. 27.

31 Reuters, "*Vodafone wins international arbitration against India in $2 billion tax dispute case: Report*", THE TIMES OF INDIA (September 25, 2020), https://timesofindia.indiatimes.com/business/india-business/vodafone-wins-internatio nal-arbitration-against-india-in-2-billion-tax-dispute-case-report/articleshow/78314357 .cms, (visited on February 15, 2021).

32 *Ibid.*

In 2017 Organization for Economic Cooperation and Development (OECD) inserted Article 25(5) if any issue cannot be settled within two years by negotiation between competent tax authorities of the two countries, then they shall opt for Arbitration.[33] The Apex Court of India has delivered very important landmark rulings providing an environment where Indian Arbitration can flourish in the coming future.[34]

ADR in Taxation/GST - Different Countries in The World

The scope and method of ADR vary from country to country and region to region as follows

ADR in England

The traditional tax dispute resolution is the same as that of India, initial appeal is an administrative appeal to the department itself and then to the tribunals, and then to the judiciary. It faced inordinate delay, high expenses, and procedural complexities.

Her Majesty's Revenue and Customs (HMRC) in the United Kingdom has adopted various mechanisms to revolutionize the traditional approach to tax disputes by minimising the procedural formalities and augmenting the opportunities for settlements and alternative dispute resolution[35].

Since 2005 HMRC is focused on simplifying and making it accessible for the taxpayers. In 2007 HMRC launched the Litigation and settlement strategy (LSS) designed to facilitate guidance for the resolution of disputes in relation to all taxes, duties, and associated payments.[36] Through this HMRC adopted a collaborative approach to the taxpayers in resolving the disputes by reducing the penalties for the genuine errors. It aimed to form a system that ensures accountability and compliance rather than mere revenue generation.[37] In 2013 HMRC published the taxpayer's chart which mentioned the rights and responsibilities of the taxpayers in a single accessible document.

HMRC also issued guidelines for resolving the disputes through ADR primarily through the following methods:

- "Facilitative mediation - an independent third-party mediator without offering any opinion brings the two parties together.

33 "*2017 Update to the OECD Model Tax Convention*", OECD, November 21, 2017, https://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf, (visited on March 20, 2022).

34 Shagun Mahajan, "*Arbitration and Tax disputes Hand in Hand?*" TAX GURU, February 27, 2016, https://taxguru.in/income-tax/arbitration-tax-disputes-hand-hand.html, (visited on February 1, 2021).

35 Sriram Govind and Samira varanasi, "*Dispute resolution in Tax Matters – An India-UK Comparative Perspectivee*", INTERNATIONAL TAXATION, Vol. 9, September 2013, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Dispute_Resolution_in_Tax_Matters.pdf, (visited on February 15, 2022).

36 *Ibid.*

37 *Id.*

- Evaluative mediation – the mediator may offer a view on the merits of the cases to both parties.
- Non-binding neutral evaluation – a neutral third-party expert provides an opinion that is not binding".[38]

ADR is a realistic option, the qualified mediators will assist in managing the procedures, from the initial stages of application up to resolving the dispute with HMRC.[39] The efforts of the HMRC received a positive response and the pilot projects conducted for evaluating the success of the implementation of ADR mechanisms revealed a fruitful outcome.

Australia

Australian GST adopted measures such as Mediation, Conferencing, Case Appraisal, Neutral Evaluation, and Conciliation in the Administrative Appeals Tribunal for resolving disputes. Independent Review is a vital method used to resolve disputes or matters of disagreement before assessment orders.[40]

Canada

Canadian Revenue Agency (CRA) is also following alternative dispute resolution methods like Mediation. It is adopted in the instances where it is witnessed that there are chances of consensus and where both parties realise its advantages.[41]

Singapore

In Singapore, there is an Advance Ruling mechanism. Here the Revenue is bound by the rulings but not on the assessee.[42]

Brazil

Brazil's taxation system has Alternative Dispute Resolution processes like Binding Rulings, Tax Amnesty Programmes, and Administrative Litigations[43]. Administrative Litigations and Binding Ruling were prevalent in Brazil for decades. The Tax Amnesty Programme is of comparatively new origin.

Revamping of Indian Tax Administration

Since the tax disputes involves sovereign rights of the nation the tax administrators still believe that arbitration is not a suitable mechanism. But it is high time to realize that only such bold steps highlight the country's image as a business-friendly destination. Even our own tax-payers should have a belief that they will be provided with an expeditious, convenient and efficient resolution system in the instance of disputes.

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38 *Id*.
39 Manpreet Arya et al. "*Identification and Resolution of potential disputes in post-Goods and Service Tax (GST) regime- Alternate Dispute resolution mechanisms*", NACIN, 2015, https://nacin.gov.in/resources/file/downloads/5697773fd3e2e.pdf, (visited on March 20, 2022).
40 *Ibid*.
41 *Id*.
42 *Id.*
43 *Id*.

As an initial step, India by considering the issues faced by investing foreign companies, should be ready to utilise all the possible resolution methods along with traditional dispute resolution methods which will be beneficial to the taxpayers and can instil confidence in institutions supporting arbitration which is indubitably established resolution mechanism prevalent in today's world.[44]

The 12th report of the Law Commission of India submitted in 1958 has pointed out the awkwardness of preferring the first appeal under the tax laws to the Commissioner of Income Tax (Appeals), being the authority within the department itself. The report highlighted the maxim that justice must not only be done but should appear to be done.[45] The same is followed even today without any change; the first appeal is to the Commissioner of Appeals within the concerned department. Even though there were efforts to rationalise the tax system in India since independence none of them give importance to simplifying or revamping the administrative side and the government-appointed Tax Administration Reform Commission (TAR Commission) headed by Dr. Parthasarathi Shome. The Committee submitted its report in two volumes, and several of its recommendations were implemented.[46]

Conclusion

Evolving of new mechanisms is indispensable as there is a proliferation of tax disputes. Today's tax world is witnessing rapid advancement that radically alters the nature of tax disputes and the way in which these are to be administered.

Goods and Services Tax is in the early stages of implementation and many grey areas are required to be simplified and made specific. The recurrent amendments in the Goods and Services Tax Law coupled with the glitches faced in the Goods and Services Tax Network (GSTN)- the technological platform of GST leads to lot of difficulties to the assesses. The pandemic COVID-19 crisis also augmented it. Amnesty schemes are to be introduced to support business by settling their disputes at the initial stage itself without moving to the litigations, which enables them to concentrate on their future business which will ultimately benefit the economy of the country.[47] The only thing which has to be given importance while adopting and implementing ADR mechanisms in the field of taxation is that the person who is selected for reaching the solution should be an expert in the field of taxation. As this law is ever-changing and complicated it may not be easy to deal with.

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44 *Supra* n. 34.

45 "*Twelfth Report on Income Tax Act 1922*", LAW COMMISSION OF INDIA, 1958, p. 43, https://lawcommissionofindia.nic.in/1-50/Report12.pdf, (visited on January 14, 2022).

46 "*Tax Administration Reform in India Spirit, Purpose and Empowerment*", TARC, 1st report, 2014, http://www.nadt.gov.in/writereaddata/MenuContentImages/First_report_TARC635480254365343004.pdf, (visited on January 11, 2022).

47 Rajendra Prabhu S P, "*Settlement of Disputes-Possibilities in GST*", TAX GURU, https://taxguru.in/goods-and-service-tax/settlement-disputes-possibilities-gst.html, (visited on January 12, 2022).

Suggestions

- A "co-operative-compliance" method is to be adopted rather than resorting to coercive measures to ensure the compliance of the taxpayers;
- Dispute resolution strategies should, along with litigation, adopt a new and broader framework which provides preventive measures and alternative dispute resolution strategies which enable the assesses to get speedy and efficacious remedy;
- The Settlement Commission which was prevalent in some of the legacy acts should be included with sufficient modification in GST; and
- In furtherance of coping with the 'new normal' after the COVID-19 pandemic,[48] it is advisable to create an online Dispute Resolution mechanism. Alternate Dispute Resolution can be better adopted in virtual proceedings. It has a two-fold advantage in that parties can join the process from anywhere in the world and also helps to get the experts in the field of taxation as the mediator.

Justice is to be delivered in a more harmonious manner so as to benefit both assesses and the tax administration which is ultimately benefits for the nation. The relationship between the assesses and the department should be strengthened by more rationalized enforcement activity to better serve the country.[49] For the efficient working of the tax administration which is the backbone of the economy, innovative strategies should be explored and adopted.

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48 After the repeated attack of pandemic COVID -19 and its variants, it has been realized by the world that the world will not be back to normal situations for at least five years. So everyone is coping with the newly created atmosphere which is termed as new normal.

49 *Supra* n. 46.

GODMEN PHENOMENON IN CONTEMPORARY INDIA: A SOCIO-LEGAL ANALYSIS

Rajeev Dubey[♣] *and Praveen Mishra*[♠]

Abstract

With the rise and growth of new religious movements (NRMs) there has been a tectonic shift in the religious landscape of India. This research paper reflects on the shift and contradiction in the religious landscape with the emergence of Godmen phenomena. Further, while analysing social factors which facilitate the growth of Godmen phenomena, this paper also outlines the legal implications of people falling prey to Conmen. The responsibility of the secular state towards protecting its citizens from falling prey to Conmen has also been critically analysed.

Keywords: Constitution, Godmen, Religion, Secularism, Spirituality.

Introduction

It is interesting to look through the emerging paradox in the religious landscape of India. On the one hand, while we see the increasing presence of new Gurus and Godmen, growth of religious television channels, and preoccupation with yoga and spirituality in contemporary India[1]; on the other hand, we also see a series of allegations and scandals pertaining to Godmen. The allegations against some of the Godmen involve the commission of criminal activities of serious nature. It is strange that while the tradition of Gurus is old, the negative connotation or say Gurus proclaiming themselves to be a Godmen is a recent phenomenon.

As a researcher one is inclined to ask –why in India there is a preponderance of Gurus, at times assuming the stature of Godmen? What necessitates and facilitates their reception by the masses? In India, the Guru movement has thrived and survived for centuries. Guru is one of those Indian terms of Sanskrit origin which has no equivalent term in English. Though, commonly it is translated as 'teacher' in English. However, guru has a lot more roles and responsibilities than the teacher. Guru has been conceived to be a teacher, spiritual guide, father/mother-figure, and at times even personified God. Guru's knowledge transcends the intellectual boundary and embodies experiential knowledge as well. It has been widely held that a student needs the tutelage of an able teacher for spiritual development. This axiom is especially emphasized in Hinduism and amply reflected in *guru-shishya* tradition from time immemorial.

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1 The issue has been discussed in greater detail in K. Klaus. Klostermaier, HINDUISM: A SHORT HISTORY, 2000, p.272-284.

Mlecko while analysing guru tradition would argue that, "religion is manifested or embodied in the continuing, successive presence of the guru. It is the guru who reveals the meaning of life; he is the immediate, incarnate exemplar in life, and as such, the guru is an inspirational source for the Hindu. The basic strengths of the guru's role are such that guruhood is the oldest form of religious education still extant".[2] Though historically there has been a tradition in India to revere Guru as God by the disciples, the practice of Gurus making a claim about their divinity themselves is a new phenomenon. Such Gurus making claims about their divinity can be termed as self-styled Godmen.

In the last few decades, the number of Godmen either exported from India to the West or initiated in the West has proliferated to such a degree that it is impossible to give a complete account or an adequate assessment of them. Klostermaier on this upsurge writes that- "An Indian writer quipped that nowadays the *abhiseka* (ordination) of a Hindu Swami consists of a jet trip to America. Some are extensions of Indian *sampradayas*, not primarily aimed at Western audiences, others have been specifically designed for the West".[3] Interestingly they have a declared policy of non-proselytizing, but an emphatic claim of universality. The hagiographies of several Godmen carry the title *Dig-vijaya*, the conquest of the four quarters of the earth; *Jagad-guru*, world-teacher. These traditional terminologies shrouded and loaded with an aura and reverence elicit a similar response from millions of people when it is used in the modern context.

The question as a researcher we need to ponder is- how and why it is that in a techno-scientific modern age millions of people subscribe to these Godmen? As social scientists we cannot deny their agency, we have to make sense of the emergent reality that there are millions of people who follow these Godmen. It is pertinent to reflect on the social factors which facilitate the growth of Godmen phenomena and also the legal implications of people falling prey to some of the Conmen in the garb of being a Godmen. It is also pertinent to look into the responsibility of the secular state towards protecting the citizens from falling prey to Conmen.

Social Factors facilitating the Godmen Phenomena

With the passage of time as religion evolved as an institution, it got polluted with egotism and power. People in modern times increasingly feel that the ritualistic and priestly class dominating religious institutions have failed to address their existential and experiential questions. In modern times with rapid social change, there has been communal dislocation, normative ambiguity, value confusion, etc. Man's search for meaning in these troubled times and at times for want of spiritual solace drives them towards Godmen. Such circumstances necessitated and facilitated the rise and growth of Godmen in India. In the dispassionate, impersonal modern world, Godmen promise to offer instant spiritual solace, salvation, and personalized attention to the devotees.

2 Joel D. Mlecko, "*The Guru in Hindu Tradition*" Numen, 29(1) no. Fasc. 1 ,1982, p.33

3 *Supra* n. 1, p. 274.

This process is further facilitated by, in the words of T.N. Madan, "the concern of the 'modern' Hindu with instant religious experience in the midst of his other activities makes him shy away from a slow-moving ritual-ridden life and its guardians, the priests, in the direction of the sadhu (saintly person) and the guru (religious preceptor), who may even perform miracles"[4]. Further, the all-venture exercise of religious Gurus makes their presence and involvement felt in various aspects of social life. Madan writes, "Religious leaders are today more visible as the promoters of modern (medical, technical, other) education and providers of integrated modern health care (for instance at SathyaSai Baba's institutional complex at Puttaparthi) than as holy preceptors, and as religious leaders, they command larger following as instructors of practical yoga and the 'art of living' (Sri Sri Ravishankar) than of esoteric doctrines and arcane rituals."[5]

Though most of these institutions like education, health etc. are otherwise secular domains once they are mediated and introduced through the conduit of new religious movements, they acquire a religious overtone. Further, scholars have highlighted that NRMs led by some Godmen in contemporary times introduce religious belief and practices in such a way that it is accessible and comprehendible by laypersons. The proposed new religious belief and practices instead of being too esoteric are tuned to meet the practical day-to-day existential and experiential challenges of common people. Another important feature of these NRMs led by Godmen is that they are a matter of choice. Unlike the traditional organized religion which is a matter of ascription (one is born in the traditional organized religion). In NRMs, devotees exercise their preferences and also change their affiliation from one to the other based on their experience[6].

Most of these Godmen refrain from overtly and rigidly being associated with a particular traditional organized religion. It is a conscious decision on their part to resort to syncretism so that in a pluralistic country like ours people from different faith can relate themselves with the Godmen. It is not surprising therefore to witness devotees of these Godmen coming from diverse faith, region, and nationalities. These Godmen at times resort to modern techno-scientific vocabulary to attract the contemporary generation with scientific orientation. At times they invoke scientific terms and studies about their yogic practices to embolden devotees' faith in them.

As the sociological studies have revealed that contrary to the prophecy of a section of scholars arguing that religion will decline with the advancement of modernity accompanied by the process of rationalization, it is increasingly being noticed that religion thrives and survives in modern times. It is increasingly being manifested in new forms of religiosity- one of them being the search for Godmen. It is in this context we need to analyse the role of secular state. How far have our

4 T.N. Madan, THE HINDU HOUSEHOLDER: THE T.N. MADAN OMNIBUS, 1st ed. 2010, p. 166.

5 T.N. Madan, IMAGES OF THE WORLD: ESSAYS OF RELIGION, SECULARISM, AND CULTURE, 1st ed. 2006, p 18-19.

6 James A. Beckford, NEW RELIGIOUS MOVEMENTS AND RAPID SOCIAL CHANGE, 1st ed. 1986, p. ix-xv.

political elite adhered to the secular principles enshrined in our constitution in letter and spirit? Can state abnegate its responsibility towards protecting citizenry from being cheated by Conmen in the name of neutrality and maintaining equidistance from all faiths and religions? A nuanced reflection is required to contemplate state's response within the constitutional framework in the face of contemporary challenges emerging in the landscape.

India as a Secular State and Godmen Phenomena

In India religion (popularly known as *dharma* in indigenous terminology) has been a way of life so the founding fathers of India have tried to ensure neutrality on the part of the state as far as matters of religion are concerned.[7] The concept of secularism, contemplated by the Indian Constitution, is that the state must treat all religions equally and without any discrimination in all matters under its direct or indirect control.[8] In *Dr. M. Ismail Faruqui v. Union of India*[9] the Supreme Court observed "...it would thus be clear that Constitution made demarcation between religious part personal to the individual and secular part thereof. The State does not extend patronage to any particular religion, State is neither pro particular religion nor anti particular religion, it stands aloof, in other words maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively acts on secular part."B. P. Jeevan Reddy, J. in the same context in the decision stated thus "while the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the State is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally".[10]

In a similar vein, Donald E. Smith explains that "To most Indians, secular means non-communal, or non-sectarian, but it does not mean non-religious. The basis of a secular state is not a 'wall of separation' between state and religion but rather a 'no preference doctrine' which requires that no special privilege be granted to anyone religion. The secular state includes the principle that the function of the state must be non-religious."[11] The Indian understanding ofsecularism is in variation withthe western European countries to the extent thatin the west, state and church(religion) is separate and do not interfere in each other's affairs.

India is a secular nation, but there is no "wall of separation" between religion and state. They interact and intervene in each other's affairs as and when required according to the constitutionally settled principles.[12] Indian secularism does not require a total banishment of religion from the society or affairs of the state. The concept of secularism requires only that the "state must treat all religious creeds

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7 M.P Jain, INDIAN CONSTITUTIONAL LAW, 1st ed. 2010, p. 1315. The Preamble of the Indian Constitution contemplates India as a secular State.

8 Tahir Mahmood, "*Religion, Law, and Judiciary in Modern India*", Vol. 2006 No. 3, BYU LAW REVIEW, 2006, p.755.

9 AIR 1995 SC 605.

10 *Ibid.*

11 Donald E. Smith, INDIA AS A SECULAR STATE, 1st ed. 1963, p. 381.

12 *Ibid.*

and their respective adherents absolutely equally and without any discrimination in all matters under its direct or indirect control."[13]Article 15 prohibits discrimination by the State, on the grounds of religion.[14]Section 123(2)b of the Peoples Representation Act 1951 prohibits an appeal made to vote or refrain from voting on the grounds of religion[15] These provisions are a reflection on India's secular principles.

Looking from the prism of aforesaid enshrined constitutional principles if we look at the engagement of the political elite at constitutional posts with the modern Godmen, one is baffled to think whether we are 'secular' in the real sense. There was a time when Gandhi though believed in 'Guru' but not in the present sense of mushrooming self-styled Godmen in the garb of Guru. He wrote, "I seek a guru. That a guru is needed I accept. But, as long as I have not come upon a worthy guru, I shall continue to be my own guru. The path is arduous certainly, but in this sinful age, it seems to be the right one. Hinduism is so great and so wide in sweep that no one has so far succeeded in defining it"[16]. He further writes in a different context, "In these difficult and degenerate times, the pure spirit of religion is hardly in evidence anywhere. Men who go about the world calling themselves *rishi*, *munis,* and sadhus rarely show this spirit in themselves. Obviously, they have no great treasure of the religious spirit to guard"[17].

Therefore, Gandhi as a visionary could foresee the imminent danger in Godmen phenomena and warned,

"If I had a guru, and I am looking for one, I should surrender myself body and soul to him. But in this age of unbelief, a true guru is hard to find. A substitute will

13 *Supra* n. 8.

14 Article 15(1) of The Constitution of India - The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

15 *Abhiram Singh v. C.D. Commachen (Dead) By Lrs.* Civil Appeal No. 37 of 1992. was held that "An appeal in the name of religion, race, caste, community or language is impermissible under the Representation of the People Act, 1951 and would constitute a corrupt practice sufficient to annul the election in which such an appeal was made regardless whether the appeal was in the name of the candidate's religion or the religion of the election agent or that of the opponent or that of the voters. The sum total of Section 123 (3) even after amendment is that an appeal in the name of religion, race, caste, community or language is forbidden even when the appeal may not be in the name of the religion, race, caste, community or language of the candidate for whom it has been made. So interpreted religion, race, caste, community or language would not be allowed to play any role in the electoral process and should an appeal be made on any of those considerations, the same would constitute a corrupt practice."

16 THE COLLECTED WORKS OF MAHATMA GANDHI, Vol. 16, 1999, pp.137-141, https://www.gandhiashramsevagram.org/gandhi-literature/collected-works-of-mahatma-gandhi-volume-1-to-98.php (visited on December 9, 2019).

17 *Ibid.*

be worse than useless, often positively harmful, I must therefore warn all against accepting imperfect ones as gurus…Has a man ever learned swimming by tying a stone to his neck"[18]

So, for Gandhi a guru, by definition, was vastly superior to his disciples. Else guru cannot command abject obedience and blind trust from those who cast themselves at his feet. Jawaharlal Nehru, the first Prime Minister, came from a nominally Hindu background but repudiated all religious affiliations. Khuswant Singh a perceptive writer on the Godmen phenomenon in post-independent India, writes in the context of Nehru regarding adhering to a religious guru or Godmen, "This kind of public reverence of holy men is a post-Pandit Nehru phenomenon. As long as he was alive, even his daughter Indira Gandhi did not dare to go paying homage to sadhus or praying in temples".[19] In his view, Nehru had "nothing to do with these archaic practices"[20].

Scholars like David Smith also add to this development of the political legitimacy of NRMs and their gurus.

"Politicians have a special need for gurus: the tradition of spiritual adviser to the ruler goes all the way back to the Vedic notion of the priest as *purohita*, 'standing before the king'. Dhirendra Brahmachari was the guru of Indira Gandhi; infamous Chandraswami was the guru of Narasimha Rao (prime minister 1991-96); Bhagwan Ram was the guru of Chandrasekhar (prime minister in 1990)".[21]

In post-Nehruvian era, Godmen got political patronage from the highest authorities in bureaucracy and other professions. Such practices have raised serious questions regarding the secular credentials of India as a nation.

Freedom of Religion and New Religiosity

As an academician one is inclined to ask isn't it that people have freedom and liberty to choose their faith including faith and belief in Godmen. Article 25 of the Constitution of India provides that "subject to public order, morality, and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."[22] It assures every person subject to public order, health and morality, freedom not only to entertain his religious beliefs but also to exhibit his belief in public and propagate or disseminate his ideas for the edification of others.[23]M.P Jain in his treatise Indian Constitutional Law[24] has written "Religion is a matter of faith. A religion undoubtedly has its basis in a system of belief and doctrines which are

18 Swami Agnivesh and Valson Thampu, "*An Age of Disbelief: Con Men Thrive Under the Garb of Religion*", THE TIMES OF INDIA, September 5, 2013, https://timesofindia.indiatimes.com/edit-page/an-age-of-disbelief-con-men-thrive-under-the-garb-of-religion/articleshow/22298455.cms, (visited on December 10, 2019).

19 Kushwant Singh, GODS AND GODMEN OF INDIA, 1st ed. 2012, p. 240.

20 *Ibid.*

21 David Smith, HINDUISM AND MODERNITY, 1st ed. 2008, p.168.

22 Article 25(1) of The Constitution of India.

23 *Sri Lakshamana v. State of Andhra Pradesh* AIR 1996 SC 1414.

24 *Supra* n. 7, p. 1319.

regarded by those who profess that religion as conducive to their spiritual well-being. But it is also something more than merely doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept but also prescribe rituals and observances, ceremonies, and modes of worship which are regarded as an integral part of that religion. These forms and observances might extend even to matters of food and dress. Therefore, the constitutional guarantee regarding freedom of religion contained in article 25(1) extends even to rights and ceremonies associated with the religion." The state is not entitled to regulate the religious practices but it is entitled to regulate the secular activities which are associated with the religious practices. For example, state is entitled to regulate economic, political, and commercial activities associated with religious practice. Thus, it can regulate the management of a property or endowment associated with the religious organizations of modern Godmen.

In *State of Orissa and Sri Jagannath v. Chintamani Khuntia*[25] the Supreme Court observed "although the State cannot interfere with freedom of a person to profess, practice and propagate his religion, the State, however, can control the secular matters connected with religion. All the activities in or connected with a temple are not religious activities. The management of a temple or maintenance of discipline and order inside the temple can be controlled by the State. The management of the temple is a secular act. If any law is passed for taking over the management of a temple it cannot be struck down as violative of Article 25 or Article 26 of the Constitution". Therefore, it becomes very important to have a distinction between religious practice and secular activities. The cardinal principle to deciding the issue is whether a practice is an integral part of a religion? If the answer is yes, then it cannot be regulated but if the answer is no then the state will be within its right to regulate it. But if we look into the contemporary scenario we witness a situation where we find Godmen venturing into spiritual, educational, entrepreneurial, and medical ventures which are secular domains, yet we find a dilemma in the state's approach while dealing with these secular ventures on the basis of secular rational legal principles as per the law of the land.

Rajasthan High Court in the case of *Nikhil Soni v. Union of India*[26] examined the practice of *Santhara* and *Sallekhana* prevalent in Jains[27] and refused to accept that *Santhara* or *Sallekhana* is a religious practice and an essential part of the Jain religion permitted under Article 25, 26, or Article 29 of the Constitution of India. It directed the State to ensure that such practices are stopped. Thus, the State can and it should intervene to address the myths, and superstitions and stop the practices which are prejudicial to the public interest. While Article 25 protects the freedom

25 AIR 1997 SC 3839.

26 In The High Court Of Judicature For Rajasthan At Jaipur Bench, Jaipur Civil Writ Petition No.7414/2006 (Public Interest Litigation)

27 Nikhil Soni v. Union of India (2015) Cri LJ 4951. In The Jain community is divided into two groups of Digambara and Shvetambara. The Santhara, a religious fast unto death, is prevalent in Shvetambara, whereas a similar kind of fast called Sallekhana in the Digambara. *Santhara* is a kind of self-emulation, wherein the person adopting it starts fast to achieve the goal of death in which he stopped consuming food, water and medicines.

of religion of individuals the rights of religious denominations are protected by Article 26 of the Constitution of India.[28] Thus Article 26 contemplates the collective right of religion and is subject to public order morality and health[29]. The implications of Articles 25 -28 are that the State would not interfere in religious affairs so long as they do not offend any provision of Constitution or any other law in force.[30] However this is not a correct approach on the part of the state to wait till the religious affairs of an individual or any community offend any provision of the Constitution or the law of the land in general and criminal law in particular. Article 25 (2) b provides an obligation on the State to take measures for social welfare and reform. Therefore, the state should not remain a mute spectator and allow the superstitions and practices to continue which are associated with some religious practices. Art. 25(2) is applicable to Article 25 (1) which guarantees freedom of religion of individuals and Article 26 which contemplates collective rights of freedom of religion.[31] Renowned author, Tahir Mahmood states "There is no provision in the Constitution directing the State to remain neutral to religious issues".[32] If some practice, principles, or a belief of any particular religion or new religious movement led by Godmen violates the constitution or the law of the land, then the State is entitled and obliged to interfere with and remedy the situation.[33]

The Law Commission of India has also observed "while freedom of religion and right to not just practice but also propagate religion must be strongly protected in a secular democracy, it is important to bear in mind that a number of social evils take refuge as religious customs and these may be evils such as sati, slavery, devadasi, dowry, triple talaq, child marriage or any other. To seek their protection under the law as religion "would be a grave folly. For these practices do not conform with basic tenets of human rights are nor are they essential to religion."[34] The Government of India has occasionally intervened in religions ostensibly as mandated in the constitution. The enactment of the anti-untouchability Act (SC/ST Act, 1989),The Commission of Sati (Prevention) Act, 1987 Hindu marriage Act which disapproves polygamy and declaring triple talak to be illegal and offence is an example of such interventions.

The right to freedom of religion has been provided the status of fundamental rights. Whenever state action in the matters of religion is challenged on the ground that it contravenes the fundamental right to "freedom of conscience and to profess, practice and to propagate religion" it must be examined to see whether such action

28 *Supra* n. 7, p. 1326.

29 *Ibid.*

30 Faizan Mustafa and Jagteshwar Singh Sohi, "*Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy"*, BRIGHAM YOUNG UNIVERSITY LAW REVIEWp.915, https://digitalcommons.law.byu.edu/lawreview /vol2017/iss4/9, (visited on December 4th, 2019).

31 Sri Venkataramana Devaruand v. The State of MysoreAIR 1958 S.C 255.

32 Tahir Mahmood "*Religion, Law, and Judiciary in Modern India*" *BYU L. Rev* 2006, p.755.

33 *Mohammad Hanif Kureshi v. Union of India*AIR 1958 S.C. 731.

34 "*Consultation Paper on Reform of Family Law*", LAW COMMISSION OF INDIA, 2018.

on the part of the state is to protect order, morality, and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorized by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practice or to provide for social welfare and reform.[35]

Obligations of State in the matters of Religion

Under Article 51 (A) of the Constitution, "it shall be the duty of every citizen of India to develop the scientific temper, humanism and the spirit of inquiry and reform". Article 51 A is a fundamental duty and casts a duty upon the individuals to develop scientific temperament. It is like telling a patient to cure himself. Instead of casting a fundamental duty upon the individuals to develop scientific temper. it would have been better on the part of policy framers to prescribe it as a directive principle upon the State to develop scientific temper amongst the people. Nowhere in the Constitution has it been emphasized upon the State to develop amongst the people scientific temper.

The doctrine of *Parens Patria* contemplates that the State is under obligation to look after the interest of those who are unable to look after themselves. The rationale behind the principle of *Parens- Patria* is that sometimes an occasion or a situation arises where a citizen is in need of someone who can act as a parent, who can make decisions, and take some other action. In certain conditions of life, the State is best qualified to assume this responsibility.[36] The people acting under ignorance or superstitions also need to be taken care of. It is the obligation of the state to educate the people about the superistions and address their ignorance which is exploited by the self-styled Godmen. The way the state can address the issue is by developing awareness and making suitable laws to address the issue. It is no denying that some the states have made laws to prohibit the criminal acts which in fact are a culmination of illiteracy, ignorance, and lack of scientific temper.

Is it possible that a secular State can take initiative in developing scientific temper and also informed choice among the citizens regarding Godmen? The answer is 'yes'. In order to illustrate this, an initiative by British Home Office responsible for law and order in England is worth discussing. The British Home Office in order to make the citizenry aware and to facilitate them in making an informed decision in matters of faith especially regarding Godmen, the British Home Office funded Information Network Focus on Religious Movements (INFORM), a registered voluntary organization steered by reputed academicians working on religion.

The stated aim of INFORM is "to provide neutral, objective and up-to-date information on new religious movements (NRMs) to government officials, scholars, the media, and members of the general public, in particular to relatives of

35 *John Vallamattom & Anr. v. Union of India* WP (civil) 242 of 1997.

36 *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480. The doctrine has been explained as *parens patriae* is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons.

people who have joined a new religious movement as well as religious or spiritual seeker". So the aim of establishing such a body was to promote and disseminate authentic, well researched, dispassionate and impartial account of the NRMs including the Godmen to the common masses, government officials and media personnel. India too as a secular state can take such initiative to scientifically document and put in public domain rational and impartial details of NRMs including the Godmen so that common masses should not be tricked and cheated. It is ironical that many repeat offenders and criminals have exploited the business of faith and innocent devotees have no clue regarding them. It is the responsibility of state to provide information about these Conmen so that people can make an informed choice.

Criminal Liability for Offences related to Religion:

State has sparingly made laws related to religion. It has tried to regulate only those acts related to religion which has been considered to be inimical to the interest of the State. It has addressed only those acts related to religion that can cause a threat to law and order. For example, promoting enmity between different groups on grounds of religion has been made an offence under section 153A of the Indian Penal Code (IPC). Chapter 15 of the IPC prescribes punishments for offenses relating to religion. Section 295 provides "whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

Section 295A of the IPC provides "Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."[37]It is an offence to disturb a religious assembly.[38] Similarly trespassing on burial places, etc. is an offence.

37 *Mahendra Singh Dhoni v. Yerraguntla Shyamsundar* AIR 2017 SC 2392, in context of section 295A the Supreme Court observed "on a perusal of the aforesaid passages, it is clear as crystal that Section 295A does not stipulate everything to be penalized and any and every act would tantamount to insult or attempt to insult the religion or the religious beliefs of class of citizens. It penalizes only those acts of insults to or those varieties of attempts to insult the religion or religious belief of a class of citizens which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class of citizens".

38 Section 296 of the Indian Penal Code 1860 -Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[39]Also uttering, words, etc., with deliberate intent to wound the religious feelings of any person is an offence.[40]

There are other legislations such as the Drugs and Magic Remedies (Objectionable Advertisements) Act 1954 which prohibits people from advertising drugs and remedies that claim to have magical properties and considers advertising products claiming to do so as a cognizable offence. States like Karnataka, and Maharashtra have made laws such as the Karnataka Devadasis (Prohibition of Dedication) Act 1982, the Karnataka Koragas (Prohibition of Ajalu Practice Act 2000) and the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013. Therefore, it is high time that the Parliament should enact special laws to deal with the growing menace of Conmen in contemporary India.

Conclusion

Guru tradition has been there since time immemorial in India and it provides a fertile ground for Conmen to exploit the faith and devotion of disciples towards the Guru. In contemporary times, it is not surprising to see the way spiritual Gurus and self-styled Godmen have made a foray into active politics or are canvassing directly or indirectly for one or the other party. This had three effects: first, it bolstered the political legitimacy of these Godmen; secondly, people got an alibi to seek refuge in the shelter of these Godmen in face of crisis seeing the highest office holders doing the same; thirdly, it is needless to mention that such a practice seriously dented into the secular credential of world's largest democracy and revealed the yawning gap in the idea of 'secular' enshrined in our constitution and the actual practice.

Instead of knee-jerk reactions, the secular State can take initiatives in developing scientific temper and also encourage informed choice among the citizens regarding Godmen. In order to deal with the phenomena, India can learn from best practices like the British Home Office funded Information Network Focus on Religious Movements (INFORM) which provides neutral, objective, and up-to-date information on the NRMs which includes various Godmen. This shall help the citizens to make an informed choice of visiting a Godmen. Although in the framework of secularism, the state is not entitled to regulate the religious practices

39 Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulcher, or any place set apart from the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

40 Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

it is entitled to regulate the secular activities which are associated with the religious practices. For example, the state is entitled to regulate economic, political, and commercial activities associated with religious practice. Thus it can regulate the management of a property or endowment associated with the religious organizations of modern Godmen. Godmen venturing into spiritual, educational, entrepreneurial, and medical ventures which are secular domains, yet we find a dilemma in state's approach while dealing with these secular ventures on the basis of secular rational legal principles as per the law of the land.

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RISING CYBER CRIMES AGAINST WOMEN AND ITS CAUSES

Raju N. Gaikwad[♣]

Abstract

Cyber Crimes against women are showing increasing trend since last 10 to 15 years. Ultimately, the entire society is affected by this phenomenon. In India, Cyber Crime against women is now at alarming stage. Cyber Crimes encountered against women includes, mainly, sexual crimes and sexual abuses through the Internet. The present study focused on the Major causes of rising cyber-crimes against women in cyber-crimes against women, its social implications on victims after committed to the Cyber Crime. Apart from this an attempt has been made to focus on the nature of Cybercrimes that are frequently encountered and major constraints in detecting and investigating of Cyber Crimes against women in India.

Keywords: Causes, Cyber Crimes, Sexual Crimes, Women, Victims.

Introduction

There are several crimes against women like rape, murder, dowry death, etc. Today, cyber-crimes against women are also increasing. The crimes like – stalking, cyber pornography, sexual harassment through e-mails, morphing, cyber defamation, email spoofing etc. are showing growth trend in the metro cities in India. It may pose as a major threat to the security of women. The vulnerability and safety of women is one of the major issues of criminal and penal law. Even though, the implementation of various laws pertaining to the women's safety and security, they are still defenseless in the context of cybercrimes. Although, acquaintance with advanced technology is positive factor, which can be considered very significant with a view to improvement and development of life. But nowadays it has become a major source for the growth of crimes against women. The growth in cybercrimes against women is negatively affecting on the social life of women victims of cybercrime. It is also adversely affecting on their physical and psychological health conditions. Cyber space provides a plethora of opportunities for cyber offenders either to cause harm to women and minor girls.

Legal and Social Causes of rising cybercrimes against women - The causes of rising cyber-crimes against women are broadly categorized as – Legal causes and Social Causes.

Legal Causes

Majority of the cybercrimes are related to sec. 66 (Hacking) sec. 67 (Publishing of obscene material in the electronic form), and sec. 72 (Breach of confidentiality). The cyber-crimes such as – e-mail spoofing, cyber defamation, hacking and

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trespassing into individual's privacy etc. are commonly committed against women; today. The major legal reason of rising such cybercrimes is that, the Information Technology Act is not mentioning these crimes under specific sections. But through the Indian penal code, criminal procedure code and constitution, the special protection have been provided to the women and children. Transcendental nature of Internet is also one of the major legal related reasons of rising cyber-crimes against women in India. Section 75 of Information Technology Act not explaining about the jurisdiction of the crimes committed through the Internet, specially, and therefore, the question may arise regarding the reporting of cyber-crime offence to the police. The case arises when the crime is committed at one place and affected at another place, and reported at some other place. These types of anomalies in the law is responsible for rising cybercrimes against women in India.

Social Causes

On the basis of various studies, it is observed that, majority of the cyber-crime cases remain undetected and unreported due to hesitation and shyness of women cybercrime victim. In many cases women believes that, she herself is responsible for the crime that committed against her, and therefore she won't report to the police because of defamation of her family. Cyber criminals take the advantage of this and dare to do crime again and again, therefore, the rate of cybercrime against women is rising day by day. The victimized women heisted for reporting to the police about the sexual crimes (Whether it is in real form of in virtual form) and preferred to shut up and try to not disclose the event happened with them. They think that it may disturb their family. This provides the opportunity to the offenders to escape himself after committing cybercrime against women majority of the women users are also not having knowledge about the handling of Internet, social media which may also cause for increasing cybercrimes against them.

Review of Literature

- Shobhana Jeet, (2012)[1], has compared the nature of cybercrimes against women in UK and in India. Author has explained the various types of cybercrimes against women. Through the study author has also focused on the various reasons for the increasing rate of cybercrimes against women in India. Author has concluded that, IT Act, 2000 have no specific provision to protect security of women and minor girls.
- Nidhi Arya, (2019)[2], has explained the terms of cyber space, cybercrimes etc. Through the study author has discussed on the implementation on enactment of cyber law in India. Author has also focused on the various types of cybercrimes and its functions. Through the study author has also discussed on the problems faced by the police for investigation on cyber

1 Shobhana Jeet, "*Cybercrimes Against Women in India*: *Information Technology Act, 2000*", ELIXIR INTERNATIONAL JOURNAL, Vol. 47, 2012.

2 N. Arya, "*Cybercrime's scenario in India and Judicial Response*", INTERNATIONAL JOURNAL OF TREND IN SCIENTIFIC RESEARCH AND DEVELOPMENT, Vol.3 No 4, 2019.

criminals. Through the study author has discussed on the role of judiciary in expanding cybercrime jurisprudence.

- Sarojani Chiluvuri, (2017)[3], has also focused on the types of cyber savagery against women and girls in India. Author has also focused on the impact of cybercrimes against women in terms of social and psychological conditions. Through the study author has discussed on the provisions of IT Act, 2000 relating to cybercrime and offences against women in India and focused on the loopholes of this Act. Through the study author has suggested some preventive measures to overcome the social evil of cybercrime.
- Sunil Kumar, (2020)[4], has analyzed the cases pertaining to cybercrimes against women in Delhi. Author has further discussed on the various reasons for cybercrimes and also discussed on how women can abduct themselves from cybercrimes cases and if convicted what they need to do. Through the study author has focused on the cybercrimes rate in India and Delhi. In the opinion of author, there should be stricter laws for the Internet services providers for ensuring the safety and securities of women and minor girls.

Significance of the study

The present study could be useful addition to the literature pertaining to the causes of cybercrimes and its social implications, major constraints in the investigating and detecting of cybercrimes against women. The present study is significant to understand the nature of cyber-crimes frequently encountered against women, and the nature of adverse effects on their personal life.

Objectives of the study

- To focus on the major factors that are responsible for increasing cybercrimes against women.
- To know about the social implications of cybercrimes on the women victims.
- To understand the adverse effects of cyber-crimes victimization on the temperament of women.
- To understand the nature of cyber crimes against women that are frequently encountered.
- To know about the major constraints in detecting and investigating of cyber crimes against women.

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3 Sarojani Chiluvuri, "*Cyber Savagery Against Women – Present Scenario*", GLOBAL JOURNAL FOR RESEARCH ANALYSIS, Vol. 6 No. 9, 2017.

4 Sunil Kumar, "*Cybercrimes Against Women in Delhi: An Analytical Study*", UGC CARE JOURNAL, Vol. 31 No.10, 2020.

Research Methodology

For the study purpose, descriptive survey research method has followed. The required primary information has been collected from the cyber cell officials. The collected primary information has been analysed by using percentile method. The required secondary information has been collected through study papers, published in national and international journals, published books etc. The information available on Internet has also referred for the study purpose.

Sampling size and Technique

Convenient sampling method has been implemented to select the sample of cyber cell officers and experts in Pune city. The sample unit consisted of 25 experts, 50 trial court judgments and 200 students for study purpose. Cyber cell officers which included police officers' software engineer, professional social workers, counsellor, etc.

Scope of the study

The scope of the present study is confined to the study of causes and social implications of cyber crimes against women. Therefore, the study does not focus on the other types of cybercrimes. For the study purpose specified sample unit has been selected (that is cyber cell officers). The geographical scope of the study is confined to Pune city only.

Results and Discussion

Table No. 1

Incidences of cyber-crimes/cases registered under IT Act (Section wise)

Sr. No.	Types of Cyber Crimes	Year 2016	2017	2018
01.	Cheating and Fraud	1167	4320	3654
02.	Offences of Social Networking	552	885	824
03.	Hacking	151	239	156
04.	Data Theft	22	25	32
05.	Mobile Offences	101	167	106
06.	Mobile Laptop Theft	13	06	00
07.	Fake Website	11	08	04
08.	Child Pornography	01	00	00
09.	Software and Movie Piercy	01	00	02
Total including other cyber-crime offences		2079	5741	5523

The information presented in the above table shows the various cyber crime incidents or cases registered to the police under Information Technology (IT) Act, during the years 2016 to 2018 in Pune city. The information is obtained from the

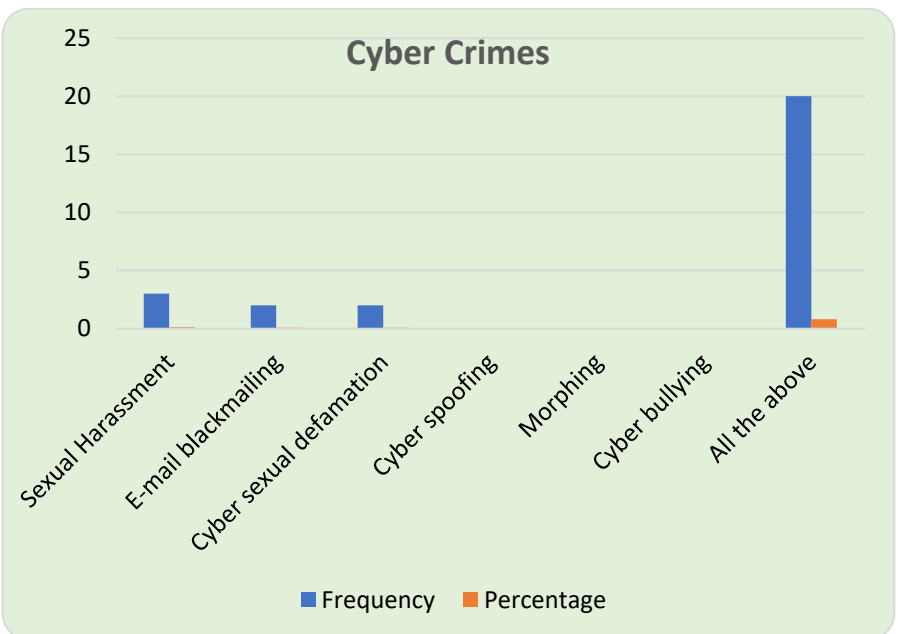
Pune city cyber-crime unit[5]. In the year 2016 there were 2079 cases registered under IT act, whereas in the year 2018 the total number of cybercrime cases were increased up to 5523. These cases are included cybercrime cases committed against women.

Table No.2

Nature of cyber-crimes against women frequently encountered

(Multiple responses)

Sr. No.	Particulars	Frequency	Percentage
01	Sexual Harassment	03	12%
02	E-mail blackmailing	02	08%
03	Cyber sexual defamation	02	08%
04	Cyber spoofing	-	-
05	Morphing	-	-
06	Cyber bullying	-	-
07	All the above	20	80%



In the opinion of 80% respondents (Experts), sexual harassment, email blackmailing, cyber sexual defamation, cyber spoofing, morphing cyber bullying etc. are some of the major cyber-crimes that are often encountered by the experts

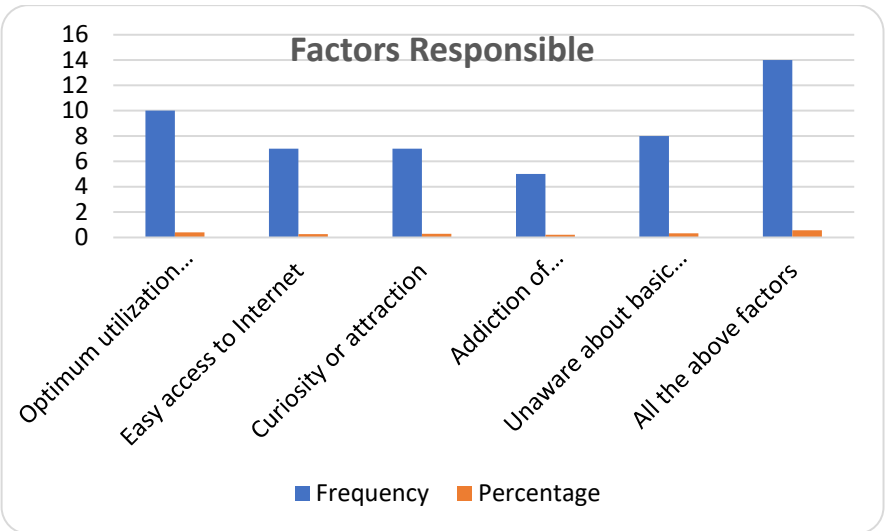
5 Source of Information Pune City Police Cyber Unit.

only 12% experts have stated that they have encountered the cyber crimes like sexual harassment, and 8% experts have stated that they often encountered the cyber crimes such as email blackmailing, and cyber sexual defamation. Various types of cyber crimes against women have been existed as there is an advancement in information technology in India.

Table No.3

Factors caused to increase cyber-crime against women (multiple responses)

Sr. No.	Particulars	Frequency	Percentage
01	Optimum utilization of mobile phone, computer etc.	10	40%
02	Easy access to Internet	07	25%
03	Curiosity or attraction	07	28%
04	Addiction of watching pornographic sites	05	20%



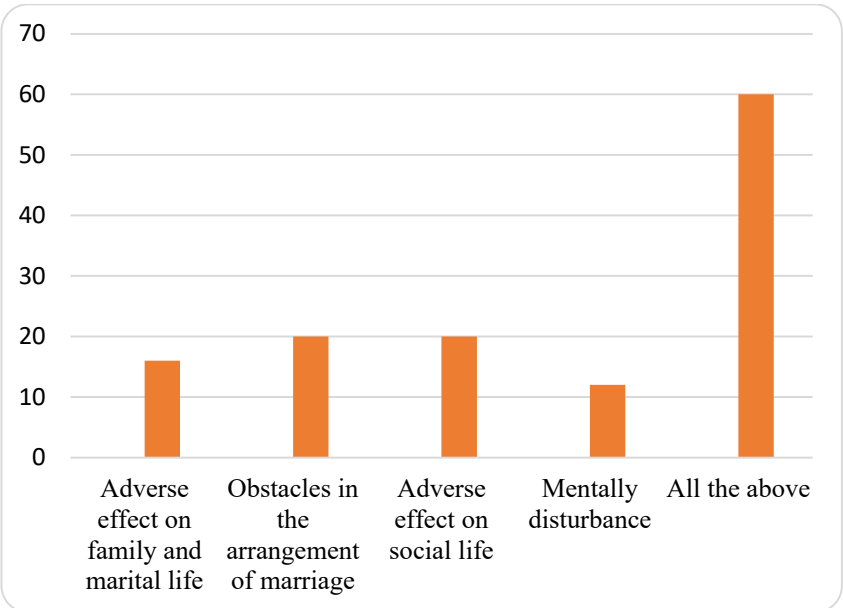
40% experts have stated that, optimum utilisation of mobile phone, computers and unnecessary surfing on Internet are some of the major factors that caused to increase cyber-crimes against women. Easy accessibility of Internet, curiosity and attraction of surfing on Internet are also mainly caused to rising cyber-crimes against women, stated by 25% and 28% experts respectively. According to 20% experts' addiction of watching pornographic sites, obscene materials among the adolescents and young people may also cause to raise the cyber-crimes. It is also found that, yet majority of the women are not having adequate skills for browsing or adequate knowledge of handling Internet. Majority of women are also not having

awareness about the basic cyber ethics, and hence they face the problem occurred through cybercrimes committed against them, opined by 32% experts. In the opinion of 56% experts, all the above-mentioned factors are equally responsible for rising of cyber crimes rate against women in India.

Table No. 4

Effects of cybercrime family life and social life of the victims

Effects	Frequency	Percentage
Mentally anguish	02	04%
Disturbance in family life	-	-
Disturbance in social life	-	-
Frequent disputes with spouse	-	-
All the above effects	48	96%
Total	50	100%



On the basis of study of 50 trial court judgements it is observed that, after victimised by cyber-crimes, women are facing many social problems and the problems related with the health, family and marital life, mentally disturbance etc. The 4% report have pointed out that, women victims faced problems like mentally disturbance, anguish due to victimisation of cyber-crimes. According to majority of the reports, after victimisation of cyber-crimes, majority of the women not only faced the problem of mentally anguish, but also faced the issues such as family and

social life disturbances, which caused to inferiority complex among the women. Victimised women feel that everyone is watching her doubtfully, though they have not made any mistake. Through the study of Trial Court judgement reports, it is observed that majority of the women victims faced the problem of frequent disputes with their spouses and other family members.

Findings

- It is found that, there was increasing trend of cyber-crimes against women during the study period (that is during 2016 to 2018). Due to many legal and social causes there is a raise in the cyber crimes rate against women.
- As per the information provided by the experts, it is come to know that, sexual harassment, e-mail blackmailing, cyber sexual defamation, cyber spoofing, morphing etc. are some of the major cyber offences which often committed against women as there is an advancement in Information Technology.
- As per the information provided by the experts it is observed that, yet, Indian women are not having in-depth knowledge and skill for browsing freely on Internet and social media. They are also not much aware about the basic cyber ethics. Apart from this, addiction of watching pornographic sites among young people, attraction of surfing on Internet social media, optimum utilization of mobile phone, computers, easy accessibility of internet etc. caused to increase cyber crime rate against women.
- Due to victimisation of cyber-crimes, there are adverse effects on the family marital and social life of the women. These effects are very disruptive to overall lifestyle and also to the earing potentials of women. Apart from this fear intense anger, depression etc. are some short-term effects. On the basis of oral discussions with experts it is come to know that these effects may convert long term depressive effects life- insomnia, anxiety loosing of faith in society etc.

Conclusion

Because of diversified nature of cybercrimes committed against women it is very difficult to find out the cyber security problems and issues which leads to unawareness of women users towards security issues. Therefore, NGOs have a wide role in creating awareness among women users, arranging workshop on safe and secure utilization of social media like Facebook. WhatsApp, Internet etc. There should be government intervention through the NGOs in reducing cybercrime rate against women with the help of awareness programmes advertisement in public interest etc.

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LEGISLATIVE AND REFORMATIVE APPROACHES TO COMBAT TRAFFICKING OF WOMEN AND CHILDREN IN INDIA

Bir Pal Singh[♣]

Abstract

Society and culture play important roles in satisfying the needs of every human group. At the same time, it is also true that certain sections of society have their place at the margins of mainstream culture and thus their marginalisation becomes the focal point of victimsation. Women and children face many such problems in society and as a result, their exploitation becomes continuous affairs in the hands of dominant people. Trafficking is one of the worst forms of human exploitation in which both women and children become safe targets. There are various socio-cultural and socio-economic factors responsible for the trafficking of women and children in the economically poor countries of the world. India is also facing such problems being a developing country. The present paper attempts to highlight the efforts taken in India for protecting and restoring the rights of victims of trafficking.

Keywords: Children, Discrimination, Laws, Trafficking, Women.

Introduction

Social exclusion and discrimination are the realities of every known human society. Everywhere the marginalized sections especially the women and children are victimised by the dominant male population for the satisfaction of their sexual and economic urges. The exploitation of children is the worst form of inhuman treatment. Today trafficking has become one of the most growing and profit-making industries after the trades of drugs and arms. Children are lured to trafficking against their own will. Trafficking is a modern form of slavery in which one's own will never work. Thus, victims become part of multifold exploitations. Affected persons loses their own identity because of the physical injury, psychological trauma, and the kind of atrocities they face.[1]

The statistics of trafficking present a very alarming situation all over the world. Office of Drugs and Crime, The United Nations released a Global Report 2020 on Trafficking in Persons. It assesses the global scope of trafficking in Persons covering one hundred forty-eight countries. The data gathered by the United Nations presents a very critical situation of trafficking in persons at the

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1 Siddhartha Kara, "*Zero Trafficking: Eliminating Sex Trafficking in India*", DASRA, 2013, p. 18, https://www.dasra.org/assets/uploads/resources/Zero%20Traffick%2020Eliminating%20Sex%20Trafficking%20in%20India.pdf, (visited on March 17, 2022).

global level. It mentions: "in 2018 about 50,000 human trafficking victims were detected and reported by 148 countries; 50 percent of detected victims were trafficked for sexual exploitation, 38 percent were exploited for forced labour; female victims continue to be the primary targets; women make up 46% and girls 19% of all victims of trafficking; globally, one in every three victims detected is a child, and the share of children among detected trafficking victims has tripled, while the share of boys has increased five times over the past 15 years". India is an origin for women and girls trafficked to other countries in Asia, the Middle East, and the West. India is also a destination country for Nepali and Bangladeshi women and girls trafficked for sex trade.[2]

Defining Human Trafficking

Trafficking is a human body trade where humans are involved, purchased, sold, and utilised like a commodity. It is a kind of contract between concerning parties. Black's Law Dictionary[3] defines it as "the illegal recruitment, transportation, transfer, harboring, or receipt of a person, esp. one from another country, with the intent to hold the person captive or exploit the person for labour, services, or body parts". The direction and dimensions of human trafficking are varied according to the social and cultural traditions of the human society. Prostitution has religious sanctions among certain communities in India. The term *Devdasi* is being used by different names in various states such as *Bhavin* in Goa, *Jogin*, *Bogam,* and *Kudikar* in Andhra Pradesh. They are known as *Thevardiyar* in Tamil Nadu, *Aradhine, Jogateen,* and *Murali* in Maharashtra. Further in Karnataka, they are known as *Jogati* and *Basani*. In Odhisa and Assam, they are called *Ganika* and *Nati* respectively. There are other communities like *Bedia* of Madhya Pradesh, Uttar Pradesh, and Rajasthan, and also *Becheda* of Rajasthan-Madhya Pradesh border, *Tawaif*, *Paturia,* and *Natani* in Uttar Pradesh. These communities traditionally sanction the practice of child prostitution as part of their customary practices. Section 370 of the Indian Penal Code 1860 defines trafficking as "whoever for the purpose of exploitation, (a) recruits, (b) transports, (c) harbors, (d) transfers, or (e) receives, a person or persons, by – First, using threats, or Secondly, using force, or any other form of coercion, or Thirdly, by abduction, or Fourthly, by practicing fraud, or deception, or Fifthly, by abuse of power, or Sixthly, by inducement, including the giving or receiving of payments or benefits, to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received, commits the offence of trafficking".[4]

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2 SAI, "*Research study on trafficking in women and girl children for commercial sexual exploitation: An interstate explorative study in Jharkhand, Odisha and West Bengal*", WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA, 2015, p. 2, https://wcd.nic.in/sites/default/files/Final%20Report%20Trafficking%20in%20women%20and%20girl%2C%20SAI.pdf, (visited on March 17, 2022).

3 Garner and A. Bryan, "*Black's Law Dictionary*", 9th ed. 2009, p. 1635.

4 "*Standard Operating Procedure (Sop) for Combating Trafficking of Persons in India*", NATIONAL HUMAN RIGHTS COMMISSION INDIA, 2017, pp. 1-2, https://nhrc.nic.in/sites/default/files/sop_CTPI_19012018.pdf, (visited on March 17, 2022).

The debate on trafficking became instrumental firstly in the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This was adopted by the General Assembly Resolution 317 (IV) of the United Nations on 2nd December 1949 and became enforceable on 25th July 1951. The United Nations General Assembly Resolution 49/166 was adopted on 24th February 1995. Trafficking again became the focal agenda of discussion. The United Nations General Assembly Resolution[5] A/RES/49/166 mentioned that it invites "the World Summit for Social Development, the Fourth World Conference on Women: Action for Equality, Development and Peace, and the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to consider including in their respective programs of action the subject of the traffic in women and girl children; and recommends that the problem of trafficking in women and girl children be given consideration within the implementation of all relevant international legal instruments and, if need be, that consideration be given to measures to strengthen them, without undermining their legal authority and integrity".

The United Nations General Assembly through its resolution 55/25 adopted the "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime"[6] on 15th November 2000, and this became enforceable on 25th December 2003. India also became the signatory in the year 2000. The Preamble of the Protocol reads: "The States Parties to this Protocol, declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit, and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights". The definitional and explanatory aspects of trafficking have been categorically mentioned in the Article 3 of the Protocol which states that:

(a) "Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, using the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs";

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5 UN General Assembly, "*Traffic in Women and Girls*", February 24, 1995, p.3, https://www.refworld.org/docid/3b00f30e8.html, (visited on March 17, 2022).

6 "*Protocol to prevent, suppress and punish trafficking in persons especially women and children*", UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, 2000, https://www.ohchr.org/Documents/ProfessionalInterest/ProtocolonTrafficking.pdf, (visited on March 17, 2022).

(b) "The consent of a victim of trafficking in persons to the intended exploitation outlined in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used";

(c) "The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons even if this does not involve any of the means set forth in subparagraph (a) of this article";

(d) "Child shall mean any person under eighteen years of age".

Trafficking is related to multitasking and thus it involves many players who are involved in this trade knowingly as well as unknowingly. Trafficking does not involve any serious note on gender and age division. It includes anyone – children or adults, males or females. The resultant of this can be seen in social, economic, and health aspects of the person or a group of persons who are exploited and forced to be a part of it. Trafficking involves the violation of fundamental rights of men, women, and children especially those who belong to the marginalized sections of society. Vulnerability and poverty are the main causes of occurrence of this and for financial gains, people become soft targets unwillingly involve themselves in this trade.

Factors Responsible for Generating the Trafficking

Trafficking has multifaceted structures resulting from various combined factors in person(s). Compulsion, cooperation, motivation, manipulation, initiation, circumstances, exploitation, etc. become essential factors to bring people into this exploitative trade of human business by the human themselves. Poverty, gender, age, increased wealth gap, lack of education, low status of women, unending demand for prostitution, failed governance in protecting the rights of women and children, and free market without any effective measures to control trafficking, etc. are causes for the running of trafficking and resultant is continuous exploitation of women and children in its various dimensions and directions. Social pathologies of the societal behaviours and interactive approaches about the dispute in the family, marital relations, adversaries in the form of physical and sexual abuse, uncertainty of economic security, gender stereotypes, ill treatment by husbands, and husbands acquiring a second or a third wife, and all other such behavioural aspects are considered to create a vulnerable ground to trafficking[7].

Nair and Sen[8] cite "how the feminization of poverty and migration increases women's vulnerability to traffickers. Driven by the pressing need for gainful employment and by the scarcity of jobs in their home bases, women and children are easy prey to the designs of unscrupulous agents offering 'choices' and assistance with jobs, particularly across the border". Further mentioned here that "the disempowerment, social exclusion, and economic vulnerability are the results of policies and practices that marginalize entire groups of people and render them particularly vulnerable to being trafficked. Natural disasters, conflict, and political turmoil exacerbate the inadequacies of already tenuous social protection

7 Nair P.M. and Sen, Shankar, "*Trafficking in Women and Children*", 2005, pp. 7-8.
8 *Ibid*, p. 8.

measures".[9] Thus, the causes of human trafficking are very complex with deep roots.

Trafficking as a process has various outcomes and binding effects. Various factors are associated with trafficking in persons and the harm that is the outcome. Generally, two main factors are involved in human trafficking: firstly, the available supply of people. They are those who are susceptible to being tricked, manipulated, and/or forced into "slavery-like situations", and secondly, the demand created by those who use these people to fill a need for cheap, vulnerable and highly exploitative commercial sexual services and/or exploitative labour"[10].

Child Trafficking and Its Forms

Children are the worst victim of trafficking. Children become the victim of trafficking in many folds in the early age of their development in the form of bonded labour, domestic workers, working in the construction industry, garment industry, carpet industry, and agriculture fields. The other ways include begging, organ trade, drug peddling smuggling, forced prostitution, sex tourism, pornography, circus, dance troupes, beer bars, camel jockeys, etc. There is no uniformity in the formal definition of a child as it varies from one legislation to others. Nair and Sen[11] have noted that "under the Child Labour (Protection and Regulation) Act 1986, a child means a person who has not completed 14 years of age. Under the Juvenile Justice (Care and Protection of Children) Act 2000, the age at which childhood ends is 18 years for both boys and girls. The Convention on the Rights of Child (CRC) defines a child as every human being below the age of 18 years".

A major legislative measure was adopted by the Ministry of Law and Justice, Government of India in the year 2012 when it enacted by enacting the Protection of Children from Sexual Offences Act, 2012. This act aims to "protect children from offences of sexual assault, sexual harassment, and pornography and provide for the establishment of Special Courts for the trial of such offenses and matters connected therewith or incidental thereto. It further says that it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child. And the law must operate in a manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child". Child trafficking is also considered an offence under the Prohibition of Child Marriage Act, 2006. Marriage may become null and void if any act of trafficking is involved in child marriage[12]. Socio-

9 "*Signatories to the United Nations Convention Against Transnational Organized Crime and its Protocols*", UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2008.

10 The Bangladesh Thematic Group on Trafficking, REVISITING THE HUMAN TRAFFICKING PARADIGM: THE BANGLADESH EXPERIENCE, 1st ed. 2004, pp. 24-27, http://publications.iom.int/bookstore/free/Revisiting_Trafficking_Bangladesh.pdf, (visited on March 17, 2022).

11 *Supra* n. 7, p. 131.

12 *Supra* n. 2, pp. 16-17.

economic and educational backwardness play an adverse role many times in child trafficking. Children belonging to these sections of society become the soft targets to get involved in sex trafficking. The rapid process of urbanization and expansion of slum areas with this also accelerates the social pathology of children living in these areas who are vulnerable to sex trafficking due to forced labour. A report by National Human Rights Commission mentions that illiteracy supported by poor economic conditions make the children and family members knowingly and unknowingly become the victim of trafficking for their survival. For these sections, migration and trafficking are considered interconnected issues as agents and traffickers generate the exploitation of children as their business. This situation is happening across India due to mobility and the rapid growth of urbanization.[13]

Legal Framework at National Level

Law always serves as efficacious means of tackling problems. Various measures have been taken both at the international and national levels to curb trafficking in persons. Article 23 of the Constitution of India, Article 20 of the Constitution of Nepal, and Articles 18 and 34 of the Constitution of Bangladesh contain provisions prohibiting trafficking and forced labour. There is no specific law that deals with the definitional aspect of human trafficking. Though the Juvenile Justice (Care and Protection of Children Act) Amendment Act 2021; the Bonded Labour System (Abolition) Ac, 1976; the Immoral Traffic Prevention Act 1956, and the Indian Penal Code, 1861 are the legal enactments dealing with such issues.

The Constitution of India provides all possible protection to victims of trafficking. Both substantive law and procedural law act as a base for and procedure for actions against such crime. The relevant provisions under the Indian Penal Code(IPC), are: "section 359 (Kidnapping), section 360 (Kidnapping from India), section 361 (Kidnapping from lawful guardianship), section 362 (Abduction), section 363 (Punishment for kidnapping), section 363A (Kidnapping or maiming a minor for purposes of begging), section 364 (Kidnapping or abducting in order to murder), section 364A (Kidnapping for ransom, etc.), section 365 (Kidnapping or abducting with intent secretly and wrongfully to confine person), section 366 (Kidnapping, abducting or inducing woman to compel her marriage, etc.), section 366A (Procuration of minor girl), section 366B (Importation of girl from foreign country), section 367 (Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.), section 370 (Trafficking of person), section 370A (Exploitation of a trafficked person), section 371 (Habitual dealing in slaves), section 372 (Selling minor for purposes of prostitution, etc.), section 373 (Buying minor for purposes of prostitution, etc.), section 374 (Unlawful compulsory labour), section 376 (Punishment for rape), section 376A (Punishment for causing death or resulting in persistent vegetative state of victim), section 376B (Sexual intercourse by husband upon his wife during separation), section 376C (Sexual intercourse by a person in authority), section 376D (Gang rape), section 376DA (Punishment for gang rape on woman under sixteen years of age), section 376DB

13 *Supra* n. 1, p. 7.

(Punishment for gang rape on woman under twelve years of age), and section 376E (Punishment for repeat offenders)".

The Immoral Traffic (Prevention) Act, 1956 is specific legislation dealing with trafficking. The Act defines the terms "brothel, child, corrective institution, magistrate, major, minor, prescribed, prostitution, protective home, public place, special police officer and trafficking police officer". Some of the other relevant legislative frameworks prohibiting the trafficking are- "Karnataka *Devdasi* (Prohibition of Dedication) Act, 1982; Child Labour (Prohibition and Regulation) Act, 1986; Andhra Pradesh *Devdasi* (Prohibiting Dedication) Act, 1989; Information Technology Act, 2000; the Goa Children's Act, 2003; the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006; the Indian Evidence Act, 1872; Child Marriage Restraint Act, 1929; Young Persons (Harmful Publications) Act, 1956; Probation of Offenders Act, 1958; Criminal Procedure Code, 1973; Bonded Labour System (Abolition) Act, 1976; Indecent Representation of Women (Prohibition) Act, 1986; and the Transplantation of Human Organs Act, 1994".[14]

International Laws on Combating Trafficking

Trafficking has become a global phenomenon and thus it involves the global concern to combat trafficking. Various covenants and conventions have been ratified in international law to combat human trafficking. Some efforts in this regard have been made to protect and secure the rights of the two most vulnerable sections (women and children) by binding the members' countries to strictly apply the rules related to the prevention of trafficking and also to adopt the proper rehabilitative approach for the mainstreaming of the victims. Trafficking destroys the in-person identity of women and girl children. The psychological effect of trafficking has far-reaching consequences on the mental and social well-being of the victims of trafficking. Globalisation has facilitated freer movements of people, goods, and services across international borders, unwittingly resulting in camouflaging clandestine operations such as human trafficking.[15]

Trafficking of children is always seen as a grave crime. The efforts have gained the momentum at the international level by applying the international instruments such as "the Convention on the Elimination of All forms of Discrimination against Women, (CEDAW) 1979; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; Declaration on social and legal principles relating to the Protection and Welfare of Children with special reference to Foster Placement and Adoption Nationally and Internationally; the Convention on Suppression of Trafficking in Persons and the Prostitution of others; the

14 "*Draft National Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women*", MINISTRY OF WOMEN AND CHILD DEVELOPMENT, 2006, p. 8, http://www.protectionproject.org/wp-content/uploads/2010/11/NAP-Draft-India_2006.pdf, (visited on March 17, 2022).

15 "*Trafficking in women and girls: Report of the expert group meeting*", UNITED NATIONS DIVISION FOR THE ADVANCEMENT OF WOMEN, 2002, p. 6, http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/Finalreport.pdf, (visited on March 17, 2022).

Convention on the Rights of the Child, 1989; the Platform for Action of the Fourth World Conference on Women and the Beijing Platform of Action, 1995; the Declaration and Agenda for Action Adopted by World Congress Against Commercial Sexual Exploitation of Children held at Stockholm in 1996; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000; Second World Congress against Commercial Sexual Exploitation of Children held at Yokohama, Japan 2001 to review developments as a follow-up process to strengthen the commitment to protect children from sexual exploitation; and abuse and the SAARC Convention on Regional Arrangement for the Promotion of Child Welfare 2002."[16]

Combating of Trafficking

Prevention of human trafficking requires several types of interventions. Not only the Governments, and agencies but everyone whether media, enforcement agencies, civil societies- should involve directly or indirectly to curb such inhuman acts. The like-minded people whatever the positions they are having, at whatever the level they have been placed should assist to prevent the practice of human trafficking. Presently, the subject matter of trafficking of persons is dealt with under the provisions of the Indian Penal Code 1860, and the Immoral Traffic (Prevention) Act 1956. Section 370 of the Indian Penal Code, 1860 only defines and penalises the offence of trafficking of persons, whereas, the provisions of the Immoral Traffic (Prevention) Act 1956 deal with trafficking of persons for commercial sexual exploitation and it does not recognise trafficking of persons for physical and other forms of exploitation.

Keeping in view the above deficiencies in the existing legislation and after considering the issues relating to the prevention, rescue, and rehabilitation of victims of trafficking, it has been considered necessary to bring comprehensive legislation, namely, the Trafficking of Persons (Prevention, Protection, and Rehabilitation) Bill 2018, covering all related aspects of trafficking of persons. It aims "to prevent the trafficking of persons, to prosecute offenders and to provide care, protection and rehabilitation to the victims of trafficking; to create a conducive legal, economic and social environment for the victims of trafficking and also addresses the transnational nature of the crimes; to provide for dedicated institutional mechanism at District, State and National level for prevention, protection, investigation and rehabilitation aspects relating to trafficking; to provide for new offenses with stringent punishment and fine, which are aggravated in nature and not addressed in existing laws; to ensure confidentiality of victims, witnesses, and complainants by not disclosing their identity; and to provide for Rehabilitation Fund for the welfare and rehabilitation of victims to ensure timely relief to the victims and also addresses their physical, mental trauma, etc. It also proposes to designate a Sessions Court in each district for speedy disposal of the cases under the proposed legislation and for this purpose the bill also proposes the

16 *Ibid*, p. 10.

appointment of Special Public Prosecutors to deal with such cases in a time-bound manner".[17]

Role of Ministry of Women and Child Development

In 1998, the Ministry of Women and Child Development (MWCD) formulated a National Plan of Action to Combat Trafficking and Commercial Sexual Exploitation of Women and Children. The purpose was to mainstream and reintegrate women and children who have been victims of commercial sexual exploitation into society. The MWCD in collaboration with the National Institute of Public Co-operation and Child Development (NIPCCD) and UNICEF has developed three manuals: a "Judicial Handbook on Combating Trafficking of Women and Children for Commercial Sexual Exploitation", a "Manual for Medical Officers for Dealing with Child Victims of Trafficking and Commercial Sexual Exploitation", and a "Counselling Services for Child Survivors of Trafficking". The Ministry has provided States with guidance for implementing the National Plan of Action. In 2005, it issued a Protocol for Pre-Rescue, Rescue, and Post-Rescue Operations of Child Victims of Commercial Sexual Exploitation. The following are some of the initiatives by the Ministry of Women and Child Development that have a direct impact on the care and protection of human trafficking victims:

- Ujjawala Scheme
- Swadhar Greh
- Integrated Child Protection Scheme

The Ministry has developed the *Ujjawala* central program, which is a comprehensive scheme for preventing human trafficking and rescuing, rehabilitating, and reintegrating victims of commercial sexual exploitation. The scheme, which began in 2007, was created with the primary goal of combating human trafficking on the one hand and rescuing and rehabilitating victims on the other. The implementation of the scheme has been initiated with the help of NGOs. The *Swadhar Greh* scheme caters to the needs of women victims in difficult circumstances. It aims to the institutional rehabilitation of women victims as well as leading them to secure a dignified life by protecting their socio-economic rights with a special focus on the issues of food, shelter, clothing, and health. To ensure the proper mechanism for child protection, an Integrated Child Protection Scheme was introduced in the year 2009 by the central government aiming at the overall development of the children in adverse conditions. The scheme works to reduce the reduce vulnerabilities of situations and actions that lead to abuse, neglect, exploitation, abandonment, and separation of children.[18]

The Ministry of Home Affairs, Government of India has introduced a very comprehensive scheme "Strengthening Law Enforcement Response in India against

17 *Id*., p. 18.

18 "*Current Status of Victim Service Providers and Criminal Justice Actors in India on Anti Human Trafficking*", UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2013, p. 35-37, https://www.unodc.org/documents/southasia/reports/ Human_ Trafficking-10-05-13.pdf, (visited on March 17, 2022).

Trafficking in Persons through Training and Capacity Building". It proposes to establish 330 "Anti Human Trafficking Units" across the country. A Nodal Cell has also been set up by the Ministry of Home Affairs in this regard.This Cell acts as a coordinating mechanism between the states and union territories on the various issues related to the combating of human trafficking. Besides the efforts on the part of the government, there are many corporate bodies/non-profit organizations that are also working for the rehabilitation of victims of trafficking in India. Some of such organizations are[19]: "Sanlaap, a Kolkatta based non-profit organization partnered with 10M, NIFT, Café Coffee Day, ITC Sonar Bangla and Explotec call center, on livelihood programs for survivors; Core, a Delhi-based non-profit, liaised with the corporate sector and opened up avenues for the sale of the handicraft items produced by the rescued children. This enabled the victims to produce high-quality demand-based products that could be marketed easily. Amul trains these young girls to place them at their retail outlets in Hyderabad. With the assistance of government officials, kiosks were opened in various places including the government secretariat complex. Network against Commercial Sexual Exploitation and Trafficking (NACSET), started by the non-profit organization Prerana, is a network of 253 organisations. NACSET has several achievements to its credit and is supported by UNICEF-Maharashtra, UNIFEM-SARO, USAID, and the Government of Maharashtra. It has been less effective most recently with decreased funding from USAID. The South Asia Regional Initiative/Equity Support Programme (SARI/Q) was a three-year USAID-funded project managed by the Academy of Educational Development (AED) and Management Systems International (MSI) under the South Asia Network for Advocacy against Trafficking in Persons (SANAT)".

It is noteworthy here that efforts have also been made by international bodies to combat trafficking. Action against Trafficking and Sexual Exploitation (ATSEC) was the first network in South Asia (Afghanistan, Bangladesh, India, Mauritius, Nepal, Pakistan, and Sri Lanka) supported by UN agencies. In 2004, a Cross Border Anti-Trafficking Network was established. This network is a coalition of NGOs from Bangladesh, Nepal, and India working to have control of cross-border human trafficking.

Indian Judiciary on Combating Trafficking

Judicial interventions have been playing very proactive roles in protecting and safeguarding the rights of vulnerable and marginalised sections since the beginning. For ensuring speedy justice, the Apex Court and the respective High Courts of the country are taking the efforts to strengthen institutional machinery. Monitoring mechanisms are required to ensure the rights of victims affected by the trafficking so that they may further lead a better life in society while making their dignified identity. Effective implementations of laws related to combating the trafficking of women and children become the need for a just society. Some of the various proactive landmark judgments related to combating human trafficking are mentioned here as "People's Union for Democratic Rights Vs. Union of India (1982) 3 SCC 235, Laxmi Kant Pandey v. Union of India (1984) 2 SCC 244,

19 *Supra* n. 1, pp. 26-28.

Bandhua Mukti Morcha v. Union of India and others AIR 1984 Supreme Court 802, Ashram Vs. State of Bihar and Others 1987 (Supplementary) Supreme Court cases 141, Liberties Vs. State of Tamil Nadu Writ Petition Civil No. 3922 of 1985, Vishal Jeet Vs. Union of India (1990) 3 SCC 318, M C Mehta v. State of Tamil Nadu 1996 6 (SCC) 756, Madhu Kishwar Vs. State of Bihar (1996) 5 SCC 125, Gaurav Jain v. Union of India (1997) 8 SCC, Prerna v. State of Maharashtra 2003 (2) Mah.L. J. 105, Munni v. State of Maharashtra, Criminal Writ Petition No. 227/2011(Bombay High Court), Geeta Kancha Tamang v. State of Maharashtra, Criminal Appeal No. 858 of 2009, State of A.P. v. Bodem Sundara Rao [(1995) 6 SCC 230: 1995 SCC (Cri) 1097], State of Punjab v. Gurmit Singh [(1996) 2 SCC 384: 1996 SCC (Cri) 316], Hori Lal v. Commissioner of Police, Delhi and Ors Respondents Writ Petition (Crl.) No. 610 of 1996, Kamaljit v. State of NCT of Delhi (2008)101 DRJ 582, Bachpan Bachao Andolan v. Union of India 2011 SCC (5) 1, and Budhadev Karmaskar v. State of West Bengal (2011) 11 SCC 538".[20]

Conclusion

The Government of India does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so. The government demonstrated overall increasing efforts compared to the previous reporting period; therefore, India remained in Tier 2. These efforts included convicting traffickers and completing a high-profile investigation into a case that involved officials complicit in trafficking at a government-funded shelter home in Bihar, convicting 19 individuals in the case, including three state officials; an influential former legislator was among the 12 that received life sentences. The government also filed First Information Reports (FIRs) against other government-funded shelter homes in Bihar that allegedly abused residents, including trafficking victims. For the first time, the Madras High Court reversed an acquittal in a bonded labour case. The government continued to work on its draft anti-trafficking bill and committed to devoting funding to expand its police anti-human trafficking units (AHTUs) to all 732 districts.[21]

Some of the recommendations of the Trafficking in Person Report[22] by the United States of America are noteworthy and will help India to combat the trafficking of women and children. These are as: "Increase investigations, prosecutions, and convictions of all forms of trafficking, including bonded labour; vigorously investigate allegations of official complicity in human trafficking and sentence perpetrators to significant prison terms; develop and immediately implement regular monitoring mechanisms of shelters to ensure adequate care, and promptly disburse funding to shelters that meet official standards for care; improve clarity on central and state government mandates for and implement protection programs and compensation schemes for trafficking victims to ensure states immediately provide release certificates, compensation, and non-cash benefits to all

20 *Supra* n. 20, pp. 25-27.

21 Trafficking in Persons Report, June 2020. Department of State, United States of America, p. 250, https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf., (visited on Mach 17, 2022).

22 *Ibid*, pp. 250-251.

victims; provide clear mandates, dedicated funding, and training to existing AHTUs, and establish new AHTUs with these same resources; continue to disseminate and implement standard operating procedures (SOPs) for victim identification and referral, and train officials on their use; amend the definition of trafficking in Section 370 of the Penal Code to include labour trafficking and ensure that force, fraud, or coercion are not required to prove a child sex trafficking offense; increase oversight of, and protections for, workers in the informal sector, including home-based workers; lift bans on female migration through agreements with destination countries that protect Indian workers from human trafficking, and provide rehabilitation services for child soldiers associated with non-state armed groups".

Trafficking is a very complex issue in any society and it needs a serious grievance redressal mechanism to combat. In the fight against the trafficking of women and children, we need the support and involvement of all the sections and sectors of society. The Government of India has already passed the Trafficking of Persons (Prevention, Protection, and Rehabilitation) Bill, 2018 in Lok Sabha (Lower House of the Parliament). The Bill seeks to establish National Anti-Trafficking Bureau to investigate trafficking cases. Thus, if passed by both houses of the Parliament, it may have a far-reaching effect on combating trafficking in the country. There is a need to adopt a victim-oriented approach since in courts focus always remains on the accused. Justice Dharmadhikari[23] (2010:96) has aptly remarked:

The existing criminal justice delivery system has failed to satisfy society in maintaining the law and order. The main reason for its partial failure is over emphasis in court proceedings on the right of the defense of the accused, being his constitutional right under articles 20, 21, and 22 of the Constitution… The apathy towards the rights of the victim and very little or no participation given to him in the course of the trial, coupled with frequent occurrence of witnesses turning hostile under compulsions e.g., intimidation, coercion, or allurement deflects the course of justice, invariably resulting in acquittals. The victims are thus left to suffer physically, mentally, and financially under the crime committed against them.

The implementation of the law has always been a serious concern in India. As we all know that any legal enactment depends on public support and the willpower of the enforcement agencies to make that law more functional at the ground level. Law cannot be the only instrument to take care of all problems. And for the purpose combined efforts, coordination, and cooperation of all the active groups of the society, active functioning of NGOs, Media, and the positive approach and awareness of the people themselves- all are required.

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23 Dharmadhikari, J, D.M., HUMAN VALUES AND HUMAN RIGHTS, 1st ed. 2010.

DISABILITY JURISPRUDENCE IN REFERENCE TO CASE OF V. SURENDRA MOHAN v. STATE OF TAMIL NADU

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Abstract

Through this paper the author has analysed the case of V. Surendra Mohan v. State of Tamil Nadu, decided by the Supreme Court on January 22, 2019. The case deals with a person with blindness who wants to appear in the interview for the recruitment of Civil Judge Junior Division, in the state of Tamil Nadu, and his pursuit of justice and equality. The authors have analysed in-depth what the problem is with disability jurisprudence in India. The courts in India have failed to interpret the cardinal principles enshrined under Article 14 and 21 of the Constitution of India, along with Section 32 of the Person with Disabilities Act 1995 to hold the society as one which is disabled rather than the person. Therefore, the paper points out that the approach taken by the court in the present matter is inherently flawed and suggests the correct approach that should be taken in such cases. The paper highlights the dichotomy of the judiciary in India which hesitates to apply the same standards of responsibility and accountability to the general masses, which it expects all the other institutions to behold. It points out the injustices that a person with disability faces in society, where even the judiciary seems to be against him, thus making him a truly disabled man. This article seeks to analyse the effect of laws on persons with disabilities and how far we have come to accommodate our disabled population in the mainstream fold.

Keywords: Dichotomy, Disability, Equality, Judiciary, Justice.

Introduction

> *Blindness is unfortunate handicap but true vision does not require the eyes*.
>
> - Helen Keller

The irony is a figure of speech used in the English language usually to highlight the contradictory nature of a situation, it is this very irony that shall be explored in this article. Following what you preach, is one of the sayings that we all have been hearing since our childhood. As an institution that holds authority and respect in the eyes of the world, not just the countrymen, the Supreme Court of India is more than expected to follow this adage. The present case is an antithesis to this old saying. The Apex Court has held at various instances the validity of

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reservations in public sector jobs and has acted as the guardian of the rights of the differently able community on many occasions but both these stands seem to lose their legitimacy when it comes to their implementation on the institution of judiciary. It is this double standard that the researcher will focus on in the research assignment.

The government has taken various steps and has set guidelines so that the differently-abled can also have the right to live with their head held high. The state has a *parens patriae* role and thus, does not only have the role but also a duty to take care of its citizen and also to provide an atmosphere where everyone is equal and self-sufficient. As the judiciary is a state when it comes to administrative (non-judicial) functions,[1] it is more than expected of it to do so.

Justice Jak Yacoob, Judge of the Constitutional Court of South Africa a famous anti-apartheid activist of South Africa and the person who was completely blind since his early childhood set an example that justicing does not need eyes to see, it needs a 'sound and just' mind and nothing else. Prof. Dr. Sirish Deshpandey, a professor at MNLU, Nagpur who was pegged to be the best teacher in the country,[2] was born blind. The current judgment bars minds like such to serve in the judicial services, and deprives the national of their invaluable contribution and thus needs to be revisited.

Background of the Case

The state of Tamil Nadu in consultation with the High Court of Madras gave a nod to the Tamil Nadu Public Service Commission (TNPC) on the 8th of August 2014, to go ahead with the notification for filling the vacancies of 164 posts of Civil Judge Junior Division. Subsequently, on 26.8.14, the TNPC issued a notification for the vacancies of the above-mentioned job. The notification specified that under the blind category of the reservation for specially-abled people with 40 to 50% of blindness were eligible to apply.

The petitioner who was a lawyer by profession got a medical certificate with 70% blindness and applied for the said job. The petitioner under the column of the percentage of blindness mentioned his disability as more than 40%. The petitioner qualified for the written examination and when all the necessary certificated were demanded the upcoming interview, he produced his disability certificate. After the submissions were made, the list of the qualified candidates came notifying who were eligible to go forward with the interview, but the list did not contain the name of the petitioner. The petitioner went to the High court of Madras, under the writ petition and the court dismissed the petition on the ground that, the notification of the TNPC was not challenged by the appellant and therefore he cannot challenge the limitation. Then the aggrieved petitioner came to the Supreme Court in its appellate jurisdiction.

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1 *A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 60.

2 Sanjay Jain, "*A Tribute to Dr. Shirish Deshpandey*", BARANDBENCH, https://www.barandbench.com/columns/a-tribute-to-dr-shirish-deshpande, (visited on February 12, 2021).

Issues Raised before the Court

Following were the issues before the court to ponder and decide.

- Was the appellant eligible to participate in the selection process as specified by the notification dated 26.08.14?
- Was the decision of the State government to give reservations to people with 40 to 50% disability a valid condition as per the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Signature Not Verified Digitally signed by Participation) Act 1995?

Arguments Advanced

Arguments by the Counsel for Appellant

The counsel for the appellant submitted that the job in question, that is, of the post of civil judge junior division has been identified under the section 32 of the Persons with Disabilities Act 1995 (Act 1995), which implies that it can be reserved for the person with a disability and hence the restriction of 40 to 50% of disability put is not valid. Also, by exercising the power granted by the proviso clause of section 33, the Government put an exemption that the post is not for a person with complete blindness, but it does not in any way pinpoint the upper limit of the percentage of disability. Thus, the limitation has no statutory backing. He argued that when the post was identified under Section 32 of the Act in 2005 no such limitation was placed, and also the High Court while deciding on the case at hand did not take the view of an expert committee on this limitation, given that the High Court is not an authority to peg a limitation on the percentage of disability that would render a person incompetent to perform its duty, hence the limitation is arbitrary and baseless.

Arguments by the Counsel for the State of Tamil Nadu

In reply to all the arguments made by the appellant, the counsel for the State of Tamil Nadu submitted that the writ petition challenges only the letter dated 08.08.2014 and not the notification dated 26.08.2014 issued by the TNPC. Also, it is imperative for the appellant to challenge the said notification to contend that he is eligible. Therefore, not challenging the said notification was sufficient ground to dismiss the case by the High Court.

Arguments by the Counsel for the High Court

The Learned Counsel for the High Court submitted that the advertisement for the post required the candidates to submit a disability certificate and the appellant failed to do say also in the application form the appellant wrote more than 40% and does not specify the exact disability percentage. As has been now placed before the court the actual disability percentage is 70% which is more than the prescribed limit and hence the appellant is not eligible. The counsel further argued that the disability certificate did not say that the appellant was fit to carry out the job of civil judge junior division hence he was not. Also, the counsel argued that the limit set was in consultation with the high court and hence was completely valid. It was further submitted that looking at the post of civil judge, the position requires tasks that cannot be performed by a person with some disability.

Judgment

The judgment written by Justice Bhushan was methodical and it dealt with every issue one after the other. Coming to the first issue which was the appellant or any candidate with 70% disability be allowed to participate in the selection process as per the notification of the TNPC. The court was of the opinion that as the advertisement for the job clearly stated that the candidates with 40 to 50% of disability were allowed to participate in the selection process as was also clear by the notification of TNPC, and the order of the state government.

It was also pointed out by the court while dealing with the issue that the high court and the government order put a limit on the percentage of disability. Thus, the candidate was ineligible to apply for the post. Further, the court said that since the notification of the TNPC was not challenged, so the appellant cannot be allowed to challenge the limitation, thus upholding the dismissal of the case by the High Court of Madras.

Moving forward the court in the judgment expressed its opinion that the government order specifying the condition of 50% limitation of disability was completely set-in due procedure. Now the question before the court was whether the condition of 40 to 50% disability was valid or not. While looking into this question the court observed provisions of the Act. Interpreting it the court observed that the person with disability is the one who has more than 40% of the disability. Although the act did not define partial blindness the court said that

> *The word partial blind may be a general concept but where a percentage has been fixed looking to nature of job, it cannot be said that all partially blind are eligible. There is a valid classification with a nexus to object sought to be achieved, when eligibility is fixed 40% to 50% of disability.*

The court also pointed out that as per Articles 233, 234, and 235 of the Constitution of India the High Court has control over the judicial services of the state. Also, the court pointed out that judicial services come on the state list of the Seventh Schedule of the Constitution. hence the state government is fully competent to take executive actions with regard to recruitment for the post of Civil Judge (Junior Division). Section 33 of the Act provides for reservation for the person with disability, which is referrable to Article 16(1) of the constitution of India. The Supreme court in order to give authority to the claim of the High Court in dealing with the matter of judicial services referred to the case of *State of Bihar v. Bal Mukund Sah*,[3] where the question of reservation in judicial services was death with.

Then the court rightly pointed out that the high court was duly consulted and it has the power to lay down the eligibility criterion. The court then went on to say that the judge needs to have a reasonable limit on the sensory facilities, thus said that the limit seems to be fair logical and reasonable. And commented that duties of a judicial officer cannot be performed by people with disability more than 50%.

3 *State of Bihar v. Bal Mukund Sah* (2000) 4 SCC 640.

Analysis of the Judgment

In the little world in which children have their existence, there is nothing so finely perceived and finely felt, as injustice.

The irony is that the scales of justice are balanced by a blindfolded lady. The Supreme Court lost an opportunity to lead by example. In this dreadful decision, the apex court ruled that a person with more than 50% disability is incompetent to be a judge.[4]

Various Approaches towards Disability

Disability has in itself a negative connotation with it. It in a way categorizes people into normal and abnormal. Talking about the different approaches to disability, culturally, the people with disability have been considered 'cursed' who are suffering because of the sins they committed in their previous life. This is the religious approach to disability. Then came the charity model, which puts the assistance of the disabled, as a matter of sympathy and pity. Then there is another approach which is the social model, which separates impairment and disability, saying that disability is due to the barriers in the society which does not let the person with a disability be at an equal footing. The Human right-based model, contains the value of dignity, justice, and rights with it.[5]

This Human right based approach has been recognised by the Apex Court in the case of *D N Chanchala v. The State of Mysore*,[6] but in the present case, the Court chose not to do so. The court in the present case though established that the act of the State of setting up of limitation is absolutely valid but it failed to check whether the limitation set here is correct or not. The Court, in the case of *Syed Bashir-ud-din Quadari v. Nasir Ahmad Shah*[7] said that, when necessary arrangements can be made for the person with a disability to remove the impediments, then all those arrangements should be made. The irony is that the court here in the present case, did not consider making such an arrangement, which could have easily been made, but chose the rather easier path.

Interplay of Fundamental Rights

The fundamental right is the heart and soul of the constitution, one of the most important rights among it is the Right to Equality, it ensures that there is no preferential treatment and equality prevails among all, including the people of disability. Article 14 enshrines the right to equality for us all. Taking this concept on a broader canvas, the said article also gives us all the right to contribute to

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4 Shamnad Basheer, "*The SC Ruling that a Blind or A Deaf Person Can't be a Judge Goes Against the Constitution's Spirit*", HINDUSTAN TIMES, January 26 2019, https://www.hindustantimes.com/analysis/the-sc-ruling-that-a-blind-or-a-deaf-personcan-t-be-a-judge-goes-against-the-constitution-s-spirit/storytBHaxJ6uYL2xVcelFcqUFP.html, (visited on January 29, 2021).

5 Tushti Chopra, "*Expanding the horizons of Disability Law in India: A Study from Human Rights perspective*", THE JOURNAL OF LAW, MEDICINE & ETHICS, Vol. 41 No. 4, 2013, p. 807.

6 *D N Chanchala v. The State of Mysore* AIR 1971 SC 1762.

7 *Syed Bashir-ud-din Quadari v. Nasir Ahmad Shah* (2010) 3 SCC 603.

society equally, and thus gives the state an onus to the government to prove an atmosphere conducive to doing so.

As per our apex court, the Right to Life enshrined in Article 21 also includes the right to live with dignity. It said that mere animal existence is not life but it includes the right to live with dignity and human values. The right to choose the right to have a life of one's choice is something that lies at the centre of this right. As per Justice AK Sikri, "*personal autonomy is respected at the touchstone of human dignity. An act, direct or indirect, interfering with the autonomy to choose will amount to tampering with the human dignity quotient.*" In the case of *Navtej Johar v. UOI*[8] this right of personal autonomy was put forth and was glorified.[9] The decision stands contrary to each of these principles as it fails to accept and provide for the personal autonomy of the people to flourish. This personal autonomy and dignity aspect of the right to life was also affirmed in the case of *Amita v. Union of India*,[10] by the apex court. In this case, the petitioner was denied the opportunity to appear for the exam for the post of Probationary Officer (PO) in a bank, only on the ground that the girl was blind. Interpreting Article 14, the Supreme Court said that it is the duty of the state to provide an atmosphere of equality and dignity for all.

Regardless of all this, the Supreme Court has in the present case chosen to weed the person with disability out. It is not only demeaning but also a step that gives the "helpless" feeling to the people, who suffer from various disabilities.

The Correct Approach

Providing reservations for disabled people is definitely not sufficient it is just the first step; it is the duty of the state to maintain that the said reservation actually benefits the people and reaches out to the maximum number of people. This can only be done if the government strives continuously to remove the infrastructural and sociological barriers present in the country while taking the social model into consideration. This is something not only demanded but also expected of a state which is determined to uphold the rights of the people and create a "Human-Friendly Environment".

A reasonable accommodation is a legal mechanism to "dismantle the social barriers, stereotypes, and prejudices to achieve this substantive equality and equality of opportunity." The reasonable accommodation gives an added duty to the state to remove all the barriers and tailor the system to make it reach out to the majority and hence, provide a corroborating right to disabled people.

The Court here seems to have taken the Charity model of disability, but what is needed is a right-based approach. Equality in its true sense can be achieved and disability can be removed only when the supreme court takes the prior meaning of disability into light while pronouncing judgments. Decisions as such set bad precedents for the upcoming cases which will deal with discriminatory laws and

8 *Navtej Johar v. Union of India,* (2018) 10 SCC 1.

9 Shashank Pandey, "*Differently Abled Candidates: More Unequal Than Others Part I*", LIVELAW, https://www.livelaw.in/columns/differently-abled-candidates-more-unequal -than-others-part-i-159834, (visited on February 02, 2021).

10 *Amita v. Union of India* (2005) 13 SCC 721.

regulations set by the executive legislature and judiciary, hence it needs to be revisited.

Conclusion

Though, there is a provision for three percent reservation for the person with disability but currently there are just one percent of the employees of the government who are disabled, which shows that the true objective of the Act has not been achieved, and then comes this judgment.[11] The judgment here is a mirror to the Indian society where the disabled are considered as a second-class citizen. The judiciary instead of providing an atmosphere where even the disabled can have the chance to equal opportunity and the right to live with human dignity. We saw in the research paper that the court did not go to any expert committee to check whether the limitation of 50% was arbitrary or not. This shows how serious lacuna can be in the apex court and thus gives a relentless need for people who are ready to analyse and criticize the judgments of the Supreme Court. The judgment sets a dangerous precedent for the other courts and takes the evolution of disability jurisprudence a step back.[12] The Supreme Court should stop its sympathetic approach towards the rights of the disabled and treat them at par with others. Also, the Court should see the society and the infrastructure like the one which is disabled and not the person.

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11 *Supra* n. 9.

12 Alan Hodkinson and Chandrika Devarakonda, "*For Pity's Sake: Comparative Conception of Inclusion in England and India",* INTERNATIONAL REVIEW OF QUALITATIVE RESEARCH, Vol. 4 No. 2, 2011, pp. 253-270.

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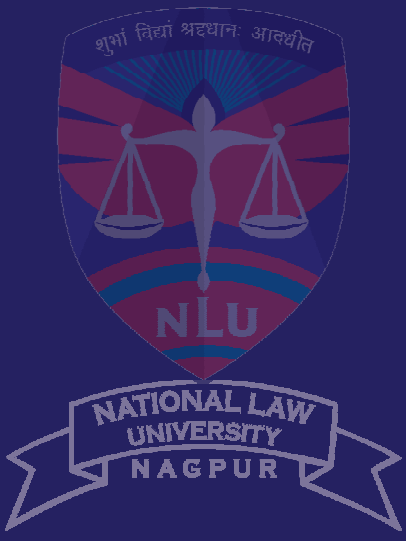

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