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EDITOR'S NOTE

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RESTITUTION OF CONJUGAL RIGHTS UNDER HINDU LAW : A DEAD LETTER

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ABSTRACT

Restitution is a remedy to protect the institution of marriage provided in general law and specifically under Section 9 of Hindu Marriage Act,1955[1]. The remedy is based on forcing the person who has withdrawn from the matrimonial obligation to perform his obligation by intervention of the court. This is undue interference in the right to privacy to compel a person to perform marital obligations through the agency of state. With the passage of time it is realised that remedy of RCR turned out to be a total failure when it comes to the execution of the decree. One cannot be compelled to perform conjugal duties when body and mind are not willing to do so. This research paper try to analyze the constitutional validity of RCR on the platform of Fundamental Rights provided under the Constitution of India. Supreme Court is also expected in the pending petition to come out with positive development to struck down this redundant and outdated law, which is not serving any valid purpose in society.

Keywords- Restitution of Conjugal Rights (RCR), Hindu Marriage Act (HMA), Civil Procedure Code (CPC)

I. INTRODUCTION

Marriage is an essential part of society where man spends his whole life. Hindus conceived of marriage as a sacramental union, holy union. This implies several things first the marriage between man and woman is of religious or holy character and not a contractual union. Secondly a sacramental union implies that it is a permanent union. Marriage is a tie which once tied cannot be untied. This implies that marriage cannot be dissolved. Thirdly the sacramental union means that it is an eternal union, it is valid not merely in this life but in lives to come.[2]Matrimony binds two people who are consequently placed on equal footing in

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[1] Section 9 of Hindu Marriage Act "Restitution of conjugal right.—When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. [Explanation.—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.]

[2]Diwan, paras., *Modern Hindu Law,*64 (Allahabad law agency,21st ed. 2012)

terms of rights and liabilities arising out of their marital ties. Manu's idea about society being "neither by sale nor by desertion is the wife released from the husband"[3] has become controversial with the progress in the society. Evidently, in India a wife has been underplayed as a dispensable counterpart furthering unequal treatment of women in our society. Hindu Marriage Act,1955 provides many remedies to protect the sacramental aspect of marriage. Restitution of Conjugal Rights was treated as a positive concept but has been misused thereby adversely affecting the sanctity of a wife. The inappropriate usage of this matrimonial remedy has been attacked many times on the footing of being violative of right to life, liberty, privacy and equality. Thus one can render it unconstitutional as it attacks the very basis of the Constitution of India. The flaws need to be rectified to ensure Restitution of conjugal rights is either embraced as a socially viable remedy or to be removed from statutory books. "When spouses who have previously entered into marital ties start living separately i.e. one spouse leaves the society (matrimonial home) of the other then in order to have some remedial measures for the disadvantaged party, which acts as a kind of restoration there comes the concept which in a way tries to fulfill one of the most important objectives of these personal laws i.e. to prevent the marriage ties from being getting broken and fulfilling one of the most fundamental purposes of marriage i.e. spouses must live together after the marriage and that one spouse is entitled to the society and comfort of the other spouse. This concept is known as "restitution" of these all important conjugal rights."[4]

Every piece of legislation must be in accordance with the basic structure of the Constitution of India. Recently, numerous issues have been raised in the courts of law, particularly the Supreme Court (guardian of fundamental rights) questioning whether the laws related to restitution of conjugal rights are against the principles of natural justice and part III of the Constitution of India or not? This debatable question is being discussed at all platforms amongst members of the legal fraternity. For the survival of any law in the legal system of India it should confirm with the basic structure of the Constitution and Fundamental Rights (i.e. Part III is the basic structure of the Constitution).

"The principle of restitution of conjugal rights, was never documented under the Dharmashastra nor did the Muslim law made any provisions for it."[5] Nevertheless, it entered India during the much detested British Invasion where it was introduced with the name of

[3] The Laws of Manu,c.1500 BCE,Indian History Sourcebook (ChapterIX Rule 46) *available at* http://hinduism.about.com / library/ weekly / extra / bl-lawsofmanu8.htm(last visited Aug.10,2013)
[4]Meurar, Dave,"Restitution of conjugal rights:A Debate over Its constitutionality", *available at* http:// thelawbrigade.com(last visited on 12th Jun 2022)
[5]Diwan,Paras, *Law of Marriage and Divorce,* 328(Universal Law Publishing Co,Delhi,5th ed. 2008)

social reforms (as per the British Raj).[6] Restitution of conjugal rights has its roots in the period of feudal England, where marriage was merely considered as a property deal and a wife was rendered as a meager part of man's possession like other chattels, but this concept was never welcomed by the English Society. This demonstrates that the concept of restitution of conjugal rights is very barbarous, moreover it has been blatantly misused resulting in the ultimate abolishment of this remedy in England by the Law Reforms (Miscellaneous Provisions) Act, 1947.[7] Thus, it was brought by the Britishers as a social reform and for the first time this concept was introduced in India in the case of Moonshee *Buzloor Rahim* v. *Shamsunnisa Begum*[8], where such actions were regarded as considerations for specific performance.[9]

The restitution of conjugal rights means the re-establishment of marital relationship between husband and wife because the prime objective of marriage is that parties will enjoy the society and comfort of each other. The idea of providing restitution of conjugal rights by the Court is to preserve the marriage union as far as possible by enabling the courts to intervene between the parties. This research paper deals specifically with the concept of Restitution of conjugal rights under section 9 of Hindu Marriage Act,1955.

II. CONSTITUTIONAL CHALLENGE TO PERSONAL LAWS

"Statutory as well as customary laws which were in existence prior to coming into force of the constitution have to conform to the Constitutional mandate."[10] Judiciary is confronted with the question of whether the personal laws which were in existence prior to the enactment of constitution came within the purview of Article 13 which stipulates that all laws and custom must adhere to the constitutional mandate.[11] The question whether the stipulation of equality can be applied to the private domain of family life has been another concern that was addressed by the judiciary.

The first Constitutional challenge to the provision of Hindu Marriage Act,1955 came from the Hindu male challenging the provision of monogamy before the Bombay High Court in the *State of Bombay* v.*NarasuAppa Mali*.[12]A petition was filed in the Bombay High Court challenging the monogamy imposed by the Bombay Hindu Marriage Act, 1946. A Hindu

[6] *Ibid*
[7] .Gupte, S.P.,*Hindu Law in British India*, 186 (Premier Publishers, Delhi,2nd ed.1947)
[8] *Moonshee Buzloor Rahim* v. *Shamsunnisa Begum*(1877) ILR 1 Bom 164
[9] *Ibid*
[10] Agnes,Flavia, *Family Laws and Constitutional claims*, (Oxford University Press ,New Delhi, vol 1, 2011)
[11] *Ibid*
[12] *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84

husband pleaded that the law relating to monogamy violates his personal freedom and hinders the practice of religion. He also argued that this law is discriminatory against the Hindu man since Muslim men are permitted to practice polygamy. But the High court held that personal laws are not "laws in force" as per the stipulation of Article 13 of the constitution and hence they are not void even when they came into conflict with the provision of equality under the Constitution because Fundamental Rights cannot be applied to the personal laws.

In *Srinivasa Aiyer* v.*Saraswati Ammal*[13] a similar question was raised. It was argued that prohibiting polygamy denied Hindu men equality before law and equal protection of laws and further that it is discriminated against Hindu men on the grounds of religion as it restricted the right to freely profess or practice and propagate religion. The Madras High Court did not address the core issue whether the term laws in force include personal laws. Instead it was held that even assuming that term laws in force under Article 13 includes personal laws, the Act does not offend Article 15 which stipulates non discrimination on the basis of sex.

In *C. Masilamani Mudaliar* v. *Idol of Sri Swaminatha Swami Thirukoil*,[14] the Supreme court while not referring specifically to the principle laid down in *Narasu Appa Mali*[15] has impliedly overruled the same and held that personal laws come within the purview of Article 13 and hence are subject to the application of Fundamental Rights. This case concerned the rights of a Hindu woman to executive will in respect of the property acquired or possessed by her under Section 14 of Hindu Succession Act, 1956.

Now the Judiciary has started applying or included personal laws within the word "laws in force" under Article 13 of Constitution therefore in T. Sareetha v. Venkatasubbaiah,[16] Justice Chaudhary of Andhra Pradesh High Court struck down the provision of Section 9 of Hindu Marriage Act regarding restitution of conjugal rights as unconstitutional, as it violates the individuals right to privacy. Therefore the process of application of fundamental rights to personal laws were given due recognition by this revolutionary judgment.

Recently in *Ojaswa Pathak* v *Union of India*,[17] students Of Gujarat National Law University, Gandhinagar have filed a public interest litigation challenging various restitution of conjugal rights provision under codified family laws. They specifically challenged the constitutional validity of Section 9 of Hindu Marriage Act 1955 and Section 22 of Special Marriage Act

[13] AIR 1952 Mad 193
[14] *C. Masilamani Mudaliar* v. *Idol of Sri Swaminatha Swami Thirukoil*(1996) 8 SCC 525
[15] *Supra* note 12
[16] *T. Sareetha* v. *Venkatasubbaiah* AIR 1983 AP 356
[17] *Ojaswa Pathak* v. *Union of India*https://www.scobserver.in/reports/union-india-restitution-conjugal-rights-writ-petition-ojaswa-pathak-summary/

1954 and Order 21 rule 32 and 33 of the Code of Civil Procedure 1908.[18] The students argued the legislative validity of conjugal rights which are inherently violative of right to life and equality. The petitioners also argue that the provisions are in violation of Article 21 this is because restitution of conjugal rights violate the respondent spouse's right to privacy and individual autonomy.[19] They have argued that though the provisions are gender-neutral, it places undue burden on women in real sense. They noted an unequal power structure in Indian families and how this makes it more difficult for women to return to their husband's home. It is noted that the origin of laws on restitution of conjugal rights is feudal English law where women were considered chattel or property.[20] They argue that this makes the provisions violative of Article 14 and 15(1) of our Constitution. They have further argued that Section 9 of Hindu Marriage Act states that if a spouse withdraws from the society of the other spouse without reasonable excuse the District Court may decree a restitution of marital rights of the appellant spouse. Section 22 of Special Marriage Act, 1954[21] also provides the same but is applicable to persons marrying under Special Marriage Act, 1954. Order 21 rule 32 of CPC[22] provides for enforcement of a decree of restitution of conjugal rights by District court by attachment of property of the judgment debtor.

The petitioners referred to *Puttaswamy* judgment[23] on privacy to highlight that right to privacy includes the right to bodily integrity and mental sanctity. They argued restitution of conjugal rights violates this right.[24] The petition refers to the finding of a committee formed by the Ministry of women and child development on the status of women and children.[25] The committee had noted that the main focus of the framework around conjugal rights was to

[18] *Ibid*
[19] *Ibid*
[20] *Ibid*
[21] Section 22 in The Special Marriage Act, 195**4,** Restitution of conjugal rights.—When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. [Explanation.—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.]
[22] Rule 32 Order 21 of Code of Civil Procedure 1908 "Decree for specific performance for restitution of conjugal rights or for an injunction",(1)Where the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of decree for restitution of conjugal rights by attachment of his property or in the case of decree for specific performance of contract or for an injunction by his detention in the Civil prison or by attachment of his property or by both
[23] *Justice K.S.Puttaswamy*v. *Union of India* AIR 2017 SC 4161
[24] *Supra* note 17
[25] *Ibid*

preserve the integrity of family. However, it has since been misused to deny women's claim for maintenance or cruelty. The committee suggested the deletion of provisions related to restitution of conjugal rights, as it no longer serves the best interests of the family.[26]

III. EMERGENCE OF REMEDY OF RCR

The remedy of restitution of conjugal rights emerged in an extremely anti-women context in medieval Europe where the Roman Catholic Church had the power to physically restore to the husband, his wife who had escaped from their custody. Later, it was incorporated into the English law. Though neither the Hindu nor Muslim law recognised this concept, it was used by English lawyers who were practicing in the newly setup courts both in Presidency and Moffusil towns. Two important cases within the newly set up judicial system where this remedy was contested and awarded are *Moonshee Buzloor Ruheem* v. *Sumsoonnisa Begum*[27] and *Dadaji Bhikaji* v.*Rukhmabai.*[28] In the first case, the Privy Council, in 1876 applied the principle of restitution of conjugal rights to Mohammedan law and held that on authority as well as principle there is no doubt that a Muslim husband may institute a suit in the Civil Court of India for a declaration of his right to the possession of his wife and for sentence that she return to cohabitation.

In the second case, a single judge, Pinhey J., who had initially heard the case in 1885 ,the Judge found that it would be barbarous, cruel and revolting to compel a young lady to go to a man whom she dislikes, in order that he may cohabit with her against her will. He had refused to grant the husband the remedy based on the following two grounds: firstly that it can only be applied to situations where a couple has cohabited. Judge stated that "it is misnomer to call this case a suit for restitution of conjugal rights because the couple had never cohabited after marriage. It would be a suit for institution and not restitution of conjugal rights; Secondly, the remedy was transplanted from England and it has no foundation in Hindu law."[29] This historical judgment succeeded in drawing attention to the vexed question of the relationship between morality and law and in embedding the case within a broader legal humanitarian framework. The verdict made the case inseparable from women's cause. But within six months, on appeal, a division bench of the Bombay High Court comprising two senior most judges, Sargent C.J. and Sir Bayley J.,set it aside and ordered a fresh trial. In the fresh trial, Judge Charles Farran ruled in favour of DadaJi and

[26] *Ibid*
[27] *Supra* note 8
[28] *Dadaji Bhikaji* v. *Rukhmabai*(1886) 10 Bom 301
[29] *Dadaji Bhikaji* v. *Rukhmabai*(1885) ILR 9 Bom 529

even ordered Rukhmabai to pay for his legal costs since she had opposed his suit. Though the norm for refusal to comply with such decrees of the court is attachment of property, Judge Farran sought to enforce his decree by warning Rukhmabai with imprisonment of nearly six months. "In the moment of pride and glory for Indian women for centuries to come, Rukmabai declared that she would willingly undergo imprisonment rather than let a man she detested enforce conjugality. Fortunately for all concerned the matter was finally settled by payment of compensation by Rukhmabai to her husband. What was crucial for this debate is the fact that Rukmabai owned property and had a separate income from which she was in a position to pay her husband a compensation for her refusal to live with him. Only through payment of compensation could the dispute finally be settled."[30] This case directly led to a change in law requiring a minimum age of marriage for women. In England, and later in India it led to dropping of criminal consequences for refusing to comply with the court's decree on restitution. Since Rukhmabai's case the law on restitution of conjugal rights has been upheld by the Supreme Court. "This remedy is often viewed as anachronistic and has been at the center of several controversies regarding its constitutionality It has also surfaced in reference to husband authority and control over their wives who had refused to give up their jobs." This case is of historical significance.

Though initially only husbands availed of this remedy, later it was also used by deserted wives to restore their marriages. It has been incorporated into almost all matrimonial statutes. it has also been introduced into Muslim law through judge made laws.

IV. CONCEPT OF RCR

Restitution of Conjugal Rights is covered under Section 9 of Hindu Marriage Act,1955. "For Restitution following three conditions must be satisfied, the respondent has withdrawn from the society of the petitioner without any reasonable excuse; the court is satisfied about the truth of the statement made in such a petition; and there is no legal ground why the relief should not be granted. The second condition relates to proof. The third condition relates to bars as laid down in section 23, Hindu Marriage Act,1955. The first condition contains two elements, the withdrawal of the respondent, and the withdrawal of the respondent without any reasonable excuse."[31] These two elements of the first condition are matters of interpretation before the court of law.

[30] *Supra* note 10 at p.15
[31] *Supra* note 2 at p.185

The most important reason for seeking the remedy of restitution of conjugal rights is to prove withdrawal of one spouse from the society of the other. There are certain rights and obligations which arise as a consequence of the contract of marriage. The phrase 'withdrawal from society' has been taken to mean the refusal of one spouse to continue with matrimonial obligations. It is withdrawal not from the place but from a particular state of affairs i.e. conjugal obligations. There must be an act of separation coupled with the intention of separation. When the fact of separation co-exists with intention to separate then that constitutes withdrawal from one's society or desertion. Further 'withdrawal from society' may take place even when the parties are living under the same roof. When the husband compels the wife to leave the matrimonial home, it cannot be construed that the wife has withdrawn from the society of her husband.

"The defence available to the remedy of restitution is one reasonable excuse or reasonable cause. If the cause or excuse for withdrawal is reasonable, courts will not award a decree of restitution of conjugal rights to the petitioner. A 'reasonable excuse' may often seem to be under the ambit of subjectivity, however there has been a consistent opinion held by the courts, that the following constitutes a reasonable cause:

i. An act on the part of petitioner which can constitute a ground for relief to respondent for obtaining any other matrimonial relief
ii. A matrimonial misconduct that is grave but cannot be considered a ground for matrimonial relief
iii. An act, an omission, or conduct, which makes it impossible for the respondent to live with the petitioner.

An act which can be construed as a ground for divorce, judicial separation or nullity of marriage is complete defence to the respondent in a petition for restitution of conjugal rights. A reasonable cause or excuse has been considered to include behaviour such as husband's insistence that the wife live with his parents, wife's apprehension that it is unsafe to continue living with her husband, husband having another wife or bringing another woman into the house, false accusation of adultery immorality against the wife etc. In case the husband himself is responsible for the wife's desertion or in other words, if he is guilty of constructive desertion, he is not entitled to decree of restitution of conjugal rights. On the contrary, a wife who has been deserted is entitled to such a decree."[32]

[32]Flavia Agnes, *Marriage, Divorce, and Matrimonial Litigation*, Vol II (New Delhi:Oxford University Press,2011) p.23

Though both husband and wife are able to use this remedy, practically far more husbands file for this remedy as compared to wives. When a wife files for maintenance, as a retaliatory measure, husbands are advised to file a petition for restitution of conjugal rights. Very often this remedy is used as a legal ploy to defeat the wife's claim rather than genuine intention of reconciliation.

V. DIVORCE UNDER SECTION 13(1A) (II)[33] OF HINDU MARRIAGE ACT & RCR

In *PushpaKumari*v. *Parichhit Pandey*,[34] the wife had filed criminal cases against the husband and in-laws on grounds of cruelty and demand of dowry. In retaliation the husband filed for restitution of conjugal rights. The trial court passed a decree in his favour. While setting aside the decree awarded by the trial court the high court held "that in the present society, it is very difficult to force any person to live according to the desire of the other and therefore, the Section 9 of Hindu Marriage Act for restitution of conjugal rights is losing its force because even if the prayer for restitution of conjugal rights is allowed, this decree cannot be enforced against the desire of the wife who does not want to live with husband. The cases filed by the wife under Section 498(A) of IPC and the Dowry Prohibition Act were pending against the husband and in-laws. In these circumstances if the prayer for conjugal rights is allowed, it would amount to demolishing the cases filed by her. When this fact has come on record, prayer for restitution of conjugal rights cannot be allowed at all because there is always the danger that the wife may be put to further the trouble in some other form."[35]

"Restitution of conjugal rights is mere paper decree as it cannot be enforced. But it helps to secure ancillary relief such as maintenance, custody of children etc., in case the wife is not willing to file for divorce and wants to retain her marital tie or is hoping for a reconciliation with her husband."[36] While moving the court on this ground, one needs to be cautious that the

[33]Section 13(1A) in The Hindu Marriage Act, 1955
[(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground
(ii)that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

[34]*Pushpa Kumari* v. *Parichhit Pandey*,2005 MLR 551

[35]*Ibid*

[36]*Supra* note 32 at p.25

decree serves as a backdoor entry towards divorce on ground of irretrievable breakdown of marriage.[37]

In *Saroj Rani* v. *Sudarshan Kumar*,[38] the wife filed a petition for restitution of conjugal rights, on 28 March 1978 the husband appeared and a consent decree was passed in favour of the wife. After a gap of one year on 19 April 1979, the husband filed for divorce under Section 13(1A) on the ground that one year had passed since the passing of the decree and no actual cohabitation had taken place between the parties. The wife alleged that she tried to comply with the decree many times but husband did not allow her to cohabit with him. The trial court dismissed the husband's petition for divorce. In an appeal, the husband was granted a decree of divorce. The wife approached the Supreme Court for setting aside the High Court decree on the ground that the husband should not be allowed to take advantage of his own wrong. But the Supreme Court ruled that non-compliance with the decree of restitution of conjugal rights does not amount to taking advantage of his or her own wrong as stipulated under Section 23(1)(a) of Hindu Marriage Act. The court held that whatever be the reasons, the marriage had broken down irretrievably and parties would no longer live together as husband and wife and in such a situation it was better to close a chapter. If such conduct of the husband is intended to be treated as wrong, then it requires legislation to that effect. The court commented that it cannot rule out the possibility of a party obtaining a decree of restitution of conjugal rights and in not enforcing the same with the sole purpose of getting a divorce after lapse of statutory period, but such abuse can be prevented only by bringing necessary legislation to plug the loophole. It is certainly a matter which requires serious consideration of the Parliament. But as the law stands now, the court is helpless in the matter and can only give that relief as one naturally flowing from the compliance of statutory requirements.

"In the same ruling, the Apex Court also upheld the constitutional validity of this provision on the ground that it is a benevolent provision which would facilitate the reconciliation and save the marriage".[39]

But the more recent trend is a clear departure from the position adopted by the Supreme Court in *Saroj Rani* v. *Sudarshan Kumar Chadha*.[40] "Courts have refused to award a decree to the husband who is guilty of taking advantage of his own wrong. But if either of the parties, through their conduct prevent the decree from being executed, the aggrieved spouse

[37] *Ibid*
[38] *Saroj Rani* v.*SudarshanKumar*,AIR 1984 SC 1562
[39] Supra note 32 at p.26
[40] *Supra* note 38

would be entitled to decree of divorce on the ground of non-compliance of the decree of restitution of conjugal rights."[41] Therefore the decree which is meant to preserve the marriage ultimately turned out to be a decree which leads to the dissolution of marriage. Therefore the ultimate purpose of keeping section 9 on statutory books is defeated by the latest development in law relating to divorce, so the better process to delete this remedy from the statutory books as it has lost its main purpose.

VI. CONSTITUTION AND RCR RIGHT TO EQUALITY AND FREEDOM TO CARRY ON ANY PROFESSION *VIS-A-VIS* RCR

The Hindu Marriage Act, 1956 by virtue of section 24 and 25 has burdened the wife with the obligation that she must maintain the husband when the husband is unable to maintain himself under the notion of equality but the courts continued to undermine a woman's right to retain her job against husband wish under the ancient notion of patriarchy. "This concept was adopted into the modernized law and the courts granted the husband the privilege of determining the choice of matrimonial home. If the women are employed at a place away from the matrimonial home the husband could claim restitution of conjugal rights against the wife."[42]

For many years after Hindu Marriage Act, courts in a number of cases have held that Hindu marriage is a sacrament and it is a sacred duty of the wife to follow her husband and reside with him wherever he chooses to reside. In all these cases the women were working and supporting the family. The husbands had approached the court for restoring conjugality just to spite the wife. The courts upheld the husband's right and granted him a decree of the restitution of conjugal rights as referred below.

In *Ramprakash* v. *Savitri Devi,*[43] court held that according to Hindu law, marriage is a holy union for performance of marital duties with her husband where the husband chooses to set up a matrimonial home.

In *Tirath Kaur* v. *Kirpal Singh*[44] the wife pleaded that she was willing to carry on with the marriage but was not prepared to give up the job. But the Punjab High Court disallowed her plea and ruled in favour of the husband stating that the wife's refusal to give up the job

[41] *Supra* note 32 at p.27
[42] *Supra* note 10 p.24
[43] *Ramprakash*v. *Savitri Devi* AIR 1958 Punj 87
[44] *Tirath Kaur* v. *Kirpal Singh* AIR 1964 Punj 28

amounts to desertion. This would entitle the husband for a decree of restitution of conjugal rights.

The Madhya Pradesh High Court in *Gaya Prasad* v. *Bhagwat*[45], held that a wife's first duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection.

The Punjab and Haryana High Court in *Surinder Kaur* v. *Gurdeep Singh*[46], held that the Hindu law imposes on the wife duty of attendance, obedience to and veneration for husband to live with him wherever he chooses to reside.

Similar issue came before the full bench of Punjab and Haryana High Court in the case of *Kailash Wati* v. *Ayodhia Prakash*.[47] The wife was employed prior to marriage, seven years after the marriage the husband has asked the wife to resign her job. On her refusal to do so he filed for restitution of conjugal rights. The wife stated that she was prepared to honour her matrimonial obligation but was not prepared to resign her job.The Full Bench of Punjab and Haryana High Court held that according to Hindu law, marriage is a holy Union for the performance of marital duties with her husband where he may choose to reside and to fulfill her duties in her husband's home. The court reaffirmed that the wife's refusal to resign her job amounts to withdrawal from the husband's society and granted the decree in favour of the husband.

Therefore asking the wife to leave her job and resume cohabitation under the sacramental concept of marriage is a violation of the right to carry on any profession under Article 19(1)(g) of the Constitution. Therefore Court is not able to adopt balancing approach between Fundamental Rights and marital obligations.

"While under the modern concept of equality the husbands have the right to be maintained by their wives, under HMA under the concept of sacramental marriage they could restrain them from gainful employment. The right was based on a plea that it was a sacred duty of the Hindu wife to reside under the care and protection of her husband, her lord and master. While the husband's plea is not surprising, the judicial affirmation of this plea under a modern statute is disturbing."[48]

It was around 1975 that the court began to recognise the woman's right to hold on to a job away from her husband's residence. There are many important judgments of this time which secured for women their right of holding a job away from their husband's residence.

[45] *Gaya Prasad* v. *Bhagwat* AIR 1966 MP 212
[46] *Surinder Kaur* v.*Gurdeep Singh* AIR 1973 P&H 134
[47] *Kailash Wati* v. *AyodhiaParkash* ILR (1977) 1 P&H 642 FB
[48] *Supra* note 10 at p.25

The Gujarat High Court, in the case of *Praveenben* v.*Sureshbhai*,[49] while denying the husband the relief, declared that in the modern outlook, the husband and wife are equally free to take up a job and retain it. Since there had been a mutual arrangement, it was not a case where it could be said that the wife had withdrawn from the society of the husband. In *N.R. Radha Krishna* v. *Dhanalakshmi*[50] Madras High Court held that under the modern law,the concept of wife's obedience to her husband and her duty to live under his roof under all circumstances does not apply.

The Delhi High Court in the leading case, *Swaraj Garg* v. *R.M.Garg*,[51] dissented from the full Bench decision in Kailash Wati and held that in the absence of a premarital agreement between the parties it cannot be said that the wife who had a permanent job with good income had to live at a place determined by the husband when the husband did not earn enough to maintain the family.

"Providing constitutional validity to the wife's right to hold onto the job, Deshpande J. ruled that an exclusive right to the husband to decide the matrimonial home would be violative of equality of sexes clause under Article 14 of the Constitution."[52]

In all the cases, the fact that the wives were better placed economically as compared to the husband and effectively managing the household expenditure and judges while delivering the judgment were influenced by these considerations and denied the husband's right to set up the matrimonial home.

VII. ARTICLE 21 AND RCR : RIGHT TO PRIVACY

The case of *T.Sareetha* v *VenkataSubbaiah*,[53] was the first to question the validity of the provision relating to restitution of conjugal rights under the protective umbrella of right to privacy. In this case Sareetha, a 16 year old high school girl was married to one Venkat in Tirupati. The petitioner contended that Sec 9 was "liable to be removed from the statute as it was in violation of articles 14, 19 and 21. The petitioner stated that this remedy is contrary to the freedoms of life, liberty and dignity."According to Justice Chowdary, "marital rights connote two formulations, first that marriage partners have right for each other's company and second, marital intercourse. He held that "enforcing this right would amount to transfer of the right of the individual over her body, to the state". He posited against the continued use

[49] *Praveenben*v.*Sureshbhai*AIR1975 Guj 69
[50] *N.R. Radha Krishna* v. *Dhanalakshmi* AIR 1975 Mad 331
[51] *Swaraj Garg* v *R.M.Garg* AIR 1978 Del 296
[52] *Supra* note 32 at p.25
[53] T.*Sareetha v Venkata Subbaiah* AIR 1983 AP 356

of the section to enforce unwilling sex over a partner, under the garb of tyranny of the law. The judgment highlights the fact that even the decision to have a child is an intimate decision that should be taken by the woman and not something she should be coerced into against her will. This provision is truly a reminder of the illegitimate colonial era. It lacks legal backing and is a blatant infringement of an individual's right over his/her body, thereby violating an individual's liberty under Article 21 of the Indian Constitution. Justice Subba Rao perceptively made this observation and extended the right to life to include individual's liberty as well."[54]

The Supreme Court in *Govind* v. *State of M.P*[55] held that right to privacy under Article 21 should "encompass the right to personal intimacies of home, family and marriage". The court reiterated that the right to privacy is available to every person irrespective of the marital status. Similarly, Justice Chowdary held that 'there could be no legitimate grounds for the withdrawal of this right to privacy, by state sanction'. These two judgments can be construed to advocate the protection of the right to privacy under the Constitution. The law as laid out in the Maneka Gandhi[56] case, ordained that "due process" connotes being right, just and fair and does not accept arbitrary action by certain individuals. Further, under Article 14 it was observed that 'a blind adherence to equality of treatment without a reference to equality of circumstances is neither just nor constitutional'. The court acknowledged that while section 9, HMA might exhibit formal equality, wherein there are no distinctions between the rights of husband and wife. "However, husband and wife from a social point of view are unequal and treating unequals equally is neither just nor fair." Since this makes the remedy oppressive for the wives, while benefiting the husbands. These cases mark the evolution of a different line of thought in family jurisprudence.

Right to liberty

The Saritha judgment can go a long way in benefiting working women, by protecting them from being subject to undue pressure to give up their careers or suffer threats of dissolution of marriage. This section was assumed to be a lifeline for deserted women who were unwilling to divorce their husbands. However, a possible amendment in Section 13 to introduce irretrievable breakdown of marriage as a logic for divorce would go a long way in solving this problem and the wife would no longer be forced to use the diverted route of section 9, for severing the marital ties. "Justice Chowdary through his other pronouncements on

[54]https://jcil.Isyndicate.com/wp-content/uploads/2016/08/ Restitution -of-conjuga rights-preserving-a-sacrment-or-creating-a-liability-Arushi-Nayar-pdf(last visited on 12 Jun 2022)
[55]*Govind*v. *State of M.*P AIR 1975 SC1378
[56]*Maneka Gandhi* v. *Union of India* AIR 1978 SC 597

subjects like "forced sex is a denial of joy" and his scathing critique, calling it barbarous and laws enforced indignity, has positively liberated women. The court would enforce its powers either through Civil Procedure Code Order 21, rules 32, 33 or by holding the other party in contempt."[57] This statement is a tacit admission of the existence of marital rape, which the law thus far doesn't recognize.

Right to bodily autonomy and dignity

In T. Sareetha[58] the Court observed that sexual cohabitation is an integral ingredient of Restitution of Conjugal Rights. Therefore, the Court determined Section 9 of the HMA and Order 21, Rule 33 and 34 of the Civil Procedure Code could serve to enforce marital intercourse on an unwilling person. These provisions thus transfer the decision to have or not have intercourse from the private individual to the State. Thus, a decree of Restitution of Conjugal Rights "offends the inviolability of the body and the mind" and the "integrity of a person", and it "invades the material privacy and domestic intimacies" that a person should have individual control over. Additionally, the Court also observed that these provisions diminish the value of consent by using the judicial process to coerce an individual to engage in sexual cohabitation. The Court acknowledged that this would have worse consequences for a woman as pregnancy could result from non-consensual intercourse. In this way, this Section encroaches on the individual's dignity, which is an integral part of Article 21 of the Constitution. The Court then gave the example of *Anna Saheb* v. *Tarabai*, where a decree of restitution was passed in favour of the husband even after the wife repeatedly expressed her dislike of him and reluctance to live with him. The cumulative effect of all these would be the misuse of state force to coerce a woman into forced sex and pregnancy. Since pregnancy alters the life of the woman significantly, her right to decide prevails over state interference. Based on these, the Court concluded that Section 9 constitutes a grave violation of Article 21 and that there can be no countervailing state interests that justify this invasion of privacy.

In this case the court held that Section 9 of the HMA cannot be viewed as just or fair because even though it is equal on paper, it is unequal in practice. This is because the requirements of equality under Article 14 of the Constitution are not satisfied as in our social reality, Section 9 is used predominantly by husbands and rarely by wives. The consequences of this remedy are disproportionately high on the wives due to social and physiological reasons. In summary, the Court ruled that the remedy of Restitution of Conjugal Rights is "partial," "one sided",

[57]Mayne's, Treatise on Hindu Law & Usage, 16th ed.(New Delhi: Bharat Law House,2013) p.93
[58]*T.Sareetha* v.*Venkata Subbaiah* AIR 1983 AP 356

and work as an "engine of oppression". Thus, Section 9 of the HMA is void as it offends both Article 14 and 21 of the Constitution.

Thus in conclusion the Andhra Pradesh High Court in *T. Sareetha* v.*Venkata Subbaiah*[59] held that "the right to privacy belongs to an individual and is not lost by marital affiliation". The court observed that the enforcement of section 9 against an individual forced her to have sexual relations with her spouse, thus bereaving her of control over her body. This, according to the court, was a severe aperture of the right to privacy as it transfers "the choice of whether or not to have marital intercourse to the State from the concerned individual".[60]

Latest in the series is the *K.S. Puttuswamy* v. *Unionof India,*[61] the Supreme Court held that individuals have a right to privacy which grants them complete sovereignty over their bodies. "Nine judges of the Supreme Court gave this landmark judgment and unanimously held that " right to privacy is protected as an intrinsic part of right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution."[62]The Court has thus adopted the egocentric definition of privacy as argued in the Sareetha case.

Narrow view after T. Sareetha

Regrettably, the Delhi High Court, in *Harvinder Kaur* v. *Harmander Singh Choudhry,*[63] returned back to the narrow definition of privacy. One year after the historic Sareetha judgment, the Delhi High Court re-examined this issue and held to the contrary. In this case the wife challenged a decree for restitution granted to her husband by the lower court. "The court, while dismissing the appeal, held that the section was constitutionally valid, stating that the dual objective of the section was 'restoring amity in marital life through a legally enforced rapprochement'. The court went on to add that introducing constitutional law in the sphere of marriage is like a bull in a china shop, and that Articles 14, 21 have no place in the privacy of the home. The Delhi court redefined the foundations of marital relationships, away from the protection of right to privacy. Further, the court considered sexual relations as a vital element of marriage, but not necessarily the *summumbonum*, or the sole motivation behind petitions of restitution. Thus, unlike Justice Chowdhary, the Delhi high court took a more narrow view of the provision of restitution."[64]

[59] *Ibid*
[60] *Ibid*
[61] *Supra* note 23
[62] https://www.scobserver.in/cases/Fundamentalright to privacy (last visited on 12 Jun 2022)
[63] *Harvinder Kaur* v. *Harmander Singh Choudhry* AIR 1984 Del 66
[64] *Supra* note 62 at p.9

Post these two diametrically different judgments, the Supreme Court in Saroj Rani's case[65], clarified its stance on this provision. The court construed that marriage, as a socially sanctioned practice and family as its essential structure, provided husband and wife inherent rights over each other's society. The Supreme Court expressed its motivation to protect these uncodified laws towards, the social function of preventing the breakup of the marriage, restoration of conjugal relations and to prevent the severing of the marital tie. Therefore, Justice Mukherjee was unequivocal in upholding the Delhi High Court judgement that section 9 was not in violation of Art 14 and 21 of the constitution.

The Court in Delhi High Court case[66] held that the leading idea of Section 9 is to preserve marriage. Section 9 is an endeavor to bring about reconciliation between the parties. The Court then moved on to discuss the concept of the breakdown of marriage as, if the decree for restitution is not obeyed for the space of one year and the parties continue to live separately it is undoubtedly the best evidence of the breakdown of marriage and with the passing of time the most reliable evidence that the marriage has finished.

The decree of restitution of conjugal rights serves a useful purpose because it gives the parties a cooling-off time of one year which is essential. The Court also observed that Section 13(1-A) is based on proceedings under Section 9. If Section 9 is unconstitutional, then Section 13(1-A)(ii) is also constitutionally void. Thus implying no decrees of restitution and no divorce under Section 13(1-A)(ii). The Court held that the abolition of Section 9 is to be done by the legislature and not the courts. As the ground for divorce under Section 13(1-A) is available to either party to a marriage, there is complete equality of sexes and equal protection of the laws. Hence, it is not violative of Article 14 of the Constitution. The Court even scorned the introduction of principles of constitutional law in the private matters of family. The Court held that to hold Section 9 unconstitutional without regard to Section 13(1-A) is to take too narrow a view. The Court held that though the remedy under Section 9 may be outmoded, it is not unconstitutional, thus, Section 9 is perfectly valid. There is express admission by the court that a remedy introduced with the concept of preservation of marriage has become outdated with time and should therefore be deleted from statutory books.

VIII. MARITAL RAPE & RCR

This judgement of T.Sareetha can be considered a landmark not only in the field of family law but also in criminal law, particularly the offence of marital rape. "After several years

[65] *Supra* note 38
[66] *Supra* note 63

of debate and activism, marital rape is still not recognised as a criminal offence in India. In fact, Section 375 of the Indian Penal Code expressly excludes it from the ambit of rape through its exception clause, which states that sexual intercourse by a man with his own wife is never to be considered rape as long as the wife is above 15 years of age.[67] The statute, thus, does not place any importance on the consent of the wife. Through the judgement of T. Sareetha, it can be seen that the doctrine of Restitution of Conjugal Rights can be misused to force sex on the respondent spouse, and in a largely patriarchal and male-dominated society, it disproportionately victimises women. Such a situation provides impunity to those men who enforce restitution of their conjugal rights, coerce their wives to cohabit with them, and further commit marital rape on them. "Justice Chowdhary's pronounced in his judgment that "forced sex like other forced things is denial of all joy. No positive act of sex can be forced upon an unwilling person because nothing can be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of law to a positive sex act. This statement it should be noted has been made in reference to a couple who are merely living apart and are not judicially separated. Judge's observation on forced sex is the indication of rape within marriage. It has a tremendous implications for women's movement, especially for activists who have been working on behalf of battered wives who are not only physically beaten but are subjected repeatedly to act of forced sex."[68]

"The patriarchal structure under which the rape law defines rape as forced intercourse with the woman other than his own wife. This has always been implied that in the marriage a husband cannot rape his own wife, that forced intercourse with his own wife is not rape. On the other hand according to the Judgement of T.Sareetha it is unconstitutional for a man to demand sex from his wife. By this judgement raping his own wife is even more heinous, more grossly violative of the Fundamental Rights in question"[69]

"The amended section 376B created a new category of marital intercourse called illicit intercourse meaning forcible intercourse by husband with his judicially separated wife without her consent with minimum punishment of imprisonment for two years and maximum punishment of seven years and fine"[70].

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[67] Exception 2 of section 375 IPC creates an exception to the offence of rape in cases of forced sexual intercourse by a man with his own wife if she is of 15 years of age or above.

[68] Vimal Balasubramanyan"Conjugal Rights v. Personal Liberty", Andhra High Court judgment *EPW*,July 10,1983,p.1263,https://www.jstor.org/stable/4372307

[69] *Ibid*

[70] Section 376B IPC. 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

" Justice Chaudhary in the Sareetha case had also declared that restitution of conjugal rights is a barbarous and imported remedy, that it is arbitrary and does not serve any social good that even under British law from where it was originally imported it is now abolished. At the end however he has said that the Hindu concept of matrimonial law never recognised the Institution of restitution of conjugal rights although it fully upheld the duty of wife to surrender to her husband. This last corollary suggests that even while talking of the forced sex the judge perhaps does not really recognise the concept of rape within marriage."[71]

"One more point Justice Chaudhary had observed that forced sex is accompanied by forcible loss of precious right to decide when, if at all, her body should be allowed to be used to give birth to another human being. This seems to have implication in the context of sexual acts in which the woman is not allowed to use contraception either for religious reason or sheer male cussedness. The end result is the same loss of precious right to decide whether and when to have a baby."[72] Section 9 of Hindu Marriage Act,1955 was struck down for violating Article 21 based on the fact that forced sex violated personal freedom.

The Kerala High Court[73], "in a recent historical judgment, declared that marital rape, while not being a statutorily punishable offence on its own, can be considered as a form of cruelty and further viewed as a ground for the Court to grant a divorce to the aggrieved party. The facts in this case also involved a husband seeking to enforce restitution of conjugal rights on his wife, whom he had previously sexually abused and raped. This decision is a massive step in the direction of the criminalisation of marital rape and must be used as a building block in the argument against the concept of restitution of conjugal rights."[74] In Independent Thought v. Union of India[75], "the Supreme Court declared that sexual intercourse forced by a man on his minor wife would be recognised as a criminal offence. This has raised the age ceiling for the criminalisation of marital rape to women aged below 18 years. The court stated that exception 2 to section 375 IPC is read down as follows: Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape."The same considerations can now apply to rape committed on adult wives as well. As held in the Puttaswamy judgment, privacy is a fundamental right, and bodily autonomy, being a vital part of privacy, must not be put in jeopardy through the institution of marriage.

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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.

[71] *Supra* note 68 at p.2

[72] *Ibid*

[73] https://www. livelaw.in(last visited on 12 Jun 2022)

[74] *Ibid*

[75] https://www.scobserver.in(last visited on 12 Jun 2022)

"The Delhi High Court on 11th May 2022 gave separate verdict on a batch of petitions challenging the marital rape exception under Section 375 of Indian Penal Code. Justice Rajiv Shakdher in his judgment has held that marital rape exception in favour of husband is violative of right to equality, right to life, right against discrimination and right to freedom of speech and expression."[76] However, the other judge, Justice Hari Shankar did not agree with Justice Rajiv Shakdher. Justice Shankar has held that marital rape exception is not violative of Constitution and is based on intelligible differentia.

"Justice Shakdher's verdict is sound as there can be no rational basis to differentiate between married and unmarried women. The IPC classifies the crime of rape on the basis of marital status of women, namely unmarried, married and married but separated. This qualification does not have any relation with the object of the statute, that is, to prevent and punish offence of rape. A woman does not lose her right to sexual autonomy upon her marriage. Rape is rape irrespective of the fact that it is perpetrated by husband on his wife."[77]

"The marital rape exception also violates the right to freedom of speech and expression. It violates the right of married women to say no to sexual intercourse. As correctly pointed out by the petitioner, conjugal rights end where the right to bodily integrity begins. A sexual intercourse between man and woman require consensus ad idem."[78]

Justice Shankar's verdict is based on argument that marital rape exception is aimed at preservation of marital institution, on which the entire Bedrock of society rests. His argument is trying to preserve the Institution of marriage at all (potentially harmful) cost? His argument comes in direct conflict with the right to privacy.

The case is pending before Supreme Court, but the Parliament should take active steps to resolve this issue of marital rape exception. It is high time to realise that right of women under Constitution can not be ignored on a assumption that non consensual sexual intercourse would strengthen the institution of marriage. A relationship must rest on trust and mutual respect and law should not legally disempower a married woman.

IX. CONCLUSION AND SUGGESTIONS

So from the long discussion it is clear that the question of constitutionality of restitution of conjugal rights has created a lot of confusion and ambiguity over its existence in the legal

[76]Hemendra Singh," No Means No: Marital Rape Exception in India", *EPW*, 28 May,2022 Vol 57, Issue No. 22
[77] *Ibid*
[78]*Ibid*

system. From a legal point of view it is constitutional whereas from the practical point of view it is still unconstitutional. The judiciary has given different answers to the same question which has created untold difficulties for the application of this doctrine of RCR. Therefore rights of the individuals should be given more importance rather than considering that marriages are to be preserved at any cost. Thus the tussle between the personal laws and the eternal fundamental rights is turning very ugly in nature.

The decision in T. Sareetha was one of the first judgments to view the Constitution as a transformative document. It took a stand for the bodily autonomy of women, which was inviolable even by marriage and her husband. It was made clear that a wife is not a subordinate party in a marriage and her consent and rights have equal value as that of her husband. Based on this emancipated and progressive logic, Section 9 of the HMA was declared liable to be struck down as unconstitutional. Further, when acknowledged as an enabler of marital rape, this Section becomes even more dangerous to the fundamental rights of married women across the country. While it has been overturned by subsequent judgements, thereby restoring the status of Restitution of Conjugal Rights, the T. Sareetha judgment remains a beacon of hope for the proponents of the belief that marriage must no longer serve as a license to enforce cohabitation and intercourse and that fundamental rights are paramount, even against deeply entrenched institutions like marriage.

The Supreme Court by permitting section 9, yet calling it outdated and not in tune with modern times, provided only a half -hearted step. Major progress in this field can be claimed only after two changes. First, from now the grounds of divorce include, 'irretrievable breakdown of marriage'. Second, courts should test family laws on the platform of fundamental constitutional rights. Remedy of restitution has failed to qualify the test of being at par with Fundamental Rights under the Constitution of India. The restitution section is unfit for a modern gender sensitive society and against the principles of natural law. It fails at the touchstone of justice and fairness. The remedy of RCR is frequently used by men to get divorce on easier terms, therefore there is a need to introduce irretrievable breakdown of marriage directly as a ground of divorce. While some people argue that this section aims at preserving the bond of marriage, the question is whether it is worth sacrificing our fundamental rights for a marriage. Fundamental Rights are very basic to our existence, they help us to lead a life of dignity while staying within the marriage.

With the growing need that the law should intervene in family matters and protect the rights of individuals, restitution of conjugal rights has been criticized across common law countries, leading to its abrogation in the UK, Australia, Ireland, and South Africa. It is time that India,

too, should delete restitution of conjugal rights, taking into consideration the gross breach of the right to privacy, equality and personal liberty. Further, the Court are considering that state force was a highly inappropriate way to preserve a marriage. Recently, in Ojaswa Pathak's case, petitioners challenged the validity of Section 9 and acknowledged that women are the worst affected by the Section and that the Restitution of Conjugal rights is an archaic and oppressive procedure that promotes the commodification of women.Restitution of Conjugal Rights may enforce intercourse on an unwilling party which is a grave violation of human dignity and is a misuse of legal procedure to coerce cohabitation. Individual bodily autonomy is paramount over invasive state interests and Section 9 of the HMA promotes no public good and is inherently oppressive and discriminatory.

In law the husband has the Right to demand RCR or to take support of the state to get sexual access to his wife who may not be willing to participate in sexual relations. Marriage guarantees to the man through RCR, access to his wife's body which is also the basis for creating legal heirs to property and lineage. Hindu law influenced by religious fundamentalist impose husband's right to sexual access to wife in demanding tone. In arranged marriages among Hindus, the consent of Individuals involved in marriage is discounted and considered entirely irrelevant. Recently Delhi High Court tried to criminalize marital rape, which is very essential to maintain equality in gender relations because in Hindu marriage sex and power is centralised in the hands of men in the family. It is the right time to delete the RCR provision which also promotes practically this theme of centralization of power in the hands of men.

Suggestions

i. The remedy of restitution which is facing a lot of opposition must be replaced by reconciliation. The compulsive force of restitution in which courts ask the spouse to cohabit with the other spouse is practically not welcomed by the litigating spouses, resulting in the ending of the relationship. Reconciliation is a mild, acceptable and amicable way in which both the spouses may cohabit and if not possible part away resorting to some alternate remedy like divorce by mutual consent without consuming most of their time in litigation.

ii. RCR is justified on statutory books for preservation of marriage but ultimately it turned out to be a remedy for dissolution of marriage. It serves only a indirect or via medium to dissolve the marriage. In order to get divorce on the ground of 13(1-A)(ii) of HMA there is need to get two decrees, first decree of RCR under Section 9 and then wait for a minimum period of one year and then get second decree under Section 13(1-A)(ii) of HMA. This results in multiplicity of suits and pendency in the

courts.Therefore it is better to have separate and direct ground of irretrievable breakdown of marriage as a remedy to seek divorce rather than invoking two decrees to get the one and the same result of divorce.

iii. RCR was introduced with the concept of preservation of marriage but the amendment of 1964 in the divorce law and further amendment in 1976 promoted the provision of RCR as a diverted route to get divorce. With time the decree of RCR has lost its sanctity and reduced as a subsidiary decree to get divorce.

iv. Therefore it is high time to evaluate and amend the Hindu Marriage Act,1955 and to take immediate steps to include the "irretrievable breakdown of marriage" as one of the grounds of dissolving the marriage between two parties.

v. Section 9 HMA should be repealed and in its place some useful provision which will serve the purpose of law should be introduced. The 71st Law Commission Report has recommended that "irretrievable breakdown of marriage" should be included as a separate ground for obtaining divorce under the Hindu laws. It emphasized the separation period of three years as a criterion of breakdown. On the basis of the report, the Marriage Laws (Amendment) Bill, 1981 was introduced in the Parliament but lapsed due to opposition from women organizations. Therefore irretrievable did not formally become law, but informally validated in a number of judicial decisions. Thus to avoid this confusing state of affairs, the Law Commission of India in its 217th Law Commission Report in March 2009 again recommended " irretrievable breakdown of marriage" as a ground of divorce. On the same grounds Marriage Laws (Amendment) Bill 2013 was introduced though passed by the RajyaSabha but could not be considered by the LokSabha and lapsed.

vi. Thus Section 9 originally introduced for preserving marriage has lost most of its force and reached a stage of being repealed. Therefore, by compulsive decree of Section 9, forcing people to remain in unhappy marriages will not serve any useful purpose. This will cause constant misery and grief which will undermine the institution of marriage.

vii. There is a need to either legislature should come in forefront to delete this provision from statutory books or the Supreme Court put its seal and declare it unconstitutional and struck it down.

viii. Decree Of RCR even if passed by the court cannot be executed personally and force a person to perform marital obligations. The question is when a decree is not capable of being enforced and serves its purpose then why should it be there in the statutory books. It has already become a Dead Letter which is required to be deleted.

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WORLD FOOD SECURITY CHALLENGES AND FUTURE OF INDIA

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ABSTRACT

A realizable 'Right to food' is integral to a dignified humane existence guaranteed under the Right to life enshrined under Article 21 of the Constitution of India. Towards this end, we have the National Food Security Act 2013, with the goal of providing food grains at subsidized prices to the majority of our people. The enactment of right to food legislation is a watershed moment indicative of the State ideology that views food security as a matter of right and not a dole. Contemporary times are harsh for humankind where the pandemic is far from over and mankind finds itself in the midst of a war that has implications for all of us. Food crisis is looming large over the world and this has the potential of escalating into the worst humanitarian crisis the world has witnessed post world war two. India being the world's second largest agriculture producer and with one of the highest fertile land in the world, has capacity to feed the entire human populace. But, that requires strategic planning and qualitative as well as quantitative reforms in the agrarian sector.

I. INTRODUCTION

The world is developing on the ill-defined parameters of development and we may have to pay a hefty price for this in the coming years. The world could not get over of Covid crisis and then suddenly entered another manmade disaster in the form of Ukraine crisis. This is going to create a serious threat to global food security. Our faulty development model has shaken the fundamentals of environment which is reflecting in the form of several natural disasters liking rising floods, famines and lowering productivity of soil.

According to António Guterres, Secretary-General of the United Nations- "When war is waged, people go hungry. sixty per cent of the world's undernourished people live in areas affected by conflict. In 2021, most of the 140 million people suffering acute hunger lived in just 10 countries: Afghanistan, Democratic Republic of the Congo, Ethiopia, Haiti, Nigeria, Pakistan, South Sudan, Sudan, Syria and Yemen. When this Council debates conflict, you debate hunger, and when you fail to reach consensus, hungry people pay a high price[1]."

He further said that- "Shortages of grain and fertiliser caused by the war, warming temperatures and pandemic-driven supply problems threaten to tip tens of millions of people

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[1]'Lack of Grain Exports Driving Global Hunger to Famine Levels, as War in Ukraine Continues, Speakers Warn Security Council'*available at*: https://www.un.org/press/en/2022/sc14894.doc.htm

over the edge into food insecurity, as financial markets saw share prices fall heavily again on fears of inflation and a worldwide recession".[2]

Ukraine crisis has added heavy fuel in this disastrous global situation. Ukraine is known as the world's bread basket for its 10% contribution in global wheat export.[3] This Russia – Ukraine war may affect supply of food heavily to the entire world. In this article we will discuss the challenges of food security before the world.

II. FOOD SECURITY

Food security has a very broad meaning. It includes not only access to food for all but also includes sufficient and nutritious food.

According to the definition given by United Nation's Committee on the World Food Security- Food security means- all people, at all times, have physical, social, and economic access to sufficient, safe, and nutritious food that meets their food preferences and dietary needs for an active and healthy life[4].

In order to guarantee food security, it is also necessary that producers of food must be able to earn decent living wages[5].There is a close nexus between Food security and food supply. Without ensuring food supply food security cannot be ensured. Production of food, its processing, distribution and then consumption are the four components of food system[6].

Here the meaning of availability of food is ensuring smooth and timely availability of safe and nutritious food. Similarly access to food includes capacity to barter goods for food. Other social mechanism and government schemes are also considered as part of access to food. Food security also demands effect utilization of food through proper storage for the purpose of protection from spoilage and diseases. Ill management of food may hit the goal of global food security. Stability is the another component food security. It ensures stable availability and accessibility of food rather than a passing phase susceptible to uncertainties.

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[2]'Ukraine war has stoked global food crisis that could last years' *available at*: https://www.theguardian.com/world/2022/may/19/ukraine-war-has-stoked-global-food-crisis-that-could-last-years-says-un.

[3]'Ukraine Says May Grain Exports Down More Than 60% Compared To 2021 In Latest Alarming Sign Of International Food Crisis' *available at*: https://www.forbes.com/sites/dereksaul/2022/05/19/ukraine-says-may-grain-exports-down-more-than-60-compared-to-2021-in-latest-alarming-sign-of-international-food-crisis/?sh=5089c48a2cc6.

[4]'Food Security' *available at:* https://www.ifpri.org/topic/food-security#:~:text=Food%20security%2C%20as%20defined%20by,an%20active%20and%20healthy%20life.

[5]'What is Food Security?'*Available at*: https://www.resilience.org/stories/2015-01-09/what-is-food-security/

[6]'Food Systems: Environments, Production, Distribution, and Household Utilization of Food' *available at*: https://www.e-education.psu.edu/geog3/node/1032

There are three more components which deals with challenges of food security and they are Production, Distribution and Exchange. Here the meaning of production is what types of food we are producing and storing locally. Distribution deals with the physical movement of food stuff and meaning of exchange is how much food could is available via the different exchange mechanisms or through purchase.

Mere availability is not sufficient to deal with food security but the food should also be available at affordable prices. Food production cost should also be affordable to attract people towards food production. Recently we have seen the example of Sri Lanka where the people were not able to purchase food due to high inflation and thus sky rocketing prices.

Food security also includes allocation of food in a particular household as per need like based upon their age, gender, requirement etc. Food according to the social, religious and cultural norms of a particular community should also be available like vegan diets for those who prefer it. In ensuring the food security metabolism and health condition of the consumer and nutritional value of the consumed food is equally important.

The opposite of food security is food insecurity which may sustain for short term, mid- term and long term. It happens when monetary or other considerations compel a change in qualitative or quantitative eating habits. Broadly it can be categorized into three parts-

i. Chronic food insecurity- when food insecurity sustains for long term and in persistent condition then it is called as Chronic Food Insecurity. It happens when a population finds it unable to meet its minimum food consumption requirements for a long time like six months, a year or longer.
ii. Transitory food insecurity- It is a short term or temporary food crisis. It happens in case of sudden drop of food producing ability or in accessing sufficient food for a healthy nutritional status. For eg. after flood, draught or conflict.
iii. Seasonal food insecurity- It reoccurs predictably following the pattern of seasonal cycle.

Though there is no single tool to measure food insecurity but The Food Agricultural Organization has created a Food Insecurity Experience Scale. This scale seeks answers to the following eight queries

“During the last 12 months, was there a time when, because of lack of money or other resources:

i. You were worried you would not have enough food to eat?
ii. You were unable to eat healthy and nutritious food?

iii. You ate only a few kinds of foods?
iv. You had to skip a meal?
v. You ate less than you thought you should?
vi. Your household ran out of food?
vii. You were hungry but did not eat?
viii. You went without eating for a whole day?"[7]

Food Security &Sustainable Food Systems

The meaning of sustainable food system is the consistent assurance of food supply for the current as well as for the future generations. For example, if today food requirements of 7 billion people should be fulfilled then tomorrow if the population rises up to 10 billion then that should also be fulfilled. Thus, a sustainable food system ensures that there is no scarcity of nutritious food for the current and future generations. Agriculture has sufficient capacity to involve a great proportion of population in agriculture work which may result into mitigating or reducing significant amount of global emission.

As per a recent research of University of Minnesota and Oxford University a plant-based diet is more environment friendly. Findings of this research revealed some shocking data which proves that "red meat was 35 times more damaging to the environment than a bowl of vegetables. The study also suggests that only those foods which are healthier for human beings are healthier for environment. It also takes 100 times the amount of land as consuming vegetables"[8]. Thus agriculture has immense potential to be an important part of mitigation by reducing Green House gases.

Thus to ensure food security we need a healthy and sustainable food system which includes inter-alia" environmental health, economic vitality, human health and social equity"[9].

Environmental Health – It is the most important part of sustainable food security which ensures that land, air and water should not be compromised for the food production and procurement. It should be saved to save the future of coming generations.

Economic Vitality – Those who are involved into food production must definitely earn a decent earning. This will encourage the producer to remain in food production.

[7] https://www.fao.org/in-action/voices-of-the-hungry/fies/en/
[8] 'Study Finds Environmental Impact of Meat Versus Vegetables is Staggering' *available at*: https://www.onegreenplanet.org/environment/study-environmental-impact-meat-vs-veggies-staggering/
[9] 'Sustainable food systems, Concept and framework' *available at*: https://www.fao.org/3/ca2079en/CA2079EN.pdf

Human Health & Social Equity – It must be ensured that people have access to healthy food at reasonable prices and without compromising on their human dignity.

III. FUTURE OF FOOD SECURITY

As per an estimation by 2050 two billion more people will be added in world's population with a new rising demand of food security. The demand of food is predicted to rise by 56% over and above the demand of 2010. There will be a lots of pressure to increase food demand globally. It will put a considerable pressure on the fragile environment of earth.

Though United Nation has kept eradication of hunger, achievement of food security and nutritional augmentationas one of its most important sustainable development goal for 2030 but the reality is that since 2014 number of hungry people has been steadily rising. So achieving the goal seems quite difficult. As of now 768 million people are living in hunger. Ukraine crisis, Covid-19 and extreme weather creates more urgency for a positive infrastructure which nourishes and feeds everyone.

Realizing the urgency of food security, world leaders explored the connected threats to the regional and country food systems, which are already under pressure to navigate complex transition and highlighted the key areas that deserved attention during the Opening Plenary for the 'Bold Actions for Food' event, as follows:

"•Global outlook for 2022; Rising food insecurity and market volatility

• Enabling countries to take on integrated transitions across food, nature and health

• Unlocking policy, innovation and finance levers to scale solutions."[10]

The World Economic Forum also had to discuss the climate crisis[11]. Five key areas of discussion were holistic objective approach for food security, short term and long term goals to ensure inclusive sustainable food security, humanitarian assistance to the countries suffering from food insecurity and to ensure supply chain model to curb the pressure.

World food crisis is predictably the worst humanitarian crisis in the coming years after world war two. On the parameters of economic indications there are 40 nations which are suffering from political unrest like Sri Lanka, Peru, Indonesia, Afghanistan, Pakistan etc. The problem will be related not only with rising food prices but price and availability of fertilizer as well, resulting in lack of production.

[10] 'Food Systems 2022: Outlook' *available a*t: https://www.weforum.org/agenda/2022/02/food-systems-2022-outlook/

[11] https://www.weforum.org/

Erratic environmental behavior like drought or flood will lead to chronical hunger of 810 million people. 43 Countries will face extreme trouble due to famine destabilization and mass migration. Africa would be one of the most badly hit continent. World need to think seriously to solve the problem of arriving food crisis. Agriculture sector needs a bigger attention and much bigger investment.[12]

Presently Europe countries are facing record inflation. According to U S Secretary of State Antony Blinken and UN chief Antonio Guterres the crisis of food may extend for decades if it is allowed to go unchecked. To find emergency food assistance to meet global humanitarian crisis US has pledged an additional $215 million, while World Bank has pitched in with an additional $ 12 billion funding to control the effect of global food crisis.[13]

According to India developing creative solution of the problem is the need of hour. Dealing with the issue of hoarding and equality during distribution of humanitarian assistance was also cautioned. According to India open market must not lead to promote discrimination. We should remember that Indian Prime Minister Mr.Narendra Modi promised to fulfill the need of wheat for the entire world but subsequently banned wheat export in the face of falling production due to heat waves. According to the United Nations in 2021 severe food crisis affected 246 million people while pre pandemic food insecurity affected 135 million populations. This crisis was further pushed higher by climate change.

Thus food security is a big global challenge not just because food scarcity but also for affecting different aspects of economy and society. Rising population growth is the key component. As per an estimation, “Sub-Saharan Africa is expected to double its population from one to two billion by 2050. Populations in the developing world are also becoming increasingly urbanized, with 2.5 billion additional urban residents projected in Africa and Asia. Global population growth projections by 2100 is over 10 billion. Food of my choice is also a challenge. As people become more affluent they start eating food that is richer in processed foods, meat and dairy. But to produce more meat means growing more grain. Climate change is another challenge. Currently, 40% of the world’s landmass is arid, and rising temperatures will turn yet more of it into desert. At current rates, the amount of food we’re growing today will feed only half of the population by 2050. Water crisis is creating a serious threat to human existence. Even, as of now 28% of agriculture lies in water-stressed regions. The number of people facing water shortages could double by 2050.Farming has become a risky affair and now due to several uncertainties, fewer people are choosing

[12] https://www.un.org/press/en/2022/sc14894.doc.htm
[13] *ibid*

farming as an occupation. Meanwhile, global food prices are rising, arable land continues to be lost to urban sprawl and soil is being degraded by over-farming."[14]

IV. INDIA & FOOD SECURITY

India, which is the second largest populated country with over 1.3 billion populations has registered anexponential rise in its GDP and per capita consumption during the past twenty years. Our food grain production has nearly doubled. However, in spite of such a tremendous growth in terms of industry, economy and agriculture still a large number of population is struggling for access to food.

According to FAO estimates in 'The State of Food Security and Nutrition in the World, 2020 report', "189.2 million people means 14% population is undernourished in India. Also, 51.4% of women in reproductive age between 15 to 49 years are anaemic. Further according to the report 34.7% of the children aged under five in India are stunted (too short for their age), while 20% suffer from wasting, meaning their weight is too low for their height. The Global Hunger Index 2020 ranks India at 101 out of 116 countries on the basis of three leading indicators -- prevalence of wasting and stunting in children under 5 years, under 5 child mortality rate, and the proportion of undernourished in the population."[15]

"With a five-fold increase in food grain production from 50 million tonnes in 1950-51 to about 250 million tonnes in 2014-15, India has moved away from dependence on food and become a net food exporter.[16] In 2016, the government launched a number of programs such as the National Food Security Mission, Rashtriya Krishi Vikas Yojana (RKVY), the Integrated Schemes on Oilseeds, Pulses, Palm oil and Maize (ISOPOM), Pradhan Mantri Fasal BimaYojana and the e-marketplace to double farmers' incomes by 2022. These seek to remove bottlenecks for greater agricultural productivity, especially in rain-fed areas. Additionally, there is a massive irrigation and soil and water harvesting programme to increase the country's gross irrigated area from 90 million hectares to 103 million hectares by 2017."[17]

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[14] https://www.un.org/development/desa/en/news/population/world-population-prospects-2019.html

[15] 'Hunger in India' *available a*t: https://www.indiafoodbanking.org/hunger#:~:text=State%20of%20Hunger%20in%20India,to%2049%20years%20are%20anaemic.

[16] 'Every grain saved is a grain produced' *available at:* https://www.tribuneindia.com/news/features/every-grain-saved-is-a-grain-produced-322970

[17] 'Nutrition And Food Security' *available at*: https://in.one.un.org/un-priority-areas-in-india/nutrition-and-food-security/

Access to food is a legal right and towards this end we have the National Food Security Act (NFSA), 2013; and the State, has been trying to check the nutritional deficiency among our children by providing mid-day meals at schools. We have *anganwadi* workers who are entrusted with the responsibility of procuring rations and subsidized grains for the needy such as the poor who lie below the poverty line, pregnant women and lactating mothers[18].

India has immense potential of growth in the field of agriculture and the reason is its unique geographical and climatic conditions. Fundamentally India is an agriculture country and the agriculture sector is currently valued at US$ 370 billion. Thus this sector is one of the major sectors in the Indian economy. According to the Economic Survey 2020-21, GDP contribution by the agriculture sector is likely to be 19.9% in 2020-21, increasing from 17.8% recorded in 2019-20[19].

India is the world's second largest agriculture producer. It is the largest producer of milk, jute, and pulses. It is also the world second-largest producer of rice, wheat, sugarcane, fruit, vegetables, cotton, and groundnuts. India remains the world's largest exporter of refined sugar and milled rice. Strong exports of rice, cotton, soybeans, and meat helped India move up to 9th place among global agricultural exporters in 2019[20].

India has one of the highest fertile land in the world and it has capacity to feed the entire population of the world but to make it true India will have to work hard for improving quality, quantity and to monetize the entire sector. A short term, mid-term and long-term strategy can be of great help. First and most important is to improve quantity of the product along with Quality and for this purpose following should be the focused area-

1. *Implementation of land reforms*-To achieve the goal of fulfilling future food requirement land reforms are very much important. Dealing with the problem of small landholding to using machines like tractors. These machines make the field easy and improves productivity. Abolition of middlemen, land ceiling are also the part of land reforms to improve productivity[21].
2. *Interplant*-Interplanting is a practice of growing different crops together at the same time. It is also known as intercropping. It is one of the best way to maximize

[18]'Government's effort to fight Malnutrition' *available at*: https://motherchildnutrition.org/resources/pdf/mcn-the-governments-efforts-to-fight-malnutrition.pdf
[19]'Digital Agriculture - The Future of Indian Agriculture' *available at*: https://www.ibef.org/blogs/digital-agriculture-the-future-of-indian-agriculture
[20]'4 Countries That Produce the Most Food*' available* at: https://www.investopedia.com/articles/investing/100615/4-countries-produce-most-food.asp#citation-40
[21] 'Land Reforms in India' *available at*,: https://byjus.com/free-ias-prep/land-reforms-india-upsc/

the productivity and utilizing space. But the appropriate combination of crops is very much important to get better results[22].

3. *Plant more densely*- It is the simplest way to improve the productivity of farms. Many times unnecessarily farmers keep their vegetables excessively away. It wastes so much of area. Planting densely increases effective utilization of space[23].
4. *Plant many crops*-The next method of improving productivity is to plant many crops. Mixed cropping or co-cultivation, which involves planting two or more plants simultaneously which save space and provide environmental benefit, including protecting soil nutrient. Different crops may get mature at different point of time.[24].
5. *Raised beds*-Raised bed farming means building crops bed above the existing soil level. One of the major advantage of raised bed is Improvised soil drainage, which allows soil to get dry and warm faster during the spring. It also provides better soil conditions for vegetable crops which need well drained soil[25].

6. *Smart water Management*-Water is an essentiality for crops. Rising water crisis is creating a threat for the agriculture sector as well. So now water management is the dire need of hour. The meaning of water management is the best utilization of water for agriculture purposes without wasting it. By using the sprinkler irrigation system, we can increase the output by up to 50%[26].

7. *Heat Tolerant Varieties*–Due to global warming the temperature on earth is constantly rising. Plant varieties which are heat tolerant can maintain their yield at high temperature too. Heat tolerant varieties may increase the crop yield by up to 23%[27].

8. *Use Nitrogen*-Nitrogen is one of the most essential component for better plant growthas most of the plants will not exist without it. Annually around 100 million tonnes of nitrogen are applied to crops in the form of fertilizer, which enhances the

[22]'Interplanting and Intercropping Definition and Tips*' available at*: https://www.thespruce.com/what-is-interplanting-and-intercropping-2539764
[23] Top 10 Methods to Improve Farming Productivity, *available at*: https://www.tractorjunction.com/blog/top-10-methods-to-improve-farming-productivity/
[24]'Mixed Cropping: The Co-Cultivation of Two or More Crops' *available at*: https://www.thoughtco.com/mixed-cropping-history-171201.
[25] 'Raised Bed Farming Techniques' *available at*: https://www.kenncomfg.com/blog/raised-bed-farming-techniques#:~:text=Raised%20bed%20farming%20refers%20to,or%20have%20an%20irregular%20shape.
[26]'Top 10 Methods to Improve Farming Productivity' *available at*: https://www.tractorjunction.com/blog/top-10-methods-to-improve-farming-productivity/
[27]'Temperature extremes: Effect on plant growth and development' *available a*t: https://www.sciencedirect.com/science/article/pii/S2212094715300116

production upto22%.to help them grow stronger and better. So effective use of nitrogen can give better results in plant productivity[28].

9. *Improved seeds*- Seeds are the mother of yield. They are the best to enhance the productivity. Improved seeds mean seeds which could ensure good crop yield in less favorable climate and areas. In such areas with the help of such seeds we can secure higher yield of crop[29].

10. *Plant protection*- As per an estimation 5% of crops are destroyed by diseases, pests and insets. Government should try to make farmers aware about the ill effect of all and to teach them about pesticide and insecticides. Only through appropriate plant protection we can create better yield to fulfill the rising demand of food items[30].

In the coming decades as per estimated predictions India is going to be the largest populated country. The size and demand of the population will increase but not the size of the land. It is going to put extra pressure over available resources to fulfill the requirement of rising population. In new era of new challenges agriculture sector will have to contribute significantly in employment generation and in economic empowerment of this nation.

India needs to re-look its strategy, for producing more with less water and less land, for which the below mentioned points must be considered-

Soil Health Enhancement

If soil loses its productivity, then it directly affects the direct yield of the crop. Soil improving practices plays an extremely constructive role to improve soil ecosystem. Soil health enhancement includes soaking up of soil nitrates, increasing soil organisms and improving crop health. It also includes reduction of erosion, soil compaction and plant parasite nematodes[31].

Increasing supply of water for irrigation

Water is life. It is a natural resource and not a private property. Falling level of portable water and rising scarcity of the same is going to create a big challenge for the agriculture sector as

[28]'Three ways we can better use nitrogen in farming' *available at*: https://www.unep.org/news-and-stories/story/three-ways-we-can-better-use-nitrogen-farming#:~:text=Without%20nitrogen%2C%20most%20of%20the,them%20grow%20stronger%20and%20better.

[29]'Feed The Future Improved Seeds For Better Agriculture' (Semear), *available at*: https://www.usaid.gov/mozambique/fact-sheets/feed-future-improved-seeds-better-agriculture-semear

[30]Importance of Crop Protection, *available at*: https://www.longdom.org/open-access/importance-of-crop-protection-78142.html

[31]'Enhancing Biota and Improving Soil Health', *available at:* https://www.sare.org/publications/manage-insects-on-your-farm/putting-it-all-together/enhancing-biota-and-improving-soil-health/

well. Though the government is working in this direction but each of us should work for renovating wells and ponds and should use the practice of sprinkler and drip irrigation, should receive priority attention.

There should be launch of awareness campaigns to encourage recycling and sustainable use of water.

Credit and Insurance

Credit is a very important part of agriculture as farmer needs money to meet their basic capital requirements which is otherwise not easily available to them. It helps them in securing seeds, equipment, fertilizers etc.[32]In India credit reform is immensely required to enhance small farm productivity. Transactions and risk both is needed to be improve efficiently.

We need to improve our debt recovery and settlement process between the financial institutions and farmers. Agriculture is becoming more and more uncertain and thus increasing distress among farmers. It is highly required to restructure farmer's loan, reducing the interest rates on loans taken for sowing crops and protecting loss of the farmers due to natural disasters[33].

It is imminent for the central and state government to provide an agricultural risk fund to mitigate losses of farmers when natural disasters recur[34].

Technology

Technology is the new boon in agriculture sector improve the performance of new varieties. Technology enhances per hectare yield and income both. Technology is helpful in post harvesting circumstances too.

In the era of fifth generation technology the agriculture industry also transformed radically. New advanced machineries have improved the scale of production. Also yield have improved owing to the improved quality of Seed and fertilizers and access to irrigation facilities[35].

Market

Marketing of the product is one of the most important strategy to improve economic viability of farming. Market reform should begin from production, planning and investment in

[32]'Agricultural Credit' *available at*: https://www.investopedia.com/terms/a/agricultural-credit.asp
[33] https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?UrlPage=&ID=512
[34]'Government considering to set up an agriculture credit risk fund' *available at*: https://economictimes.indiatimes.com/news/economy/agriculture/government-considering-to-set-up-an-agriculture-credit-risk-fund/articleshow/15793872.cms
[35]'Agriculturesconnectedfuturehowtechnologycanyieldnewgrowth'*available at:* https://www.mckinsey.com/industries/agriculture/our-insights/agricultures-connected-future-how-technology-can-yield-new-growth

agriculture market. There must be an effective link of production-planning and marketing, so that the entire cultivation- consumption- commerce chain gets due attention[36].

Strategize our farming

India should also adopt different agriculture strategies for different climatic ones. "In the North-Western High Productivity Region, the strategy should be to promote diversification of agriculture, agro processing industry and exports. In Eastern Region the major thrust should be on flood control, improvement of irrigation facilities and adequate credit and extension facilities. In Peninsular India the emphasis should be on promotion of an appropriate farming system, which economises on water use and generated higher value from land. In Ecologically Fragile Regions Including Himalaya and Desert Areas the trust should be on the development of agricultural system, which does not damage the fragile ecological balance in the region, but help in conserving and strengthening the sustainability of natural resources"[37].

V. CONCLUSIONS

Thus, after the detailed analysis it can be concluded that in the coming years entire world is going to face different challenges for human existence like water and food. But even in this grim situation India has immense capabilities for doing excellent in food production. China and India alone account for close to 30 percent of the global total[38]. Contrary to popular perception, India's agriculture sector is a great. India ranks second in the world in the agricultural sector. Agricultural structure of India in 21st Century is much diversified and stronger. During the last fourteen years, agriculture has recorded a 350 percent rise over the growth recorded in the last three decades.

To evolve as a global leader in agriculture sector that India need to develop a more structured model for agri-economy. India's agriculture sector has ability to generate a good number of employability for Indian youths. Foreseeing the opportunity in food sector India is now intended more in investing in technology. Better quality seeds and use of neem coated urea is more rampant. Work on land reform, water management and food distribution is still going on by the government.

[36] National Commission for Farmers *available at* https://agricoop.nic.in/sites/default/files/NCF3%20%281%29.pdf

[37] 'Six Main Strategies to Improve the Agriculture Productivity in India' *available at :* https://www.yourarticlelibrary.com/agriculture/six-main-strategies-to-improve-the-agriculture-productivity-in-india/40230

[38] 'India: An agricultural powerhouse of the world' *available at:* https://www.business-standard.com/article/b2b-connect/india-an-agricultural-powerhouse-of-the-world-116051800253_1.html

Now India is able to market its product globally. Farmers are also becoming tech savvy and are aware about the latest advancement in agriculture sector and also about latest scheme of the government. "Proactive promotion of Indian agri products will further increase India's farm exports. It will bring price and income stability and will contribute to its rural prosperity. Finally, fast-track clearance of investment, production proposals including innovative technologies for agri inputs will considerably help, too. The 'Make in India' initiative is a stage with great potential to recognise and champion Indian farmers, and provide the country with opportunities for a brighter future"[39].

Maintaining cash flow for farmers is another matter of concern for the Government. Several schemes and programs have been launched by the government to improve access to credit for farmers through a number of channels, including: interest rate subsidies; debt relief; collateral-free loans; improving administration; and mandating banks to increase the flow of credit to rural customers. Micro-financing is also playing a significant role in providing loan to the farmers.[40]

Indian government very recently introduced three farm laws which were withdrawn subsequently. The government should discuss with the stake holders and should try to bring new laws to increase inflow of money and huge investment in the agriculture sector especially in enhancing the storage capacity. Food processing and packaging industry also have a golden future in India. India can tame its potential and channelize its resources in the field of agriculture more appropriately to play a vital role in ensuring food security for not only India, but the entire world.

[39] *ibid*

[40] Adam Cagliarini and Anthony Rush, 'Economic Development and Agriculture in India' *available a*t https://www.rba.gov.au/publications/bulletin/2011/jun/3.html

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MEDIATION AN EFFECTIVE MODE IN SETTLING THE ISSUES: AN OVERVIEW

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ABSTRACT

The courts in India are overburdened, there is scarcity of Judges. Time to time new amendments have been done in the laws to make provisions for early disposal of the cases. In this regard for settling the civil disputes between the parties, important amendments in the year 1999 and 2002 (which came into force from July 1, 2002) were done in the Civil Procedure Code of 1908. After these amendments Alternate Disputes Resolution gained momentum. Special act on ADR was passed, the courts started making efforts in settling the disputes outside the court by applying the ADR methods and through Lok Adalat's. In ADR the mediation method is one of the important technique, in which mediator plays an important role in mediating between parties and then settling the issues between them. Mediation has proved to be the effective mode in settling disputes, but still there are courts in India, where emphasis is not on settling the disputes through these techniques, which is matter of concern. All these issues are discussed here in this paper, so that there should be optimum use of these techniques.

Key Words: Mediation, Constitution, Civil Procedure Code, Civil Disputes, Parties, Resolution.

I. INTRODUCTION

An Alternative dispute resolving system refers to ways of resolving disputes outside the court, where ADR procedures are usually done with the help of a neutral and independent person. ADR procedures in modern times have emerged as alternative to the courts. The ADR methods are more natural in nature and can be applied to all the disputes that are of civil nature and the disputing parties can easily resolve them by mutual understanding.ADR techniques are without formalities, they are more adaptable and help in the completion of process. The importance of ADR is reflected from the words of Mahatma Gandhi[1], "I approached Tyeb Sheth and requested and advised him to go to arbitration. ……. I suggested him that if arbitrator commending the confidence of both parties could be appointed, the case would be quickly finished……I felt that my duty was to befriend both the parties and bring them together. I strained every nerve to bring about a compromise. ……I had learnt the true

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[1]M.K. Gandhi,*An Autobiography or The Story of My Experiments with Truth 118-119* (GBD Books, New Delhi, 2015).

practice of Law. ……I realized that a true function of a lawyer was to unite parties riven as under. …. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. Ilost nothing thereby- not even money, certainly not my soul."

Different modes of ADR are Mediation, Conciliation, LokAdalats and Arbitration. In mediation and conciliation there is involvement and the assistance of a neutral third party, which empowers parties to resolve their own disputes. In mediation, the mediator (an impartial third party) assists the parties to a dispute in reaching a mutually satisfactory and agreeable settlement of the dispute, it is important to note that mediator is no authority to make the decision binding on the parties, it is confined to resolving the dispute through negotiation and not by adjudication. Then the end point of mediation will that be of conciliation which involves formation of opinion and delivery of verdict.

The mediation is very important mode in settling the civil disputes. It involves the techniques, skills and psychological approaches, where the mediator identifies the actual dispute of the parties, the expectation of the parties in dispute, probable solutions including aid and advice of the mediator. It is important to note here that the disputes between the parties in the court are resolved as per the law, but in mediation it is not necessary to go by the bindings of law.It is necessary to mention here that in other ADR methods, the arbitrator follows the law and rule of the procedure, but it is not in case of mediation. In mediation, the mediator goes in depth of the parties and in mediation both of the parties may be the winners. In comparison to other ADR methods the Mediation is having a cost effective and pocket friendly method. It is not wrong to say that mediator is neither an arbitrator, negotiator nor a judge; he acts asan unbiased friend and facilitate the parties. In the legal jurisprudence mediation is very much effective in the matters relating to industrial, commercial, trade, business, diplomatic, employment and family matters.

II. Meaning of Mediation

Mediation is a technique of ADR which is frequently used where mediator has no power to adjudicate or impose an award. Mediation is done by a neutral third person to reach negotiated settlement between the parties. Mediation has always been part of legal jurisprudence and the meaning of mediation is very important as it determines its nature and scope. The definition of the mediation in legal context are:

As per The Black's Law Dictionary[2] "mediation is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution."

As per the Oxford Dictionary[3] the word 'mediating' means, 'act as go- between or peacemaker', reflecting an attempt to end a problem between two or more people or groups who disagree by talking to them and trying to find things that everyone can agree on. It is process of influencing something and/or make it possible for it to happen.

As per the Merriam Webster dictionary[4], mediation is the act or process of mediating, such as

a) Intervention between conflicting parties to promote reconciliation, settlement, or compromise. Specifically, a means of resolving disputes outside of judicial system by voluntary participation in negotiations structured by agreement of the parties and usually conducted under the guidance and supervision of a trained intermediary;
b) Indirect conveyance or communication through an intermediary;
c) Transmission by an intermediate mechanism or agency.

As per Business English, it means, 'the process by which someone tries to end a disagreement by helping the two sides to talk about and agree to a solution'.

Simple meaning of mediation reflects about a process done between conflicting parties by a neutral third party. The independent and impartial person who is mediator, after taking the parties in dispute into the confidence, tries to resolve the disputes, the mediator plays an active participation for bringing out the fair result. Mediation is different from the arbitration. In arbitration, arbitrator acts as a judge. Mediation is very common in resolving the civil disputes relating to family matters, contracts and damages cases. Mediation is done for a substantial fee by the professional mediators and this fee is borne by both the parties. It also helps the parties get early results.

Mediation in India

In the mediation process the resolution of the dispute between parties is assisted by a third party who helps them to negotiate and reach at a just outcome. It takes place in three broad phases i.e. First- introduction (identifying the issues);

Second- a joint session; and

Third- reaching to agreement.

[2]Black's Law Dictionary, (10th. Edition).
[3]A S Hornby *Oxford Advanced Learner's Dictionary*528 (14th edition).
[4] https://www.merriam-webster.com/dictionary/mediation

The concept of mediation is traceable in India since thousands of years by historians, anthropologists and scholars. In ancient time it was known with different names and had sanction of the sovereign. Though in those times mode of mediation may differ or there may be absence of honest endeavour to resolve the dispute amicably, as it all depend on the system of the sovereign ruling the country or we can say,on the morality of the sovereign. In modern India the mediation is divided into two broad basis, one the traditional and the other is formally structured.

Traditional Mediation platforms

Traditional mediation is deep rooted in our society or we can say it is part and parcel of the society, in which mediation is done by a family member, friends, civil bodies which may include elderely persons from the society, these are mainly:

Family Mediation

In our society family mediation is in existence since ages and centuries.It includes the family led by the male or female, the person whoever is holding the central power plays the important role of in mediation, whenever disputes arise between the family. Though in most of the parts of the country there is patriarchal social system but there are few areas and tribes where there is matriarchal society.

Friendly interventions

It is an important mediation where friends, near and dear to the families play a role in disputes resolving between the parties. It not only exists in India but in almost all parts of the world. Family friend sometimes include an advocate or any wise man.

Civil bodies

It is very important to note here that the existence of mediation done by the civil societies exist traditionally in our system. In village, village bodies (consisting of elderly villagers), in cities civil bodies again consisting of elderly persons are the persons who mediate between the parties, through deliberations and talks. Panchayats are themost commonly used platform under this category.

Structured Mediation under Indian system

In the country there are rules and laws for the mediation which are reflected in statutes, as mediation is considered to be important mechanism for dispute resolving.

Provisions in CPC

Civil Procedure Code is general law of procedure, certain provisions of it reflect about the mediation. For example, Section 89[5] gives the power to the courts, for the settlement of the disputes case be referred to arbitration, conciliation, judicial settlement including settlement through LokAdalat or for mediation. The mandate of section 89 CPC recognize mediation as right and distinguish it from conciliation and LokAdalat settlements.

Order 10 Rule 1A of CPC[6] is to be read with the Section 89 CPC. This rule makes it mandatory for the court to explore the resolution of the disputes through the alternative means as reflected under section 89 of CPC. Under Order 32 A[7]of the CPC all the rules reflect the duty of the court in family matters including matrimonial, maintenance, adoption, succession and legacy matters. This section is having greater intensity and intention in dispute resolving. The court has to explore the possibility of settlement between the parties.

Provisions in other statutes

In the present times when statutes are made then emphasis is given by the state to insert some provisions relating to mediation in the statutes. In the companies Act, 2013 section 442 obligates the central government to maintain a panel of experts for mediation between the parties during the pendency of any proceedings before the central government or the tribunal or the appellate tribunal under this act. In this mediation the parties can request or the judicial bodies including the central government suo-moto, refer any matter pending before them to the experts from mediation and conciliation panel. It is pertinent to mention here that pursuant to section 442, the central government notified the companies (Mediation and Conciliation) Rules, 2016 to give effect to the provisions of mediation.

The provisions relating to mediation are also reflected in the Industrial dispute act, 1947, it embodies a formal and assertive structure of mediation and can be done bilaterally between the employer and their workmen with or without the assistance of in-house experts or formal conciliation proceedings with the assistance and concurrence of conciliation officer.The settlement reached by virtue of conciliation proceedings has the same force as the award of a labour court, industrial and national tribunal.

Then in Real Estate (Regulation and Development) Act,2016, there is explicit provision regarding mediation for prompt consideration and resolution of the complaints and disputes.

[5] Inserted by the CPC (Amendment Act, 1999, S.7 (w.e.f. July 1, 2002). *Code of Civil Procedure* 37(Professional Book Publishers New Delhi, 2002). Page37.
[6] *Ibid.*
[7] *Ibid.*

Section 32(g) of the act empowers the regulatory authority to make recommendations to the state government to facilitate amicable conciliation of dispute between the promoters and the allottees.

In the provisions of Commercial Courts Act, 2015, section 12-A embodies pre-litigation mediation as exist in other progressive countries. As per the provision, the plaintiff cannot file urgent interim relief without exhausting the remedy of pre- institutional mediation and the mediation process shall have to be completed within three months from the date of application and this period can further be extended for two months with the consent of parties. The settlement has the same status and effect of arbitral award under sub section 4 of section 30, Arbitration and Conciliation Act, 1996. On Section 12-A, the Bombay High Court in case *Deepak Raheja*v. *Ganga Taro Vazirani*[8] expressed its opinion as, "These debates in the Parliament support the view that Section 12A is mandatory and enacted in the larger public interest. The debates also indicate that Section 12A is an innovative legislative tool enacted to expedite the commercial disputes resolution in the economic interest".

In the consumer protection Act, 2019provisions are made which empowers the district commission, if it appears to the commission at the first hearing of the complaint after its admission or at any later stage that chances of settlement are there which may be accepted to the parties, direct the parties to give in writing their consent to have their disputes settled by mediation.

Mediation Provisions and the Judiciary

In our system the judicial organ always being the front-runner in introducing the innovative concepts for the benefits of the society, whether it be public interest litigation, Legal Aid Setup in the country or setting of the mediation centres. The High courts and Supreme court have their own set of rules and the mediation centres, in the case *M.R. Krishna Murthi* v.*New India Assurance Co. Ltd*[9] the supreme court of India reaffirmed the commitment of the Indian Judiciary and the legal fraternity in favour of having a substantive mediation law. In this case the Supreme Court, has given the direction to the government to consider the feasibility of enacting Indian mediation act to take care of various aspects of mediation in general. Now even district courts have mediation centres. It is pertinent to mention here that in state of Delhi, in the district courts, matter relating to family, matrimonial, labour, tenancy, complaints under section 138 Negotiable Instrument act can be referred for mediation.

[8]Commercial Appeal (L) No. 11950 OF 2021 (Jan 10, 2021) *available at*https://indiankanoon.org/doc/8789372/
[9] 2019 SCC online SC p. 315

The significance of mediation has been consistently recognised by the judiciary in the country. During the covid-19 period the supreme court in case *Ficus Pax (P) Ltd.* v. *Union of India*[10] while deciding the bunch of writ petitions relating to disputes of workers with the government relating to payment of wages during lock down in covid-19 period held that efforts should be made to sort out the differences and disputes between the workers and employers regarding payment of wages through negotiations and settlement and directed the employees to initiate the process of negotiation with their organisation and enter a settlement with them and if they were unable to settle by themselves, submit a request to the concerned labour authorities.

The mediation has become such an important concept that even the Law Commission of India in its 129th report[11] proposes the courts to compulsorily refer disputes for mediation.

Kinds and procedure of mediation

Different models based on different ideologies are found of mediation but the basis, procedure and skill are almost same in all jurisdictions and cultures. Now a days emphasis is on in resolving the disputes before initiating the case against the erring party and mediation has emerged as a frontrunner in alternate dispute resolution mechanism. In today's mediation, skilled and trained mediators help in resolving the disputes. The mediation in today's time include:

i. *Facilitative Mediation*: Facilitative intervention is termed as conventional mediation, it has been witnessed since the ancient times and in 20th century this sole mediation as a facilitatory, which now termed as facilitative mediation. In this mediation instead of forcing suggestions proposals, solutions and recommendations, the mediator create confidence among both the parties and work out towards the solution. So, this kind of mediation is also termed as form of facilitated negotiation which is done by an impartial third party.

ii. *Court Referred Mediation***:** Mediation is the voluntary participation of the parties in the resolution of their dispute, but sometimes parties don't approach the court for mediation. The court seeing the chances of the settlement and in the interest of the party's court direct the parties to go for mediation. It is most effective and less

[10] (2020) 4 SCC p 810

[11] Law Commission of India, "129th Report" (1988) *available at*https://lawcommissionofindia.nic.in/101-169/Report129.pdf

expensive way. The courts act under the statutory provisions and some of these mediations are supervised by the courts themselves.

iii. *Evaluative Mediation*: Obvious divergence to facilitative mediation is evaluative mediation. In this type of mediation mediators are expected to make proposals, suggestions, recommendations and articulate ideas, thoughts and belief, the mediators encourage and impress upon the parties to evaluate merit of their contentions and claims and come out with an equitable and fair resolution. Evaluative mediation generally applied in court mandated mediation, here mediators are skilled and possess legal expertise on the subject matter of the dispute. In this mediation mediator plays an important role.

iv. *Transformative Mediation:* Like facilitative mediation it is more party driven. It is constructive, reasonable and efficient category of mediation. Transformative mediation is founded on the principles of empowerment of each of the parties as much as possible and recognition of each other position and belief. Empowerment in respect of decision making signifies that the party utilizes the good decision-making skills to make decisions about settlement. In this mediation the party's structure both the process and the outcome of mediation and the mediator follow the lead. This mediation is better and improved version of the facilitative mediation, it is mainly used in public policy conflict, industrial commercial disputes, civic conflict and family etc.

v. *Mediation-Arbitration*: In short termed as *Med- Arb*, not very popular except the parts of Europe, it is an alternative mode of conflict resolution which entails engaging in arbitration in the event of mediation failure. This practice is new age discovery and provocation to the jurist. As in mediation and arbitration mattes are pursued between the disputing parties, a solution to the dispute either found amicably at the mediation or in a binding manner by arbitration, here same person or different persons may act as mediator and arbitrator.

vi. *Arbitration-Mediation and Arbitration-Mediation- Arbitration:* In short *Arb-Med* and *Arb- Med- Arb* are two separate but similar practices with slight divergence. Here dispute is first referred to arbitration then to media. Here skilled third party conducts arbitral meetings with the contesting parties, access the evidence of the parties and arguments in a formally conducted arbitration. It formulates an award but don't share it with the parties, then it attempts to mediate between the parties, to resolve the dispute amicably. If the parties resolve their disputes in mediation, then the outcome

of it comes as a consented award, failing which the arbitrator delivers a previously determined award. If the dispute settled up to mediation, it is termed as *Arb- Med* and if dispute is finally decided by the arbitration, then it is termed as *Arb- Med- Arb*. In the Indian context this mediation and the earlier one are not prevalent.

vii. *E-mediation:* Electronic mediation is the mediation process in which disputes are resolved by taking the help of information communication tools. It is alternative dispute resolution that is performed online communication through texting, emailing, voice messaging and video conferencing, which now has become a way of normal business life. It is convenient and time saving, in the digital age electronic mediation has assumed an important place. In the last two years in the time of covid-19 lockdowns e-mediation become very much prevalent. On e- mediation platforms the parties communicate with the mediators through video conference, using different applications and software, such as Google meet, Zoom, Microsoft Teams etc. online private individual and joint sessions are conducted with mediators along with voice chats. Though there have been concerns regarding confidentiality and safety issues connected to using the online apps and software's.

Modes of Mediation

In the mediation, cases are referred to the mediation centres with the consent of the parties, the mediator is impartial third party which assist the parties to resolve their disputes through reaching a mutually satisfactory and agreed settlement of their disputes. The mediation has been institutionalised within and outside the courts. Outside the courts it has been institutionalised by trade, business and commerce-based association such as Federation of hotel and restaurant association of India or Chamber of commerce and industry most of these trade bodies have a formal mediation mechanism.

In the courts it is organised, whether it be High Courts, Supreme Court or the district courts. It is important to note here that in the mediation no court rules or legal precedents are involved, mediation centres in the courts worked under their own internal rules and bar association also plays an important role in it. It is not right to say mediation centres are alternate to filing of a case in the courts, but is an important mode in resolving the disputes between parties. As a general rule, mediation is non-binding procedure, where mediator through his effortand deliberation with the parties makes them understand and help both the parties agree on the settlement. Cases to the mediation centres are sent on the request of the parties or the courts taking *suo-moto* action in referring the case to the meditation centre. In

present times pre-suit mediation is becoming more widely accepted way of resolving disputes. The mediation has becoming more important dispute resolving mechanism as the proceedings of mediation are confidential, non-binding, quick and inexpensive.

Importance of mediation in present times

The mediation proceedings are widely accepted and sensible way of resolving disputes. Mediation enjoys a great success rate as the parties brought together to a neutral environment, where they can freely present their position before a neutral third party, who then limit the issues and put them in perspective the importance of mediation in present times is reflected as under

i. *Informal Proceedings*: The mediator does not impose decision upon the parties, in mediation settlement is arrived with the consent of the parties. The mediator helps the parties to reach the amicable settlement in resolving a dispute. There are no fixed solution in mediation. Parties can look to developing creative solutions to resolve matters and the solutions rest with the parties themselves.

ii. *Privacy and Confidentiality*: The mediation between the parties took place in separate rooms and are not of public nature. The confidentiality is maintained and the proceedings before mediation are not a matter of public record. No party can take any advantage or benefit of the statement given in mediation of the other party in any court of law, moreover the parties cannot take the benefit of the observation of the mediator during mediation in any court of law. There are no of judgements, where high court and the supreme court of India has retreated time and again that full privacy and confidentiality should be maintained of the proceedings took place before the mediation. In case*Perry Kansagra*v.*Smriti Madan Kansagra*,[12] Supreme Courtin para 30 laid down,"The mandate of Section 89 of the Civil Procedure Code, 1908, read with Rule 20 and Rule 21 of the Delhi High Court Mediation and Conciliation Rules, 2004 provides for confidentiality and non-disclosure of information shared with the mediator and during the proceedings of mediation". In another case of *Moti Ram(D) Tr. Lrs. & Anr* v. *Ashok Kumar & Anr,*[13] the supreme court held, 'If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the Court stating that the `Mediation has been unsuccessful'.

[12] 2019 **SCC** OnLine SC 211, decided on Feb 15, 2019
[13] (2011) 1 SCC 466

Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings'.

iii. *Time and cost saving*: In comparison to the normal proceedings in the civil courts, in mediation centres less time consumed. It is very quick process, only in complicated issues and mediation between multiple parties more time is required. The proceedings before mediation are without formalities and no cost or very less cost is spent in the mediation proceedings.

iv. *Parties Right*: It is parties right and have control over opting for mediation, it is also there that during the mediation proceedings either of the party can terminate its participation. The mediator helps parties to have control over negotiation during the mediation proceedings. In case *Ganga Taro Vazirani* v. *Deepak Raheja,*[14]Supreme Court in para 26 laid down, "A defendant who genuinely desires to resolve the disputes through mediation, can always request the Court to invoke the provisions of section 89 of the CPC to send the parties to mediation."

So, in the mediation it is parties which prescribe the rules and terms, subject to which their disputes are to be mediated. Mediation is hybrid process where informal procedure is adopted and a neutral person helps and assist the parties in dispute to reach on settlement. This neutral person collects information from both the sides and maintain confidentiality in the matter. The mediator narrows down the issue, make the parties understand, facilitate dialogue and resolve the dispute after the negotiation between the parties.

III. CONCLUSION

Mediation has become such an important platform that now a days the organs of the state i.e executive, legislature and judiciary overwhelmingly propagate the mediation gateway for the dispute resolution, though mediation is a voluntary process, it is not necessary for the parties in dispute to agree on some solution, what is required a honest endeavour to resolve the dispute amicably. Mediation is an effective means of alternate dispute resolution, it don't cause any prejudice and bias towards the parties, even if the mediation fails to arrive at an amicable settlement, it don't affect the rights of the parties and if mediation meet with a positive outcome then it became a binding and enforceable effect. Mediation is an attempt to revival of the process in resolving the disputes in a traditional way. Mediation success rate is very high in dispute resolving as comparison to the other modes. So, to popularise the concept of mediation certain steps are required to be taken. These include:

[14] 2021 SCC Online Bom 195, decided on Feb 16,2021

i. The government must ensure setup of mediation centres in all the courts of the country.
ii. Mediation should be made obligatory alternative before litigation starts in court.
iii. In case the mediation fails between the parties the guidelines laid down by the Indian judiciary relating to privileges to the statement of parties and the report of mediator should be taken care by the adjudicating bodies.
iv. Awareness programmes should be initiated by the government, to aware the masses to opt for mediation in the mediation centres for settling their disputes.

By following the above suggestions there can be optimum use of the technique of mediation, which will benefit the society and the country at large.

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DEBATE ON ARMED FORCES (JAMMU AND KASHMIR) SPECIAL POWERS ACT, 1990 POST ABROGATION OF SPECIAL STATUS

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ABSTRACT

The violence unleashed by militants in the late 1980's and the consequent combating exercises by state forces in the newly formed Union Territory of Jammu and Kashmir have frequently violated the basic rights of life and liberty of the people in the region. The escalation of insurgent violence, which developed into an "invisible war" by 1990, had necessitated the enactment and implementation of anti-terrorist laws such as the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (hereafter used as AFSPA). Paradoxically, these anti-terrorist laws meant to combat insurgency and terrorism have more often than not, contributed to repression, and violation of civil liberties resulting into demand of the repeal of the Act. Such demand has become an issue for debate among politicians, human rights groups and the armed forces. The issue over the years has acquired political overtones casting a cloud over its revocation as the diverse communities, regions and political organizations in the state hold conflicting and contradictory views on the matter. The paper attempts to examine the debate on AFSPA and that has assumed significance following the abrogation of Article 370 and division of the state of Jammu and Kashmir into two Union territories, Jammu and Kashmir and Ladakh.

I. INTRODUCTION

The terrorist violence in the erstwhile state of Jammu and Kashmir now a union territory[1] has affected all the three regions of the state. The indiscriminate killings, incidents of rape, molestation, blaze, destruction of property by militants sometimes assumed menacing proportions. According to the information provided by the Jammu and Kashmir government as many as 41,866 persons lost their lives in 71,038 incidents of terrorist violence in the region.[2] This apart, 23 civilians and 78 security personnel lost their lives itself till September 4, 2019. Such violations by the terrorists groups necessitated the enactment, implementation and retention of anti-terrorist laws such as Armed Forces

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[1]On August 5, 2019, Home Minster introduced two Bills in the Rajya Sabha revoking the special status of Jammu and Kashmir under Article 370 and bifurcating the state into two Union Territories.

[2]Vijaita Singh, "365 terrorist incidents so far in J&K this year", *The Hindu*, (November 23, 2019).

(Jammu And Kashmir) Special Powers Act, 1990 (hereafter used as AFSPA), which was enacted by the Parliament on 5th July 1990. Ironically, the Act also contributed to the spate of violations of human rights and "ended up being the vehicle of state oppression".

The Act, according to some, confers extraordinary powers on the men in uniform who have often abused it but cannot be prosecuted. According to them, as per section 4 of the Act, special powers are conferred upon the members of the armed forces empowering them to arrest, to detain, and even to kill. Under section 4(a) of the Act, even a non-commissioned officer can order his men to shoot to kill "if he is of the opinion that it is necessary to do so for maintenance of public order".[3] Section 4(c) of the Act permits arrest without warrant, and section 4(d) authorizes the entry and search, without warrant of any premises to make arrests as sanctioned under section 4(c), or to recover any person believed to be wrongfully restrained or confined" etc. Moreover, in order to enable them to carry out their duties without fear of being prosecuted for their actions, section 7 exempts army personnel from prosecution. It states that "no prosecution suit or legal proceedings shall be instituted, except with the previous sanction of the central government". Section 7 of the AFSPA have rather given impunity and non-accountability to security forces resulting in more excesses. This has been substantiated by incidents such as Pathribal and Machil encounter cases. Amnesty International has held section 7 of the Act as "the primary facilitators of impunity"[4] and thus sought removal of prior sanctions. While demanding repeal of AFSPA it has sought investigation into violations by an "independent and impartial authority".[5] The Act has also evoked criticism and scorn among the academicians and human rights activists. This apart, no political outfit based in the Kashmir Valley has favoured the AFSPA in the present form.

The judiciary however, has upheld the provision of sanction by the Central government. In *General Officer Commanding* v. *CBI & Anr.*[6], the Supreme court held that "If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction"[7]. Earlier also, the Supreme Court in the *Naga People's*

[3] The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.
[4] *Available at*http://economictimes.indiatimes.com/news/politics-and-nation/afspa-amnesty-seeks-probe-into-human-rights-violations-in-jk/article/show/47898718.cms. Accessed on 4January2021.
[5] Available at http://economictimes.indiatimes.com/news/politics-and-nation/afspa-amnesty-seeks-probe-into-human-rights-violations-in-jk/article/show/47898718.cms. Accessed on 9 December2020.
[6] (2012) 5 SCR 599
[7] Id at 614. Also see, Bhadra Sinha, "Let Army decide how to try personnel in fake encounter cases: SC", The *Hindustan Times,(* May 02,2012).

Movement of Human Rights v. *Union of India*[8] upheld the validity of the law. But in view of the potential abuse of human rights the court has laid down detailed guidelines for its use. Further, to ensure accountability for human rights violations by the police and security forces the Supreme Court in case of *Extra Judicial Execution Victim Families Association (EEVFAM) & Anr.* v. *Union of India & Anr,*[9]ordered the Central Bureau of Investigation to thoroughly investigate cases of alleged extrajudicial killings by the security forces in the state of Manipur. The court held that the Act, 'does not allow blanket immunity for perpetrators of unjustified deaths or offences.' Further, the court stated that the armed forces cannot justify excessive use of force under the AFSPA. Any excesses beyond the call of duty, those members of the armed forces would be liable to be proceeded against in a court of law, and not necessarily by the army in court martial proceedings.[10] Ironically, such initiative by the court has not been seen in cases of alleged extrajudicial killings in Jammu and Kashmir.

However, despite such guidelines and directions issued by the Supreme Court, the people in 'disturbed areas' have experienced abuses as the Act has an inherent tendency to enable any incumbent of such power to misuse. Demanding the revocation of the Act, they have often alleged that the AFSPA has led to violations of human rights and abuse of power by the security forces. The killing of three labourers Abrar Ahmad (25), Mohammad Ibrar (16) and Imtiyaz Ahmad (20), in the Amshipora (Shopian) in an encounter on July 18, 2020 has once again ignited the debate against the Act and security personnel. All three were labelled as terrorists by the security personnel. The protesting relatives on the contrary stated that the deceased had no connection with militancy and were locals not foreign terrorists as claimed by the forces. As doubts were raised, the police conducted DNA profiling of the three families which established that the killed persons were infact locals not foreign terrorists. Consequently, an SIT was set up to probe the case. A chargesheet was produced in the District and Sessions Judge, Shopian by the police, against three persons, including an Army Captain for their alleged role in encounter. The three accused are Captain Bhoopendra of 62 Rashtriya Rifles, Bilal Ahmad and Tabish Ahmad.[11] The Army also conducted an inquiry which found prima facie evidence that the troops had "exceeded" powers vested under the Act. A general court martial proceedings has now been initiated against Captain

[8] AIR 1998 SC 431
[9](2016)14 SCC536
[10]*Ibid.* **Para 173.**

[11]"Shopian fake encounter :Capt among three named in challan", *The Tribune*, (December 27, 2020).

Bhoopendra Singh. Mohammed Yusuf, father of Abrar Ahned, who was called for deposing in the court martial proceedings stated that he is "expected justice".[12] In another incident the families of the three youths killed in an encounter with security forces in the Parimpora area have also claimed that those killed had no connection with militancy. The deceased included a class XI student, a university student and a carpenter. The three were killed in a joint operation of the Army, Central Reserve Police Force (CRPF) and the police. The case is being investigated.[13] Such incidents of human rights violation result in resentment and demand of the local Kashmiri people for whom the Act has become a "metaphor for the denial of human rights". Their resentment is further stirred by the ceaseless opposition and propaganda carried out by the separatist groups and related organizations in Kashmir. Further, the ISI handlers from Pakistan has tried to build up false narrative by using fake videos of alleged atrocities committed by the security forces to whip up the emotions.[14]

However, conflicting and contradictory views on the matter has resulted in fragmented and contrasting stand, casting a cloud over its revocation. This apart, the incidents of infiltration and terrorist strikes supported from across the border has thwarted any dilution or repeal of the AFSPA. In 2020, there were 5,100 instances of ceasefire violation with an average of 14 cases daily by Pakistan along the Line of Control (LoC) in Jammu and Kashmir. Of these 1,565 violations took place since August 2019 after the Central government abrogated Article 370 and bifurcated the state into UT's. This is the highest ceasefire violation by the Pakistan that claimed 36 lives including 24 security personnel and left more than 130 persons injured.[15] Thus even after revocation of Article 370 the problem of militancy is not over. In addition, Pakistan has used terrorism as a substitute for war. It has failed to "significantly limit" militant outfits like the Lashkar-e-Taiba(LeT) and the Jaish-e-Mohammed (JEM). Consequently the withdrawal of the Act is extremely difficult in the existing conditions. Nonetheless, the issue over the years has acquired political overtones casting a cloud over its revocation as the diverse communities, regions and political organizations in the state hold conflicting and contradictory views on the matter.

[12]"Amshipuraen counter : GCM proceedings begin against Capt", *The Tribune*, April 4, 2022. Available at https://www.tribuneindia.com/news/j-k/amshipura-encounter-gcm-proceedings-begin-against-capt-383407. Accessed on April 4, 2022.
[13]"Youths killed in Srinagar encounter had terror links, say J&K Police", *The Tribune*, (January 2, 2021).
[14] "Pak terror groups resorting to cyber recruitment : Officials", *The Tribune*, (January 4, 2021).
[15]"Highest truce violations by Pak this year", *The Tribune*, (December 30, 2020).

The paper attempts to examine and analyse the debate surrounding AFSPA that has assumed significance following the abrogation of article 370 and division of state of Jammu and Kashmir into two union territories, Jammu and Kashmir and Ladakh. More so with the decision of the government to withdraw the Act from parts of Assam, Manipur and Nagaland that has fuelled calls for the Act to be lifted from Kashmir as well. Broadly, there are three types of conflicting viewpoints regarding the AFSPA in Jammu and Kashmir as reflected in the actions and attitudes of various organizations including political parties, civil liberty groups, separatist outfits and the army elite. The paper accordingly is divided into three parts followed by conclusion. While the first and second part deals with views on complete and partial revocation of the Act, the third part focuses mainly on debate surrounding retention of the Act.

II. REVOCATION OF AFSPA

The first view consider AFSPA as troublesome providing cover to the perpetrators of violations. It includes perceptions of groups or organizations demanding scrapping or withdrawn or review of the AFSPA. The separatist groups maintained that the state of Jammu and Kashmir is a disputed territory and laws like AFSPA and Disturbed Areas Act (DAA) need to be revoked.[16] According to them "peace would return to the state only after India withdrew its security forces and agreed to plebiscite".[17] Similarly, the leaders of the moderate Hurriyat group have asserted that the situation in Kashmir could improve only by taking steps such as: the revocation of the AFSPA and the Public Safety Act (PSA); withdrawal of troops and removal of security bunkers from cities, towns and villages; release of prisoners and holding tripartite talks involving Pakistan for the solution of Kashmir problem.[18] Likewise, Muzzafar Hussian Beig, a senior leader of the Peoples Democratic Party (PDP), said that AFSPA "will have to go from all areas and not merely from Srinagar and Jammu as a cosmetic exercise".[19] The PDP, maintains that since the Act clashes with human rights and democratic values it should be withdrawn. The former chief Minister Mehbooba Mufti appealed to the Central government to consider the recommendations of repeal made by the Amnesty International.[20]While the PDP supported the recommendation of Amnesty

[16]*The Tribune*, (August 12, 2010).
[17]Arati R. Jerath & M.Saleem Pandit, "India not listening to people of J&K – Withdraw forces to bring peace :Geelani" *Times of India*,(August 5, 2010).
[18]*The Tribune, (*August 28, 2010).
[19]Ehsan Fazili, "PDP holds anti-govt. protests across Kashmir valley", *The Tribune*, (November 22, 2011).
[20]Available at http://zeenews.india.com/news/jammu-and-kashmir/pdp-hails-amnesty-recommendations-forremoval-of-afspa-from-jk-1624360.html. Accessed on 4July 2021.

International asking for revocation of the Act, the BJP on the contrary strongly opposed the demand of its coalition partner.[21]

Apart from political parties, the human rights organizations, including the Kashmir based groups, have also opposed the AFSPA. Protesting against AFSPA a Kashmir based civil rights activist asked "The Army is here to protect Kashmir. But what of the Kashmiris".[22] He also alleged that the prevalence of AFSPA in the state makes it difficult for the police to investigate cases of human rights violations. The Association of Parents of Disappeared Persons (APDP), also demanded repeal of the Act.[23] A report released by the APDP and the International People's Tribunal on Human Rights and Justice in Kashmir alleged that 235 army men had been involved in human rights abuses in the state. The Army, however, rebutted the report and said "allegations of human rights abuses by army personnel are investigated and action is taken against defaulters. Further it claimed that since 1990, only 36 cases, out of 1,519 cases of alleged human rights violations in the state, were found to be true".[24] The activists, however, are not satisfied. According to them the inquiries conducted by the army are never transparent. In addition, the social activist, Medha Patkar, while demanding revocation of the AFSPA, termed the Act as a blot on democracy.[25] The Justice Santosh Hegde Commission set up by the Supreme Court to investigate cases of fake encounters in Manipur described the law as "a symbol of oppression".[26] Likewise, Irom Sharmila, who sat on fast for 16 years demanding repeal of AFSPA,[27] stated that "I am against a government that uses violence as a means to govern". Some have demanded a review of the AFSPA. Regarding this, the report of the three interlocutors, appointed by the Central Ministry of Home Affairs to study the situation in Jammu and Kashmir, had suggested a review or re-appraisal of the AFSPA and other central Acts in the state.[28] In like manner, a high-level committee comprising former Chief Justice of India, Justice J.S. Verma,

[21]Dinesh Manhotra, "BJP makes veiled attack on PDP for endorsing Amnesty report on AFSPA" *The Sunday Tribune*, (July5, 2015).
[22]Poulomi Banerjee, "Kashmir's Festering Wounds", *Sunday Hindustan Times*, (August 2, 2015).
[23] Press release from the Association of Parents of Disappeared Persons, "Not Just AFSPA, End the Culture of Impunity from JK : APDP", *Daily Post, Kshmir Walla*, (October 29, 2011).
[24] "Army rebuts NGO's report", *The Tribune,* Chandigarh, (December 8, 2012).
[25]Shikh Saleem, "In Irom Sharmila's support, march begins from Srinagar", *The Indian Express*, (October 17, 2011).
[26] "Amnesty for repeal of AFSPA in N-E", *The Tribune*, (July 13, 2015).
[27] "Sharmila completes 12 years of fast", The Tribune, (November 6, 2012). She went on fast on November 5, 2000 after 10 persons were shot dead in an encounter with Assam Rifles personnel at Malon, on November 2, 2000.
[28]Dileep Padgaonkar, Radha Kumar and M.M.Ansari, "A New Compact With The People Of Jammu and Kashmir (Final Report)", 150(2012)

also called for a review of the AFSPA.[29] According to some "The Act is a display of hard power. There is a need to replace it with soft power generated by democracy."[30]

The National Human Rights Commission (NHRC) of India also holds that the AFSPA confers impunity which has often led to the violation of human rights.[31] More than that, Justice BP Jeevan Reddy Committee, which was set up by the Union Home Minister to review the provisions of the AFSPA in the north-east, also recommended repeal of the Act in its report submitted on June 6, 2005. The report said "It is highly desirable and advisable to repeal the Act altogether". Further, it said that "recommending the continuation of the present Act, with or without amendments, does not arise".[32] However, the report recommended insertion of appropriate provisions of the AFSPA in the Unlawful Activities (Prevention) Act(UAPA) 1967 (as amended in the year 2004, 2008) instead of any new legislation. In fact, the committee proposed the insertion of a new chapter VIA in the UAPA incorporating, among others, the Supreme Court's directions regarding deployment of armed forces of the Union and their conduct during such deployment.[33] In the case of violations or abuse of power by armed forces, the committee proposed an independent "grievances cell" constituted by the Union government. Similarly, the Second Administrative Reforms Commission (2007) also favoured the repeal of the AFSPA by inserting its appropriate provisions in chapter-VIA of the UAPA.[34] Altogether, the aforesaid description shows that a variety of groups including certain Kashmir based organizations, human rights bodies, committees etc. have perceived that the AFSPA is incompatible with human rights and democratic norms.

Apart from this, the United Nations Human Rights Committee had also pointed out that the provision of sanction of central government "contributes to a climate of impunity". While recognizing the factor of terrorist violence, the Committee emphasized that all measures adopted must be in conformity with the state's obligation under the covenant. Section 4 of the AFSPA violates Article 6(1) of the International Covenant on Civil and Political Right (ICCPR) which states that "no one shall be arbitrarily deprived of his life". In 2018, the United Nations Office of the High Commissioner for Human Rights (UNHCR) emphasized on the urgent need to address "human rights violations and to deliver justice for all people in

[29]Nitya Rao, "Rights, Recognition and Rape", *Economic and Political Weekly,* 19(February 16, 2013)
[30]Arun Joshi, "AFSPA in J&K will remain a bone of contention", *The Tribune*, (July 6, 2015).
[31]Aditi Tandon, "NHRC calls for AFSPA's repeal", *The Tribune*, Chandigarh(December 5, 2011).
[32] Government of India, Ministry of Home Affairs, *Report of The committee to Review The Armed Forces Special Powers Act, 1958*, 74(2005).
[33]*Ibid.*
[34] Government of India, *Second Administrative Reforms Commission-Public Order(Fifth Report) 242*(June 2007)

Kashmir".[35] Notwithstanding the criticism of the AFSPA, the Government of India in its national report for the Universal Periodic Review (UPR II) maintained that "as long as deployment of armed forces is required to maintain peace and normalcy, AFSPA powers are required".[36] Likewise in its third Universal Periodic Review report (2016), when some members of United Nations recommended that India should repeal or revise the AFSPA the Government of India stated that whether the "Act should be repealed or not is a matter of on-going vibrant political debate" in the country". Regarding aberrations, according to the government, same are "dealt with by internal processes that include our fiercely independent judiciary, autonomous Human Rights Commission at both national and State levels, vigilant and vocal media and a vibrant civil society".[37] Moreover, any allegations of human rights violations by security forces are appropriately handled by the military justice system. However, in March 2018, Union Minister of State for Home Affairs, while rejecting any demand to repeal or amend AFSPA added that a proposal is under consideration to make the Armed Forces (Special Powers) Act, 1958 "more operationally effective and humane".

III. PARTIAL REVOCATION OF AFSPA

The second point of view holds that the Act should be partially withdrawn and made "more humane". Regarding this, the then Chief Minister, Omar Abdullah, had claimed that his suggestion for the gradual revocation of AFSPA in certain parts had represented the public view as the people wanted to relish the fruits of peace and tranquility along with the development process.[38] In terms of areas, he wanted withdrawal of the AFSPA from districts like Ganderbal, Srinagar, Badgam, Jammu, Kathua and Samba where terrorism related incidents had declined considerably. Notwithstanding his views on the AFSPA, he has appreciated Army for help and relief operations in the troubled areas of the state. The Congress party, on the other hand in its manifesto of 2019 Parliamentary election promised to

[35] *Available at*http://www.ohchr.org/Documents/Countries/IN/Developments in KashmirJune2016ToApril2018.pdfAccessed on April 3, 2022.

[36] National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March, 2012, para 25. The UPR mechanism was created by the UN General Assembly (UNGA) on March 15, 2006 and is undertaken every four years to ensure universal coverage on human rights across the world. The mechanism calls for three reports from every country to judge its performance on human rights – the report by the country's human rights commission; another by the civil society and a third by the government. Also see, Aditi Tandon, "India rejects recommendation to review AFSPA", *The Tribune,* (December 10, 2012).

[37] https://mea.gov.in/Uploads/PublicationDocs/27953_27953_UPR_-III_for_MEA_website_.pdf. Accessed on December 2, 2021

[38] "My demand for AFSPA rollback reflects public view: Omar", *The Tribune*(November 22, 2011).

amend AFSPA. According to its manifesto, Act will be reviewed so as to make suitable changes to balance the requirements of security and the protection of human rights.[39] Whereas, the CPIM had supported the partial withdrawal of the AFSPA from the aforementioned areas on a trial basis.[40] Unfortunately, the relatively peaceful situation in the stated areas soon turned volatile by the mid-2013 as the terrorist made major attacks on the Army units in Srinagar and Samba area which, obviously, had put the then Chief Minister, Mr. Omar Abdullah in a dilemma whether AFSPA should stay or go from the Jammu and Kashmir. During the terrorist strikes on the Army units eight soldiers were killed on June 24, 2013, near Hyderpora on the outskirts of Srinagar and four army personnel, including one Lt. Colonel, in Samba on September 26, 2013. Before entering into the Army camp at Samba, the three terrorists dressed in combat fatigues also killed four policemen and one shopkeeper in the way in Hiranagar. These attacks took place in areas from where the Chief Minister had demanded the Act should be revoked. The situation had improved but intermittent violence by militants was yet to be brought to an end. In one of the worst attack so far, 31 people, including 21 army personnel and their family members, and 10 civilians were killed by three Pakistani terrorists at Kaluchak on May 14,2002.[41] Likewise, on August 27, 2008 as many as 11 people, including three soldiers, five civilians and three militants were killed in a suicide attack in Kanachak. On March 20, 2015, seven people were killed by two terrorists dressed in army uniforms after they hijacked a jeep and stormed a police station in Kathua district. Both terrorists were shot dead. And on March 21, 2015, two terrorists, probably a splinter group of the March 20 terror attack try to storm an army camp in Samba district. However, both were killed. Apart from this in 2014, 12 people, including five civilians and four terrorists, were killed in a day-long encounter at Arnia sector in Jammu.[42] This apart, there has been a spurt in incidents of firing along the border, with Pakistan attacking India on regular basis. Firing along the Line of Control (LOC) in Poonch district of Balakote on 15th August 2015 resulted in five civilian casualities.[43] These factors have adversely affected the move for the partial withdrawal of the AFSPA in the state. The situation ever since 1990, has remained

[39] http://www.news18.com/india/lt-gen-hooda-bats-for-amendment-of-afspa-says-act-needs-to-be-more-humane-2089935. Accessed on February 5, 2022.

[40] Dinesh Malhotra, "CPM supports AFSPA revocation", The Tribune, (November 5, 2011).
[41] "NH-15: Highway to terror attacks", *Hindustan Times*, (July 28, 2015).
[42] *Ibid*.
[43] "Amid shelling and firing on LoC, Shariff greets India", *The Hindu*, (August 16, 2015).

impregnated with insurgency, infiltrations, ceasefire violations, terrorist strikes, combat exercises etc., making army's presence indispensable in the state.

IV. RETENTION OF AFSPA

The third group favours the AFSPA and spurns the idea of revocation, review or reappraisal of the Act. It is presumed that revocation of the AFSPA may promote terrorism and demoralize armed forces. Among the political parties falling in this group, the ruling party, BhartiyaJanata Party (BJP), which is based in the Jammu region, has unequivocally opposed the premise of revocation because it would weaken the fight against terrorism sponsored from across the border. The Act, according to BJP, has served as a protective mechanism for the armed forces.[44] The spokesperson of the state unit of the BJP, while opposing the idea of partial rollback of the Act, said "one can not expect a soldier chasing a militant to be suddenly deprived of the protective AFSPA cover once the militant enters another district where the Act is not applicable".[45] Further, while reacting to the killing of CRPF jawans in a fidayeen attack in Srinagar the BJP's state chief spokesperson said, "The demand for withdrawal of AFSPA at the time when these forces are already target of recurrent terrorist attacks is senseless and politically motivated".[46] He dared the then Chief Minister Omar Abdullah to surrender the Z-plus and NSG personnel security cover.[47] Consequently the then coalition government of the BJP and PDP which took office on 1 March 2015, in its 'Common Minimum Programme' stated that "While both parties have historically held a different view on the Armed Forces Special Powers Act (AFSPA) and the need for it in the state at present, as part of the agenda for governance of this alliance, the coalition government will examine the need for de-notifying 'disturbed areas'. This, as a consequence, would enable the Central Government to take a final view on the continuation of AFSPA.[48] However, when PDP supported the recommendation of Amnesty International asking for revocation of the Act from J&K, the BJP strongly opposed the demand of its coalition

[44] Ravi KrishananKhajuria, "Our stand against AFSPA rollback vindicated : BJP" *The Tribune*, (December 13, 2011).
[45] *Ibid*.
[46] Arteev Sharma, "Suicide attack reignites debate on AFSPA revocation", *The Tribune*,(March 14, 2013).
[47] *Ibid*
[48] "Full text: Common Minimum Programme of PDP-BJP government in J&K", IBN Live, (2 March 2015). Available at http://ibnlive.in.com/news/full-text-common-minimum-programme-of-pdpbjp-government-in-jk/531591-37-64.html. Accessed on 16 April 2015.

partner.[49] The then Union Home Minister Rajnath Singh said that the Act would be revoked only when the situation was conducive in the state.[50] Similarly, the "Jammu State Morcha", a Jammu based outfit, has opposed the withdrawal or revocation of the Act in the present circumstances. In addition, the Panthers Party, commanding support in certain pockets of the Jammu region, charged that if the Ministers in the state were not safe, where was the guarantee of safety of life of the common people. According to the party, it is duplicity on the part of the state government which demands revocation of the AFSPA and shows no concern for security personnel gunned down by militants from time to time.[51]

Apart from the Jammu based political parties, the Kashmiri migrants (Pandits, Sikhs etc.) have also opposed the idea of revocation of the AFSPA till the ongoing violence has ended. The migrants, among others, have also criticized the civil liberty groups for opposing the AFSPA. They accused the Amnesty International of refusing to entertain their plea of human rights abuses and brutality at the hands of the militants.[52] It was also alleged that their account had violated all human norms of fair reporting as it had highlighted the alleged excesses by security forces and tended to gloss over atrocities by the militants.[53] Mr. K.P.S. Gill, the former DGP, Punjab said, "If they were fair and balanced, one could accept their views. But they are biased and support the terrorists"[54]. According to some "security forces not only take casualties, they get bad press".[55] At times, the vested interests have instigated people nevertheless, excesses have been committed by the security forces.

The Army, which is of paramount importance in the terror-affected state, has also resisted any scrap or dilution of the Act under the pretext that it would fritter away the gains made in curbing the militancy in the state. The stand of the army, according to an army officer "rests on this vast experience, gained over a long period of time."[56]It is argued that "what the Indian Army most needed in its face-off with Pakistan is not more officers or better-trained soldiers or bullet proof jackets. It is AFSPA."[57]The army holds that AFSPA is merely a legal cover and does not give sweeping protection to the forces being used in aid of the civil

[49]Dinesh Manhotra, "BJP makes veiled attack on PDP for endorsing Amnesty report on AFSPA" *The Sunday Tribune*, (July 5, 2015).
[50] "AFSPA to stay in J-K for now", *The Tribune*, (July 3, 2015).
[51]Arteev Sharma, "Suicide attack reignites debate on AFSPA revocation", *The Tribune*,(March 14, 2013).
[52] Sabina Sehgal, "How green was our valley", *The Times of India*, (January 24, 1993).
[53] N.C. Menon, "Asia Watch Report on J&K", *The Hindustan Times* (May 10, 1993).
[5454]Kanwar Sandhu, "Confessions of a killer cop", *Outlook* ,33(December 14, 2015)
[55] Prakash Singh, "Wash The Khakhi", *Outlook* 44(December 14, 2015).
[56] Lt-Gen Harwant Singh (retd), "AFSPA in J and K : Selective withdrawal may be harmful", *The Tribune* (January 8, 2013).
[57] Sanjay Kak, "It is what you don't see", *Hindustan Times,* New Delhi, September 29, 2010.

administration. Further, it is believed that if protection is denied to soldiers tackling insurgency they will conduct operations "not on the basis of military judgement but on the need to defend their actions in court". That can only benefit the insurgents.[58]

In other words, the military officers perceive that Act is almost the same as the protection available to the state police under the Criminal Procedure Code (CrPC). Further, to counter the charge of misuse of powers, it is claimed that strict action has been taken against the guilty or errant official under the Army Act -1950, which, according to army, is prompt and as stringent as the Criminal Procedure Code. It is illustrated by facts that the "The Army has punished 104 of its men, some of them held guilty of rape, including a major. They were dismissed from the service and also sentenced to rigorous imprisonment ranging from seven to 10 years. Since 2008, there has not been a single case of rape charge against any of the soldiers posted in Jammu and Kashmir".[59] According to the Ministry of Defence, "there have been 1013 allegations of human rights violations by the army officials in Jammu and Kashmir between 1994 and 2014. After enquiry, only 61 of these cases were found to have any truth in them and in these cases, action was taken against the guilty."[60]The militants according to them, want the army to withdraw and are inciting people to bring in such allegations against soldiers.[61]

Moreover, the AFSPA, according to a retired General, was essential to keep the highways secure and to ensure supply lines for Indian troops in Siachen".[62] Another General believed that it would be impossible for the army to operate in J&K without the cover of the Act as the force would get bogged down in legal battles. The General observed:

> "The provocation for a move to abrogate the AFSPA is due to alleged serious violations of human rights by the security forces. Counter-insurgency operations are complex in nature and are carried out under difficult and trying circumstances. Often it is a situation where you kill or get killed. In many encounters, collateral damage in the form of casualties to innocent civilians takes place. During such encounters, invariably it is the insurgents who target innocent civilians knowing

[58] Karan Thapar, "Act now, act right", *Sunday Hindustan Times*, New Delhi (September 26, 2010)
[59] "By commenting on AFSPA, panel has overstepped its brief",*The Tribune (*January 25, 2013).
[60] *Supra Note 22*
[61] *Ibid*.
[62] Sanjay Kak, "It is what you don't see", *Hindustan Times,* New Delhi, September 29, 2010.

> fully well that it is the security forces who will be blamed. In a virulent insurgency, security forces just cannot operate without the cover of the AFSPA".[63]

Similarly, a former chief of Army staff observed that any dilution or partial revocation of the Act would affect operational effectiveness in Jammu and Kashmir. According to him, the Act's revocation in districts like Srinagar and Ganderbal will have the following security implications

(a) These areas are likely to become a safe haven for terrorists. After carrying out activities in areas outside, the terrorists may escape to find shelter in such areas.

(b) Many army units are located in Srinagar. There is a frequent movement of troops and convoys within and outside the city. Convoys to Kargil and Leh have to pass through Ganderbal. In the event of any terrorist act troops will not be able to conduct a seamless operation.[64]

Moreover, while reacting to the proposed amendments such as taking prior arrest warrants, taking away the power of armed forces to open fire causing death and setting up of a grievance redressal cell[65], a senior army officer said "Terrorists do not have a permanent address and keep moving. By the time we get warrants, he would have moved to another district. How can we operate under such circumstances".[66] Furthermore, in the case of J&K there exists elements within the state that are perennially in support of the insurgents.[67]According to a former army officer, separatists create situations in which the security forces are offered few options but to respond". It is not easy to be facing mobs and attempting to be "good guys". Cadres are usually on the ready for this and professional rabble-rousers move from town to town, with teams of stone throwers.[68] Many stone throwers had admitted to being paid, meaning the pot was frequently stirred.[69]

The army, thus, maintains that lifting of AFSPA may prove counter-productive in the present scenario as over 4o terrorist camps are still active in PoK and more terrorists awaiting their chance to enter into Kashmir. Pakistan's support to the ongoing proxy war continues

[63] Lt-Gen Harwant Singh, "AFSPA in J and K : Selective withdrawal may be harmful", *The Tribune*, January 8, 2013.
[64] Gen. V.P.Malik, "Revisiting AFSPA", *The Tribune*(September 20, 2010).
[65] "home ministry mulls three amendments in AFSPA", *Hindustan Times* (April 11, 2012).
[66] *Ibid.*
[67] *Ibid*
[68] Syed Ata Hasnain, "Kashmir may witness many Handwaras", *The Tribune* (April 19, 2016).
[69] Samar Halarnkar, "Threat to the idea of India", *Hindustan Times* (April 21, 2016).

unabated, the terror infrastructure, both in Pakistan/POK (Pakistan occupied Kashmir), remains intact."[70] Similar concerns were raised by the Union Ministry of Defence, in its Annual Report. Above all, intermittent attacks, causing death and injury to security personnel, political leaders, panchayat members and civilians have contributed more than any other factor to keep the issue of revocation or partial withdrawal of the Act hanging. Around 300 panchayat members in South Kashmir have resigned on account of alleged threats from militants.[71] Several Sarpanches and Panches have also lost their lives. In July 2012, the National Human rights Commission had also directed the state government to provide a security cover to all vulnerable persons with immediate effect.[72] During the Parliamentary elections held in May 2014, a number of attacks against election officials by armed groups took place resulting in the killings of a local village head and his son in Pulwama district, and another village leader in the same district on 21 April 2014.[73] This apart, the incidents of killing of security personnel on different occasions make it evident that terrorist have the capacity to strike anywhere. The incidents include killing in a suicide attack and beheading of police personnel. As many as 71 have reportedly lost their lives upto September 2018.[74] On February 14, 2019, a SUV driven by suicide bomber packed with RDX rammed into a CRPF bus in Pulwama. Atleast 38 CRPF personnel were killed.[75]. According to official their "bodies had been mutilated beyond recognition".[76] The JeM released a video claiming credit for the attack. They identified the attacker as Adil Ahmed Dar, a resident of Kakapora in Pulwama, who joined the outfit last year. In the video, Dar, who was seen sitting with sophisticated weapons in front of a backdrop of a black and white flag, was heard saying that by the time the video was released, he would be in heaven.[77]The attack is the second fidayeen attack in Pulwama. The first was on November 3, 1999, when a Srinagar boy, along with another militant, drove an improvised explosive device-laden car into the Badamibagh Cantonment in Srinagar, killing six security personnel.[78].This apart soldiers and policemen

[70]Ajit Kumar Singh, "J&K: Lingering Irritants", *South Asia Intelligence Review (SAIR), Weekly Assessments & Briefings,* Vol.10, No.51,(June 25,2012).
[71]*Ibid*.
[72] See Aditi Tandon, "Lashkar threat : NHRC tells state to provide security to sarpanches" *The Tribune* (July 20, 2012).
[73]"Lok Sabha elections: Militants kill three including sarpanch before voting in Kashmir", *DNA India*, 22 April 2014. Available at http://www.dnaindia.com/india/report-lok-sabha-elections-militants-kill-three-including-sarpanch-before-voting-in-kashmir-1980795. Accessed on 9 April 2020.
[74]AjaiSahni, "Nothing New About SPO Killings", *The Tribune* (September 28, 2018).
[75]*The Hindu (*February 15, 2019).
[76]Vijaita Singh, "Suicide car bombing returns to the Valley after 18 years", *The Hindu* (February 15, 2019)
[77]*Ibid*
[78]PeerzadaAshiq,"Resurgent Jaish poses new challenge to security apparatus", *The Hindu*, February 15, 2019

have been targeted and killed when off duty on leave.[79] The cases of rifleman Aurangzeb, Lt. Umar Farooq are too well known.[80]Atleast 27 policemen, have reportedly fallen to such targeted killings. Militants have also targeted the family members of the police personnel. The abduction of 11 members of the families of police personnel in Pulwama, Anantnag, Kulgam and Tral district of the Valley has created panic and fear among them.[81]

The Army personnel viewed that such attacks had vindicated their stand on the AFSPA.[82]These killings and proxy-terror from across the border have impacted the discourse on AFSPA. Keeping these factors in mind, the Army, Defence Minister and Home Ministries at the Centre perceive that the withdrawal of the Act may endanger safety and security of the people in the state. In his K. Subrahmanyam Memorial Lecture on February 6, 2013 at the Institute of Defence Studies, P.Chidambaram said : "We can'nt move forward because there is no consensus. The present and former Army Chiefs have taken a strong opposition that the Act should not be amended (and) do not want the government notification… to be taken back. How does the government … make the AFSPA a more humanitarian law?"[83]

V. CONCLUSION

It can be concluded that the debate on AFSPA has brought forth controversial and contradictory stands in the region and elsewhere. Those poised against the AFSPA and demand its revocation in the state mainly belong to the Kashmir valley whereas those who favour it represent the Jammu region. The army maintains that the revocation of the Act would prove counter-productive frittering away the gains made in curbing militancy in the state. This apart, the terrorist violence at regular intervals and the pangs of cross-border terrorism has strongly impacted the discourse on the partial or complete withdrawal or revocation of the AFSPA in Jammu and Kashmir. The Union Territory of Jammu and Kashmir is facing militancy which cannot be fought without soldiers. Exceptional situations justify exceptional measures. The Act has conferred extraordinary powers on the men in

[79] "J&K police asks its personnel to avoid visiting hometowns", Press Trust of India (16 August 2017). Available at http://indianexpress.com/article/india/jk-police-asks-its-personnel-to-avoid-visitinghometowns-4615700/ . See; "Ex-militant and a lawyer shot dead in Kashmir", Press Trust of India (17 August 2017). Available at https://www.financialexpress.com/india-news/ex-militant-and-a-lawyershot-dead-in-kashmir/630200/. .Amnesty International , "The State of the World's Human Rights 2017/18", p. 189. Amnesty International, "The State of the World's Human Rights 2016/17", p. 183. Available at https://www.amnesty.org/download/Documents/POL1048002017ENGLISH.PDF.

[80]Lt-Gen Syed Ata Hasnain, "A Twist to insurgency in Valley", *The Tribune (*July 9, 2018).

[81]AjaiSahni, "Nothing new about SPO killings", *The Tribune*, 28 September 2018.

[82] Ravi Krishnan, "Jammu grenade attack may upset Omar's AFSPA plan", *The Tribune* (November 20, 2012).

[83] The Hindu, February 7, 2013. Quoted in Walter Fernandes, "AFSPA : Who Rules India?", *Mainstream*, 11(February 23, 2013).

uniform so as to prevent terrorist act. However, it is fair to argue that even after 30 years since the Act came into existence the problem of terrorism remains. Unfortunately the people in the region are witnessing violations on all hands. On the one hand are the militants who do not recognise the Indian constitution and the Indian state and are targeting innocent people in the region. On the other hand the state is also responding in the similar vein resulting into excesses committed by them. At times the vested interests have also spread false information to malign the security forces and have instigated people to protest and bring in such allegations against soldiers. Nevertheless, excesses have been committed by the security forces. The security forces are no doubt operating in difficult situation and are target of recurrent terrorist attack but it does not justify human rights violations by them. Misuse of law by the state forces is self-defeating and alienates the security forces. It does not provide solution to the problem. On August 5, 2019, the Central government revoked Article 370 and bifurcated the state into two Union territories. The government while abrogating Article 370 stated that it was the root cause of corruption and militancy in Jammu and Kashmir. However, even after revocation of Article 370 and retention of AFSPA militancy is not over. Abrogation has rather created more anxiety and led to breaking the trust of the Kashmiri people. The recent move of the government to withdraw the Act from parts of Assam, Manipur and Nagaland will lead to demand for lifting of AFSPA from Kashmir also. It remains to be seen whether in the changed circumstances the Central government will listen to such demands or not. Since the situation has remained impregnated with insurgency, infiltrations, ceasefire violations, terrorist strikes, revocation appears to be risky. In addition, Pakistan has used terrorism as a substitute for war. It is the security forces who bear the brunt of Pakistan's aggressive manoeuvres and are being attacked by the terrorist forces. The real problem is not the legitimate protection the Act offers to the armed forces, but the impunity it simultaneously grants. It is imperative to review the Act and amend section 4 which confers extreme powers on security forces and section 7 which allow impunity and non-accountability to security forces. Winning the trust of the people by urgent review of the Act and holding the security personnel accountable for violations combined with restoration of democratic rights in the region would prove to be a strong fight against terrorism.

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ADEQUACY OF LAWS FOR THE CARE AND PROTECTION OF ELDERLY PEOPLE IN INDIA: CRITICAL ANALYSES

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ABSTRACT

This research paper aims at providing an understanding of the factors leading to an increase in the miseries of elderly people. Further, it explores the existing laws for mitigating the sufferings of elderly people under international laws, constitutional laws, personal laws, criminal laws, civil laws, special laws and laws enacted exclusively for the care and protection of the elderly people in India. It also discusses the various government policies and schemes for the welfare of elderly people. When looking at crime against elderly people in India, the question arises: How far the existing laws are adequate to provide care and protection to elderly people in India. The statistical data on crime against elderly people are analysed to give suggestions and recommendations for improving the condition of elderly people in India.

Keywords:
Elderly people, older people, senior citizens, Legal Aid, maintenance, protection, Old age

I. INTRODUCTION

Traditionally, India had a joint family system where elders were treated equivalent to God. They were given supreme importance and were taken care of by their children and the other family members with love and compassion. But with time, families became smaller and smaller, and more nuclear families emerged. The members of a family started getting distant from their elders. Migration, work pressure, minimum technology, and human life expectancy has increased over the past few years. This has led to a substantial increase in the country's population of old-aged people. But at the same time, these developments and advancements have adverse consequences. Rapid urbanisation, industrialisation and modernisation have led to the trend of a nuclear levels of patience and several other factors have resulted in neglect, abuse and abandonment of the elderly in India.[1] With the advancement in medical science and family, the tradition of care and respect for the elder is on the decline, making senior citizens more vulnerable to crimes. On top of all this, lack of cooperation from the police; lengthy, complicated and expensive judicial procedure also

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[1] Anuradha Thakur, 'Care of Senior Citizens and the Role of the State', *Economic And Political Weekly* 11 (2008), *available at*:http://www.epw.in/system/files/pdf/2008_43/17/Care_of_Senior_Citizens_and_the_Role_of_the_State.pdf.

restrains elder people from lodging complaints against the criminal. Sometimes even senior citizens do not cooperate with the investigating agency. They do not provide details of their domestic help and tenants for verification. They want their problems redressed without any action against the wrongdoer, often their children's relative or servant. Their casual approach and fear of revenge from the accused also contribute to the rise of crime against them.

There is a need for a formal law mechanism for the protection and welfare of the elderly person. This need for safety and welfare has been recognised under both international law and domestic law, which is evident from the elaborate discussion of International and Domestic laws as under.

II. INTERNATIONAL LAW

The safety and welfare of elderly people have been a matter of concern even at the international level. There are various conventions and treaties at the international level which has explicitly provided safeguards for the care and protection of elderly people. The U.N. General Assembly declared 1999 as the International Year of the older persons and October 1 as the "International Day for the older person". The U.N. General Assembly, on December 16, 1991, adopted 18 principles that are divided into five clusters. These clusters consist of independence, participation, care, self-fulfilment and dignity of the older persons. Universal Declaration of Human Rights, 1948, under Article 3, provides the right to life and security of a person. Universal Declaration of Human Rights, 1948 under Article 25(1) provides a right to an adequate standard of living for every person and his family. International Covenant on Civil and Political Rights, 1966 under Article 6(1) and 9(1) provide a right to life, liberty and security for every person. International Covenant on Economic, Social and Cultural Rights, 1966 under Article 11 provides the right to an adequate standard of living for himself and his family.

III. GENERAL DOMESTIC LAWS

The domestic laws of India have various laws that recognise the need for the care and protection of elderly people in India. The supreme law of our country, i.e. the Constitution of India, has very strongly advocated promoting the welfare of elderly people who have invested the prime years of their life in the growth and development of our nation. The elderly people strongly deserve a dignified life where they are not at mercy for securing the basic necessities

of life. Similarly, other statutory laws also provide for the welfare of elderly persons, which are elaborately discussed as under-

Constitution Law:

The Constitution of India equally supports the need of senior citizens for special protection. Article 41 provides for public assistance in case of old age. This provision is a part of directive principles, so it is not enforceable but fundamental in the governance of our country. So, the State is under an obligation to keep in mind the question of public assistance to elderly people while governing the country. Entry 24 in list III of schedule VII deals with the Welfare of Labour, including work conditions, provident funds, liability for workmen's compensation, invalidity and old-age pension and maternity benefits. Item 9 of the State list and Item 20, 23 and 24 of the concurrent lists relate to the old-age pension, social security, social insurance, economic and social planning. So, it shows that the protection of elderly people is a well-recognised right by the framers of the Constitution while distributing the legislative subject matters.

Personal Laws:

Almost everyone recognises the moral duty to maintain parents. However, the position and extent of maintaining elderly people vary from community to community which is dealt with under their respective personal laws.

Hindu Law:

Hindu Law recognises some special rights for senior citizens. The statutory provision for maintenance of parents under Hindu personal law is contained in Section 20 of the Hindu Adoption and Maintenance Act, 1956. Under this section, both sons and daughters are equally responsible for maintaining their parents. Only those parents who are financially unable to maintain themselves from any source are entitled to seek maintenance from their children. Parents of any age can claim maintenance from children.

Muslim Law:

Under Muslim Law also, children are bound to maintain their parents. It provides that children having resources to maintain are bound to maintain their poor parents, even if parents are in a position to earn something for themselves. Even if not having resources to maintain, a son is bound to maintain his mother if the mother is poor irrespective of her capability of earning. A poor son but earning something is bound to support his father not

earning anything. According to Muslim law, both sons and daughters must maintain their parents.

The Christians and Parsis have no personal laws providing maintenance for the parents. Under these communities, parents who wish to seek maintenance have to apply under the Criminal Procedure Code provisions.

Criminal Law:

The Cr.P.C 1973 is a secular law and governs persons belonging to all religions and communities. The provision for maintenance of parents was introduced in Section 125(1) of the Code of Criminal Procedure in 1973. Daughters, including married daughters, also have a duty to maintain their parents. The code imposes an obligation on children to maintain their parents only if they neglect or refuse to maintain despite having sufficient means to maintain their parents. Parents can claim maintenance from children only if they cannot maintain themselves. The age of parent is immaterial for claiming the right to maintenance.

Civil Law:

Like constitutional law, Personal laws and criminal law, civil laws also provide safeguarding provisions for the protection of elderly people. The Indian Contract Act, 1872 under section 16 deals with the instances of undue influence. It is of much use for senior citizens as generally, people in a dominant position take advantage of their position and tends to enter into contract disadvantageous for elderly people. One of the essential ingredients for proving undue influence is if the other party is in a dominant position and takes advantage of the dominant position. Under such circumstances, if any contract is entered, it's a voidable contract and gives a right to the senior citizen to set aside an agreement.

Similarly, the Specific Relief Act, 1963 also under section 31, enables provision for protecting senior citizens' interests. By this provision, if a written instrument is initially valid, but becomes inefficacious by subsequent events, then under such circumstances, courts intervene to prevent injustice or hardship and will decree a delivery and cancellation of the instrument. Thus, helping out a senior citizen to recover their property from someone who is not the owner of the property.

IV. Special Domestic Laws

Some special laws provide additional protection to elderly people by providing a speedy remedy for violations of rights and helping in litigation by the elderly. The protection of women from the Domestic Violence Act, 2005 is another enabling Act under which senior citizens can take protection and claim compensation for the violence inflicted on them. A woman senior citizen can complain about the domestic violence inflicted upon her by the person in a domestic relationship with her. Domestic relation includes a relationship by consanguinity, marriage or through a relationship like marriage, adoption, or family members living together as a joint family.

Legal Services Authorities Act, 1987 came into force in 1995 and proved to be a golden gift for poor people. The objective of this Act is to promote equal access to justice by providing legal aid. Lack of legal awareness and high litigation charges are some of the reasons which restrain people from taking legal action against the wrongdoer. Under the rules framed under this Act, many States have made senior citizens entitled to free legal aid, including free legal counselling, waiver of court fees, and free legal representation in court.

Another factor that restrains people from filing cases against the wrongdoer is the delay in the disposal of cases. To handle this problem as far as it concerns the elderly people, the Chief Justice of India has advised all the Chief Justices of High Courts to prioritise cases involving older people and ensure expeditious disposal. Punjab and Haryana High Court Case Flow Management Rules, 2007 provides that senior citizen cases should be tried in fast-track courts, and all efforts should be made to decide such cases within six months.

The plight of elderly people in our country, despite many safeguarding provisions for elderly people under various laws discussed above, highlighted the need for an exclusive Act for the care and protection of elderly people, which led to the enactment of the Maintenance and Welfare of Parents and Senior Citizens Act,2007.

Maintenance and Welfare of Parents and Senior Citizens Act, 2007

This Act aims to provide more effective maintenance provisions, including food, clothing, residence and medical attendance and treatment[2] for senior citizens and parents. The Act was unique because the whole procedure under the Act was cheap, time-saving and simple.[3]

The beneficiary of the Act:

A parent, who cannot maintain himself from his earnings or his property, can claim maintenance from one or more of their children.[4] The Act defines parents broadly to include both father or mother, either biological or adoptive or step.[5]The point to be noted here is that parents under this Act need not be above 60 years of age. The term 'children' also has been defined broadly and covers both son or daughter or grandson or granddaughter (excluding a minor). Therefore, even grandfathers can claim maintenance from their grandson or granddaughter.[6]

A senior citizen who does not have children[7] and is above the age of 60 years[8], and is unable to maintain himself from his own earnings or his property, can claim maintenance from his relative[9] who is his legal heir and is either in possession of his property or would inherit his property after his death.[10] When it comes to children, the Act is not concerned about their financial capacity to provide maintenance. But about relatives, only those relatives that have sufficient means are entitled to maintenance.[11]

Application and procedure:

The application for maintenance can be made by the senior citizen or the parent, any person or organisation that is authorised by the above in case he is incapable, *The Tribunal itself may*

[2] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s.2(B).
[3] Anuradha Thakur, Care Of Senior Citizens And The Role Of The State, Economic And Political Weekly 12 (2008), Available at::http://Www.Epw.In/System/Files/Pdf/2008_43/17/Care_Of_Senior_Citizens_And_The_Role_Of_The_State.Pdf.
[4]The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s4(1)(i).
[5]The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007,s 2(d).
[6] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s 2(a).
[7] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s.Section 4(1)(i).
[8] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s.Section 2(h).
[9]The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007,s.4(1)(i).
[10] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007,s. 2(g).
[11] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s.4(4).

take suomoto cognisance.[12] The Tribunal, headed by the Sub Divisional Officer of a State, has to decide the maintenance claim within 90 days from the date of issuing a notice regarding the application to the children or relative.[13] This provision is vital as it provides a time limit for dispensation of justice, which is absent in section 125 of Cr.P.C.[14] The Act provides that a parent or senior citizen can claim maintenance either under this Act or under section 125 of Cr.P.C. but not under both.[15]

The amount of maintenance that the Tribunal can order shall be according to the prescriptions of the State Governments but cannot exceed Rs. 10, 000/- per month.[16]The proceedings under the Tribunal are not expensive as the Act bars the representation of parties by legal practitioners.[17] But a maintenance officer, who the State Government appoints, can represent a parent or senior citizen if they desire.[18] An interesting provision of the Act is that it provides for the process of conciliation before hearing any application of maintenance wherein the conciliation officer would try to bring about an amicable settlement of the dispute and submit his findings, and the Tribunal shall pass an order accordingly.[19] The intention behind such a provision is to maintain the sanctity of the family as an institution.[20]

Establishment of Old age homes:

The State Government has been given the discretion to establish and maintain old age homes at accessible places in a phased manner that should accommodate at least 150 indigent senior citizens.[21] Also, State Governments have been given the discretion to prepare a scheme for the management of old age homes, including standards to be maintained and services to be provided by such old age homes. Section 19 of the Act has been criticised as the State Government has been given the discretion to establish old age homes, and it has not been

[12] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s. 5.
[13] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s 5(4).
[14]Partha Sarathi Adhya, *The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007 Requires Serious Amendments,*19Helpage India-Research & Development Journal 40(2013), *Availableat:*Http://Www.Helpageindia.Org/Helpageprd/Index.Php?Option=Com_Publishing&View=Authorarticle&Itemid=10&Name=Partha%20sarathi%20adhya.
[15] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s.12.
[16] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s. 9.
[17] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s 17.
[18] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s.18.
[19] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s. 6.
[20] Standing Committee On Social Justice And Empowerment, The Maintenance And Welfare Of Parents And Senior Citizens Bill, 2007, Ministry Of Social Justice And Empowerment, 28th Report, 3 (2007-08), *Available at:*http://Www.Tiss.Edu/Tiss-Attachements/Downloads/Maintenance-And-Welfare-Of-Parents-And-Senior-Citizens-Act-Mwpsc/At_Download/File.
[21] Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s. 19, *Available a*t: Http://Socialjustice.Nic.In/Oldageact.Php?Pageid=6.

mandatory since the word 'may' has been used in the section and not 'shall' for the establishment of old age homes.[22]Further, so far Government of Delhi is concerned two old age homes have been established, one at Bindapur and the other at Lampur.[23]

Medical care of senior citizens:

The Act cast a duty on the Government to ensure that government hospitals, or hospitals funded fully or partially by the Government provides beds to all senior citizens. It also facilitate separate queues for senior citizens, treatment of chronic, terminal and degenerative diseases. It encourages research activities for chronic diseases of elders and facilities for geriatric patients in every district hospital headed by a medical officer with experience in geriatric care.[24]

Under the National Programme for Health care of the elderly (NPCHE), the geriatric OPD was introduced at All India Institute of Medical Sciences, New Delhi, in 2011. It would consist of a multi-disciplinary team of doctors to cover preventive, curative and rehabilitative aspects in the geriatric field.[25] Also, the Government of Delhi has started special clinics for senior citizens on Sundays in various Government hospitals, providing services under medicine, surgery, ENT and eye specialists, and Radiological diagnostic facilities.[26]

Protection of life and property of senior citizens:

There are many cases where a senior citizen transfers his property to his relatives. They after taking possession of their property, throw them out on the streets, leaving them all alone. To protect such activities, the Act provides that after the commencement of the Act, if a senior citizen transfers his property by way of gift or otherwise under the condition that the transferee will take care of his basic needs and if the transferee fails to do so then such a

[22]Partha Sarthi Adhya, The Maintenance and Welfare of Senior Citizens Act, 2007 Requires Serious Amendments, *Help Age India-Research And Development Journal*, www.Helpageindia.Org/Helpageprd/Download.Php.
[23]Non Statutory Institutions/Old Age Homes In Delhi, *Available at*: Http://Delhi.Gov.In/Wps/Wcm/Connect/DOIT_Socialwelfare/Socialwelfare/Home/Our+Services/Social+Security+And+Old+Age+Welfare
[24]Section 20, Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, *Available at:* Http://Socialjustice.Nic.In/Oldageact.Php?Pageid=6.
[25]Press Information Bureau, GOI, Azad Dedicates AIIMS Geriatric OPD To NPCHE' Available At: Http://Pib.Nic.In/Newsite/Erelease.Aspx?Relid=76405.
[26]Social Welfare Department, National Policy For Older Persons, *Available at*: Http://Delhi.Gov.In/Wps/Wcm/Connect/Doit_Socialwelfare/Socialwelfare/Home/Our+Services/Social+Security+And+Old+Age+Welfare/National+Policy+On+Older+Persons.

transfer would be deemed to be made by fraud or coercion or undue influence and declared void at the option the transferor.[27]

Offences and Procedure for Trial:

Any person who has the responsibility for care and protection of a senior citizen and leaves such senior citizen in any place to abandon such senior citizen then he shall be punished with imprisonment for of term of three months or with fine up to Rs 5000 or both.[28]Every offence under the maintenance and protection of parents and senior citizens act 2007 shall be cognisable and tried summarily by a Magistrate.[29]

Policies and Schemes for Older Persons:

The Government of India has provided many schemes and policies to secure the health, well-being and independence of senior citizens in our country. Schemes and policies are essential for the effective implementation of laws as it bridges the gap in the general statutory laws and the minute details of the needs of people for whom the State has enacted the laws. Some of the significant policies and schemes are discussed in detail under the following headings:

National Policy for Older Persons

In 1999, the National Policy for older persons was launched by the central Government. The aim of this Policy is to facilitate the promotion of health, safety, social security and well-being of senior citizens in India. The Policy has defined a senior citizen as above sixty years of age. This policy endeavours to encourage people to take care of their old family members. This Policy also provides for taking assistance from various NGOs to pitch in when the care and protection provided by the family members of the old person fall short. It focuses on the care and protection of elder persons who don't have family members to take care of them and are comparatively more vulnerable. This Policy has certain key areas of intervention which consists of financial security, shelter, welfare, nutrition, healthcare, education, protection of life and property etc. for securing a dignified standard of living for elderly persons of our country. The main focus of the Policy is to ensure the independent status of the elderly people because when elderly people are not dependent on anybody for their basic necessities of life, then they are not in a vulnerable position, and there are lesser chances of their being forced to

[27]The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s. 23.
[28] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s 24.
[29] The Maintenance And Welfare Of Parents And Senior Citizens Act, 2007, s.25.

live a miserable life. This Policy has introduced new schemes for the effective implementation of the objectives of this Policy. These schemes aim at building a stronger primary health care system to fulfil the health care needs of older persons, conducting training and orientation for medical and paramedical personnel to train them in the health care of the elderly, facilitating understanding of healthy ageing, promoting production and distribution of material on geriatric care, proving separate queues and keeping beds for elderly patients in hospitals.[30]

National Council for Older Persons:

The Ministry of Social Justice and Empowerment constituted a National Council for Older Persons (NCOP) to give a backbone to the National Policy on Older Persons. The main aims of the NCOP are to provide advisory to the Government on programs and policies for the elderly persons, review implementation of National Policy on Older Persons, establish a contact point at the national level for taking up the grievances of elder persons, represent the needs and demands of the elder persons to the Government, guide measures for engaging old persons and making their lives interesting, suggest measures for improving the inter-generational relationships and take up any other activity for the betterment of older persons.[31]

V. CRITICAL ANALYSES OF STATISTICAL DATA

After the elaborate discussion of the laws at the international and domestic level, this segment has made an attempt to critically analyse the deterrence and prevention created by these laws to ensure the protection of elderly people from crime being committed against them. Police and courts are major stakeholders in the administration of justice. The effectiveness of any law would depend on the prompt and effective investigation by the concerned police officer and speedy disposal of cases by the court. The ineffectiveness of police investigation in criminal cases against senior citizens and the unreasonable delay in the disposal of cases by the court discourage the elderly people from filling the case or continuing with the trial of the case. So, this segment has also attempted to analyse the functioning of police investigating in the crime against senior citizens and the adjudication of cases against senior citizens by the

[30]Situation Analysis Of The Elderly In India, Central Statistics Office Ministry Of Statistics &Programme Implementation, Government Of India, , *Available at* Http://Mospi.Nic.In/Mospi_New/Upload/Elderly_In_India.Pdf
[31]*Ibid*

court. The purpose of any law is to suppress the mischief for which it is enacted. The effectiveness of any law can be evaluated by analysing crime rate under the Act. If the crime rate is more, then it indicates that the Act fails to prevent the commission of the crime for which it has been enacted.

Crime Against Senior Citizens

Total Population of senior citizens (Census of 2011)	**Total crime against Senior citizens (NCRB crime report 2020)**	**Crime Rate (Per one lakh of the Population)**
1038.5 Lakhs	24794	23.9%

NCRB crime report 2020

As per the registrar general of India actual population census 2011, the total Population of senior citizens was reported as1038.5Lakhs. According to the national crime report bureau report 2020, the total number of offences registered against senior citizens was 24794. The crime rate against a senior citizen is 23.9% per one lakh of the Population, which is worth consideration.

When we try to analyse the data of offences under different heads committed against senior citizens, we find that some of the offences like murder, hurt, grievous hurt, forgery, fraud and cheating, and criminal intimidation are more prominent. Data of offence under these heads are shortlisted for assessing the ground realities of the laws for the protection of senior citizens.

Offences against Body of Senior Citizens

S.No.	**Offence**	**Cases Reported**	**Crime Rate***
1	Murder	1159	1.1%
2	Hurt	6369	6.2%
3	Grievous Hurt	1138	1.1%

NCRB crime report 2020; Crime rate calculated per lakh of the Population

Old age makes elderly people weak and infirm, which puts them in a position where they can resist the force and become easy prey of offences like murder, hurt and grievous hurt. So, in the category of crimes against the human body, murder, hurt and grievous hurt are the prominent offences against senior citizens. In 2020, 1159 murder cases of senior citizens were reported, which is 1.1% per lakh population. A total no of 6369 cases was reported of simple hurt, which is 6.2 % of per lakh population. In contrast, cases of grievous hurt were comparatively lesser in no. i.e., 11381, which is 1.1 per lakh population.

Offences against Property of Senior Citizens & Criminal Intimidation

S.No.	Crime Head	Case Reported	Crime Rate
1.	Theft	2872	2.8%
2.	Forgery, Cheating and Fraud	2363	2.3%
3.	Criminal Intimidation	1664	1.6%

NCRB crime report 2020; Crime rate calculated per lakh of the Population

Elderly people generally take help from other people in the maintenance of their assets and financial transactions. Science and technology have brought various services within reach of people. Still, it's difficult for the elderly people to operate these electronic gazettes and do online transactions. Hence, they generally accept the help of other people being offered to them and many times end up bearing the loss of their money and valuable securities. In the category of offences against the property, theft, forgery, cheating, and fraud are the prominent crimes. In 2020, a total number of 2872 theft cases were reported, which is 2.8 % per lakh population. The total number of forgery, cheating, and fraud cases was 2363, which is 2.3 % of the per lakh population. Due to old age, elderly people easily get intimidated and succumb to the demands of the intimidators. It is evident from the number of criminal intimidation cases registered in 2020. 1664 cases were reported for intimidating senior citizens which are 1.6% of per lakh population.

Investigation Of Offences Against Senior Citizens

Pending cases From Previous Year	Cases Reported in 2020	Total no. of Pending Case	Total no of Cases disposed off	Chargesheet submitted in 2020 cases
16577	24794	41399	24244	18516

Source: NCRB crime report 2020

Whenever a crime is committed, the first authority which comes to mind for intervention is the police agency. The role of police in the investigation of crime is very crucial. If the investigation is not conducted effectively, then there are more probable changes of the case not being survived at the trial stage due to lack or insufficient evidence. When we look at the data of police investigation in offences against the senior citizens in the year 2020, then it shows that a total number of 41399 cases were pending for investigation out of which total no. of 16577 cases were from the previous year and a total no of 24794 cases were reported in the year 2020. On analysis of this data in the light of cases disposed off by police, we find a total no of 24244. There is a pendency of 41.4 % at the investigation stage of offences against senior citizens. Out of the 24794 cases reported in 2020, the charge sheet was submitted only in 18516 cases, which is 76.4% of the reported cases in 2020. In the total no of 4424 cases, no clue or sufficient evidence was found. Delay in completion of investigation generally leads to loss and destruction of evidence. It also discourages the complainants to keep visiting police stations again and again to know the investigation status in their case. When a complainant is an elderly person who is weak and struggling from other old age issues,, his chances of pursuing the investigation are less likely.

Conviction versus Trial

S.No.	Crime Head	Cases sent for trial	Conviction in Cases	Acquittal in Cases
1.	Murder	1028	0	111

2.	Hurt	5925	30	5302
3.	Grievous Hurt	1110	2	69
4.	Theft	914	18	84
5.	Forgery, Cheating, Fraud	998	2	84
6.	Criminal Intimidation	1602	11	208

Source: NCRB crime report 2020

On the analyses of data of cases sent for trial in the year 2020 from offences against senior citizens, it is found that the conviction rate is meager. Out of the cases settled in 2020, there are no convictions in murder cases, 30 convictions in hurt cases, 2 convictions in grievous hurt cases, 18 convictions in theft cases, 2 convictions in forgery, cheating and fraud cases and 11 cases in criminal intimidation. In contrast, there are 111 acquittals in murder cases, 5302 acquittals in hurt cases, 69 acquittals in grievous hurt cases, 84 acquittals in theft cases, 84 acquittals in forgery, cheating and fraud cases and 208 acquittals in criminal intimidation cases. So from the analysis of the data, we can infer that as the conviction rate is so low in offences against senior citizens, it is bound to affect the faith of elderly people in the justice administration system. It will discourage the same elderly people from filing a complaint if in future their rights get violated again and other elderly people who learn the lesson from the fate of cases of other elderly people.

Pendency Of Cases:

S. No.	**Crime Head**	**% of pendency**
1	Murder	96%
2	Hurt	94.4%
3	Grievous Hurt	97.7%

4	Theft	93.7%
5	Forgery, Cheating, fraud	96.4%
6	Criminal Intimidation	90.9%
7	All Offences	95.2%

Source: NCRB crime report 2020

The data shows a considerable pendency in cases of offences against senior citizens. 96% of the murder cases are pending, 94.4% of the hurt cases are pending, 97.7% of grievous hurt cases are pending, 93.7% of the theft cases are pending, 96.4 % of the forgery, cheating and fraud cases are pending, 90.9% of criminal intimidation cases are pending. There is an overall pendency of 95.2% in all offences against senior citizens. It is a well-accepted fact that justice delayed is justice denied. From the analyses of the above-stated data of pendency of offences against senior citizens, it can be easily inferred that justice has been denied to elder people. The elder people who invested their lives in the growth and development of our nation had to return from the doors of justice delivery system with empty hands.

VI. CONCLUSION & SUGGESTIONS

The travesty of rights that have been guaranteed to a population that now comprises over forty per cent of the total citizenry of our globe is abysmal. The principles of modern-day adulterated utilitarianism echo that a state should only spend on individuals who can render their services to the nation. Social Security Benefits are therefore seen as a benevolent gesture of a few states of the first world countries and not a compulsive international human rights obligation. According to this real smidgen, it is assumed that a particular segment of the society ceases to be productive upon having attained a certain age. Therefore the State should not spend its invaluable resources on the upkeep of such individuals. This may not be the most prominently brought out factum, which may out rightly diminish the international reputation of the modern-day welfare state, but this is undoubtedly the vital consideration while modelling policy laws.

In developing countries, the lack of a social security apparatus and the weakening of the family unit present obstacles to the provision of care for elderly family members.[32] Lack of a comprehensive international instrument that guarantees the Rights of the Elderly, and which, according to established International Legal principles, is accepted and endorsed by the global fraternity seems like a distant calling. It is also lamented that not much attention has ever been paid to secure these rights to the elderly to the extent that they so deserve. There is a need to develop a strong and all-encompassing Rights-based mechanism, which recognises and gives effect to the rights that are made available to the senior citizenry within the framework of the International Humanitarian Laws.

The only principle which stands as a bar in the effective implementation of these International Commitments, or their timely and effective incorporation into the municipal laws of respective countries is the principle of "Rights of Progressive Implementation" under which such treaties and international instruments are kept at par with certain norms which will be achieved at a later point of time when the process of implementation has shifted focus from more compelling needs which are to be addressed. A principle that is the equivalent of a normative policy that would only focus on a problem if the State has its resources available to address for the said purpose. This principle leads to prioritisation of problems, and as dormant as it may seem now, the problem is steadily and continuously growing, with little or no representation/ support from the international community, for a senescent fraction of our Population, who are at the last pedestal of their lives, usually are too deprived, and too helpless to echo any semblance of a claim for their rights, which are due to them.

We have ample legal provisions for safeguarding the interests of elderly people. The only need of the hour is the effective implementation of these provisions. Spreading legal awareness among senior citizens about their rights, informing them about the authorities to approach in case of violation of their rights, and encouraging them to cooperate with the police by following the security measures like sharing details of their tenants and servants with the police can help in better implementation of these provisions. There is a need for sensitisation of the police agencies about the special need of elderly people and safeguards to be followed in offences against senior citizens. Though we have provisions under various high court rules for speedy disposal of cases involving senior citizens, the data depicts that it fails to produce the desired result, so looking at the pendency of cases, special courts exclusively deal with cases involving senior citizens will provide some immediate relief. Such

[32]Economic, Social And Cultural Rights Of Older Persons: General Comment 6, U.N. ESCOR, Econ., Soc., & Cultural Rts. Comm., 13th Sess., Para. 1, UN Doc. E/C.12/1995/16/Rev.1 (1995)

suggested measures will reinstate the lost faith of elderly people in the justice delivery system and deter the violators in the light of effective and prompt action in cases involving senior citizens.

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PREVENTING CYBER CRIMES AND FRAUDS USING PRO-ACTIVE COMMUNICATION INTELLIGENCE AND NEUTRALIZING THE CYBER CRIME SYNDICATES : A CASE STUDY OF MEWAT DISTRICT, HARYANA, INDIA

*Naveen Jakhar**

ABSTRACT

The last three decades have seen a revolution in the field of Information and Communication Technology (ICT). Mobile phones have played the role of a catalyst in this digital transformation. The journey which started with voice calls have reached to huge data consumption, group calls and payment transfers on the go using UPI, Banking APPs and other payment APPs. As per TRAI Telecom Subscription Data as on 31st December 2021, there are approximately 115.4 crore wireless users and 76.5 crore broadband users in India.[1]This huge and vulnerable subscriber base provides a very large attack surface to the malicious elements. These malicious elements carry out various frauds like SIM swap, fake OTP, KYC updation, installing remote access APPs like Any Desk,Lottery Scam, online Transactions Frauds, Fake Calls Frauds, Email Frauds,Vishing, Phishing, SMiShing etc. The Law Enforcement Agencies (LEAs) and Ministry of Home Affairs (MHA) have reported that major cyber-crime fraud networks are operating from regions like Mewat, Jamtara etc. areas of the country. SIMs subscribed on forged/fake documents are involved in majority of these cybercrimes as well as conventional crimes like extortion, dacoity, kidnapping, hoax and threat calls etc., owing to anonymity and untraceability of such SIMs. Such syndicates are a direct threat to national security, public law and order. Once a mobile number is reported to be involved in any cyber fraud, the LEAs start investigation and the mobile number is also shared with Department of Telecom (DoT) for checking Customer Acquisition Form (CAF) and Proof of Identity/Address (PoI/PoA) documents used for taking the SIM connection. Majority of the times it is observed that the PoI/PoA documents are in order for these Fake SIMs.So, an alternative system was required which should be agnostic of any PoI/PoA. This paper presents a case study on an indigenous and innovative system designed by DoT Haryana LSA unit for carrying out pro-active analysis using communication intelligence for identifying non bonafide mobile numbers and weeding them out from the telecom ecosystem even before they carry out any cyber fraud. The tool has been proven so successful that entire cyber crime syndicates of Mewat have been neutralized, disconnecting 4.96 lakh SIMs across all TSPs, which is approximately 30% of total SIMs.

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[1] TRAI Telecom Subscription Data as on 31st December 2021, https://www.trai.gov.in/sites/default/files/PR_No.12of2022_0.pdf last visited on 4th April 2022.

I. INTRODUCTION AND PROBLEM STATEMENT

National Crime Records Bureau (NCRB) *Crime in India 2020 Report* has revealed that India recorded 50,035 cases of cyber crime in 2020, with an 11.8% surge in such offences over the previous year. In terms of motive, the maximum 60.2% cyber-crimes lodged in 2020 were done for fraud (30,142 out of 50,035 cases).[2] India lost Rs 1.25 lakh crores due to cyber crimes in year 2019-20.[3]More than 7 lakh complaints have been lodged on National Cyber Crime Reporting portal in last 3 years[4]. 135 crore Indian citizens are vulnerable to such frauds.

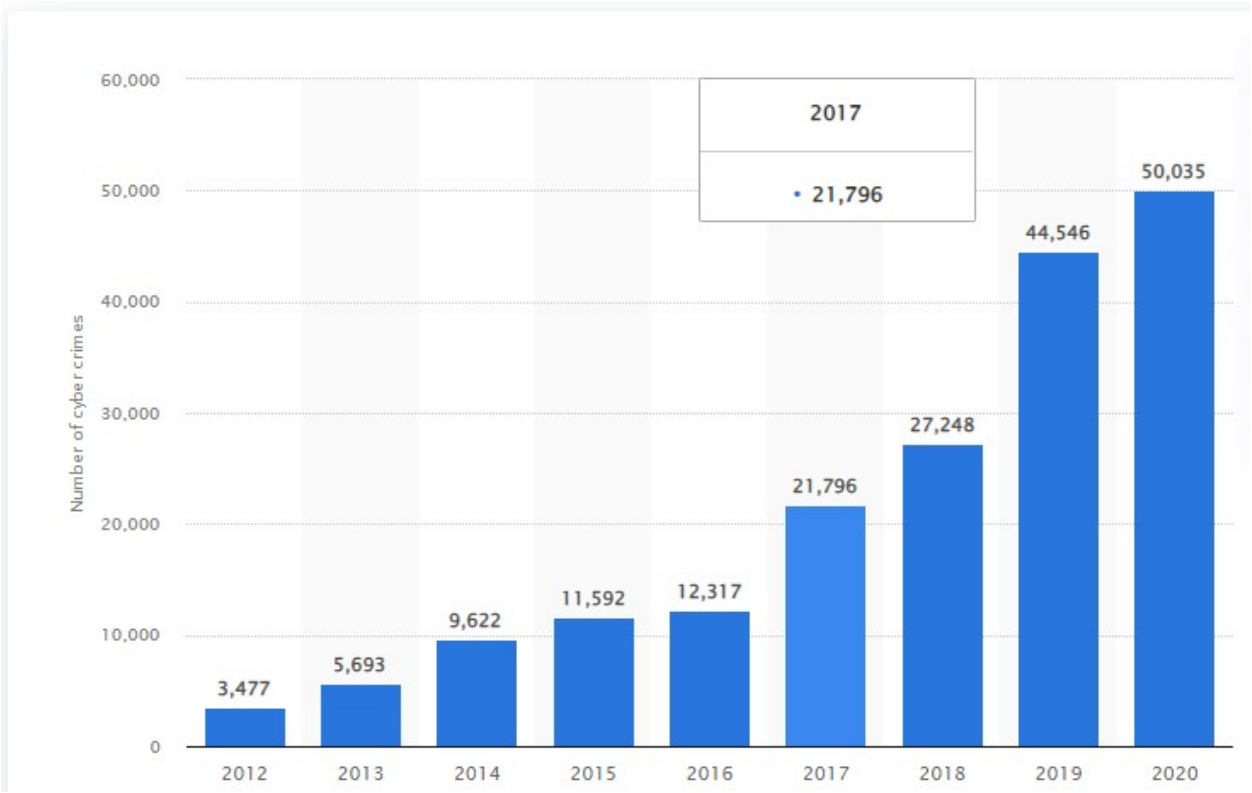

Fig.1 Number of cyber crimes in India from year 2012 to 2020 *Source: Statista 2022*[5]

Let us try to understand the Modus Operandi of a cyber crime syndicate. This is how any cyber crime syndicate works – the first person arranges fake SIM card, the second person gets bank accounts and payment APPs opened on fake SIM cards, thethird person impersonating as an agent of telecom service provider, bank or any other service agency, makes the fraud calls using another set of fake SIM cards to citizens for seeking their details like Aadhaar

[2] National Crime Records Bureau (NCRB), MHA Crime in India 2020 Report https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf last visited on 4 April 2022.
[3] *ibid*
[4] www.cybercrime.gov.in
[5] Number of cyber crimes reported across India from 2012 to 2020 https://www.statista.com/statistics/309435/india-cyber-crime-it-act/ last visited on 4th April 2022.

number, OTP, PIN, CVV debit/credit card details, bank details and the fourth person withdraws the money once they have duped the innocent citizen. Fake SIMs is the main link in the chain. The untraced-ability and anonymity in the SIMs make cyber crime investigation very complex.

The list of suspected mobile numbers is shared by MHA with DoT on regular basis. But when the documents of these suspected mobile numbers were analyzed, they were found to be genuine in all respects because each verification case was being dealt separately. An in-depth analysis and investigation was carried out by DoT Haryana LSA and it was observed that such is the expertise level of fraudsters that they have created fake Proof of Identity/Address documents which can never be detected by human beings by analyzing a single case in isolation – so even after being reported by LEAs – such SIMs come out be compliant during DoT audit – and cyber crime gangs remain functional. The fraudsters are creating fake/forged documents with such advanced techniques and keep on changing the Name, Guardian's Name, Date of Birth etc that conventional text based analysis can never catch them.

DoT and LEAs carry out conventional text based analysis on regular basis. But due to these changes in Name and other details, such Fake SIMs are never caught during text based analysis.

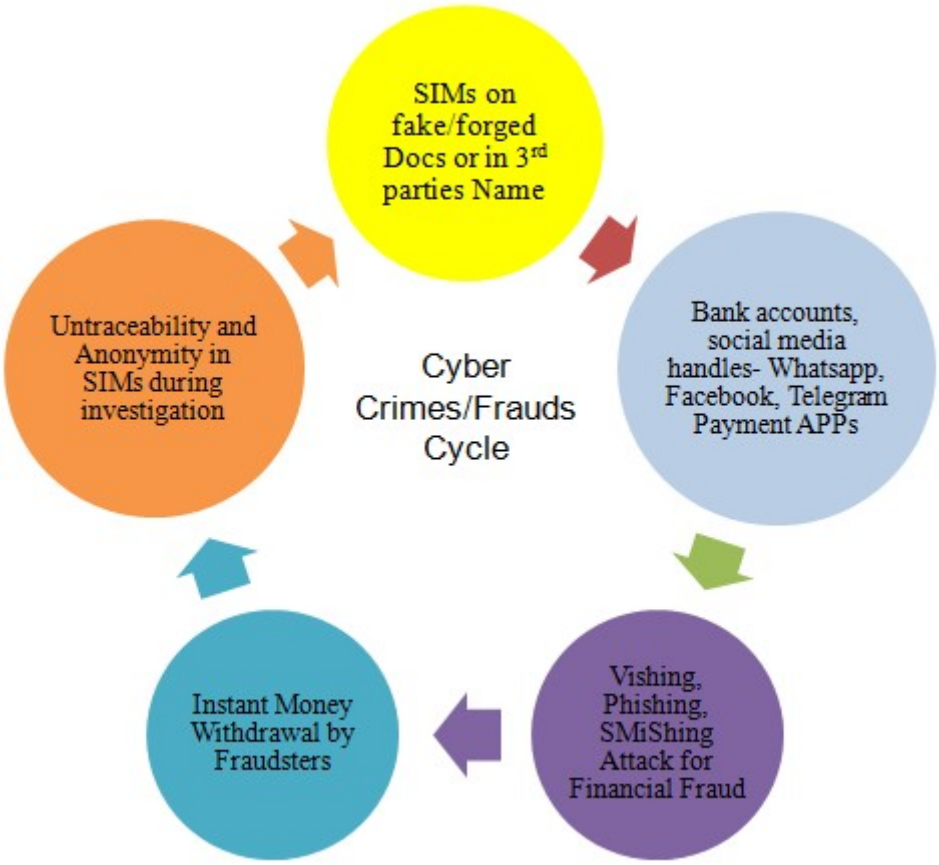

Fig.2Modus operandi of cyber crime syndicates -cyber crime/frauds cycle

The above mentioned issues crystallize into following problem statements:

i. The TSPs maintain their individual database and work in silos.

ii. There are more than 30 PoI/PoA documents on which a person can take a new SIM connection.[6] The database of the issuing organizations of these PoI/PoA does not have connectivity with SIM subscriber database. So, there exists no cross checking mechanism at the TSP end if a person uses a fake/forged PoI/PoA for taking a new SIM connection.

iii. The field units of the DoT were carrying out text based analysis of the entire subscriber base. The fraudsters are creating fake/forged documents with different Names Date of Birth; with such advanced techniques that conventional text based analysis can never catch them.

iv. More than 7 lakh complaints have been filed on NCRP portal in last 3 years. India recorded 50,035 cases of cyber crime in 2020, maximum 60.2% cyber-crimes were done for fraud. Fake SIMs are the main link in all such crimes[7].

v. The number of registered cyber-crimes has increased more than five-fold since 2014 and crossed 50000 for the first time in 2020. Cases of fraud accounted for more than 60% of these cases in 2020. The pendency of these cases at the police crossed 70% by the end of 2020.[8]

[6] https://dot.gov.in/
[7] www.cybercrime.gov.in
[8] https://factly.in/data-the-number-of-registered-cyber-crimes-cross-50000-in-2020-20-of-these-are-fraud-cases/

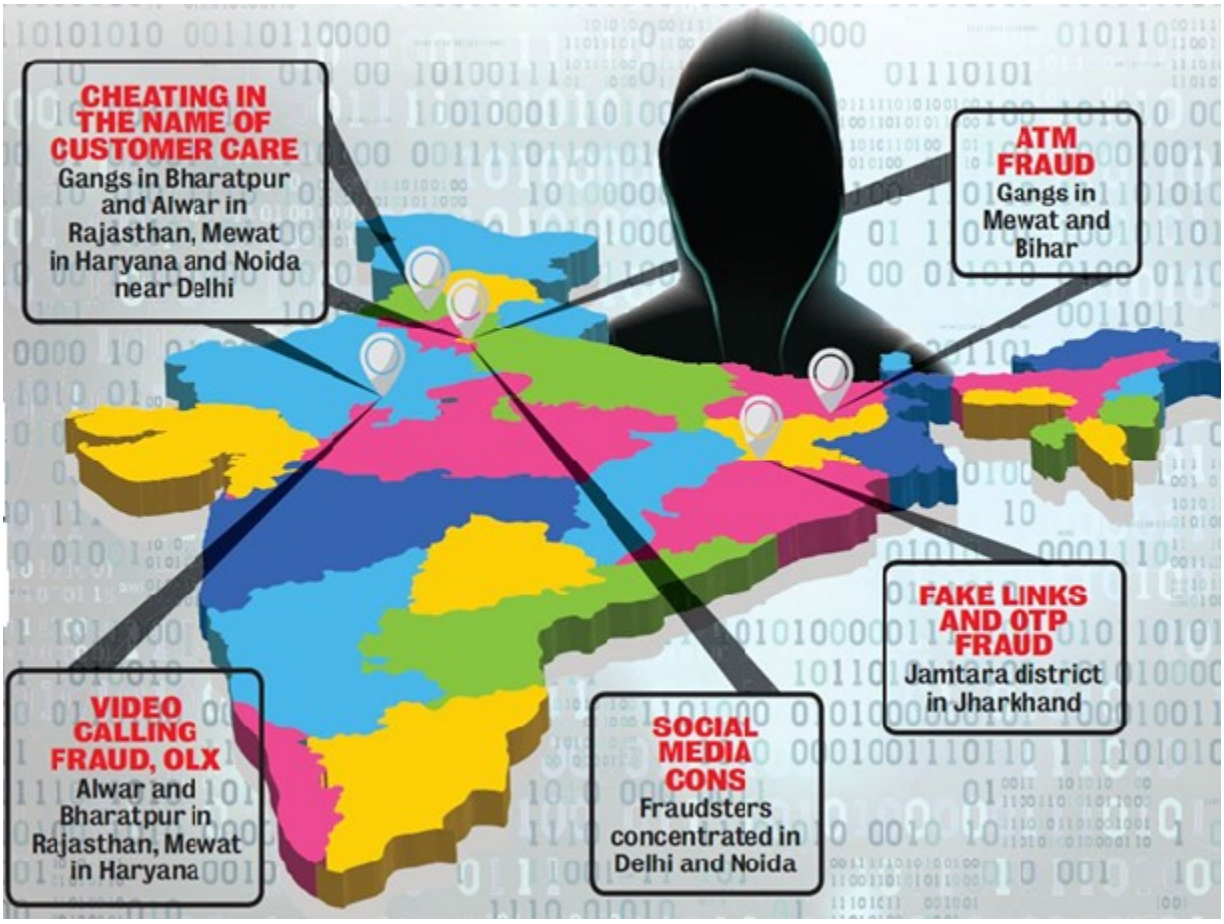

Fig.3 Cyber crime hotspots in India

II. Innovation and Methodology Adopted

These above mentioned figures of cyber crimes cases and pendency of investigation are not only scary but also pose a strong threat to the vision of Digital India and Digital Economy. As they say "*Prevention is better than cure*." The aim of the field study was to detect the non bonafide SIMs before incident of cyber crime or fraud. The study was descriptive and was carried out in Mewat District, Haryana. So, a team of officers in DoT Haryana LSA took this challenge of detecting the potential non bonafide SIMs and weeding them out from the telecom ecosystem even before they carry out any cyber fraud/crime. This gave birth to ASTR (अस्त्र)–Artificial Intelligence and Facial Recognition powered Solution for Telecom SIM Subscriber Verification. It is an indigenous and innovative system designed by an in house team of ITS officers in DoT Haryana LSA.

Innovative Research Approach

ASTR project was conceptualized and designed during the period April 2021 to July 2021. The subscriber images were taken from the TSPs and algorithms were trained using this

dataset. The first version of the system was ready in the last week of July 2021. As a pilot project, ASTR was launched in Mewat region. The vision of the ASTR project is to analyze the whole subscriber base of all TSP combine and cleanse the database by identifying on bonafide mobile numbers even before they carry out any cyber fraud and the case reporting by LEAs.

As per DoT instructions, a person can have at max nine SIMs in his name in India. For people staying in Jammu & Kashmir and Northeast, a person can have at max six SIMs.

During SIM subscription process, live image of the subscriber is taken by the Point of Sale agent of the TSPs. DoT has issued instructions to all the Telecom Service Providers (TSPs) for submitting the images of the subscribers taken during SIM subscription process. ASTR utilizes these captured images of the subscribers and tries to find similarity among them with very high grade of accuracy using face recognition and Artificial Intelligence. The images from all the TSPs are merged for carrying a comprehensive analysis. In second step, Big Data Analytics was performed on the name of the subscribers for checking similarity of names using Fuzzy logic.

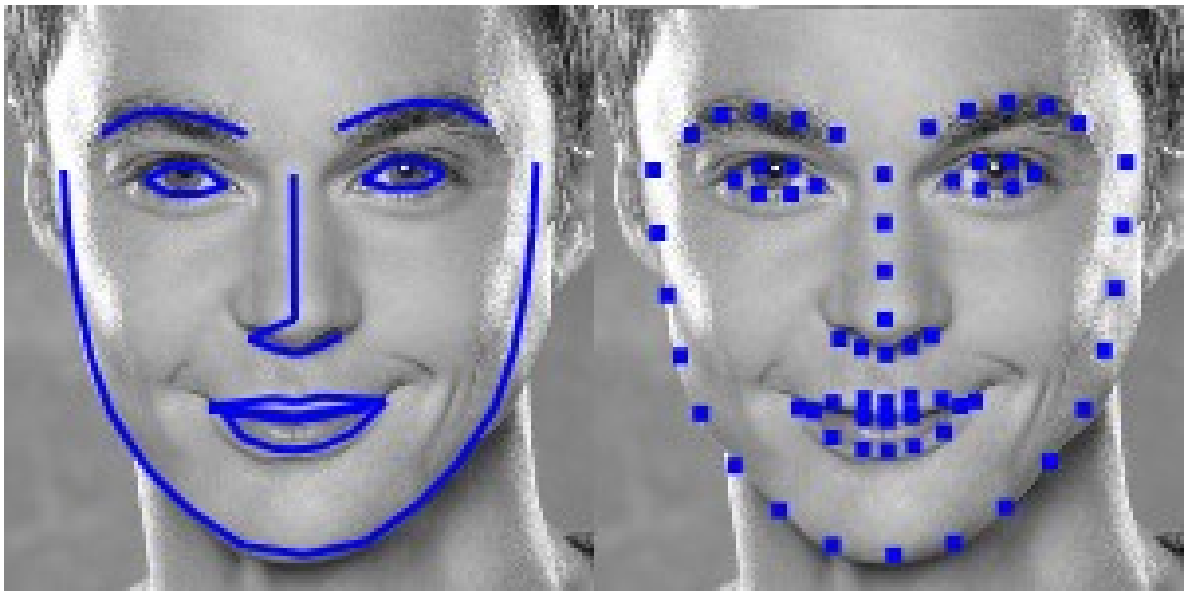

Fig4. Genesis of ASTR: 68-point Frontal Facial Landmark Model

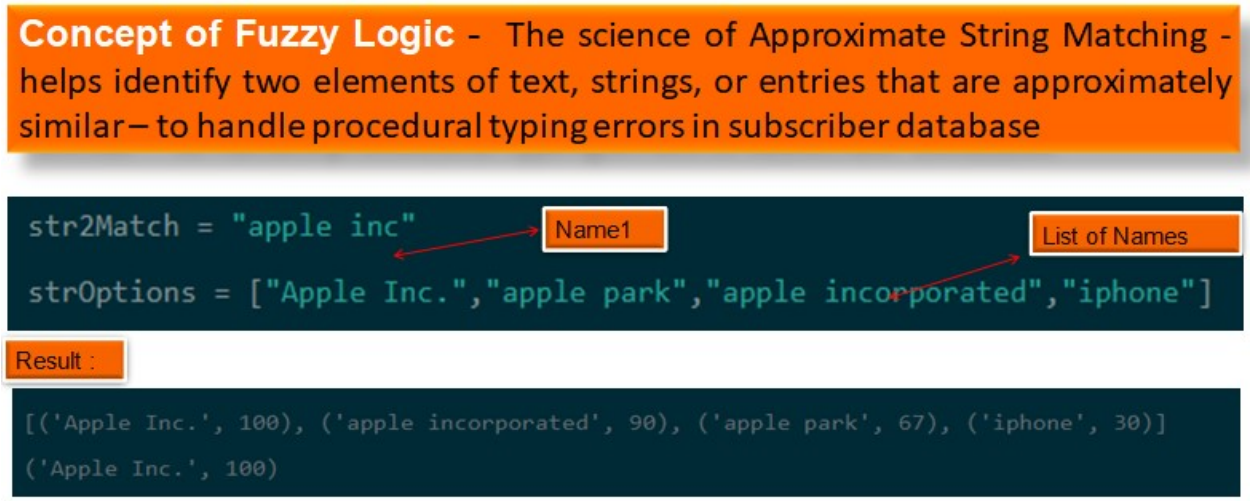

Fig5. Concept of Fuzzy Logic in ASTR

The innovative elements of ASTR are as follows:

(i) The subscriber images are taken from all the TSPs and stored as aggregated images.

(ii) In second step, the human faces are encoded using multi staged and layered HOG model and Convolutional Neural Network (CNN) models. Multi layered and integrated HOG and CNN models have been used for handling the tilt and angle of face, opaqueness and dark colour of the images.

(iii) In third step, face comparison is carried out for each face against all faces. Similar faces are grouped under one directory. Multi threading and cosine vector comparison have been used for ensuring face comparisons with very high grade of accuracy. Vectorized comparisons have been used for handling huge calculations of 16.69 lakh * 16.69 lakh i.e. 2.785 lakh crore comparisons.

(iv) Two faces are said to be identical by ASTR if they match 97.5% or more.

(v) In fourth step, Fuzzy logic is used for finding similarity / approximate match for the subscriber names. It is capable of handling all type of typographical mistakes and provides unique sets of names. Depending upon the output, it is derived whether the same person has acquired two or more SIMs under different names using forged Proof of Identity/ Proof of Address documents.

(vi) In the final step, all similar faces under one directory are mapped to a collage and important details like Mobile Number, CAF Number, Name of Subscriber and TSP are stamped on the collage for easy identification and further analysis like hotspot of Point of Sales and retailers which are involved in selling these fraudulent SIMs etc.

(vii) ASTR is capable of detecting all SIMs against a suspected face in less than 10 seconds from a database of 1 crore images.

III. LEGAL PROVISIONS

Indian Telegraph Rules 1951 has laid down rules for handling improper or illegal use of telephone. The relevant rules are reproduced below:

S. No.	Rule under Indian Telegraph Rules, 1951	Description
1	Rule 416A - Special Powers of Telegraph Authority	Notwithstanding anything contained in rule 416 where the Telegraph Authority is satisfied that any person is engaged, in any smuggling activity or is acting in violation of any law relating to the conservation of the foreign exchange resources of the country or is acting prejudicially to the public safety and interest or the Defence of India, Civil Defence or Internal Security, the Telegraphy Authority shall- (a) where such person is an applicant, refuses to grant any telephone connection or any similar service or to provide any alteration of any existing service; and (b) where such person is a subscriber, withdraws, either totally or partially, any telephone or similar service provided under these rules
2	Rule 419 - Interception or monitoring of telephone messages	It shall be lawful for the Telegraph Authority to monitor or intercept a message transmitted through telephone, for the purpose of verification of any violation of these rules or for the maintenance of the equipment.
3	Rule 427 - Illegal or improper use of telephone	A subscriber shall be personally responsible for the use of his telephone. No telephone shall be used to disturb or irritate any persons or for the transmission of any message or communication which is of an indecent or absence nature orris calculated to annoy any person or to disrupt the maintenance of public

		order or in any other manner contrary to any provision of law

Relevant Sections in Indian Penal Code, 1860

Impersonation, cheating, creating forged/fake documents is an illegal act under Indian Penal Code, 1860. Section 415 to 420 of Indian Penal Code, 1860 deal withcheating, impersonation and their punishment. Section 463 to 476 Indian Penal Code, 1860deal with creating fake documents, using fake documents as genuine one, false document or electronic record. The provisions of sections 463, 465 and 468 of the IPC dealing with forgery and "*forgery for the purpose of cheating*", may also be applicable in a case of identity theft.

The cyber crimes also find mention in Information Technology Act, 2000. The relevant sections for identity theft and impersonation are as follows:

S. No.	Section under Information Technology Act,2000	Description
1	Section 66C - Punishment for identity theft	Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.
2	Section 66D - Punishment for cheating by personation by using computer resource	Whoever, by means for any communication device or computer resource cheats by personating, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.

IV. CONCLUSION AND IMPACT OF ASTR PROJECT IN MEWAT, HARYANA

(i) Before ASTR project, there were approx 16.69 lakh SIMs in Mewat region, Haryana. The tool has been proven so successful that entire cyber crime syndicates of Mewat have been neutralized, disconnecting 4.96 lakh SIMs across all TSPs, which is approximately 30% of total SIMs.

(ii) The project which was launched in Mewat, Haryana has been expanded in complete Haryana LSA. On monthly basis, the activity of 100% SIM subscriber verification for new SIMs is carried out using ASTR system. The list of suspected mobile numbers is generated by ASTR. Immediate action for re-verification of suspected mobile numbers is taken and the mobile numbers are disconnected if found non-bonafide.

(iii) Also, all the suspected mobile numbers of Haryana which are being reported on National Cyber Crime Reporting Portal are analyzed using ASTR for finding all other SIMs which have been taken using similar faces. The re-verification and disconnection of all non bonafide SIMs involved in the criminal syndicates is carried out.

(iv) ASTR project is directly benefitting 135 crores Indian citizens using mobile devices or telecom services by creating a robust telecommunication ecosystem and keeping the fraudsters away from the telecom network. The project is acting as a catalyst for providing a robust and secure telecommunication ecosystem for achieving the goal of Digital India. The ASTR project is directly instilling confidence among the citizens for using digital services and giving a push to the digital economy.

(v) ASTR Project has directly helped the LEAs, banking/financial institutions by detecting the fake/forged SIMs using pro active analysis. The cyber crime syndicates which were operational in Mewat, Haryana have been completely neutralized. The cyber frauds, crimes and other illegal activities using SIMs, have drastically reduced in Mewat, Haryana.The effectiveness of ASTR system is evident as approx 4.96 lakh potential fraud SIMs have been disconnected.

(vi) ASTR is acting as a tool for e-governance and ease of doing business by ensuring a trusted and verified digital telecommunication ecosystem where every subscriber will be uniquely identifiable and traceable.The ASTR project is directly instilling confidence among the citizens for using digital services and giving a push to the digital economy.

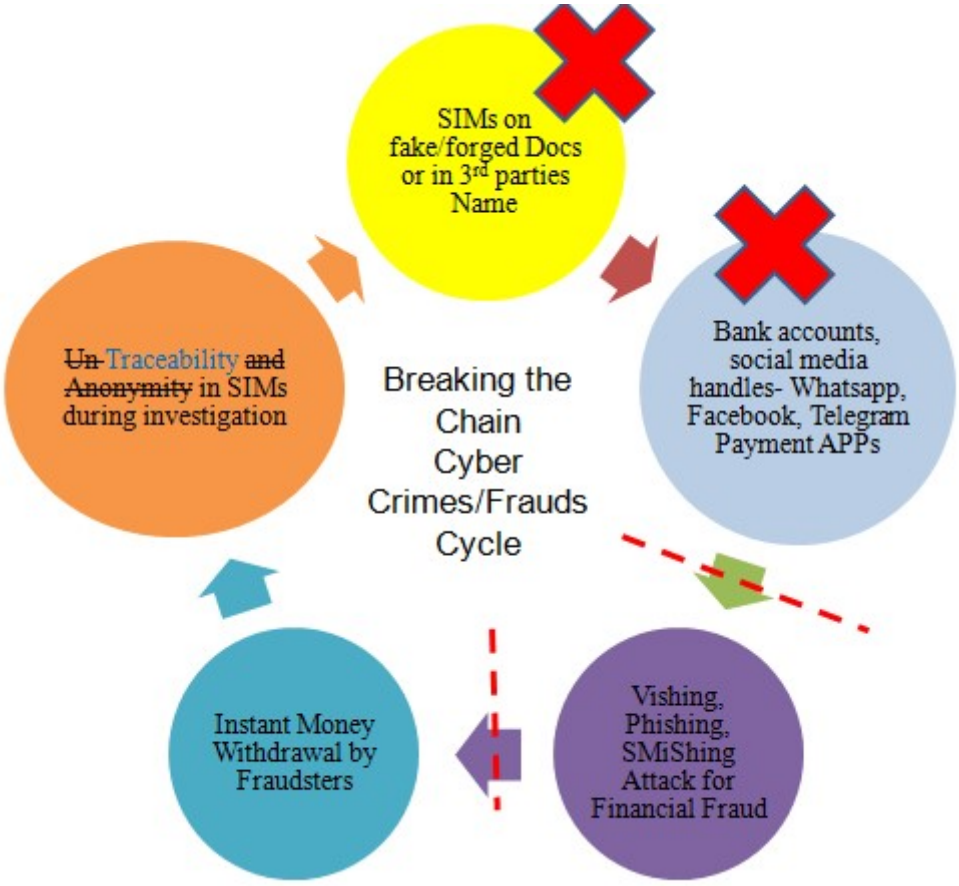

Fig.6ASTR – breaking the Chain of Cyber Crimes/Frauds cycle

V. WAY FORWARD FOR CURBING CYBER FRAUDS IN INDIA

DoT Haryana LSA aims to curb the cyber crimes/frauds across India using communication intelligence and pro-active analysis. The feedback and result of ASTR may be integrated in the SIM subscriber on boarding APPs of all the Telecom Service Providers, thereby making the entire telecom ecosystem more robust and secure as envisaged in National Digital Communication Policy 2018[9].

The cyber laws are still in nascent stage in India and stricter regulations are required for dealing financial frauds and cyber frauds.

There is an urgent requirement of finding all hotspots where fake SIMs are being sold and from where these syndicates operate. Utilizing ASTR, targeted operations may be launched in these hotspots for effectively neutralizing the cyber crime syndicates operating anywhere in India.

A Standard Operating Procedure (SoP)may be developed and integrated version of ASTR

[9] National Digital Communication Policy, 2018 *available at* https://dot.gov.in/sites/default/files/EnglishPolicy-NDCP.pdf

in coordination with MHA for re-verification of the social media accounts like Facebook, Whatsapp, Telegram etc. and bank accounts & payment APPsof suspected disconnected mobile numbers. Their removal from these suspected entities from the social media platforms and bank, Payment APPs will further cleanse the system and will play a key role in ensuring a secure and robust telecom and digital ecosystem.

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WITNESS PROTECTION SCHEME, 2018: A BRIEF PRIMER

Dr. Monica Chaudhary[*]

ABSTRACT

India has an adversarial system of justice in which the criminal courts decide cases on the basis of evidence produced before them by the parties. Such evidence may be documentary evidence or testimonial evidence of witnesses. Witnesses, as Jeremy Bentham, the English jurist, famously said are "the eyes and ears of justice". Therefore, any criminal justice system in which witnesses are not able to depose freely, justice will be a casualty. Witnesses may not be able to depose freely, if they or their family members are threatened, intimidated or influenced through the use of money or muscle power. Witnesses may also be influenced psychologically, due to their relationship with the accused and/or the victim or other witnesses. Whatever be the reason, if witnesses are unable to speak the truth in a court of law, criminals may go scot-free and sometimes innocent persons may be convicted. This emboldens criminals and shakes the faith of the public in the criminal justice delivery system. The low conviction rates in India, even for heinous offences, are often attributed to witnesses not deposing or witnesses turning hostile. Therefore, it becomes imperative to have an effective witness protection programme in India, so that the witnesses feel safe enough to depose freely. India does not have a dedicated legislation for witness protection so far. But, the Supreme Court approved Witness Protection Scheme, 2018 is a significant step forward in the journey towards witness protection in India. This article gives a brief overview of the Witness Protection Scheme, 2018 and the traces the judiciary's contribution in emergence of this Scheme.

I. INTRODUCTION

India does not have a dedicated legislation for witness protection so far. However, the inconveniences, challenges, threats and the apathy faced by witnesses in the criminal justice system in India, the myriad reasons for witnesses turning hostile and the required measures for protection of witnesses and their identity have often been highlighted by the Law Commission of India, in about half a dozen Reports since 1958. The Law Commission has highlighted issues like:

(i) The importance of convenience and comfort of witnesses and adequate allowance for them.[1]

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[1]See Law Commission of India, "14th Report on Reform of Judicial Administration" (September, 1958) Vol. 2, pp.743-744, para 29.

(ii) The need to penalise attempts to dissuade witnesses from giving evidence, by use of threats, bribes or other corrupt means.[2]

(iii) Making bail provisions more stringent in order to ensure that the accused persons do not intimidate or influence witnesses after being released on bail,[3] the need to ensure adequate facilities, payment of realistic allowances and protection to the witnesses and their quick examination, without unnecessary adjournments,[4]and the need to check the delaying tactics, often resorted to by the accused persons, in order to dissuade witnesses from deposing against them.[5]

(iv) The use of a screen or other appropriate measures while recording the testimony of a minor victim of rape, so that she is "not confronted by the accused while at the same time ensuring the right of cross-examination of the accused".[6]

(v) The problem of witnesses turning hostile due to inducements, threats or promises and the need to ensure a fair investigation.[7]

The constitutional courts have also recognised the need for protection of witnesses and their identity in various judgments for over two decades.[8] The concerns raised by the judiciary led to the Law Commission taking up the issue *suo moto* which resulted in circulation of a "Consultation Paper on Witness Identity Protection and Witness Protection Programmes" in August 2004 and culminated in the 198th Report on "Witness Identity Protection and Witness Protection Programmes" in which a Draft Bill for Witness Identity Protection was also annexed.[9]However, no Draft Bill for Witness Protection Programmes was provided in the Report.

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[2]See Law Commission of India, "42nd Report on the Indian Penal Code" (June, 1971), p. 207, para 11.36.
[3]See Law Commission of India, "154thReport on the Code of Criminal Procedure, 1973 (Act No. 2 of 1974)" (August, 1996) Vol. I, para 11.
[4]See *Id*., Chapter 10, paras 3,4,7, 27.
[5]See *Id*., para 39.4.
[6]See Law Commission of India, "172ndReport on Reform of Rape Laws" (March, 2000), pp. 81-82, para 6.1.
[7]See Law Commission of India, "178th Report on Recommendations for Amending Various Enactments, Both Civil and Criminal Law" (December, 2001) pp.116-123.
[8] See *Delhi Domestic Working Women's Forum* v. *Union of India*,(1995) 1 SCC 14;*State of Punjab* v. *Gurmit Singh*, (1996) 2 SCC 384; *Swaran Singh* v. *State of Punjab*,(2000) 5 SCC 668; *State of U.P.* v. *Shambhu Nath Singh*,(2001) 4 SCC 667; *Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81;Mrs. Neelam Katara v. Union of India, 2003 SCC Online Del 952;*Sakshi* v. *Union of India*, (2004) 5 SCC 518 ; *People's Union for Civil Liberties* v. *Union of India*, (2004) 9 SCC 580; *Zahira Habibullah Sheikh* v. *State of Gujarat*, (2004) 4 SCC 158, (2006) 3 SCC 374; *National Human Rights Commission* v. *State of Gujarat*, (2008)16 SCC 497, (2010) 4 SCC 315; *Manu Sharma* v. *State (NCT of Delhi)*,(2010)6 SCC1;*State* v. *Sanjeev Nanda*, (2012)8 SCC 450;*Ramesh* v. *State of Haryana*,(2017)1 SCC 529.
[9] See Law Commission of India, "198th Report on Witness Identity Protection and Witness Protection Programmes" (August, 2006).

The Justice V.S. Malimath Committee Report[10] also referred to the problem of witnesses turning hostile and not deposing truthfully "due to threats, inducement or sympathy".[11]The Report also noted the shabby treatment meted out to the witnesses[12] and the lack of proper facilities and adequate allowances for witnesses.[13] The Committee emphasised the need for a comprehensive law for protection of the witnesses and their families.[14] The National Police Commission also recommended various measures to alleviate the difficulties of the witnesses in 1980.[15]

Despite these repeated concerns and suggestions, the Legislature has refrained from passing a comprehensive law on witness protection in India. Although some Private Members' Bills have been introduced in Parliament on the issue of witness protection, none of them have been passed, so far.[16]However, some specific provisions relating to witness protection have been added from time to time in some special laws. Such provisions for in-camera proceedings and for protection of the identity and address of witnesses have often been included in anti-terror laws.[17] Even laws dealing with offences by and against children prohibit direct or indirect disclosure of their identity.[18]The Whistle Blowers Protection Act, 2014 also included provisions on protection of witnesses and the "protection of identity of complainant".[19]The general penal laws also contain some provisions dealing with witness protection and comfort.[20]In the year 2006, "threatening any person to give false evidence" was made a punishable offence under the

[10]Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, March, 2003).
[11]*Id*., p. 13, para 1.24.
[12]*Id*., p. 20, para 1.37.
[13]*Id*., pp. 151-154, paras 11.1 to 11.6.
[14]*Id*., p. 152, para 11.3.
[15] Fourth Report of the National Police Commission (1980), p. 16, para 28.15.
[16] See The Witness Protection Bill, 2015 (Bill No. 341 of 2015); The Witnesses (Protection of Identity) Bill, 2015 (Bill No. 250 of 2015); The Witness Protection Program Bill, 2016; The Compulsory Protection of Witnesses and Victims of Crimes Bill, 2018 (Bill No. 131 of 2018).
[17]See The Terrorist and Disruptive Activities (Prevention) Act, 1985, s. 13;The Terrorist and Disruptive Activities (Prevention) Act, 1987, s. 16; The Prevention of Terrorism Act, 2002, s.30; The National Investigation Agency Act, 2008, s. 17; The Unlawful Activities (Prevention) Act, 1967, s. 44.
[18]See The Juvenile Justice (Care and Protection of Children) Act, 2015, s. 74; The Protection of Children from Sexual Offences Act, 2012, ss. 23,24,33.
[19]See The Whistle Blowers Protection Act, 2014, ss. 12, 13.
[20]See, for example, The Indian Evidence Act, 1872 (IEA), ss. 53A, 151, 152; The Code of Criminal Procedure, 1973 (CrPC)ss.160-163, 273, 309, 327, 406-408; The Indian Penal Code, 1872 (IPC) ss. 228A, 195A.

Indian Penal Code, 1872 (hereinafter, IPC).[21] The National Capital Territory of Delhi took a lead on the issue and notified the Delhi Witness Protection Scheme, 2015 in July, 2015. However, no Central legislation on the issue was enacted, despite the repeated concerns raised.

II. THE EMERGENCE OF THE WITNESS PROTECTION SCHEME, 2018

In *Mahender Chawla* v. *Union of India*,[22]a writ petition was filed under Article 32 of the Constitution of India by four petitioners, who made specific allegations against a self-professed godman, Asaram Bapu and his son Narayan Sai, who were accused in rape cases. The petitioners included a witness who had survived a murder attempt on his life for daring to testify against the accused, the father of a murdered witness who was allegedly killed for daring to be a witness against accused, the father of a child rape victim and a journalist who had escaped a murder attempt by the henchmen of the accused and was still facing death threats for daring to write articles against the accused. [23]The petitioners alleged that witnesses in the rape cases against Asaram were being threatened and three witnesses had already been killed and ten others had been attacked. The petitioners prayed for "a court monitored SIT or a CBI probe".[24]

Recognising that the condition of witnesses in the Indian Legal System has been "pathetic", the two-judge bench, speaking through A.K. Sikri, J., referred to the threats faced by witnesses during investigation and trial and the fact that witnesses are not suitably treated and are taken for granted in the criminal justice system.[25] Identifying lack of witness protection measures as one of the main reasons for witnesses turning hostile in India, Sikri, J. observed:

> "It is a harsh reality, particularly, in those cases where the accused persons/criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorise or intimidate the witnesses because of which these witnesses either avoid coming to courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any

[21]IPC, s. 195A, inserted by the Criminal Law (Amendment) Act, 2006 (Act 2 of 2006), s. 2.
[22](2019) 14 SCC 615.
[23]*Id*., at p.626, para 16.
[24]*Id*., at p. 627, para 17.
[25]*Id*., at p. 618, para 4.

protective measure to ensure the safety of these witnesses, commonly known as 'witness protection'."[26]

The petitioners had initially impleaded the Union of India and the States of Haryana, Uttar Pradesh, Rajasthan, Gujarat and Madhya Pradesh and the Court directed the States of Uttar Pradesh and Haryana to ensure "full and proper protection to the petitioners by providing adequate security".[27] However, since the issue of witness protection programme had pan India significance, other states were also impleaded and the coverage of the petition was extended to the entire country. The learned Attorney General was asked to submit a draft scheme. Understanding the significance of the issue, the Union Ministry of Home Affairs prepared a draft Witness Protection Scheme, 2018 and comments were invited from Governments of States and Union Territories, after which the Witness Protection Scheme, 2018(WPS) was finalised "based on the inputs received from 18 States/Union Territories, 5 States Legal Services Authorities and open sources including civil society, three High Courts as well as from police personnel" and in consultation with the National Legal Services Authority (NALSA).[28] Emphasising the need to have a statutory witness protection regime, the two-judge bench held that, till a suitable law is framed by the Central and/or State Legislatures, the WPS should be considered as "law" under Articles 141/142 of the Constitution.[29] The Union and State Governments were asked to enforce the WPS in letter and spirit.[30]

III. OVERVIEW OF THE WPS

The WPS recognises that "in cases involving influential people, witnesses turn hostile because of threat to life and property". [31]The WPS has a wide scope and it prescribes a slew of measures for affording physical as well as identity protection and even relocation, if required, to the witnesses. The WPS does not follow a one size fits all approach to witness protection. The protection needs of a witness have to be assessed on a case-to-case basis, depending upon their vulnerability and threat perception.

[26] *Id*., at p. 619, para 6.
[27] *Id*., at p. 627, para 18.
[28] *Id*., at p. 629, para24.
[29] *Id*., at p. 639, paras35, 36.3.
[30] *Id*., para 36.2.
[31] WPS, Need and Justification for the Scheme.

Offences to which the WPS is Applicable

The WPS defines a witness as a "person, who possesses information or document about any offence".[32] However, the application of the WPS is only applicable to the following offences:[33]

i. Offences punishable with death or life imprisonment;

ii. Offences punishable with imprisonment up to seven years and above; and

iii. The gender specific offences of "assault or criminal force to woman with intent to outrage her modesty",[34]sexual harassment,[35] disrobing,[36] voyeurism,[37] stalking[38] and "utterance of any word, or making of any sound or gesture with intent to insult the modesty of a woman under the IPC".[39]

Application for Protection Under the WPS

The WPS provides for setting up of a 'Competent Authority' (CA) for issuing witness protection orders, specifying the witness protection measures to be taken under the WPS in specific cases in the District.[40] The CA is "a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as member and Head of the Prosecution in the District as its Member Secretary".[41]

An application seeking a witness protection order under the WPS, along with supporting documents, if any, can be filed before the CA of the District where the offence is committed, through the Member Secretary of the CA.[42]The application can be filed by "the witness, his family member or his duly engaged counsel or Investigating Officer/Station House Officer/Sub-divisional Police Officer/Prison Superintendent concerned" and it should preferably be forwarded by the Prosecutor concerned.[43] Family member under the WPS includes "parents/guardian, spouse, live-in partner, siblings,

[32]WPS, cl. 2(k).
[33]*Id*., cl. 2(i).
[34]IPC, s. 354.
[35]*Id*., s. 354A.
[36]*Id*., s. 354B.
[37]*Id*., s.354C.
[38]*Id*., s. 354D.
[39]*Id*., s. 509.
[40]WPS, cl. 2(n).
[41]*Id*., cl. 2(c).
[42]*Id*., cl. 5 read with cl. 2(c).
[43]*Id*., cl. 2(l).

children, grandchildren of the witness".[44] The format for the witness protection application that has to be filed before the CA is also appended in the WPS.[45]

Categorisation of Witnesses According to Threat Perception

The WPS divides witnesses into three categories as per the threat perception in decreasing order of severity. Category 'A' includes cases where "the threat extends to life of the witness or his family members".[46]Category 'B' includes cases "where the threat extends to the safety, reputation or property of the witness or his family members".[47]Category 'C' includes cases "where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property".[48]All three categories cover threats during investigation, trial or thereafter.

Processing of the Witness Protection Application

On receiving the application for witness protection, the Member Secretary of the CA should call for a "Threat Analysis Report from the Assistant Commissioner of Police(ACP) /Deputy Superintendent of Police(DSP)in charge of the concerned police sub-division".[49]A Threat Analysis Report (TAR) is a detailed report about the "seriousness and credibility of the threat perception to the witness or his family members".[50]The TAR should be expeditiously prepared by the concerned ACP/DSP and it should reach the CA within five working days of receipt of the order of the Member Secretary.[51]If there is any imminent threat, the CA can also pass interim protections orders during the pendency of the witness protection application.[52] Such a protection order may be for the witness and/or his family members. The TAR should contain "specific details about the nature of threats by the witness or his family to their life, reputation or property, apart from analysing the extent, the person or persons making the threat, have the intent, motive and resources to implement the threats".[53]The TAR should also categorise the threat perception and suggest adequate protection measures required

[44]*Id*., cl. 2 (*d*).
[45]*Id*., cl. 2(e).
[46]*Id*., cl. 3.
[47]*Ibid*.
[48]*Ibid*.
[49]*Id*., cl. 6(a).
[50]*Id*., cl. 2(j).
[51]*Id*., cl. 6(c).
[52]*Id*., cl. 6(b).
[53]*Id*., cl. 2(j).

for the witness or his family.[54]Full confidentiality has to be maintained during the preparation of the TAR.

In order to ascertain the witness' protection needs, the CAis required to interact with him and/or his family members/employers or any other suitable person, while processing the witness protection application.[55]Such interaction can be in person or through electronic means.[56] Witness protection applications have to be heard in-camera, that is, only those persons whose presence is essential for the decision on the witness protection application, should be allowed by the CA, and full confidentiality should be maintained.[57]The WPS provides for time bound disposal of witness protection applications. Such applications should be disposed within five working days of the receipt of the TAR from the police authorities.[58]

Implementation of Witness Protection Orders

Once the CA passes a witness protection order, it has to be implemented by the "Witness Protection Cellof the concerned State/UT or the trial Court, as the case may be". [59] A Witness Protection Cell (WPC) under the WPS means a "dedicated Cell of State/UT Police or Central Police Agencies assigned the duty to implement the witness protection order".[60]Overall responsibility of implementation of all witness protection orders, except orders for change of identity and/or relocation lies on the Head of the Police in the State/UT. Witness Protection Orders for change of identity and/or relocation have to be implemented by the Department of Home of the concerned State/UT.[61] The WPC is required to file monthly follow-up reports before the CA.[62]If the CA feels the need to revise the Witness Protection Order or a witness applies for it, and when the trial is completed, a fresh TAR has to be called.[63]

[54]*Id*., cl. 2(*j*), cl. 6(*d*).
[55]*Id*., cl. 6(*e*).
[56]*Ibid*.
[57]*Id*., cl. 6(f) read with cl. 2(f).
[58]*Id*., cl. 6(*g*).
[59]*Id*., cl. 6(h).
[60]*Id*., cl. 2(o).
[61]*Id*., cl. 6(h).
[62]*Id*., cl. 6(i).
[63]*Id*., cl. 6(*j*).

Protection Measures Under the WPS

The WPS providesfor a slew of measures for the physical as well as identity protection of a witness.[64]It provides that the witness protection measures should be "proportionate to the threat" and they are for a specific duration, not exceeding three months at a time.[65]The CrPC provides that all evidence in a criminal trial should be taken in the presence of the accused. [66] However, under the WPS, the protection measures that can be ordered by the CA include ensuring that the witness does not come face to face with the accused during investigation or trial.[67] This can be ensured with the help of one-way mirrors, screens and video conferencing. The witness may also be afforded protection by monitoring his mails and telephone calls[68] or by arranging with the telephone company to "change the witness's telephone number or assign him an unlisted telephone number".[69] Technology can be also used to protect the witness by providing for installation of security devices like "security doors, CCTVs, alarms, fencing etc." in the witness' home.[70] The witness' identity may be concealed by referring to him with a changed name or an alphabet.[71]The concealment of identity of witnesses includes "prohibition of direct or indirect disclosure of identity of the witness during investigation, trial and post-trial stage".[72]The witness should be provided details of emergency contact persons.[73]

Physical protection measures under the WPS include "close protection, regular patrolling around the witness's house",[74] "temporary change of residence to a relative's house or a nearby town",[75]escorting the witness to and from the court and providing a Government vehicle or a State funded conveyance for the date of hearing.[76] Protection measures like in-camera trials,[77] presence of support persons during recording of statement and deposition,[78]expeditious recording of the witness' testimony during trial on a day to day

[64]See *Id*., cl. 2(*h*), cl. 7 and Parts III, IV and V.
[65]*Id*., cl. 7.
[66]CrPC, s. 273.
[67]*Id*., cl. 7(*a*).
[68]*Id*., cl. 7(b).
[69]*Id*., cl. 7(*c*).
[70]*Id*., cl. 7(*d*).
[71]*Id*., cl. 7(*e*).
[72]*Id*., cl. 2(b).
[73]*Id*., cl. 7(*f*).
[74]*Id*., cl. 7(*g*).
[75]*Id*., cl. 7(*h*).
[76]*Id*., cl. 7(*i*).
[77]*Id*., cl. 7(*j*).
[78]*Id*., cl. 7(*k*).

basis, without unnecessary adjournments[79] can also be ordered. An important development in the area of witness protection has been the provision for specially designed vulnerable witness court rooms. Such court rooms have special arrangements like "live video links,[80]one-way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable".[81]

Apart from the specific measures mentioned above, the CA also has the power to order any other protection measures it considers necessary.[82]The CA also monitors the implementation of the protection order. The WPCs are required to submit monthly follow up reports to the CA, based on which the CA can review a protection order. The WPS provides for mandatory review by the CA on a quarterly basis, based on the monthly follow-up reports.[83]

Identity Protection Measures

The WPS also provides for the protection of the witness' identity.[84]An application for witness identity protection can also be filed before the CA through its Member Secretary. It can be done during the pendency of the investigation or trial of any offence covered under the WPS. The Member Secretary is then required to call for a TAR and the CA is required to examine the witness or his family members or any other suitable persons, in order to ascertain the need for an identity protection order. The identity of the witness has to be protected during the hearing of the application for witness identity protection. The CA is required to dispose of the application after considering the material on record. If the CA passes an order for protection of the identity of the witness, the onus lies on the WPC "to ensure that identity of such witness/his or her family members including name/parentage/occupation/address/digital footprints are fully protected".[85] The WPCis also required to provide details of emergency contact persons to the protected witness.[86]

[79]*Id.*, cl. 7(*m*).
[80]*Id.*, cl. 2(*g*).
[81]*Id.*, cl. 7(*l*).
[82] *Id.*, cl. 7(*o*).
[83] *Id.*, cl. 8.
[84]*Id.*, cl. 9.
[85]*Ibid.*
[86]*Ibid.*

Change of Identity

The CA can also make an order for conferring a new identity to the witnesson the basis of a request made by the witness and the TAR.[87] Conferment of new identities includes "new name/profession/parentage and providing supporting documents acceptable by the Government Agencies".[88] However, conferment of new identity does not deprive the witness of "existing educational/professional/property rights".[89]

Relocation of Witness

The CA can also order relocation of a witness in appropriate cases, on the basis of a request from the witness and the TAR. The witness may be relocated to a safer place within the State/UT or within the country, keeping in view the safety, welfare and well-being of the witness.[90] The expenses for relocation have to be borne from the Witness Protection Fund set up under the WPS.[91]

Other Key Features of the WPS

The WPS also provides for the establishment of a State Witness Protection Fund(WPF) for meeting "the expenses incurred during the implementation of a Witness Protection Order passed by the CA and other related expenditure".[92]The WPF has to be operated by the Department/Ministry of Home under the State/UT Government.[93] The WPF comprises of:

"(i) Budgetary allocation made in the Annual Budget by the State Government;

(ii) Receipt of amount of costs imposed/ordered to be deposited by the courts/tribunals in the WPF;

(iii) Donations/contributions from philanthropist/charitable institutions/organisations and individuals permitted by Central/State Governments.

(iv) Funds contributed under Corporate Social Responsibility."[94]

[87] *Id.*, cl. 10.
[88] *Ibid.*
[89] *Ibid.*
[90] *Id.*, cl. 11.
[91] *Id.*, cl. 4.
[92] *Ibid.*
[93] *Id.*, cl. 4 (c).
[94] *Id.*, cl. 4(b).

Financial aids/grants may be awarded to a witness from the WPF from time to time, if required for "re-location, sustenance or starting a new vocation/profession".[95]In case of false complaints by witnesses, expenses incurred from the WPF can be recovered and proceedings for the same can be initiated by the Home Department of the concerned Government.[96]

The onus to give wide publicity to the WPS, in order to generate awareness about it,is placed on the States.[97] The investigating officers and the courts are also duty bound to inform the witnesses about the WPS.[98]

Strict confidentiality has to be maintained with respect to the records, documents or information relating to the proceedings under the WPS and they can only be shared with the trial court/appellate court on a written order. All the records pertaining to proceedings under the WPS have to be preserved during the pendency of the trial or appeal in the case.[99] Hard copies of the records can be weeded out by the CA after one year of disposal of the last court proceedings, after preserving the scanned soft copies of the same.[100]

If the witness or the police authorities are aggrieved by a decision of the CA, they can file a review application within 15 days of passing of the impugned order by the CA.[101]

IV. VULNERABLE WITNESS DEPOSITION CENTRES

An important development in the area of witness protection in the last decade has been has been the provision for specially designed vulnerable witness court rooms or centres. The Delhi High Court took the lead in this matter by setting up the first such "vulnerable witness deposition court" in Delhi in 2012and by framing the "Guidelines for Recording Evidence of Vulnerable Witnesses in Criminal Matters" (hereinafter, Delhi High Court Guidelines). A Vulnerable Witness Deposition Complex/Centre(VWDC)provides facilities like:

> "separate witness room, separate accused room, play area for the child witnesses, pantry, separate toilet and an exclusive and comfortable waiting area

[95] *Id*., cl. 7(n).
[96] *Id*., cl. 14.
[97] *Id*., cl. 12.
[98] *Ibid*.
[99] *Id*., cl. 13.
[100] *Ibid*.

[101] *Id*., cl. 15.

> and is equipped with all facilities of audio-visual exchange for a free interface between the presiding Judge, the witness and the accused without witness facing the accused. The complex has a separate entry for vulnerable witnesses, so that they do not come in direct contact with accused at any point of time. There are provisions for support persons, pre-trial court visit and facilities for pick and drop of the witnesses from their residence."[102]

The Supreme Court in *State of Maharashtra* v. *Bandu*,[103]referred to the Delhi High Court Guidelines and the VWDCs in the National Capital Territory, and recognised the role of such complexes in creating a conducive environment for vulnerable victims to depose in courts.[104] The Court directed that all such High Courts adopt such guidelines, with suitable modifications, if required. Recognising the need for setting up of one VWDC in almost every district in the country in the long run, the Court directed that "at least two such centres in the jurisdiction of each High Court may be set up within three months" from the date of the judgment", that is, October 24, 2017.[105]

Referring to the above developments, in *Mahender Chawla* v. *Union of India*, the Supreme Court directed that VWDCs shall be set up in all the district courts in India, within a period of one year, that is, by the end of the year 2019.[106]The Central Government was also directed to render financial and other support to the States for this endeavour.[107]

On January 11, 2022, in *Smruti Tukaram Badade* v. *State of Maharashtra*,[108] a two-judge bench of the Supreme Court, speaking through D.Y. Chandrachud, J.,reiterated the need for creating a safe and barrier free environment for recording the evidence of vulnerable witnesses. Referring to the link between a fair trial and the pursuit of substantive justice to the manner of recording of statements of vulnerable witnesses, the learned Judge observed that the dignity of vulnerable witness "cannot be left to the vagaries of insensitive procedures and a hostile environment".[109] The Court emphasised the need to

[102]*Supra* note 22, at p. 638, para 32.
[103](2018) 11 SCC 163.
[104]*Id*., p. 165, para 10.
[105]*Id*., p. 166, para 12.
[106]*Supra* note 22, at p. 639, para 36.4.
[107]*Ibid*.
[108]2022 SCC OnLine SC 78.
[109]*Id*., para 3.

create a "barrier free environment where depositions can be recorded freely without constraining limitations, both physical and emotional".[110]

In this case, the Supreme Court had earlier sought details of the VWDCs in various High Courts as on 25 October, 2021. The record submitted by the *amicus curiae* revealed that at least one permanent VWDC had been established in 15 out of 25 High Courts. The maximum number of permanent VWDCs in District and Subordinate Courts were stated to be in Maharashtra. It was also submitted that at least one permanent VWDC had been established in all District Courts in Delhi and the Delhi High Court Guidelines had also been adopted by other High Courts.

In order to facilitate the implementation of the directions given in *Bandu's* case, the Supreme Court issued the following directions under Article 142 of the Constitution in *Smruti Tukaram Badade's* case:[111]

(i) In the Delhi High Court Guidelines, the definition of 'vulnerable witness' was limited to child witnesses under the age of 18 years.[112] In *Smruti Tukaram Badade's* case, the Supreme Court expanded this definition of vulnerable witness to mean "any witness deemed to be vulnerable by the concerned court", including age neutral victims of sexual assault; child victims of sexual assault, below 18 years of age, irrespective of their gender; age and gender neutral victims of unnatural offences under section 377 IPC; witnesses suffering from "mental illness"[113] or any speech or hearing impairment or any other disability, if the court finds them to be vulnerable; or any witness facing a threat perception under the WPS.[114]

(ii) All High Courts were directed to adopt and notify a VWDC Scheme within two months, with due regard to the Delhi High Court Scheme. The High Courts that had already adopted such Schemes, were directed to make suitable modifications, in conformity with the guidelines issued by the Supreme Court in the instant case.

(iii) All High Courts were directed to set up "an in-house permanent VWDC Committee for continuously supervising the implementation" of the Supreme Court's directions in

[110] *Ibid*.
[111] See *Id*., para 5.
[112] Delhi High Court Guidelines, cl. 3(a).
[113] See The Mental Healthcare Act 2017, s. 2(s).
[114] *Supra* note 108, para 5, pt. (i)(a)-(g).

the instantcase and for "making a periodic assessment of the number of VWDCs required in each district and to coordinate the conduct of periodic training programmes".[115]

(iv) All High Courts were also directed to make a cost estimation for setting up of at least one permanent VWDC in every District Court and the estimate for the number of VWDCs required in their State within three months.

(v) Recognising the need for periodic training programmes for sensitising all stake holders involved in managing the VWDCs, the Supreme Court also constituted a committee under the Chairpersonship of Hon'ble Justice Gita Mittal, former Chief Justice of the Jammu and Kashmir High Court, with an initial tenure of two years, to "devise and implement an All-India VWDC Programme, besides engaging with the High Courts on the creation of infrastructure for VWDCs".[116] All High Courts were directed to facilitate and co-operate in conducting training programmes, according to the training modules prepared by the Committee.

(vi) State Governments were also directed to expeditiously sanction and disburse the funds to the High Courts, as per the cost estimates prepared by the VWDC Committee of each High Court and appoint a nodal officer of the Finance Department to facilitate the implementation of the directions.

(vii) All High Courts were directed "to ensure that at least one permanent VWDC is set up in every District Court or additional Sessions Court establishments" within four months and the Registrars General of the High Courts were asked to file compliance reports before the Supreme Court for the same.[117]

(viii) In States where ADR Centres have been set up by the High Courts in close proximity to the court establishments in the districts, High Courts were given the "liberty to ensure that the VWDC is made available within the premises of the ADR Centre so as to secure a safe, conducive and barrier free environment for recording the depositions of vulnerable witnesses".[118]

(ix) The Chairperson of the Committee appointed by the Court was also requested to engage with the National Legal Services Authority (NALSA) and the State Legal Services Authorities (SLSAs) for effective implementation of the training schemes.

[115] *Id*., para 5, pt. (iii).
[116] *Id*., para 5, pt. (v).
[117] *Id*., para 5, pt. (vii).
[118] *Id*., para 5, pt. (viii).

(x) The Chief Justices of the High Courts were asked to take all appropriate steps to implement the directions and to periodically monitor their compliance.

(xi) The Chief Justice of the High Court of Delhi was requested to make the necessary office space and experienced staff available to the Court appointed Committee. The Ministry of Women and Child Development (MWCD) of the Union Government was directed to defray the remuneration for the staff and the honorarium payable to the Chairperson, to the Director of the Delhi Judicial Academy. The Chairperson was given the liberty to seek any further directions, if necessary, from the Supreme Court.

(xii) The MWCD was also directed to "designate a nodal officer for coordinating the implementation" of the directions and for "providing all logistical support" to the Court appointed Committee.[119] The MWCD and all Ministries of Women and Child Development in the States were also directed to coordinate with the Chairperson and extend logistical support to her. The High Courts were directed to "enlist experts in the field to facilitate proper training and development of all stake holders" in consultation with the Chairperson of the Committee.[120]

V. CONCLUSION

Although India does not have a specific law dealing with witness protection so far, the steps taken by the judiciary and the executive have led to significant progress in the field of witness protection in India,with the notification of the WPS. By supplementing it with an expansive definition of vulnerable witnesses and extensive directions for establishment of VWDCs in every district of India, the Supreme Court has taken a significant stepforward towards the implementation of the WPS. The need for training and sensitisation of all stakeholders and the staff of the VWDCs has also been recognised and the constitution of a specific committee for fulfilment of this task is also a commendable step. However, the journey of implementation of the WPS is a long and arduous one. This journey will be more fruitful if the Legislature steps in to pass a comprehensive, dedicated legislation for witness protection at the Central level. The States can make suitable state amendments to such a law, if and wherever required. This will ensure uniformity of the witness protection programmes and policies, and strengthen the mandate of the agencies like WPCs constituted under the WPS for witness protection.

[119] *Id*., para 5, pt. (xii).
[120] *Ibid*.

Such a legislation should also resolve issues in the WPS, like the conflict of interest inherent in the fact that the Head of the Police in the District is a member of the CA and the TAR is also to be prepared by the ACP /DSP in charge of the concerned police sub-division. It should also address the fact that the WPS does not specify any penal provisions or other consequences for non-observance of its provisions. Such a law should also enlist specific measures for protecting victims from not just physical, but even emotional and psychological pressures that witnesses often face, especially in cases where the offender is family member, or a relative, or a known person. Victims and other witnesses often face such pressures in sexual offences, as according to the official data, in almost 95 percent of the cases, the offender is a person known to the victim [121]The State owes it to the witnesses,including the victims, to empower and protect them,so that they can testify in courts freely, as partners in the cherished goal of justice.

[121] See National Crime Records Bureau, "Crime in India 2020"(Ministry of Home Affairs, Government of India) p. 217, Table 3A.4, *available at*: https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf (last visited on January 15, 2022).

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RIGHT TO FOOD IN INDIA

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ABSTRACT

The right to food, guarantees to people, the right to feed themselves with dignity. It forms part of the right to an adequate livelihood, which in turn, is a part of a person's broader human rights. The right to health is intertwined with the right to food since nutrition is an essential component of both these rights. When people are unable to feed themselves, they face the risk of death by starvation, malnutrition or resulting illnesses. The right to food includes all those elements which are required in order to lead an active and healthy life. Since the right to food is intrinsically linked with the right to life itself, no governmental practice or action should be allowed to deny this right to the people. Given its importance, this right has been recognized in a host of international instruments - most notably the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). The Millennium Development Goals (MDGs) of 2000 included as Goal 1, the eradication of extreme poverty and hunger by the year 2015. The present position is that despite food-aid and other measures taken to fight this scourge, MDG No. 1 is far from being realized at the global level, even though substantial progress has been achieved in several countries. In India, the passage of the National Food Security Act (NFSA) has redefined the existing governmental schemes operating in the area of food security, as legal entitlements, marking the beginning of a very important chapter in India's tryst with food security.

Keywords: Right to Food, Hunger, NFSA, Food Security, Malnutrition

I. INTRODUCTION

In order for a country to be able to ensure the right to food to all its citizens, three conditions need to be satisfied, namely, the country should have sufficient food available, people should have the means to access it, and the food so provided should be able to adequately meet the nutrition requirements of every individual. Thus, it can be said that the right to food protects the right of all human beings to be free from hunger, food insecurity and malnutrition.[1]

In the year 1941, the then President of the United States (US), Franklin D. Roosevelt[2] included 'The freedom from want' as one of the fundamental freedoms which ought to be

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[1] http://www.righttofood.org/work-of-jean-ziegler-at-the-un/what-is-the-right-to-food/ *Last visited* on December 10, 2021 at 1110 hours.

[2] 32nd President of the US, who was first elected to this office in 1932. He acted to restore public confidence in the wake of the Great Depression of the 1930s, and his ambitious 'New Deal' programmes and reforms redefined the role of the federal government in the lives of ordinary Americans. Re-elected by comfortable

enjoyed by people throughout the world during the course of his famous 'Four Freedoms' speech[3]. Later on, this freedom become a part of the United Nations (UN) Charter[4] in the year 1945. The UDHR recognised the right to food as part of the right to an adequate standard of living[5].

At the World Food Summit, 1996 [6], governments of the world reaffirmed the right to food, and committed themselves to halve the number of hungry and malnourished people throughout the world from 840 million to 420 million by 2015. However, except in the case of some Latin American countries like Argentina, Bolivia and Brazil, this goal has remained a mere chimera. Rather, what we have seen is that, instead of decreasing, the actual number of hungry people the world over, has actually increased over the past few years, and today, we have more than a billion undernourished and malnourished people in our midst[7]. Furthermore, the numbers who suffer from hidden hunger i.e., micronutrient deficiencies which may cause stunted bodily and intellectual growth in children, amounts to over two billion people worldwide[8].

The endeavours of the State are often hampered by practical difficulties, and the task remains a daunting proposition even to this day. Scholars and specialists working in this area claim that the achievement of this basic human right is, more often than not, missing from the agenda of policymakers, and that there is a palpable lack of political will because of the lesser visibility of work done in these areas when compared to work done in other sectors of the economy like infrastructure growth or increase in industrial production.

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margins in 1936, 1940 and 1944, FDR led the transition of the country from isolationism to victory over Nazi Germany and its allies in World War II. *Available at* https://www.history.com/topics/us-presidents/franklin-d-roosevelt Last visited on November 23, 2022 at 1745 hours.

[3] The 1941 State of the Union address delivered by the then President of the US on January 6, 1941, in which he proposed four fundamental freedoms that people 'everywhere in the world' ought to enjoy. Roosevelt delivered his speech 11 months before the US declared war on Japan on December 8, 1941. In this speech, the President made a break with the tradition of US' non-interventionism doctrine that had long been held in vogue and outlined the US role in helping allies that were already engaged in warfare. *Available at* https://fdrlibrary.org/four-freedoms *Last visited* on January 2, 2022 at 1800 hours.

[4] UN Charter, *See* art. 1 (3).

[5] UDHR, 1948, *See* art. 25 (1).

[6] Held at the headquarters of the Food and Agriculture Organisation of the UN (FAO) in Rome, Italy from November 13-17, 1996 in response to the concerns of widespread undernutrition across the world, and the capacity of agriculture to meet future food needs. The 'Rome Declaration on World Food Security' and the 'World Food Summit Plan of Action' were two outcomes of this summit. *Available at* http://www.fao.org/WFS/ Last visited on November 4, 2021 at 1600 hours.

[7] *Supra* Note 1.

[8] Pooja Ahluwalia, "The Implementation of the right to food at the National Level: A Critical Examination of the Indian Campaign on the right to food as an Effective Operationalization of Article 11 of ICESCR", *CHRGJ Working Paper No. 8* (New York, 2004).

Today, most parts of the world are largely self-sufficient when it comes to food grain production. Among the continents, those with the biggest food-related problems are Africa, Asia and Latin-America. Except in the case of the food-deficient countries (which number around 82, and are concentrated in parts of the Middle East and Africa[9]), for the large part, the issue of food insecurity is one that involves misdistribution and inadequate access to food.

II. FOOD AND NUTRITION IN INDIA

Historically, Indians have laid a great deal of importance on growing food in abundance. However, the distribution of food grains among the populace has always been the responsibility of either the King or the State. The occurrence of a series of famines in British India points to the fact that distribution of food grains did not take place in a proper manner during this period, and it is here that the imbalances began to creep into the system for the very first time. The rapid elimination of famines since independence is certainly an accomplishment when compared with the experience of many other developing countries. However, millions of Indians are still plagued by chronic hunger and malnutrition. India has a population of 1.4 billion people[10], which includes some of the poorest and most marginalised people in the world. In this backdrop, the challenge of ensuring food security for the masses, is indeed a formidable one, and is therefore, one of the foremost concerns of governmental policy.

In this day and age, "...to die of hunger is equivalent to being murdered"[11]. Chronic hunger and malnutrition have, therefore, begun to be seen as a gross violation of the fundamental right to life[12], which is guaranteed to each and every citizen of India. In recent years, the Indian economy has witnessed unprecedented rates of growth and is ranked amongst the fastest-growing economies of the world. Despite this welcome economic development, per-capita calorie intake has witnessed a decline. Similarly, the intake of many important nutrients has also fallen, and the problem of endemic hunger continues to remain alarmingly high[13].

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[9] Francis Ng and M. Ataman Aksoy, "Who Are the Net Food Importing Countries?", *Policy Research Working Paper No. 4457* (World Bank Development Research Group, Washington DC, January 2008).

[10] https://www.worldometers.info/world-population/india-population/ *Last visited* on March 5, 2022 at 1130 hours.

[11] Arnie H. Eide and Benedicte Ingstad (eds.), *Disability and Poverty: A Global Challenge*, p. 180 (The Policy Press, Bristol, 2011).

[12] Constitution of India, *See* Article 21.

[13] Angus Deaton and Jean Drèze, "Food and Nutrition in India: Facts and Interpretations", *Economic and Political Weekly*, Vol. XLIV, No. 7, February 14, 2009, pp 42-47.

One-fourth of the world's hungry live in India, and according to the Global Hunger Index (GHI)[14], we also have the dubious distinction of topping the list of hungry people in the world with a total of 194.6 million hungry and undernourished persons living in our midst[15]. When this huge figure is seen in perspective, we see that it is more than the combined populations of nations like Australia, Canada, France and the United Kingdom (UK). We are currently ranked 102nd out of 117 nations in the GHI, and 42% of the world's undernourished children live in India alone[16]. The ranking of the country is worse than that of its immediate neighbours like Sri Lanka, Nepal, Bangladesh and even Pakistan[17], and even today, the average Indian household still spends about 45% of its total expenditure on food[18]. In fact, estimates of malnutrition indicate that the situation in some parts of our country is even worse than that of Sub-Saharan Africa where intermittent famines occur even today[19]. Over half of the Indian children are malnourished, and about one-quarter so severely malnourished that they have shrunken brains and stunted bodies. Thus, an entire generation of millions of Indians is all set to grow into adulthood in a disabled condition. More than half of all women are anaemic with pregnant and lactating women often suffering from severe anaemia and malnutrition.[20]

An important facet of the problem of food insecurity in India is the fact that the *Dalit* (the Scheduled Castes) and *Adivasi* (the Scheduled Tribes) population of the country is hit the hardest by hunger and undernourishment[21]. At least three thousand starvation deaths are reported in India each year as per documentation by Non-Governmental Organisations (NGOs)[22]. Of these, the vast majority comprises of those belonging to these segments of the population.[23]

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[14] Multidimensional statistical tool used to describe the state of countries' hunger situation. It was adopted and further developed by the International Food Policy Research Institute (IFPRI), and was first published in 2006 with the German non-profit organisation *Welthungerhilfe*. *Available at* http://www.globalhungerindex.org/pdf/en/2017.pdf Last visited on August 31, 2021 at 1345 hours.

[15] IFPRI, *Global Hunger Index 2020* (Washington DC, 2020).

[16] *Id.*

[17] *Id.*

[18] National Sample Survey Office (NSSO), Government of India, *Household Consumer Expenditure Statistics*, p.16 (New Delhi, 2013).

[19] As per a 2010 estimate of the FAO, 925 million or 13.6% of the world's population is hungry and undernourished and nearly all of them live in developing countries. *Available at* http://www/fao.org/nens/story/en/item Last visited on September 23, 2021 at 1330 hours.

[20] Prakash V. Kotecha, "Nutritional Anemia in Young Children with Focus on Asia and India", *Indian J Community Med* 36 (1), p. 13.

[21] Utsa Patnaik, *The Republic of Hunger and Other Essays*, pp 97-98 *(*Merlin Press, London, 2007).

[22] Non-profit, citizen-based groups which function independently of Government agencies. Also called 'civil societies', these are organized on community, national and international levels to serve specific social or political purposes, and are cooperative, rather than commercial, in nature. *Available at*

III. PRESENT DAY SCENARIO

Regarding India, the UN Special Rapporteur on Right to Food[24] has commented as follows:

> India provides one of the best examples in the world in terms of the justiciability of the right to food. The Constitution of India prohibits discrimination and recognizes all human rights. The right to life is recognized as a directly justiciable fundamental right[25], while the right to food is defined as a Directive Principle of State Policy[2627]. As it has interpreted these provisions, the Supreme Court of India has found that the government has a constitutional obligation to take steps to fight hunger and extreme poverty and to ensure a life with dignity for all individuals.[28]

Today, India is largely self-sufficient when it comes to foodgrain production, and also possesses substantial food reserves; but widespread hunger, chronic malnutrition and starvation deaths continue unabated. It appears that governmental efforts relating to food security have, so far, concentrated only on enhancing agricultural production, and have largely ignored the question of food security at the household and individual levels. The decade of the 2000s witnessed growth in Gross Domestic Product (GDP)[29] at an average rate of around 7% on a year-on-year basis. Since the rate of growth of population was less than 1.5% per annum, the per capita income witnessed a rise of more than 5.5% per annum during this period. This exerted a tremendous amount of pressure on food demand, and this situation

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https://www.investopedia.com/ask/answers/13/what-is-non-government-organization.asp Last visited on November 13, 2021 at 1100 hours.

[23] http://www.hrln.org/hrln/right-to-food/reports/679-fact-finding-on-right-to-food-and-farmers-suicide-in-up.pdf Last visited on October 10, 2021 at 1130 hours.

[24] The UN Special Rapporteur on the Right to Food led a country mission to India from August 20, 2005 to September 2, 2005. *Available a*t http://www2.ohchr.org/english/issues/food/docs/A.HRC.9.23.pdf Last visited on October 15, 2021 at 1930 hours.

[25] *Supra* Note 12.

[26] Guidelines or principles given to the Central Government with a direction that these are to be kept in mind while framing laws and policies. These provisions which are contained in Part IV (Article 36-51) of the Constitution of India are not enforceable by any court, but are considered irrefutable in the governance of the country.
Virendra Singh, *Indian Polity with Indian Constitution and Parliamentary Affairs* p. 22 (1st Edn, Neelkanth Prakashan, New Delhi, 2016).

[27] Constitution of India, *See* Article 47.

[28] Jean Ziegler, UN Special Rapporteur on the Right to Food, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, (UN Human Rights Council, Geneva, January 2008). *Available at* http://www.webcitation.org/68CmO1PyB Last visited on September 19, 2021 at 1945 hours.

[29] Refers to the monetary value of all finished goods and services which are produced within a country's borders during a specific time period. It is commonly used as an indicator of the economic health of a country, as well as a gauge of a country's standard of living since the mode of measuring GDP is uniform across countries.*Available at* http://www.investopedia.com/terms/g/gdp.asp Last visited on August 11, 2021 at 11.30 hours.

is likely to exacerbate in the foreseeable future as income and prosperity levels rise even further.

Agricultural production in India has increased on a regular basis, but on the other hand, there has also been a steady increase in population. This increase in population has been even more in the case of urban areas, on account of migration of people from villages to towns in search of better employment opportunities. Unlike in the rural areas where it may be possible for people to grow their own food, self-sufficiency in food production in urban areas is not an option on account of limited land availability. Augmented foodgrain production has also come with the problem of inadequate storage facilities and improper infrastructure. This has led to wastage of foodgrains in our country almost on a year-on-year basis, especially during the monsoon season or whenever there are unseasonal rains. Our country is largely self-sufficient in foodgrain production today, which was not always the case. Despite this, there have been chronicled instances of deaths caused by endemic hunger and malnutrition. Food riots have taken place in different parts of our country from time to time. Both these unpleasant situations demonstrate that we have often had a situation of 'poverty amidst plenty' when it comes to foodgrains. Thus, the problem of food security in India is not one of food production alone, but also comprises of various other components, the most notable being the need for redistribution of food to those who cannot otherwise afford to buy it.

The problems in the food availability scenario of today are not rooted in frequently occurring natural calamities, which was the case earlier, but in deeply embedded economic patterns. Despite large sums of money being doled out for such programmes, the benefits often do not reach the ones who need them the most. This is because administrative processes in the form of welfare schemes, have conferred benefits upon individuals and groups on a selective basis. The severely impoverished persons who occupy the bottommost rungs of the social ladder, have not really benefitted as the development bureaucracy has allowed the benefits of the developmental process to be cornered by politically-dominant persons and groups[30].

Since India is today seen as a rising economic power, it is hoped that a trickle-down effect of the gains made in the economic sphere would benefit the poor and marginalized. In reality however, the gap between the rich and the poor has grown over the years, and there has also been an increase in the absolute number of hungry and malnourished persons, including the

[30] M.N. Srinivas, *Caste in Modern India: And Other Essays*, pp 21-25 (Media Promoters, Bombay, 1978).

number of children who are malnourished or stunted[31]. Prof. Utsa Patnaik[32] in her famous work *The Republic of Hunger and Other Essays*[33]has concluded that on an average, a family of 5 in India, consumes around 100 kg of grain less per year, as compared to the consumption of such a family during the Second World War[34].

This situation becomes even more intolerable given the fact that our country, thanks to the gains of the Green Revolution[35], is today, a surplus producer of foodgrains. This grain however, is either exported to other countries, or sold in the open market. The poor and those living on the margins of society, cannot afford to buy grains at market rates, and it is therefore imperative that welfare measures like the Public Distribution System (PDS)[36], which provides cheap grains to such persons, are greatly strengthened and implemented in a more targeted manner.

IV. ROLE OF JUDICIARY IN ENSURING RIGHT TO FOOD

The journey towards a justiciable right to food is not a new one, although this issue has been a rather contentious one during the course of the last few decades or so. The Indian judiciary has also been grappling with this issue for several years now, and has, from time to time, recognised this right.There have been several judicial interventions in this regard - most notably, those in the case of *People's Union for Civil Liberties (PUCL) v. Union of India & Ors*[37] wherein the Hon'ble Supreme Court of India, in its order issued after the very first date

[31]*Supra* Note 15.
[32] Celebrated Indian Marxist economist who obtained her doctorate in economics from the University of Oxford, and taught at the Centre for Economic Studies and Planning in the School of Social Sciences at Jawaharlal Nehru University (JNU) from 1973 to 2010. She has authored several books, including *Peasant Class Differentiation - A Study in Method* (1987), *The Long Transition* (1999) and *The Republic of Hunger and Other Essays* (2007). *Available at* https://www.jnu.ac.in/FacultyStaff/ShowProfile.asp?SendUserName=utsa Last visited on September 3, 2021 at 1440 hours.
[33] Merlin Press, London, 2007, ISBN: 9788188789337.
[34]*Supra* Note 21 at 116-121.
[35] Period when agriculture in India, especially in the north-western parts of the country, increased its yields due to improved agronomic technology. The credit for the development of High Yielding Variety (HYV) seeds which was one of the high points of this programme, goes to scientists like Prof. M. S. Swaminathan, the noted American agronomist Dr. Norman E. Borlaug and others. Available at http://www.indiaonestop.com/Greenrevolution.htm Last visited on September 7, 2021 at 1130 hours.
[36] Administered by the Department of Food and Public Distribution, Ministry of Consumer Affairs, Food & Public Distribution, this scheme is one of the oldest welfare measures in India. It was launched by the Central Government in June 1947, and is jointly managed by the Central and State Governments. Subsidized food and non-food items like wheat, rice, sugar and kerosene are distributed to India's poor through a network of half-a-million 'fair price shops', also known as 'ration shops'. *Available at* http://dfpd.nic.in/public-distribution.htm Last visited on August 23, 2021 at 0855 hours.
[37]Writ Petition (Civil) No. 196 of 2001 filed before the Hon'ble Supreme Court in April 2001 in the wake of a large number of starvation deaths in the state of Rajasthan. This case was filed at a time when the country's foodgrain stocks were at unprecedented high levels and even then, people in large parts of the country continued

of hearing i.e. September 17, 2001, was pleased to affirm as under, "...We direct all the State Governments to forthwith lift the entire allotment of foodgrains from the Central Government under the various schemes and disburse the same in accordance with the schemes"[38]. The Hon'ble Court went on to unambiguously direct the Central Government to immediately release 5 Million Tonnes (MT) of foodgrains for distribution amongst the poorest sections of society in 150 poverty-stricken districts across the country. In the words of the Hon'ble Apex Court, "...the Union of India had the responsibility to ensure food security of the country"[39].

In 2001, a highly unfortunate incident was reported from south-eastern Rajasthan wherein 47 tribals and *Dalits* had reportedly starved to death. The tragedy occurred at a time when governmental warehouses were brimming with an excess of around 40 MT of foodgrains. Weeks later, the Right to Food Campaign[40], which was a civil society network of activists and organizations, moved the Apex Court to secure food security for all citizens of the country. The orders in the PUCL[41] case had a major role to play in the enactment of the NFSA, 2013. In response to this writ petition, several interim orders were passed in order to detail India's constitutional right to food. In the defining order of November 28, 2001, the court essentially redefined the existing governmental schemes as constitutionally protected legal entitlements, marking the beginning of a very significant milestone in our country's tryst with food security. The Apex Court identified the already existing food schemes which would constitute legal entitlements under the constitutional right to food, and also outlined as

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to face hunger and malnutrition. . *Available at* http://www.pucl.org/reports/Rajasthan/2001/starvation-writ.htm Last visited on October 17, 2021 at 1540 hours.

[38] Order dated September 17, 2001 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCL v. Union of India & Ors*. *Available at* http://supremecourtofindia.nic.in/jonew/bosir/orderpdfold/18655.pdf Last visited on November 19, 2021 at 2300 hours.

[39] Order dated August 12, 2010 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCL* v. *Union of India & Ors*. *Available at* http://supremecourtofindia.nic.in/jonew/bosir/orderpdfold/1139485.pdf Last visited on November 1, 2021 at 2300 hours.

[40]Began with the filing of a Writ Petition before the Supreme Court in April 2001 by PUCL, Rajasthan. The petition demanded that the country's gigantic food stocks should be used to protect people from hunger and starvation. Despite significant interim orders being issued in this case, it soon became clear to Right to Food advocates that the legal process would, by itself, not go very far. This motivated the effort to build a larger public campaign for the Right to Food.Bruno Jobert and Beate Kohler-Kech (eds.), *Changing Images of Civil Society: from protest to governance*, pp 80-82 (Routledge Studies in Governance and Public Policy, London, 2008).

[41]Veteran leader Jaya Prakash Narayan founded the People's Union for Civil Liberties and Democratic Rights (PUCLDR), in 1976. Today, the organisation supports grassroots movements which focus on organizing and empowering the poor rather than using state initiatives for change. *Available at* http://www.pucl.org/history.htm Last visited on November 29, 2021 at 1355 hours.

to how these schemes were to be implemented in the future[42]. The order laid down certain policy guidelines which the Central and State Governments were bound to implement in order to provide food security to the entire populace. The court also identified persons within the government bureaucracy who would be held accountable in the event of non-compliance.

The Apex Court, through a series of directions and interim orders, stepped in to stem the rot and corruption prevailing within the PDS, and issued several orders strengthening various social security schemes[43]. Over 160 interim orders were passed by the Apex Court in this case, spread over a period of over one-and-a-half decades. Top-level functionaries of the Central and State Governments / Union Territories (UTs) were either asked to enter personal appearance before the court in this matter, or were asked to swear affidavits before the court from time to time. In addition, the Ld. Attorney General, Ld. Solicitor General, Ld. Additional Solicitors General, Ld. Advocates General of States, Ld. Additional Advocates General and Ld. Standing Counsels for various States / UTs entered appearance in this extremely significant matter, and assisted the court. The court also obtained, from time to time, assistance from highly acclaimed professionals like Justice D.P. Wadhwa,[44]Nandan Nilekani[45] and the Right to Food Commissioners, each of whom are stalwarts in their own right. Finally, on February 10, 2017, i.e., nearly 17 years after the first judicial intervention in this matter, a Divisional Bench of the Apex Court headed by Madan B. Lokur, J. decided to end the case, and held that, "... in view of the passage of the NFSA, nothing further

[42] Order dated November 28, 2001 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCL* v. *Union of India & Ors*. *Available at* http://supremecourtofindia.nic.in/jonew/bosir/orderpdfold/33378.pdf *Last visited* on December 21, 2021 at 2100 hours.

[43] http://www.hrln.org/hrln/right-to-food/pils-a-cases/255-pucl-vs-union-of-india-a-others-.html Last visited on November 2, 2021 at 1400 hours.

[44] Former Judge of the Supreme Court of India who served as the Chairman of the Central Vigilance Committee constituted by the Ministry of Consumer Affairs, Food & Public Distribution, Government of India, under the orders of the Supreme Court in Writ Petition (Civil) No. 196 of 2011 titled *PUCL* v. *Union of India and Ors*. This Committee was constituted to examine various aspects of public distribution including prevalent corruption in the PDS system, and suggest modalities for efficient use of the PDS. Available at http://pdscvc.nic.in/biodata%20of%20justice%20wadhwa.htm Last visited on December 19, 2021 at 1930 hours.

[45] Indian entrepreneur, bureaucrat and politician who co-founded the software company Infosys, and has served as the Chairman of UIDAI. He has been ranked at number 12 in 'India's 50 Most powerful people of 2017' list, and is the author of two books - *Imagining India: The Idea of a Renewed Nation* (Penguin Press, 2009)and *Rebooting India: Realizing a Billion Aspirations* (Penguin Books Limited, 2015). *Available at* http://www.bloomberg.com/research/stocks/people/person.asp?personId=398010&privcapId=398006 Last visited on October 13, 2021 at 1700 hours.

survives in this petition. In case the petitioner has any grievance with regard to the implementation or otherwise of the NFSA, 2013, he may file a fresh petition"[46].

Judicial interventions in the area of right to food in India are, however, not a recent phenomenon, and began with the celebrated case of *Sunil Batra* v. *Delhi Administration*[47], wherein the Apex Court famously laid down that even prisoners enjoyed a right to adequate and nutritious food. Borrowing from Justice Corwin's remarks on American constitutional law, V.R. Krishna Iyer, J., in his judgment opined that a person would not lose his basic right to proper, wholesome and nutritious food just because (s)he happened to be incarcerated. The court laid down that this visitorial power of the Board of Visitors[48] was to be given wide interpretation, and made it mandatory for the members of the Board of Visitors, to inspect the barracks, cells, wards, and other buildings of the jail, and in particular, the food that was served to the prisoners.

While deciding the case of *People's Union for Democratic Rights* v. *Union of India*[49], P.N. Bhagwati, J. quoted from Sir W. Paul Gormley's address at the silver jubilee celebrations of the UDHR at Banaras Hindu University (BHU)[50], and opined that: ".... the question may be raised as to whether or not the Fundamental Rights enshrined in our Constitution have any meaning to the millions of our people to whom food, drinking water, timely medical facilities and relief from disease and disaster, education and job opportunities still remain unavailable."

In 1987, a Bench of the Apex Court headed by O. Chinnappa Reddy, J. during the adjudication of *Union of India v. Cynamide India Ltd*[51], laid down that profiteering, by itself, was an evil prevalent in our society. When this act of profiteering happened to take place with respect to the scarce resources of the community like foodstuffs and life-saving drugs, the situation became diabolical and absolutely untenable. This was a menace which has to be

[46] Order dated February 10, 2017 of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 196 of 2001 titled *PUCL v. Union of India & Ors*. *Available a*t https://www.sci.gov.in/jonew/bosir/orderpdf/2873174.pdf Last visited on March 5, 2022 at 1535 hours.
[47] AIR 1980 SC 1579.
[48] In every prison, there is the institution of the Board of Visitors which includes judicial and administrative officers and also members of the public. Such members include District & Sessions Judges, District Magistrates and Sub-Divisional Magistrates among the members.
Bureau of Police Research and Development, *Model Prison Manual for the Superintendence and Management of Prisons in India*, p. 287 (New Delhi, 2003).
[49] (1982) 2 SCC 494.
[50] Formerly known as Central Hindu College, it is one of the oldest higher education institutions in India, and serves as a public central university located in Varanasi, UP. Established in 1916 by Pt. Madan Mohan Malaviya, with over 12,000 resident students, it claims the title of the largest residential university in the whole of Asia. *Available at* http://www.bhu.ac.in/ Last visitedon December 12, 2021 at 1900 hours.
[51] AIR 1987 SC 1802.

lettered and curbed. According to the court, the Essential Commodities Act[52] was a legislation towards that end, in keeping with the duty of the State[53] towards securing the ownership and control of the material resources of the community in order to best subserve the common good.

When the case of *Kishen Pattnayak* v. *State of Orissa*[54]came up for adjudication, certain districts in Orissa had witnessed a continuing phenomena of drought, starvation deaths and famine. While laying down guidelines for the district administration to provide food to the affected population on a priority basis in the event of a natural calamity, the Bench headed by M.M. Dutt, J. opined that it would be the personal responsibility of the District Collector to review the relief measures undertaken in the area. The court directed that the entire procurement of paddy should be immediately entrusted to the Food Corporation of India (FCI)[55] and the State Cooperative Marketing Federation, which were specialised agencies when it came to making such purchases and possessed adequate number of godowns to store the grains so procured. These agencies were mandated to open procurement centres throughout the State, and the court directed that no produce from the drought affected area should ordinarily be refused by the procuring agencies.

In *Shantistar Builders* v. *Narayan Khimalal Toame*[56], Ranganath Misra, J. laid down that the right to life is guaranteed in any civilized society, and the same is also the position in our Constitution[57]. Further, the right to life is not merely the physical act of breathing and the basic needs of man have traditionally been accepted to be three - food, clothing and shelter. Thus, the right to life would take within its ambit, the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. This decision has, since, been quoted with approval in several cases, most notably in *Chameli Singh v. State of Uttar Pradesh*[58].

[52] Act No. 10 of 1955.
[53] Constitution of India, *See* Article 39 (b).
[54] AIR 1989 SC 677.

[55] Indian Government owned corporation which was established as a statutory body on January 14, 1965 to implement the objectives of the National Food Policy, 1964. It is one of the largest corporations in the country, and probably the largest supply chain management in Asia. *Available a*t http://fci.gov.in/ Last visited on October 28, 2021 at 1535 hours.

[56] AIR 1990 SC 630.
[57] *Supra* Note 12.
[58] AIR 1996 SC 1051.

In its judgment delivered in the case of *Jilubhai Nanbhai Khachar* v. *State of Gujarat*[59], the Apex Court made it clear that the Founding Fathers of our Constitution believed in the concept of a welfare State as envisioned under the Directive Principles of State Policy. The basic prerequisites for ensuring this kind of a State are that everyone should be entitled to a minimum amount of material well-being, such as food, clothing and decent housing. Expansion of living standards should certainly be the mandate of the State and it should take every step possible to further this end, by either using the existing physical resources and scientific knowledge or by expanding them. Further, the Bench comprising K. Ramaswamy and N. Venkatachala, JJ. opined that the State has a right and duty to act in this regard whenever private initiative failed.

In the case of *Harit Recyclers Association* v. *Union of India*[60], the petitioner prayed for the issue of a writ of *mandamus*[61] commanding the Central and State Governments to investigate into a health hazard that was suffered by the students of a Government school in Trilokpuri, East Delhi. The petitioner alleged that these children had been forced to eat contaminated food which was served to them under the Mid Day Meal[62] programme administered by the Delhi Government. The Delhi High Court while agreeing with the petitioner, once again laid down that the right to food was a basic human right and the need for food was a basic human need. Dipak Misra, C.J. picturesquely opined that, "…A civilized society does not countenance starvation…All across the globe, nutrition, health and education have been recognized as the basic needs of a member of the society as man cannot be allowed to have animal existence."

While evaluating the functioning of a Government scheme for lactating mothers and pregnant women, in the course of its hearing in the case of *Laxmi Mandal* v. *Deen Dayal Harinagar Hospital*[63], the Delhi High Court postulated that the right to health, as defined in Article 12.1

[59] AIR 1995 SC 142.
[60] (2010) 170 DLT 476 (DB).
[61] It is one of the five types of writs which can be issued by courts in India, and means 'we command' in the Latin language. It is issued by a superior court to compel a lower court or a government officer to perform his / her mandatory or purely ministerial duties correctly. *Available at* http://www.legalservicesindia.com/article/592/Analysis-Of-Writ-Of-Mandamus.html Last visited on November 4, 2021 at 1145 hours.
[62] Nationwide school meal programme designed to improve the nutritional status of school-going children. It supplies free lunches to primary and upper-primary school children in government, government-aided and local-body run schools. It currently serves over 120 million children in over 1.2 million schools and Education Guarantee Scheme centres, and is the largest such programme in the world. *Available at* http://mdm.nic.in/ Last visited on August 17, 2021 at 1430 hours.
[63] (2010) 172 DLT 9.

of the UDHR was an inclusive right which extended not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and an adequate supply of safe food, nutrition and housing. Writing for the Bench, S. Muralidhar, J. went on to opine that, "...A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels".

In *Emergent Genetics India (Pvt.) Ltd.* v. *Shailendra Shivan*[64], the plaintiff was a private limited company engaged in research, development, processing and sale of agricultural seeds in India. The suit alleged that the defendants had violated the plaintiffs' copyright in the sequences of their hybrid seeds. A Bench of the Delhi High Court headed by S. Ravindra Bhat, J. opined that "...food security lies at the heart of agriculture, and food sovereignty. It is an undoubted material resource, as are agricultural practices such as seed breeding." The court went on to extol the virtues of copyright law and discussed one basic tenet of intellectual property law according to which, the needs of the inventor / creator to earn royalty as a result of his invention should always be attempted to be balanced with the needs of the society to have access to better products. However, in cases where there is a conflict between the two, and this conflict cannot be harmonised, the rights of the society must necessarily prevail over the rights of the individual. In view of the above, copyright in the sequence of these seeds as claimed by the plaintiff, could not be allowed to prevail over the right of the society to have access to adequate food to meet its requirements.

During the adjudication of *PUCL (PDS Matters)* v. *Union of India*[65], the Justice D.P. Wadhwa Committee[66] submitted its various reports before the Supreme Court. *Inter alia*, these reports contained detailed guidelines for revamp of PDS / Targeted Public Distribution System (TPDS)[67], and included various short-term and long-term measures for improvement of the scheme, including complete computerisation of records, augmentation of storage

[64] (2011) 125 DRJ 173.
[65] (2013) 2 SCC 688.
[66] Also known as the 'Central Vigilance Committee on Public Distribution System', this committee was created by the Supreme Court of India, while hearing Writ Petition (Civil) No. 196 of 2001 titled *PUCL* v. *Union of India*. It was headed by Justice D. P. Wadhwa, Former Judge, Supreme Court of India, and was asked to look into the maladies affecting the proper functioning of the PDS and to suggest remedial measures. *Available at* http://www.prsindia.org/uploads/media/Food%20Security/Justice%20Wadhwa%20Committee%20Report%20on%20PDS.pdf Last visited on December 9, 2021 at 1900 hours.
[67] Launched in 1997 in order to benefit the poor, and to keep budgetary food subsidies under control, following the failure of the existing PDS system. Conceptually, the transition from a universal PDS to the TPDS was a move in the right direction, as it was designed to include within its ambit, only the poor households. *Available at* http://planningcommission.nic.in/reports/peoreport/peo/peo_tpds.pdf Last visited on September 16, 2021 at 1430 hours.

capacity, better transportation for procured foodgrains, tracking of vehicles and Fair Price Shops (FPSs)[68] through use of Global Positioning System (GPS)[69], better accountability and monitoring, electronic weighment, etc. The court incorporated all these suggestions in its final order while disposing of the matter.

In *Swaraj Abhiyan* v. *Union of India & Ors*[70], certain important aspects of the NFSA including the setting up of grievance redressal machinery and a Food Commission in every State, as mandated by the Act, came up for adjudication before the Apex Court. Despite the fact that the National Food Security Bill was passed by both Houses of Parliament and received Presidential assent on September 10, 2013, almost four years had elapsed and the authorities and bodies mandated to be set up under the Act had not been set up till as late as July 2017. The Act *inter alia* mandated that every State Government was required to put in place an internal grievance redressal mechanism[71], and that for each district, there should be a Grievance Redressal Officer[72]. Similarly, the Act also mandated the setting up of a State Food Commission in every state[73]. Each of these provisions of the NFSA were mandatory and yet even after four years, they had not been fully implemented by some State Governments. The Apex Court directed the Union Food Secretary to immediately write to the State / UT Governments to immediately notify appropriate rules for a Grievance Redressal Mechanism under the provisions of the Act, while also designating appropriate and independent officials as District Grievance Redressal Officers. State / UT Governments were directed to constitute, establish and make fully functional, their respective State Food Commissions by the end of the year, i.e., by end 2017.

V. RIGHT TO FOOD AS A LEGALLY ENFORCEABLE RIGHT

The right to food, like any other social or economic right, has been recognised the world over, only in recent times and its specific nature - whether moral or legal, absolute or

[68] NFSA (Act No. 20 of 2013), *See* s. 2 (4).

[69] Space-based radio-navigation system which is owned by the US Government and operated by the US Air Force. The US Government created the system, maintains it, and makes it freely accessible to anyone who has a GPS receiver. *Available at* http://www8.garmin.com/aboutGPS/ Last visited on September 10, 2021 at 1900 hours.

[70] Writ Petition (Civil) No. 857 of 2015.
[71] NFSA (Act No. 20 of 2013), *See* s. 14.
[72] NFSA (Act No. 20 of 2013), *See* s. 15.
[73] NFSA (Act No. 20 of 2013), *See* s. 16.

conditional, individual or collective, was under discussion till just a few years ago[74]. Our Constituent Assembly while emphasising the need to provide a constitutional basis for a welfare State, enacted the Directive Principles of State Policy and placed the right to food in this category[75]. Although it did not enact a specific fundamental right to food in the Constitution, there are several provisions which guarantee such a right by implication. Thus, it can be said that the Constitutional provisions pertaining to the right to food in India are meant to impose obligations upon the State to ensure food security to the entire population but they do not explicitly guarantee to individuals, the right to food. The right to life is recognized as a directly justiciable fundamental right under Article 21 of the Constitution, and the right to food finds mention in the form of Directive Principles of State Policy under Article 47 of the Constitution. Further, there is a constitutional mandate cast upon the State to ensure early childhood care and education to all children below the age of six years[76].

In the period after independence, various states of the country like Maharashtra[77], have recognised the right to food in the form of Employment Guarantee Schemes (EGS)[78] and Food for Work[79] programmes in their respective jurisdictions. Others like Chhattisgarh[80], Odisha[81] and Tamil Nadu[82] have achieved a considerable degree of success in the supply of foodgrains at subsidised prices to the poor through the mechanism of the PDS. At the national level, the NFSA, which is popularly referred to as the 'Right to Food Act', was

[74] Dr. K.R. Aithal, "Towards Justiciable Right to Food" *in* Prof. (Dr.) Bimal N. Patel and Dr. Ranita Nagar (eds.), *Food Security Law: Interdisciplinary Perspectives* , pp 1-30 at 10-11 (1st Edn., Eastern Book Company, Lucknow, 2014).
[75] *Supra* Note 27.
[76] Constitution of India, *See* Article 45.
[77] As a part of the '15 Point Programme' formulated by the Government of Maharashtra for the development of the state's economy, an EGS was sanctioned for the very first time on March 28, 1972. Later on, the scheme acquired statutory recognition in the form of the Maharashtra Employment Guarantee Act, 1977, and served as a role-model for future legislations like the MGNREGA, 2005. *Available at* http://nagarzp.gov.in/html_docs/mregs.htm Last visited on October 29, 2021 at 1020 hours.
[78] The main objective of these schemes is to provide guaranteed wage employment to all adult persons who volunteer to do unskilled manual work in rural areas, which would, in turn, help create durable assets for the benefit of the community and the economy. Examples of such works include construction of rural roads and small check dams, water conservation, village tanks, digging of drinking water wells, afforestation, etc.
Jean Drèze, "Employment as a social responsibility", *The Hindu*, New Delhi, November 22, 2014.
[79] Incorporated as the National Employment Guarantee Programme during the Sixth Plan, the programme entailed construction of developmental projects like building of roads and canals in exchange for foodgrains. It was modified from time to time, and in February 2006, it was subsumed within the MGNREGA scheme. *Available at* https://tnrd.gov.in/schemes/nrega.html Last visited on October 27, 2021 at 1900 hours.
[80] Jean Drèze and Reetika Khera, "Chhattisgarh shows the way", *The Hindu*, New Delhi, November 13, 2010.
[81] "Jean Drèze explains how Odisha managed to make public distribution system work", *Catchnews.com*, February 14, 2017. *Available at* http://www.catchnews.com/india-news/jean-dreze-explains-how-odisha-managed-to-make-public-distribution-system-work-1453720234.html Last visited on October 15, 2021 at 2225 hours.
[82] S. Vydhianathan and R.K. Radhakrishnan, "Behind the success story of universal PDS in Tamil Nadu", *The Hindu*, Chennai, August 10, 2010.

enacted in the year 2013, and ably demonstrates our national priorities. The passage of this Act proves that we as a country, are determined to rid ourselves of the scourge of hunger and malnutrition which has plagued us for considerable periods of time in our history.

The NFSA was signed into law by the President of India on September 12, 2013 with retrospective effect from July 5, 2013 [83], and defines 'food security' as "...the availability of sufficient foodgrains to meet the domestic demand as well as access, at the individual level, to adequate quantities of food at affordable prices[84]". This date of July 5, 2013 was chosen as the date when the provisions of the Act would come into effect because the Central Government had earlier promulgated the law in the form of the National Food Security Ordinance on July 5, 2013.[85]

Prof. K.V. Thomas[86], who was the Union Minister of State (Independent Charge) in the Ministry of Consumer Affairs, Food and Public Distribution, at the time when the National Food Security Bill was introduced in Parliament, stated while addressing the press corps on April 3, 2013 that

> This is no mean task; a task being accomplished in the second most populated country in the world. …The responsibility is not just of the central government but equally of the states / [UTs]. I am sure (that) together we can fulfil this dream. The day is not far off, when India will be known the world over for this important step towards eradication of hunger, malnutrition and resultant poverty...By providing food security to 75% of the rural and 50% of the urban population with focus on nutritional needs of children, pregnant and lactating women, the National Food Security Bill will revolutionize (the) food distribution system.[87]

[83] The National Food Security Bill, 2013 received the assent of the President of India, and was published in the Gazette of India as Act No. 20 of 2013.
Government of India, *Gazette of India, Extraordinary, Part-II, Section-1* (New Delhi, September 10, 2013).
[84] Parliamentary Standing Committee on Food, Consumer Affairs and Public Distribution, *The National Food Security Bill 2011: Twenty Seventh Report*, p. 17 (Parliament of India, New Delhi, 2011).
[85] http://www.prsindia.org/uploads/media/Ordinances/Food%20Security%20Ordinance%202013.pdf Last visited on August 26, 2021 at 1900 hours.
[86] Indian politician who represented the Ernakulam constituency in the *Lok Sabha* from 2009 to 2019,and served as the Union Minister of State (Independent Charge) in the Ministry of Consumer Affairs, Food and Public Distribution, when the NFSA was enacted. As a Minister in the Kerala Government, he has handled the portfolios of Excise, Tourism and Fisheries. *Available at* https://www.india.gov.in/my-government/indian-parliament/kuruppassery-varkey-thomas Last visited on August 9, 2021 at 1440 hours.
[87] Ministry of Information & Broadcasting (Government of India), *Salient Features of the National Food Security Bill, 2013: Food Security Bill will Eradicate Hunger, Malnutrition - Prof. Thomas* (New Delhi, April 3, 2013). *Available at* http://inbministry.blogspot.in/2013/04/salient-features-of-national-food.html Last visited on September 4, 2021 at 1500 hours.

Former National Advisory Council (NAC)[88] member and noted development economist Prof. Jean Drèze who was one of the foremost architects of the National Food Security Bill 2011, has written that, "...the Bill is a form of investment in human capital... It will bring some security in people's lives and make it easier for them to meet their basic needs, protect their health, educate their children, and take risks[89]." While dismissing opposition from business interests, he maintains that "...Corporate hostility does not tell us anything except that the Food Bill does not serve corporate interests. Nobody is claiming that it does, nor is that the purpose of the Bill[90]."

This legislation has subsumed three existing food security programmes which were hitherto being implemented by the Central Government *viz.* the Mid Day Meal scheme, the Integrated Child Development Services (ICDS)[91] scheme and the TPDS. Further, the NFSA has also recognised maternity entitlements[92]. According to the scheme of the Act, the Mid Day Meal and the ICDS would be universal in nature, while the TPDS, which was the country's principal domestic food-aid programme, would reach out to approximately two-thirds of the population, i.e., 75% of the population in rural areas and 50% in urban areas[93]. Persons who were covered under the TPDS system under the NFSA would be entitled to 5 kg of foodgrains per person per month at the following prices:

- Rice at ☐3 per kg ;
- Wheat at ☐2 per kg ; and

[88]Advisory body which was established on June 4, 2004 to advise the Prime Minister of India, it was instrumental in drafting several important legislations like the MGNREGA, the NFSA, the RTI Act and the RTE Act. Sonia Gandhi served as its Chairperson for much of the tenure of the UPA and it comprised of ex-bureaucrats, members of civil society, academicians and lawyers. *Available* at http://www.allgov.com/india/departments/ministry-of-youth-affairs-and-sports/national-advisory-council-nac?agencyid=7592 Last visited on September 11, 2021 at 1430 hours.

[89] Revati Laul, "The Food Security Bill can help to protect the people from poverty and insecurity", *Tehelka.com*, July 9, 2013. *Available at* http://www.tehelka.com/2013/08/the-food-security-bill-can-help-to-protect-the-people-from-poverty-and-insecurity/ Last visited on October 10, 2021 at 1615 hours.

[90]*Id*.

[91] Programme which provides food, pre-school education and primary healthcare to children under the age of six years, as well as their mothers. The widespread network of ICDS has played an important role in combating malnutrition especially for children belonging to weaker sections of society. *Available at* http://icds-wcd.nic.in/icds/icds.aspx Last visited on August 13, 2021 at 1440 hours.

[92] http://dfpd.nic.in/Salient-features-National-Food-Security-Act.htm Last visited on September 29, 2021 at 1300 hours.

[93] NFSA (Act No. 20 of 2013), *See* s. 3 (2).

- Coarse grains (millet) at ☐1 per kg.[94]

Thus, up to 75% of the population in rural areas and upto 50% of the urban population was proposed be covered under TPDS, with a uniform entitlement of 5 kg per person per month[95]. However, households covered under the *Antyodaya Anna Yojana* (AAY)[96] which constituted the 'poorest of the poor', were entitled to 35 kg of foodgrains per household per month prior to the enactment of the NFSA. Therefore, their entitlement of 35 kg per household per month is protected under the Act[97]. Corresponding to the all-India coverage of 75% in rural areas and 50% in urban areas[98], state-wise coverage under the NFSA was to be determined by the Planning Commission of India, which did so by using the NSS Household Consumption Survey[99] data for the year 2011-12. The work of identification of eligible households who were to be covered under the TPDS within the purview of the NFSA, was to be done by the respective State / UT Governments[100], who were also given the responsibility to place the list of the identified eligible households in the public domain, where it was to be displayed in a prominent manner[101]. Foodgrains distributed under the TPDS were to be made available at subsidised prices of ☐ 3 / 2 / 1 per kg respectively in the case of rice, wheat and coarse grains for a period of three years from the date of commencement of the Act. Thereafter, prices were proposed to be linked to the Minimum Support Prices (MSPs)[102] of the respective

[94] NFSA (Act No. 20 of 2013), *See* Schedule I: Subsidised Prices Under Targeted Public Distribution System.
[95] *Supra* Note 93.
[96] Centrally-sponsored scheme launched on December 25, 2000 to provide highly subsidised food to the 'poorest of the poor' families. Once a family has been recognized as eligible for the AAY, they are given a unique colour-coded ration card which acts as a form of identification. *Available at* http://pib.nic.in/feature/feyr2001/fmar2001/f280320011.html Last visited on August 11, 2021 at 1440 hours.
[97] Shweta Punj, "Digestion pangs: The food security bill has been passed. But implementing it is a formidable challenge", *Business Today*, September 29, 2013.
[98] *Supra* Note 93.
[99] Household Consumer Expenditure is the sum total of the monetary value of all the items, i.e., all goods and services consumed by the household on domestic account during the reference period. The NSSO conducts surveys on Household Consumer Expenditures based on a thin sample of households on an annual basis, and a quinquennial survey based on a large sample of households. *Available at* https://data.gov.in/catalog/household-consumer-expenditure-national-sample-survey Last visited on October 28, 2021 at 1400 hours.
[100] http://dfpd.nic.in/Salient-features-National-Food-Security-Act.htm Last visited on September 29, 2021 at 1300 hours.
[101] NFSA (Act No. 20 of 2013), *See* s. 11.
[102] Price fixed by the Government of India to protect the farmers from any excessive fall in prices during bumper production years. MSPs are announced at the beginning of the sowing season for certain crops based on the recommendations of the Commission for Agricultural Costs and Prices (CACP), and serve as a guarantee price for the grower. MSPs are currently announced for 24 commodities including seven cereals (paddy, wheat, barley, *jowar*, *bajra*, maize and *ragi*), five pulses (gram, *arhar* / *tur*, *moong*, *urad* and lentil), eight oilseeds (groundnut, rapeseed/mustard, *toria*, soyabean, sunflower seed, *sesamum*, safflower seed and *nigerseed*), *copra*, raw cotton, raw jute and Virginia Flue Cured (VFC) tobacco. *Available at*

crops[103]; however, till the date of writing this Paper, there has been no increase in the price of foodgrains supplied under the NFSA.

With the passage of this Act, the Government finds upon itself, for the very first time, a positive obligation to enforce the right of the people to have an adequate supply of food to meet their daily nutritional requirements. If the Government fails to meet these legal obligations, it can be called to account by courts across the country. Thus, the NFSA aims to empower persons through a clear acknowledgement of their basic human right, i.e., the right to food.

VI. CONCLUSION

Traditionally speaking, the right to food did not entail that governments had an obligation to hand out free food to anyone, and everyone who wanted it, nor did it entail that everyone had a right to be fed. However, what it meant was that in cases where people were deprived of access to food for reasons that are beyond their control, the right to food necessarily entailed that the Government had to provide food directly. For instance, there could be some special situations wherein persons are incarcerated or when a natural calamity or a riot has taken place or when there is a war (something similar to what we are seeing in Ukraine today). Traditionally speaking, it was under these types of circumstances, that there was a mandate cast upon governments to provide food to the people directly[104]. However, with the passage of legislations like the NFSA, this definition has broadened manifold, and so have the legal responsibilities cast upon the State. Today, several countries of the world have guaranteed the right to food to their citizens either through various constitutional arrangements, or through statutory law or through application of various international treaties in which the right to food is protected. While some countries have chosen to provide this right for a specific segment of their population, others have chosen to provide it as part of a human right to an adequate standard of living[105].

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http://www.arthapedia.in/index.php?title=Minimum_Support_Prices Last visited on October 1, 2021 at 0730 hours.

[103] http://dfpd.nic.in/public-distribution.htm Last visited on August 23, 2021 at 0855 hours.

[104] General Comment No. 12 of the United Nations (UN) Committee on Economic, Social and Cultural Rights. *Available at* http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx Last visited on January 20, 2022 at 1700 hours.

[105] Lidija Knuth and Margret Vidar, *Constitutional and Legal Protection of the right to food around the World,* p. 17 (FAO, Rome, 2011).

Even though endemic hunger and resultant poor nutrition have been continuing problems for policymakers across developing countries for several centuries now, it is at the time of natural disasters such as floods and droughts, that the impact of these problems gets even more severe. This happens because certain sections of the population who live on the margins of society, immediately lose their meagre means of livelihood during such times, and become particularly vulnerable to the vagaries of the weather Gods. Despite governmental measures to alleviate their plight, millions of Indians have gone to bed hungry in the seven decades since independence. The lot of these unfortunate people with respect to access to food, has not really improved as much as it should have, given the significant degree of economic progress that the country has made, especially in recent decades.

Often hailed as the country's most successful Public Interest Litigation (PIL)[106] ever, the Right to Food case witnessed day-to-day monitoring by the Supreme Court of virtually every government scheme related to food (both at Central and State levels), as well as its implementation on the ground. This was done through the mechanism of Court Commissioners wherein ground realities were brought to the courtroom by these officers. One reason for the spectacular success of the Right to Food case could be the fact that the petitioner was not any one particular person or one particular NGO, but an entire movement, comprising people drawn from civil society, academia, politics and economics. Even before the first intervention of the Supreme Court came in the year 2001, the National Campaign on the Right to Food was actively lobbying in the area of right to food, and there were groups which were active in every state. This case enabled all of them to come together on one single platform, and ensure implementation of the orders of the Supreme Court. Over 160 interim orders were passed in this case over a period of 17 long years. This constant monitoring of the functioning of governmental efforts in the area of right to food contributed tremendously to an already existing active grassroots campaign which enjoyed considerable public support[107].

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[106] Writ Petition wherein the rule of *locus standi* is relaxed. Such litigation is introduced in a court of law, not by the aggrieved party, but by the court itself or by any other private party. The person filing the petition must prove to the satisfaction of the court that the petition is being filed for a public interest, and is not a frivolous litigation by a busy body. *Available at* http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=a4a599a3-ee92-41da-aa0b-b4201b77a8bd&txtsearch=Subject:%20Jurisprudence Last visited on August 13, 2021 at 1445 hours.

[107] Apurva Vishwanath, "What are the lessons learnt from the Right to Food case?: Lessons learnt from the Right to Food case can be applied for other social issues that end up at the Supreme Court's doorstep every day", *Live Mint*, New Delhi, March 21, 2017.

Even though campaigners like Biraj Patnaik[108] are slightly disappointed with the fact that the case ended without a "...last order stating that access to food is a fundamental right in as many words", the PUCL case is today the world's most-cited case on right to food and even judicial activism in this area[109]. In the eight-and-a-half years since its enactment, the perceived success of the NFSA has led to a strong clamour for similar framework laws for protection of the right to food in several other countries of the world, especially in the backdrop of the devastating Covid19 pandemic. Countries like neighbouring Bangladesh, have been particularly keen to learn from the Indian experience, and have sought to adapt the NFSA to suit their domestic requirements.

[108] Currently serves as Executive Director at National Foundation of India, he has served as Amnesty International's South Asia Director, and is also an Honorary Research Fellow at Coventry University, UK. He has previously served as Principal Adviser to the Supreme Court Commissioners on the Right to Food case, where he was closely associated with the drafting and lobbying for the NFSA 2013. *Available at* http://nfi.org.in/biraj-patnaik Last visited on September 29, 2021 at 1900 hours.

[109] *Supra* Note 107.

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THE CONSTITUTION OF INDIA AND INDIAN CITIZENSHIP AMENDMENT ACT, 2019 - A BRIEF ANALYSIS

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ABSTRACT

The Citizenship Amendment Act 2019, which created a furor across the country was passed by Indian Parliament on December 11, 2019 and came into force on January 10, 2020. Citizenship is a legal relation between an individual and his sovereign state where individuals have the capacity to defend their rights in the front of governmental authority. The 2019 amendment gives citizenship to illegal migrants who belong to these six communities i.e Hindu, Buddhist, Sikh, Christian, Jain, and Parsi and are from three neighboring countries i.e Afghanistan, Pakistan, and Bangladesh. This amendment is in issue because of religion is criteria for granting citizenship and includes only religious minority, not linguistic, ethical, and other type of minority. This paper gives an overview of the amendment and explains the concept of religious persecution. Further, it analyzes the essence of this law in the light of grundnorm i.e Constitution of India and its constitutionality.

[Keywords: illegal migrants, religion, religious persecution, well founded fear, constitutionality, essence of law, Article 14, International obligations]

I. INTRODUCTION

The issue of citizenship in India is discussed in two places i.e. in Constitution of India and Indian Citizenship Act, 1955. Article 5 to 11 of Constitution of India deals with citizenship which says who born before 1950 is per se citizens of India. But the question of citizenship after 1950 or how anyone can acquire Indian citizenship is also of equal importance. These issues are discussed in Indian Citizenship Act, 1955. According to 1955 Act (hereinafter referred to as the Principal Act), citizenship may be acquired through 5 methods – by birth in India, by descent, through registration, by naturalization and by incorporation of the territory into India. There was a prohibition on illegal migrants from acquiring Indian Citizenship as per this Act.

II. CITIZENSHIP AMENDMENT ACT, 2019: KEY FEATURES

The Citizenship Amendment Act, 2019 seeks to provide Indian citizenship to illegal migrants who areHindu, Buddhist, Sikh, Christian, Jain, and Parsicoming from Pakistan, Bangladesh, and Afghanistan. There is no use of the word 'persecution' in the Amendment Act.For this, the 2019 Act changes the way of acquiring citizenship according to the Citizenship Act, 1955 by changing the definition of illegal immigrants and the process of acquiring citizenship.

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Change the Definition of Illegal Migrant

Migrant means if any person leaves his country and starts living in other country permanently then he is an immigrant for that nation. Till now, illegal migrant defined in the Principal Act as – if any person who comes to India for living without having a valid passport or having fraud documents or he has exceeded the permission limit of staying in India, in that case that person will be called as illegal immigrant and he will be forced to leave the country.[1]

But this Amendment Act inserted a proviso in definition clause and says that before 31 December, 2014 any people who have come to India by any ways and if they are from Afghanistan, Pakistan and Bangladesh and they belong to these 6 communities i.e Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians shall not be called as illegal immigrants. They will not be deported as illegal immigrants under the Passport (Entry into India) Act, 1920, and Foreigners Act, 1946[2].Such persons shall be deemed to be citizens of India from the date of entry into India and all legal proceedings against them in respect of their illegal migration or citizenship will be closed.

Change in the Process of Acquiring Citizenship

Before it was like, if you are coming from Pakistan and willing to take Indian Citizenship so for that you have to spend 11 years in India or have to do any Government service and after that you will get Indian citizenship. This amendment Act changes the whole process and says that if you are from Pakistan, Bangladesh and Afghanistan and belong to Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from these countries you have to spend only 5 years instead of 11 years to get Indian citizenship.[3]

The amendments on citizenship for illegal immigrants will not apply on two categories:

a. State protected by inner line
b. Areas covered under the sixth schedule of Constitution

III. RELIGIOUS PERSECUTION- INTERNATIONAL CONCEPT

The simple meaning of persecution is to misbehave or doing violence or discriminating. If one group is doing violence or discrimination on other group is called persecution. Persecution could be of many types such as religious persecution, political, or being racist.

Even though India is not a signatory of refugee conventions but rules of Amendment Act, 2019 will be derived from these guidelines because it is an international concept. So it is required to understand the concept of religious persecution at international level.

[1]The Citizenship Act, 1955, s 2 (1) (b).
[2]The Citizenship Amendment Act, 2019, s 2 (1) (b) proviso.
[3] The Citizenship Amendment Act, 2019, Schedule 3 (d) proviso.

The right to freedom of thought, conscience, and religion is one of the fundamental rights and freedoms in international human rights law.UNHCR issued Guidelines on International Protection Religion-Based Refugee Claims (hereinafter mentioned as Guidelines) under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees. It provides guidance in defining the term religion in the context of international refugee law and provides guiding parameters to facilitate refugee status determination and their religion - based claims.[4]

As per paragraph 3 of the Guidelines, the central element of religious persecution is 'well founded fear'. It has to be proved on the individual level, not collective. As per this rule, every individual who wants Indian Citizenship under Amendment Act, 2019, and he applies for it; he has to prove personally that he had a well founded fear. If he fails to prove at the individual level then he will not get Indian Citizenship and paragraph 14 of the Guidelines provides

> "Every individual has to prove his claim and each claim require examination on its merits on the basis of the individual's situation. The area of enquiry includes claimant profile, personal experience, religious belief, identity and/or way of life how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution. In this context, there is no need to prove the "well founded fear" on claimant personal experience. What happened to his friends and relatives, other members of same group may well show his fear that sooner or later he also will become a victim of persecution. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status".

According to Paragraph 12,

> "There may be various forms of religion persecution depending on particular circumstances of case. It could include prohibition of membership of a religious community, prohibition of worship with others in public or private, prohibition of religious instruction, serious measures of discrimination imposed on individual because they practice their religion, belong to or are identified with a particular religious community, or have changed their faith. Equally, in communities in which a dominant religion exists or where there is a close correlation between the State and religious institutions, discrimination on account of one's failure to adopt the dominant religion or to adhere to its practices, could amount to persecution in a particular case. Persecution may be inter-religious (directed against adherents or communities of different faiths), intra-religious (within the same religion, but between different sects, or among members of the same sect), or a combination of both. The claimant may belong to a religious minority or majority. Religion-based claims may also be made by individuals in marriages of mixed religion"

[4]Religion based refugee claims under Article 1A(2)- UNHCR, *available at* : https://www.unhcr.org/publications/legal/40d8427a4/guidelines-international-protection-6-religion-based-refugee-claims-under.html (visited on 30 June, 2020)

Further, according to paragraph 5 of the Guidelines, Claim based on 'religion' may involve one or more of the following elements:

a) Religion as belief (including non-belief);

As per paragraph 6 of the Guidelines

> "Belief should be interpreted so as to include theistic, non-theistic and atheistic beliefs. Beliefs may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of humankind. Claimants may also be considered heretics, apostates, schismatic, pagans or superstitious, even by other adherents of their religious tradition and be persecuted for that reason"

b) Religion as identity;

As per paragraph 7 of the Guidelines,

> "Identity is less a matter of theological beliefs than membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry. A claimant may identify with, or have a sense of belonging to, or be identified by others as belonging to, a particular group or community. In many cases, persecutors are likely to target religious groups that are different from their own because they see that religious identity as part of a threat to their own identity or legitimacy"

c) Religion as a way of life.

According to paragraph 8 of the Guidelines,

> "For some individuals, 'religion' is a vital aspect of their 'way of life' and how they relate, either completely or partially, to the world. Their religion may manifest itself in such activities as the wearing of distinctive clothing or observance of particular religious practices, including observing religious holidays or dietary requirements. Such practices may seem trivial to non-adherents, but may be at the core of the religion for the adherent concerned"

IV. CITIZENSHIP AMENDMENT ACT 2019 AND ITS CONSTITUTIONALITY

If we interpret Citizenship Amendment Act 2019 in light of the essence of that law and essence of grundnorm i.e. Constitution of India, the objective is to give the Indian citizenship to persecuted minorities either it is religious or linguistic or ethnic from neighboring countries. It means who had suffered religious as well as linguistic persecution or fear of religious as well as linguistic persecution in their country of origin are eligible for Indian citizenship.

The soul of the amendment is to give citizenship to persecuted minorities because they suffered enormously in their countries. Minorities are subject to discrimination, humiliation, and persecution while majority enjoy special rights and privileges. Many have been forcibly

converted and women belonging to minority communities have been kidnapped, raped and forced into marriage with the majority. The spirit is to set an example for other countries that India stands with all persecuted minorities of all neighboring countries irrespective of their religion and language and we are against all kinds of discrimination, humiliation and persecution.We will not sideline the rights of minorities. The purpose of bringing amendment is to give more secured and dignified life to persecuted minorities by giving them Indian citizenship that would enable them to secure admissions in educational institution, gets jobs, buy property, and enjoy state welfare benefits. It will clearly shows to other countries that India is fully against any kind of discrimination and they all have freedom of thought, conscience and religion. They all have right to freely profess, practice and propagate their religion and right to conserve their distinct language, script and culture.

But in view of the author, this amendment Act is against the essence of this law and grundnorm as it gives citizenship on the basis of religion which belongs to selected countries. Article 14 deals with '*equality before law and equal protection of law'*.[5] This equality and protection apply equally to both citizens and foreigners. It clearly said there can't be any discrimination between individuals on any unreasonable grounds. There should be an equal treatment between individuals and the law should apply equally upon all. Article 14 permits reasonable classification only and forbids class legislation. Reasonable classification is constitutionally permissible as the laws can apply equally only upon the persons who are equally placed with respect to the purpose of that law and for that purpose the test of reasonable/ intelligible differentia has to be applied. However, class legislation in itself is arbitrary, discriminatory and against the principle of natural justice.

Now question is whether this amendment Act violates Article 14 and spirit of Constitution as it gives a different treatment to illegal migrants on the basis of:

1. Country of origin
2. Their religion
3. Date of entry into India
4. Place of residence in India

Now we have to examine whether these differentiating factors could fall in reasonable classification or not. It means whether they could serve a rational purpose for classification.

Firstly, this Amendment Act classifies the illegal migrants on the basis of their country of origin which includes Afghanistan, Pakistan, and Bangladesh. We have limited resources, so

[5] The Constitution of India, 1950, Article 14.

it is not possible to include all countries of the world. Now the question is why we include only these 3 neighboring countries, not all neighboring countries. According to the Statement of Objects and Reasons(SOR), "India has had historic migration of people with Afghanistan, Pakistan, and Bangladesh and these countries have a state religion due to which there is religious persecution of minorities". But they did not consider the migrants from other neighboring countries such as Sri Lanka where Buddhist is State Religion and Myanmar where preference is given to Buddhist. Sri Lanka has had a history of persecution of linguistic minority, the Tamil Eelams and Myanmar also has had a history of persecution of a religious minority, the Rohingya Muslims. The Act does not cover Rohingya Muslim refugees from Myanmar, Hindu refugees from Sri Lanka, and Buddhist refugees from Tibet, China. It is not clear why they have been excluded from the Act, despite the objective of the Act is to provide citizenship to migrants escaping from religious persecution. It is not clear in the considered opinion of author as to why migrants from Pakistan, Afghanistan, and Bangladesh are differentiated from migrants from other neighboring countries

All persecution is solely based on religious grounds and do not cover the persecution on the basis of ethnicity, linguistic etc. This Act does not cover the ethnic issues of Balochs, Sindhis, Pakhtuns, Mohajirs in Pakistan, the Biharis in Bangladesh, ethnic, and linguistic issues of Tamils in Sri Lanka an ethnic Indians in Malaysia and Fiji who migrated there in search of work or brought therein as independent laborers when those were British colonies. Further, there is no reason to include Afghanistan while there is a reason that millions of citizens of undivided India were living in Pakistan and Bangladesh.

Second, there is a classification based on their religion. According to SOR, there is religious persecution of minorities in Pakistan, Afghanistan, and Bangladesh. It is absolutely true. But the Act considers only certain minorities' i.e Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians. There are other religious as well as linguistic minorities also who face religious persecution and they may have illegally migrated to India. But there is no cognizance on this. This Act includes only certain religious persecution, not include linguistic and other religious persecution. It should have included Ahmadiyyas – a Muslim sect who have been "viciously hounded in Pakistan as heretics", and the Hazaras – another Muslim sect who have been murdered by the Taliban in Afghanistan. They should be treated as minorities. In Pakistan, Ahmadiyas Muslims are considered Non-Muslim and there has been report of their persecution and the murder of atheists in Bangladesh.

Third, there is a differential treatment of migrants based on their date of entry into India, i.e., whether they entered India before or after December 31, 2014. If you are from Pakistan,

Afghanistan and Bangladesh and you belong to Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from these countries then you have to spend only 5 years to get Indian Citizenship but if you are Muslim you have to spend 11 years. It is not clear what is rational behind this and why likes cannot be treated alike.

Hence, there is no reasonable classification and it seems to violate Article 14 of Constitution. It divides the migrants on the basis of religion that compromises the Constitution's basic structure i.e. secularism. It seems to make a line between Muslims and Non - Muslims which compromises the concept of fraternity and unity and integrity of the nation.

Suppose there is a reasonable classification but reasonable classification is not the end of equality rather it is a tool of equality as it was held by Bhagwati Justice in Ajay Hasia v. Khalid Mujib[6]. It was also held that now the test of reasonable classification is not the end of equality rather it is a tool of equality. The real test is to examine the essence of law and to see whether the law provides unreasonable and arbitrary powers. The moment it is found to be arbitrary the law itself would be stuck down as being unconstitutional, even though it makes reasonable classification. After the *Kesavananda Bharti* v. *State of Kerala*[7] judgment the entire perception regarding constitutional interpretation is changed and now the test is that legality of any legal provision is to be checked in the light of the essence of that law and essence of the Constitution.

This amendment also seems to violate India's international obligations. Article 14 of UDHR[8] clearly said "everyone has the right to seek and to enjoy in other countries asylum from persecution", and according to Article 15, "everyone has the right to a nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Article 26 of ICCPR[9] says "all persons are equal before law and are entitled to equal protection of the law without any discrimination". There should be no discrimination on any ground such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status.

V. CONCLUSION

It must be pointed out that the national spirit of providing shelter and sanctuary to refugees is not new. In fact, India has a long history of doing so for victims of persecution. Whether it is

[6] *Ajay Hasia* v. *Khalid Mujib*(1981) 1 SCC 722.
[7] *Kesavananda Bharti* v. *State of Kerala*(1973) 4 SCC 225.
[8] Universal Declaration of Human Rights, 1948, Article 14.
[9] International Covenant on Civil and Political Rights, 1966, Article 26.

the Zoroastrians in the 12th century or the recent Tibetans, India has always demonstrated humanity and generosity and has opened its arms to those who seek asylum.

The Act must be viewed with a positive eye to legitimize its existence as an asylum-seeker in India. However, just as bitterness and cruelty are not partial to certain people, we cannot favor our generosity. The law should also find ways to accommodate Ahmadiyyas, Uighurs and Rohingyas who are also persecuted ethnic minorities, and have knocked on the door of India when needed.

We must reason and discover what the citizenship really means. Citizenship is not only a legal tie between the state and the individual, but also reflects a sense of belongingness and yearning. The amendment Act addresses people who are eager to live in an environment that free from the fear of persecution and those who can imagine a better future for themselves. This amendment Act fulfils the spirit of our Constitution if it does not discriminate persecuted minorities on the basis of religion and if all kinds of persecuted minorities of neighbouring countries are eligible for Indian Citizenship irrespective of their religion.

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INTELLECTUAL PROPERTY AND GMOs AS A FRONTIER TECHNOLOGY: CASE FOR A DISABLING REGIME FROM BAUMAN'S PERSPECTIVE

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ABSTRACT

The frontier technology like GMOs is surrounded with benefits and risks. The former ranges from diverse applications of this technology while the latter are due to associated costs. The benefits encourage the law makers to argue for an incentivising, promoting technology or can be said an enabling regime in the form of Intellectual Property rights, and rightfully so. Howsoever, on the other hand, the uncertainty around the technology, weak regulatory frameworks and other risks associated also requires for a disabling regime. This side of the technology regulation can not be overlooked and the current paper seeks to analyse the same from the perspective of Bauman's Liquid Fear hypothesis.

I. INTRODUCTION

The Genetically Modified Organisms (hereinafter, GMO's) is, "*an organism whose genetic material has been altered using genetic engineering techniques*"[1]This frontier technique involves the inducing desirable alterations in the DNA molecule of a living organism by purely technical intervention without resorting to any natural methods. It is not an absolutely modern science, however, the recent developments in the field promise applications in the field of medicine, forensics, and food industry.[2]The impact of genetic engineering as an applied science on life and environment and has evolved into a major economic consideration

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[1]*See* Royal Commission on Environmental Pollution 13th Report"Report of the Select Committee of the House of Lords on EC Regulation of Genetic Modification in Agriculture", 198-99 HL Paper 11 II (London, 1999); The Release of Genetically Engineered Organisms to the Environment, Cmnd. 720 (London, 1989) *cited from* Jane Holder, "New Age: Rediscovering Natural Law", in Albert W. Musschenga, Wlm J. Van Der Steen, *et.al.* (eds.), *Reasoning in Ethics and Law: The Role of Theory, Principles and Facts*, Ashgate (1999), See also Gilbert, *International Encyclopaedia of Biotechnology*. p.31, (OUP, 2010).

[2]*See generally* Christopher Arup, *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property,* 216-17 (Cambridge University Press, Ed. 1, 2000); Philip w. Grubb*, Patents for Chemicals, Pharmaceuticals and Biotechnology: Fundamentals of Global Law, Practice and Strategy*, 249-51 (OUP,1999); Fionna Macmillan, *WTO and the Environment,* 138 (Sweet & Maxwell, London, 2011), Jayshree Watal, *Intellectual Property Rights in the WTO and Developing Countries,* 128 (Springer 2001); Yvonne Cripps, Patenting Resources: Biotechnology and the Concept of Sustainable Development, 9 *Ind. J. Global Legal Stud*. 119, 121-24 (2001); Sean D. Murphy, Biotechnology and International Law, 42 *Harv. Int'L. J.* 47, 51-56 (2001) also see Neil D. Hamilton "Feed a Hungry World" in "Legal Issues Shaping Society's Acceptance of Biotechnology and Genetically Modified Organisms", 6 *Drake J. Agric. L.* 81, (Spring 2001).

and it is expanding day-by-day.[3] It is a common knowledge that the growth of bio-sciences had never been as fast relatively speaking as witnessed in the fields of physics or chemistry but it has caught up in the race very fast. The flood gates were opened with the revelation of double helix by Crick and Watson in 1953 and has become unstoppable since. With the DNA revealed and the dawn of the knowledge that one can cut and stitch the DNA as one desires revolutionized the scenario. It was the dawn of modern biotechnology. The species barrier stood broken Darwin had entered into a hyper-speed and new developments in this field start coming to the fore on a regular basis. More recently, on October 8th, 2012 scientists John Gurdon and Shinya Yamanaka were awarded Noble Prize for medicine for their work in stem cell research which did not involve taking of embryo cells, thereby, avoiding the ethical issues. Their work can be used to re-grow tissues in damaged brains, hearts or other organs- an amazing possibility.[4]

However, that is one side of the coin. Like other technologies it is also, "Janus faced"[5], that is having both pros (the benefits) and cons (the harm/ cost). The promises of its benefits are surrounded by the security, environmental and ethical risks which are very real and at the same time difficult to be defined, calculated and quantified as the long-term consequences of this technology are a – known-unknown. The fact that generally law is reactive and not proactive also fuels the concern that law as an institution grapple with the speed of advancement in science and technology. The latter is neutral it offers us the solutions and choices; therefore, we need something to regulate it both ways, that can only be done by the institution of law. The underlying presumption of the present paper is that in the current age of manufactured risks a balance of proactive law as to reap the maximum benefits of genetic technology is required.

Apart from the international regime which seeks to provide standards for law making regimes around the globe the present national legal regime can be classified as enabling and disabling (or, regulatory), the former includes the Intellectual Property Rights (hereinafter, IPRs) and the latter is about controlling the pace and direction of the technology that will include the rules and protocols enacted under environmental law, biological diversity conservation and food labelling laws. Enabling IPR regime had some restrictions like, for example, the European approach provides for legal restrictions regarding morality and public policy,

[3] The biotech industry in India is valued at US dollars 70.2 billion in 2020 at a growth rate of 12.3% and is growing at a CAGR of 16.4% is expected to be a US 150 billion dollars by 2025. Available at www.ibef.org/industry/biotechnology-india(last visited on May 10,2022).

[4] *See*https://en.wikipedia.org/wiki/History_of_biotechnology(last visited May 9th, 2022)

[5] *See* M. B. Rao and Manjula Guru, *Biotechnology, IPRs and Biodiversity*, 32 (Pearson, Longman, Ist Ed. 2007).

whereas, the United States in contrast tries to avoid such restrictions and they had been traditionally liberal in granting patents. But when posed with a difficult ethically contentious issue about granting a patent upon an animal –human chimera both the patent systems struggled to find an answer to it. The question raised was what is a human? What are the limits of patentability?

As to the regulatory regime, unlike in the developed countries it suffers from a techno-centric approach that is the science not only defines the problem but also led the answer. There is also an issue of low threshold of standards. This culminates into a crisis of confidence in the society giving rise to a heightened dilemma fuelled with the irreversibility and scale of possible consequences. One recent example is the issue of Bt. Mustard and Bt. Brinjal. This paper attempts to argue that any regulatory regime must not only ensure compliance with the best practices but also include an element of garnishing public opinion so that the benefits can be reaped in a best possible manner.

Undeniably, the technology of making GMOs has benefits and also has risks. The study has relevance because the technology has not only major economic implications, access to food, and implications over human life and health, but is also surrounded by the questions of proper governance and regulation of scientific community and social, environmental, ethical and health related issues. This analysis for a disabling regime obviously would not be meaningful without discussing the enabling regime in the light of the benefits of GMOs. The next part of the article deals with them together in Part II and is followed by a Conclusion in Part III.

II. THEORETICAL FOUNDATIONS FOR COST AND BENEFITS

Overview

The theoretical foundations are important to understand and determine what needs to be measured and what relationships should be looked for. As far as the question of legal regulation of GMOs is concerned it is important to underline the need for the same on the basis of perspectives of costs and benefits. Costs has to be understood from the perspective of risks and losses and benefits has to be understood from the perspective of gains. When we talk about GMOs it is a highly contested area with its proponents at one end of the spectrum who cite its benefits and its opponents at the other who cites its threats. The truth, howsoever, lies somewhere in between these two extremes. As to its benefits, they range from its wide variety of applications in health, medicine, food, agriculture and forensics. These benefits call for providing incentives and there are strong reasons for that. Likewise, its threats, actual and

potential, to the environment, health and economics calls for its strong regulation. Both these will be taken up along with justifications for that.

The Benefits: Case for Enabling Regime

As pointed out previously GMOs offers a range of benefits to food, health and economics. It can be used to enhance production of food crops thereby offering food security, it has been used to develop path breaking medicines as well it has become a serious factor in terms of the market it has created. This part won't emphasize much on the benefits but would rather focus more upon the methods and reasons to do it. One of the ways is providing an incentive to it. That can be achieved by offering limited IPRs in the form of patents and plant variety protection. Intellectual property protection has a rational which can be understood from two perspectives, individual and more importantly public.

Undoubtedly, society since time immemorial has developed and craved for new knowledge and products which make their lives easier. Howsoever, knowledge is intangible in nature that also applies to scientific knowledge and techniques.[6] Being intangible they are different from tangible assets like land or a fruit. They primarily differ from each other in two aspect, excludability and rivalrous consumption. Tangible are excludable- they can be kept and in varying degrees can be kept away from others. For example, an orange is highly excludable, the owner can put that under lock and key. An intangible on the other hand is not excludable like an orange. Say if an author releases his story, he cannot put it under lock and key any more. Furthermore, intangibles are non-rivalrous in consumption as compared to tangible which has rivalrous consumption. If "A" eats his orange, "B" cannot eat the same. "A" and "B" however, can enjoy the same story and so do other "N" number of people. One person's use of intangible asset does not interfere with another's ability to use the same.

These characteristics poses challenges to the creators of knowledge. Owing to them economists would describe them as "*public goods*" and providing an adequate supply of a public good calls for a proper mechanism.[7] As to that one might ask, why not we rely on contract, property law and tort for that. The reason being as one is aware about "*tragedy of commons*", that give rise to problem of '*overuse*' of property if treated as a public good. But the same problem would not arise for an intangible, the problem rather would be '*underproduction*' and not '*overuse*'. Consider an innovative company had made a medicine based on a GMO after decades of research and experimentation. Once he would start selling

[6]For a brief see US Council for International Business report titled "A New MTN: Priorities for Intellectual Property" Page 3 (1985)

[7]*See* H. Ullrich, "The Importance of Industrial Property Law and Other Legal Measures in the Promotion of Technological Innovations", *Industrial Property*102-03 (Geneva 1989).

it the others would be free to purchase, examine and in absence of any intellectual property law would be able to copy it.[8] This implies that they would be able to sell it at a lower price as they had incurred no sunk cost to recoup. To stay in the game the innovative company would be forced to lower the price in the end it would be below the marginal cost of producing it. It wouldn't be able to recoup its initial R&D costs. Knowing that they are unlikely to engage in creating that medicine at the first place and that would mean stagnation in innovation for the consumers, that is, underproduction. This calls for a proper mechanism in the form of robust intellectual property laws which can lend a characteristic of excludability to intangible assets through which externalities can be internalized.[9]

Justifications for Enabling Regime on the Theoretical Foundations

There are several theories which had been relied upon in order to justify the grant of intellectual property rights over intangibles. The present study would focus on two, private justifications and public justification. These two are neither mutually exclusive nor contradictory.

Private Justification

The private justification is based on natural law- a right based approach. One of the chiefs amongst them is that of Jurist and Philosopher John Locke's Labour Theory. His approach is his well-known work *Second Treatise of Government*[10] begins from the supposition that individuals naturally are entitled to the fruits of their labour/toil. It assumes the existence of an uncultivated common, which is characterised by plentifulness of goods. Property rights are therefore granted to those whose labour adds certain value to the goods they take from the common, with the proviso that, as a result of their labour, the common reservoir is also increased or, as Locke put it, provided enough and as good left for others to enjoy. In case of IP the commons would be represented by the public domain. The public domain retains those which either cannot own or exploit, for example idea or discoveries or conversely those which are free to be expropriated as intellectual property, provided that necessary labour is expended on them. Meaning thereby that finished Intellectual work would leave the public domain once it meets the relevant legal criteria for protection with a right in the form of

[8] *See* E. Mansfield, M. Schwartz and S. Wagner, "Imitation Costs and Patents: An Empirical Study" 907, *Economic Journal*, (1981).

[9] *See* M. Lehmann, "The Theory of Property Rights and the Protection of Intellectual and Industrial Property"at 530 *IIC* 525 (1985) explains that an externality is an economic situation in which an individual's pursuit ofhis or her self-interest has positive or negative spill-over effects on the utility or welfare of others. It can be seen as a market failure and, in this context, a property right is a tool used to correct such a market failure. See R. Ekelund, and R. Tollison, *Economics*, 404-05 (Boston, M. A.: Little, Brown and Company, 1986).

[10] *See* John Locke, *Second Treatise on Government*, available at www.earlymoderntexts.com>locke1689a(last visited onSeptember15, 2021).

property right as IPR. As far as the question that it would breach the Lockean proviso of enough and as good it can be answered in no. Instead over course of time intellectual property rights would enrich the public domain. It would allow creators to present their work before the public which would lead to new ideas and encourage further creativity. Secondly, given the time limited nature of IPRs, these intellectual goods will eventually return to the public domain.[11]

Public Justification

As far as public justification is concerned it can be explained on the basis of Law and Economics Theory. It is concerned with the role of law in the efficient allocation of economic resources. Because of its very nature intangible intellectual property poses what economist referred as public goods problem also discussed previously. Intellectual property is considerably costly due to investment in terms of time, money and effort. The problem with Intellectual property is that its creation is expensive but when one incorporated in a tangible form it can easily be plagiarised that too limitlessly at virtually no cost, even negative cost in some cases. And the plagiarised product would also carry an equal value as the original. In absence of excludability in the form of intellectual property rights free riding on other's investments would happen without incurring any original costs. As a result, IPRs offer an important incentive to create new knowledge and products by having a deterrent effect. This would also consequentially enhance the competition in the market. As far as it being a public justification this efficient allocation of economic resources would have a long-term positive-effects. Immediate being that society would be benefitted by new products and knowledge. This knowledge would later form the foundations for creation of further knowledge and products, thus, benefitting the public at large in this *quid pro quo*.[12]

The Costs: Case for a Disabling Regime

In the past few decades, we had been witnessing an exponential revolution in GMOs creating plethora of commercial products for deriving profits.[13] This deliberate alteration along with its promises has come along with a panoply of new health, environmental and economic risks not previously foreseen. We are living in an age as one commentator describes as "*Darwin in*

[11] *See* Hughes, "The Philosophy of Intellectual Property", *Georgetown Law Journal*, 288 (1987).
[12] *See* Van Der Bergh, "The Role and Social Justification of Copyright: A "Law and Economics" Approach", *Intellectual Property Quarterly*, 17 (1996).
[13] Genetically modified plant crops have been planted commercially in the United States since 1994. By 2002, more than 88 million acres of genetic engineering-derived crops were being planted annually in the United States. Proposed Federal Actions to Update Field Test Requirements for Biotechnology Derived Plants, 67 Fed. Reg. 50,578, 50,578 (Aug. 2, 2002).

Hyper-speed"[14] as they were not previously foreseen the attempts of the law to regulate can be described as a reaction to the new posed challenge. Amidst this chaos haphazard steps had been taken. The situation got further worsened by politics surrounding it and inaction on the part of the bureaucracy. Though it is the inherent nature of the law that it is reactive and seldom proactive this is truer in case of science and technology. Given the associated risks involved with the GMOs the law is required to act proactively and not wait for a disaster to happen.

Risk involves dual elements of hazard and exposure. Those posed by GMOs are different both in type and degree then are those presented by traditional known environmental pollutants and chemicals. The potential hazards of GMOs are well beyond imagination, and adding to the concern is that there are multiple ways of exposure to them without even knowledge of their existence, for example, through food, cross pollination etc.

One of the typical risks associated with some GMOs is toxicity. It can be toxic in itself or may produce a toxic substance which would cause prejudice to heath, life or the environment.[15] Another potential risk is change in behaviour pattern or reproduction ways by any future genetic changes which are unpredictable to assess and might not have been anticipated initially calling for a cautious approach. Another is for the reason that GMOs are altered to give a selective advantage to suit our needs, but that can cause a havoc upon indigenous varieties, which would not be able to compete due to lacking in that capacity. This evolutionary advantage can result in depletion Because of the very different types of risks associated with GMOs, any regulatory system that does not take into consideration these risks is inherently skewed.[16] There are economic risks as well in the form of contamination of organic crops and pesticide resistance. The cause is cross pollination of GM plants with other plants. Organic farmers who have their land near a GM farm wouldn't be able to sell their crop as organic if cross pollination occurs leading to losses in revenue. And lastly the biggest concern is the risk of uncertainty of this relatively new technology[17] and the lack of experience regarding it. Another matter of greater concern is the use for R&D which may

[14] *See* Charles A. Deacon & Emilie K. Paterson, "Emerging Trends in Biotechnology Litigation", 590 20 *Rev. Litig.* 589 (2001).

[15] *See* L.G. Firbank et al., "The Implications of Spring-Sown Genetically Modified Herbicide Tolerant Crops for Farmland Biodiversity: A Commentary on the Farm Scale Evaluations of Spring Sown Crops" 1, 19-20 (2003), available at http://www.defra.gov.uk/environment/gm/fse/results/fse-commentary.pdf(last visited October 12, 2021)

[16] *Supra note* 14 at p. 590.

[17] *See* Margaret Mellon & Jane Rissler, "Union of Concerned Scientists, Environmental Effects of Genetically Modified Food Crops: Recent Experiences" (2003), http://www.ucsusa.org (llast visited Jan. 6, 2020)

pose much more significant risks, to illustrate, any failure to contain them at that stage can pose significant risks.

The above discussion on risks is not to suggest a moratorium on GMOs neither it is suggesting that GMOs are devoid of any advantage. This is to suggest high amount of sensitivity required to deal with this emerging uncertain field of technology and hence a disabling legal regime to minimise the risks.

Justifications for Disabling Regime on the Theoretical Foundation from Bauman's perspective.

One of the theoretical justifications that can be offered is what was described as the concept of liquid fear as coined by Zygmunt Bauman, that is, living in a state off constant anxiety which presence can be felt everywhere.[18] Bauman describes in his book *Liquid Fear* as living in a state of constant anxiety where the dangers may strike any time unannounced. The problem with liquid fear it is dissimilar to a specific defined danger. The latter is one which people are aware about and had knowledge of its where, how and when and in case of former it is exactly opposite. Today's society is surrounded by potential hazards and they are aware of that. But it is uncertain where and when that hazard touches us. Absence of any reliable structures guarding the society enhances that fear. Even the most robust regulatory structures appear to be powerless before this march of science and technology manifesting itself in the form of GMOs. They do not have even power to do so when two people are in a similar situation and they know that they are here together because they bring satisfaction to each other. Now if they know about that, they live in constant fear what about if the other partner first decides that it is the time to give notice and disappear? Uncertainty - impossible to predict the future, and even after you have made your decisions after long, along deliberation, very careful, very meticulous calculations. Looking retrospectively, you still are not sure whether you made the right or wrong decision.

But how is it different from past and why GMOs. Of course, dangers were with us, with our ancestors, as long as humanity is on earth but it was a different story in the middle-ages, there were wolves in the forest. So, you had to prevent our children going their keep them into home. Don't go to the forest alone, danger. Now, these are the dangers what German sociologist Ulrich Beck called society of risks[19] , risk means that at best, you can calculate probability of catastrophe but probability is a very foggy idea. Probability, there may be 90% probability but still we are in this one 10% or the other way around. Only 10% probability but

[18] *See* Zygmunt Bauman, *Liquid Modernity*, (Wiley, Ist Edition , 2013).
[19] *See* Ulrich Beck, *Risk Society: Towards A New Modernity*, Sage Publishing

we are struck in the 10%. To put it in one word the state of continuous "*uncertainty which makes us fear*".

To put it briefly, there are two values without which human life is simply inconceivable one is security, that is, feeling safe. The other is freedom, that is, ability to self-assert. At this point, with regard to GMOs security can be understood to mean a robust regulatory legal regime and freedom can be taken as scientific freedom. In absence of legal regime and only scientific freedom it can potentially create a chaotic situation. Likewise, in absence of scientific freedom with only legal controls would push us back in times. We had to exchange it for security and a good deal of security has been surrendered. The people live by anxiety, by fear- they are already afraid this is the most important mark of the precariat. Precariat which comes from the French word *precarite* which loosely means walking on moving sands - not having firm ground under your feet. Somewhere in the regime of science and technology well beyond the control of our government, not to mention our own control, there are processes. These processes can do whatever they wish and may strike at any moment. We cannot turn our back we cannot turn our face when they suddenly appear next to us and we cannot omit their presence. They signify, they embody all our fears. The shock is only beginning and we are far from coming to digest the new situation, at just ourselves to this new situation possibilities are not limitless neither the human ability to endure. Realising that so we have to exercise what is called …… but, and that's a big but unfortunately going to that there is no shortcut solution., no instant solution it's a long-long process coming to an understanding takes some time. So, we have to accept this is the situation and find a solution.

Biotechnology has in recent times emerged as an applied science with far reaching impact on society. GMOs is such area which has applications in a wide range of activities like food and agriculture, environment, forensic science, medicine, and industrial products.[20] At the same time with its enormous benefits, it also comes along with unforeseen risks which can't be ignored. The critics often cite ethical and security concerns. One of the often-cited concern is the risk of an uncontrolled and/or unintentional release of GMOs. The same is feared to translate into an irreversible damage to the ecology and can have serious negative ramifications for the plant, animal or human life and health. Likewise, there are associated ethical dilemmas ranging from concerns raised with regard to the attempt of man playing God. Adding fuel to the concern is the underlying uncertainty in the form of long-term

[20] For example, the claimed invention by Chakrabarty. *see also* Elizabeth Hecht, "Beyond Animal Legal Defense Fund v. Quigg: The Controversy over Transgenic Animal Patents Continues", 1036ff, 41 *Am. U. L. Rev.* 1023(1992).

consequences which remains to be a known-unknown. Thereby, a proper disabling regime which can regulate the direction of GMO technology and products.

III. CONCLUSION

In conclusion it can be said that there is a realization in the community and science that GMOs are potentially beneficial as well as associated with risks. This in turn informs the law to act accordingly. The proponents of GMOs are justified as well given the benefits to life, environment, heath, food security and many more coupled with its contribution to economic development requires an enabling environment to promote its development. For that purpose, the IPR regime is present and the same sufficiently incentivizes it. Given that we should also not loose sight of the consequent costs and risks associated with the technology, uncertainty around it, lack of robust regulatory structures, coupled with the divergence of opinions, lack of solutions, or solutions being scientifically driven forces us to rethink about our approach towards GMOs. In conclusion it can be said that a balance in the legal approach with regard to frontier technology like GMOs would be advisable in order to be able to reap benefits to its maximum while limiting the risks to a minimum level.

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LIVE-IN RELATIONSHIPS: A BENEFIT TO THE SOCIETY OR A LUCRATIVE RELEASE FROM INDIAN TRADITIONS BY GRAVE DESTRUCTION OF CUSTOMS AND SOCIAL VALUES

*Kumud Mehra & Dr.Nitesh Saraswat**

ABSTRACT

The prime focus of this paper is towards the probable impact of the growing acceptability of the newly emerged concept of unmarried cohabitation by the Indian youth in the name of live-in relationships, which is seemingly becoming a substitute for marriage in our country. This newly evolved trend has similar characteristics and a great resemblance to marriage. Couples opting for such an unmarried union could only be differentiated from the married couples just on the basis of lack of solemnisation of their alliance with each other. The present generation of our society is a fast-moving cohort having modern and progressive mindsets when compelled to abide by the rigid and traditional matrimonial norms and prefer staying hassle-free having a strong inclination in favour of their career. In such a state of things, a major portion of the Indian youth, in order to keep themselves burden free from mandatory matrimonial commitments, have been seen to keep marriage at bay and opt for its alternative with no legal boundaries. But at the same time, such reckless behaviour appears to be a destructor of the Indian cultural norms and the social values of the country. The researcher, through this paper, tries to evaluate the impact of this newly budding mode of heterosexual unification on Indian society.

I. INTRODUCTION

India is a country having a rich cultural and traditional heritage that rests upon spiritual and moral values. It is a secular country with a great diversity of religions, faith, and beliefs. In India marriage is such an institution, which is looked upon with great probity under every religion and has also got legal recognition along with societal reverence. Indian society from its very inception deeply rests upon religious principles, moral values, and diversified cultures of different religions; all the religions are given equal eye even though Hindus are in majority, still, all other religions are treated equally and have all the freedom to get flourished across the nation and to be professed by the people.[1]Despite India being home to diversified creeds and cultures and their dissimilar traditions, one thing that is common is the 'supremacy of marriage' among all religions. Every religion in India favours marriage and

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[1] The Constitution of India, art. 25 (Freedom of Religion-"All persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion subject to public order, morality and health.").

considersmarriage to be the basic building block of the society[2] and an effective tool to regulate the behaviour of the community by regulating their biological urges. However, the definition of marriage cannot be narrowed down to just an instrument that satiates one's sexual desires but also is an entity that provides a certain set of social guidelines for ensuring the continuation of the family system in India.[3]

Since the ancient era, marriage holds a high position in Indian society and is regarded as a sign of repute. Married couples are admired by the whole society from time immemorial. Marriage in India is regarded as a sacrament among Hindus and is a universal social institution across the whole nation.[4]The purpose of marriage and the rights it creates in respect of married couples towards each other and the duties it involves is demarcated by almost every religion in India in their religious texts. Marriages among Hindus have both social and religious significance. Religiously in the Hindu *dharma*,marriage has three paramount purposes mentioned in the *dharamashastras,*[5] namely *dharma* (the duty), *praja* (the progeny) and *rati* (the sensual pleasure),[6]on social the front it serves as an excellent mechanism to promote socially civilized and decently regularised society. It fosters decorum in society and lays down rules of social conduct. It qualifies an individual to discharge those religious performances towards the society, which mandatorily should be discharged in the presence of both husband and wife.

However, this age-old societal setup is experiencing structural turbulence with the increased popularity and priority among the young Indian generation towards unmarried cohabitation which is commonly known as a live-in relationship in India.

A live-in relationship is an arrangement in which two persons of heterosexual nature live together under the same roof, share an intimate relationship with each other, and represent them to be husband and wife to the world outside. Both marriage and live-in relationships

[2]Katharine Franks Kyros, *Using marriage to protect White supremacy and heterosexual privilege: a historical analysis of marriage law in the United States* (2011) (Masters Thesis, Smith College, Northampton, Massachusetts),*available at:*https://scholarworks.smith.edu/cgi/viewcontent.cgi?article=1616&context=theses (last visited on November 10, 2021).

[3] Kamala Ganesh,"New Wine in Old Bottles? Family and Kinship Studies in the Bombay School"62(2)*Sociological Bulletin, Special Issue on The Bombay School of Sociology: The Stalwarts and Their Legacies* 291 (2013), *available at:* http://www.jstor.org/stable/23621066(lastvisited on November 1, 2021).

[4]*Ibid.*

[5]The *Dharmasastra* is a collection of ancient Sanskrit texts, which give the codes of conduct and moral principles (dharma) for Hindus*, available at:*https://www.yogapedia.com/definition/5420/dharmasastra (last visited on November 12, 2021).

[6] Anil Moharana, "Hindu Marriage: Aims, Forms, and types of Hindu Marriage",*available at:*https://www.studyinsta.com/hindu-marriage/(last visited on November10, 2021).

have almost identical traits but one thing that completely separates the two concepts is the legal sanction, which is provided by the marriage to the married couples. However, a live-in relationship on the flip side provides no such legal protection to intimate partners. Despite uncertainties, live-in relationships are rapidly growing popular among the new generation as it calls for no or very little responsibility towards one another and each other's family. Unlike marriage, it does not bind the partners to dispense mandatory duties and provides them with ample space for their personal growth. The majority of persons who opt for this sort of living arrangement are generally those who believe that marriage puts unnecessary restrains both on males and females in the name of customs and traditions which obstruct the path of their personal and professional development.

The present paper tries to find out whether this newly bloomed concept of live-in relationships is helping the Indian society to move a step ahead towards growth and progress or is it brutally strangulating the age-old well-established cultural norms of India.

II. PIOUS NATURE OF MARRIAGE IN INDIA

As discussed above India is a land of diversified religions practicing different cultures. Every religion in India considers marriage as an absolutely necessary obligation for the betterment of an individual. Major religions followed in India are Hinduism, Islam, Sikhism, and Christianity; under Hindu religion *vivah* or marriage is regarded as an important sacrament for the continuation and propagation of elementary tenets of the Hindu religious life.[7] It serves as a foundation of the Hindu cultural complex.[8]According to the Hindu religion, a life of a Hindu consist of four stages (*ashrams*), the first one being the *brahmacharya*i.e. the learning or student stage, the second stage is *grihastha*i.e. stage of a householder, the third is hermit stage and the fourth stage being the *sannyasa* that is a wandering ascetic[9]; a person practicing the Hindu *dharma* should ideally go through all four of them in order to achieve four goals (*purusharths*) in life which are *artha* (wealth), *kama* (desire), *dharma* (righteousness), and *moksha* (liberation) respectively.[10] Marriage enables a Hindu to enter the

[7]Nelistra Singh, "The Vivaha (Marriage) Samskaraas A Paradigm for Religio-Cultural Integration in Hinduism" 5(1)*Journal for the Study of Religion* 31–40 (1992), *available at:* http://www.jstor.org/stable/24764135 (last visited on November 21, 2021).
[8]*Ibid.*
[9] H.L. Richard,"Counting Hinduism"9 *Journal of Adventist Mission Studies* 5 (2013), *available at:*https://digitalcommons.andrews.edu/cgi/viewcontent.cgi?article=1221&context=jams (last visited on November 28, 2021).
[10]*Ibid.*

second stage of life i.e. the *grihastha ashram*. It is commonly believed that a person remains incomplete unless entered into a *grihastha ashram*.

Along with the Hindu Dharma, other religious communities in India also hold the same notion with regard to marriage and consider it obligatory. Islam considers marriage (*nikah*) as part of "*sunnah*"[11](practices) of the messenger of Allah and makes it mandatory for all the Muslims. Christianity holds marriage as a grace of God and very crucial for the correct channelization of God's proper order so that a man and a womancan keep themselves from being unchaste. It lays stress on the formation of the mutual relationship between man and his wife and their faithfulness and responsibilities towards each other.

III. MARRIAGE AS A SOCIAL NORM

Marriage along with being religiously relevant also serves as an effective tool for maintaining social decorum in Indian society. In India, a family is regarded as the epitome of pride and prestige. The tradition of two people uniting into one soul after getting married to each other and leading to the formation of a family unit by reproducing children is being followed in India since time immemorial. The relationship of the children born out of marriages is determined with the world outside only in the name of their respective birth-giving family.[12]A family in India works as an organization for all its members and takes every individual's interest into consideration for their better well-being. These kinds of familial arrangements are commonly seen in India where a family collectively takes all the decisions for its members with regard to their personal as well as professional affairs.

Therefore, it will not be incorrect to say that marriage is the first step towards the development of an organized and civilized society. In India, high societal status is rewarded to those who are married and permanence to their relationship is perceived to be more probable under the social stamp.

[11]***Sunna*****,** is the body of traditional social and legal custom and practice of the Islamic Community. Along with the *Quran* (the holy book of Islam) and *Hadith* (recorded sayings of the Prophet Muhammad), it is a major source of Shariah, or Islamic law. *Available at:*https://www.britannica.com/topic/Sunnah (last visited on November 21, 2021).

[12]Jayashree Khandare, "The Concept of Marriage and Its Form: An Indian and Western Perspective" 4 *International Journal of Scientific Research* 342(2015), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713715 (last visited on December 13, 2021).

IV. ARE LIVE-IN RELATIONSHIPS A NEMESIS TO MARRIAGE IN INDIA

Marriage is an age-old institution comprising several benefits for the societal as well as for individual growth and prosperity.[13] It works as an effective legal shield for those who are living in it. It provides married couples with a number of remedial protections in case of split and grants protection to the children born out of marriage. From the legal lens, the law in India is also inclined towards marriage, which is clear from the fact that there is no legislation to regulate the concept of live-in relationships and to redress the grievances of the cohabiting couples while there are several for married couples.

Despite having numerous shortcomings, the trend of living into an unmarried union is continuously growing popular among the Indian youth. There are number of reasons behind the frequent adoption of this new concept of living together. Modernisation as a result of the persistent espousal of the western culture in Indian society could be noted as one of the majorreasons behind the propensity towards unmarried cohabitation.[14]

Cohabiting with each other without marriage was never a trend in Indian society, where all the unnamed close relationships between a man and a woman are treated immoral and living together without marriage was considered a sin. However, due to happening of the ideational advancement in the present generation at a very high rate is witnessing a storm of change where living into an unmarried union is no more sin or an act of immoral nature.[15]

India is a vast country having been practicing an end number of customs and traditions by various religions and their subdivisions; marriage is performed in every part of the Indian society differently according to the customary norms of different people. Though performed differently in different regions marriage still has common traits everywhere; in marriage, equal rights and duties are assigned to both bride and groom towards each other and their respective families. Indian society being patriarchal in nature follows a certain set of organized rules with regard to marriage where the bride is regarded as proud of her

[13] The Week Staff, "The Origin Of Marriage" *The Week*, Jan. 9, 2015, *available at:*https://theweek.com/articles/528746/origins-marriage#:~:text=The%20first%20recorded%20evidence%20of,Hebrews%2C%20Greeks%2C%20and%20Romans (last visited on December 20, 2021).

[14]Choudhary Laxmi Narayan, MridulaNarayan,*et.al.*, , "Live-In Relationships in India—Legal and Psychological Implications" 3 *Journal of Psychosexual Health* 19 (2021),*available at*: https://journals.sagepub.com/doi/full/10.1177/2631831820974585 (last visited on December 10, 2021).

[15]Atreyo Banerjee "Beyond Marriage: the role of Indian courts in upholding in-egalitarian access to protection for women" *The Leaflet,* Sep. 06, 2021, *available at*:https://theleaflet.in/beyond-marriage-the-role-of-indian-courts-in-upholding-in-egalitarian-access-to-protection-for-women/ (last visited on November 1, 2021).

matrimonial house and resultantly is obligated to abide by the canons of her new extended family and act accordingly, leaving behind her previous customs, traditions, and habits which she used to observe in her maiden home. This sort of matrimonial arrangement has been followed in India from ancient times but now in the modern changing world with increasing globalization women have got more exposed towards awareness of their rights, their personal choices, and their career; they are no more ready to tolerate themselves to be tied behind the shackle in the name of customs and traditions and as a consequence to which the rate of divorce is increasing due to clash of egos and incompatibility between the couple and among the families.

Though there could be several other reasons also behind the incompatibility between the couple ranging from troubling in-laws to financial problems, intimacy issues, abusive nature, and infertility of either of the spouse; all the issues result in separation of the couple which is another big task, involving emotional and financial drain of both the families and more of the couple as the procedure of divorce in India is very lengthy, painful and mentally torturing. Therefore, in order to escape themselves from the painful sufferings flowing out from the legal procedure of divorce in India, some couples nowadays prefer to opt for the live-in relationships to test their compatibility, which acts as a conclusive factor that determines whether marrying each other in the future will going to be a wise step for them or not.

Also, India is a profoundly customary society. Marriage is significantly more with regards to uniting the families and substantially less with regards to decision and satisfaction,[16] which leaves the Indian youth with minimal space for their personal and professional growth. Therefore, in such circumstances, a live-in relationship works as an easy option for them, because balancing a promising career and a highly demanding household at a time is difficult.

Therefore, in the light of the above-mentioned reasons for the popularity of live-in relationships in India, perceiving it, as an enemy to Indian marriage does not stand good, however, it could rather be called as an alternative to it as it accommodates itself more easily with the changing needs and demands of a progressive Indian society.

V. INDIAN SOCIETY TOWARDS A TRADITIONAL SHIFT

The influence of the west upon Indian society has also affected the structural pattern of the Indian family system, which in return has impacted upon the traditional arrangement of an

[16] *Supra* note 9 at 3.

Indian marriage in various ways[17].With the advent of economic globalization, industrialisation has paved the way for urbanisation, which ensued people to flee from their native places towards urban areas in search of better job opportunities, which gradually has eradicated the one roof system and simultaneously the joint family fashion got replaced with the new trend of a nuclear family.

With the growing popularity of the nuclear family system, the interdependency among the married couples and their elders got reduced enough to make the nuclear family an autonomous unit making it solely responsible for all its decisions including matrimonial affairs as well, which once only used to be dealt with by the elder members in the joint family. Therefore, the complete exclusion (however partial in some cases)of the elders from the Indian household has created barriers to the transmission of cultural, traditional, and moral values among generations.

India has been witnessing continuous structural and functional change with changing social norms of the society and with the advent of modernisation of the thoughts the old traditions related to marriage that used to be observed in the olden times are now very feeble in number. Due to the paucity of time in people's lives, the get-togethers before marriage which used to start a month before in the house has been reduced to the formal celebration of a couple of days and has diminished many such similar traditions related to Indian marriages that once use to be followed with keen interest by the people.

Living in a relationship is another identical-looking living arrangement like a nuclear family, in terms of intolerance towards the restrictions imposed by the elders. Couples in a live-in relationship most often live separately from their parents, either with or without their permission making themselves unbounded and carefree towards social responsibility to follow Indian customs and traditions, which is considered paramount in a marriage in India. An Indian married couple soon after the marriage are commonly expected to follow all the traditions of the family and are somewhere socially and psychologically bound to follow the same, failing which gives them the tag of being disrespectful and irresponsible. The situation reverses in the case of a live-in relationship because of the absence of marriage as Indian marriages comes with several implied conditions; therefore, live-in relationship in the

[17]ShashankMalviysa, "Influence of Western Culture on Indian Society" *Times of India*,Sept. 12, 2021,*available at*:https://timesofindia.indiatimes.com/readersblog/know-your-rights/influence-of-western-culture-on-indian-society-37332/ (lastvisited on September 16, 2021).

absence of any such marital knot does not restrict the parties to follow and abide by all the traditions of the family and the couple is independent to live according to their free will.

VI. ARE LIVE-IN RELATIONSHIPS DESTROYING THE SOCIAL FABRIC OF THE INDIAN SOCIETY

On the basis of the detailed discussion about the difference between the traits of marriage and live-in relationships, it can be concluded that live-in relationships are not directly propelling the institution of marriage towards extinction; it is however acting as an alternative way to cater to the needs of the changing society. Though it is becoming popular among Indian youth, still it is not abrogating the sanctity of marriage in society.

Every society has a certain organised framework and moral boundaries that weave the whole gamut of the social fabric of that particular society; and anything that trespasses such boundary is generally regarded as a destructor of the social infrastructure. Though India has a very vast and rich traditional history under which existed an organised social structure that has been witnessed weighing the societal norms from ancient times, even then such a design cannot be carried forward to do the same without any amendments to it. India is developing at a very fast pace and in lieu of the same the changing dynamics of the society cannot be overshadowed, therefore, in the light of drastically changing Indian society and its social norms it will not be incorrect to say that "what used to be felonious in the past is not a sin today".[18]

Thus, taking live-in relationships into consideration, it cannot be labelled as a mark of disgrace upon Indian society, nor it can be called as a device destroying the social fabric; it is just a new pattern of unmarried unification of the new Indian generation. Nonetheless, live-in relationships promote newer ideas of unmarried union; still, it cannot be given enough leverage to surpass the basic social norms of the Indian society. Based upon this notion, the High court of Allahabad in *Smt. Aneeta* v. *State of UP*[19]refused to give any protection to the couple who were in a live in relationship with each other believing it that doing so would amount to "directly giving assent to such illicit relations".[20]In the present case, the High Court of Allahabad was encountered with a situation under which a married lady left her husband who according to her was apathetic towards her, in order to live with her live-in

[18]*Revanasiddappa* v. *Mallikarjun*, AIR 2011 SC 2447.
[19]*Smt. Aneeta* v. *State of UP* (Writ C.No.14443/2021).
[20]*Ibid.*

partner.[21] She made a plea to the court asking for legal protection for them from her husband and in-laws as she claims that they are continuously threatening her and her partner and their life is in danger. The woman was married to her husband under the provision of Hindu Marriage Act, 1955, and was not yet divorced. The court while dismissing the petitionopined that even though she has been subjected to the unethical behaviour of her husband, it does not entitle her to stay with her live-in partners and maintain a live in relationship with him as she was still married to her husband and has not yet taken divorce from him. The High Court stated that:

> "No law-abiding citizen who is already married under the Hindu Marriage Act can seek protection of this Court for illicit relationship, which is not within the purview of social fabric of this country. The sanctity of marriage pre-supposes divorce. If she has any difference with her husband, she has first to move for getting separated from her spouse as per law applicable to the community if Hindu Law does not apply to her".[22]

The Division Bench of Justices Kaushal Jayendra Thaker and Subhash Chandra had observed in this case that, "directing the police to grant protection to them may indirectly give our assent to such illicit relations".[23]

Stating further the court mentioned that though article 21[24] of the Indian Constitution permits a person to have liberty over his/her choices, the same has to be practiced within the ambit of law and concluded with a closing statement that –

> "We make it clear that this Bench is not against live-in-relationship but is against illegal relations".[25]

The court felt that encouraging them by giving legal protection would be a direct violation of the prospects of marriage.[26]Therefore, in the instant case it was declared by the court that any live-in relationship during the period in which either of the partners is married and not

[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] The Constitution of India, art. 21("Protection of life and personal liberty- "No person shall be deprived of his life or personal liberty except according to procedure established by law").
[25] *Supra* note 20.
[26] The Legal Lock, "Live-in relationship a threat to country's social fabric?"*available at*:https://thelegallock.com/live-in-relationship-a-threat-to-countrys-social-fabric/(last visited on October 28, 2021).

divorced would directly harms the social fabric of the society as living into such union promotes adulterous acts and it is against the tenets of the Indian society.[27]

The High Court of Rajasthan, relying upon the orders of the Allahabad High Court in *Smt. Aneeta.* v. *State of UP*,[28]in its orders in the case of *Smt. Maya Devi* v. *State of Rajasthan*,[29] termed live-in relationship between a man and married women "illicit"[30]and dismissed the petition solely on the ground that such a union of a married woman and an unmarried man falls outside the boundary of morality.

In *Indira Sarma* v. *V.K.V Sarma*[31] the Supreme Court has demarcated five broad categories under which a live-in relationship could be recognised before the court, which are as follows:

i. Relationship between an adult male and an adult female both unmarried.
ii. Married man and an adult unmarried woman entered knowingly.
iii. An adult unmarried man and a married woman entered knowingly.
iv. An adult unmarried female and a married male entered knowingly.
v. Relationship between same sex partners.

However, in view of the public morality of the country, only the former guideline is often recognised by the Indian courts while the latter generally result in dismissals,[32]which could easily be deduced from the above-discussed orders of both Allahabad and Rajasthan High Courts respectively.

However, on the contrary, the Punjab and Haryana High Courtin *Paramjit Kaur* v. *State of Punjab*[33]has shown a complete disagreement from both the High Court of Allahabad and Rajasthan stating that it no offence would be constituted, if two adults consent to stay with each other in a live-in relationship even if either of them is married. In *Pradeep Singh* v. *State*

[27]Express News Service, "Allahabad High Court refuses to grant protection to a married woman in live in relationship" *The Indian Express*, June 18, 2021, *available at:*https://indianexpress.com/article/india/allahabad-high-court-refuses-to-grant-protection-to-married-woman-in-live-in-relationship-7364069/#:~:text=The%20Allahabad%20High%20Court%20has,of%20the%20Hindu%20Marriage%20Act. (last visited on October 2, 2021).
[28]*Supra* note 20.
[29]S.B. Criminal Miscellaneous (Petition) No. 3314/2021, decided on August 13, 2021.
[30]*Ibid.*
[31] (2013) 15 SCC 755.
[32]VivekSheoran and SumatiThusoo, "Why Indian In Live-In Relationships Must Be Wary Of Seeking Protection From Courts", *available at*: https://article-14.com/post/why-indians-in-live-in-relationships-must-be-wary-of-seeking-protection-from-courts-6141706a7aa1c (last visited on November 21, 2021).
[33]CRWP-7874 of 2021, decided on September 03, 2021.

of Haryana[34]the court once again stating in favour of the live-in relationships directed the state police of Haryana to provide with ample protection to the petitioners so that no harm could be inflicted upon both their lives and liberty.

In *Leela* v. *State of Rajasthan*[35]the Rajasthan High Court has given a dissenting opinion from its previous judgment. The court in the present case while dealing with the matter of providing legal protection to a live-in couple in which the female partner was already married to someone else, rescued the couple by providing legal protection to them. The court stated that the constitutional morality must be given supremacy over the public morality.[36] The court stated that-

> "When the right to life and liberty is guaranteed to convicted criminals of serious offences, there can be no reasonable nexus to not grant the same protection to those in a legal/illegal relationships"[37]

It was further added, Besides, upholding the principles of constitutional morality, there exists a parallel duty of the court to not infringe upon the personal relationship between two free-willed adults."[38]

> While deciding upon the present issue, Justice Pushpender Bhati stated:
>
> "In the context of the limited question this court is posed with, pertaining to the application of Article 21 of the Constitution of India, it is clear that the right to claim protection under this Article is a constitutional mandate upon the state and can be availed by all persons alike. There arises no question of this right to be waived off, even if the person seeking protection is guilty of an immoral, unlawful or illegal act".[39]

The court while refraining itself from commenting upon the morality of the live-in relationships remarked that-

[34]CRWP-4521-2021(O&M).
[35]Criminal Misc. (Pet.) No. 5045/2021.
[36]Ashok Bagriya, "Live-in couples can demand police protection to guard their right to life: Rajasthan High Court" *available at*: https://www.news9live.com/india/live-in-couples-can-demand-police-protection-to-guard-their-right-to-life-rajasthan-high-court-122080 (last visited on November 21, 2021).
[37]*Supra* note 36.
[38] *Ibid.*
[39]*Ibid.*

> "It is well-settled that it is not in the court's domain to intrude upon an individual's privacy. Any scrutiny or remark upon the so-called morality of an individual's relationship and blanket statements of condemnation especially in matters where it is not called into question, to begin with, would simply bolster an intrusion upon one's right to choice and condone acts of unwarranted moral policing by the society at large".[40]

The court's judgment in the instant case is in direct conflict with its previous judgment based upon the similar facts under which the protection to the live-in couple was not granted on the basis that a relationship between an unmarried man and a married woman is not permissible and cannot be termed as a live-in relationship in the "nature of marriage" which had certain prerequisites which were well laid in the landmark case of *D. Velusamy* v. *D. Patchaiammal*[41]as follows:

a) "The couple must hold themselves out to society as being akin to spouses.
b) They must be of legal age to marry.
c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time."[42]

In another instance, the High Court of Allahabad in the case of *Mohit Agarwal.* v. *State of U.P.*.[43],while recognising the live-in relationship between an unmarried man and a married woman has stated that:

> "Live-in relationships have become part and parcel of life and stand approved by the Honourableapex court. The live-in relationship is required to be viewed from the lens of personal autonomy arising out of the right to life guaranteed under Article 21 of the Constitution of India, rather than, notions of social morality."[44]

The court while making such a statement was of the opinion that the judiciary is not supposed to question the couple's decision to live-in together.

[40]*Ibid.*
[41] 2011 Cri LJ 320.
[42] *Ibid.*
[43]Criminal Misc. Writ Petition No. – 1479 of 2022.
[44]*Ibid.*

Therefore, in the presence of the above contrasting decisions of the various High courts, it would be hard to rule out whether live-in relationships are truly undermining the basic tenets of social morality and destroying the cultural and social values of the Indian society in a true sense.

VII. CONCLUSION

As discussed above, there are several reasons that incline the present society towards opting for unmarried cohabitation over traditional marriage, and simultaneously the fact that time never stops cannot be falsified, therefore, the change is also inevitable. It would be grossly incorrect to say that the advancement in both the technological and social spheres has toppled Indian society. Also criticising the radical change brought to the Indian society due to the influence of western civilisation would not be correct as a transformation of the society is imperatively needed in order to save it from getting stuck in a stagnant situation where progress develops at a very low pace.

Though it is partly true that with the adoption of live-in relationships, a considerable portion of the Indian culture has been altered but it is just a reflection of the change, which is nothing but the demand of the changing social norms of the Indian society.

It cannot be called to be the one blitzing upon the well-established institution of marriage rather it could either be called as either a prelude or an alternative to it. As far as the benefits arising out of a live-in relationship are concerned, it cannot be called beneficial in a generalised manner as different people in India perceives it differently. As the society at large has not given acceptance to this new kind of relation forming process, it works both as a boon and a curse for different people at the same time. However, it cannot be denied that live-in relationships are becoming an integral part of the Indian society. Therefore, they should be channelized in such a way efficient enough to make them adjust swiftly within the society. This could not take place in the absence of particular legislation with regard to their proper regulation and redressal mechanism. Also, it is difficult to synchronise them in the shades of varying judgments with regard to their moral standing in society. Thus, it is suggestive that the Honourable Supreme Court should come to the forefront and conclusively determine its social position in the Indian society.

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A STUDY ON THE VALIDITY OF AUTONOMY UNDER THE SIXTH SCHEDULE TO THE CONSTITUTION OF INDIA

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ABSTRACT

The Constitution of India under its Sixth Schedule has provided local autonomy of governance and administration of justice in conformity with the tribal traditions, customs and usages of the North Eastern region. Such autonomy has been legally recognized since the colonial period. However, in contemporary times with the growth of society and exposure of the region to the outside world, such protective Constitutional provisions are challenged as ultra vires fundamental provisions of the Constitution and other enactments of the Parliament. This paper thus endeavours to examine the validity of the Sixth Schedule and the laws enacted by virtue of its provisions in the light of judicial pronouncements and conclude with a balancing test of the Sixth Schedule with fundamental provisions of the Constitution and other laws.

I. INTRODUCTION

The Sixth Schedule to the Constitution of India is a special feature of the Constitution of India depicting the utmost sensitivity of the founding fathers of the Constitution of India towards the special needs of the tribal people of the North Eastern (NE) region. The Sixth Schedule is an exceptional federal feature of the Indian Constitution that gathers to the grassroots of village customary administration bringing the common man to the centre of governance, policy making and administration of justice. The Sixth Schedule provides autonomy in local governance like allotment or occupation of land, social customs, etc., administration of justice, constitution of village councils or courts, trial of cases or suits, establishment of primary schools, collection of revenue and imposition of tax, grant of licences for extraction of minerals and regulations for money landing and trading by non-tribals[1] in accordance with the local practices independent of the technical statutory laws enforced in other parts of the country. It thus provides absolute protection of the tribal customs and usages in all branches of local governance and administration of justice. The autonomy of the NE has been recognized by Constitution of India by constituting Autonomous District Councils (ADCs), Regional Councils, village councils and courts[2] for

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[1] *See* the Sixth Schedule to the Constitution of India, Paragraphs 3, 4, 5, 6, 8, 9 & 10 respectively.

[2] *Ibid* at Paragraphs 1, 2, & 4(1).

governance and administration of justice respectively.[3] The ADCs and Regional Councils have been given the power to collect revenues, make laws and impose taxes as per their respective customs and practices.[4] The NE region though constitutes only about eight percent of the total areas of country; it occupies a significant position in the cultural assets, biological resources and frontier policy of the nation. The colonial administrators to protect these indigenous assets has kept the region under a non-interference policy and enacted laws accordingly keeping the region away from the general laws enforced in other parts of British India. Post the Indian independence, the Constitution Assembly adopted the Sixth Schedule which was akin to the colonial period. A study of the legal, political and socio-cultural history of the region shows the circumstances that led to adoption of this special feature under the Constitution. However, laws enacted by virtue of the powers under the Sixth Schedule may in some cases conflict or appear repugnant to the some fundamental provisions of the Constitution and other laws enacted by the parliament. Thus, this paper endeavours to study the validity of the provisions of the Sixth Schedule and the laws enacted by such autonomous institutions in the light of judicial rulings. To comprehend the validity of the provisions of the Sixth Schedule, an understanding of the colonial enactments and the vision of the framers of the Constitution of India is indispensable. Hence, this paper endeavours to explore and study the history of colonial enactments and the circumstances leading to the adoption of the Sixth Schedule by the Constituent Assembly.

II. A Background Study on The Colonial Legislation

The colonial administration in the NE region for the purpose of a legal study may be broadly classified into three stages. The first stage is the period from where the region was administered from Bengal. The second stage is the period after the formation of the Commissionership of Assam and the third is the period of constitutional reforms.

[3] There are two types of Autonomous District Council (ADC) in the NE region. One constituted under the Sixth Schedule and the other by the respective state legislation. Bodoland Territorial Council, DimaHasao ADC (Cachar), Karbi Anglong ADC, Khasi Hills ADC, Garo Hills ADC, Jaintia Hills ADC, Chakma ADC, Lai ADC, Mara ADC and Tripura Tribal Areas ADC are the ones constituted by the Sixth Schedule. Churachandpur ADC, Chandel ADC, Tamelong ADC, Missing ADC, Deori ADC, SonowalKachari ADC, RabhaHasong ADC, etc. are constituted by the respective state legislation.

[4] The power to make laws in the fields of land, forest (not being reserved forest), water course for agriculture, Jhum cultivation, village councils, town committees, inheritance of property, marriage & divorce, appointment & succession of Chiefs or Headman, social customs, etc. by virtue of clause (1) of Paragraph 3 of the Sixth Schedule. The power to collect revenue and impose tax in the field of taxes on land & buildings, tolls on persons, professions, trades, callings, employments, animals, boats, vehicles, entry of goods, maintenances of roads, schools, dispensaries, etc. by virtue of Paragraph 8 of the Schedule.

First Stage: Administration from Bengal

In the NE region, every tribe was composed of independent villages. The Chief or the Headman ruled the village according to their respective customs and usages. The customs and usages in administration and policy making were diverse. One finds this diversity among the villages of the same tribe. However, after the Dewany of Bengal was handed over to the British by the Mughals[5] the administrative system underwent changes, the footprints of which can be seen in the contemporary legislations. To avoid technical procedures of law in administration of justice, Regulation X of 1822centralized all the powers of government in the Civil Commissioner who was empowered to act independently subject only to the orders and directions of the Governor General in Council. This system of administration was called "Non-Regulated" system. By virtue of the said Regulation[6] a new administrative unit called North-East Rangpur was carved out and placed it under the Civil Commissioner. The reason for giving wide powers to the Civil Commissioner was for administrative convenience of the Britishers to conclude agreements with the Chiefs and Headman of the tribes unhampered by the lengthy technical administrative and legislative procedures unknown to the tribal people. Thus, on one hand such legislation was shown to be simple and friendly to the tribal people, however on the other hand, it was for easy and speedy realization of the colonial ambitions in the NE region. Thus, the Non-Regulated system laid the genesis of a plural system of administration giving autonomy to the local people in internal affairs while the management of external economic, political and foreign affairs were with the Britishers.

Couple of decades post the Non-Regulated system, by virtue of the Government of India Act, 1854 the erstwhile territories of Assam, *viz*., Kamrup, Darrang, Sibsagar, Nowgong, Garo Hills, Lakhimpur, Khasi and Jaintia Hills, Naga Hills, Cachar and Goalpara were brought under the immediate authority and management of the Governor General in Council.[7]However, the legality of law making powers delegated to the Governor General in Council was seriously questioned.[8] Therefore, the Indian Councils Act, 1861 (hereinafter the Act of 1861) was passed to give retrospective effect to enacted laws and supplement the law making power of the Governor General in Council by laying down that for peace and good government in the Non-regulated areas, the Governor of the presidencies was empowered to make laws and regulations and also to amend or repeal any laws and regulations made prior

[5] The Dewany of Bengal was given to the Sir Robert Clive in 1765 by the Shah Alam.
[6] Regulation X of 1822, Rule III.
[7] P. Chakraborty, *Fifth & Sixth Schedule to the Constitution of India* 1 (Capital Law House, Delhi, 2005).
[8] B.L. Hansaria, *Sixth Schedule to the Constitution of India* 2 (Universal Law Publishing, New Delhi, 3rd Edition, 2011).

to the Act of 1861.[9]The purpose of delegating such wide powers was to take executive as well as legislative decision immediately in the exigency of the situation. The vesting of such powers under a single organ was termed by the British Parliament "for peace and good government" an exception to the general principle of separation of powers, which was indispensable for the peaceful and inexpensive administration of the NE region of India.

By virtue of Section 3 of the Garo Hills Act, 1869, (hereinafter referred to as the Act of 1869) the Regulation X of 1822 and its Non-Regulated system were repealed and administration of the Garo Hills and East of Khasi Hills were put under the management of the Lieutenant Governor and its officers. The Act of 1869 removed the application of civil and criminal judicature from the said areas and delegated the powers of administration of justice to officers appointed by the Lieutenant Governor.[10] Thus, disputes were settled in accordance with the customs and usages of the respective tribes. A customary institution subject to the supervision of the British officer was established where revenues were collected by the village Chief and Headman. The disputes between individuals or villages were also settled by the Chiefs and Headman in accordance with customs, however under the watch of the British officer. The practice of involving the Chiefs and Headman in the administration and settlement of disputes made the colonial officers regulate and control the tribal people smoothly. This practice gradually developed into the customary institution of *Gaonburas*[11]and *Dobhasis*[12] in the NE region, which efficiently helped the colonial administration and continued in the present days.

Section 9 of the Act of 1869 empowered the Lieutenant Governor to extend the application of the Act to the Naga Hills and the Jaintia Hills by notification in the Gazette. By a Notification in Gazette of Calcutta[13] the Lieutenant Governor extended the application of the provisions of

[9] The Indian Councils Act, 1861, ss. 25 & 42.
[10] The Garo Hills Act, 1869, s. 4.
[11]Gaonbura is a Hindi-Assamese word. The word "Gaon" in Hindi means village. "Bura" in Assamese means old man. Thus, Gaonbura means old man of the village or village elder. In the villages of the North East, the elderly men are respected by all the villagers for their wisdom and knowledge. The final words in policy making, settlement of disputes or in any matters of the village are with the Gaonbura of the village.
Also *See*, Ngaopunii Trichao Thomas and Poukho Stephen, "The Dynamics And Politics Of Self-Governance Among Poumai Naga In Senapati District" 3(3) *Journal Of Tribal Intellectual Collective India* 66-83 (2016); MoatoshiAo, *A Treatise on Customary and Fundamental Laws of the Nagas in Nagaland* 140-144 (Notion Press, Chennai, 2019); A Handbook on Gaon Buras & Panchayati Raj Leaders, available at: https://www.arunachalpwd.org/pdf/Hand%20Book%20for%20Gaon%20Burahs.pdf (last visited on January 20, 2022).
[12] The word "Dobhasi" originated from Hindi-Assamese word. "Do" means two and "bhasha" means language. Thus, Dobhasi means a person who knows two languages, i.e., the local language and English. The Dobhasis were appointed by the British officers as interpreters to help the communicate with the tribal villagers.
[13] Notification Dated 14th October, 1871.

the Act of 1869 in the Jaintia and Cossyah Hills. The Notification also directed that the Commissioner of the province of Assam would exercise the powers of the High Court in all civil and criminal cases. The delegation of powers under the Act was challenged in *Empress* v. *Burah & Book Singh*[14] as excess delegation of the powers of the Governor General in Council. In this case Mr. Burah and Mr. Book Singh were convicted of murder and sentenced to death by the Deputy Commissioner of Jaintia and Cossyah Hills. On appeal before the Chief Commissioner of Assam, the sentence was commuted to transportation for life. The Calcutta High Court held that such delegation of judicial powers was in excess. The Privy Council reversing the Calcutta High Court judgementheld that:

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."[15]

With the ruling of the Privy Council in *Her Majesty The Queen* v. *Burah*[16]the jurisprudence of application of established law and the separation theory as enforced in other parts of the country was excluded in the NE region by providing the plenary powers of legislation to the Indian legislature. To make administration simple to the understanding of the hill tribes which otherwise would impede the tea business of the British in Assam, the isolation of the region from the general laws as indispensable. To prevent the hill tribes from constant attacks for hunting head of the British subjects in the tea gardens was a humongous task for the British. It was military and financial drain on the British. Thus, to conclude peaceful agreement of not interfering in each other's affairs and territory, the only non-costly solution was to isolate the tribes by leaving them alone in the management of their own affairs.

Notwithstanding, the autonomy given to the hill tribes with a hope to end the headhunting of British subjects, but the savage act of the hill tribes continued, intolerable to the colonial officers. The headhunting was an act of valor to the men of the hill tribes. A man was recognized in the society by the number of heads he hunted.[17] To the men of the hill tribes, the heads were an accolade, every head he hunted adds to his position and popularity. Thus, in the midst of the conflicting civilization, the Britishers were left with no option but to take

[14]ILR (1878) 3 Cal 64.
[15]*Her Majesty The Queen* v. *Burah*, L.R. (1878) 5 I.A. 178; 5 M.I.A. 178.
[16]*Ibid*.
[17] Almost all the hill tribes of the region practiced headhunting.

the whole of Assam and her neighbouring hilly tracts under the control and management of a strong and experienced officer to tame the aggressive and unrelenting tribes. Thus, on the 6th of February, 1874,[18] Assam was taken out from the jurisdiction of the Lt. Governor of Bengal by forming a separate province under the control of a Chief Commissioner. By virtue of Section 3of the Scheduled District Act, 1874 (hereinafter referred to as the Act) the entire territory of the Chief Commissionership of Assam was notified as a scheduled district.[19] By virtue of Section 1 of the Act, the North Lushai Hills, the South Lushai Hills and the Mokokchung sub-division of Naga Hills District were notified[20] that the provisions of the Government of India Act, 1870 (33 Victoria, Chapter 3), section 1, to be applicable. However, in 1898, by a Notification[21] the North Lushai Hills and the South LushaiHills together with Ruttaon Puiya's villages including Demagiri in the Chittahong Hill tracts were placed under the administration of the Chief Commissioner of Assam as a part of scheduled district of Assam under Section 3 of the Act. Thus, the entire NE region was brought under the Act, and by virtue of Sections 3, 5 and 5A the local government were empowered to declare which enactments were to be applied in the district or any part of the district. The Act recognized the diversity of the tribes of the region and their customs and usages. The Chiefs and Headman were given magisterial powers in administration of justice in accordance with their customs. Post the Indian independence, underlining the importance of the Scheduled District Act, 1874 in the legislative history of the NE region, in the case of *State of Nagaland* v. *Ratan Singh*,[22] the Supreme Court observed:

> "We must not forget that the Scheduled Districts Act was passed because the backward tracts were never brought within the operation of all the general Acts and Regulations. particularly the Criminal Procedure Code, and were removed from the operation and jurisdiction of the ordinary courts of Judicature….The local Governments were empowered by the Scheduled Districts Act to appoint officers to administer civil and criminal justice and to regulate the procedure…Regulating procedure, therefore, meant more than framing administrative rules. It meant the control of the procedure for the effective administration of justice."[23]

[18] Government of India, Home Department Proclamation No. 379, dated the 6th February, 1874.
[19] Government of India, Home Department Proclamation No. 380, dated the 6th February, 1874.
[20] These territories were declared by virtue of Resolutions passed by the Secretary of State for India in council under the third paragraph of Section 1 of the Scheduled District Act, 1874. Thus, for the North Lushai Hills and the South Lushai Hills the Resolution took effect from 6th September, 1895 and for the Mokokchung sub-division of Naga Hills District the Resolution took effect from 21st October, 1896.
[21] By Notification No. 591 S.B., dated 1st April, 1898.
[22] AIR 1967 SC 212; 1967 CriLJ 264.
[23] *Ibid* at Para 29.

The Second Stage: Administration during the Commissionership of Assam

The administrative changes introduced by the Scheduled District Act, 1874 could not bring a desired result and therefore the Assam Frontier Tracts Regulation, 1880 was passed to remove the frontier tracts inhabited by barbarous or semi civilized tribes from the operation of enactments enforced therein.[24] The Chief Commissioner of Assam was empowered to remove any law enforce in any part of province unsuitable to the tribal inhabitants.[25] Further, to clarify the doubt as to the extension of the Garo Hills Act, 1869 to Naga Hills, Khasi Hills and Jaintia Hills the Assam Frontier Tracts Regulation, 1880 was amended which empowered the Chief Commissioner to extend the Act (Assam Frontier Tracts Regulation, 1880) to Garo Hills, Khasi Hills, Jaintia Hills, Naga Hills and Nowgong District.[26] The first paragraph read with Section 1(2) of the Assam Frontier Tracts Regulation, 1884 removed the application of the Code of Criminal Procedure (CrPC) from the Garo Hills District, Khasi Hills District, Jaintia Hills District and Naga Hills District and further laid down that the CrPC shall be deemed never been enforced in these districts.

The Third Stage: Constitutional Reforms

The Montagu-Chelmsford Reforms reported in 1918 that "political reforms could not be applied to these areas whose people are primitive and there was no material on which to found political institutions"[27] and therefore suggested that these areas should be administered by the Governor directly. Thus, to incorporate the recommendation of the Montagu-Chelmsford Reforms, the Government of India Act 1915 was amended in 1919. The Government of India Act, 1919 inserted Section 52A in the Government of India Act, 1915. Clause (2) of Section 52A of the Act provided that the Governor General in Council may declare any territory in British India as 'Backward' and no Act of the Indian legislature shall apply to the backward areas or part thereof. Thus, by virtue of the provision[28] the nomenclature of "under-developed tracts" was changed to "Backward Tracts" and nine territories of the NE region were notified as Backward Tracts, namely, the Garo Hills District; the British portions of the Khasi & Jaintia Hills District other than the Shillong

[24] *See* preamble to the Assam Frontier Tracts Regulation, 1880.
[25] By virtue of Sections 1 and 2 of the Assam Frontier Tracts Regulation, 1880 the Chief Commissioner was empowered to remove any enactments from any part of his province by notification in the Local Gazette unsuitable to the tribal people. However, for the European British subjects the criminal jurisdiction of any court would remain unaffected. Thus, two sets of law were enforced, one for the tribes and other for the British subjects.
[26] The Assam Frontier Tracts Regulation, 1884, ss. 1(1)&(2).
[27] *Supra* note 7 at 4.
[28] The Government of India Act, 1919, s. 52A(2).

Municipality and Cantonment; the Mikir Hills (in Nowgong&Sibsagar Districts); the North Cachar Hills (in Cachar District); the Naga Hills District; the Lushai Hills District; the Sadiya Frontier Tract; the Balipara, Frontier Tract, and the Lakhimpur Frontier Tract.[29] These territories post the Indian independence were designated as Tribal Areas under Part-A and Part-B of the table appended to Paragraph 20 of the Sixth Schedule to the Constitution of India (as first enacted).

In the constitutional reforms of 1930-35the Indian Statutory Commission (Simon Commission) recommended that the tribal areas should be excluded from the constitutional reforms and arrangements. The Simon Commission reported "the stage of development reached by the inhabitants of these areas prevents the possibility of applying to the methods of representation adopted elsewhere. They do not ask self-determination but for security of land tenure in the pursuit of their traditional methods of livelihood and the reasonable exercise of their ancestral customs."[30] The Commission also recommended replacing the word "Backward" to "*Excluded Areas* - Excluded and Partially Excluded Areas". To Sir John Simon the word "Backward" was nauseating while to Mr. Cadogan it was "misleading".[31] The Commission recommended that these areas should be the responsibility of the central government and should use non-political offices of the Governor as agents to administer these tribal areas. The recommendations of the Simon Commission were not fully adopted in the constitutional reforms of 1935 (the Government of India Act, 1935). However, in pursuance of the Simon Commission recommendations, a separate chapter (Part-III, Chapter-V) was adopted in the Government of India Act, 1935 dedicating to the backward tracts. The Government of India Act, 1935 (hereinafter the Act of 1935) removed the terminology of "Backward" and replaced with "Excluded and Partially Excluded Areas" and provided that no Act of the Federal Legislature or the Provincial Legislature would apply unless the Governor by a notification so declares.[32] Though declaration of the Excluded and Partially Excluded Areas was vested with His Majesty in Council but the preparation of the draft was with secretary of state.[33] Further, the Governor was given the power to make regulations and to amend or repeal any laws of the Federal Legislature or the Provincial Legislature for the

[29] These nine territories were declared as Backward Tracts vide Notification No. 5-G dated the 3rd January, 1921.
[30] The Indian Statutory Commission, *Report of the Indian Statutory Commission Volume II, Part-III*, His Majesty's Stationery Office, London (1930), Paragraph 128.
[31] *Hansard*HC Deb. Vol. 301, Cols. 1347, 10 May 1935.
[32] The Government of India Act, 1935, s. 92(1).
[33] *Ibid* at s. 91.

peace and good governance.[34] Thus, the executive had strong hand in the declaration of any area as Excluded and Partially Excluded Areas and to make regulations for the administration of the area. By virtue of Section 91(1) of the Act of 1935, His Majesty in Council by an Order[35] on 3rd March, 1936 declared the North-East Frontier (Sadiya, Balipara and Lakhimpur) Tracts, the Naga Hills District, the Lushai Hills District, the North Cachar Hills Sub-division of the Cachar District and the North-West Frontier as Excluded Areas. By the same Order the Garo Hills District, the Mikir Hills (in the Nowgong and Sibsagr District) and the British portion of Khasi and Jaintia Hills District (other than the Shillong Municipality and Cantonment) were declared as Partially Excluded Areas. This arrangement of Excluded and Partially Excluded Areas under the Government of India Act, 1935 continued until the adoption of the Constitution of India. The Governor was given the power to exercise his functions in his discretion in the Excluded Areas by virtue of Section 92(3) of the Act of 1935. Thus, Sadiya, Balipara, Lakhimpur, Naga Hills District, Lushai Hills District, North Cachar Hills and the North-West Frontier were administered by the Governor in his discretion.

The doctrine of peace and good governance introduced by the Government of India Act, 1853 and validated by the Indian Councils Act, 1861 continued until the Government of India Act, 1935. This arrangement of giving wide legislative, executive and judicial powers to the Governor and his subordinate officer in the name of peace and good governance continued until the Sixth Schedule to the Constitution of India was adopted.

III. THE NORTH-EAST FRONTIER (ASSAM) TRIBAL AND EXCLUDED AREAS SUB-COMMITTEE

The Advisory Committee on Fundamental Rights, Minorities, Tribal and Excluded Areas (herein after the Advisory Committee) constituted in pursuance of Paragraph 20 of the Cabinet Mission's Statement of May 16, 1946[36] further constituted a sub-committee called "the North-East Frontier (Assam) Tribal and Excluded Areas Sub-Committee"[37] (herein after

[34] *Id*., at s. 92(2).
[35] The Government of India (Excluded and Partially Excluded Areas) Order, 1936 at the Court of at Buckingham Palace, the 3rd day of March, 1936.
[36] *Hansard* HL Debates 16 May 1946, vol. 141 cc271-87 *available at*: https://api.parliament.uk/historic-hansard/lords/1946/may/16/india-statement-by-the-cabinet-mission (last visited on January 25, 2022).
[37] The Sub-Committee was composed of Shri Gopinath Bardoloi as the Chairman and Rev. J.J.M. Nichols Roy, Shri Rup Nath Brahma, Shri A.V. Thakkar and Shri AlibaImti were the members. Shri R. K. Ramadhyani, *I.C.S.*

the Sub-Committee) also known as the Bardoloi Committee under the Chairman of Shri Gopinath Bardoloi on 27th February, 1947. The Sub-Committee toured the entire province of Assam and submitted its report to the Advisory Committee on 28th July 1947. The Sub-Committee however could not visit Garo Hills District and Jowai sub-division of the Khasi Hill District due bad weather and difficult communications.[38] The Sub-Committee prepared the Report after visiting the district headquarters where they met representatives of the tribes. The Sub-Committee also met various political organizations and recorded their views. Except AlibaImti[39] the Report was signed by Shri G.N. Bardoloi, Rev. J.J.M. Nichols Roy, Shri Rup Nath Brahma and Shri A.V. Thakkar. Shri Kezeholco-opted member from the Kohima area resigned during the final meeting at Shillong.[40] Some of the important recommendations of the Sub-Committee to the Advisory Committee for the administration of the NE region are:

- To set up District Councils with powers of legislation over occupation or use of land other than reserved forest under the Assam Forest Regulation of 1891.
- Social law and customs to be regulated by the tribes. Cr.P.C not to apply and Civil suits to be disposed by tribal courts and local councils;
- Mineral resources to be managed by Provincial Government with right of District Council to a fair share in revenue. No license to be granted without consultation with District Council;
- Constitution of Regional Councils for tribes;
- Non-tribals not eligible for election except in the Municipality and Cantonment of Shillong;
- A Commission to watch the progress of development plan and examine aspects of the administration;
- Alteration of boundaries to bring the same tribe under a common administration;
- Management of primary schools, dispensaries and other institutions of local-self government by the District Council;
- Selection of non-tribal officials with care if posted to the hills;

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was the Secretary. The Sub-Committee also co-opted two members each from Lushai Hills, Garo Hills, Mikir Hills, Kohima Area, Haflong Area, Khasi and Jaintia Hills.

[38]Gopinath Bardoloi to the Chairman of the Advisory Committee on Fundamental Rights, Minorities, Tribal and Excluded Areas, 28th July, 1947, Constituent Assembly of India, North-East Frontier (Assam) Tribal and Excluded Areas Sub-Committee, Vol. 1, Government of India Press, New Delhi (1947), P. 1.

[39]AlibaImti could not sign the Report due to threat from the Naga underground extremists.

[40]*Supra* Note 38.

- Power of the Governor to set aside any Act or Resolution of the Council if safety of the country is prejudiced. Also to dissolve the Council if gross mismanagement is reported by a Commission.[41]

The Sub-Committee in its report also recommended some special features to be considered in the administration of the region. Some of them are:

- Preservation and protection of distinct social customs, tribal organisations, religious beliefs, etc. Eg. the Khasi and Garo matriarchal system, like the youngest daughter inherit mother's property, the hereditary chiefs of Lushai tribe where the youngest son inherit father's property, and the Tatar system of the Ao Naga tribe;
- The continuance of Inner Line Permit due to the fear of exploitation by the people of the plains on account of their superior organisation and experience of business;
- Non-establishment of industries by non-tribals;
- Preservation of ways of life and language, and method of cultivation etc.
- Transfer of government entirely in the hands of Hill people and suitable financial provisions conferred upon the local councils.[42]

Owing to the view of the External Affairs Department that the Lakhimpur Tract need not be considered similar to the problem of the hill tribes, the Sub-Committee also recommended that the tribal areas of Lakhimpur Frontier Tract inhibited FakialsBuddhist villages should be brought under the regular administered area.[43] Similarly, the Saiknoagbat portion of the excluded area south of the Lohitriver and the whole of the Sadiya plains up to the Inner Line should be included in the regular administration.[44] The Sub-Committee also proposed for seat of the Hill tribes in the Federal Legislature in accordance with Section 13 of the Draft Union Constitution.[45]

[41] *See* the Government of India, "Constituent Assembly of India, North-East Frontier (Assam) Tribal and Excluded Areas Sub-Committee (Report)" 35-38, (Vol. 1, Government of India Press, New Delhi, 1947).
[42] *Ibid* at 7-19.
[43] *Id.*
[44] *Id.*
[45] *Id.*

IV. THE VISION AND DEBATES OF THE CONSTITUENT ASSEMBLY

The Advisory Committee discussed the Report and Recommendations of the Sub-Committee on 7th December, 1947 and 24th February, 1948. The Advisory Committee on 4th March, 1948 forwarded the draft to the Constituent Assembly with only two amendments.[46] The Constituent Assembly debated the draft of the Sixth Schedule to the Constitution of India for three days (5th, 6th and 7th September, 1949). Many members of the Constituent Assembly opposed the autonomy given to the Hill tribes. On the first day of the introduction of the draft of the Sixth Schedule, Shri Kuladhar Chaliha objected to the constitution of a Commission proposed by the Sub-committee. Requesting to delete the provision, he said, "I do not want a Commission. The Governor would have the power in consultation with his Cabinet to discuss these things and if it is be left to a Commission there will be obvious delay."[47] Shri Brajeshwar Prasad opposed the handing over of the administration of the tribal areas to the provincial government. To him these tribal areas are surrounded by six foreign states and the Government of Assam was unable to tackle the problem of infiltration from East Bengal (Bangladesh) and also the conflict between the tribals and non-tribals, therefore it is a militarily in the interest of the Government and strategically and politically advisable that the administration of the province should be left to the experts and no politicians should be allowed to meddle with its affairs.[48] Further, according to him the matter was too complicated and large beyond the economic resources of the Government of Assam to tackle the problem.

On the second day (6th September, 1949), objecting to the autonomy given to the District Council in administration of the district, Shri Kuladhar Chaliha expressed the fear that the Nagasdoes the old ways doing summary justice and if permitted to run the administration, it would be negation of justice and anarchy would prevail. He thus said, "They have not been able to chop off our heads for the last three thousand years and till 1948 they have not been able to do anything, and we are not afraid that they will chop off our head if they are not given independence of administration... There is no need to keep any Tribalstan away from us

[46] The amendments made by the Advisory Committee were:
(1) The Assam High Court shall have power of revision in cases where there is failure of justice or where the authority exercised by the District Court is without jurisdiction.
(2) The plains portion were to be excluded from Schedule 'B' of the areas which were recommended for inclusion in the Schedule by the Sub-Committee.

[47] IX, *Constituent Assembly Debates* 1005 (LokSabha Secretariat, New Delhi, Sixth Reprint, 2014).

[48] *Ibid* at 1006.

so that in times of trouble they will be helpful to our enemies."[49] Supporting Shri Chaliha, Shri Brajeshwar Prasad added that he is opposed to division of India into provinces. He opposed to the constitution of District Councils and Regional Councils. To him "it will lead to the creation of another Pakistan."[50] Therefore, he said, "I will not jeopardise the interest of India at the altar of the tribals...It led to the vivisection of India, arson, loot, murder and the worst crimes upon women and children…We are jeopardising the interests of the whole country. This is not a question in which the people of Assam only are concerned. This is a question which affects the whole of India."[51]

Prof. Shibban LalSaksena expressed the fear that if such schemes and provisions are added permanently in the Constitution than some areas of Assam would remain beyond the control of the Parliament forever. He therefore suggested that ten years, fifteen years or a fixed period should be given and added in the Constitution and after which the tribal people would be absorbed and the Scheduled Areas will not be necessary but become part of the normal population in the Province of Assam.[52]

Accusing Shri Gopinath Bardoloi and Rev. J.J.M. Nichols Roy, Shri Rohini Kumar Chaudhury said that even they do not know the tribal people well and have not visited the entire tribal areas; it was the British that kept the tribal people of these areas as primitive as possible.[53] He told the Assembly, "The British wanted the Nagas to remain as they were, they should not clothe themselves properly; they should not live like civilised men."[54] Further, Shri Rohini Kumar Chaudhury challenging the knowledge of Dr. Ambedkar and that this matter should be handled by some other expert, he said:

> "I do most regretfully observe that what Dr. Ambedkar is doing in regard to this Schedule VI is that he is closely, absolutely closely, following, except in some cases, the British method. He is wanting to perpetuate the British method so far as the tribal areas are concerned. This action on his part is due more to ignorance than to intention. I would therefore respectfully submit to this House not to be impatient, to reconsider the whole question in its proper perspective. Let this Constitution about the tribal areas be worked out by persons who have a direct and intimate knowledge of the affairs in the tribal areas. None of these persons, I assert with all the emphasis that I can command, neither my honorable friend Mr. Munshi, neither Dr. Ambedkar, nor my honourable friend the Premier of Assam, have any intimate knowledge of the affairs going on in the tribal areas."[55]

[49] *Id.* at 1009-1010.
[50] *Id.* at 1011.
[51] *Id.* at 1011-1012.
[52] *Id.* at 1015.
[53] *Id.* at 1015-1016.
[54] *Ibid.*
[55] *Id.* at 1016-1017.

Shri Lakshminarayan Sahu who was working for the Kangh tribe of Orissa supported the protection provided in ownership and transfer of lands by stating that "We have got a similar law in Orissa and we wish that none should be able to take away land from the aboriginals since they do not understand their own economic interest."[56] He also agreed with the view expressed by Prof. Shibban Lal Saksena of giving ten or fifteen years. To him by doing so the hill tribes would be able to bring in line with the rest of the nation and after ten years they should not be left aloof but bring them into the main fold. In addition to views of Lakshminarayan and Prof. Shibban and to confront the criticism leveled against the Sub-Committee, Shri Jaipal Singh said it was useless to discuss the motives of the British, for it would serve no purposeas the matter is in the hands of the Constituent Assembly. Further, it does no good to anyone to suspect the intentions of the tribal people of Assam. He thus questioned the Assembly, "Do my friends believe that the Naga is not a man of his word? Do they mean that the people of the Lushai Hills are trying to deceive us? What do they mean? There is the definite understanding between the leaders and the Tribal Sub-Committee that went round the place. Then why this doubt?"[57]

Answering to the fear expressed by the members for giving autonomy to tribal areas, the Sub-Committee member, Shri A.V. Thakkar said that there is no reason to fear, for the autonomous districts were not making states within the states and it was not permanent. He further added that all laws are changeable and can be changed when the time is ripe for it.[58] Rev. J.J.M. Nichols Roy adding to the words of Shri A.V. Thakkar, explained the cultural difference of the Hill tribes stating that they eat both pork and beef and therefore are neither Hindus nor Muslims. Their culture is sharply different from the plains and the social organization is the village, the clan and the tribe. The society is strongly democratic and there is no caste or purdah and child marriage. He questioned the members of the Assembly, "Why should you deprive the people of the thing which they consider to be good and which does not hurt anybody on earth? It does not hurt India. Why do you not want them to develop themselves in their own way? The Gandhian principle is to encourage village panchayats in

[56] *Id.* at 1018.
[57] *Id.* at 1019.
[58] *Id.* at 1022.

the whole of India. Why then should anyone object to the establishment of the district councils demanded by the hills people?"[59]

The debate on the Sixth Schedule went on for longer than anticipated and therefore Shri H.V. Kamath requested to postpone the session to a more propitious day. Upon this, the President of the Constituent Assembly requested Dr. B.R. Ambedkar to reply. First of all, Dr. B.R. Ambedkar stated that the time was wasted on issues not concerned with the Sixth Schedule. Justifying the need of giving a different treatment and scheme of law for the Hill tribes of the NE region, Dr. B.R. Ambedkar addressed the Assembly in these words:

> "The tribal people in areas other than Assam are more or less Hinduised, more or less assimilated with the civilization and culture of the majority of the people in whose midst they live. With regard to the tribals in Assam that is not the case. Their roots are still in their own civilization and their own culture. They have not adopted, mainly or in a large part, either the modes or the manners of the Hindus who surround them. Their laws of inheritance, their laws of marriage, customs and so on are quite different from that of the Hindus."[60]

Further, explaining the Constituent Assembly, the scheme of the Sixth Schedule which is analogous to the federal autonomy given to the Red Indians in the United States of America, Dr. B.R. Ambedkar stated:

> "Now, what did the United States do with regard to the Red Indians? So far as I am aware, what they did was to create what are called Reservations, or Boundaries within which the Red Indians lived. They are a republic by themselves. No doubt, by the law of the United States they are citizens of the United States. But that is only a nominal allegiance to the Constitution of the United States. Factually they are a separate, independent people. It was felt by the United States that their laws and modes of living, their habits and manners of life were so distinct that if would be dangerous to bring them at one shot, so to say, within the range of the laws made by the white people for white persons and for the purpose of the white civilization."[61]

To remove the fear expressed by some members that Autonomous District Councils and Regional Councils would divide the nation and pose a threat to the integrity of the nation, Dr. B.R. Ambedkar justified stating, firstly, that the executive authority of Assam shall be exercised in all the areas covered by the Autonomous District Councils and Regional

[59] *Id.* at 1025.
[60] *Id.* at 1027.
[61] *Ibid.*

Councils.[62] Thus, unlike the Government of India Act, 1935, the authority of the Parliament as well as the Assam Legislature would extend over the District and Regional Councils in all matters barring a few functions like management of local government, customary and religious practices, money lending, etc. In other words they are not immune from the authority of the Parliament and the jurisdiction of the High Court of Assam and the Supreme Court. Secondly, the laws made by the Parliament and Assam Legislature will apply to the District and Regional Councils unless the Governor thinks that they ought not to apply.[63] Thus, the burden is with the Governor to show why the Central or the State laws would not apply. In this way, both the Central Government and the State Government would supervise the District and Regional Councils. Dr. B.R. Ambedkar pacified the opposing members of the Assembly by justifying that the scheme of the Sixth Schedule to the Constitution is to provide the tribal people representation in the Central and State Legislature and to bring the them closer in the law making of the nation. He thus stated in the following words:

> "We have provided that the tribal people who will have Regional Councils and District Councils will have enough representation in the Legislature of Assam itself, as well as in Parliament, so that they will play their part in making laws for Assam and also in making laws for the whole of India."[64]

At the third day, after intensive debate on each Paragraph of the draft, the Sixth Schedule was adopted and added to the Constitution of India with a total of twenty one Paragraphs. As a result, the United Khasi-Jaintia Hills, the Lushai Hills, the Garo Hills, the Naga Hills, the Mikir Hills and the North Cachar Hills were declared as tribal areas to be autonomous districts and regions under Paragraph 1 of the Sixth Schedules.[65] The Naga Tribal Area and the North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abhor Hills and the Misimi Hills were also declared to be tribal areas, however shall not include the plain areas, unless notified by the Governor of Assam with approval of the President of India.[66]

[62] *Id.* at 1028.
[63] *Ibid.*
[64] *Ibid.*
[65] Part-A of the table appended to Paragraph 20 of the Sixth Schedule to the Constitution of India (as first enacted).
[66] Part-B of the table appended to Paragraph 20 of the Sixth Schedule to the Constitution of India (as first enacted).

V. THE AUTONOMY UNDER THE SIXTH SCHEDULE: JUDICIAL EXAMINATION

The Autonomous District Councils and Regional Councils under Sub-Paragraph (1) of Paragraph 4 of the Sixth Schedule to the Constitution of India are empowered to constitute village courts or councils to try suits and cases between parties of whom both the parties are Scheduled Tribes within the area except suits and cases to which the provision of Sub-Paragraph (1) of Paragraph 5[67] shall apply. Sub-Paragraph (4) of Paragraph 4 further provides the power to the District Councils and Regional Councils for making rules for the courts and councils with regard to the constitution, procedures to be followed, enforcement of decisions, etc. In the *State of Meghalaya v. Melvin Sohlangpiaw*[68] the respondent, a Khasi Scheduled Tribe was issued a summon to appear before the Sessions Judge, of the West Khasi Hills District of Meghalaya for trial of offences under Sections 302 and 201 of the Indian Penal Code (IPC). The respondent filed a Writ Petition before the High Court of Meghalaya for transfer of the case from the Session Court to the District Council Court on the ground that both the parties are Scheduled Tribe of the area and therefore Paragraph 4 and 5 of the Sixth Schedule should be given effect. The respondent contented that Paragraph 4 and 5 of the Sixth Schedule read with Notification dated 7th February 2017 issued by the Governor conferring upon the District Council Court for trial of cases and suits as provided in the said Paragraphs should be given effect and therefore the case should be transferred to the District Council Court. The High Court allowed the petition and hence the State appealed to the Supreme Court against the judgment of the High Court. Before the Supreme Court, the State argued that the term '*case*' appearing in Paragraph 4 of the Sixth Schedule precludes criminal cases, because the State is the *de jure* complainant in criminal cases, hence IPC and Criminal Procedure Code (CrPC) should be applicable. Therefore, the Session Judge has the jurisdiction for the trial of the case. The Supreme Court defining the term 'case' and 'suits' observed that:

> "Though the expression "suits and cases" has not been defined in Article 366 of the Constitution, the Code of Criminal Procedure, or the Code of Civil Procedure, in common legal parlance developed over the years, the expression 'suit' is used to connote legal proceedings of a purely civil nature, while the term 'case' is used to connote either a civil suit or a criminal proceeding."[69]

[67]Sub-Paragraph (1) of Paragraph 5 of the Sixth Schedule to the Constitution of India lays down that the Governor may for trial of cases and suits arising out of any law or trial of offences punishable with death, transportation of life, or imprisonment for a term of not less than five years or any other law confer on the District or Regional Councils or any officer appointed in that behalf by the Governor.
[68]AIR 2020 SC 5204; 2021 CriLJ 1546.
[69]*Id.* at Para 9.1.

Upholding the judgment of the High Court and directing the transfer of the case to the District Council Court and accordingly issue summons as per law, the Supreme Court observed that, "a reading of Paragraph 5 in conjunction with Paragraph 4 inevitably leads to the conclusion that all such criminal cases are tribal by the Courts constituted under Paragraph 4 of the Sixth Schedule, irrespective of the fact that de jure Complainant is the State, as long as both the accused and the victim of the offence belong to the same Scheduled Tribe."[70] Thus, the Supreme Court held that a combined reading of the Paragraphs 4 and 5 of the Sixth Schedule confers the District Council Courts the exclusive jurisdiction to entertain such cases.[71]

In *Westarly Dkhar* v. *Shri SehekayaLyngdoh*[72] the High Court in an ex-parte ad-interim injunction matter, allowing a revision petition against an order of the District Council Court held that since the appeal was filed within thirty days of the ad-interim ex-parte order, it would not be maintainable under the Code of Civil Procedure. It was appealed before the Supreme Court that the Code of Civil Procedure do not apply in letters but only the spirit thereof applies in the Autonomous Districts as provided under the United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953. The respondent on the other hand argued that an appeal can be entertained only when the Subordinate Court failed to comply with the provisions of Order 39 Rule 3A of the Civil Procedure Code. Thus, an aggrieved party cannot approach the Appellate Court during the pendency of the application for vacation of a temporary injunction. Agreeing with the appellant, Justice Rohinton Fali Nariman observed that Rule 47 of the United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953 provided that in civil cases the District Council Court and its subordinate courts shall not be bound by the letter of the Civil Procedure Code but guided by its spirit in matters not covered by customary laws and usages of the District. The court further observed that the said Rules of 1953 were validly enacted under Paragraph 4 of the Sixth Schedule to the Constitution of India.[73]

Justice Jasti Chelameswar, C.J. in *Longsan Khongngain* v. *State of Meghalaya*[74] ruling the exclusion of the customary institutions like Village Courts and District Courts held that:

[70] *Id.* at Para 9.4.
[71] *Id.* at Para 9.6.
[72] 2015(1)SCALE734.
[73] *Id.* at Para 7 and 9.
[74] 2007(4)GLT938.

> "Paragraphs 4 and 5 of the Sixth Schedule deal with the administration of justice in Autonomous Districts and Autonomous Regions referred to in paragraph 2 of the Sixth Schedule…It is further declared in Paragraph 4 that the jurisdiction of such village courts is to the exclusion of any court in the State. In other words, the courts functioning either under the laws of the Parliament or the laws of the State of Meghalaya are ousted of their jurisdiction to try any suit or case between the parties all of whom happen to be tribals residing within the jurisdiction of such Village Court….Therefore, the courts constituted under paragraph 4 of the 6th Schedule either by the District Council or the Regional Council, as the case may be, are not bound by the procedures prescribed under either of the Codes referred to above."[75]

Though the special protection of trade given to the tribal traders against the non-tribals appears to be *ultra vires* Articles 14 and 19(1)(g) of the Constitution, but as recommended by the Sub-Committee and accepted by the Constituent Assembly, the Supreme Court has upheld the validity of such laws enacted under the Sixth Schedule to the Constitution of India. Thus, in *LalaHari Chand Sarda v. Mizo District Council*[76] the Mizo District Council refused to renew the trade license of a non-local business man on the ground that under Section 3 of the Lushai Hills District (Trading by non-Tribals) Regulation, 1963 the maximum number of non-tribal licensee has reached. Before the Supreme Court, it was appealed that the said Regulation of 1963 violates Fundamental Rights granted under Articles 14 and 19(1)(g) of the Constitution. The respondent contented that the said Regulation of 1963 was enacted by virtue powers provided under Paragraph 10(2)(d) of the Sixth Schedule to the Constitution of India. The Supreme Court held that if Paragraph 10 of the Sixth Schedule cannot be regarded as violative of any provision in the Constitution, than, it is impossible to say that Section 3 of the said Regulation of 1963 which is in strict conformity with paragraph 10 is violative of Articles 14 and 19(1)(g) of the Constitution.

Ruling the legal and constitutional justification of such laws enforced in the NE region which are different from the laws enforced in others parts of the nation, the Supreme Court in *State of Nagaland* v. *Ratan Singh*[77] pronounced:

> "Laws of this kind are made with an eye to simplicity. People in backward tracts cannot be expected to make themselves aware of the technicalities of a complex Code. What is important is that they should be able to present their defence effectively unhampered by the technicalities of complex laws. Throughout the past century the Criminal Procedure Code has been excluded from this area because it would be too difficult for the local people to

[75] *Ibid* at Para 10 and 13.
[76] 1967 AIR 829; (1967) 1 SCR 1012.
[77] *Supra* note 22.

> understand it. Instead the spirit of the Criminal Procedure Code has been asked to be applied so that justice may not fail because of some technicality."[78]

Similarly, in *Changki Village through Tinnunokcha Ao* v. *TibungbaAo*[79] the Supreme Court upholding the validity of the non-application of the Code of Civil Procedure and Code of Criminal Procedure held that "before we proceed to set out the details of the case and the decision rendered by the High Court, it is relevant to mention that the Civil Procedure Code and the Criminal Procedure Code do not govern the proceedings before the Civil and Criminal Courts in Nagaland and the proceedings are to be governed by Rule 30 of the Rules for the Administration of Justice and police in the Nagaland Hills District."[80] In TekabaAo v. SakumerenAo[81]the Supreme Court held that "the civil rights to the water source and the land in the Hill District of Nagaland….are not governed by any codified law contained in Code of Civil Procedure and the Evidence Act. The parties are governed by customarylaw applicable to the tribal and the rural population of Hill District of Nagaland."[82] Thus, the Supreme Court sustained the non-applicability of the codified technical and procedural laws in dispensation of justice by the formal courts, but the trail of such disputes to be conducted in accordance with the laws enacted as per custom and usages of the tribes.

Notwithstanding the above cited judgements upholding the autonomy in application of laws under the Sixth Schedule, it can be argued that should the Sixth Schedule be interpreted ignoring other provisions of the Constitution. In other words, should be Sixth Schedule be considered as a Constitution within the Constitution. The constitutional bench of the Supreme Court in *Pu Myllai Hlychho*v. *The State of Mizoram*[83] held that Sixth Schedule is a part of the Constitution and other provisions of the Constitution cannot be ignored in interpreting it. In this case it was argued that Sixth Schedule is a Constitution within the Constitution and therefore the powers of the Governor is independent of other provisions of the Constitution and hence not bound by the advice of the council of ministers. The court rejecting the argument observed that complete segregation of the Sixth Schedule from the rest of the

[78] *Id.* at Para 34.
[79] AIR 1990 SC 73.
[80] *Id.* at Para 2.
[81] AIR 2004 SC 3674.
[82] *Id.* at Para 3.
[83] AIR 2005 SC 1537.
See also *Edwingson Bareh v. State of Assam*, AIR 1966 SC 1220

Constitution is impossible and the legislative history of the region is not sufficient for declaring the Sixth Schedule as a Constitution within the Constitution.[84]

VI. CONCLUSION

A perusal of the colonial enactments, the recommendations of the Sub-committee and the debates of the Constituent Assembly reflects the social and political developments introduced by the advent of colonial administration. Thus, it was the social and political developments of the region that entailed the Sub-Committee to place the recommendations that were based on demands of the tribes before the Constituent Assembly. From the beginning of the colonial occupation, the NE region was never brought under the general laws and reforms introduced in other parts of the nation. In other words, it was kept isolated but under the direct supervision of the central government. Though the region was under direct control of the centre, but the tribes were given autonomy in management of their local affairs in all realms of customary law. No prohibition in the customs and usages were issued except the savage practice of head-hunting.

The region was financially dependent on the centre, but the centre chose to retain the territory and bear the burden. In fact, the Inner Line Regulation was introduced by virtue of the Bengal Eastern Frontier Regulation Act, 1873[85] which statutorily isolated the hills. This law was introduced to protect the British and American missionaries and explorers from the head-hunting of the hill tribes, however with time, it turn to protect the naïve tribes from exploitation of the Europeans. Post the Indian independence, the founding fathers of the Constitution recognizing the just and simple customs and usages adopted the Sixth Schedule, thereby constitutionally institutionalizing the customary laws and authorities.

Thus, it may be said that the customary bodies are part of the constitutional machinery forming a basic structure in the federal structure of the Indian union. Though such laws may appear to be discriminatory and violates some fundamental provisions of the Constitution, the Supreme Court has been upholding the laws. Notwithstanding the rulings of the Supreme Court validating the legality of the laws enacted under the Sixth Schedule, it may be

[84] *Ibid* at Para 21.

[85] The Chief Commissioner of Assam (presently the State Government) by virtue of Rule 2 of the Bengal Eastern Frontier Regulation Act, 1873 is empowered to notify a line called the "Inner Line" prohibiting all or any class of citizen or any persons (citizens of India or any class of such citizens) to enter or going beyond such Inner Line without a pass (Inner Line Permit) under the hand and seal of the chief executive officer of the district or any such officer as the state government may authorize.

questioned that such laws are *ultra vires* the fundamental rights and dissect the NE region from the mainstream of the nation.

However, the Sixth Schedule is not a parliamentary enactment but a part of the original Constitution; therefore its essence and basic structure cannot be destroyed by a parliamentary amended. It is a special feature of the federal structure which enriches the beauty of the Constitution and strongly regards the protection of culture as a fundamental right under the Constitution. Irrespective of the preservative view of the Sixth Schedule, a rational view may indicate that inclusive appendage to the traditional institutions may consequent in the backwardness of the region and negativity in integration. Law is a tool of social engineering and unless the contemporary laws are applied, the traditional law would be obsolete to balance the present needs and interests of the society.

Thus, as observed by the Supreme Court in *Pu Myllai Hlychho*v. *the State of Mizoram*[86] the Sixth Schedule is not a Constitution within the Constitution and cannot be isolated from other provisions of the Constitution in all cases. Also, as Shri A.V. Thakkar and Dr. B.R. Ambedkar has said in the Constituent Assembly, the Autonomous District and Regional Councils are not making states within the states and are also not immune to the jurisdiction of the Parliament, the State Legislature, the Supreme Court and the High Court.[87]Further, Paragraphs12, 12A, 12AA, 12B, 14 and 15 of the Sixth Schedule provides which law to apply in the area and the powers of the Governor to annual or suspend any law made by District and Regional Councils which is likely to endanger the safety of India or prejudicial to public order. The Governor also has been empowered to appoint a commission to enquire and examine on matters relating to administration of Autonomous District and Regional Councils. Thus, it can be observed from the judicial rulings, the debates of the Constituent Assembly and the legislative history that the Sixth Schedule is a supplementary and special constitutional protection of the customs, usages, traditions, land and other resources of the indigenous tribes inhabiting the region but does not supplant or overlap with other provisions of the Constitution and other laws.

[86]*Supra* note 83.
[87] See *Supra* notes 58 & 63 respectively.

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OBJECTIONS TO MEDIATION: A PERUSAL OF THE PROCESSUAL LIMITATIONS

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ABSTRACT

In recent years, the idea and practice of mediation have gained significant acceptance in legal systems across the globe. This non-adversarial consensual process of dispute resolution is largely employed to reduce the overburdened docket system. Its rapid proliferation is grounded in the belief that process being creative and partly-driven can generate consensual outcomes which are mutually long lasting in contrast to adjudicatory results. No denying, mediation does offer many a benefit to the participants, yet the propriety of the process is often critically challenged in certain situations. In the light of this background, the present paper discusses and explores these situations wherein beneficial claims of the mediation process might and should be questioned. To this end, it peruses the nature of objections surrounding the mediation process, and thereby endeavours to analyse the certain processual limitations of this fast emerging method of Alternative Dispute Resolution.

I. INTRODUCTION

The recognised advantages of mediation include time and cost savings, privacy, confidentiality, self-empowerment, reduction of court backlogs, and preservation of future relationships. However, while acknowledging these advantages, there are certain situations where the propriety of mediation is challenged. It is contended that mediation can be detrimental, especially when mandated.[1] Examples of the problem include situations where there is an imbalance of power between the parties or where individuals may fare worse in mediation than in adjudicatory or rule guided process. Since mediation is private and the process flexible, no procedural safeguards exist.

Although many reasons exist for the use of mediation and its practice has vastly increased over the last two decades, there are many situations where mediation may not be a preferred choice. In some instances, courts have ordered the parties to participate anyway, and resolutions have been reached in several of the cases. At other times, courts may consider the

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[1]As for example where parties are sent for mandatory mediation, the process and outcome may lead to compromising with one of the essential elements of mediation, i.e., the voluntariness of the parties to choose this mode of ADR.

objection, and excuse the party from participation. A few of the more common objections to use of mediation are discussed below:

Procedural Considerations

One concern voiced by critics of mediation is that the process lacks procedural safeguards. Some feel that compelling parties to meet with one another may be detrimental, particularly where the parties are not represented by the advocates. Another consideration is that gender, race, and culture may dictate that some parties are not treated as fairly as they might be in a courtroom. One contention is that prejudicial attitudes are more prone to be acted upon in informal settings like mediation.[2]

Another procedural objection concerns discovery.[3] In some cases, it is paramount to a realistic consideration of alternatives for settlement that certain information be learnt or exchanged. If it is not, then the parties are unwilling to even consider a proposal of resolution. One solution is that the mediator oversees an informal method of information exchange prior to the mediation session.

Another concern surrounds the issue of procedural justice, particularly in court-annexed cases. The concern is that in mediation, the procedure may not be fair. Yet, research indicates that the parties' participation is the key to assurance of procedural justice, or at least their perceptions of justice. One method advocated to assure procedural justice in mediation is party participation.[4]

Power Imbalances[5]

Often mediation is criticized for there is a high possibility of one party unduly dominating the other during the mediation process. This might lead to skewed settlement agreement or an agreement which is an outcome of power imbalance of the parties. Some of the instances could be mediation involving a woman and her husband over a matrimonial dispute; or an employment dispute between a small level employee and the corporation itself; or a business

[2]*See generally*, Delgado, Richard *et al*., "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution", *Wisconsin Law Review* 1359 (1985).

[3]Discovery in the civil suits is a procedural device whereby each party can obtain evidence from the opposite party through requests for answers to interrogatories, production of documents, admission and depositions. When discovery requests remain un-addressed or objected by the opposite party, the requesting party may apply for the assistance of the court by filing an application to compel discovery. *See*, CPC, 1908, Order XI, Discovery and Inspection.

[4]*See*, Nancy A. Welsh, "Making Deals in Court-Connected Mediation: What's Justice Got to do with it?", 79 *Washington Univ. Law Quarterly* 787 (2001).

[5]Author presented a paper on "Power Imbalances in Mediation" at the *International Council of Jurists Conference*, held at VigyanBhawan, New Delhi, Dec. 4, 2012.

dispute between large and small trading companies etc. Power imbalance can also occur where one of the parties is state government or its powerful machinery. Thus the question of power imbalance in mediation has posed a serious challenge to its growth and acceptance. It is contended that this negative feature of mediation makes it a tool in the hands of a powerful party to achieve its skewed purpose, which it may not get through court process.

Owen Fiss (1984) commenting on the issue of power imbalance has contended that ADR processes in general and mediation in particular are highly problematic and should not be institutionalized on a wholesale and indiscriminate basis. He observed:

> "The disparities in resources between the parties can influence the settlement agreement in three ways: First, the poorer party may be less able to amass and analyse the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. All plaintiffs want their damages immediately but an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is far less than the ordinary values, one may have secured through court judgment. Third, the poorer party might be forced to settle because he does not have the resources to sustain the litigation. It might seem that mediated settlement benefits the plaintiff by allowing him to avoid the litigation costs, but this is not so…."[6]

Cases of the power imbalance between the parties to mediation can arise due to various factors apart from commonly visible economic or social status. These rather hidden factors may include disparity in knowledge resources, communication skills, cognitive abilities, personality traits, cultural values etc. Examples may be cited of mediation between a literate party and an illiterate one, where the former is very expressive with better communication and understanding skills compared to the latter. Similarly, mediation between a company's powerful owner and a small level employee may get skewed due to disparity in the above factors.

[6] *See*, Owen M. Fiss, "Against Settlement", 93 *Yale Law Journal* 1076 (1984).

It must be acknowledged that every time a mediator attempts to assist two parties resolve a dispute the issue of a potential power imbalance can emerge. Indeed there will always be some inequality between disputants.[7] The impact of this unequal bargaining power on the mediation process has led to an enormous amount of discussion and controversy amongst commentators, ranging from those who view mediation as simply not an appropriate ADR method in these (power imbalance) situations to those who believe that, even in severe cases of inequality, for example, where domestic violence is involved in a family dispute, mediation is still a preferable resolution process to adjudication, for the purpose of understanding the nature and extent of the marital problem and for narrowing down the issues to few.[8]

It is submitted that the best approach lies somewhere between these two extreme positions. It cannot be said that mediation is never appropriate where a power imbalance exists, because the result of that thesis would be simply that mediation should never be used as a dispute resolution process. There will always be some degree of inequality of power between disputants. However, in cases of severe imbalance of power, for example, in cases involving severe domestic violence (one that involves recurring physical and verbal abuses) or child abuse, mediation will not be an appropriate process and court adjudication should be preferred in such instances.

A more definitive list of situations where mediation should be terminated due to severe power imbalance is as follows:

i. Where a party is unwilling to honour mediation's basic guidelines (for example, continuous attempts to intimidate the other party during the mediation process);

[7] *Ibid*.

[8] Some advocates take the position that cases involving domestic violence are simply inappropriate for mediation. Adherents of this view argue that domestic violence is not the result of interpersonal conflict but of a culture of dominance and control. Mediation's focus on resolving interpersonal conflict is therefore misplaced in this context. Second, since mediation de-emphasizes the criminal aspects of the behaviour and is future-oriented, the abuser is allowed to escape responsibility for his past behaviour. Third, the power imbalance that exists by virtue of the intimidation simply cannot be effectively remedied in the process. Finally, the effects of domestic violence on children are exacerbated when an abusive parent is allowed to use the children to retain control over their mother. Others, however, argue that domestic violence ought to provide grounds for seeking a waiver but should not result in automatic disqualification. The proponents of this approach believe that screening mechanisms to identify abuse and appropriate intervention techniques on the part of the mediator can ameliorate the harm. Another, argument is that lawyer's representation in mediation involving domestic violence can also ensure that no imbalanced bargaining happens between woman and her husband. Finally, they argue that if none of the mediation techniques works then the court-door can always be knocked. *See generally*, Joe Folberg, Ann L. Milne & P. Salem (eds.), *Divorce and Family Mediation: Models, Techniques and Applications*, 304-336 (Guilford Press, 2004).

ii. Where one of the disputants is so seriously deficient in information that any ensuing agreement would not be based on informed consent;

iii. Where domestic violence or fear of violence is suspected; or where a party indicates agreement, not out of a free will, but out of fear of the other party;

iv. Cases involving child abuse or sexual abuse;

v. Where the parties are hoping to gain some tactical or strategic advantage which is not related to the subject-matter of the dispute, for example, as a "fishing expedition" to gain information, or as an attempt to, delay proceedings.

While some of the mediation literature discusses methods that a mediator may utilise to equalize the above mentioned imbalances,[9] the fundamental problem remains, in that he may not always be able to so. The reason being that if he attempts to rectify the imbalance that may be taken as an act of siding with a particular party.[10] Thus it would seem that power imbalance, in one form or another, is likely to remain present in most of the types of mediation, just as it exists in litigation or arbitration. It is the duty of the mediator to address this problem in a skilful manner without compromising with his neutrality. If, however, power imbalance remains unaddressed or intolerable, the mediator should terminate the process and let parties explore the court system.

Problem of Unwilling Partners

In several instances, one or more of the parties involved in a dispute may be unwilling to go to mediation. In other words, mediation will not work if the parties are unwilling or unable to negotiate. This may occur for a number of reasons. If a party to the conflict is unwilling to participate, the mediation will not be able to go ahead.

Further, there can be a situation where the conflict may have escalated too far that the parties are no longer able to communicate with each other. The parties may be so firmly entrenched

[9]*See generally*, Jacqueline M Nolan-Haley, "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making", 74 *Notre Dame Law Review* 775 (1999) (Author arguing that one of the most effective method to minimize the risk of power imbalance is to take the well informed consent from the parties before mediation is to start and also to ensure that any resulting settlement is well understood by both the parties. Mediator may then ask the parties as to whether they are fully satisfied with the outcome, or they still hold any clarifications. In short, mediator has a key role in diminishing the power imbalances between the parties.).

[10]This may be seen as a loss of neutrality on the part of mediator. However, mediation theorists have also suggested that neutrality does not mean a 'non-active mediator', but rather a mediator who facilitates exchange of information between the parties in a very candid manner, without hiding anything from either party. He has to make sure that some fundamental problems like unequal-bargaining positions of the parties are also discussed freely, either in separate session or joint meeting. He thus has to conduct himself as an agent of reality. *See*, Joseph B Stulberg, "The Theory and Practice of Mediation: A Reply to Professor Susskind", 6 *Vermont Law Review* 85-87 (1981).

in their positions that they refuse to accept or acknowledge the other side's perspective. Where a party has a very firm view of who is right and who is wrong and is unlikely to change his or her opinion on this, no amount of facilitation or encouragement from the mediator may enable the mediation to proceed.

Parties may be unwilling to mediate, precisely because as Bernard Mayer (2004) reasons that mediation could be, in fact, an opportunity for 'fishing expeditions', delays, offering false hopes, pretending to collaborate, and so forth.[11] According to him, most often participants in mediation are often not trying to make any genuine progress on a conflict but to gain an advantage so that they can pursue the 'gains' made in mediation in more serious forums like litigation.[12]

Further, a party may be unwilling to mediate where he/she has limited capacity to negotiate effectively, where there is a significant power imbalance or risk of physical or emotional abuse. In some cases, a party's cultural background may also be incompatible with mediation. Where parties have a history of acting in bad faith in negotiations or it seems that compliance by one or both of the parties with any possible agreement is unlikely, mediation then cannot be considered a good option.

The problem of an unwilling partner is too rampant in mediation. This problem cannot be addressed by compelling parties to mandatorily explore mediation for any possible solution, as that would compromise the very essential tenet of mediation i.e., voluntariness.

Lack of Fairness

Arguably, the most serious criticism of mediation relates to the fairness of the process. Critics say that mediation represents secondary justice- that only the courts provide first class justice. Owen Fiss for example, cautions that the thrust of mediation is towards the surrender of legal rights. He observes:[13]

> "I do not believe that settlement as a generic practice is preferable to judgment… It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice

[11]Bernard S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*,98 (Jossey-Bass, 2004).
[12]*Ibid.*
[13]*Supra* note 6

> may not be done…settlement is capitulation to the conditions of mass society and should be neither encouraged nor praised."

Fiss asserts that underlying all ADR processes, including mediation, is an assumption of rough equality between the contending parties and that, as a result, it is the rich who can afford first class justice via the court system, and the poor who cannot finance litigation settle for second best- that includes mediation.[14]

It is submitted, this theory misses some essential underlying reasons. Firstly, it is assumed that only a resolution based on law is first class justice. Surely a better definition of a dispute resolution process will be that which is most satisfying to the disputing parties. Secondly, there is a difference between theoretical justice and applied justice. In practice, litigation often falls short of the ideal. In theory, justice is accessible to all, however, in a country like India, it seems to be accessible only to the rich, and the poor are often provided legal aid at state expense which may not be compatible with first class justice. The danger is that disputants in the court process can only obtain the justice they can afford. Furthermore, an inexperienced junior advocate could easily be defeated in court contestation by an experienced senior. The practical reality is such that "nothing can reasonably be done to eliminate whatever advantage can be obtained by the richer litigants', access to the more expensive, and therefore presumably more expert legal assistance."[15]

In the background of harsh realities of litigation practice, the mediation theorists are in agreement with the proposition that if one accepts mediation as more economical and speedier than litigation, it is arguable that where a disparity in wealth exists between the disputants, it is actually mediation which may be the fairer way of resolving the dispute-not litigation.[16] This is possible because mediation may provide an environment of free discussions wherein a less equal party can raise all his concerns, and actually see his most serious concerns addressed before the mediation can proceed further.

Finally, it is argued that, theoretically, legal system is a far safer path for a disputant than mediation if there is any question of the parties being of different "intelligence, articulation and ingenuity."[17] Yet, as has already been illustrated, the litigation process as practised falls

[14] *Supra* note. 6 at p. 1075
[15] C.W. Pincus, "Judge Asks why Old Methods are Still Used to Resolve Disputes", 23 (10) *Australian Law News* 11 (1988), *available at*http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1053&context=adr (last accessed Jan. 9, 2017).
[16] Maxwell J. Foulton., *Commercial Alternative Dispute Resolution* 90 (Law Book Co., Sydney, 1989).
[17] *Id*., at104.

short of the theoretical ideal and may not protect disputants any better than as mediation in this situation.

If these questions of equity are of concern to a disputant, he/she may withdraw from the mediation process. But before withdrawing, the concerned party must weigh up the probable gains in terms of financial cost, speed of resolution, flexibility and informality, self-determination, privacy, avoidance of stress and preservation of future relationships with what that party sees as a lack of fairness in the mediation process.

Lack of Precedent

Certain types of disputes require that a determination be made by an outside third party, such as a court. For a variety of reasons, parties sometimes have a need for developing case law and setting a precedent. Mediation, however, does not set any precedent like courts.[18] This is mainly due to the confidential nature of mediation proceedings which prevents the establishment of a useful body of case law on mediated outcomes. As a result, disputants lack the knowledge as to how disputes similar to their own have been resolved in mediation at an earlier point of time.

Thus, mediation may not be the best process to deal with certain substantive issues. For example, where the dispute involves a constitutional or human rights issue, or a matter directly affecting the public interest, a public forum might be more appropriate. In some cases, an advocate or mediator needs to make an immediate decision to protect the interests of a disputant or of the public. For example, a precedent may be desirable for deterrence, or injunctions may be urgently required to stop certain behaviour. A public resolution may also be needed to preserve or restore a party's reputation.

Further, where a matter involves a significant or novel legal question, a judicial interpretation of a statutory question, the creation of an important legal or policy precedent or where there is need for a final decision on past events, litigation is and will be more appropriate.

[18]In India, only Supreme Court and High Courts have the constitutional jurisdiction to set precedent through case laws. There is a possibility that such courts may rule specifically about mediation in general in litigations arising out of mediated outcomes. In that sense courts may set a precedent which has theoretical and practical implications for mediation, thus supplementing the academic developments on mediation. But such precedents will be highly different from the ones actually needed. What we need is a body of case law on mediation that decides if an act (fact) 'X' has happened between A & B leading to mediation in the year 2014, then what would happen in similar fact and situation between L & M in the year 2016. This is actually least likely to happen given the confidential nature of mediation. So, in that sense, mediation by its very nature, discourages precedent-setting.

Regarding this particular criticism of mediation that it lacks any precedential value, one may concede that not all cases are suitable for mediation. While some cases are to be adjudicated upon by court so as to set a precedent, still a vast number of cases may be suited to a less formal resolution through mediation.

Problem of Defining Party's Self-Determination

Party control in mediation reflects understanding about parties' competence to deal with the mediation process. All fields of mediation practice place central importance on party control, which is variously described as 'party autonomy', 'empowerment', 'self-determination', 'responsibility' and 'party authority'. The authority of the mediator is derived from the parties themselves. It is the central task of the mediator to ensure that by engaging voluntarily in the mediation process, the parties' participation is equal and fair and that they retain control both over the content of their communication and over the decision-making outcome. It is the task of mediator to ensure too that the vital but limited role of mediator in managing the process is not exceeded.

While in mediation parties are presumed to have competence in matters of decision-making and control of the process, yet the same has attracted several problems in exceptional situations, such as, gross imbalance of power, poor negotiation skills, lack of adequate mental resources, etc. In such exceptional situations, pre-mediation screening may be offered to parties in order to measure the party's competency in mediation.[19]Consequently, this can limit the risk of lack of competency of the party.

It remains a case that in mediation decision-making authority must stay with parties. If the third party (mediator) makes a binding determination of the issues, the process is not mediation. As for instance, if parties jointly ask a mediator to decide the issues on a binding basis, as in med-arb,[20] and the mediator agrees to do so, then the process changes from mediation to one of the adjudicatory forms such as arbitration.

This should, however, be distinguished from the situation in which the mediator is asked by the parties to make a non-binding settlement recommendation, which is part of the mediation procedure of some organizations and individual mediators.[21] Such a recommendation allows

[19]It is described as preparing the parties for mediation.
[20]Mediation-Arbitration or Med-Arb is combination of mediation and arbitration processes. In such hybrid form, failed mediation attempts are quickly followed with arbitration if parties so decide.
[21]Mediation process in this sense can be suitably designed by the parties themselves. Even the mediator can let parties know that he/she will put forward his non- binding settlement recommendations.

the parties the freedom to accept or reject it, and consequently does not diminish their self-determination.

Parties may be advised and assisted by their lawyers and perhaps other professionals in the process. This does not detract from the parties' role as the ultimate arbiters of how the matters should be resolved or from their self-determinative function.[22]

If, however, a party is coerced into making a decision, then that would generally undermine the principle of self-determination as negotiation should not be a coercive process.[23] Mediators may sometimes encourage parties towards settlement- if done appropriately this is a standard element of the process- but if they try to coerce a party into settling, or become so directive that their actions amount to coercion, then that would undermine the principle of party self-determination and would frustrate the very essence of mediation process. The point which may be unmistakably highlighted in this context is that parties' self-determination is essentially a fundamental characteristic, yet in absence of proper receptivity of its actual meaning among the mediating community, the process will tend to become a mere branch of arbitration.

Other Disadvantages

i. *Additional Cost if Unsuccessful*: If the mediation does not result in a settlement then the costs will be in addition to any litigation costs.[24] However, the mediation process usually increases the parties' understanding of each other along with their mutual needs and demands, and this can be very helpful in the litigation process or in promoting settlement later.

ii. *Fishing Expeditions*: Occasionally, someone will come to mediation to attempt to extract useful information from the other party, rather than with the desire to reach an agreement. An experienced mediator can usually spot this and may call a halt to the mediation. Mediations are usually confidential and without prejudice, but will involve giving some information about one party's position to the other party. Of course, this works both ways. However, real risks remains that an unscrupulous party might

[22] *Seegenerally*, Michael Moffitt & Dan Dozier, "Information, Autonomy and the Unrepresented Party", in Ellen Waldman (ed.), *Mediation Ethics: Cases and Commentaries*, 155-176 (Wiley Publishers, 2011).

[23] *See*, Mediation, Conciliation Rules of Delhi High Court, 2005, Rule 27 provides, The mediator/conciliator shall recognize that the mediation/conciliation is based on principles of self-determination by the parties and that the mediation/conciliation process relies upon the ability of parties to reach a voluntary agreement.

[24] To counter this argument, one may say that a failed litigation is much more costly, futile and cumbersome, if the parties later prefer mediation for the same dispute. Parties should consider the potential additional costs if they are unsuccessful at trial and are required to pay the other side's legal costs and the potential additional costs and time of a potential appeal. *See*, Alan Sitt, *Mediation: A Practical Guide* 104 (Cavendish Publishing, 2004).

exploit the information, oral or documentary, discovered in the mediation to the possible detriment of another party.

iii. *Mediation Viewed as a Sign of Weakness*: Is going into mediation a sign of weakness? Some people (mistakenly) see an offer to mediate as a sign of weakness. Such an attitude can be for a variety of reasons. The party offering for mediation might be seen as having a weak case in terms of law and evidence. However, such a notion is misplaced in the face of other advantages of this process. This attitude, however, is becoming less common and can usually be dealt with by explaining the benefits of mediation.

iv. *Attitude of the Mediator*: If the mediator is not capable and efficient, the process of mediation can get derailed as he may not be able to guide the parties in a suitable direction and thus defeating the purpose of mediation. The parties will not be able to resolve their disputes and ultimately will have to resort to litigation or arbitration.

v. *Attitudes of the Parties*: The attitude of the parties determines the success of mediation. If they are reluctant to settle even the best efforts of the mediator will prove futile especially if they take positional stands[25] and refuse to budge from their settled position or do not treat the mediation process with the seriousness which it deserves. Refusal to see reason and lack of co-operation will leave the dispute unresolved.

vi. *Enforcement of Settlement*: At the conclusion of the mediation process, an agreement may be reached between the parties, but either of the party can still back out from mediation by refusing to sign the settlement agreement.[26] Moreover, if party does not fulfil its obligations under the mediated settlement, the other party will still have to take out execution proceedings as in the case of a court decree or award.

vii. *Social Apprehension*: Apart from the above general criticism, the wider criticism of mediation as a whole relates with ADR, and is concerned with the privatization and in in-formalization of dispute resolution. It is argued that the privatization of dispute resolution is problematic because the elaboration of law achieved in public trials and

[25] *See,* Roger Fisher & William Ury, *Getting to Yes* 82 (Random House Publisher, I[st]edn., 1981).

[26] This particular aspect of mediation that a party can back out even at the last moment before the settlement agreement is signed, is viewed both as a positive and negative feature of mediation. As a matter of fact a party has the last opportunity to think about the outcome reached in mediation, and if he decides to sign, he does so by applying his mind. If he refuses to sign, then again, he does so by understanding the potential consequences of not signing the agreement. In case of withdrawal from mediation, the entire process undertaken would seem futile. *See generally*, Cathleen Cover Paynee, "Enforceability of Mediated Agreements", *Journal of Dispute Resolution* 385 (June, 1985).

published decisions are necessary to protect and secure individual rights. Similarly, it is argued that treating disputes as matters of individual, rather than public concern eliminates important public accountability, and such a situation leads to erosion in education function of law and justice. Additionally, feminists have argued that women—traditionally less powerful members of society—may be worse off in mediation or other ADR processes than they are in litigation, especially in family law matters.[27]

II. CONCLUSION

The objections to mediation demonstrate the need to seek answers for the critical shortcomings of the process. While the process does provide opportunities for parties to explore tailor-made solution for the dispute, nonetheless, the limitations of the process must inform parties in advance before they seek mediated result. To this end, prospective parties should be able to appreciate all the critical aspects of mediation. This can happen through wide and sustained dissemination of mediation-related knowledge among the masses. This is particularly more required in a vast and diverse country like India, which of late, has seen a flurry of mediation-related activities, but where a large chunk of disputing populace still remains poor and resource-less.

The success of mediation system hinges on the awareness of the public in general and disputants in particular. If mediation is to become a popular dispute resolution mechanism, its glaring shortcomings should be spotted and minimized, or else it will merely reflect the adjudicatory process such as arbitration. In the end, it is submitted that the future development of mediation will require structured educational initiatives to teach the masses how to work through their disputes more effectively, more productively and with a sense of preserving the mutual relationships.

[27]Some feminist writers suggest that the powerless, the disadvantaged and discriminated against are further disadvantaged by this lack of public scrutiny. Women are included in this group. The argument is that disputes involving these categories of people demand the public arena because without public scrutiny and education, there will be no attempt to reform, legislatively or socially, entrenched discrimination in the society. There is certainly some merit in this proposition but each situation should be dealt with individually on a case by case basis. It is agreed that in case of severe power imbalances, domestic violence or child abuse, the proposition is correct. Mediation in such cases will not be suitable. In any case, it has never been suggested that mediation is always the answer. Many times, court adjudication is the only answer in such situations. *See*, *supra* note 6.

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PROTECTION OF NON-CONVENTIONAL TRADE MARKS: A LEGAL ANALYSIS

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ABSTRACT

Corporate houses have always spent a huge amount of their resources on building their brand image, a very important aspect of which includes distinguishing their goods and services from those of others. This function is generally performed by trade marks. Trade marks traditionally comprise of slogans, words, images etc. but these traditionally accepted categories did not appear to meet the requirements of modern-day consumers and corporate houses who are always looking for something new. This has also been augmented by rapid technological development making it easier to develop new kinds of trade marks like motion marks, holograms etc. and an increase in cross border trade, making it imperative to have as unique trade mark as possible. All this has led to the development of many new varieties of trade marks like touch and feel marks, olfactory marks, sound marks, posture marks etc. Even consumers feel an immediate connection with these new categories of trade marks like Britannia's sound mark or Hesrhey's tear drop shaped chocolates, we can talk about many such examples where consumers immediately relate these non-traditional trade marks to their brands. In these circumstances, it becomes imperative to analyse whether our laws are capable of protecting these new categories of trade marks or not. This paper is an attempt to delve into the Indian Trade Marks legislation to find out how far it is capable of protecting these new categories of trade marks.

I. INTRODUCTION

The importance of our sensory organs can never be understated. They help us identify so many things, at times even without looking at them. Even before we see, our nose informs us that the fragrance we are getting from the kitchen is of freshly cut lemon or of coriander leaves. Even before we read the words coca over a bottle our eyes, just by looking at the shape of the bottle, inform us that what lies on the shelf is a bottle of Coca-Cola. When a mobile phone is switched on, we get to know which brand's phone it is, just by listening to the sound. These senses help us identify as well as differentiate between so many products, apart from doing many other important bodily functions. In our day-to-day life when we are not able to recognise something by looking at it, we use our other sensory organs to know what it is. The function of trade marks is also somewhat similar, as they also help us differentiate between the products of different manufacturers.

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Like our sensory organs, the importance of trade marks can never be trivialised. They are one of the most important forms of intellectual property rights. Trade marks perform a variety of functions, the most important being its identification function. Trade marks let us know from where a particular product is coming and assure us about the quality of the product. Every day people even without knowing anything about the concept of trade marks or its importance use it, from buying a KwalityWall's ice cream to purchasing Skechers' shoes everything has something to do with the concept of trade marks. By just looking at the triangular box or purple wrapper we get to know which brand of chocolate we are purchasing. This clearly shows that these colours or shapes perform the function of trade marks pretty well.

The concept of trade marks is more than two thousand years old when Roman people use to leave their marks on almost everything that belonged to them[1] and since then, the concept of trade marks is ever developing. Our ancestors have never underestimated the importance of trade marks and always gave due importance to them nor do our present lawmakers are leaving any stones unturned to provide the best protection to trade marks. Trade marks are important both from the perspective of manufacturers as well as consumers, they protect the rights of manufacturers on one hand and protect the consumers from being fooled on the other. It is this dual function of trade mark that makes it all the more important. This is also the reason why every new addition in the definition of the trade mark becomes a matter of academic debate and policy discussion. This also leads to the development of the concept of non-conventional trade marks.

II. NON-CONVENTIONAL TRADEMARKS

The concept of non-conventional trade marks is of comparatively recent origin and can be said to be around 100 years old, since then they are being debated. The non-conventional trade marks are those trade marks that do not fit within the realms of the traditional concept of trade marks , though they perform pretty much the same function. Generally speaking, a trade mark comprises of words and figurative representation, but non-conventional trade marks are different, meaning thereby that they may be described in words or are capable of graphical representation but they do not necessarily comprise of words and figurative

[1]Dennemeyer, "Luxembourg: The Evolution of Trademarks - From Ancient Egypt to Modern Times"*available at:* https://www.mondaq.com/trademark/873224/the-evolution-of-trademarks--from-ancient-egypt-to-modern-times (last visited on January 7, 2022).

representation like the use of sound or smell as a trade mark. Registration of a fragrance or taste as a trade mark is non-conventional, but if registered these trade marks could be of great value not only to their owners but to their intended consumers as well.

The World Intellectual Property Organisation's (WIPO) Standing Committee on Law of Trade Marks, Designs and Geographical Indications in its 16th session in 2006 discussed about new types of trade marks. The discussion and classification is based on the response to questionnaire administered by the WIPO. The committee considered the fact that the subject matter of trade marks has now expanded beyond words and figurative devices and has classified new kinds of trade marks into two categories: visual (shape, colour etc.) and non-visual trade marks (smell, sound, taste etc.).[2] One of the most important international agreements on intellectual property rights is the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It lays down the minimum standard for the protection of Intellectual Property Rights for its member nations. TRIPS defines trade mark on the basis of its identification function. The definition neither expressly excludes nor includes non-conventional trade mark within its sweep.

In India, trade marks are governed by the Trade Marks Act of 1999. Section 2(zb) of the Act defines trade marks to mean:

> "a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours."[3]

The term mark has been defined to include "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof."[4]

The definition of trade mark under the Indian trade mark legislation is clearly based on its identification function and is wide enough to include within its sweep different kinds of trade marks, even those which we never thought could be used as trade marks provided that they are capable of graphical representation. Rule 26 of the Trade Marks Rules explains how non-conventional trademarks could be represented graphically for example a three-dimensional

[2]https://www.wipo.int/edocs/mdocs/sct/en/sct_16/sct_16_2.pdf (last visited on January 7, 2022).
[3]The Trade Marks Act, 1999, s. 2(zb).
[4]*Id.*, s. 2(m).

trade mark could be reduced into two-dimensional graphic representation or a photograph consisting of three different views of the trade marks.

The Draft Manual of Trade Marks Practice and Procedure prepared by the Office of Controller General of Patents, Designs and Trade Marks also talks about non-conventional trade marks. This manual is meant to bring uniformity and consistency of practice with respect to the various procedures involved in the administration of the Trade Marks Act.[5] As per the manual following types of marks come under the category non-conventional trade marks:

1. Colourtrade marks,
2. Sound marks,
3. Shape of goods, packaging,
4. Smell trade marks.[6]

Let us now discuss each of these kinds of trade marks.

Colour Trade Marks

If we look at the definition of the term 'marks' under the Trade Marks Act it does talk about the combination of colours but not about the use of single colour as a trade mark. It may be because of the fact that people hardly identify the goods based on their colour. Moreover, the application of registration of a single colour as a trade mark may lead to an objection under section 9 of the Trade Marks Act which deals with the absolute grounds of refusal with regard to registration. It is believed that colours are inherently incapable of distinguishing the goods and services of one person from another. Though that does not mean that a single colour cannot be considered for registration as a trade mark, it can be registered only if it is of such nature as to differentiate between the goods and services of one trader from those of another.[7] The application for registration for a combination of colours or a single colour will only be considered if it contains a statement to that effect.[8]

There have been a lot of disputes regarding the registration of colour*per se* or a combination of colours as trade marks. Colours usually fall within the public domain and giving a

[5]https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf (last visited on January 7, 2022).
[6]A Draft Manual of Trade Marks Practice and Procedure, p. no. 84.
[7]*Ibid.*
[8]*Ibid.*

monopoly to someone over a particular colour or combination of colour requires a lot of caution. Though, a particular pattern made with a single colour or combination of colours may not require a lot of deliberation for registration.

Another issue with respect to the registration of colours as trade marks is their graphical representation. The manual of the trade mark office very clearly states that every application for registration of colours as trade mark must very clearly state the details of the colour or combination of colours as per the international classification system and should concisely contain an accurate description of the mark.[9] At times it is difficult to explain the exact shade of colour or combination of colours and the samples may fade over a period of time and that's another reason that leads to disqualification of a single or a combination of colours as trade marks.

As per the Trade Marks Rules, it is for the applicants to prove that the manner in which the colour or the colours have been used forms an essential part of the trade mark and thus requires protection under the Act. So, if evidence of acquired distinctiveness is given by the applicant like in the case of the trade mark of HP, the right over those colours limited to those shapes or geometrical patterns could be given to the applicant.[10]

In *Philmac Case,*[11] the Australian court discussed about situations where the colour or combination of colours will be considered registrable without evidence of use and stated:

> "Colour is only inherently adapted to distinguish goods where it has: no utilitarian function – the colour imparts no physical or chemical properties such as light reflection or heat absorption; no ornamental function – the colour has no ordinarily recognised meaning such as heat, danger or environmentally friendly; no economic function – the colour is not naturally occurring in that product such that competitors would be required to use extraordinary manufacturing processes, at extra expense, to avoid infringement; no other competitive advantage – other properly motivated traders might naturally use the colour in a similar manner in respect of their similar goods."[12]

[9] *Id.,* at 17.
[10] *Id.* at 85.
[11] *Philmac Pty Ltd* v. *The Registrar of Trade Marks*, [2002] FCA 1551.
[12] *Id.,*para 65.

Another important case on the registration of colour trade mark is the case for registration of purple colour (Panatone 2685C) for Cadbury chocolates.[13] In 2019, the UK Court of appeal rejected the claim of Cadbury over the colour purple, the claim was challenged by Nestle, who said that the colour is inherently incapable to distinguish. The court disallowed the registration of the colour purple as the application is based predominantly on the registration of a single mark i.e., colour purple and stated:

> "In my judgment, the reader would conclude that the 876 registration was an attempt to register a single mark which falls foul of the requirements of clarity and precision."[14]

This judgment clearly highlights the fact that the graphical representation is of utmost importance, if the graphical representation is not clear and precise then the registration could not be granted.

Another area in which the colour trade mark leads to great debate is the pharmaceutical industry. The pharmaceutical industry apart from patents tries to monopolise the market with the use of trade marks. The matter was discussed by the European Court of Justice,[15] where the court dismissed the claim of Glaxo Smithkline that sandoz was confusingly similar to galaxy in using the same purple colour over inhalers. In cases surrounding pharmaceutical products, the court should be doubly cautious as they are dealing with substances that can affect the life and limb of an individual.

In *Qualitex Co.* v. *Jacobson Products Co. Inc.*,[16] the court has discussed the registration of colour trade marks on the basis of functionality. The court, in this case, has held that colour could be registered as a trade mark if it is not *de jure* functional and stated:

> "The word 'symbol or device' so as not to preclude the registration of colours, shapes, sounds or configurations where they function as trade marks."

Based on the entire discussion it can be stated that colour could be registered as a trade mark provided it could be graphically represented and does not try to monopolise a particular

[13] *Cadbury Limited* v. *The Comptroller General of Patents Designs and Trade Marks,* [2018] EWCA Civ 2715.
[14] https://www.bailii.org/ew/cases/EWCA/Civ/2018/2715.html (last visited on January 7, 2022).
[15] Swaraj Paul Barooah, "The Monopoly Purple – Colours, Shapes and Sizes in the Pharmaceutical World" *available at:* https://spicyip.com/2021/04/the-monopoly-purple-colours-shapes-and-sizes-in-the-pharmaceutical-world.html (last visited on January 7, 2022).
[16] *Qualitex Co.* v. *Jacobson Products Co. Inc.*, 514 U.S. 159 (1995),*available at*: https://www.law.cornell.edu/supct/html/93-1577.ZO.html (last visited on April 6, 2022).

colour or the colour does not have any reference to the functional characteristics of the product.

In India, the courts have long before recognised that colour can perform the identification function of trade marks. In the case of *Colgate* v. *Anchor,*[17] the court has recognised that the red and white colour packaging of Colgate identifies the product of Colgate and though no monopoly can be created over a particular colour but if people start recognising a particular colour to a manufacturer it needs to be protected in order to prevent further deception and confusion.

Sound Marks

Another kind of non-traditional trade mark that is widely recognised all over the world is sound trade mark. Sound marks could be musical or non-musical like a lion's roar before a movie or Britannia's ting ding ding. Sound marks can be represented graphically by musical notations and are considered to be capable of distinguishing the goods and services of one person from other. Simply put sounds are used as trade marks instead of words and devices. In India, sound marks are registrable only on the proof of factual distinctiveness. The Trade Mark Rules, 2017 under rule 26 gives the following guidelines for the registration of sound trade marks:

> "Where an application for the registration of a trade mark consists of a sound as a trade mark, the reproduction of the same shall be submitted in the MP3 format not exceeding thirty seconds' length recorded on a medium which allows for easy and clearly audible replaying accompanied with a graphical representation of its notations."

Further form 6 of the rules states that in the column for description of marks "representation of specific musical notes must be submitted at the place provided for the trade mark."

As per the trade mark manual sound marks will be accepted for registrationdepending upon whether the sound is or has become distinctive. This means that sound marks will be registered only when people start associating a sound with a particular manufacturer something like Britannia's ting ding ding or as formally called the four-note bell sound.

[17] *Colgate Palmolive Compan*y v. *Anchor Health and Beauty Care Pvt.*, 2003 (27) PTC 478 Del.

The first company to be granted registration for sound marks in India is yahoo and there is no looking back after that. Though there are various questions regarding the registration of sound marks like it has been argued that the musical notations or sonograms (graphs depicting the distribution of sound frequencies at different levels) are the arena of experts and not everyone could read and understand them. Discussing about sound marks ECJ in the case of *Shield Mark BV,*[18] stated that:

> "Even if such a representation is not immediately intelligible, the fact remains that it may be easily intelligible, thus allowing the competent authorities and the public, in particularly traders to know precisely the sign whose registration as a trade markis sought."[19]

In *Edgar Rice Burgohs Inc.*,[20] while dealing with sonograms court stated:

> "The representation of a sound by any way other than musical notation is so difficult that the legislature has allowed filing of a sound file electronically in 2005. This makes it easily accessible and self-contained."

Shape of Goods, Packaging etc.

We relate so many products to their shape or packaging, we can recognise Kit Kat chocolates just by looking at them or we can recognise Coca-Cola just by looking at the shape of its bottle. In these cases, the shape of these products seems to perform exactly the same function that we attribute to trade marks hence their protection becomes inevitable. The definition of the term 'Trade Mark' under the Act clearly states that the shape of the goods and their packaging can be registered as a trade mark as long as it can be graphically represented. The Manual of Trade mark Practice and Procedure also talks about registration of shape trade marks and states that every application for registration for a shape trade mark should clearly state so and if it is not clearly stated and it is clear from the three-dimensional drawings or any other details of the application, then it is the responsibility of the applicant to verify the same. It also empowers trade mark registrar to ask for more views of the trade mark under registration in case the one submitted by the applicant is not clear. A black and white

[18]*Shield Mark B.V.* v. *Joost Kist*, CASE C-283/01,*available at*: https://ipcuria.eu/case?reference=C-283/01 (last visited January 7, 2022).
[19]*Id.,*para. 63.
[20]*Edgar Rice Burroughs Inc*. v. *OHIM*, R708/2006-4,*available at*: https://indiancaselaws.wordpress.com/2020/01/01/edgar-rice-burroughs-inc-v-ohim/ (last visited on April 6, 2022).

photograph of the shape trade mark mounted on good quality paper which is capable of being used for advertising purposes will be accepted as the representation of the trade mark.

Registration of shape trade mark brings with it a lot of concerns. Giving monopoly over these three-dimensional trade marks can lead to an increase in anticompetitive practices, not in every case but at least in those cases where the shapes are inherently incapable of registration. Section 9 of the Trade Marks Act which is dealing with absolute grounds of refusal for registration of trade marks specifies certain shapes can be considered to be inherently incapable to be registered as a trade mark. As per section 9(3) of the Trade Mark Act following shapes cannot be registered:

> "a mark is not registrable as a trade mark if it consists exclusively of –
> a) the shape of goods which results from the nature of the goods themselves; or
> b) the shape of goods which is necessary to obtain a technical result; or
> c) the shape which gives substantial value to the goods."[21]

So, trade marks which consists of a shape that is essentially a result of the nature of goods themselves, or a shape that leads to technical results or which adds substantial value to the product cannot be registered even if it has acquired distinctiveness, for example, the shape of an egg tray, a regular bottle, a ceiling fan are few shapes that cannot be registered as they fall in one of the three specified categories. The provision makes sure that future traders are not put at loss by giving monopoly of a particular shape or packaging and also guards against anti-competitive practices.

Almost similar provisions exist with regard to shape trade marks in almost all corners of the world. Explaining the purpose of such provisions the English Court of Appeal in the case of *Philips Electronics N.V.* v. *Remington Consumers Product Ltd.*,[22] stated:

> "The sub-section must be construed so that its ambit coincides with its purpose. That purpose is to exclude from registration shapes which are merely functional in the sense that they are motivated by and are the result of technical considerations. Those are the types of shapes which come from manufacture of patentable inventions. It is those types of shapes which should not be monopolised for an unlimited period by reason of trade mark registration, thereby stifling competition. Registrabletrade marks are those which have some characteristic which is capable of and does denote origin. In my judgment

[21] *Supra* note 3, s. 9(3).
[22] [1999] RPC 809.

> the restriction upon registration imposed by the words 'which are necessary to obtain a technical result' is not overcome by establishing that there are other shapes which can obtain the same technical result. All that has to be shown is that the essential features of the shape are attributable only to the technical result." [23]

In the case of *Lego Juris* v. *Office for Harmonisation of Internal Market*,[24] the CJEU while dealing with functional shapes stated:

> "Once the sign's essential characteristics have been identified, the competent authority still has to ascertain whether they all perform the technical function of the goods at issue. Article 7(1)(e)(ii) of Regulation No 40/94 cannot be applicable where the application for registration as a trade mark relates to a shape of goods in which a non-functional element, such as a decorative or imaginative element, plays an important role. In that case, competitor undertakings easily have access to alternative shapes with equivalent functionality, so that there is no risk that the availability of the technical solution will be impaired. That solution may, in that case, be incorporated without difficulty by the competitors of the mark's proprietor in shapes which do not have the same non-functional element as that contained in the proprietor's shape and which are therefore neither identical nor similar to that shape."[25]

In the case of *Hauk* v. *Stokke*,[26] the CJEU again pointed out that a shape to registrable should add sufficient aesthetic value in addition to the functional characteristics.

Speaking particularly about India, Indian courts have on numerous occasions referred to the concept of shape trade marks and provided registration to the same or at least upheld their rights in the same. In the case of *Apollo Tyres*v. *Pioneer Trading Corporation,*[27] the Delhi High Court while dealing with the registration 'tread pattern tyres' stated that:

> "...No party can claim propriety over the technique/practice of providing treads in a tyre, since treads are functional, i.e., they afford the necessary grip between the tyre and the ground during movement of the vehicle to keep it substantially stable. No party can

[23] *Id.,* at 830.
[24] *Lego Juris v. Office for Harmonisation of Internal Market,* Case C-48/09 P, *available at:*https://curia.europa.eu/juris/document/document.jsf?text=&docid=82838&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=378236 (last visited on January 7, 2022).
[25] *Id*., para. 72.
[26] *Hauck GmbH & Co KG* v. *StokkeA/S*, Case C-205/13, EU:C:2014:2233.
[27] *Apollo Tyres* v. *Pioneer Trading Corporation*, CS(OS) 2802/2015.

> claim proprietary over the technique/practice of a plurality of ribs, separated by grooves, which create the tread on the tyre. However, that does not mean that the unique pattern of the tread adopted by a particular manufacturer, which constitutes its unique design and shape, would not be entitled to protection as a design if it is registered, and also as a trade mark - if the tread pattern has been exploited as a trade mark, i.e., a source identifier. What is functional in a tyre are the treads and the tread pattern."[28]

While dealing with the shape trade mark, it becomes essential to discuss its relationship with the Designs Act, as in many cases the applicant argues that the design of their shape is distinctive and people have started associating it with their products. One of the leading and most discussed case on this point is *Crocs* v. *Bata*,[29] where the court clearly highlighted that the elements of design cannot be considered as trade mark and they can only form a part of larger trade dress or get up.

Smell Trade Marks

Smell trade marks or as we call them olfactory marks is another category of non-traditional trade mark recognised in India. If we look at the definition of trade marks under the Indian Trade Marks Act clearly these olfactory marks nowhere fit in it as they are not capable of being represented graphically and the same has also been reiterated in the Indian Draft Manual of Trade Marks 2015.[30]

The question of registration of smell trade mark came in the case of *Ralph Sieckmann*v.*Deutsches*,[31]where the question related to the registration of fragrance of methyl cinnamate came in front of European courts. The court discussed in detail about the graphical representation and stated:

> "Finally, the object of the representation is specifically to avoid any element of subjectivity in the process of identifying and perceiving the sign. Consequently, the means of graphic representation must be unequivocal and objective."[32]

[28] *Id.*,para. 87.
[29] *Crocs* v. *Bata,* 2019 SCC OnLine Del 6808.
[30] *Supra* note 6 at 87.
[31] *Ralph Sieckmann*v. *Deutsches*, C-273/00,*available at*: https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A62000CJ0273 (last visited on January 7, 2022).
[32] *Id.,*para. 54.

In the light of the foregoing observations, it can be said that a mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective.

The representation of an olfactory mark with a chemical formula does not fulfil the requirement of graphical representation as the graphical representation of an odour does not recognize the odour itself. That is the reason why the court held that the said trade mark is not registrable.[33]

Despite all the difficulties many manufacturers today want to make optimum use of the fragrance that they have developed for their product and want to monopolise them. The fragrance is important for consumers in the case of a number of products like deodrants, perfumes, home cleaning products, cleaning products etc. and thus has good significance among the stakeholders. The biggest obstacle for the registration of the olfactory mark is the graphical representation. It is very difficult to graphically represent a scent trade mark without associating it with a commodity.

Another major challenge for the registration of a smell trade mark is the functionality doctrine. This doctrine is widely applied in courts around the world in cases of trade mark registration. This doctrine ensures that legitimate competition is not hampered by granting a monopoly over an essential function of a product. The doctrine is recognised under the Indian Trade Mark Act in relation to shape trade marks under section 9(3). Sometimes the scent or the smell of a product is indicative of its function and thus cannot be monopolised. The *Pohl-Boskamp*[34] case indicates how functionality doctrine work where the registration of peppermint fragrance was denied to a pharmaceutical company for treating certain categories of chest complications as the registrar found that peppermint fragrance has properties that can treat a different kind of chest complications and thus ineligible for registration. Though, it has been argued that at least the fragrance of certain well-known beauty and skincare products should be allowed to be protected especially when they are widely recognised by the consumers.

Of late the countries owing to the commercial significance have started registering scent marks but a lot of questions still need to be answered. A clear-cut definition as to what is

[33] https://curia.europa.eu/juris/showPdf.jsf?docid=47585&doclang=EN (last visited on January 7, 2022).
[34] *In re Pohl-Boskamp GmbH & Co.*, 106 U.S.P.Q.2d 1042.

protectable and what is not in cases of smell marks is required. Other question is with regard to the graphical representation of these marks, what standard will be adopted or whether the graphical representation has to be done with reference to a commodity. Moreover, the fragrances in public domain also need a clear-cut mention, as these are the fragrances that help small buisnesses to make their product attractive.

Unorthodox Trade Marks

Mentioned above are some of the kinds of non-conventional trade marks which do find a mention somewhere or the other in our legal regime. But we can discuss about many other kinds of non-conventional trade marks like motion marks, holograms etc.

Motion trade mark wasregistered for the first time in India by Nokia for their joining hand trademark. As it is difficult to graphically represent a motion mark prima facie their registration is very difficult under the Indian Trade Mark Act. However, in the case of Nokia Trade Mark many screenshots of the motion trade mark of Nokia were attached in order to step by step graphically represent their trade mark. This method of registration is adopted by many countries around the world though many accept the motion trade marks in the form of multimedia clips as well. Ideally, a motion mark comprises of animated work along with the sound, clearly not capable of being registered under the Trade Mark Act as it is very difficult to depict the entire trade mark graphically.[35]

Another category of unorthodox trade mark we can talk about is holograms. Holograms as per Cambridge University Dictionary means "a specialtype of photograph or image made with a laser in which the objectsshownlooksolid, as if they are real, rather than flat."[36] These are basically three-dimensional trade marks which look different when viewed from different angles. It is again very difficult to represent them graphically. Moreover, their role as source identifiers is also very doubtful. India so far does not have any registration of hologram trade mark. Though many other countries have given registration to holograms.

We can talk on and on about these new categories of trademarks gesture, posture, texture, touch and fee marks, the list is growing every day.

[35]Jain & Partners, "Motion Trade Mark: Unconventional TradeMarks" *available at:* https://www.jainandpartners.com/blog/details/motion-trademark/29 (last visited on March 29, 2022).
[36] https://dictionary.cambridge.org/dictionary/english/hologram (last visited on March 29, 2022).

III. CONCLUSION

Discussed above are only those non-traditional trade marks which are widely recognised around the world but apart from these many other kind of trade marks are developing these days that need the attention of our policy makers. We can talk about taste trade marks, touch or feel marks, motion marks like moving images, holograms, gestures, position trade marks etc. which are hardly recognised in our trade mark legislation. The policies behind registration of these widely accepted non-traditional trade marks is itself not clear and these new categories will add fuel to the fire. In these circumstances, it becomes responsibility of our policy makers to pay some attention to these new categories of trade marks as well.

The *Sieckmann case*[37] has rightly given the due importance to the aspect of graphical representation and its necessity even in cases of non-traditional trade marks. In fact, the same criteria seems to be adopted by India in the draft manual but it becomes imperative to mention here that the requirement of graphical representation was waived of by EU Trade Marks Reforms, 2017. The reason appears to be simple and that is easy registrability of non-traditional trade marks. The United States has always focused more on acquired distinctiveness thus making registration of non-traditional marks easier.

It seems that the world has already opened its door for new and emerging non-traditional trade marks. In these circumstances it becomes essential for us to stop and analyse whether the laws are capable of protecting these ever-emerging different kinds of non-traditional trade marks. No doubt we have taken few steps forward but a lot is yet to be done.

[37] *Supra* note 31.

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CHALLENGES TO GOOD GOVERNANCE IN INDIA

Dr. Princy Chahar[*]

ABSTRACT

Governance is a system which is concerned with structure and processes for decision making, accountability, control and behavior at the top of an entity. A government is a machinery through which the duties and functions of the State is formulated, expressed, and realized. Relation between the State and government, execution of laws, role of government and nature of governance has also undergone a lot of changes with the passage of time. Good governance is related to institutional and political processes and results which are necessary to achieve the goal of development. Citizens of all the countries expect their nation-state and various organs of Government for governance that provide them with all the means to live a good life. In short, good governance, means securing justice, employment, empowerment and efficient delivery of services. When we discuss about governance in India, due to its huge size and heterogeneity, India is not an easy country to govern. Concept of 'good governance in India' has multiple aspects and challenges as well. Since we got Independence, India is facing many roadblocks on its way to good governance. Major roadblocks are criminalization of politics, terrorism, corruption, unemployment and poverty etc. In this paper, author has highlighted the challenges to good governance which India is facing, laws related to those issues in place in India and ways to minimize them.

I. INTRODUCTION

Generally, the terms "government" and "governance" are used interchangeably and signify the exercise of authority in a country, corporation, institution, or State. Government is the name given to the entity which exercises this authority. A government is a machinery through which the duties and functions of the State is formulated, expressed, and realized. But with changing scenario, relation between the State and government, execution of laws, role of government and nature of governance has also undergone a lot of changes. Governance has now become Good Governance. In the 1992 report entitled "Governance and Development", the World Bank set out its definition of Good Governance. It defines 'Good Governance' as "the manner in which power is exercised in the management of a country's economic and social resources for development."[1]Citizens from all the countries look up to the nation-state

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[1]*Available at*: http://documents.worldbank.org/curated/en/604951468739447676/Governance-and-development. (Last visited on August 1, 2021).

and various organs of Government for governance that provide them all the means to live a good life. In short, good governance, means securing justice, employment, empowerment and efficient delivery of services.

Due to its huge size and heterogeneity, India is not an easy country to govern. Concept of 'good governance in India' has multiple aspects and challenges as well. Since we got Independence, India is facing many roadblocks on its way to good governance. In his famous 'tryst with destiny' speech on 14 August 1947, Pt. Nehru articulated this challenge as 'the ending of poverty and ignorance and disease and inequality of opportunities'[2]. In this Article, I will be highlighting major challenges to good governance in India.

II. Major Challenges to Good Governance

Criminalization of Politics

Criminalization of politics can be described as participation of criminals in the politics by various ways including contesting of elections, getting elected as members of Parliament and running the country. In India, criminalization of politics began in late 1970s. Criminalization of the politics and the unconsecrated nexus between politicians, civil servants and business houses started having an evil influence on formulation of public policy and governance. Criminalization of Indian politics has been pointed out by various committees formulated on political and electoral reforms.

The most frightening form of criminalization of politics is the substantial numbers of elected representatives in the Parliament with undecided criminal charges against them. Apart from it, booth capturing, intimidation of voters, proliferation of unworthy candidates etc. also constitutes major obstructions to good governance. The Vohra Committee on Criminalization of Politics[3] submitted its report in October 1993 and identified the extent of political-criminal nexus. It also revealed how over the years' criminals have been elected to Parliament and State Assemblies. The Supreme Court made recommendation in *Shri Dinesh Trivedi, M.P. & Others*. v. *Union of India*[4] for the appointment of a high level committee for ensuring an in depth investigation on the findings of the Vohra Committee.

[2] *Available at*: https://en.wikipedia.org/wiki/Tryst_with_Destiny (Last visited on August 1, 2021).
[3] Government of India, "Vohra Committee Report on Criminalization of Politics" (Ministry of Home Affairs, 1993).
[4] (1997) 4 SCC 306.

Laws in Place in India to Curb Criminalization of Politics

India does not have a specific law to prevent criminalization of politics. There are some provisions in various Acts and Rules which points out the measures taken to prevent the criminalization of politics. Section 4A of the Conduct of Election Rules, 1961 provides that an affidavit must be filed by each candidate who wants to contest election. The affidavit must have following details[5]:

i. Details of pending case, if any, against the candidate which is punishable with two or more years of imprisonment and in which charges have been framed by the court.
ii. Details of cases where a conviction for an offence is involved other than an offence that has been mentioned under Section 8 of Representation of the People Act, 1951 and includes imprisonment for one year and more.

Section 8 of the Representation of People's Act states that "a person who has been punished with an imprisonment for more than two years cannot contest an election for next six years after the term of his imprisonment has over."[6] But we can't ignore the sad reality that the cases are continued for years in the courts which makes this provision useless in reality, because if a candidate is facing trial, no matter how gross the charges are against him, he can contest the election until the court pronounce its judgment.

The Supreme Court bench of Justice R.F. Nariaman and S. RavindraBhat on 13th February 2020 in the case of *Rambabu Singh Thakur* v. *Sunil Arora & others*[7] ordered the political parties to publish criminal antecedents of their candidates for the Legislative Assembly and LokSabha elections. The court also ordered that the political parties have to within 48 hours of selecting a candidate with criminal background, publish a detailed reason as to what made them chose the candidates having criminal records over other candidates. Following are the information that needs to be disclosed:

i. The crime that the candidate is accused of;
ii. Number and nature of cases accused is charged with;
iii. Name and number of the case along with name of the court;
iv. Stage of the case;

[5] Conduct of Election Rules, 1961, s. 4.
[6] The Representation of the People Act, 1951. s. 8(3).
[7] W.P.(C) No. 2192 of 2018

v. Why the other person without any criminal record can't not be selected as a candidate.

As per the order of the Hon'ble Supreme Court information must be uploaded on social media platform, one national newspaper, website of the party and one vernacular newspaper. Having criminals and musclemen as protectors and guardians of our country, is one of the most devious threat to our democratic governance. It is the time, we need to move further to debar criminals from contesting elections and to do that there is a need to amend Section 8 of the Representation of the People's Act 1951 in order to disqualify an individual against whom any case is pending related to the grave and heinous offences and corruption.

Terrorism

One of the most important functions of the democratic government is to provide security of life and property to its people. But the life and property of individual in India is in danger due to terrorism which is spreading like wildfire. Almost 150 districts from various States of India are affected by terrorism, insurgency and Naxalite movements.

Definition of terrorism can't be confined in the boundaries of words. Where some scholars and experts have chosen the open-ended definitions, others have outlined several different kinds of definitions, all exploring and endeavoring to incorporate all the elements that decide what terrorism is.In general, Terrorism is defined as an act of force or violence against persons or property in violation of laws. The main purpose of terrorism is to achieve some political aim.

Terrorism is one of the biggest threats not only to the good governance but to the humanity as well. India has witnessed many major terrorist attacks in which many people including our armed forces have lost their lives. The main support behind terrorism in India is foreign intervention and support from the neighboring countries. Neighboring countries like Pakistan, China, Nepal, Bhutan, Myanmar are constantly promoting and assisting terrorism in India. Terrorism is not something that can be ousted by recourse to the ordinary laws of the land, there are many special laws in force in India to stop terrorism including Maintenance of Internal Security Act, Unlawful Activities Prevention Act, 2004, Terrorist and Disruptive Activities Act 1985, The Disturbed Areas Act, The Armed Forces Special Power Act 1958, National Security Act, Assam Preventive Detention Act, Armed Forces Jammu & Kashmir Special Powers Act and Essential Services Maintenance Act but as we know that though India has an absolute spectrum of draconian laws that are enacted in order to stop terrorism but are effectively used by state agents to abuse the legislative powers. Inability of the

agencies to act promptly and executives to properly implement the laws also contributed in the spread of terrorism.

Corruption

While anti-corruption laws in India are rigorous, corruption is very common in our country. Corruption in India has been widely alleged as one of the major obstacle in improving the standard of governance in India. The complex and nontransparent system of control, monopoly of the government as a service provider, immature legal agenda, lack of data, and the weak perception of citizens' rights have given ample backing to corruption in India.

The government has taken few steps by introducing several laws in order to curb corruption like creation on an independent ombudsman i.e. Lokpal to investigate and prosecute corruption charges against public officials including ministers. Lokpal and Lokayuktas Act, 2013 is the latest legislation that provides establishment of Lokpal at central level and Lokayutas at the State levels. Lokpal and Lokayuktas appointed under this Act are independent from executive branch of the Government. They are given power to investigate complaints of corruptions against public and government functionaries including Prime Minister or other central ministers.

Apart from Lokpal India has Prevention of Corruption Act, 1988 (hereafter PCA) This Act criminalizes receipt of any 'undue advantage' by 'public servant.' Offence under Prevention of Corruption Act includes:[8]

i. public servant obtaining any undue advantage with the intention, or as reward, to improperly or dishonestly perform any public duty;
ii. Public servants obtaining any undue advantage without consideration from a person concerned in proceedings or business transacted either by the public servant to whom such public person is a subordinate and
iii. Criminal misconduct by a public servant and a habitual offender.

Before 2018, Bribe-givers were brought within the ambit of the Act only through the charge of abatement of the offences mentioned above but the amendment of 2018 in PCA have expressly targeted bribe givers by criminalizing the act of providing or promising to provide a bribe to any person, whether public servant or not, to induce or reward a public servant to

[8]Prevention of Corruption Act, 1988.

improperly or dishonestly perform a public duty. Central Civil Services (Conduct) Rules, 1964, All India Services (Conduct) Rules, 1968, Foreign Contribution Regulation Act, 2010, Central Vigilance Commission Act, 2003, Right to Information Act, 2005 etc. contains various provisions aiming to tackle corruption in India

Despite all these legislations, Corruption is not ready to take its step out from Indian governance. Corruption is the result of lack of effective management by the government functionaries, unsupervised administration, lack of support from good leaders and lack of proper vigilance system in our country. Government should strive hard to eradicate corruption from government administration.

Employment and Poverty

Providing employment to the youth is the most difficult task faced by the Government of India. Unemployment refers to "a situation in which skilled or educated people are unable to find a job." Youth of working age in India constitutes almost half of the population. A fast-growing working population will ensure more workers, more saving and hence more investment.

This robotic view of growth assumes that demography is the fate and that economic policies and programs play little or no role. If we fail to produce employment and prepare the youth with excellence education and skills, India's demographic dividend could become a demographic liability. Employment growth accelerated to 2.6 per cent during 1999-2005 but the average daily status unemployment rate increased further to 8.3 per cent in 2004-05 as more persons entered market-seeking employment. This trend continues.

Good governance is important for fighting poverty. Governance is about politics or the relationship between Government and public. Good governance requires state capability, responsiveness, and accountability. It means making politics work for the poor. Countries got to do better at delivering security, incomes, and health and education for all. Security may be a precondition for development and requires effective states. Preventing conflict is best and more cost-effective than helping countries rebuild afterward. Growth is that the best way to reducing poverty and there must be better access to economic opportunities. Everyone must have access to four essential public services i.e. education, health, water and sanitation and social protection.

III. CONCLUSION

The effective functioning of governance is the prime concern of every citizen of the country. The citizens are ready to pay the price for good services offered by the state but what is

required is a transparent, accountable and intelligible governance system absolutely free from bias and prejudices. There is a need to reformulate our national strategy to accord primacy to the Gandhian principle of 'Antyodaya" to restore good governance in the country.India should also focus on developing probity in governance, which will make the governance more ethical. The government should continue to work on the good ideals that will lead to inclusive and sustainable development. Criminalization of politics should be stopped and a government must be an association of people who are no associated with any sort of criminal activities, whatsoever. There is a dire need to bring more stringent legislation to curb criminalization of politics.

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PRECAUTIONARY PRINCIPLE: COVID AND REOPENING

Akash Anand[*]

ABSTRACT

India saw the pandemic in its worst form last year, i.e., 2021 during the Delta wave of the Covid19 pandemic. The reason why that happened was the unavailability of vaccine and more importantly the fact that after the first wave of the pandemic people started to assume that there would not be any other wave and dropped taking almost all the precautions that were in place. The country saw large gathering in elections, markets, marriages, religious festivals etc. Delta emerged in India and resulted in a havoc and deleted on an average a member of the infected family. Then came a period of respite but not for long. In the month of January and February this year, we saw the Omicron wave, not even after a gap of a year from Delta wave, which according to the data available was more transmissive but milder than delta. Till date people are dying because of the Omicron infection but the wave is surely in its lowest trajectory. However, what is going to happen few months from now or in near future is totally uncertain. Uncertainty always calls for precautionary action and thus this paper provides to assist the policymakers and implementers to apply precautionary principle as directed by the existing laws and practices. It takes the help from European Laws to interpret Indian Laws and also brings out similarities with the United States precautionary action with the Indian counterpart. It advocates for cost effective balancing between lives and livelihood, reopening and safe reopening and mentions innovations that are cost effective which are becoming popular abroad to counter the pandemic and its future waves if any.

I. INTRODUCTION

India just saw the third wave of the pandemic which ran wild due to the emergence of a new variant which was more contagious than the deadlier Delta wave which happened in March-June last year.[1] The most prominent of questions asked are whether there will be a new variant or not? If there is, whether that will be deadlier or not? When I write this article a new sub-lineage of Omicron is showing evidences of being much more transmissible than the

[1] Bindu SajanPerappadan, "Omicron in community transmission in India, has become dominant in multiple metros: INSACOG" *The Hindu*, January 23,2022, *available at*https://www.thehindu.com/news/national/omicron-in-community-transmission-stage-in-india-dominant-in-multiple-metros-insacog/article38313131.ece(Last Visited on Jan 30,2022). See also https://www.thehindu.com/sci-tech/science/omicron-epidemic-third-wave-or-new-pandemic/article38190636.ece, https://www.economist.com/asia/2022/02/17/indias-omicron-wave-recedes-but-not-the-risk-of-premature-death,

present variant, known as BA.2.[2] What we can conclude is that there is no scientific certainty that there will be for sure a deadlier variant or there will be for sure no deadlier variant in future. Does that mean everyone, after the end of the current wave, should start behaving normally as they were before the pandemic or, as we have experienced, should behave as if we were between the waves which in reality or practice more akin to the behaviors before the pandemic. This takes us to the recent question posed to the government of many nations and also India and its states whether they should open schools, colleges, other educational institutions for the continuation of the academic process in the physical mode. Also that hotels, restaurants, bars, cinema halls should be open for public and air-conditioned railway coaches and buses shall start running in their full capacity. This is where policy and law play a major role in regulating the conduct of people or even to direct the behavior of people balancing the protection of life and health of the majority of people and the economy of a nation so that the invaluable lives and livelihood attached to economic activity are not lost due to inaction on the part of the state. This article will find the policy and the law relating to such reopening so that lives and livelihood are both taken care of in the best and affordable manner.

II. Policy And Law: Inform The Actions

The executive organs of the state are faced with the question that require to be addressed which is "*Whether there is a policy which can assist the state in regulating and managing this pandemic that can also inform laws for its application?"* Or "*Is there a law which can inform the policy for regulating and managing this pandemic?* Therefore, if the answer is yes for both the above questions then there is a political and a legal solution to minimize if not eradicate the effects or even the cost of the pandemic driven by loss of life, education, health services and businesses and even tourism, hospitality which are the most affected sectors by this pandemic. When we say minimize and not eradicate it is very clear that eradication of the pandemic is subject to the eradication of the Sars-CoV2 disease from any and every place in the planet which seems to be a talk of a late future. Variants of the virus have developed in so many different parts of the world that it is impossible to say with certainty that a later variant cannot emerge from a place which hasn't been a contributing country or region yet, apart from variants such as Delta from India, Omicron from South Africa or other variants of interest and concerns as named by the WHO.[3]

[2] WHO, Statement on Omicron sublinegae BA.2, *Newsletter*, *available at* https://www.who.int/news/item/22-02-2022-statement-on-omicron-sublineage-ba.2 (Last Visited on February 20, 2022)

[3] WHO, Variants of Concern (VOC), Variants of Interest (VOI), Variants under Monitoring (VUM), WHO Activities, *available at* https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/

Can we act under such uncertainty in such a way which does not endanger the lives, education and the economy of a nation? Shall we open schools and other academic institutions, hotels, restaurants air-conditioned buses, air-conditioned railways coaches, which is not to be equated as an office or a private shopping mall because there the number of people and the time period of exposure is still very limited? It is also a fact that all this institutions, buildings, transport vehicles and railway coaches are closed spaces where outside air circulation is limited. It is also a fact that opening of windows in buildings generally invites the pollutants, most importantly in cities, of the outer environment and remain in circulation if the building doesn't have proper ventilation mechanism inbuilt. So closed spaces are not good for protection from the covid infection from the infected ones and opening of the windows adds pollutants to the air in circulation inside those institutions. It's a double whammy.[4] *What shall be an action in this case in view of the uncertainty revolving around the emergence of newer variants? Is lockdown the only solution? Is only the mask mandate apt for these problems? Is there a principle that guides us for action in such uncertainty?*

Let us consider the second question above before we come to the first one. The answer to the second question about a law which can inform the policy is in the affirmative. It is the precautionary principle. The principle is stated as: -

> "*Where there are threats of serious or irreversible nature lack of scientific certainty shall not be used as a reason to postpone cost-effective measures to prevent environmental degradation*."[5]

This is the wording of the principle as defined in the Rio Declaration of 1992.[6] Why this principle is important in the present context can be seen from one of the origins among the various debated origins of the principle. That is its origin in a specific application of the principle in a dispute in the European region between United Kingdom and one of the EU institutions.[7] It is relevant because the decision involves the matter of disease transmission between animals to humans which stands true also for the spread of Covid19. The export from the United Kingdom of bovine meat was banned rather the import by rest of the EU States on the reason that it can re-enter other EU States via import from other countries to

[4] Maria Neira, "Air Pollution and Covid, WHO Science in 5", Episode 56, WHO *available at* https://www.who.int/emergencies/diseases/novel-coronavirus-2019/media-resources/science-in-5/episode-56---air-pollution-covid-19

[5] Principle 15, Rio Declaration, UNCED, 1992

[6] *Id.*

[7] *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, Case C-180/96, European Court Reports 1998 I-02265,ECLI identifier: ECLI:EU:C:1998:192, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61996CJ0180&from=EN (Last Visited January 20,2022)

which United Kingdom would export the bovine meat.[8] The decision was made in the environment of uncertainty of whether there would be serious risk or not together with the fact that public health jurisprudence of EU incorporated the principle of precaution.[9] Therefore public health as an area incorporates the principle of precaution and it is no argument that the principle shall remain in the environmental jurisprudence alone.[10] So what is clear is that the precautionary principle is very much part of the public health in addition to the environmental law jurisprudence. India has recognized the precautionary principle as the law of the land.[11] It has also received a policy recognition.[12] It has also received a statutory recognition.[13]

III. MANAGEMENT: THE MEANING

A. From the Communication on Precautionary Principle

The behavior of governments and the people of India in this pandemic is declared and directed under the Disaster Management Act and by the Disaster Management Authority created under the Act.[14] The pandemic and the spread of the infectious virus as a public health emergency is controlled under the said Act.[15] Therefore, emphasis shall also be put on the meaning of management as it is aim of the Act. It doesn't and shouldn't mean only those cases where disaster has already taken place and what is left is to reduce the of losses of the already happened disaster.[16] Let us take the help of Communication on the Precautionary Principle of the European Union in order to understand what actually management shall mean in the case of risks.[17] It says: -

> "*4. The precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication. The precautionary principle is particularly*

[8] *Id.*

[9] *Id.* para 100 at page 2298

[10] *Id.* para 99 at page 2298, *"Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent".*

[11] *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715

[12] Environmental Policy of India, 2006

[13] National Green Tribunal Act, 2010, Section 20

[14] The Disaster Management Act, 2005, (Act 53 of 2005) available at https://ndma.gov.in/sites/default/files/PDF/DM_act2005.pdf(Last Visited on Feb 22, 2022). See also, Section 3 of the Act.

[15] *Id.,* Section 2(d)

[16] *Id.,* Section 2(e) the definition includes "threat of any disaster" which can be equated with risk.

[17] Commission of the EUROPEAN COMMUNITIES, Communication from the Commission on Precautionary Principle,Brussels, February 2, 2000, COM(2000), *available at* https://op.europa.eu/en/publication-detail/-/publication/21676661-a79f-4153-b984-aeb28f07c80a/language-en(Last Visited on February 20, 2022)

> *relevant to the **management of risk**. The precautionary principle, which is essentially used by decision-makers in the **management of risk**, should not be confused with the element of caution that scientists apply in their assessment of scientific data*."[18]

It further states that application of the principle as a risk management is to be undertaken when scientific uncertainty fails to provide a full assessment of the risk because of which the decision-makers consider that the available standard of protection of environment or humans may jeopardize the health of both.[19] It is jurisprudentially clear from the above illustration that management as an action also incorporates the precautionary element in cases of risk.

B. From the CODEX and Food Safety

The "Codex Alimentarius Commission" was formed jointly by the FAO and the WHO which can be said to be the result of the *Codex Alimentarius Europaeus* formed in 1958. In 1961 the *Council of the Codex Europaeus* passed a resolution that its working shall be taken over by the FAO and WHO and in the 11th Conference of the FAO the Commission was formed.[20] The Codex is the "collection of internationally adopted food standards" which aim at protecting human health and is "intended to guide and promote the elaboration of definitions and requirements to assist in their harmonization".[21] India is the member of the Codex Alimentarius Commission since 1964.[22] The 27th edition of the manual in its Seventh Section contains the working principle for risk analysis adopted in the year 2003 to be applied in the framework of the Codex and the definition of risk analysis and its elements relating to food safety adopted in 1997 among other things.[23] It mentions that risk analysis is composed of three elements i.e. risk assessment, risk management and risk communication.[24] It also states as follows:

> "*Precaution is an inherent element of risk analysis. Many sources of uncertainty exist in the process of risk assessment and risk management of food related hazards to human health. The degree of uncertainty and variability in the available scientific information should be explicitly considered in the risk analysis*."[25]

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[18] *Id.* para 4 at page 2

[19] *Id.*

[20] *See* http://www.fao.org/fao-who-codexalimentarius/about-codex/history/en/ (Last Visited on February 20, 2022)

[21] FAO and WHO, Codex Alimentarius Commission: Procedural Manual 27th Edition, Rome,2019, para 1 page 21.

[22] *See* http://www.fao.org/fao-who-codexalimentarius/about-codex/members/en/(Last Visited on February 20, 2022)

[23] *Supra* note 21 at page 121.

[24] *Id.* para 5 at page 121.

[25] *Id.* para 11 at page 122.

The European Parliament in the year 2002 passed a regulation, No. 178/2002, laying down the "general principles and requirements of food law" which established the "European Food Safety Authority".[26] The Regulation states that it is for providing the basis "for the assurance of a high level of protection of human health" by a strong science based procedures and efficient organizational arrangements for "decision making" in matters for food safety.[27] Further, for the purposes mentioned above, it lays down the general principle and that it shall apply to all stages of production, processing and distribution of food.[28] Then under Article 7, with the heading "precautionary principle" it states as follows:-

> "*1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.*"[29]

The year 2006 saw the enactment of the Food Safety Act in India.[30] One of main contribution of this act is the establishment of the food authority popularly known as the FSSAI.[31] However, apart from this, it importantly provides in its preamble that it establishes the authority "*to lay down science based standards for articles of food and to regulate*" its "*manufacture, storage, distribution and sale purchase and to ensure safe and wholesome food for human consumption".*[32] Section 18 of the Food Safety Act incorporates Article 7 of the EU Regulation, No. 178/2002, even though its marginal note doesn't mention specifically that it's the precautionary principle which has been incorporated. Clause (c) of Section 18 states as follows: -

> "*(c)where in any specific circumstances, on the basis of assessment of available information, the possibility of harmful effects on health is identified but* ***scientific uncertainty*** *persists, provisional* ***risk management*** *measures necessary to ensure appropriate level of health protection may be adopted, pending further scientific information for a more comprehensive risk assessment.*"[33]

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[26] See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0178&qid=1572287272009&from=EN

[27] *Id.* Article 1 para 1.

[28] *Id.,*Article 5 para 1.

[29] *Id.,*Article 7 para 1.

[30] Food Safety and Standards Act,2006, *available at* https://www.fssai.gov.in/upload/uploadfiles/files/FOOD-ACT.pdf(Last Visited on February 20, 2022)

[31] *Id.,*Section 4.

[32] *Id.,*Preamble to the Act.

[33] *Id.*, Section 18(c)

The Disaster Management Act no doubt is very much concerned with the public health and therefore empowers various authorities to prevent the consequences of any disaster. Public Health and food safety principles and standards are also correlated which stands proved by the preceding paragraphs where management of risk is called for in both the areas. Additionally, one can also see the National Health Policy Document, which is directly regulating the health sector of the country, substantiates this fact further.[34] It is interesting to note that it incorporates the Food Safety Act which is a clear indication that the principles mentioned in the act will also apply to policies undertaken by health department.[35] It shall not be surprising that it also incorporates the Health Impact Assessment to be undertaken by departments not only limited to health sector but others as well.[36] The environmental law jurisprudence has always read the Environmental Impact Assessment as a part of the precautionary principle which directly points that impact assessment includes precautionary standards.[37] Lastly the Universal Immunization included in the health policy cannot but be a precautionary element of the policy.[38] Therefore precautionary principle is an essential part of management of risk and also an essential part of public health jurisprudence.

IV. COVID TRANSMISSION AND SPREAD INDOORS OR IN CLOSED SPACES

It is known to all that the popular precautions with regard to covid transmission are wearing face masks, social distancing and also hand washing and sanitizing. However, it should also be known that these precautions were never taken away but still we have seen many covid waves, large and small, national and regional, universal and even local. Is there something else that needs to be done in order to foresee that such waves are nipped in the bud or is not let to have deleterious effects on public health and cause paralyzing effects on the economy. With vaccination the problem is again of breakthrough infection, waning of protection and also the uncertainty of the future variant's capacity to evade vaccine constructed immunity popularly known as immune escape.[39]

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[34] Government of India, National Health Policy, 2017(Ministry of Health and Family Welfare), *available at*https://www.nhp.gov.in/nhpfiles/national_health_policy_2017.pdf (Lat Visited on February 20,2022)

[35] *Id.* para 14.3 at page 23

[36] *Id.* para 3.2 at page 7

[37] See *S. Jagannath v. Union of India*, AIR 1997 SC 811; See also dissenting opinion of J. Bharucha in *Narmada BachaoAndolan v. Union of India*, AIR 2000 SC 3751

[38] *Supra* note 34 para 4.4 at page 12

[39] Timothy A. Bates et. al.,"Antibody Response and Variant Cross-Neutralization After SARS-CoV-2 Breakthrough Infection", *J AM MED ASSOC*,Volume 327, Number 2,January 11, 2022,(doi:10.1001/jama.2021.22898) available at https://jamanetwork.com/journals/jama/fullarticle/2787447(Last Visited March 2, 2022). See also Victoria Hall

So what we can conclude under these circumstances is that there has to be a multi-modal approach towards preventing the infection waves as it affects not only the health of the people but the economy of the nation as a whole because of the nature of the stringent restriction that are placed during those waves in the form of lockdowns and weekend curfews. For example, for the decision to open schools, colleges, coaching institutes, gyms, cinema halls, restaurants etc. it is very difficult to supervise whether masks are correctly and religiously being worn by the members inside those closed arenas and social distancing will also see the same fate. It is also proved that the threat of transmission in the open-air outside is very less as compared to indoor in a closed environment.[40] It will not be a suitable thing to say that we can limit indoor gathering because that will never happen and that has its own drawbacks. So, what policy shall guide the action in these cases. Precaution is the answer but what kind of precautions shall be undertaken? The precautionary principle says that in cases of uncertainty cost effective alternative strategies shall be undertaken and then we can go ahead with the action and it does not ask for stalling the whole process.

A. CDC Guidelines

The Centre for Disease Control and Prevention is one of the major operating components of the Department of Health and Human Services of United States of America.[41] Let us embark on what the CDC Guidelines say about precautions with regard to covid with respect to indoor management to minimize covid transmission. The CDC recommends a layered approach to reduce the exposures to the virus which includes a multi mitigation strategy. It talks about physical distancing, face masks, hand hygiene and vaccination but importantly it also talks about ventilation improvements.[42] It notes that viral particles of covid spreads between people more readily indoor than outdoors and suggests that protective ventilation practices and interventions can reduce the airborne concentration of particles in the indoor air and therefore reduce the overall viral dose to occupants of the spaces.[43] Activities such as

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et. al.,Protection against SARS-CoV-2 after Covid-19 Vaccination and Previous Infection, *N Engl J Med*, February 16,2022 (doi: 10.1056/NEJMoa2118691)available at https://www.nejm.org/doi/pdf/10.1056/NEJMoa2118691?articleTools=true(Last Visited March 2, 2022)

[40] B. R. Rowe et al., Simple quantitative assessment of the outdoor versus indoor airborne transmission of viruses and COVID-19, Environ. Res., Volume 198, Number 111189,July 2021, (doi.org/10.1016/j.envres.2021.111189) available at https://www.sciencedirect.com/science/article/pii/S0013935121004837(Last Visited March 2, 2022)

[41] For details see https://www.cdc.gov/about/organization/cio.htm?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fabout%2Forganization%2Findex.html(Last Modified on May 7, 2021)

[42] See https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html(Last Modified on June 2, 2021)

[43] *Id.*

exercising which can lead to heavy breathing, shouting and singing may also increase the risk, especially indoors.[44]

For the above aim at hand it suggests "tools in the mitigation toolbox" to contribute towards reduction of risk of transmission.[45] It after referring to an article suggests certain measures for the HVAC systems installed in buildings.[46] HVACs are Heating Ventilation and Air Conditioning equipment which are attached to building and they through there terminals and distribution systems provide heated, conditioned and ventilated and filtered air to be circulated inside the buildings.[47] It also claims that enhancing outdoor air ventilation, in case where outdoor air is not polluted, or enhancing filtration with a well-functioning HVAC system should complement other public health measures by removing and diluting virus from indoor air, thereby lowering exposure to COVID-19.[48] It is suggested to reduce recirculation of the air by increasing outdoor air ventilation by operating on as high as possible outdoor air supply.[49] it further suggests filtration as another strategy to remove virus and other particles from indoor air and recommends a filter rated by the Minimum Efficiency Reporting Value (MERV, ranging from 1 to 16), based on the fraction of particles removed from air passing through it under standard conditions and finally suggests using MERV 13 or higher rated filters based on their ability to filter out virus-sized particles.[50] It also suggests using UVGI, Ultra Violet Germicidal Irradiation technology, particularly in high-risk spaces such as waiting rooms, prisons and shelters.[51] This system uses ultraviolet (UV) energy to kill viral, bacterial, and fungal organisms and are fixed at a height above people, called Upper Room UVGI, which produce UV-C energy, which has shorter wavelengths than more penetrating

[44] Public Health Ontario, "Heating, Ventilation and Air Conditioning (HVAC) Systems in Buildings and COVID-19", page 1-2, March 2021, *available at*https://www.publichealthontario.ca/-/media/documents/ncov/ipac/2020/09/covid-19-hvac-systems-in-buildings.pdfla=en(Last Visited on February 2, 2022)

[45] *Supra.* note 40

[46] Lawrence J. Schoen, "Guidance for Building Operations During the COVID-19 Pandemic", *ASHRAE JOURNAL*, May 2020, available at https://www.ashrae.org/file%20library/technical%20resources/ashrae%20journal/2020journaldocuments/72-74_ieq_schoen.pdf(Last Visited on February 2,2022)

[47] See https://xp20.ashrae.org/terminology/index.php?term=HVAC&submit=Search(Last Visited on February 2,2022)

[48] *Supra.* note 44

[49] *Id.*

[50] *Id.*

[51] *Supra* note 46 at page 73

UV-A and UV-B rays and pose less risk to human health.[52] Lastly they also suggest to consider portable room air cleaners with HEPA filters to remove by filtering viral particle from the indoor air.[53] One such cost effective and "do it yourself" capable innovation is Corsi-Rosenthal Covid Cube.

B. Corsi-Rosenthal Cube

The Corsi-Rosenthal Cube/Box is the brainchild of two, Richard Corsi and Jim Rosenthal, one is Dean of the Engineering School at UC Davis and also an environmental engineer and the other one the owner of Tex-Air Filters, so is an air purifier manufacturer.[54] They have provided a low cost, easy to assemble and effective, capable of being made at home, DIY, air purifier to be used in places of gathering in order to reduce the viral particles from the indoor air. The combined cost of assembling the purifier is about 70 to 120 dollars designed to last for 6 months and that they are being used in homes, schools and university campuses across United States of America.[55] The Corsi-Rosenthal Cube is made up of four MERV13 rated filters which are taped together to form the four sides of a box leaving the bottom and the top. A 20-inch box fan is fixed on top side of the box and joined with a duct tape attaching it to the filters thereby sealing the system so that air is drawn in through the filters and is moved up and then out of the box. The fan's cardboard box doesn't go waste as it is repurposed to make the bottom of the cube and to create a cardboard "shroud" on the fan to further improve efficiency and reduce back-flow of air.[56] It is also said that this new air purifier filters at least 90% of COVID-carrying particles.[57] Such is the popularity of this cube that the well-known company, 3M, which finds its place in the Fortune 500 list started to market filters made by it

[52] See CDC, "Upper-Room Ultraviolet Germicidal Irradiation", available at https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation/uvgi.html(Last Modified April 9,2021)

[53] *Id.*

[54] Adam Rogers, "Could a Janky, Jury-Rigged Air Purifier Help Fight Covid-19? Indoor-air experts think: Sure, maybe. Why the hell not? We convinced the CEO of an air filter company to give it a try", *Wired,* AUGUST 6, 2020, *available at* https://www.wired.com/story/could-a-janky-jury-rigged-air-purifier-help-fight-covid-19/ (Last Visited on February 2,2022)

[55] University of California San Diego, "Build Your Own Air Filter System", *Blink*, available at https://blink.ucsd.edu/safety/resources/public-health/covid-19/diy-air-filter.html. *See also* Clean Air Crew, DIY box fan air filters Corsi-Rosenthal box, *available at* https://cleanaircrew.org/box-fan-filters/(Last Visited on February 2,2022)

[56] Brown University School of Public Health, "School of Public Health Builds and Installs Corsi-Rosenthal Air Cleaners", November 1, 2021, *available at* https://www.brown.edu/academics/public-health/news/2021/11/school-public-health-builds-and-installs-corsi-rosenthal-air-cleaners

[57] Jonathan Lapook, "New air purifiers filter at least 90% of COVID-carrying particles, researchers say", *Cbsnews*, October 7,2021, *available at* https://www.cbsnews.com/news/covid-air-purifiers-particles/

to be used for creation of the cubes.[58] The Company also recognizes the increased usefulness of such DIY technology.[59] The California State's Health Department in their latest guidelines for covid management though indoor air management has specifically named and mentioned that the Corsi-Rosenthal Cube should be used in addition to upgrading the HVACs and air ventilation through natural air by opening of the windows and allowing cross draft of air.[60]

V. Status of Law and Policy in India

In the preceding paragraphs it has been already stated that precautionary principle finds itself in law and policy of environmental adjudication. It has also been summarized as to why the principle can also be applied in the area of public health risk assessment and management in India by the example of disaster management and public health policy of India. The next search should be whether we also have precautionary applications as like the example of CDC guidelines. The parallel example is given below.

A comprehensive building Code, The National Building Code of India (NBC), is a central government instrument which provides guidelinesfor regulating the building construction activities in India. It is to be used as a ModelCodeand to beadopted by allagencies involved in building construction works whether they be the Public Works Departments, other government construction departments, local bodies or even private construction agencies.[61] Importantly, it also discusses air conditioning, heating and mechanical ventilation for buildings.[62] The objective of installing air conditioning, heating and mechanical ventilation is said to provide comfortable conditions without compromising the health and safety of occupants and shall aim towards controlling and optimizing air quality, air movement among other things.[63] It also discusses Indoor Air Quality and states that poor quality air may result in sick building syndrome and severe and recurring discomforts such as nausea, headaches,

[58] See https://www.3m.com/3M/en_US/company-us/about-3m/history/(Last Visited February 2,2022)

[59] 3M Scientists, "This Corsi-Rosenthal box movement is legit", *3M News Centre*,(Feb 24, 2022), *available at* https://news.3m.com/2022-02-24-3M-scientists-This-Corsi-Rosenthal-box-movement-is-legit(Last Visited on February 2, 2022)

[60] California Department of Public Health, "COVID-19 and Improving Indoor Air Quality in Schools", February 10,2022, *available at* https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-and-Improving-Indoor-Air-Quality-in-Schools.aspx?TSPD_101_R0=087ed344cfab20006eb52a929d40cb3c98366ccc1be687f64bf3676cabf959051ac4771ff(Last Visited on February 22, 2022)

[61] Bureau of Indian Standards, National Building Code of India 2016, available at https://www.bis.gov.in/index.php/standards/technical-department/national-building-code/(Last Visited on February 2, 2022)

[62] *Id.*, Section 3, Part B, Volume 2, Page 7

[63] *Id.* para 4.1.1-4.1.2 at page 12

cold, dry mucous, inflamed membrane eye, nose and throat irritation drowsiness, fatigue, dry skinned respiratory problems.[64] It also provides the "air quality measurement standard" where it says that CO_2 concentration below 1000ppm shall be required and if outdoor air is polluted then the indoor air shall have 700ppm less concentration of CO_2 than outdoor air.[65] Further, it states that the components of acceptable indoor air quality does not only mean taking care of any specific process or system but also contamination source control with proper ventilation and adequate filtration.[66] It, also talks about fungus and bacteria as contaminants of indoor air which are directed to be controlled by humidity management.[67] Based on air quality, air movement and air change per hour requirements it list five different types of HVAC which can be installed in building to ensure the requirements discussed above.[68] Apart from the specialized application of HVACs to Health Care Facility it also provides its application in office buildings, hotel rooms, restaurants, cafeteria, bars, night clubs, departmental store and theatres and auditorium.[69] However, important is to note that educational institutions which will include schools, university and college campuses have been also discussed separately where it mentions about proper ventilation to ensure prevention of the spread of diseases.[70]

VI. CONCLUSION

The Omicron induced wave is in its receding territory and the country is going to open full swing and one of the biggest universities in terms of student intake i.e., the University of Delhi has completely reopened. The object of this paper was to inform the government that tweaking the already in place regulations regarding indoor air quality management can aid "leaps and bounds" in restricting the spread of the disease not only induced by the Sars-CoV2/Covid19 but also protect the generations from effects of polluted air which is circulating in the big cities and which has not even spared the areas which are adjacent to the big cities. HVACs and Air Purifiers are known to prevent the transmission of the virus except of the close contact of person infected. It will not require a thorough research to find the fact that many of our schools, colleges, other educational institutions and coaching institutes have no such ventilation and filtration systems in place and the object of re-igniting the knowledge of the students and scholars may result in a health hazard which may go out of the hands of

[64] *Id.* para 6.3 at page 20
[65] *Id.* para 6.3.1 at page 20
[66] *Id.* para 6.3.2 at page 20-22
[67] *Id.* para 6.3.2 at page 22
[68] *Id.* para 7.2.1-7.2.1.1 at page 24
[69] *Id.* para 7.3.1-7.3.5 at page 39-40
[70] *Id.* para 7.3.6 at page 40

the governments to control it. We have seen the devastating effects of the virus in the three wave and even today, when I am writing this paper, loss of lives is a reality in India because of the virus even when the virus is popularized as "mild". Recently the Chief Justice of Supreme Court of India made a statement that he was still feeling the effects of his Omicron infection weeks after getting the infection. The HVACs together with Corsi-Rosenthal Cube can be a game changer for restricting the spread of the Covid indoors be it schools, colleges, restaurants, hotels, railways and transport coaches and vehicles. If the policy around the world is to "live with the covid" then adequate safeguards are must in the situation of uncertainty and this is called for as the precautionary principle is the policy and the law of the land of the country. It must not be forgotten that the principle is meant to guide actions and not inactions. Nationwide or Statewide Lockdowns or even weekend lockdowns are popularly being said to be an aspect of precautionary principle but in the real sense they are actually not based on precautionary principle. It is because precautionary principle is based on the uncertainty of harm and not where harm is necessarily the outcome. Secondly, precautionary principle is not believed to be an obstruction in activities but it ensures alternate mechanism are put in place that activities can still go on. Thirdly, the principle requires a detailed impact assessment of such actions and that actions has to be chosen keeping in mind the cost and benefits of the action. Lockdowns in general are devastating to education, livelihood and therefore to the current and future economic strength of a nation. A declaration of saving lives in itself is not a complete impact assessment of any action. All that can be said is that lockdown may be called as preventive rather than precautionary action. In the end it is necessary to observe and deliberate on a recent catastrophe which is unfolding in Hong Kong which is seeing its deadliest wave of Covid19 pandemic and it is reported in news that it is seeing the oxygen shortage which became the talk of the Indian nation during the Delta wave last year.[71] Therefore, uncertainty is writ large and thus precautionary actions shall not just appear on paper but should also become a reality in practice.

[71] Lilian Cheng*et.al*.,"Hong Kong now has the world's highest Covid-19 death rate. What happened, and how can this be fixed?" *South China Morning Post*, March 5,2022, available at https://www.scmp.com/news/hong-kong/health-environment/article/3169331/hong-kong-now-has-worlds-highest-covid-19-death?module=perpetual_scroll_0&pgtype=article&campaign=3169331(Last Visited March 5,2022)

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RESIDUAL DOUBT THEORY: A NASCENT ADDITION IN INDIAN CAPITAL PUNISHMENT JURISPRUDENCE

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ABSTRACT

Reducing any residual doubt or uncertainty about guilt of an accused is one strategy to enhance trial outcomes, but achieving hundred percent clarity about accused's guilt in every case is unrealistic. Residual doubt is that thin line of gap between the 'beyond any reasonable doubt' and 'absolute certainty' which provides that even if there is a slightest of doubt lingering in the mind of judge or jury, as the case may be, at the time of sentence pronouncement they should commute the death sentence and thereafter replace it with life imprisonment, which may further be supplemented with a condition that the convict will stay behind the bars for the remaining period of his life. The punishment of death sentence has always had abolitionists and proponents representing arguments both against and in favor of capital punishment; with the advent of residual doubt theory the academic debate related to death penalty stands ignited again generating curiosity to understand the nuances of this concept whose origin can be traced to USA. The author in this paper has given an insight into this new addition in capital punishment jurisprudence in India alongwith reflecting on the judicial approach towards this theory.

I. INTRODUCTION

"[T]he execution of a person who can show he is innocent comes perilously close to simple murder."

- Justice Blackman[1]

The fear of pronouncing death sentence upon an innocent person differs fundamentally from the fear of wrongly imprisoning the accused. The death penalty jurisprudence that has emerged over the decades as a result of our judicial pronouncements has been both inconsistent and lacks coherence, and has therefore resulted in absence of symmetry in the imposition of such punishments[2]. The belief that such an ultimate and final penalty is inappropriate if there are doubts about guilt, even if they do not reach the level necessary for acquittal, stems from common sense and fundamentals of justness and fairness.[3]

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[1] As quoted in Christina S. Pignatelli, "Residual Doubt: It's a Life Saver" 13(2) *Capital Defense Journal* 311 (2001).

[2] Project 39A, *Death Penalty Sentencing in Trial Courts: Delhi, Madhya Pradesh & Maharashtra (2000-2015)* (National Law University, Delhi, May 2020), *available at*: https://www.project39a.com/dpsitc (last visited on February 22, 2022).

[3] Dissenting opinion of Justice Marshall in *Heiney* v. *Florida*, 469 U.S. 920 (1984) at 921-22.

Although the evidence presented in a trial may be adequate to reach a guilty verdict using the beyond reasonable doubt metric, but the nascent addition in Indian capital punishment jurisprudence, i.e., residual doubt theory contends that there may be some 'lingering doubt' that renders a death sentence incompatible. It has been ruled that focusing on acquittal during trial and subsequently on residual doubt in sentencing stage might be acceptable, especially where the evidence of guilt is not found to be too overwhelming[4]. We are well aware that, the execution of an innocent person is the ultimate miscarriage of justice. Although the bar for conviction is 'beyond a reasonable doubt', the fact is that evidence is a sliding scale, possessed with varying degrees of certainty.

The residual doubt theory though has its origin in USA in the year 1986, it was only in 2014 that the Indian judiciary adopted it and incorporate it into our justice dispensation system. The residual doubt theory has sparked considerable scholarly debate, with both abolitionists and proponents of the death penalty seeking to navigate the actual impact of this concept.

Having this background in mind, the author has divided her paper into various parts. Starting with the introduction, Part-II of this paper describes the meaning and scope of residual doubt theory and also traces its origin in the American soil. Part-III elaborates the judicial recognition and acceptability of this theory in India. In Part-IV the contemporary situation pertaining to the Indian and US legal system has been touched upon followed by Conclusion under Part-V.

II. Residual Doubt Theory: Meaning, Origin and Scope

Meaning and Scope

It has been suggested that the best thing a death row inmate can do to increase his chances of earning a life sentence has nothing to do with mitigating evidence. Assuming everything else is equal, the greatest thing he can do is casting doubt on his culpability.[5] It can be said that even though the accused is more than ninety-five percent likely to have committed a capital

[4] 4. Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) at 1310, as cited in Welsh S. White, "A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants" 102(8) *Michigan Law Review* 2006 (2004).
[5] Stephen P. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?" 98(6) *Columbia Law Review* 1563 (1998).

offence, he may still make an effort to avoid the death penalty by pointing out the remaining five percent probability that he is innocent[6].

Residual doubt is a cognitive gap that exists between the standard of proof of beyond a reasonable doubt and the point of absoluteness, i.e., perfect certainty[7]. The concept of residual doubt draws a link between the intensity of punishment and the certainty of guilt, blurring the boundary between the processes of decision making in the two stages of the criminal procedure[8]. As a precaution against regular capital punishment, residual doubt sets a higher level of proof than the beyond reasonable doubt threshold employed at the stage of conviction, keeping in mind the irreversible nature of death[9]. The notion of residual doubt, is said to respond to the concern about factual ambiguity or uncertainty in capital trials[10].

Residual doubt does not result in an acquittal from the offence or any negative outcome as to the aggravating factor, but there still remains in existence a sense of uncertainty that is felt, debated, and ultimately lingers[11]. It may not be a 'reasonable' doubt[12], but is still a legitimate concern.

The difference between 'residual doubt' and 'reasonable doubt' thus can be stated as, former refers to any remaining or lingering doubt in relation to the guilt of accused which may continue to persist at the stage of pronouncing sentence despite reaching satisfaction being reached as per the 'beyond a reasonable doubt' standard during conviction[13], whereas, reasonable doubts, have been defined as doubts that are actual and substantive in nature in contrast to being "merely imaginary, trivial, or merely possible". These residual doubts as stated earlier, may not be significant for purpose of conviction, but have at times been considered a mitigating condition when determining whether the case fits into the category of 'rarest of rare'. It would not be absolutely wrong to say that, conviction after discharging burden beyond all 'residual' doubt might result in maximum penalty (for example, capital punishment), whereas conviction proving guilt of the accused beyond all 'reasonable' doubt

[6] Jacob Schuman, "Probability and Punishment: How to improve sentencing by taking account of probability" 18(2) *New Criminal Law Review: An International and Interdisciplinary Journal* 245 (2015).
[7] *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988).
[8] Talia Fisher, "Comparative Sentencing" *SSRN Electronic Journal* 7 (2009), *available at*: http://dx.doi.org/10.2139/ssrn.1488345 (last visited on February 20, 2022).
[9] *Ravishankar* v. *State of Madhya Pradesh* (2019) SCC OnLine SC 1290.
[10] Matthew Wansley, "Scaled Punishments" 16(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 311 (2013).
[11] Margery Malkin Koosed, "Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt" 21 *Northern Illinois University Law Review* 55 (2001).
[12] Reasonable doubt means a doubt backed by some reason.
[13] *Ashok Debbarma @ Achak Debbarma*v. *State of Tripura* (2014) 4 SCC 747.

would result in near maximum punishments (allowing for life imprisonment instead of capital punishment)[14].

Ron Siegel and Bruno Strulovici in their paper, point out that the weight of residual doubt varies from trial to trial and in order to explain the same they give an example. Consider a situation in which a person is found guilty on the basis of a confession and the testimony of an eyewitness. These kinds of evidence may prove his guilt 'beyond a reasonable doubt', but because confessions and eyewitness reports are known to be untrustworthy to some extent, some residual doubt continues to exist. Now take a similar trial in which credible evidence, such as clear video footage of the accused committing the crime, is available might result in less lingering doubt about his guilt. This variation in residual uncertainty among trials cannot be accounted for under a two-verdict established system, in which the accused is either guilty or not guilty.[15]

Origin of Residual Doubt Theory

The roots of the residual doubt theory with respect to capital punishment can be traced to the American legal system[16]. The residual doubt theory as understood in the American legal system can be stated as:

> "(1) actual, reasonable doubt about guilt of any crime; (2) actual, reasonable doubt that defendant was guilty of a capital offence, as opposed to other offences; (3) a small degree of doubt about (1) or (2), sufficient to cause the juror not to want to foreclose (by execution) the possibility that new evidence might appear in the future."[17]

The theory of residual doubt has developed in America from *Lockett* to *Franklin*. It was observed by the US Supreme Court in *Lockett* v. *Ohio*[18], that a prisoner on death row has the constitutional right to present to the jury each and every evidence pertaining to himself as well as the offence that can persuade the jury to sentence him to life in prison rather than execution. After this decision and approximately a decade later came the decision of the US

[14] *Supra* note 8 at 18.
[15] Ron Siegel and Bruno Strulovici, "Improving Criminal Trials by Reflecting Residual Doubt: Multiple Verdicts and Plea Bargains" 2 (2016), *available at*: https://faculty.wcas.northwestern.edu/~bhs675/Multiverdicts.pdf (last visited on February 22, 2022).
[16] *Lockhart* v. *McCree* 476 US 162, 181 (1986).
[17] Christina S. Pignatelli, *supra* note 1 at 307-08; See also, William S. Geimer and Jonathan Amsterdam, "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases" 15 American Journal of Criminal Law 1, 27 (1987-88).
[18] 438 US 586 (1978).

Supreme Court in *Franklin* v.*Lynaugh*[19], which ended up diluting the theory as was explained in the *Lockett* decision. The factors that can be attributed to such dilution are: firstly, it determined that an accused had no constitutional right to educate members of the jury on doctrine of residual doubt, and that it is up to each state of US to determine whether residual doubt is a suitable argument during the sentencing hearing; secondly, the accused was not barred from submitting evidence pertaining to his character or the circumstances prevailing during commission of offence, but they could not as a matter of right raise the issue of guilt again; thirdly, it was strongly held by the majority that, residual doubt could not be the only reason for rejection of the death sentence. Justice Sandra Day O'Connor, in her concurring judgment in *Franklin*, objected to the identification of residual doubt as mitigating factor.

In *Oregon* v. *Guzek*[20], the United States Supreme Court debated the admission of new evidence during the sentence stage. The US Supreme Court defined, during sentencing, 'reasonable doubt' and 'residual doubt', noting that sentencing is concerned with "how" rather than "if" a person committed a crime.

Post *Franklin*, this concept has gained traction in certain American states, with both the *Franklin* and *Oregon* rulings noting that nothing prevents such evidence from being offered to the jury. However, other states do not examine the theory of residual doubt because they feel that it is incorrect to raise dispute about the guilty conviction at the sentence stage.

Jennifer R. Treadway, has advocated for the use of residual doubt in the American justice dispensation system on the basis of three arguments: first, residual doubt being both logical and relevant in capital sentencing; second, because juries currently apply residual doubt in capital sentencing decisions, so it is an operative mitigating factor; and third, residual doubt provides an additional safeguard necessary in capital cases, because the beyond a reasonable doubt standard is not infallible, and death is irreversible.[21]

In situations involving residual doubt or lingering doubt, there have been contentions from the side of accused that, during capital sentencing, they should be able to persuade juries for refraining from imposition of death sentence since they are not totally convinced that the

[19] 487 US 164 (1988).
[20] 546 US 517 (2006).
[21] Jennifer R. Treadway, "Residual Doubt in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor" 43(1) *Case Western Reserve Law Review* 217 (1992).

accused is guilty of crime[22]. This although has again and again found criticism in the American system.

The fact that there is still some uncertainty about someone's guilt impacts the basic foundations of sentence judgements. Residual doubt appeals to common sense and frequently serves as a *de facto* mitigating factor, with jurors preferring to impose a lighter sentence if they are convinced of the presence of residual doubt. Despite attempts to downplay the theory's significance and concerns about its application, the idea of residual doubt has proven to play a vital role in American death sentence law and has spared the lives of numerous accused.[23]

III. JUDICIAL APPLICABILITY IN INDIA

While highlighting the challenges of the criminal justice system, such as a lack of resources, outdated investigative procedures, incompetent prosecution, and inadequate legal assistance, the Law Commission of India advocated the elimination of the death sentence in its 262nd Report[24]. Taking into account this Law Commission of India's assessment, the Hon'ble Division Bench in a Calcutta High Court case had stated that outdated investigative tactics and ineffective prosecution justify invoking the theory of residual doubt in our legal system[25]. When the instruments for unravelling truth are itself dull or ineffectual, one must get to a certitude regarding an offender's guilt, free of any remaining doubt originating from sublime or undiscovered elements, before the court may proceed to issue a death sentence[26].

The factual matrix of *Ravishankar* v. *State of Madhya Pradesh*[27], narrate a horrendous incident, wherein the appellant was accused of kidnapping a thirteen-year-old girl, raping her, strangling her to death, and thereafter destroying evidence as he had dumped her half naked body in a dry well. Consequently, he was sentenced to death under section 376-A of the Indian Penal Code, 1860, considering it to fall under the category of the 'rarest of the rare' cases. His death sentence was confirmed by the High Court. When the same was appealed against in the Apex court, the Supreme Court accepted the appeal in part and substituted the

[22] Jeffrey L. Kirchmeier, "Beyond Compare? A Codefendant's Prison Sentence as A Mitigating Factor in Death Penalty Cases" 71 *Florida Law Review* 1061 (2019).
[23] Anushree Malaviya and Rhea Goyal, "Guilt Beyond Conviction: The Theory of Residual Doubt in Indian Capital Sentencing" 33 *National Law School of India Review* 46-47 (2021).
[24] Law Commission of India, "262nd Report on the Death Penalty" (August, 2015).
[25] *State of West Bengal* v.*Ustab Ali*; *Ustab Ali* v. *State of West Bengal*, judgment dated March 06, 2020, of the Calcutta High Court.
[26] *Ibid.*
[27] (2019) SCC OnLine SC 1290.

death sentence with life imprisonment, alongwith the stipulation that no remission be granted to the appellant and that he stays in jail for the remainder of his life. Before reaching to the conclusion of replacing death sentence with life imprisonment in this case, there were rigorous deliberations done on the part of the three-judge Bench, and the same are reflective in the judgment.

Tracing the genesis of the 'rarest of the rare' doctrine in *Bachan Singh* v. *State of Punjab*[28], the court moved on to pointing out the elaborate 'rarest of the rare' test as laid down in *Machhi Singh* v. *State of Punjab*[29]. The Supreme Court also cited *Swamy Shraddananda @ Murali Manoharregono Mishra* v. *State of Karnataka*[30], in which the court had created a newer type of sentence and ruled that the court could substitute the death sentence with life imprisonment with a directive that the convict would never be granted release from the prison for the rest of his life. This category of sentence was later approved by the Constitutional Bench of the Supreme Court of India in *Union of India* v. *Sriharan @ Murugan*[31]. In *Ravishankar*, the Supreme Court also paid attention to cases whereby death sentences were confirmed in numerous horrifying, brutal, and exceptional crimes, including those involving kidnapping, rape, and murder of young children[32]. Then the court highlighted how the Apex court had been moved towards recognition and incorporation of the 'residual doubt' theory in the Indian judicial system. In *RameshbhaiChandubhaiRathod* v. *State of Gujarat*[33], on the basis of significant gaps in the prosecution evidence, as well as other mitigating factors found to be present, such as the likelihood that others were engaged in the commission of the offence, the court had refused to affirm the death sentence although upholding the conviction. Ratio of the *Rameshbhai* case can be equated to the residual doubt theory which was adopted and introduced by the Indian judiciary in the two-judge Bench decision of *Ashok Debbarma @ Achak Debbarma* v. *State of Tripura*[34]. The Supreme Court in the latter case observed that:

> "….in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts,

[28] (1980) 2 SCC 684.
[29] (1983) 3 SCC 470.
[30] (2008) 13 SCC 767.
[31] (2016) 7 SCC 1.
[32] *Mukesh* v. *State (NCT of Delhi)* (2017) 6 SCC 1; *Vasanta Sampat Dupare*v. *State of Maharashtra* (2017) 6 SCC 631; *Khushwinder Singh* v. *State of Punjab* (2019) 4 SCC 415 and *Manoharan* v. *Inspector of Police* (2019) SCC OnLine SC 951.
[33] (2011) 2 SCC 764.
[34] (2014) 4 SCC 747.

> while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt."

Debbarma has been relied upon in certain three-judge Bench decisions of the Supreme Court of India. One as stated above is *Ravishankar*, then in *Sudam @ Rahul Kaniram Jadhav* v. *State of Maharashtra*[35], it was observed that death sentences, irrevocable in nature, should be imposed only when there are no other options left; in cases based on circumstantial evidence, the doctrine of prudence should be relied on when sentencing the accused, thereby taking into account both aggravating circumstances (like brutality, enormity, premeditated nature) if any, as well as mitigating circumstances (like socio-economic background of the accused, age factor of the accused, extreme emotional distractions at the time of occurrence of the offence) if any. In *Sudam*, accused was sentenced for committing murder of five persons, including a woman living with him as his wife, his two kids from his previous marriage and other two kids which he had with the deceased woman. He was given death sentence which was upheld by the Supreme Court at first instance, but at the time of hearing review petition in the same matter, the court commuted and replaced the death sentence with life imprisonment with a direction that the accused was to spend the remainder of his life behind the bars. The court did not consider it appropriate to give death sentence to the accused because of existing lingering doubts and at the same time found that the life imprisonment in its simple form would be inadequate looking at the brutal nature of the offence.

However, in *Ravi* v. *State of Maharashtra*[36], the Supreme Court gave their decision based on purely 'crime-centric' approach, and ignored the residual doubt theory. The victim therein was a two-year old child who was kidnapped, raped and murdered; the court did not look into the mitigating factors and straight away upheld the death sentence against the accused.

Recently, another three-judge Bench of the Supreme Court, in *ShatrughnaBabanMeshram* v. *State of Maharashtra*[37], observed that already in cases wherein conviction is based on circumstantial evidence, the burden of proof to be discharged is already of such great magnitude, and once the same is discharged by the prosecution then there is no room left for any other hypothesis or innocence of accused to be taken up again at the stage of sentencing. That therefore the idea of residual doubt was conceptually flawed and cannot be used as a

[35] (2019) 9 SCC 388.
[36] (2019) 9 SCC 622.
[37](2021) 1 SCC 596.

mitigating element at the sentence stage. The Supreme Court highlighted that in the case of circumstantial evidence, a higher standard must be set for imposing death sentence. The situations wherein death sentence can be the appropriate remedy are those wherein the two questions are answered in affirmative; the questions are: that the aggravating factors outweigh the mitigating factors and secondly, there is no doubt lingering in the minds of the court that death is the only suitable remedy in accordance with the facts, evidence and circumstances of the case.

IV. CONTEMPORARY SITUATION: INDIA AND USA

India

The Supreme Court of India has made attempts to replace existing criteria with ones that can assure better impartiality and less discretion in the death penalty procedure. The residual doubt has the potential to be that standard; nevertheless, the multitude of tests and standards has resulted in a scenario in which Courts select a standard that best matches their sensibilities in a given instance.[38] Residual doubt theory still being in nascent stage has a long journey to take, it is left to be seen how far and deep this theory will be rooted in our criminal justice system.

United States

In the United States, residual doubt is not a universally acknowledged mitigating factor. The Supreme Court has refused to regard lingering doubt as a constitutionally necessary mitigating element, deferring the decision to the states. Some US states explicitly reject residual doubt as a mitigating factor. Other states, although not explicitly rejecting the idea, exhibit a reluctance to recognize residual doubt as a mitigating factor by judicial unwillingness to venture on it. This resistance appears to be motivated by the fact that lingering doubt does not meet the standard definition of a mitigating circumstance.[39]

The most overt use of residual doubt in the criminal justice system in the United States is in the decision of death sentences. In capital trials, jurors must decide whether the accused should be sentenced to death after reaching a guilty conviction. In this sentencing phase, residual doubt may be utilized as a mitigating reason to prevent the death penalty from being

[38] *Supra* note 23 at52.
[39] *Supra* note 21 at251.

imposed. The Capital Jury Project[40], a survey for academic purposes involving former jurors in death penalty cases, discovered that lingering uncertainty was the most important mitigating factor recognized by such jurors.[41]

Christina Pignatelli in her paper has reflected upon the perception of public, judiciary and legislature in relation to the residual doubt about innocence in relation to death penalty. Public was found to be most sensitive to residual doubt in the study conducted by Christina. It is because when the public imbibes the belief that the death penalty is being used unfairly or that innocent people are being sentenced to death, it calls for curbs on the usage of the death sentence, even going to the extent of asking for abolition of death sentence. The reaction of judiciary is completely different; the United States Supreme Court has granted states the authority to restrict arguments regarding residual doubt at various stages of a trial. The legislature has made efforts to provide for avenues like *habeas corpus*, executive clemency, etc., but these avenues have been considered to be restrictive in nature.[42]

The US Congress, passed the Innocence Protection Act in 2004 thereby permitting accused, in light of the issues about erroneous convictions in death sentence cases, to plead fresh DNA evidence post-conviction.

V. CONCLUSION

In India, the residual doubt theory is still at nascent stage; though promising in nature but still has a long way to go. It proceeds on the premise that even though guilt of the accused has been proven beyond reasonable doubt but there might be a residue of that doubt lingering when it comes to deciding upon the sentence of death in a case. Since it has been pointed out time and again that death is irreversible in nature, so the court should not be left with any doubt when pronouncing death sentence. The Indian courts had developed 'rarest of the rare' doctrine laying down parameters under which the death sentence of accused can be upheld. Now, the 'residual doubt' theory has been called by many as a life saver from capital punishment in case of even an iota of doubt. Ultimately it has to be understood that there lies a difference between 'reasonable' doubt and 'residual' doubt. One needs to be free from any doubt while pronouncing death sentence and it should always be kept in mind that leaving a

[40] William J. Bowers, "The Capital Jury Project: Rationale, Design, and Preview of Early Findings" 70(4) *Indiana Law Journal* 1043-1102 (1995).
[41] *Supra* note 15 at 29.
[42] *Supra* note 1 at322.

guilty person free is not that much of a horror than the horror of punishing an innocent person with death is.

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INHERITANCE RIGHTS OF WOMEN AS COPARCENERS UNDER THE AMENDED SECTION 6 OF HINDU SUCCESSION ACT, 1956: A STUDY OF ITS ENFORCEMENT IN THE STATE OF HARYANA

*Varalika Deswal**

ABSTRACT

With the 2005 amendment to the Hindu Succession Act of 1956, fundamental and drastic changes have come about in the law of intestate succession. It was a much-needed evolution in the Mitakshara law as upon one's death not only his separate property but also his coparcenary property must be divided equally among his male and female heirs. The interest of a deceased in a Joint Hindu Family is determined by a fictional, notional partition, which calculates the share of the deceased coparcener by assuming the division of the ancestral property took place before his death, and it is the only mechanism to implement the proviso given under section 6. After studying the historical evolution of women's inheritance laws and section 6 in particular, this paper will look at its enforcement in India. A research conducted with participants from the state of Haryana will also aim to uncover its practical implementation in the patriarchal set up of the state and analyze the harms of this law not reaching its citizens. The joint family system established by age-old laws needs some reevaluation, and the gendered nature of coparcenary rights is something that needs to be analyzed and deconstructed. There is a need to introduce legislations that are specific in language, free of anomalies and empowering in nature.

I. INTRODUCTION

The Constitution of India, has within its foundation, inculcated the interests and given paramount importance to the protection of women and their rights. Article 14 guarantees equality before the law and equal protection of the laws to all persons.[1]Article 15 prohibits discrimination on the grounds ofreligion, race, caste, sex or place of birth.Article 15(3) permits protective discrimination in favor of women and children and State may make special provisions for safeguarding their interests.Article 21 ensures the right to live with dignity and is a concomitant of right to life. Fundamental duty under article51A(e) renounces practices derogatory to the dignity of women.[2]These constitutional guarantees cannot be negated and any adverse legislation cannot be permitted; as the very foundation of our laws aims at establishing a code that is inclusive of every person and promotes their equal status in the Indian society. The exclusion of women from coparcenary ownership went against the constitutional mandate of equality.

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[1]Art. 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[2] The Constitution of India.

Prior to the amendment of the act the interest of women in property ownership was only limited to wives, the amendment by acknowledging daughters as coparceners is a step in the right direction. The Hindu Law Committee also suggested abolishing the 'right by birth' and the principle of survivorship, but due to the patriarchal voices which at the time could not envision women having an equal footing as men, it took half a century for daughters to get the same right from birth.[3]

II. WOMEN AND LAWS RELATING TO INHERITANCE AND SUCCESSION

Property can be acquired by three methods

- Gainful employments;
- Inheritance- intestate or testamentary; and
- Gifts.[4]

In the absence of a Uniform Civil code in our country, inheritance and succession are governed by personal laws. Hindu Succession Act governs Hindus, Sikhs, Buddhists and Jains.

Prior to codification, succession to property in North India was governed by the *Mitakshara School of Law* under which only males could be coparceners and property devolved by survivorship.[5] Women had limited inheritance rights, as only males could be coparceners and demand for partition.[6] The law recognized them as heirs, but only regarding properties that were separately owned by men or women. Hindu Law of Inheritance Act, 1929 conferred inheritance rights on three female heirs i.e. son's daughter, daughter's daughter and sister.[7]

Hindu Women's Right to Property Act (XVIII of), 1937 conferred rights on a coparcener's widow to succeed along with the son and to take a share equal to that of the son. Although shewas not recognized as a coparcener, she could claim partition and was entitled to a limited estate in the property of the deceased.[8]

Section 6 of Hindu Succession Act 1956(old) laid down rules regarding devolution of interest of a male Hindu in coparcenary property by survivorship amongst coparceners. Non-recognition of women as coparceners meant that they could not inherit ancestral property and had no right to demand partition. Being a class-i heir, she had inheritance rights in the Hindu Undivided Family, but only in the share of which her father would have had in the HUF property at the time of his death.[9]

The age old notion of coparcenary rights first was challenged in the states of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu before the changes introduced in Section 6 of the Hindu Succession Act *vide* the Amendment Act of 2005 were introduced nationwide.

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[3]Hindu Law Committee,*Annual Report*(1994).
[4]Poonam Saxena, *Family Law Lectures: Family Law II* (first published 2011, LexisNexis).
[5]Satyajeet Desai, Mulla Hindu Law (first published 1912, Dinshaw Mulla).
[6]*Sunil Kumar* v.*Ram Prakash* [1988] SC 576.
[7] Hindu Law of Inheritance Act 1929.
[8]Hindu Women's Right to Property Act 1937.
[9] Hindu Succession Act 1956, s 6.

After the Hindu Succession (Amendment) Act, 2005 [No. 39 of 2005 notified on 5th September, 2005] daughter was made a coparcener by birth in a joint Hindu family governed by the Mitakshara law, subject to the same liabilities in respect of the said coparcenary property as that of a son.[10] The amended provision is applicable only in respect of joint properties held by Hindu Undivided Family. This does not apply to self-acquired properties or properties acquired through will or gift. This applies to ancestral properties of Hindu male governed by Mitakshara School of law, dying intestate.[11]This is a central law which recognized that bifurcation of properties as ancestral and self-acquired, was harsh on women and thus, post 2005, the doctrine of survivorship has been abolished.Prior to this amendment, the partition after the father's (karta's) death, would leave the wife, son-i, and son-ii with 6/20 share in the property each and daughter-i and daughter-ii with 1/20 share each.[12] After the introduction of the amendment, daughters now have the same coparcenary rights as sons.

III. CRITIQUES OF THE AMENDED SECTION

The amendment does by restricting itself to the share of a daughter, take away from its goal of creating gender equality by a significant margin. The share of the widow and other female members of a Hindu Joint Family upon the death of a male coparcener is decided as per past judicial rulings and the legislation lacks clarity. The concept of notional partition is still however socially relevant in deciding the manner of partition in an HUF.

The diminishing share of wives is pointed out by Indira Jaising in her article where she argues that"Wives along with other class-i female heirs will get a reduced share in the notional partition due to the addition of daughter as a coparcener. Justice can not be secured for a particular category of women at the expense of other women as that hinders the end goal of bringing uniformity in law."[13] However, it must be noted that the wives will have their own share coming from a completely different source altogether, i.e. their fathers. So even when their portion in the notional partition may decrease they still have their own share from their ancestral property. Still, there is need to introduce certain clarity in the law in this area.

Critics often argue for the need to remove the right from birth system, or abolish the joint family Hindu system altogether like the state of Kerala has.[14]Removing the joint family system was considered by the Law Commission but they dismissed it as the joint family system with only male coparceners had already been abolished, making daughters coparceners was in their best interest.[15]

[10] Hindu Succession (Amendment) Act 2005, s 6.
[11] *Supra*, note 4
[12] *Gurupad Magdum* v.*Hirabai Magdum* [1978]SC 1239.
[13] Indira Jaising, 'An Uncertain Inheritance: A Critique of the Hindu Succession (Amendment) Bill' (2005) 20 *Lawyer's Collective* 8.
[14] Kerala Joint Hindu Family (Abolition) Act 1975.
[15] Law Commission of India, *174th Report on Property Rights of Women: Proposed Reforms under the Hindu Law* (2000).

A simple reading of the section also shows a number of anomalies, there is no specificity in terms of the daughter's children acquiring a right by birth in their maternal ancestor's property, such matters are left to judicial interpretation which also have certain limitations.

Judicial Interpretations of the Amended Provision

In the case of *Ganduri Koteshwaramma & Anr.* v. *Chakiri Yanadi & Anr*, the Supreme Court held that "the rights of daughters in coparcenary property as per the amended Section 6 of Hindu Succession Act are not lost merely because a preliminary decree has been passed in a partition suit." As far as partition suits are concerned, the partition only becomes final when a final decree is passed on the same. In the event where such situations may arise, the initial decree would have to be amended with taking the amendment of 2005 into consideration, accounting for the change in law.[16]

In *Prakash & ors* v. *Phulavati & ors*, the Supreme Court stated that the amendment to the Hindu Succession Act is prospective and is applicable to a living daughter of a living coparcener as on 9 September 2005 (i.e. at the commencement of the Amendment Act). This is irrespective of when such daughter was born, provided that any disposition or alienation including partitions with respect to the said property, tookplace before 20 December 2004 as per law applicable prior to the said date will remain unaffected.[17] Similarly, inthe 2008 judgment of *Danamma* v. *Amar*, the Supreme Court held that a woman, by her birth in the family, is born as a coparcener and is entitled to obtain a share in the ancestral property irrespective of whether she was born before or after the amendment of 2005.[18]

Devolution of coparcenary property as seen in *Uttam* v. *Subhag Singh*, where three appellate courts held that upon the death of one of the coparceners, the HUF comes to an end. So when one coparcener died, the ancestral property ceased to be joint family property, and all coparceners lose their share in it. As the coparcener that passed away was the only class-i heir, partition could not take place.[19]

As Professor Poonam Saxena, on this judgment comments, "it deprives a legitimate shareholder of their portion in a coparcenary property while undermining all legislation on the same. It shows the lack of understanding and poor implementation of the law regarding the concept of coparcenary".[20] This incorrect rewriting of the law leads to confusion regarding concepts of ancestral property and its acquisition and delegation.

IV. INHERITANCE RIGHTS OF WOMEN IN HARYANA

[16] *Ganduri Koteshwaramma & Anr.* v *Chakiri Yanadi & Anr* [2011] 9 SCC 788.
[17] *Prakash &ors* v *Phulavati & ors*[2016] 2 SCC 36.
[18] *Danamma @ Suman Surpur* v. *Amar* [2018]3 SCC 343.
[19] *Uttam* v *Subhag Singh* [2016]4SCC 68.
[20] Poonam Saxena, 'Judicial Re-Scripting Of Legislation Governing Devolution Of Coparcenary Property And Succession Under Hindu Law' 58 *Journal of Indian Law Institute* (2016)

As per the 2011 Census, Haryana's population constitutes of nearly 87.5% Hindus; 7% Muslims and 5% Sikhs.[21] Thus,almost 93 percent of Haryana's population is governed by Hindu Succession Act in matters of succession and inheritance. Our constitution permits State Governments to introduce variations in the central act in accordance with the prevailing customs or practices of their region. Haryana has embraced the Hindu Succession Act, 1956 andthe amendments to this act in 2005, *in toto*.[22]

However, there is a vast difference in theory and practice. Rights in ancestral property continue to elude women in Haryana.Haryana is notorious for practices such as female feticide and honor killings.[23] A deep-rooted patriarchal mindset has led to ubiquitous discrimination against women in all areas and matters of succession and inheritance are no different.[24] As noted by Professor Pathania in her research of women's lives in Haryana, eighty percent of women that she interacted with were opposed with the idea of inheriting property from their fathers.Though a level of awareness was present amongst the women regarding the laws, they still believed that they inherently had no right to ask for a share in their paternal ancestral property, fifteen percent agreed that they would take their share if financial need arises and only five percent said that they would like to have their share.[25] A disconnect from their own property rights can be observed in the women of Haryana, as the patriarchal set up rarely allows for one to feel comfortable having their ownership over resources.

Thus, this study was conducted with the following objectives

i. To assess the implementation of Hindu Succession (amendment) Act, 2005 in Haryana;
ii. To analyze the impact, positive as well as negative, of this law on people's lives and relationships;
iii. To examine the obstacles in the proper implementation of this law;
iv. Suggest remedial measures for proper legal implementation and social acceptance of the law.

Hypothesis

Hindu Succession Act (amendment) Act, though accepted, has not been implemented in Haryana.

Research Methodology

Taking the State of Haryana as the universe of this study, a questionnaire was prepared for respondents. Due to the prevailing lockdown, the researchcould not be personally done by meeting and interacting with the respondents. So, respondents were requested to submit their responses online

[21] Census of India (2011).
[22]http://hslsa.gov.in/sites/default/files/documents/19.pdf
[23]National Human Rights Commission, Review of laws, implementation of treaties and other international instruments of human rights — 'Rights of the Child' — Female foeticide and infanticide 26(1996).
[24]Sunita Pathania, 'State of Awareness among Haryana Women on the Question of Human Rights: Weaknesses of Empirical Framework.' 22 Social Scientist (2014).
[25]*Id.*

(or via telephonic communication). Samples were chosen by purposive random sampling using snowball method. A diverse group consisting of both men as well as women, cutting across caste and class lines with medium to high literacy levels, were requested to submit their responses. The data so collected was analyzed and the findings have been presented in a tabular form.

Research Findings

Question 1: Are you aware that women have an equal share in ancestral property?

Response	Yes	No
Number of respondents	40	10

Majority of the respondents 80 percent were aware of the equal property rights granted to women. Only ten percent expressed ignorance of the law.

Question 2: Have women in your family staked a claim to their ancestral property?

Response	Yes	No
Number of Respondents	3	47

A miniscule six percent of respondents said that women had claimed their share in the property. Ninety-four percent of the respondents answered in the negative.

Question 3: Should women take their lawful share under this law?

Response	Yes	No
Number of Respondents	12	38

Only twenty-four percent of the respondents agree with the proposition that women should take their rightful share in ancestral property. Majority (seventy-six percent) response was against women taking their share.

Question 4: What is the reason behind your response to question number 3?

Response	Yes	No
Reason behind response	The law says so, Now-a-days there is no difference between boy and girl child, It is important for women empowerment.	This is contrary to customs and practices followed, Girls get their share in form of dowry and other gifts, They are shareholders in their husband's property, This will lead to unnecessary disputes,

		This will allow interference of outsiders (girlshusband) in their family matters.

Those who were in favor of women taking their rightful share in ancestral property felt that it was their lawful right. Some of them said that people in the 21st century need to stop discriminating between sons and daughters and they should voluntarily give daughters their rightful share. They also felt that this will be a positive step towards women empowerment. On the other hand, majority of the respondents who were against women taking share in ancestral property felt that women should not be given share as this goes against the traditional practices and norms practiced in Haryana since ancient times and which should be preserved to maintain social order. They felt that since lot of expenditure is incurred by the family members on marriage, child birth and other related functions of daughters, so the family of her birth needs to retain the ancestral property to compensate for those expenses. Many of them also felt that women have less knowledge of worldly affairs and if they take share in ancestral property, they are indirectly giving it to their husbands who will take decisions regarding that property. This will cause outside interference in joint family property's disposition and related matters. Some expressed concerns that, even if they gave their daughters and sisters, their shares, there is a possibility that their wives or daughters-in-laws may not take shares from their brothers and fathers. Thus, the menfolk will be at loss.

Question 5: Do you think this amendment will contribute towards empowerment of women?

Response	Yes	No
Number of Respondents	45	5

An overwhelming majority, ninety percent of the respondents agreed that this will lead to women empowerment. Mere ten percent viewed this as detrimental to women empowerment.

Question 6: What is the reason behind your response to question number 4?

Response	Yes	No
Reason behind response	Women will become more confident, Girls will finally have their own share and an exit from unhappy marriages.	This law will also fail like other laws such as Dowry Prohibition Act (1961), This will lead to increase in crimes against women such

		as female feticide and female infanticide, This will reduce share of widow in husbands property.

Those who felt that this will lead to women empowerment felt that this will be a confidence boosting step for the girl child. She will not feel like an outsider in her family of birth and will always have a secure backup. Many women continue in unhappy marriages as they have nowhere to go. Having a birth right in ancestral property will shield her from such insecurities and she will be able to take a stand to safeguard her dignity.

Question 7: Is this amendment beneficial to the society at large?

Response	Yes	No
Reason behind response	22	28

Forty-four percent of the respondents feel that this amendment will prove to be beneficial to the society as this will promote substantive gender equality.

Fifty-six percent of the respondents held a contrary view and felt that this will lead to more property disputes and unrest in families. They said that when start claiming ownership over ancestral property then the societal structure will be unsettled and women will become more powerful than men, by claiming share in family of birth as well as their matrimonial home. Some people said that there will be cases of boys enticing girls for their ancestral property share and this will lead to more love marriages which could be inter-caste in nature and this would be against the traditional societal norms. Some people said that this will embolden women to speak out against their husbands as they will not be scared of walking out of their matrimonial home. This will encourage break-up of the institution of family.

Question 8: What is the reason behind your response to question no.7?

Response	Yes	No
Reason behind response	Women will finally be acknowledged as equal to men.	There will be an increase in property disputes, This will disturb the social equilibrium, Women will become more powerful than men, and disturb the family structure, This will encourage love

		marriages, This will encourage divorces.

V. CONCLUSION

The responses show that despite awareness of the laws, people are not keen to implement them. There is reluctance in according women their rightful share, the male populationis scared of loosening their hegemonic grip by making women equal shareholders in a property. People are skeptical of women taking a stand against continuing in unhappy marriages without realizing the torture that women are undergoing. Little do they fathom that the reason behind breakdown of families is ill-treatment of the woman and not the capacity of woman to sustain herself in the face of adversity.Still in Haryana, the divorce rate is one of the lowest in India.[26]That itself can be seen as a clear indicative of women not being able to avail their share of ancestral property whichwould help them in becoming more financially independent.

People need to shed the obsolete notions ingrained in patriarchy and discard discriminating practices against women. They need to be acknowledged as equal human beings not only on paper but also in practice. Sensitization of people is essential for the successful implementation and acceptance of any law.The modern version of Hinduism as we know it needs to be expanded to include women and provide them with equal opportunities, as any legislative measure will cease to exist if there is no societal acceptance of it. Though Hindus have the oldest codified laws there is a need for accommodating the modern woman and her position as a property owner.[27]

It has taken centuries for women to come out of the claustrophobic legal framework established in the Manusmriti and have their own rights recognized. Though there is still work to be done the 2005 Amendment allows unmarried as well as married women to ask for their rightful share in their ancestral property. Through evolution of legal texts women are closer to being an equal shareholder of rights in our society as their male counterparts.

[26]Soutik Biswas, 'What divorce and separation tell us about modern India' (BBC, September 29, 2016) *available at*<https://www.bbc.com/news/world-asia-india-37481054>.

[27]Halder, D., & Jaishankar, K., 'Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval, And Modern India' 24 *Journal of Law and Religion* 685(2009).

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RUSSIAN MILITARY INVASION OF UKRAINE: AN ASSAULT ON DEMOCRACY AND INTERNATIONAL LAW

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ABSTRACT

For a long time, Russia has been harbouring territorial subjugation and conquest of Ukraine. The two political entities, over several centuries, have had a tense relationship. While Russian treats Ukraine as part of its own past imperium, the latter proudly proclaims itself as a free nation carrying distinct nationalistic identity. Ukraine, following the disintegration of USSR in 1991, emerged as a sovereign country, and has since then attempted to deepen its democratic structure in sharp contrast to Russia's elected autocracy. Vladimir Putin, in power in Russia since 2000, wants Ukraine to be a part of the resurgent Russian federation. To this end, his military forces have been attempting to subjugate the Ukrainians, first in 2014, and now 2022. However, Ukraine, a young and vibrant democracy, posesserious challenges to Putin's vision of reviving the old Russian imperial glory, which was once symbolised by the USSR. In view of Ukraine's fast forwarding to democratic, liberal, free-market economy, and its cosying up with the Western regime, the 'said' strategic vision of Putin now appears challenged and undermined. The latest military invasion of Ukraine by Putin's army is a text book case of violation of Russia's obligations under international law generally, and UN Charter specifically. The launch of unprovoked military strikes by Russia against Ukraine's territorial integrity reminds the international community of further weakening of rule-based international legal order. In light of the ongoing military conflict and utter deterioration of relationship between Ukraine and Russia, the present paper attempts to examine the factors responsible for the long held hostilities between the two countries. It further examines the Russia's repeated breaches of its legal obligations under international law, in particular, how its use of force against the territorial independence and integrity of Ukrainian nation is an egregious violation of UN Charter.

I. INTRODUCTION

After each war there is a little less democracy to save.

Brooks Atkinson[1]

The invasion of Ukraine by Russia, first in 2014 and now 2022 is a stark reminder of inevitability of war occasioned by power imbalances. Russia, one of the five permanent members of the UN Security Council and a reigning continental power, by invading its western neighbour Ukraine - a militarily weaker country - has demonstrated the futility

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[1] Originally quoted by Brooks Atkinson in his book *Once Around the Sun* (1951), *see* Susan Ratcliffe (ed.), *Oxford Treaury of Sayings and Quotations* 121 (OUP, 2011).

of UN in preventing wars as a means to settle political and territorial disputes between countries. The much vaunted legal architecture concerning 'non-aggression, 'prohibition of use of force', and 'rule-based international order' as often espoused under international law has been rendered meaningless by the Russian military invasion of an independent, sovereign nation of Ukraine- a full-fledged member of the UN.

The leading factor responsible for the long held hostilities between the two countries, lies in the way Ukraine, since its independence in 1991 from erstwhile USSR, embraced and marched towards democratic political system, and the way it developed close ties with the West and European Union, in particular NATO.[2]The democratic values as embraced by Ukraine have been seen as diametrically 'opposed' to Russia's larger geo-political, strategic goals and interests in this part of the world. Russia, modelled on elected authoritarianism with Vladimir Putin holding on to power in an unchallenged manner for the last more than 20 years, does not want West led democracy (Ukraine) popped up near Russia's border. It is pertinent to mention here that several newly independent countries that came on the international plane following USSR's disintegration, by and large, adopted authoritarian model of political governance in their respective country.[3]Along with Ukraine, three Baltic countries, namely, Estonia, Lithuania and Latvia, which are geographically situated in close proximity with continental Europe, adopted West-styled democracy based on regular elections, rule of law and free market doctrines.

Ukraine, geographically the second largest country of Europe after Russia, has, since its independence in 1991, been consolidating its democracy within its territorial space, building democratic institutions, allowing freedoms to its people and market players in an attempt to entrench democratic values at the grass root levels in its society. Though, Ukraine cannot be described as a model democracy, as it has been facing a number of home grown problems related to its democratisation process. Yet, the emergence of West-styled democratic culture near Russia's borders is seen as posing serious challenges to Putin's grand vision of rebuilding Russian empire, which is built on

[2]Jonathan Masters, Ukraine: Conflicts at the Crossroads of Europe and Russia, (April 1, 2022)*available at*https://www.cfr.org/backgrounder/ukraine-conflict-crossroads-europe-and-russia (last visited on June 16, 2022)

[3]For example, authoritarian model of governance is/was adopted post-Soviet republics such as Kazakhhstan, Tajikistan, Ujbekistan, Kyrgyzstan, Turkmenistan, Moldova, Belarussia, Azerbaijan.

authoritarianism and backed by totalitarian neighbours. As Ukraine continuously assimilates democracy, freedom, rule of law, free market with the active assistance and co-operation from EU/West, Russia's wariness, at the same time, has grown in equal measure. Russia apprehends domino effect of Ukraine's full democratisation on Russia's other neighbouring countries. This, in all the possibility, as per 'Putinism' will shatter the dream of resurgent Russia to rebuild its past imperial glory.[4]Be it the invasion of Georgia's territory in 2008, annexation of Crimea from Ukraine in 2014, disrupting elections in democracies, and a number of other hostile adventures[5], Putinism provides the driving force to Russia's militaristic imagination to re-enact the old Soviet glory during the very reign of current President Vladimir Putin. It is relevant to mention here that Western democracies have often lamented Russia for disrupting and interfering with the democratic election process of other countries. In US election of 2020, such disruptive role of Russia even constituted one of the leading electoral issues.[6]

Acting on Putinism, Kremlin's strategists believes that resurgence of Russian State as a super power, which once erstwhile USSR stood as, will require militaristic re-calibrations and aggressive posturing by the Russians at international stage, just as the USA, West or NATO have been accused of doing over the years in Middle East and elsewhere.[7]But choosing this path is too much destabilising for world/regional peace and security. It essentially means direct and open undermining of United Nations and fundamental principles of international law.

The ongoing Russian invasion and military strikes against Ukraine, at its core, basically, openly hints at Russia's show of military and nuclear strength, and its willingness to violate international law with impunity. Exactly for this reason, Russia

[4]*See generally*, M. Steven Fish, "What is Putinism?" 28(4) *Journal of Democracy*61-75 (2017) *available at*https://www.journalofdemocracy.org/wp-content/uploads/2017/10/Fish-28-4.pdf(last visited on June 16, 2022) (Author in his words describes Putinism as a form of autocracy, that is conservative, populist, and personalistic. It broadly prioritizes the maintenance of status quo while evincing hostility toward potential sources of instability. Putinism rests on unrestricted one-man rule and the hollowing out of parties, institutions, and even individuals other than the president as independent political actors).

[5]*Id*. p. 68

[6]Maggie Tennis, "Russia Ramps up Global Elections Interference: Lessons for the United States", (July 20, 2020)*available at* https://www.csis.org/blogs/technology-policy-blog/russia-ramps-global-elections-interference-lessons-united-states(last visited on June 16, 2022)

[7]Paul Kirby, "Why has Russia Invaded Ukraine and what does Putin Want?" (May 9, 2022) BBC, *available at* https://www.bbc.com/news/world-europe-56720589(last visited on June 16, 2022)

now openly challenges the rule-based international order founded on fundamental UN Charter provisions *viz*., 'prohibition of use of force'[8], principles of 'non-interference'[9], and 'sovereign equality of states'[10].

II. UKRAINIAN MARCH TO DEMOCRATIC ORDER

Ukraine has been an independent country since 1991. In terms of land, population and economy, it is one of the principal successors of the USSR. Since its independence, it has been registering relatively better growth on developmental and democratic indices when compared withother post-Soviet republics(mostly authoritarian states) that now border Russia as its neighbours in the region.[11]On August 24, 1991, Ukrainians participated in the referendum over gaining total independence from former Soviet Union, following that, the Declaration of Independence was passed by Ukraine's then legislature, thus paving the way for a new democracy in the country, with a new parliament, a president and a vice-president and a host of other democratic institutions including an independent judiciary.[12]

In nearly 31 years of independent existence, Ukrainian democracy, by and large, has stood the test of time, and is rated to be in a working shape, especially since the overthrowing of Russian leaning autocratic president (Victor Yanukovych) in the Euromaidan Peoples' Revolution of 2014 (Dignity Revolution).[13]International agencies such as Freedom House, dedicated to supervise democratic credentials of countries around the world, now grade Ukraine as 'transitional' or 'hybrid', but nevertheless a

[8]UN Charter, 1945, Article 2(4)
[9]*Ibid*., Article 2(7)
[10]*Ibid*., Article 2(1)
[11]*See generally*, Bertelsmann Stiftung's Transformation Index (BTI) 2022, *Country Report on Ukraine*, *available at*https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2022_UKR.pdf(last visited on June 16, 2022)
[12]Solchanyk Roman. "Ukraine, The (Former) Center, Russia, and 'Russia'" 25 (1) *Studies in Comparative Communism* 31-45 (1992)
[13]The Euromaidan's peoples' protest is now regarded as a watershed event in Ukrainians' attempt at preserving the democratic values and moving into the Western, liberal order. The student led massive protest in the capital city Kiev was organised to force Russian leaning government of Victor Yanukovych to sign an association agreement with the European Union. Yanukovych, being under Russian pressure, did not do so, which ultimately led to his ouster. The student revolution frightened the Putin's Russia, and following this, Russia rolled out plan to invade and annex Crimea**.** *See*, Andrey Kurkov, Ukraine's Revolution: Making Sense of a Year of Chaos, BBC (Nov. 21, 2014) *available at*https://www.bbc.com/news/world-europe-30131108(last visited on June 16, 2022)

democracy that has registered some improvements since the ouster of Victor Yanukovych (widely seen as a puppet of Russia) in the Dignity Revolution of 2014.[14] In its cautious observation on Ukraine's current level of democracy, the Freedom House has reported as follows:

> "Ukraine has been struggling in its response to challenges to human rights, justice and human security, yet the country has allowed the flourishing of civil society and has demonstrated space for vibrant and open media and commitment to pluralistic democracy, especially since Euromaidan revolution of 2014."[15]

At any rate, it is quite a gain for Ukraine, if its peoples have allowed the country not to descend into authoritarianism even though so many post-Soviet republics adopted authoritarian model and have remained so due to Russia's strategic policyto removeor, at the least, limit any West inspired democracy in its immediate vicinity.While Ukraine's system of government is currently labelled as 'transitional' or 'hybrid', there is a growing optimism among the Ukrainian people that their country could one day make transition towards a full-fledged 'democratic-politico-legal order' at par with any developed Western democracy.[16]

Russian apprehension of spread of democracy in its close neighbourhood has been more acutely felt when repeated assertions were made by the current political leadership of Ukraine led by President Volodymyr Zlenskyy calling for NATO (a strong security alliance of 30 countries of Europe including USA) to include Ukraine in its organizational fold. Ukraine, for the sake of preserving its own territorial independence and sovereignty from the Russian aggression, has, since 2014, been requestioning EU and NATO leadership to allow it to be a member of NATO. A membership to NATO will, *inter alia*, afford Ukraine the security benefits of Article 5 of the Treaty of NATO, 1949, by which "an armed attack against any member of NATO is treated as an attack against all the members, and consequently, if such an armed attack occurs, each of them, in exercise of the right of individual or collective

[14] *See* the Freedom House Report 2022, *Nations in Transit*: *Ukraine*, *available at*https://freedomhouse.org/country/ukraine/nations-transit/2022(last visited on June 17, 2022)
[15] *Ibid*.
[16] *See generally*, Andreas Umland, Valentyna Romanova, "Ukraine's Decentralization Reforms since 2014: Initial Achievements and Future Challenges", Chatham House Research Papers (November 2, 2019) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479568

self-defence recognised by Article 52 of the Charter of the United Nations, will assist the member state(s) so attacked by taking individual and collective measures asNATO deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic Area."

Ukraine's legitimate call for inclusion into NATO is seen as the immediate cause of Russian special military operations against Ukraine. But, Russian apprehensions that such inclusion will bring NATO on its geographical doorstep - even if founded on Moscow's security concerns- cannot be taken as the legitimate cause for launching military strikes against the Ukrainian cities and towns. The invasion, therefore, is devoid of any legal or moral justification, and as said before, is rather ill-guided by Putinism.[17]To put it in other words, Ukraine's sovereign choice to join NATO cannot be controlled by Russia, as the former is not the vassal state of the latter. So, thepolitical arguments, based on Russian apprehension of NATO coming to its doorstep, and thereby attempting to justify an unlawful aggression against Ukraine is, in reality, designed to continue the strategic goal of Moscow to prevent spread of Western democracy in its close neighbourhood.[18]

III. Russian Invasion Under International Law

As things stand today, Russia's blatant aggression against the Ukraine is indefensible under any provision of international law. The unjustness and futility of such aggression is evident in the way UN General Assembly voted on the issue recently. General Assembly,a global deliberative society of 193 member states,in its resolution rebuked the Russian aggression and called upon Moscow to immediately halt the military operations against Ukraine. An overwhelming 141 member states voted against Russia calling it to unconditionally and immediately withdraw from Ukraine's sovereign territory. Only 5 members supported Russian position with 35 members abstaining from the voting.[19]As a face-saving exercise, the Russian side only pretended that it is not a war, but only a special military operation undertaken to prevent human rights

[17]*Supra* n. 4
[18]*See*, Maria Popova & Oxana Shevel, "Russia's Invasion of Ukraine is Essentially not about NATO", *Just Security*, (February 24, 2022) *available at*https://www.justsecurity.org/80343/russias-new-assault-on-ukraine-is-not-entirely-maybe-not-even-largely-about-nato/(last visited on June 17, 2022)
[19]*See* UN Doc. GA/12407, March 2, 2022, *available at*https://www.un.org/press/en/2022/ga12407.doc.htm (last visited on June 17, 2022)

violations by Ukrainian forces against Russian speaking population in Donetsk region of eastern Ukraine.

Moreover, world's premier human rights body *i.e.*, UN Human Rights Council went a step further and even suspended Russia from its membership.[20]Voting pattern once again showed Putin's total isolation at world stage, with 93 members voting in favour of suspending Russia from UN Human Rights Council, 24 opposing such suspension and 58 abstaining from voting process. So, the global community has resoundingly said big no to Russian aggression, but since such resolutions passed by General Assembly are legally non-binding, hence Russia has remained unmovedand has not yet shown any sign of stopping the war it waged unjustly against a militarily weaker country.

Unprovoked use of force by one state against another is declared illegal under international law. The law on prohibition on use of force and intervention into affairs of other countries is recognised both under treaty law and customary international law. In this regard, Article 2(4) of UN Charter clearly provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Moreover, ICJ in the landmark*Nicaragua case*[21] had held that there is customary law obligation on a state not to use force against another state if the latter has not actually attacked the former.So, there has to have well-founded and justifiable legal reasons for use of force.

Russia's principle legal argument justifying its invasion of Ukraine is built around right to self-defence and humanitarian intervention. It insists that that it has acted militarily for defending its own territorial security interest in the region. This is merely a rhetorical assertion devoid of any legal basis, as the elements necessary for the exercise of the right to self-defence in the instant case do not exist. Right to self-defence as provisioned in Article 51 of the UN Charter states:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain

[20]UN News, "UN General Assembly Votes to Suspend Russia from Human Rights Council", (April 7, 2022) *available at*https://news.un.org/en/story/2022/04/1115782(last visited on June 17, 2022)
[21]*Military and Para-military Activities in and against Nicaragua* (1986) ICJ Rep.

> international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[22]

A bare perusal of the above provision can easily lead to an obvious conclusion that "there must exist a prior and 'actual' armed attack" before a state can resort to use of force. In the instant case, there is no such factual condition existing in favour of Russia. Ukraine has not resorted to any actual armed attack against Russia prior to Russia's use of armed invasion against Ukraine. On the contrary, it is the Ukrainians who have been attacked militarily first, so the argument for right to self-defence rightfully belongs to them and not to the Russians. Further, here even if Russian stance is received for the sake of argument,then till now the matter should have been legally dealt with by UN Security Council with the constructive cooperation of Russia, as mandated under the second para of Article 51. But, since Russia is a veto wielding permanent member of the UNSC, it made sure that the executive arm of the UN in the case remains totally dysfunctional and unworkable.[23]

Further, the Russian justification for its pre-emptive right to attack in self-defence (anticipatory self-defence) also falls apart. In this regard the famous *Caroline* case (Test)[24]made abundantly clear by holding that:

> "A state can acquire right to intervene in self-defence if intervention is necessary to contain the danger of actual armed attack, leaving no choice of means, and no moment for deliberation for the state concerned".[25]

As per *Caroline ratio*, first, there must exist necessities for the use of force and for that the threat must be seen to be imminent allowing for a definite conclusion that pursuing peaceful alternatives is not an option (principle of necessity), and second, the response must be proportionate to the threat (principle of proportionality).[26]Recognising the element of proportionality in matter of anticipatory self-defence,ICJ in *Nicaragua* case emphasizedthe proportionality rule has been long established under customary

[22] UN Charter, 1945, Article 51
[23]*See*, UN News, "Russia Blocks Security Council Action on Ukraine", (February 26, 2022) *available at*https://news.un.org/en/story/2022/02/1112802 (last visited on June 18, 2022)
[24]*The Caroline* case, Jennings, 32 *AJIL* 82 (1938)
[25]*Ibid*.
[26]*Ibid*.

international law[27] and the same was further reaffirmed in the Advisory Opinion on *Nuclear Weapons* case.[28]

Looking at the present crisis, it is but obvious that the two conditions propounded in *CarolineTest* do not exist and hence Russian intervention has no basis in law or in fact and can only be described as 'unjust' and 'unlawful' under the settled canons of international law.

Further, the Russian argument for humanitarian intervention[29] in Ukrainian Eastern region where it (counter) claims there have been violations of human rights of Russian speaking population by Ukrainian forces is also not supported by any governing law on this aspect. A unilateral decision of a state to take coercive actions under the principle of humanitarian intervention is not lawful *per se* as it is legally not settled till this date.[30]There is no Charter provisions backing such a unliteral coercive action of Russia in the name of humanitarian intervention. Even if such a right exists, a response under humanitarian intervention can only be a collective one and not arbitrary individual action.[31] And for that too, proper authorisation from the UN Security Council must be obtained before any coercive military action could be taken in the name of humanitarian intervention. In the current individualised, unilateral intervention by Russia in Ukraine, it is but obvious that there is neither prior authorisation from the UNSC nor there is a collective action on grounds of humanitarian intervention. Hence, on this count as well Russian arguments lack legal merits and appear self-serving and rhetorical.

[27]*Supra* n. 21 at *para* 176
[28]Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep. *para* 41
[29]Humanitarian Intervention is defined as the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognised rights. *See*, Sean D. Murphy, *Humanitarian Intervention*: *The United Nations in an Evolving World Order* 11-12 (University of Pennsylvania Press, 1996)
[30]There are legitimate concerns that astate will use unilateral humanitarian intervention for its ulterior motives. Hence, its legality is uncertain and not settled.
[31]It is possible that UN Charter under Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) may allow for collective action when there is a rampant violations of human rights especially the right to life within the territorial space of state. The only condition is that such an occurrence must pose serious threat to the maintenance of international peace and security.

IV. CONCLUSION

Till date, the unprovoked military invasion of Ukraine by Russia continues with no end in sight. The ongoing war has caused immense loss of innocent lives and properties in the territory of Ukraine. Russia guided by Putinism has acted impulsively, and is therefore, required to make course correction, and immediately halt unjustified military invasion of Ukraine, as resoundingly stated through the recent UNGA Resolution.[32]The blatant show of aggression against a militarily weaker state only shows that Vladimir Putin's illegal actions are solely guided by the medieval war policy of "might is right". The Russian actions have no credible support under international law. It is, thus, required that Russia being a continental power must act responsibly and in accordance with the foundational principles of international law so as to preserve the integrity of the international order as secured under the UN Charter. The futility of war measures should inform Moscow to end this unjustified aggression, and instead rely on peaceful diplomatic negotiations for creating a climate of peace in the region.

[32]*Supra* n. 19

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MEASURES AGAINST HUMAN TRAFFICKING: AN OVERVIEW OF THE EXISTING LEGAL FRAMEWORK IN INDIA

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ABSTRACT

Victims of human trafficking could be anyone - regardless of age, gender, identity, citizenship, race, colour, nationality, religion, socio-economic status etc. The crime of trafficking for decades has posed a serious challenge to law enforcement agencies around the world, in particular India. While international legal regime against trafficking has gained further impetus in recent years with adoption of various international treaties by countries, Indian domestic response to trafficking issues still requires a lot of concerted efforts at all the levels of governance. In the light of this background, the present paper attempts to explore the human trafficking or the modern-day slavery by taking an overview of the existing legal framework on human trafficking. To this end, it endeavours to ascertain the various measures adopted at the international level and in India towards curbing, management, control of the trafficking issues.

I. INTRODUCTION

> "All States have an obligation to exercise due diligence to prevent, investigate and punish perpetrators of trafficking in persons and to rescue victims, as well as to provide for their protection, and that not doing so violates and impairs or nullifies the enjoyment of the human rights and fundamental freedoms of the victims."[1]

Human Trafficking, also referred as 'modern-day slavery', has become a major challenge and serious issue across the globe. Though illegal, it is now widely believed to be one of the most lucrative global trades having multiple dimensions and repercussions. It affects developed and developing nations alike however the poor nations are found to be major victim of this unethical and illicit practice. Over the years, member states of the United Nations have legislated and disseminated anti-trafficking laws and invested financial and human resources in their attempt to eradicate the menace of human trafficking in their respective jurisdiction.

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[1]Excerpt from the UN General Assembly Resolution 68/192, adopted on February 14, 2014.

"Trafficking in Persons" under international law is defined as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."[2]In simpler terms, the essential characteristics of human trafficking rest on, first, the transportation of a person; second, force, fraud, or coercion so used against such vulnerable person; and third, exploitation of the defenceless persons.[3]Therefore, the human trafficking is a heinous act of forced and coercive transporting of humankind without their consent for profit making and exploitation of the person. In this context, every nation becomes either source, transit or destination, sometimes even combination of the three so far as trafficking is concerned. Trafficking could be intra-national or international. According to the United Nations Office on Drugs and Crime (UNODC), in 2018 about 50,000 human trafficking victims were detected and reported by 148 countries.[4] However, given the hidden nature of this crime, the actual number of victims trafficked is far higher. The report shows traffickers particularly target the most vulnerable, such as migrants and people without jobs. UNODC, talking about the child trafficking, mentions that the number of children among detected trafficking victims has tripled in the past 15 years, while the share of boys has increased five times. Girls are mainly trafficked for sexual exploitation, while boys are used for forced labour.[5]

Human trafficking includes labour and sexual exploitation, and its victims can be men and women, adults and children. However, women and children have been found to be more vulnerable who can be easily trapped into human trafficking. South Asian and African youths are transported as bondage labours, Eastern European women trafficked into sex work and Chinese women trafficked into textiles industries. New directions in

[2] The United Nations "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, General Assembly Resolution 55/25, adopted on November 15, 2000 (also known as the 'Palermo Protocol'), Article 3(a).

[3]Rhacel Salazar Parrenas*et al*., "What is Human Trafficking: A Review Essay", 37(4) J*ournal of Women in Culture and Society* 1015 (2012)

[4]UNODC, *Global Report on Trafficking in Persons*, 2018, p. 7-8, *available at*https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf(last visited on June 25, 2022)

[5]*Id*. p. 25-26

human trafficking suggest that it ranges from very coercive and exploitative interactions between migrants and their facilitators to cooperative, consensual, and mutually beneficial relationships, with more intricate grey zones in between. Some brokers are family friends, or associates who recruit workers and facilitate migration—individuals who have a totally different relationship with migrants than those who mistreat migrants through force or fraud.[6]

Under the dark terrain of trafficking world, two broad categories commonly stand out, namely, (A) Sex Trafficking and (B) Labour Trafficking. These two broad divisions are further grouped into different sub-categories-

1. Sex trafficking & child sex trafficking
2. Forced labour
3. Debt bondage
4. Forced child labour
5. Involuntary domestic servitude
6. Unlawful recruitment & use of child soldiers

The contemporary global academic discourse on human trafficking demonstrates three broad areas or themes, namely, the examination of the international laws and protocols and its function in the effort to end human trafficking[7], the extent of human trafficking in the contemporary period[8], and the reframing of human trafficking as a labour concern[9].

II. HUMAN TRAFFICKING AND HUMAN RIGHTS

Human trafficking is intrinsically connected with human rights. Human rights ensure that no human being can be barred from enjoying or exercising fundamental natural

[6] Ronald Weitzer, "New Directions on Research in Human Trafficking", 653 *The Annals of the American Academy* 20-21 (2014)*available at*https://humantraffickingsearch.org/wp-content/uploads/2022/03/New-Directions-in-Research-on-Human-Trafficking.pdf(last visited on June 25, 2022)

[7]For the examination of trafficking through the lens of international law, *see generally*, Silvia Scarpa, *Trafficking in Human Beings*: *Modern Slavery*, 84 (OUP, 2008);*See also*, Stephanie A. Limoncelli,*The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women*(Stanford University Press. 2010)

[8] For the extent of human trafficking in the contemporary world, *see generally*, Kevin Bales, *Ending Slavery: How We Free Today's Slaves* (University of California Press, 2007); *See also*, Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press, 2009)

[9] For the reframing of trafficking as a labour concern, *see generally*, K. Kempadoo, Jyoti Sanghera, Bandana Pattanaik(Eds.), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Paradigm Publishers, 2005)

rights, and therefore, discrimination on the ground of sex, caste, religion, race etc. is prohibited under the international human rights regime. These basic rights also ensure that every natural person must be endowed with right to a dignified life, right to freedom of speech, right to liberty and security etc. As it stands obvious, human trafficking essentially prohibits all the natural and human rights of the bondage persons and compel them to do slavery, forced labour, and other activities without their consent. It is pertinent to mention that UN Office of the High Commissioner of Human Rights (OHCHR), regards "slavery, servitude, child sexual exploitation, forced marriage, servile forms of marriage, child marriage, enforced prostitution and the exploitation of prostitutes as trafficking-related practices, which are proscribed under international human rights law."[10] It is now an established fact that human rights are violated and impaired by the human trafficking. To this end, repeated calls for action against this global menace have been often made by the global bodies, such as, UN General Assembly and the UN Human Rights Council (UNHRC), and in national jurisdictions, by the central nodal agency, such as, the National Human Rights Commission (NHRC) in India.

III. INTERNATIONAL RESPONSE TO HUMAN TRAFFICKING

In the post war global order as reflected in the UN-based international system, several attempts have been made to address, curb, and control the menace of trafficking in persons. International law in general has constituted a global legal regime on human trafficking and its associated ills. In this regard, the main treaties and other related international instruments are enumerated below:[11]

- Slavery Convention, 1926
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women, and children, supplementing the united Nations Convention against Transnational Organized Crime, 2000 (Trafficking Protocol)

[10] *Supra* n. 2

[11] The list of the international instruments is extracted from the UN Report of 2014 titled *Human Rights and Human Trafficking*, prepared by the Office of the High Commissioner for Human Rights, p. 10-11, *available at*https://www.ohchr.org/sites/default/files/Documents/Publications/FS36_en.pdf(last visited on June 27, 2022)

- ILO Forced Labour Convention, 1930
- Convention on the Elimination of All forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, 2000
- United Nations Convention against Transnational Organized crimes, 2000
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- Council of Europe, Convention on Action against Trafficking in Human Beings, 2005 (European Trafficking Convention)
- Charter of Fundamental Rights in the European Union, 2000, Article 5, And Directive 2011/36/EU of the European Parliament and Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, 2011
- South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

As per the Global Slavery Index (GSI)[12] of 2018, Netherlands is found to be the best nation which has effectively curbed and controlled human trafficking issues within its borders. GSI has reported that Netherlands' legislative and implementing mechanism in this area is widely regarded as complying with the global human rights norms. The Index has covered 167 nations and analysed the anti-human trafficking mechanisms and laws of each nation. It has been reported that "an estimated 40.03 million men, women, and children were victims of modern slavery on any given day in 2016. Out of these, 24.9 million people were in forced labour and 15.4 million people were living in a forced marriage. Women and girls are vastly over-represented, making up 71 percent of

[12] In 2017 Walk Free Foundation in collaboration with International Labour Organization (ILO) and International Organization for Migration (IOM) conducted survey on human trafficking and developed the Global Estimates of Modern Slavery leading to publication of Global Slavery Index. More details about the Index are *available at*https://www.globalslaveryindex.org/2018/findings/global-findings/(last visited on June 27, 2022)

victims. It is further reported that modern slavery is most prevalent in Africa, followed by the Asia and the Pacific region."[13]

Netherlands, which has currently the best mechanism in the world to deal with trafficking issues, has published its national action plan for an integrated approach to human trafficking. The programme titled, 'Together against Human Trafficking', is billed as a successful model to be adopted by other countries where trafficking issues remain poorly addressed. The said programme contains 'Five Lines of Actions'[14] as hereunder:

1. Further development of the basic approach to combating Trafficking of Human Being (TBH)
2. Further development of the approach to combating labour exploitation
3. The prevention of victimhood and perpetrator
4. Strengthening the municipal approach to combating THB
5. Sharing knowledge and information

Dutch Government does not only focus to combat and frustrate the perpetrators, both through criminal and administrative law, as well as through alternative interventions, but also aim to equip more professionals with the necessary knowledge to be able to identify/report human trafficking and provide them necessary support and refuge. In view of the success of the anti-trafficking mechanism developed by the Netherland Government, it is co-opted by European Crime Prevention Network to apply in other EU countries that are notorious for human trafficking.

IV. HUMAN TRAFFICKING IN INDIA

Trafficking in human beings, especially in women and children, has become a matter of serious concern in India.[15]India, to some extent, has attempted to synchronise her anti-trafficking legislations and policies with international norms. The relevant Constitutional provisions and legislatives norms, along with governmental reforms in this area, are ideally harmonised with the international legal framework, yet the implementation of these domestic legislations is still a major challenge. India has ratified the United Nations Convention on Transnational Organised Crime (UNCTOC)

[13] *Id.*
[14] European Crime Prevention Network, Crime Prevention Policy, 2019, *available at*https://eucpn.org/sites/default/files/document/files/NL.pdf(last visited on June 27, 2022)
[15] Siddhartha Sarkar, "Rethinking Human Trafficking in India: Nature, Extent and Identification of Survivors", 103 (5) *The Round Table: The Commonwealth Journal of International Affairs* 483 (2014).

of 2000, and its Protocol on Prevention, Suppression and Punishment of Trafficking in Persons, particularly Women and Children (2000)[16].

Current policies regarding the human trafficking carries the colonial legacies and defined by the parameters marked by the British rulers.[17]Various actions have been taken to implement the global legal framework on human trafficking. In particular, giving a place to the mandate of the Protocol, Parliament of India in 2013 passed the Criminal Law Amendment Act, 2013, wherein 'trafficking in person' has been defined specifically for the first time.[18]At the regional level, India has signed the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution in 2002. In order to implement political commitments and legal obligations, a Regional Task Force was constituted to implement the mandate of the SAARC Convention. For dealing with cross border trafficking and to address the various issues relating to prevention of trafficking, victim identification and repatriation, and thereby make the process speedy and victim-friendly, a Special Task Force of India and Bangladesh was constituted. In this context, a Memorandum of Understanding (MoU) between India and Bangladesh on Bi-lateral Cooperation for Prevention of Human Trafficking in Women and Children, Rescue, Recovery, Repatriation and Re-integration of Victims of Trafficking was also signed in June, 2015.[19] But, in view of lack of peace between India and Pakistan, not much progress have been achieved in confronting the menace of trafficking in the SAARC region.

According to the National Crime Records Bureau of India, as per its data released for 2019, it has been found that State of Maharashtra has the highest number of human trafficking cases, followed by Andhra Pradesh and Assam. It is seen that trafficking cases across several states have grown in number, although the measures undertaken to combat the trafficking have yielded results in terms of busting and apprehending the syndicate behind inter-state trafficking.

[16]India ratified both Convention and its Protocol on May 5, 2011.
[17]*See generally*, Prabha Kotiswaran, "Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law", 4 *U.C. Irvine L. Rev.* 352-405 (2014).
[18]The Indian Penal Code, 1860, Section 370
[19] Text of the abovementioned India-Bangladesh MoU signed in 2015 is *available at*https://www.mea.gov.in/Portal/LegalTreatiesDoc/BG15B2411.pdf (last visited on June 27, 2022)

Trafficking in Human Beings or Persons is prohibited under the Constitution of India under Article 23 (1).[20] Further, in order to tighten the noose around traffickers, the Government of India brought several legislative and administrative measures, which are discussed below:

Legislative Measures

- The Immoral Traffic (Prevention) Act, 1956 (ITPA) is the main legislation on trafficking for commercial sexual exploitation. This Act does not abolish prostitution but aims to punish the commercial sexual exploitation and abuse of women and children.
- Criminal Law (Amendment) Act 2013has introduced major amendment in the IPC insofar as trafficking is concerned. Now the amended provisions under Section 370 (trafficking of person) and 370A (exploitation of a trafficked person), along with other relevant provisions under 371 (habitual dealing in slaves), 372 (selling minor for purposes of prostitutions etc.), 373 (buying minor for purposes of prostitutions etc.), and 374 (unlawful compulsory labour) provide for comprehensive penal framework to counter the menace of human trafficking including trafficking of children for exploitation in any form including physical exploitation or any form of sexual exploitation, slavery, servitude, or the forced removal of organs.

  In particular, Section 370 of the Indian Penal Code, has now defined 'trafficking' in line with global norms. It lays down that, whoever, for the purpose of exploitation (a) recruits, (b) transports, (c) harbours, (d) transfer or (e) receives, a person or persons, by -(i) using threat, or (ii) using force, or any other form of coercion, or, (iii) by abduction, or, (iv) by practicing fraud, or deception or (v) - by abuse of power, or (vi)- by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, received, commits the offence of trafficking.[21]
- Protection of Children from Sexual offences (POCSO) Act, 2012, which has come into effect from 14th November, 2012 is a special law to protect children from sexual abuse and exploitation.

[20]Constitution of India, 1950, Article 23: Prohibition of Traffic in Human Beings: (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
[21]*Supra* n. 18

- There are other specific legislations enacted relating to trafficking in women and children, for instance, Bonded Labour System (Abolition) Act, 1976, Child Labour (Prohibition and Regulation) Act, 1986, Transplantation of Human Organs Act, 1994, Prohibition of Child Marriage Act, 2006, apart from specific Sections in the IPC, e.g. Sections 372 and 373 dealing respectively with selling and buying of girls for the purpose of prostitution.
- State Governments have also enacted specific legislations to deal with the issue. (e.g. The Punjab Prevention of Human Smuggling Act, 2012).
- The Union Ministry of Women and Child Development (WCD) has recently submitted the draft titled, Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021. The Bill comes with major objective 'to prevent counter-trafficking in persons, especially women and children, to provide for care, protection, and rehabilitation to the victims, while respecting their rights, and creating a supportive legal, economic and social environment for them. It also deals with the trafficking cases in and outside India. It has made NIA its nodal agency. Further, it has expanded the definition of victim, by including transgenders, along with women and children.[22]

Administrative Measures

Several administrative measures have been taken to combat the problems of trafficking. In this regard, a dedicated Anti-Trafficking Cell (ATC) and Anti-Trafficking Nodal Cell were set up in the Ministry of Home Affairs (MHA).[23]The Cell is mandated to act as a focal point for communicating to law enforcement agencies, including those of the States, about the various decisions taken at the highest ministerial level, and to follow up on action taken by the State Governments to combat the crime of human trafficking. In this regard, Ministry of Home Affairs periodically conducts coordination meetings

[22]*See* for general discussion on the Bill, Shiv Sanjay Singh, "Survivor-Leaders to Press for Passage for Trafficking of Persons Bill", The Hindu, June 11, 2022, *available at*https://www.thehindu.com/news/cities/kolkata/survivor-leaders-to-press-for-passage-of-trafficking-of-persons-bill/article65517864.ece(last visited on June 28, 2022)

[23]*See*, UNODC & Government of India, *Compendium on Best Practices on Anti-Human Trafficking by Law Enforcement Agencies*, 2007, p. 5, *available at*https://www.mha.gov.in/sites/default/files/CBP-Trefficking.pdf (last visited on June 28, 2022)

with the Nodal Officers of Anti Human Trafficking Units nominated in all States/UTs periodically.[24]

Also, Ministry of Home Affairs, periodically, releases advisories for controlling potential incidents surrounding human trafficking in India. To this end, MHA has brought up a Scheme to strengthen law enforcement agencies, and their expected responses in India against trafficking incidents.[25] The Scheme aims to impart Training and Capacity Building to the law enforcement agencies. Further, under the Scheme, a dedicated fund has been established for supporting the Anti Human Trafficking Units as set up in 270 districts of the country.[26]

In addition, acting under the broad mandate of UNODC, Judiciary in India has been periodically holding Judicial Colloquium on human trafficking issues, and the ways and means of curbing the menace. These Colloquiums are held at the respective State's High Court, and they are organised to impart training to the trial courts(judicial officers)about human trafficking issues. The aim is to sensitize the judges and magistrates about the various raging issues concerning human trafficking, and to ensure speedy court process in such cases.

V. CONCLUSION

Human trafficking is a form of organised crime that thrives on human misery. Despite the government of India's tough measures, trafficking rackets and syndicates have become more organised, sophisticated and evolved into new forms of trafficking. The crime of human trafficking has proliferated to the point where practically every State in India is now afflicted with this menace. In particular, child trafficking for commercial sexual exploitation has till date remained a major concern for Indian law enforcement agencies. To add further woes, in recent, years, the country has registered a steady increase in child migration and trafficking for forced labour, bondage, and slavery. Moreover, attempts to modify the legal definition of human trafficking have not yet shown constructive outcomes, rather the law enforcement and prosecutorial agencies

[24] Detail information about the mandate and functioning of the Anti-Trafficking Cell of Ministry of Home Affairs, Government of India is *available at* https://www.mha.gov.in/division_of_mha/anti-trafficking-cell (last visited on June 28, 2022)

[25] *See*, in this regard, the official communication issued by the Ministry of Home Affairs, Government of India, *Comprehensive Scheme for Establishment of integrated Anti Human Trafficking Units* (AHTUs), *available at*https://www.mha.gov.in/sites/default/files/Scheme-AHTU-SS-271011.pdf (last visited on June 29, 2022)

[26] *Id.*

have shown tendencies for high-handedness and indifference while purportedly taking actions under the various provisions of anti-trafficking laws. Still there is a widely and strongly felt need for sensitizing the various State agencies including the Judiciary to handle the trafficking cases with judicious caution and sensitivity. While India has taken several measures to curb the human trafficking, nevertheless there is a large gap between professed goals and implementation of the anti-trafficking laws and policies on the ground. It is hoped that recently introduced "Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021" would go a long way in effective curbing, controlling and better management of growing cases of trafficking within and around India's borders.

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